

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

AXAHCR 2021/0014

Between

The Queen

-and-

Tyrone Carty

Defendant

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Terrence Williams with Mr. Sasha Courtney of counsel for the Crown
Mr. Thomas Astaphan Q.C. with him Mr. Devin Hodge and Mrs. Tona Simpson-Whyte of counsel for the defendant

2022: June 10.
Reissued

Decision

- [1] **Moise, J:** This is the decision of the court on an objection raised by the defence to the tendering of depositions taken during the course of an inquest. The crown seeks to tender five (5) depositions sworn and attested to by the defendant during the course of the inquest which was conducted by the Coroner between 21st June, 2018 to 8th July, 2019. Needless to say, counsel for the defendant has raised numerous objections regarding asserted irregularities which took place during the inquest and the inherent prejudice which this is likely to have on the fairness of the process of the current trial; especially in light of the provisions of section 9 of the Constitution of Anguilla. Having considered the submissions of both sides I have determined that the objection raised by the defence should be upheld and that the depositions ought not to be tendered as evidence in this trial. These are the reasons for my decision.

The Facts

- [2] This is an ongoing trial in which the defendant, Tryone Carty, is charged for the murder of Robert Benta. Given that I am writing this decision at a time when the trial has not come to an end, I wish to state that the facts as I have outlined them are only insofar as they are relevant to the narrow interlocutory issue I am called upon to consider. I have therefore only outlined some of these basic facts in summary and this is in no way designed to draw conclusions or any inferences on matters which ought to be left for determination at the end of the trial.
- [3] The evidence is that Mr. Robert Benta died on 3rd June, 2018 as a result of a gunshot wound to the neck. It is asserted that he was shot in the neck while a passenger in a motor vehicle driven by Mr. Carty on that night. Between the night of 3rd June, 2018 and the commencement of the inquest on 21st June, 2018, Mr. Carty had given at least three (3) statements to the police, giving his account of the events which occurred that evening. It is also apparent that in the investigation of the incident, various samples such as blood and DNA were taken from Mr. Benta, Mr. Carty and at least two other individuals. It is apparent that some of those items and samples had been sent overseas for expert analysis. The motor vehicle in which the incident occurred was seized. A post mortem of the body of Robert Benta was conducted by Dr. Stephen King on 11th June, 2018 which concluded that he died as a result of this bullet wound to his neck.
- [4] However, on 21st June, 2018, eighteen (18) days after the shooting, the Coroner commenced an inquest into the death of Robert Benta and on that date Mr. Carty was summoned to be deponed on his account of the events which transpired leading up to Mr. Benta's death. After a series of hearings, the jury, along with the Coroner, signed the Form of Inquisition, certifying that Robert Benta's death was a homicide. I pause here to note that on balance it would have been apparent from before the inquest began that the death was in fact a homicide. Given other aspects of the evidence which can be gleaned from the depositions at the Preliminary Inquiry, it is also apparent, and I so find, that the police investigation was not complete at the time the inquest started and therefore ran parallel to it.

- [5] However prior to concluding the inquest, the Coroner had twice granted what was described as special leave to one Officer Kenneth Millet, who I understand was a police prosecutor, to further examine Mr. Carty “in chief” on the evidence he had presented before the inquisition. Although defence counsel argued that Mr. Carty was brought back to the inquest 5 times, I do not find that to be the case. I say so as it seems clear on the face of the depositions presented to me that this special leave was granted to the prosecutor on 23rd July, 2018 and that this initial further examination continued on 20th August, 2018 and 4th April, 2019. Therefore while Mr. Carty’s evidence on these dates is presented as separate depositions, it appears that the examination spanned over a number of days prior to its completion.
- [6] A further special leave was granted to the prosecutor on 25th April, 2019, at which point Mr. Carty was brought back to the inquest to answer additional questions at the instance of the police prosecutor. What is clear however, was that in total Mr. Carty appeared on 5 separate dates to give evidence before the inquest.
- [7] It is argued by counsel for Mr. Carty that the Coroner never examined Mr. Carty herself but rather the evidence was initially solicited by questions posed by a police prosecutor. This prosecutor appeared at the Preliminary Inquiry and it would seem from his deposition, if it is to be accepted as the truth, that he was also the prosecutor for the Coroner’s Court. This insinuates that it was a custom for police prosecutors to be engaged in leading out the evidence during the coroner’s inquest. In addition, the depositions all indicate that on each occasion Mr. Carty was also allowed to be questioned by persons from Mr. Benta’s family as well as members of the jury.
- [8] Counsel for Mr. Carty argues that when one examines what was recorded in the depositions, it becomes clear that the nature of the examination by Officer Millet was tantamount to cross examination. Mr. Astaphan Q.C. argues that it was clearly being put to Mr. Carty that he had lied in his statements to the police and in his initial account to the inquisition. Indeed, as Mr. Astaphan points out, the case for the prosecution in this trial is hinged significantly on those alleged lies. It does not appear to me from the depositions or any of the information presented, that there is any intention to call direct evidence of Mr. Carty either murdering or being physically involved in Mr. Benta’s murder. The case is predicated on proof of the alleged lies, some of which were elicited by direct examination of Mr. Carty during the inquest.

- [9] Mr. Williams for the Crown does not necessarily dispute that the examination in the inquest revealed what he describes as lies from the defendant. He also readily accepts that the prosecution's case hinges significantly on those alleged lies. However, he disputes that the examination of Mr. Carty amounted to cross examination and argued that there was nothing inherently wrong with the evidence being led by a police prosecutor in this way and that the procedure adopted by the Coroner was not a breach of any of the powers conferred on her in the Coroners Act or the common law.
- [10] However, the difficulty which I express in reconciling this issue is that the court was not furnished with a transcript of the proceedings before the Coroner. The depositions do not contain what I consider to be key facts which may shed light on what in fact transpired. Firstly, while the depositions on their face state that Officer Millet had sought special leave from the Coroner to recall Mr. Carty, it does not indicate the basis upon which this request was made. Officer Millet does not address this in his own deposition before the Magistrate at the Preliminary Inquiry. Further, the deposition does not indicate the basis upon which the Coroner was satisfied that such a course of action should be pursued and the nature of the questions which were likely to have been put to Mr. Carty at this further examination. Secondly, the depositions simply record Mr. Carty's responses and a verbatim note of the examination by Officer Millet was not taken by the Coroner. While it may be possible to glean the nature of some of the questions from the recorded answers in the depositions, it is nonetheless difficult to determine the general tether of the examination, which was described by the Coroner as further examination in chief.
- [11] I express some concern about the limited nature of the evidence presented before this court upon which it is to determine rather salient issues regarding the admissibility of such evidence into a murder trial. It would seem to me that we are way past the time for proceedings of such an important nature to be properly recorded so that any review of what had transpired would be ably assisted by a transcript of the proceedings. I appreciate that judicial officers do not necessarily take a verbatim note of all which transpires in court. In light of that, my comments are not intended to be a criticism of the Coroner. But the depositions do not give an accurate account of all which transpired during the inquest. If the court is to fully consider the issues raised by counsel then it would have been better assisted by a transcript of the proceedings. However, I must now go on to consider the law and its

application to the issues raised by counsel as it relates to the admission of the statements into evidence at this trial and make what I can out of the facts which are available.

The Law and its application

- [12] It was argued by counsel for Mr. Carty that the Coroner is a creature of statute and that it is to the **Coroners Act**¹ we must turn for an appreciation of the full ambit of the Coroner's powers. For the purpose of this decision we look firstly at the provisions of section 21 of the Act which states that ***"[e]very inquest under this Act shall be a judicial inquiry and may be held as well on Sunday as on any other day."*** The office of the Coroner is ex officio. The Act itself indicates that the Magistrate shall be the Coroner for Anguilla. The Magistrate is herself a judicial officer who is expected to conduct her affairs as any judicial officer would. The inquest is therefore not an administrative investigation. It is a judicial inquiry and it is to be expected that the necessary independence and impartiality which is a feature of any judicial process would be applied to the conduct of an inquisition. The overall principles of fairness and the rules of natural justice ought also to be inherent in the conduct of an inquest.
- [13] Despite it being in the nature of a judicial inquiry, Section 22 of the Coroners Act states that the process is not an open court process in Anguilla. The Coroner therefore does not conduct the inquest as a public investigation which is open to all. This is a feature which is not inherent to all common law jurisdictions, where inquests sometimes take the form of an open and public inquiry. That is all the more reason for a Coroner to be ever more vigilant in the observance of the rules of natural justice where the process may possibly result in the implication of someone in a crime. It is also important therefore to repeat my earlier observation that a better job can be done in ensuring that the proceedings are adequately recorded so as to increase the level of accountability of an inquest if its conduct is to ever come under review. In some instances it is not merely what is recorded in the deposition which matters. It may be necessary to have a much more accurate account of everything which transpired in that process in order to conduct a proper review or to draw the court's attention to the overall fairness in admitting a deposition from an inquest into evidence in a subsequent criminal trial.

¹ CAPC125 of the Laws of Anguilla

- [14] Section 23 of the Act states that ***“No counsel or solicitor is entitled as of right to appear in any proceedings before a Coroner’s court, but the Coroner may, if he thinks fit, on application, permit such appearance.”*** This section underscores the fact that although the inquisition is a judicial inquiry it is not an adversarial trial. There is therefore no inherent right to legal representation at an inquest. However, a discretion is given to the Coroner to allow for the appearance of counsel at the inquest. The section itself does not go on to outline the full extent of the lawyer’s participation in the inquest. Mr. Astaphan Q.C. submits that although the lawyer may appear, he is not entitled to cross examine witnesses or fully participate in the inquest in the manner he would have been able to in an adversarial trial.
- [15] Insofar as section 23 is concerned I make just one observation at this stage. As I indicated earlier, there is reason to believe that a police prosecutor is quite often allowed to lead the evidence at an inquest. Mr. Astaphan submits that this is entirely contrary to the legislation. I will address that submission later on. However, even if the practice is a common one, it is my view that, depending on the nature of the inquest, a Coroner may wish to consider the question of whether the scales of justice are adequately balanced by allowing the police prosecutor to participate in the inquest in this way without the Coroner herself initiating the invocation of section 23 by at least enquiring of a person who may clearly be implicated by the outcome of the inquest as to whether he or she wishes to seek legal advice. That much may very well show a full appreciation of the judicial nature of the inquiry and the inherent fairness which the process must observe. The fact that it is not an adversarial trial does not mean that there may not be significant implications for a person appearing before the inquest if the criminal justice system is subsequently engaged. For someone to be examined by a police prosecutor where an ongoing criminal investigation is taking place, may very well create an imbalance in the scales of justice which is too great to ignore.
- [16] Section 24 of the Coroners Act states that ***“The Coroner shall at the first sitting of the inquest, examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it is expedient to examine.”*** It also goes on in subsection (2) to state that the deposition ***“shall be admissible in evidence in any proceedings in the cases in which and subject to the conditions under which***

in similar proceedings in England the like deposition taken by or before a Coroner in England would be admissible in evidence.”

- [17] It is on subsection one in this section that Mr. Astaphan hinges his argument that the Coroner has no authority under the Act to allow persons, other than herself, such as prosecutors and family members, to solicit evidence from a witness during the inquest. It is, according to Mr. Astaphan, the Coroner who must lead the inquisition by asking the questions herself.
- [18] The prosecution on the other hand disputes this. It is argued that the section itself does not limit the inquiry to questions asked directly by the Coroner. The section, in giving its literal interpretation, clearly states that the obligation to examine witnesses on oath shall be done at the “first sitting of the inquest.” It is argued that there is nothing in the Act which prohibits other interested persons from asking questions if the Coroner is minded to do so.
- [19] Counsel for the crown referred to “***Jervis on the Office and Duties of the Coroners***” and I too find some useful guidance from this text. It states at paragraph 12.10 that “***... it is the Coroner alone who has the power to call witnesses. This is the consequence of the inquisitorial nature of the proceedings before the coroner. It is his duty to conduct an investigation, and not to hear and determine issues raised by parties to litigation. Thus, it is that the coroner, and no-one else, decides which witnesses shall be called.***” This underscores two important issues. Firstly, it is the Coroner who exercises ultimate supervision and control of the process and secondly, the process is not designed to be an adversarial trial.
- [20] The text goes on to say at paragraph 14.37, that the Coroner must consider any application made by interested parties who wish to raise issues in the inquest. It is the duty of the Coroner to deal judicially and in open court with such applications. It goes on to say that “***... it must be borne in mind that on-one has the right, under the guise of making an application, to address the court as to the facts.***” The following is also stated at paragraph 15.16:

“Subject to the over-riding discretion of the coroner to ensure a properly conducted and fair proceedings, it is the privilege of the jurors, at any time during the investigation, to call back before them and to re-examine any witness who has already been examined, in order to ask further questions, perhaps arising out of their evidence.

Unless the coroner otherwise determines, a particular witness must be examined first by the coroner. The coroner will probably have before him a statement by, or about, the witness on which to base his questions, and it is usual for him to conduct the first (and most important) examination.”

- [21] On the basis of this extract, it would seem that counsel for the Crown is correct in stating that there is nothing inherently wrong in other persons being allowed to ask questions in an inquest. The section in the Act does not appear to me to necessarily limit the questioning to the Coroner. The jury certainly appears to have the right to at least request that a witness is brought back to be further examined, suggesting that there is a right to put questions to the witness in the first place. In stating that the Coroner should examine the witness at the first sitting of the inquest, the section does not appear to me to be as limiting in its scope as counsel for Mr. Carty submits. In addition to that, I find that the very broad circumstances under which a Coroner may conduct an inquest may make it unnecessary and perhaps unreasonable to narrow the questioning of witnesses down to the exclusive duty of the Coroner. Other persons may very well participate if to do so would not undermine procedural fairness.
- [22] However, two observations must be made here. Firstly, **Jervis** itself underscores the fact that the Coroner is the primary examiner and must begin the process of questioning the witness herself, unless she has decided otherwise. It also says that she must also be the one to ask the most important questions. To put it differently, it should not be a matter of course for the questioning in an inquest to be initially led by anyone other than the Coroner. If a process is to be fair and transparent, the Coroner may also do well to place the reasons for deciding not to ask questions directly and firstly on the record. Secondly, the discretion to allow other persons to participate in an inquest by putting questions to the witnesses is subject to the overriding discretion of the Coroner to ensure that the process is fair. Again the reasons for exercising such a discretion should probably be placed on the record in the inquest to ensure that the process is a transparent one if it is to ever come under adequate review. However, overall one cannot underscore too much, that the Coroner has an overall discretion to control and ultimately to protect the sanctity of this process.
- [23] In considering these issues however, it is important to note that the contention raised by the defence insofar as it relates to the questioning in the inquest in this case was not limited to the whether it was

right to allow anyone other than the Coroner to ask questions. When one examines the depositions presented, it does not seem to me that the Coroner actually lead the questions in the inquest in any way. I agree with counsel for the defence where it is argued that the depositions taken as a whole appear to me to show that the evidence was led initially by a police prosecutor prior to members of the family of Mr. Benta and the jury being invited to ask questions of their own. In addition to that, the deposition filed by Officer Millet from the Preliminary Inquiry into these proceedings, do expressly say that he was the prosecutor who led the evidence at the inquisition. There is therefore nothing to show that the Coroner actually complied even with what is counsel for the Crown's own interpretation of section 24 of the Act and the learning in **Jervis**. The evidence was clearly not led by the Coroner herself as any point.

[24] In continuing with the assessment of the provisions of the Coroners Act sections 27 to 29 outline the duties and responsibilities of persons who are summoned by the Coroner to attend an inquest and to give evidence therein. Section 27 states that ***"it shall be the duty of all persons who are able to give material evidence concerning any matter to be inquired into at an inquest to attend the inquest at such time and place appointed and to give evidence."*** Section 28 states that ***"the Coroner may at any time summon such witnesses, as he deems necessary, touching the matter of the inquest."*** Very importantly, section 29 states that any person who is summoned is liable to be committed for contempt, or to pay a fine, to be imposed by the Coroner, of \$400.00 if he refuses or neglects to attend the inquest; or being present refuse to be sworn or to give evidence; or having given evidence refuses to sign the deposition.

[25] On the basis of these provisions, it is clear that a witness in an inquest can be compelled to give evidence under the pain of fine or imprisonment; notwithstanding the fact that that evidence is admissible in a subsequent trial. The Coroner's powers are therefore significant and can have far reaching consequences. In fact it is clear that the powers granted to a Coroner are far more significant in scope than the discretion of a judge in a criminal trial where a defendant cannot be compelled to give evidence which may be self-incriminatory during the course of the trial where he or she may also refuse to give evidence at all.

[26] The rationale for this is quite obvious. The inquest is not an adversarial trial and in the main no witness is considered to be a defendant. As was noted in **Jervis**, ***"[i]t follows from the inquisitorial***

nature of the coroner's proceedings that there are no "parties" to an inquest, in the same way that there are to accusatorial proceedings such as a trial. Despite this it is important to be reminded of the fact that the overriding principle in the exercise of the Coroner's discretion is that of fairness. Compellability at an inquest is not necessarily an unfettered right on the part of the Coroner. It is well established in case law, that the Coroner must give due regard to the right against self-incrimination in the exercise of his discretion. In light of this **Jervis** states as follows:

"It is for the Coroner to decide whether or not the witness is entitled to the privilege. He must first satisfy himself that the answer would tend to incriminate the witness..."

Where it appears to the Coroner that a witness has been asked an incriminating question, the Coroner must inform the witness that he may refuse to answer. The witness or his representative must, however, take the objection himself, and if he chooses to answer, he waives his privilege. However, if a series of incriminating questions is deliberately asked, then it is open to the coroner to forbid them to be put as not 'proper' questions."

- [27] This principle was underscored in the case of ***R v. Lincolnshire Coroner, ex parte Hay***² where the issues of the privilege against self-incrimination in the course of an inquest were considered. Whilst I appreciate that this case dealt with legislative provisions which are not necessarily similar to those of Anguilla, I agree with the decision when it states that the ***"privilege against self-incrimination is concerned with the giving of an answer by a witness and that the procedure adopted when dealing with such a claim of privilege should not be such as to give the witness complete immunity against further questioning."*** This underscores the fact that even in an inquest, the Coroner's powers to compel a witness to appear and answer questions is subject to consideration of the basic principles against self-incrimination where it is appropriate. Even if this may not be specifically provided for in the legislation the overall fairness and sanctity of the process may warrant that consideration be given to whether the privilege ought to be invoked and whether a particular witness may not be informed of this privilege. Though he is compelled to appear for questioning, in certain circumstances he may not necessarily be compelled to answer questions if those answers

² [1999] Lexis Citation 2313

are potentially incriminating. The Coroner may go as far as forbidding a line of questioning if it is intended to lead to self-incrimination.

- [28] This privilege against self-incrimination is an important factor in the application before me. However, before addressing this issue any further it is important to give some consideration to the submissions made by counsel for the defence as it relates to the broad constitutional principles which may be applicable to this issue. These submissions highlight the concerns raised by counsel for the defence insofar as it relates to the admissibility of the depositions in these proceedings, given that Mr. Carty was summoned and compelled to provide answers to questions at an inquest which are now being used against him in a criminal trial.

The Constitutional Question - The Right against Self-Incrimination

- [29] Mr. Astaphan referred the court firstly to section 9 of the Constitution which states as follows:

9.—(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

...

(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty:

Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.

...

(10) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

- [30] Mr. Astaphan submits that it is universally accepted that this section of the Constitution is fashioned after Article 6 of the European Convention on Human Rights. He therefore submits that decisions of

the European Court on Human Rights provide guidance on the interpretation of the section. Mr. Astaphan therefore refers the court to the case of ***Saunders v. The United Kingdom***³ where that court came to consider the right against self-incrimination in an investigation pursuant to section 432 of the Companies Act of the UK.

[31] In summary, the facts of that case are that the Secretary of State for Trade and Industry appointed inspectors pursuant to the legislation to inquire into a potential unlawful share support operation. The applicant was interviewed by the inspectors during the course of the inquiry. He was accompanied by his legal representatives during the inquiry and was interviewed nine (9) times and was subsequently charged for a number of fraud related offences. Notwithstanding his objections, the evidence solicited at the inquiry was used against him at the trial. The trial judge noted that ***“as a matter of construction of the 1985 Act inspectors could ask witnesses questions that tended to incriminate them, the witnesses were under a duty to answer such questions and the answers were admissible in criminal proceedings.”*** The judge went on to reject the assertion that a warning against self-incrimination ought to have been given to the applicant. He was thereafter convicted of 12 counts of conspiracy, false accounting and theft. The issue for consideration before the ECHR was whether this deprived him of a fair hearing in accordance with Article 6(1) of the Convention.

[32] The court in its assessment made it clear that the pleadings before it did not suggest that the conduct of the inquiry by the inspectors had breached Article 6(1) of the Convention. It was found therefore, that in accordance with the pleadings, the issue was whether the subsequent use of the statements in a criminal trial was in breach of the convention. The court however assessed the nature of the inquiry and noted that it was not a judicial inquiry, but was rather inquisitorial in nature. As it relates to the implications for the applicant in terms of the questions put by the inspectors, the court noted the following at paragraph 70 of the decision:

“It has not been disputed by the Government that the applicant was subject to legal compulsion to give evidence to the inspectors. He was obliged under sections 434 and 436 of the Companies Act 1985 (see paragraphs 48-49 above) to answer the questions put to him by

³ [1998] 1 BCLC 362

the inspectors in the course of nine lengthy interviews of which seven were admissible as evidence at his trial. A refusal by the applicant to answer the questions put to him could have led to a finding of contempt of court and the imposition of a fine or committal to prison for up to two years (see paragraph 50 above) and it was no defence to such refusal that the questions were of an incriminating nature (see paragraph 28 above)."

- [33] Mr. Astaphan draws the court's attention to the parallels between the powers of compulsion in that case and those of the Coroner in Anguilla. One who refuses to answer questions does so under the pain of sanctions for contempt. However, in **Saunders** the government sought to argue that the answers to the questions posed by the applicant were all exculpatory and it cannot therefore be said that his rights had been breached if he had simply provided answers which were geared to maintain his innocence. The court's response to that in its decision was outlined in paragraph 71 of the judgment where it was stated that:

"The Court does not accept the Government's premise on this point since some of the applicant's answers were in fact of an incriminating nature in the sense that they contained admissions to knowledge of information which tended to incriminate him (see paragraph 31 above). In any event, bearing in mind the concept of fairness in Article 6 (art. 6), the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. Where the credibility of an accused must be assessed by a jury the use of such testimony may be especially harmful. It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial."

- [34] Essentially, the court was of the view that an incriminating response is not merely one tending to confess to a crime or admit guilt. An exculpatory statement may in itself be incriminatory, in that it

may be deployed in a criminal trial to assist the case for the prosecution. The court went on to note that “[t]he fact that such extensive use was made of the interviews strongly suggests that the prosecution must have believed that the reading of the transcripts assisted their case in establishing the applicant’s dishonesty.” The court also noted that “the evidence available to the Court supports the claim that the transcripts of the applicant’s answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.”

[35] Mr. Astaphan argues that this is precisely what is at stake here. The Crown seeks to convict Mr. Carty on the premise of lies which he had allegedly told, both to the police and during the Coroner’s inquest. The intention is therefore to present the jury in this trial with the depositions of Mr. Carty’s statement in order to assist their case in proving that he had lied about the manner in which the events of 3rd June, 2018 took place. Many of the answers to the questions put to him during the inquest were therefore self-incriminatory.

[36] The ECHR also went on to reject the government’s argument that there was a vital public interest in investigating fraud cases and that the complexity of such cases made it necessary for such an inquiry to be conducted and for the use of such evidence in a criminal trial. The court however concluded that “[t]he public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.” The court therefore found that reliance on the statement at the criminal trial was a breach on Article 6(1) of the convention.

[37] It must be noted however, that the decision in **Saunders** has at times been met with not so veiled criticisms from the UK courts. In fact counsel for the Crown in the case before me referred to the case of **Browne v. Stott and another**⁴ in which the Privy Council appears to have done just that. In that case the defendant raised a devolution issue pursuant to section 6 of the Scotland Act 1998. The question was whether the prosecution’s intention to rely at her trial on an admission compulsorily obtained under section 172(a) of the Road Traffic Act 1998 was a breach of Article 6(1) of the

⁴ [2003] 1 AC

Convention. That section empowers a police officer to require that information be given regarding the identity of the driver of a vehicle alleged to have been guilty of an offence to which the section relates.

- [38] Although Their Lordships all came to the same conclusion in that case, they all saw it fit to contribute separate judgments. In his contribution, Lord Steyn noted that “... ***the reasoning in Saunders is unsatisfactory and less than clear...***” He goes on to state that “...***the observations in Saunders do not support an absolutist view of the privilege against self-incrimination. It may be that the observations in Saunders will have to be clarified in a further case by the European Court.***” In his contribution Lord Hope was somewhat more direct in his criticism when he stated the following:

“The main weakness in the reasoning of the Court in Saunders lies in its failure to examine the issue, which is highlighted in the dissenting opinions of Judge Valticos and Judge Gölcüklü, as to whether the right to silence and the right not to incriminate oneself are or are not absolute rights the modification or restriction of which could in no circumstances ever be justified. The basis upon which the Court proceeded, as it explained in the opening sentence of para. 68, was that these rights “lie at the heart of the notion of a fair procedure under Article 6”. In the discussion which follows the rights are treated as if they were rights conferred by Article 6 which were not open to modification or restriction. The essence of the argument which the Court accepted related to the use which was made of the evidence obtained under compulsion in the course of the criminal trial: para. 71. That was enough to persuade the Court that the rights had been breached. It is true that in para. 74 of its judgment the Court said that it did not find it necessary to examine the issue as to whether or not the rights were absolute in the light of its assessment of the use which was made at the trial of the interviews. But the reasoning upon which this observation seems to have been based appears to me, with respect, to be unconvincing. It was simply that the answers to questions put in the course of those interviews, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant: para. 72. Questions as to whether the procedure which was followed was designed to pursue a legitimate aim and as to whether the means employed were proportionate were not addressed.

- [39] I must say for my part that I do agree with the criticism of the decision in **Saunders** as expressed in **Brown v. Stott**. It is well established by no less than the ECHR itself that the right against self-incrimination is not absolute⁵. It stands to reason therefore that if the right is not absolute then there are certainly circumstances where it is appropriate and proportionate for the right to be restricted or perhaps modified. The approach taken in **Saunders** seems to suggest that the court there simply determined that the answers to the questions were incriminatory and on that basis alone rendered it a breach of Article 6(1) for it to be admitted into evidence in a criminal trial. Bearing in mind that the court was careful to point out that there was no allegation made of any irregularity in the investigation which was carried out by the inspectors, I do not agree with the approach taken in **Saunders**.
- [40] I agree that ultimately it is a question of fairness and proportionality. Saunders has not been criticized for its conclusion that even exculpatory evidence can amount to self-incrimination. Therefore, if the answers to the questions put to him in the inquest amounts to self-incrimination then this court must go on to consider whether Mr. Carty's right to a fair trial is compromised by including the statements. In coming to that conclusion one does not do so by merely concluding that the answers provided in the inquest are incriminatory. One must examine the circumstances under which the inquest, including the purpose behind the powers granted to the Coroner under the Act, was conducted and the circumstances of the present case in order to make this determination. The depositions are certainly admissible, notwithstanding the self-incriminating statements made therein. The question is whether it is fair and proportionate to include them. If doing so would compromise Mr. Carty's right to a fair trial then they should be excluded.
- [41] It may be the case that the ECHR in **Saunders** sought to address the issue of proportionality when it considered the submissions of the UK Government on the public interest test. However, the court there appeared to simply dismiss the relevance of that test to the decision it came to without conducting a balancing exercise as to the proportionality of the process and its impact on the criminal proceedings. In this case, counsel for the Crown requires that I consider the public interest inherent in the duties and powers of the Coroner. Counsel refers the court to the case of **R(Amin) v. The Home Secretary**⁶ where it was stated that the Coroner's duty to investigate an unnatural death was

⁵ See the decision of the Privy Council in the case of **Kaim Sexius v. the AG [2017] 1 WLR, 3236**, where such issues were thoroughly addressed.

⁶ [2004] 1 AC 653

important to give effect to the **“profound respect for the sanctity of human life”** which itself underpins the jurisprudence under the convention. That duty must be seen in light of the public interest in ensuring that unnatural deaths are adequately investigated.

- [42] Whilst I agree with that submission in a broad sense, there are two observations which I must make at this stage. Firstly, the case of ***R(Amin) v. The Home Secretary*** is distinguishable from the present one. The issue in that case centered on the public interest in investigating the death of someone who was in state custody at the time of his death. In that case, there was a criminal trial and a conviction for murder. The Coroner, who had stayed the inquest pending the outcome of the trial, refused to continue thereafter. It was held that the public interest in conducting the inquest was important as it was not merely a question of whether someone is found guilty of the murder, but also whether the state bears some responsibility for allowing this to happen while the deceased was in its custody. In his contribution to that judgment Lord Slynn states as follows:

“The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected. The significance of this duty to those detained in prison, not least where prisons are crowded and prisoners often dangerous, is obvious. It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the state kills and those cases where an agent of the state or the system is such that a killing may take place. The result of “an incident waiting to happen” may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.”

- [43] It must also be observed that the Coroners Act makes it mandatory that an inquest be conducted in circumstances where someone has died while in prison. As expressed by Lord Slynn, the purpose behind this power is not merely to determine whether an agent of the State took the prisoner’s life, but whether the State bears some responsibility for allowing the death to occur, whether by negligence or otherwise. By placing a young offender in a cell with a prisoner who is known to be violent or had even threatened violence, the State must be held to account by what, at least in England, is an open investigation to be conducted by the Coroner. Family members being allowed to

ask questions in such circumstances certainly enhances that process and increases the level of accountability of the State in such circumstances.

[44] Therefore whilst I do agree that there is a public interest in ensuring that an unnatural death is investigated, I am not of the view that that interest alone means that the issues raised by the defendant in the case before me ought to be rejected. It is not a case of someone dying in police custody, but a case where, on balance, someone was murdered by an assailant while a passenger in a car on his own accord. The State does not bear a responsibility to account for the death in a manner similar to what transpired in *R(Amin) v. The Home Secretary*. The State's duty is to ensure that a thorough investigation is done and that someone is brought to justice for committing such an offence. For that the police powers of investigation and the criminal justice system carries the brunt of the responsibility. That is not to say that the role of the Coroner is less valuable, but there does seem to me to be a need to appreciate the overlap between the powers and to ensure that the closed and compellable nature of a Coroner's inquest in Anguilla does not disregard the inherent safeguards which exist in the criminal justice system to ensure that miscarriages of justice do not occur.

[45] It is therefore important for the court to consider the submission made on behalf of Mr. Carty from the general perspective of fairness. Whilst the courts have been careful to point out that the right against self-incrimination is not absolute, I am unable to find any authority for the proposition that it is by any means an unimportant right. The conduct of an inquest may compel an individual to give self-incriminating evidence, but it is for this court to assess the circumstances under which that evidence was given and to determine whether it would be fair and proportionate to tender that evidence to the jury. In conducting this exercise I find some important guidance in the case of *R v. Davies*⁷ which was referred to by counsel for Mr. Carty.

[46] That case also dealt with the question of the admissibility of a deposition taken during an inquisition. The circumstances are such that the Crown Prosecution Service had made a decision not to prosecute the defendant. The file was thereafter handed over to the Coroner. Having reviewed the file the Coroner requested information regarding the decision not to prosecute. Although the usual form was not presented, the Coroner was provided with a letter outlining the reasons for the decision

⁷ [2011] EWCA Crim 871

not to proceed with a criminal trial. On the morning of the inquest, and prior to its commencement, the Coroner, in private, questioned two police officers who were involved in the investigation. The Coroner expressed concern with the decision not to prosecute and was of the view that the matter was one better suited for determination by a criminal court. It seemed obvious to her that a verdict of unlawful killing was inevitable. As the trial judge found, ***“[h]ere alarm bells were sounding, an opportunity to put things right may well have been missed.”***

[47] I pause here to address a concern which I had raised with counsel for the Crown in the case before me. The concern is with the inherent overlap which exists between the powers of the Coroner and that of the police who are investigating a death which is clearly a homicide and in which the deceased did not die in custody or at the hands of the police. Whilst there is nothing prohibiting a Coroner from conducting an inquest in such circumstances, it must be observed that her powers to do so are discretionary and consideration may very well have to be given to the question of whether one investigation can prejudice the other. Here in the case of ***Davies*** one can clearly see that the Coroner was concerned with this very issue. Though in that case the investigation was already complete, something must be said about the conduct of an inquest in a case where it ought to be clear on the face of the facts already available that a homicide has in fact taken place and there are no clear public policy reasons for not waiting for a determination of whether a prosecution in the criminal justice system is more appropriate than an inquest. The trial judge appreciated the alarm bells which were sounding in the Coroner’s head and the Court of Appeal certainly felt that these alarm bells were well founded.

[48] The judgment goes on to note that the Coroner, after having raised her concerns decided to proceed with the inquest after further consultation between the officers she interviewed and their superiors. It was again determined that no prosecution should take place. What is interesting however, is that the judgment went on to state that the defendant gave evidence and ***“[h]aving received the usual warning against self-incrimination he refused to answer questions that might incriminate him.”*** Again, one cannot resist the temptation to pause here and assess the contrast between the procedure adopted in that case and the one before me. This was an inquest where the Coroner had already expressed concern that the issues were best suited for determination at a criminal trial. Yet, it states that she took the time to give the “usual warning” against self-incrimination. I appreciate that in England this right may have been enshrined in legislation, but that does not mean that such a right

does not exist in Anguilla. As I have already stated, the need for procedural fairness in a judicial inquiry may very well be enough to infer such a right if the circumstances so arise.

[49] A few observations can therefore be made. The first is that a Coroner may do well to assess whatever information is available prior to the commencement of an inquest in order to determine the nature of the procedural safeguards which may be necessary to ensure that this judicial inquiry is not undermined by unfairness and prejudice. Secondly, it would appear to me from an assessment of **Davies**, that it is not unusual for a warning against self-incrimination to precede the actual examination of the witness in various circumstances. Unlike what was submitted by counsel for the Crown in his reliance on **Jervis** and **R v. Lincolnshire Coroner, ex parte Hay**, I am of the view that the justice of the situation may very well require that a particular witness in an inquest be informed from the very onset of the right against self-incrimination if it is obvious that a homicide has taken place and that he may very well be the subject of a criminal trial. When one considers that the deposition taken is admissible in a criminal trial, there are clear public policy reasons to say that a Coroner should be especially concerned with this procedure where the circumstances are ripe for potential self-incrimination.

[50] I doubt that Parliament, in passing the Coroners Act, would have ever intended that the Coroner's inquest would be a natural substitute for a thorough criminal investigation and trial where the procedural safeguards to protect constitutional rights of individuals are a common feature. Unlike an administrative investigation, as was taking place in **Saunders**, one would expect a judicial inquiry, such as an inquest, would give consideration to such issues where the circumstances of the situation so warrants it.

[51] In returning to **Davies**, it is clear that the defendant had invoked his right against self-incrimination and chose not to answer such questions. The Coroner did not compel him to do so. However, the court of appeal also noted that the Coroner had in fact failed to inform the appellant's solicitors of the concerns which she expressed to the two police investigators. The Court of Appeal there held that this was unfair. This underscores two issues. Firstly, the appellant in that case was allowed to have his solicitors present for the inquest. A feature which is absent in the current case before me where Mr. Carty did not have his attorney present during the inquest. Secondly, as the Court of Appeal

rightly pointed out, the Coroner ought to have given consideration to the overall principles of fairness in the conduct of the inquest.

- [52] The other issue raised in **Davies** was that two other witnesses who gave evidence which may have been favourable to the defendant appeared before the inquest and it was their evidence which turned out to be the subject of discussion before the Court of Appeal. In outlining the issue the Court of Appeal noted that ***“the judge did not address specifically the possible detriment to the Appellant at a subsequent trial that might result from the fact that Mr. Kempson had not been permitted to refresh his memory of his statement before he gave oral evidence at the inquest, and that (possibly as a result of this) his evidence had been inconsistent with his written statement made only three days after the fatal accident.”***

- [53] Before coming to its conclusion the Court of Appeal in **Davies** made the following statement:

“Because of the history of the proceedings prior to the trial this is a most unusual case. It has caused us deep concern. We have reached the following conclusions: first, there is a prima facie case against the appellant and he should have been charged immediately after the identification procedures in November, 2007. The fact that he was not cannot be blamed on him. It was the result of incompetence on the part of the CPS and advising counsel. ... Secondly, it is obvious that if the Appellant was charged, there would have been no inquest in May, 2008. Thirdly, it is clear that the Coroner took the view that the likely verdict of the inquest would, in the absence of a change of evidence of the main identification witness, a verdict of unlawful killing. She took the trouble to notify the police of her preliminary view, doubtless hoping that they would take the hint and charge the appellant. The police did not do so. Fourthly, we note that the Coroner did not inform the solicitors acting on behalf of the Appellant of her preliminary view. In our judgment fairness demanded that she should have informed them. The judge said, in his abuse ruling, that the solicitor acting for the appellant must have appreciated that he was at risk; that is not obvious. But we have seen nothing to suggest that the interests of the appellant were safeguarded at that stage.”

[54] The Court of Appeal therefore described this case as being unusual and expressed deep concern about it. For my part, when I examine the circumstances under which I am asked to allow these depositions to be presented to the jury I express similar concerns. In assessing the case of **Davies** it seems clear to me that the Coroner, as well as the Court of Appeal, was concerned about the impact which the overlap between an inquest and a police investigation can have on a subsequent criminal trial. The Court of Appeal also expressed the view that a Coroner who conducts an inquest in such circumstances should not fail to safeguard the interests of persons who may very well be implicated by the process of conducting the inquest. The fact that this is not an adversarial trial and that it is a judicial inquiry as opposed to an administrative investigation does not take away the need to ensure that procedural fairness is observed. This is even more important when one considers the fact that the inquest in Anguilla is not a public inquiry. Clearly there ought to be safeguards if the circumstances show that one or more persons in particular may be the subject of a subsequent criminal trial on the basis of the information derived from the inquest.

[55] The Court of Appeal went on to state that it was normal for a witness at a trial to be given an opportunity to review his previous statement before being called to give evidence. The judges of that court stated that it was hoped that a similar procedure would have been adopted at an inquest. It is not that a witness should be coached. But it is normal practice for the witness to at least be able to review what he had said at a time more closely connected to the incident, lest his credibility be undermined purely on the basis of lack of memory. The Court of Appeal went on to note that it was that very evidence of this particular witness which gave the prosecution the opportunity at the trial to cross-examine the witness and undermine his credibility. The court went on to state that these observations highlighted a number of irregularities in the inquest which resulted in the detriment of the appellant at his trial. They therefore went on to find that ***“the fact that the prosecution could rely on the inquest material, means in our judgment, that the appellant did not have a fair trial.”*** It was therefore concluded that the verdict was not safe and the convicted was set aside.

[56] In the case before me, I find that there are a number of irregularities which makes it unsafe and disproportionate for this court to allow the depositions of Mr. Carty to be tendered into evidence. To do so would render the trial unfair. First of all, as I have already highlighted, I am of the view that consideration ought to have been given to the appropriateness of an inquest in such circumstances.

There seemed to have been an ongoing investigation in a case which was clearly a homicide. The Coroner in **Davies** expressed that concern even though the investigation was complete. The fact that the police investigation had only just started in this case doesn't mean that the Coroner ought not to have given similar consideration. Especially since this is not a case in which someone had died at the hands of the police or in state custody. In my view the public interest ought to have been weighed in favour of a thorough police investigation coupled with an actual decision as to whether or not to prosecute.

[57] I do appreciate that it would have been within the discretion of the Coroner to determine whether and when to conduct an inquest. That in and of itself is not an irregularity provided that procedural fairness had been adopted throughout. However, I do not think it was appropriate for a police prosecutor to have been involved in leading the evidence in this inquest in those circumstances. The police were clearly involved in a criminal investigation here. Samples were taken for testing, the result of which had not been obtained. The evidence led in the trial so far shows that some of those samples were taken to Jamaica for testing either during or after the inquest. The motor vehicle in which Mr. Benta was murdered was not fully processed at that time and the prosecution would wish to rely on expert evidence, which allegedly proves that what was communicated by Mr. Carty at the inquest could not have been true. This ought to have raised red flags in the mind of the Coroner regarding the appropriateness of allowing a police officer to take the lead in examining Mr. Carty in those circumstances.

[58] In addition to that, it seems clear to me that in **Davies**, the appellant was allowed legal representation at the inquest. The fact that attorneys are not allowed to participate as of right in Anguilla does not mean that it is inappropriate in the circumstances to not only allow for legal representation for a particular witness, but for the Coroner to perhaps raise the issue herself. Even though the section states that this discretion is exercised on application, I am of the view that an individual who is appearing in person cannot be deemed to fully appreciate his rights in such circumstances and it is the duty of the presiding judicial officer to be especially vigilant when it comes to issues of procedural fairness overall. The Court of Appeal in **Davies** spoke about the need for safeguards, even though the appellant was represented at that inquest. The judges there stated that it is not enough to assume that the appellant's attorneys would have appreciated the risk of the failure to allow the witness to refresh his memory. Similarly, it appears to me that Mr. Carty was allowed to navigate an inquest

with significant risk to him without any attempt whatsoever to implement the safeguards that any judicial inquiry would have aspired to in the circumstances of this inquest.

- [59] In addition to that, I agree with counsel for Mr. Carty where it is argued that the general tone of the examination of Mr. Carty comes across as being rather adversarial in nature. As I indicated at the hearing, I appreciate that an inquest is not designed to be a walk in the park. The Coroner has a duty to thoroughly examine the circumstances of an unnatural death if she had decided it appropriate to conduct an inquest in the first place. She is entitled to probe and Mr. Carty as a witness cannot expect to be treated with kid gloves. However, even the learning presented by the prosecution shows that the inquest is not an adversarial trial and if it becomes apparent that the witness may incriminate himself then consideration should be given to informing him of some of the basic rights he may have in the circumstances. That becomes all the more important in an inquest where the death is clearly a homicide, the witness is likely to be implicated in it and he has no legal representation in the inquest.
- [60] Further, in this inquest a police officer was allowed to not only lead the evidence. He made an application to recall Mr. Carty and the Coroner obliged without any of the reasons being placed on the record. Nothing on the record shows that any consideration had been given at that point to the safeguards which were referred to in **Davies**. Whilst I would not go through the trouble of repeating the content of the depositions in full here, it seems clear to me that the main thrust of recalling Mr. Carty and subjecting him to three (3) separate days of examination by Officer Millet especially, was to test his credibility. Even after that another application was made by Officer Millet to again recall Mr. Carty. Again when one examines the deposition it seems clear that the general thrust of the examination was to put to Mr. Carty that he had lied about the events of the night of 3rd June, 2018. These are the very lies which the prosecutor now alleges proves Mr. Carty's guilt.
- [61] However, it does not end there. As was noted in **Davies** a witness should, at the very least, be given an opportunity to refresh his memory from previous statements prior to giving evidence. He should be allowed an opportunity to review his statements before he is called to the witness stand. It is palpably obvious to anyone who has presided over a criminal trial that police officers are particularly skilled at memorizing their statements, sometimes almost verbatim, before giving evidence. There is nothing wrong with that, as one cannot be expected to simply retain information from even days or weeks prior in this way. But it shows that it is only fair for someone who gave a statement sometime

prior to giving evidence to be allowed the same courtesy. This is especially important for one who is being brought back to an inquest for the express purpose of testing the veracity of what he had to say prior.

[62] I appreciate that the inquest started a few days after Mr. Carty had given a statement to the police. But that does not take away from the importance of that courtesy being extended to him. I doubt that the police would not have extended that courtesy to themselves had they appeared before the inquest. After giving evidence on 21st June, 2018 Mr. Carty was brought back on 23rd July that year. That was over a month later. The deposition shows that the first line of questions put to Mr. Carty was whether he had remembered giving previous statements to the police; particularly one on 3rd June, 2018. After attesting to having done so it appears that he was also asked whether this account would have been more likely to have been given at a time when the events were fresh in his mind. That much is obvious on the deposition and very much in line with the manner in which a witness is impinged for giving an inconsistent statement in an adversarial trial. When Mr. Carty agreed with that, it was only at that point he was allowed to refresh his memory, whilst already in the witness stand. After putting his other statements to him the examination went on then along the lines of whether he had made up a story and that he had given different versions of events. Even when further leave was given to recall Mr. Carty on 25th April, 2019, there was no evidence that he was allowed to refresh his memory before giving evidence and was again subject to a line of questioning which appears to me to be clearly designed to discredit his version of what transpired on 3rd June, 2018.

[63] To my mind, Mr. Astaphan's submission that this approach by the police prosecutor is tantamount to cross examination is to be accepted. The entirety of Mr. Carty's examination by Officer Millet is somewhat adversarial and it is somewhat troubling that this was allowed to continue without any of the safeguards which are inherent in a judicial inquiry with fairness and justice at the heart of its mandate.

Conclusion

[64] In conclusion therefore, I repeat my earlier comment that the right against self-incrimination is not absolute and there is nothing inherently irregular in the admission of a statement from an inquest which amounted to self-incrimination on the part of the defendant. The case of **Saunders** referred to

by counsel for Mr. Carty is one which should be considered with a measure of caution as I do agree that there are a number of weaknesses in its reasoning. However, the issue is ultimately one of fairness and proportionality. The nature of what was before the Coroner has to be considered, along with the manner in which this evidence was solicited. To my mind, that process as adopted by the Coroner was not merely irregular but it was highly prejudicial to Mr. Carty and breached the general principles of fairness which one would imagine would be a feature of a judicial inquiry of that nature. I am of the view that to tender these depositions into evidence would render this trial unfair.

[65] I also conclude that when one examines the probative value of this evidence to the prosecution, I would have also been disinclined to weigh it against the inherent prejudice to Mr. Carty. He has given a number of voluntary statements to the police. Some have been tendered into evidence at this trial without objection. The prosecutor has indicated that it is his intention to call expert evidence to discredit those very accounts. Fairness can therefore not be weighed in favour of admitting evidence which Mr. Carty was compelled to give at an inquest which did nothing to safeguard his rights. Though not a basis upon which I have decided this application, I also doubt that public policy alone would not be a ground upon which this court ought not to allow the statements to be tendered. There is very little about the manner in which these depositions were derived which gives this Court any comfort in allowing them to be tendered before the jury if it is to adhere to its obligations to conduct a fair trial.

[66] In the circumstances, the objection raised by Counsel for Mr. Carty is upheld and the order is that the depositions which Mr. Carty swore to and signed at the Coroner's Inquest are not to be tendered into evidence.

**Ermin Moise
High Court Judge**

By the Court

Registrar