

LANG v. REGISTRAR-GENERAL OF THE STATE OF VICTORIA.

FULL COURT (Gavan Duffy, O'Bryan and Smith JJ.). MAY 17, 18, 26, JUNE 21, 1950.

Coroner—Magisterial inquiry—Certiorari to quash inquisition recorded on magisterial inquiry—On ground finding did not adequately describe manner of death—Discretion—Further inquiry not impracticable—Inquisition quashed and new inquiry ordered—Locus standi of applicant for certiorari.

The failure in a finding as to cause of death to distinguish between a felonious and an innocent suicide is sufficient ground for quashing the finding, whether it be contained in a coroner's inquisition or be made upon a magisterial inquiry.

On an appeal from a refusal to make absolute an order *nisi* for certiorari to quash such a finding, where the ground of the refusal was that a new inquiry was impracticable, the Full Court admitted evidence which showed that a new inquiry was practicable, allowed the appeal, made absolute the order *nisi*, ordered that a writ of certiorari issue, that on its return the finding be quashed without further order and that there be a new inquiry.

A son of the deceased person has sufficient interest to apply for certiorari to quash such a finding.

Decision of Fullagar J., reported *ante*, p. 45, reversed.

APPEAL.

The applicant, Eric Lang, appealed against the order of Fullagar J. discharging an order *nisi* for certiorari directing the Registrar-General of the State of Victoria to bring into Court, in order that it might be quashed, an inquisition found on the 9th August 1902 upon the death of the father of the applicant, Frederick Louis Christian Lange. The decision of Fullagar J., which is reported, *ante*, p. 45, sets out the facts.

Joske K.C. (with him, *Strauss*), for the appellant—The verdict of suicide was not open upon the evidence. In order to justify such a verdict the evidence must not be susceptible of any other not improbable explanation—*Briginshaw v. Briginshaw* (1938), 60 C.L.R. 336, at p. 368; *Peacock v. The King* (1911), 13 C.L.R. 619. There is a presumption against suicide—*R. v. Huntbach*, [1944] K.B. 606; *Southall v. Cheshire County News* (1912), 5 B.C.C. 251; *Moser v. Norwich Union Life Insurance Society*, [1932] N.Z.G.L.R. 164. Fullagar J.'s view was that a justice

could hold an inquiry if, but not unless—either because a view of the body was not possible or for some other reason—it was impracticable for a coroner to inquire, or a coroner refused or neglected to inquire.

But the justice, Mr. Keogh, was a coroner, as appears from the *Government Gazette* 1890, pp. 1166-7, and did inquire, and therefore there was no basis of jurisdiction for a magisterial inquiry and the finding thereon cannot stand. The finding is uncertain and does not adequately describe the manner of death. The applicant is a party aggrieved and the discretion is not at large. An application by an aggrieved party is *ex debito justitiæ*—*R. v. Postmaster-General*, [1928] 1 K.B. 291, at p. 299. In such a case the conduct of the applicant and the circumstances of the case are considered. There must be something in the circumstances of the case which makes it right to refuse certiorari. A person is aggrieved if he has a real interest in the decision—*R. v. Groom*, [1901] 2 K.B. 157, at p. 162; *R. v. Richmond Confirming Authority*, [1921] 1 K.B. 248; *R. v. Bedfordshire Council*, [1920] 2 K.B. 465, at p. 478. A new inquiry is not impracticable.

Lush, for the Registrar-General—The appellant is not an aggrieved person. Financial right directly affected by the death must be shown. [He referred to *R. v. Killinghall* (1756), 1 Burr. 17; *Re Loftus* (1862), 1 S.C.R. (N.S.W.) 1.] Applications by relatives to quash an inquisition require the assistance of a Law Officer—see *In re Daws* (1838), 8 Ad. & El. 936; *R. v. Huntbach*, [1944] K.B. 606; *R. v. Haslewood*, [1926] 2 K.B. 468. Inquiries may be made by magistrates if the coroner refuses to inquire or if absence or decomposition of the body render a view impossible. [He referred to *R. v. Parker* (1675), 2 Lev. 140; *R. v. Aldenham* (1676), 2 Lev. 152; *R. v. Killinghall* (1756), 1 Burr. 17; *R. v. Staines*, [1930] St. R. Qd. 142; *Ex parte Brady* (1935), 52 W.N. (N.S.W.) 109; *Stanlach's Case* (1671), Ventris 180; *Hawkins' Pleas of the Crown*, Bk. 2, c. 9, s. 23; *Sewell on Coroners* (1843), p. 156; *Hale, Pleas of the Crown*, vol. 1, p. 414; *Halsbury's Laws of England* (2nd ed.), vol. 7, p. 661; *Irvine, Justices of the Peace* (2nd ed.), p. 68.] The practice as to magisterial inquiries into cause of death is to be treated as part of the common law of the colony—*Allen, Law in the Making*, p. 31.

Joske K.C., in reply—In *R. v. Haslewood* (*supra*) the order *nisi* for certiorari was obtained and made absolute at the instance of a relative.

Cur. adv. vult.

GAVAN DUFFY J. read the judgment of the Court: This is an appeal from an order of Fullagar J. discharging with costs an order *nisi* directing the Registrar-General of the State of Victoria to show cause why a writ of certiorari should not issue to remove into this Court in order that it might be quashed “the inquisition made upon the magisterial inquiry” taken on the 9th August 1902 by John Keogh, a Justice of the Peace, concerning the death of one Frederick Louis Christian Lange, who was the father of the applicant. The finding as to the cause of death was as follows:

I say that the said Frederick Louis Christian Lange died at Yarra Doon in the said Bailiwick on the 7th day of August 1902 from gun shot wound in the head inflicted by the said Frederick Louis Christian Lange.

The argument before us raised several interesting and difficult points in law relating to coroners, magistrates, and inquiries into deaths, upon which we find it unnecessary to express any opinion. For the purpose of determining this appeal it will be sufficient to consider those matters, and those only, which are relevant to ground 3 of the order *nisi*.

That ground is: “That the finding did not adequately describe the manner of death”. Fullagar J. was of opinion that this ground had been established, since the finding, he considered, failed to distinguish between a felonious and an innocent suicide, and such a failure, in his view, was a sufficient ground for quashing either a coroner's inquisition or the finding on a magisterial enquiry. We agree. In our opinion the uncertainty and ambiguity of the finding in this case are clearly a good ground for certiorari to issue for the quashing of the finding, and indeed no attempt was made before us to contest this—see, in addition to the authorities cited by His Honour, *In re Harley* (1892); 13 A.L.T. 160, and *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. Fullagar J., however, for reasons which are set forth in his judgment, considered that he had a discretion which, in the circumstances, he ought to exercise against the applicant, and he therefore discharged the order *nisi*.

It seems clear that the matter which weighed most with His Honour in coming to this decision was that, on the material before him, he

concluded that it was impracticable to hold a new inquiry. The choice, therefore, was between, on the one hand, allowing the finding to stand, and, on the other hand, quashing it without the possibility of any other finding being substituted for it. Upon this footing, as His Honour pointed out, the applicant could obtain no benefit from an order in his favour, except to the extent to which wrong inferences might be drawn from the mere fact that the finding was quashed. His Honour said: "If a new inquiry could be held the matter might—I do not say it would—be different . . ."

Upon the hearing of this appeal this Court admitted without objection certain additional evidence tendered by the applicant. This evidence shows that, if a new inquiry were ordered, material witnesses could be called who did not give evidence at the original inquiry. Moreover, though four of the witnesses who gave evidence on the original inquiry are no longer available to give evidence, it is not disputed that their depositions could be put in evidence upon any new inquiry—see *Evidence Act 1946*. One of these depositions is that of Dr. Baird, who conducted a post mortem examination of the body and who gives a detailed description of what he observed.

It is clear, therefore, that it would be practicable to hold a new inquiry which would be a real inquiry and not a sham or a mere formality. The fact that the memories of the available witnesses who can depose to events at or about the time of the death will have become less reliable than they were, because of the great lapse of time, is a matter for which the inquiring magistrate can make due allowance. It is by no means impossible that a new inquiry will throw some additional light on the cause of death. And it may well be that on the whole of the evidence the magistrate, upon a new inquiry, will properly decline to find suicide, either innocent or felonious, and will record an open finding or even a finding of accident. These possibilities make the obtaining of an order a matter of real importance to the applicant.

Having had the advantage of the further evidence which was admitted on the hearing of the appeal, and without dissenting in any way from the course taken by Fullagar J. in the absence of that evidence, we consider that, even though the true legal position be that in the circumstances of this case there is a general discretion to decline to give effect to ground 3 in the order *nisi*, that discretion should not be exercised against the applicant. If, on the other hand, the applicant was entitled to an order *ex debito justitiae*, his case is, of course, all the stronger.

A question was raised as to the *locus standi* of the applicant. But it is by no means clear that it was necessary for him to show an interest, and, if it was, we agree with the learned trial Judge that he has sufficiently made out his interest.

The appeal must be allowed.

It is proposed that the order of this Court should provide for: (a) The setting aside of the order below. (b) The making absolute of the order *nisi*. (c) The quashing of the finding of the magisterial inquiry upon the return of the writ of certiorari without any further order. (d) The holding of a further inquiry into the cause of death. (e) The payment by the applicant of the taxed costs of the Registrar-General both in this Court and in the Court below.

JUNE 21.—The Court pronounced its order in accordance with the above intimation and further ordered that a new magisterial inquiry be held otherwise than upon view of the body of the deceased and that such inquiry be taken by a stipendiary magistrate by virtue of his office

as such and in his capacity as a justice of the peace and that a writ of *melius inquirendum* issue directing the holding of such inquiry.

Appeal allowed.

Solicitor for the appellant: *A. C. McLean.*

Solicitor for the Registrar-General: *Frank G. Menzies*, Crown Solicitor.

P.E.J.

VAN DER HOPE v. THE MEDICAL BOARD OF VICTORIA.

DEAN J.

JUNE 5, 6, 19, 1950.

Medical practitioner—Infamous conduct in a professional respect—Covering—Issue by unqualified person of certificates and prescriptions over name of registered practitioner—Whether conduct disqualifies from practice—Public interest—Discretion to remove from register—Medical Act 1928 (No. 3730), sec. 7—Medical Act 1933 (No. 4131), secs. 4, 7.

A medical practitioner allowed an unqualified person (1) to conduct portion of his practice as if such person were a doctor, and (2) to issue certificates and prescriptions over the practitioner's signature in respect of patients whom the practitioner had not seen.

Held, (1) the practitioner was guilty of infamous conduct in a professional respect; (2) it is necessarily against the public interest that persons who are not registered should practise as medical practitioners, and a qualified person, in allowing his name to be used by and allowing an unqualified person to practise and facilitating such practice, deprives the public of the benefit of the protection intended for them by the registration of practitioners: accordingly it is immaterial that the unqualified person possesses skill and experience or that there is no evidence that patients have suffered injury or have not obtained benefit from his treatment; (3) so far as concerned the issue of the certificates and prescriptions in question the practitioner had sanctioned conduct amounting to gross deception, which was also a breach of the Pharmaceutical Benefits Act and the *Poisons Act* 1928 and the regulations thereunder; (4) the conduct of the practitioner was such as in the public interest required that he be disqualified from practising: it would be harmful to public confidence in the medical profession if a person guilty of such conduct should continue to remain a member of that profession and it would be harmful to the profession if such conduct was not punished by removal of the name of the offender from the medical register.

Semble.—The only discretion under sec. 7 of the *Medical Act* 1928 (as re-enacted by sec. 4 of the *Medical Act* 1933), not to remove from the medical register the name of a person who has been found guilty of infamous conduct in a professional respect, is that which arises under sub-sec. (6) of the section when considering whether the conduct is infamous.

APPEAL under sec. 7 of the *Medical Act* 1933.

This was an appeal from an order made by The Medical Board of Victoria that the name of the appellant be removed from the register of medical practitioners on the ground that he had been guilty of in-