The Queen on the application of Bennett v HM Coroner for Inner South London v Officers A and B, Commissioner of Police for the Metropolis

Case No: C1/2006/2130

Court of Appeal (Civil Division)

26 June 2007

[2007] EWCA Civ 617

2007 WL 1685261

Before : Lord Justice Waller Lord Justice Keene and Lord Justice Dyson

Date: 26/06/2007, Hearing dates : 22nd May 2007

On Appeal from QBD, Administrative Court

Mr Justice Collins

CO144505

Representation

Michael Mansfield QC and Richard Harvey (instructed by Messrs Imran Khan and Partners) for the Appellant.

Jonathan Hough (instructed by Southward Legal Services) for the Respondent.

Edmund Lawson QC (instructed by Messrs Russell Jones & Walker) for Interested Party (1).

Michael Beloff QC and John Beggs (instructed by the Metropolitan Police Service Directorate of Legal Services) for Interested Party (2).

Judgment

Lord Justice Waller :

1 On the afternoon of 16 July 2001 Derek Bennett died as a result of being shot by a police officer. A witness thought that Derek Bennett was carrying a gun and reported that fact to the police. In the belief that the report was accurate, two officers A and B, trained in the use of firearms, were dispatched to deal with what was thought to be an armed man. During the incident that then ensued, which lasted some 30 seconds, six shots were fired by officer A, four of which struck Mr Bennett and one of which was fatal. All the shots that struck Mr Bennett struck him in his back or side, and it was impossible to say in which order the shots had been fired. At the inquest into Mr Bennett's death evidence was heard over some 13 days between 12 November and 2 December 2004. The coroner then heard detailed argument as to the appropriate directions to give and as to the appropriate verdicts that should be left to the jury. The coroner's decision was not to leave to the jury a verdict of “unlawful killing” but to leave “lawful killing” or an “open verdict”. Her direction that the jury had to be satisfied on the balance of probabilities as to the honest view of officer A, and as to the reasonableness of that view if they were to hold the killing lawful, could not be criticised as a matter of English law. The jury by a majority on 15 December 2004 returned a verdict of lawful killing.

2 An application was made for judicial review of the coroner's ruling and permission was granted to argue two points — first, that the coroner's direction on self-defence was not accurate having regard to Article 2(2) of the Convention on Human Rights , which provides that “Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence …”; second whether the coroner had correctly applied the test laid down in *R v Galbraith [1981] 2 All ER1060* in refusing to leave unlawful killing as a possible verdict for the jury.

3 Collins J dismissed the claim for judicial review. On the Article 2 point he held, in the light of the authorities of the *European Court of Human Rights from McCann v United Kingdom [1996] 21 EHRR 97* to *Bubbins v United Kingdom (2005) 41 EHRR 24 decided on 17 March 2005* , that:

> “… It is thus clear that the European Court of Human Rights has considered what English law requires for self defence, and has not suggested that there is any incompatibility with Article 2. In truth, if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the Article 2 test as applied in McCann .”

4 On the Galbraith point, the judge was critical of some aspects of the coroner's approach. The judge was of the view the case was borderline. But the judge recognised that for the jury to return a verdict of unlawful killing they would have had to be sure beyond reasonable doubt that in relation to each shot either the officer did not honestly believe that his life was being threatened, or that he reacted unreasonably to the threat he perceived. He was thus of the view that the evidence “can properly be described as tenuous, and that a verdict of unlawful killing could properly be regarded as one which was unsafe.”

5 The judge then went on to consider whether, in the light of the jury's verdict, even if a verdict of unlawful killing should have been left it would be right to quash the verdict and send the matter back for reconsideration. He rejected Mr Mansfield QC's submission that the coroner, in directing the jury in the way she did as to the unsatisfactory nature of an “open verdict”, did not in reality leave an alternative to the “lawful killing” verdict. The judge held that it was “quite impossible to conceive that they [the jury] could have been persuaded that it was clear beyond reasonable doubt that this was unlawful killing” when they had been persuaded that in relation to each shot officer A had acted lawfully.

6 Permission to appeal was granted by Laws LJ on the basis that there was a real question whether the coroner should have left unlawful killing to the jury.

7 On 22nd May 2007 we heard the appeal and at the conclusion of the hearing announced our decision that the appeal would be dismissed for reasons to be given later. These are those reasons.

8 It is right to say that the majority of Mr Mansfield's oral submissions were taken up in dealing with the last point, he recognising that, unless he could demonstrate that the jury could logically have reached a verdict of unlawful killing, the appeal was bound to fail.

9 He addressed the Article 2 point in this context, seeking to demonstrate that the coroner's directions in relation to the verdicts she did leave were inadequate. He submitted that the coroner's direction was inadequate both because (as he had submitted to the judge) no true alternative to lawful killing was left to the jury, and because (as had not been suggested to the judge or indeed I think to the coroner) the direction did not contain a sufficient warning to the jury that they should in considering officer A's honest belief and the reasonableness of his conduct in the light of that belief, take account of the training given to police officers and the ACPO manual, which stressed the need not to shoot unless it was absolutely necessary. He did not attack the judge's conclusion that the direction given in accordance with English law had been held by the court in Strasburg to be otherwise Article 2 compliant.

The facts

10 A summary of the facts in a little more detail is as follows. Officers A and B were told there was a man with a gun trying to gain entry to premises in Loughborough Road. That information was updated so that they knew the man was on the move. They arrived at the end of the first floor walkway at Marston House and saw Mr Bennett walking away from them. Officer B issued a challenge and Mr Bennett turned and then took hold of a passer-by. He held that man in front of him pointing what appeared to be a firearm at his neck. Officer A drew his firearm and at this point Mr Bennett pushed the man to one side or the man escaped. The officer in his evidence said that he was afraid Mr Bennett had discarded the man in order to shoot him and said "I thought my life was in imminent danger. I shot twice because he was moving so violently I could not be confident that I would have hit him with the first shot … he was moving so fast … I felt it was absolutely necessary to stop him there".

11 Mr Bennett ran away but did not drop the gun and went behind a pillar, from which officer A described him looking out in a crouched position. Officer A shot again and his evidence was that he feared again that he would himself be shot. Mr Bennett then turned and ran again this time into the recess of a nearby doorway. Officer A's evidence was that he approached Mr Bennett from round a pillar and saw Mr Bennett moving frantically at the doorway and he feared he was trying to gain entry and he believed Mr Bennett had not dropped his firearm. The officer's evidence was that he saw Mr Bennett's arms come round to chest height and he feared Mr Bennett was going to shoot and officer A fired again. It was then that a silver object flew from Mr Bennett's hand. It looked like a hand gun. It was in fact tragically simply a cigarette lighter. Mr Bennett then collapsed, fatally injured. 30 seconds separated the timing of the message that Mr Bennett had been sighted and the firing of the shots.

Article 2

12 It is convenient to deal with the Article 2 aspect first There are, as is perhaps already apparent, various strands to Mr Mansfield's submissions. First he submits that if there was evidence on which "unlawful killing" should have been left to the jury, it would be an infringement of Article 2 not to leave that verdict. This is simply the Galbraith point under a different label and I will deal with it when dealing with the Galbraith point.

13 Second he submits that the jury were "bulldozed into a verdict of lawful killing" and the claimant was denied his Article 2 rights to a finding as to whether unjustifiable force had been used. This also in essence is the Galbraith point. Mr Mansfield accepted that if the evidential threshold for leaving an "unlawful killing" verdict had not been reached it was appropriate not to leave "unlawful killing". But his ultimate submission was that if "unlawful killing" could not be left, because no one could be sure as to what had happened and, in particular, in which order the bullets were fired, the only verdict which should have been left was an "open verdict". If "lawful killing" was to be left, his submission was that the right course was to leave verdicts as indicated by Leveson J in R (Sharman) v HM Coroner for Inner London [2005] EWHC 857 at paragraph 13.

> "Thus, assuming that there was sufficient evidence for the jury to consider, the proper way to articulate the ingredients of the possible verdicts is:—
>
> i) unlawful killing: a finding beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot. ….;
>
> ii) lawful killing: a finding, on the balance of probabilities, that [the police officer] believed, albeit mistakenly, that he or [another] was under imminent threat of being shot ….;
>
> iii) open verdict: a rejection of the proposition that [the police officer] may have believed that he or [another] was under imminent threat of being shot … but an inability to conclude, beyond reasonable doubt, that such was not the case."

To all this I will return when considering the Galbraith point.

14 Third, in relation to Article 2 , he submitted the coroner was wrong not to incorporate the language used in Article 2 of "absolute necessity" but, in so submitting as I understood it, he did not challenge the correctness of the Strasbourg jurisprudence to the effect that the test

formulated under English law as to whether self defence had been established was Article 2 compliant. In other words he did not challenge the judge's analysis in paragraphs 12 to 27 of his judgment or the conclusion quoted in paragraph 3 above. His submission was that because the ACPO Manual, current at the time and the training given to Police Officers, used the language "absolutely necessary", it was a misdirection not to direct the jury to consider whether officer A's claim to have acted in self defence was reasonable in the light of the requirement continually to reassess whether "it was absolutely necessary" to fire.

15 This argument is not in reality an Article 2 argument at all. It is not because Article 2 uses the language "absolutely necessary" that there might be some requirement to draw the jury's attention to what is stated in the ACPO manual. If the standard direction relating to self defence complies with Article 2 as it does (see paragraph 25 of the judge's judgment quoted above and accepted as accurate by Mr Mansfield), Article 2 cannot at the same time require a different use of language. However as to whether a police officer honestly believed a particular state of facts and as to whether he acted reasonably by reference to the facts as he honestly believed them to be, the fact the officer was trained and understood the ACPO manual would be material.

16 But the short answer to the criticism made of the coroner in this regard is that many days were spent on the evidence as to the training officers A and B had had, and the training and ACPO manual were referred to at length in the coroner's summing up. The jury cannot have been under any illusion as to the context in which they were considering the questions put to them. Furthermore, hardly surprisingly, no point was taken by Mr Harvey, appearing for the claimants at the inquest, either when shown the written direction that coroner proposed to give on self defence or after the summing up had been completed, that some further direction should be given by reference to the ACPO manual or the training given.

The Actual Verdict

17 It is convenient to deal next with the verdict which the jury did bring in and to consider whether even if unlawful killing might have been left to the jury that is a verdict which they could rationally ever have brought in. This goes to the question whether the judge was right to conclude that there was no purpose in quashing the verdict and ordering a further inquest.

18 It is in this context that Mr Mansfield submitted, as he did before the judge, that the coroner's direction really left the jury with no alternative but to bring in a verdict of lawful killing — they were, he suggested, bulldozed into that verdict and given no genuine alternative.

19 The judge sets out the aspects of the summing up relevant to this point in paragraphs 48 to 59, and I need not set them all out in full in this judgment. He accepted that the coroner's direction at the commencement that "this is not a case of homicide" (paragraph 49), and that "the conclusion that is available to you on the evidence in this case is one of lawful killing" (also paragraph 49) and the reference to an "open verdict" being an "unsatisfactory outcome" (paragraph 50) might have given a cause for concern if they stood on their own. However the coroner followed the above with a direction assented to by Mr Harvey and all counsel present which was in the following terms:—

> "Members of the jury, when applying the law on lawful killing in self-defence, you need to bear in mind that only one of those shots was the fatal shot, the second one that I have described. There is no evidence, sadly, as to the order of the shots, because, even once the fatal wound was inflicted, he could have been moving quite vigorously for a matter of minutes. That means that, if you decide that Officer A was acting in self-defence for some of the shots and not others, you would have to return an open verdict."

20 That clearly left the jury in no doubt that if they were not satisfied on a balance of probabilities that all the shots were fired in self defence, they would have to enter an open verdict.

21 At the conclusion of the summing up the coroner said this:—

> "The conclusion, as I said, is a brief summary of the death in a few words [that is a

> direction of how they should fill in the inquisition], and there is only one substantive conclusion that I consider is available to you on the evidence. Nevertheless, subject to what I am about to say, no precise form of words are required, so long as they are brief and non-judgmental. You may use your own words if you wish.
>
> I have told you that I can offer only one substantive conclusion to you, that of lawful killing. That has a special meaning in the Coroner's Court, and that is why I have given you a handout to explain that meaning [that is the handout which deals with the details the approach in relation to self-defence]. I have deliberately not given you guidance about a conclusion of unlawful killing. That is because I have ruled, as a matter of law, that unlawful killing is a conclusion that is not available to you."

22 Mr Mansfield was critical of that passage because he said the coroner did not explain why she had ruled as a matter of law that unlawful killing should not be left to the jury, and the jury would once again be confused. But, if the coroner had given an explanation as to her assessment as to the safety of leaving unlawful killing on the evidence that would have been subjected to more justified criticism, it indicating her view as to the state of the evidence. The only question is whether the jury understood in relation to what they had to be satisfied if they were to bring in a verdict of lawful killing and whether it was clear to them, if they were not satisfied, that they could say so by bringing in an open verdict.

23 That much was, in my view, still clear at the conclusion of the summing up but was clarified further by a question which the jury posed after retirement. The jury retired at 10.50 am on 14th December and posed a question at three o'clock that afternoon about "question 1" which related to self defence, and after discussion with counsel the answer given by the coroner was as follows:—

> "Of course, question 1, on the balance of probability, did the person who caused the death believe or may he honestly have believed that it was necessary to defend himself or another."
>
> The answer is: it is throughout the entirety of the incident. And the reason for that is because we do not know which shot was the fatal shot. We do not know the order in which these shots were inflicted.
>
> You may remember I said to you yesterday: if you felt that Officer A was acting in self-defence for some of the shots but not all, you would have to record an open verdict, and that is because, as I say, we have this difficulty, we do not know which was the fatal shot.
>
> So, in order to return a verdict of lawful killing, you must be satisfied, on the balance of probability, that Officer A was acting in self-defence throughout the entirety of the incident."

24 The jury must have been quite clear as to what they were obliged to do. Ultimately they, by a majority of 9 to 2, brought in a verdict of lawful killing i.e. they were satisfied on a balance of probabilities that throughout the incident, when firing each shot, officer A honestly believed his life or that of a third party was threatened, and that his reaction was reasonable in the situation he honestly believed to exist.

25 I agree with the judge that that being the jury's view, it is quite impossible to conceive that the jury could have been persuaded, if a verdict of unlawful killing had also been left to them, that it was clear beyond reasonable doubt that in relation to each shot officer A in fact did not believe he or a third party was threatened, or that he acted unreasonably to the threat he believed to exist.

26 That being my view, and it following that the appeal would in any event have to be dismissed, it could be said that the Galbraith point becomes academic. But the point being the one on which permission to appeal was granted, I should deal with it.

The Galbraith Point

27 It seems to me that the authorities recognise that there is some (if small) distinction between the position of a coroner deciding what verdict to leave to a jury after hearing all the evidence and that of a judge considering whether to stop a case after the conclusion of the prosecution case. The language used by Lord Woolf appears in a passage of his judgment in R v HM Coroner for Exeter and East Devon ex parte Palmer unreported 10th December 1997 quoted by Leveson J in Sharman v HM Coroner for Inner North London [2005] EWHC 857 (Admin) paragraph 7. Having described the duty of the coroner to act as "a filter to avoid injustice" he said:—

> "In a difficult case, the Coroner is carrying out an evaluation exercise. He is looking at the evidence before him as a whole and saying to himself, without deciding matters which are the province of the jury, 'Is this a case where it would be safe for the jury to come to the conclusion that there had been an unlawful killing?' If he reaches the conclusion that, because the evidence is so inherently weak, vague or inconsistent with other evidence, it would not be safe for a jury to come to the verdict, then he has to withdraw the issue from the jury"

28 The language used by Leveson J himself when having formulated the questions as quoted in paragraph 13 is also instructive when he says:—

> "I have put the matter in that way in order to formulate the test which must be considered by the coroner in deciding whether to leave the verdict of unlawful killing. It is whether there is sufficient evidence upon which the jury could safely come to the conclusion beyond reasonable doubt that the firearm was not discharged in the belief that one of the officers was under imminent threat of being shot with a sawn-off shot gun."

29 The emphasis seems to be on the safety of leaving a particular verdict to the jury. What is perhaps of some interest is that the very issue in Galbraith was to decide between two schools of thought described in the judgment as follows:

> "There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence on which a jury properly directly could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between on the one hand a usurpation by the judge of the jury's functions and on the other the danger of an unjust conviction."

The decision was that the test to be applied in criminal trials was as per the second school of thought and that is the test since applied.

30 But the language of Lord Woolf and Leveson J, so far as coroners are concerned, would seem to be nearer the rejected school of thought, albeit Lord Woolf was saying that a coroner should not "decide matters which are the province of the jury". I would understand that the essence of what Lord Woolf was saying is that coroners should approach their decision as to what verdicts to leave on the basis that facts are for the jury, but they are entitled to consider the question whether it is safe to leave a particular verdict on the evidence to the jury i.e. to consider whether a verdict, if reached, would be perverse or unsafe and to refuse to leave such a verdict to the jury.

31 I would thus agree with the judge that the question is an evidential one and that considerations as to whether an inquest is a satisfactory form of process in identifying whether criminal conduct has taken place or as to whether some evidence might or might not have been admissible at a criminal trial, are irrelevant. The coroner however had heard all the evidence. In her ruling she took account of the fact that two of the shots were found to be in the back and two in the side of Mr Bennett. She recorded on that basis that the pathology "appears" to contradict Officer A's evidence, but the coroner also took account of the evidence of the firearm experts (Pryor,Weir, Bailey and Burrows) and of the psychologist, Professor Alexander, from which it was apparent "that such injuries are not inconsistent in a fast moving incident such as this

undoubtedly was". She noted that nothing contradicted officer A's account of Mr Bennett moving violently and frantically; and that only 30 seconds separated the timing of the sighting of Mr Bennett and the shots being fired.

32 The coroner had regard to what officer A was alleged to have said to PC Brooks (see paragraph 37 of the judgment), that although she took the view (with which I agree), even if said, the words were not necessarily inconsistent with Officer A's evidence.

33 What Superintendent Plowright recorded in the debriefing (see paragraph 39 of the judgment) can, as the judge says, be read both as consistent with officer A's evidence as well as inconsistent. In his evidence Officer A did not accept he had said something inconsistent in the debriefing when that version was to put to him by Mr Harvey. The coroner in her ruling did not, I think, refer to this evidence at all and I do not think she can be criticised for not doing so.

34 Thus any suggestion that Officer A was not giving truthful evidence in describing his fear for his own safety had support of only the most tenuous nature.

35 It seems to me that the coroner was right to take the view that a verdict of unlawful killing could not safely have been left to the jury in this case. There are certain incontrovertible points which to my mind support that conclusion. This incident all took place in a matter of moments -30 seconds at most; there were explanations from the experts on both sides how the entry wounds could be in the back or side even if Mr Bennett was facing officer A when the officer decided to fire; all shots were fired while Mr Bennett had what was honestly thought to be a gun; Mr Bennett had held what was thought to be a gun to the neck of one member of the public; Mr Bennett had given no indication that he was not intending to use what was thought to be a gun; and, if a verdict of unlawful killing was to be brought in, the jury would have to be satisfied beyond reasonable doubt in relation to each shot that officer A did not honestly believe he was under threat or that the officer reacted unreasonably to that honestly held view. To bring in a verdict of unlawful killing would have been perverse, and the reality is that the jury's actual verdict confirms that view.

36 It is for these reasons I was of the view that this appeal should be dismissed. Let me however add this. To lose a son in these tragic circumstances will have caused indescribable agony to the Bennett family. No-one could feel other than the greatest sympathy for them. But the death of their son was, on the verdict of the jury, a terrible accident and I simply express the hope that the family can accept that and move on after all these years.

Lord Justice Keene:

I agree.

Lord Justice Dyson:

I also agree.