GLASS J.A. I also agree, and I have nothing to add.

MOFFITT P. The order of the Court is as Mr. Justice Hutley has indicated.

Appeal allowed. Summons dismissed with costs. Appellant to have costs of appeal. Respondent to have certificate under s. 6 of Suitors' Fund Act, 1951.

Solicitor for the appellant (defendant, Commissioner): *H.K. Roberts* (Crown Solicitor).

Solicitor for the respondent (plaintiff, taxpayer): *Harold C. Westall* (Crows Nest) by his Sydney agents, *Bell, Cadogan & Gengos.*

A. HILLER,

Barrister.

BILBAO v. FARQUHAR AND OTHERS

Court of Appeal: Moffitt P., and Hutley and Glass JJ.A.

July 3, 4; Aug. 16, 1978.

Coroners—Inquest into death of person while in custody—Inquest commenced—Charge of murder against police officers—Inquest adjourned—Police discharged at conclusion of committal proceedings—Decision by coroner not to resume inquest—Court has power to quash inquest, though not completed, and to order another inquest—Meaning of "inquest … has been held"—Coroners Act, 1960, ss. 28 (3), 37 (2).

A stipendiary magistrate, acting as a coroner pursuant to s. 8 of the *Coroners Act*, 1960, commenced an inquest into the death of a man who had received physical injuries within about twelve hours of his arrest, and whilst in jail. When the two arresting police were charged with the man's murder, the magistrate, as required by s. 28 (1) (ii) of the Act, adjourned the inquest, without fixing a date for its resumption. He then presided over the committal proceedings and, in the result, discharged both defendants.

The magistrate next dismissed an application by the sister of the deceased that he resume the inquest as provided for in s. 28 (3), and, having been ordered by the Supreme Court to reconsider the application according to law: *Bilbao v. Farquhar* [1974] 1 N.S.W.L.R. 377, did so and again exercised his discretion not to continue the inquest.

A further application for an order that the magistrate resume the inquest was dismissed: *Bilbao v. Farquhar* (Court of Appeal, 5th June, 1975, unreported); and an application for special leave to appeal to the High Court was refused: *Bilbao v. Farquhar* (High Court, 27th November, 1975, unreported, but noted (1975) 50 A.L.J.R. 217 (n.)).

On appeal from an order of Lee J., pursuant to s. 37 (2) of the Act, that the inquest be quashed and that another inquest be held, it was argued that s. 37 (2) did not apply, because the inquest had not been completed.

Held: (1) Upon its true interpretation, s. 37 (2) of the *Coroners Act* empowers the Supreme Court, in the circumstances provided for in that subsection, to quash an inquest which has been commenced, but which has been adjourned pursuant to s. 28 (1) (ii), and which the coroner has declined to resume pursuant to s. 28 (3). The words "has been held"

in s. 37 (2) should be read to mean "has been commenced" rather than "has been completed". This view is reinforced by the use of the words "completes" and "complete" in s. 28 (1) and of the words "held" and "completed" in s. 35.

(2) In any case, when the coroner, in the present case, exercised his discretion not to continue the inquest, he brought the inquest to an end, so that, if "held", as used in s. 37 (2), means "completed", then this inquest had been "held" in that sense.

(3) The power to quash given by s. 37 (2) is not limited to the quashing of the ultimate finding of an inquest, but extends also to an inquest where the depositions are dealt with as provided for in s. 28 (2) (ii), or an inquest which the magistrate has decided not to resume pursuant to s. 28 (3).

(4) The judge's power to order another inquest to be held, on the ground of insufficiency of inquiry, is not limited to a case where he has first determined that the finding of the coroner will probably be replaced by a different verdict, if a new inquest should be held.

Re Davis, deceased [1968] 1 Q.B. 72, at p. 82, distinguished.

(5) The judge, when considering whether to make an order under s. 37 (2), is required to reach his own conclusions, based on his own view of the facts; and is not bound by any previous decision of the Court (when considering whether to make an order in the nature of mandamus in relation to the coroner's exercise of his discretion under s. 28 (3)) in relation to the same inquest.

Bilbao v. Farquhar (Court of Appeal, 5th June, 1975, unreported), distinguished.

(6) The dismissal of the committal proceedings against the two police officers provided no estoppel or res judicata. Therefore, it was not contrary to the interests of justice within s. 37 (2) to order another inquest. Per contra, it was clearly in the interests of justice, in all the circumstances of the case, that another inquest should be held and completed.

(7) For all these reasons, the judge had power under s. 37 (2) to make the order which he did.

CASES CITED.

All the cases cited in the judgments are referred to above.

The following additional cases were cited in argument:

Anthony Hordern Sons Ltd. v. Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 C.L.R. 1.
Brady, Ex parte; Re Oram (1935) 52 W.N. (N.S.W.) 109.
Coffey, Ex parte; Re Evans [1971] 1 N.S.W.L.R. 434.
Cousens, Ex parte; Re Blacket (1946) 47 S.R. (N.S.W.) 145; 63 W.N. 228.
Lang v. Registrar-General (Vic.) [1950] V.L.R. 307.
Minister of Justice, Ex parte; Re Malcolm; Re Inglis and Coroners Act [1965] N.S.W.R. 1598.
R. v. Cardiff City Coroner, Ex parte Thomas [1970] 1 W.L.R. 1475; [1970] 3 All E.R. 469.
R. v. Divine; Ex parte Walton [1930] 2 K.B. 29.
R. v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 C.L.R. 254.
R. v. Margate Coroner (1865) 10 Cox C.C. 64.
R. v. Medical Appeal Tribunal; Ex parte Burpitt [1957] 2 Q.B. 584.
R. v. O'Brien (1882) 17 Ir. L.T. 34.
R. v. Payn (1864) 34 L.J.Q.B. 59.
Routledge, Ex parte (1943) 60 W.N. (N.S.W.) 184.
Sankey v. Whitlam [1977] 1 N.S.W.L.R. 333.

APPEALS.

There were appeals, (1) by the second and third defendants and (2) by the first defendant, against an order of Lee J. that an inquest begun by the first defendant into the death of a man who had been arrested and charged by the second and third defendants be quashed, and that a further inquest be held.

B. J. Herron Q.C. and *J. S. Purdy*, for the appellants (second and third defendants, police officers).

C. A. Porter Q.C. and *R. W. R. Parker*, for the appellant (first defendant, magistrate). A

F. S. McAlary Q.C. and *D. H. Hodgson*, for the respondent (plaintiff, sister of the deceased).

Cur. adv. vult.

Aug. 16.

B

MOFFITT P. Jose Bilbao died in Sydney Hospital at about 12.05 a.m. on 22nd July, 1972. He had been arrested at about 9 p.m. on 20th July, 1972. He was taken to Central Police Station, and charged with using unseemly words, and placed in a cell there. He appeared before a magistrate on the next morning and, as a result of what Bilbao then said, he was taken to Sydney Hospital at the suggestion of the magistrate at about 1.15 p.m. on the same day. It is clear he died of injuries which had been very recently received.

C

On 9th October, 1972, Mr. Farquhar S.M., commenced an inquest into the death of Bilbao. A relative of Bilbao, being his sister Miss Maria Jesus Bilbao, appeared with legal representation. Evidence was given as to the identification of the deceased, and of his injuries, and of the cause of death, stated by Dr. Malek to be an extensive intra-abdominal bleeding occasioned by a laceration of the transverse mesocolon. There had been a rupture of the liver. There were other injuries which it is not necessary to detail.

D

At this stage of the inquest, the police prosecutor who had been assisting the coroner informed him that two constables, Swift and Abel, had been charged with the murder of Bilbao. Thereupon Mr. Farquhar adjourned the inquest without fixing a date for the resumption of that inquest as he was required to do by the *Coroners Act*, 1960, s. 28 (1) (ii). Mr. Farquhar then presided over the committal proceedings conducted under the *Justices Act*, 1902 in respect of the charges against the two police officers. Having regard to the nature of these proceedings, the relatives of Bilbao had no right of appearance. The accused police officers were represented, and the various witnesses were cross-examined on their behalf. After hearing a very considerable amount of evidence Mr. Farquhar discharged both defendants on 14th November, 1972.

E

On 22nd November, 1972, application was made to Mr. Farquhar by the solicitors for the relatives of Bilbao, and on behalf of Miss Bilbao in particular, that he resume the inquest as provided by s. 28 (3) of the Act in question. Mr. Farquhar refused to do so, after having heard argument. Miss Bilbao then commenced proceedings in the Supreme Court seeking an order in the nature of mandamus directed to Mr. Farquhar to resume the hearing of the coronial inquiry. This Court considered that the reasons given established that Mr. Farquhar had not exercised the discretion required to be exercised under s. 28 (3), so that there was a constructive failure to exercise that jurisdiction. This Court however considered that it was appropriate only to order Mr. Farquhar to reconsider the application according to law, and on 6th June, 1974, so ordered: The reasons given by Mr. Farquhar for not resuming the inquest, and the reason for this Court's decision are reported: see *Bilbao v. Farquhar* (1), and need not be repeated.

F

G

(1) [1974] 1 N.S.W.L.R. 377.

A On 2nd December, 1974, Mr. Farquhar reconsidered the application to resume the inquest and, having given reasons, concluded: "In these circumstances I should exercise my discretion so as not to continue the inquest. I do not continue the inquest."

Having regard to the issues ultimately debated before us, only limited reference need be made to the facts and questions which emerged in the course of the proceedings so far referred to. However it should be said that, in the course of giving his reasons for his ultimate refusal to resume B the inquest, Mr. Farquhar said: "It was abundantly clear at the committal proceedings that the injuries suffered by the deceased occurred somewhere in the Central Police Station at sometime between when he was first present in the charge room for allegedly using unseemly words and when he appeared in court on such information. These injuries might have been inflicted by one or more police officers or they may have been inflicted by fellow prisoners."

C So far as the former are concerned, the only evidence given at the committal proceedings which could possibly implicate any police officers is that which had some relation to one or both of the two police officers charged. So far as such evidence given on that occasion is concerned, reference to fellow prisoners must include principally a prisoner, not identified, who is the subject of evidence given by another prisoner, Anton Grasa. In the committal proceedings, Grasa was called by the police prosecutor but, having regard to the nature of those proceedings, D his story was not tested by means such as cross-examination as could have occurred in an inquest: *Coroners Act*, s. 17. This, together with a number of other factors, became relevant considerations in the various proceedings and decisions taken following the first refusal to resume the inquest. Bowen J.A., as he then was, in the first appeal, referring to Grasa said (2): "This witness was put forward by the prosecutor, who did not challenge the evidence of his own witness. Counsel for the persons charged did not cross-examine him. The Acting Deputy Chief Superinten- E dent of the Metropolitan Police District gave evidence of inquiries which had been made in an endeavour to identify the tall grey-haired prisoner referred to by Grasa. As a result of these inquiries a man was produced in court, while Grasa was giving evidence. After observing him he said: 'No, I am sure it is not him.' The defendant then said: 'For the record, it is nothing like the description Grasa gave either.'

"The defendant does not appear to have taken the view that Grasa's evidence was entirely unworthy of credit. On the contrary, in his reasons F for judgment he described it as 'of a considerable significance'. This leaves a possible explanation of the manner and cause of death in a somewhat unsatisfactory condition. Presumably, police records would show who was in the cell at the time. It is difficult to believe it cannot be established whether there was anyone there answering the description given, and, if so, who he was. Grasa gave evidence there were 'a good few' other men in the cell at the time."

G When giving his reasons for his refusal, on the second occasion, to resume the inquest, Mr. Farquhar discounted what he had earlier said, and expressed the view that, if the credit of Grasa were destroyed, the absence of his evidence would not bring him closer to ascertaining the manner of death.

Following the second refusal to resume the inquest, further proceedings,

(2) [1974] 1 N.S.W.L.R. 377, at p. 390.

again in the nature of mandamus were commenced in the Supreme Court, in which Miss Bilbao sought an order that Mr. Farquhar resume the inquest. The order sought was precisely that, it being argued that, in view of what had previously happened, it would be unlikely to serve any purpose if Mr. Farquhar were ordered merely to reconsider the matter again.

On 5th June, 1975, the Court of Appeal dismissed the application: *Bilbao v. Farquhar* (3). The only question open in that proceeding was whether there was an express or constructive declining of jurisdiction. As Reynolds J.A. stated: "It is of no avail merely to criticize the path by which the conclusion was reached."

In those proceedings, it was no part of the jurisdiction of this Court to consider whether the coroner had made a wrong decision of fact, for example, that sufficient inquiry had been held, or that further inquiry would be unproductive, or for it to come to its own conclusions on such matters.

Miss Bilbao then applied for special leave to appeal to the High Court which was refused (4). Barwick C.J. stated that the arguments had been "full and wide ranging", but he concluded there was no doubt as to the "correctness of the order which that court (the Court of Appeal) made on the application before it". Jacobs J. came to a like conclusion, but expressed the view that the *Coroners Act* did not diminish the supervisory jurisdiction of the Supreme Court through the ordinary prerogative writs, and that there was nothing in that Act to take away the right of the Supreme Court to bring up an inquest on certiorari, and that he would be loathe to place limitation on the powers of the Supreme Court by the mere insertion of the words "if he thinks … fit" in the power to resume an inquest provided by s. 28 (3).

The proceedings which are the subject of the present appeal were commenced by summons on 23rd April, 1976, by Miss Bilbao, the defendant joined being Mr. Farquhar. On 24th September, 1976, the Minister of Justice gave his authority pursuant to s. 37 (2) of the *Coroners Act* to an application to be made by Miss Bilbao quashing "the inquest held into the death of Jose Bilbao and for the holding of a new inquest". The summons was amended by leave on 27th September, 1976. It sought the following orders: (1) An order in the nature of a writ of certiorari: (a) removing into the Supreme Court the inquest conducted by the defendant into the death of Jose Bilbao; (b) quashing the said inquest. (2) An order in the nature of a writ of ad melius inquirendum that another inquest be held into the death of the said Jose Bilbao before a coroner other than the defendant. (3) An order under s. 37 (2) of the *Coroners Act*, 1960 that the inquest begun by the defendant on 9th September, 1972, into the death of the said Jose Bilbao be quashed and that a further inquest be held into the death of the said Jose Bilbao.

Lee J. disposed of the proceedings by making an order that the inquest begun by Mr. Farquhar be quashed, and that a further inquest be held. He expressed the view that the procedure by way of certiorari to quash and writ of ad melius inquirendum was not taken away by the enactment of the *Coroners Act*, but held, however, that s. 37 (2) applied to the inquest conducted by Mr. Farquhar. The Minister having given the requisite

(3) Court of Appeal, 5th June, 1975, unreported.

(4) High Court, 27th November, 1975, unreported, but noted (1975) 50 A.L.J.R. 217 (n.).

A authority, he made the order referred to pursuant to the power there provided.

When the proceedings first came before Lee J. on 15th July, 1976, it was announced that Mr. Farquhar submitted to any order the Court might make other than an order for costs. Throughout the proceedings, the Attorney-General by leave appeared as amicus curiae represented by senior counsel. Counsel appeared throughout for Constables Abel and Swift and eventually their participation in the proceedings was formalized by an order of Lee J. that they be parties. They had been joined as parties in the proceedings in the Court of Appeal in 1975.

B

Two appeals to this Court against the decision of Lee J. were filed on the same day, the first being that of the two constables. Mr. Farquhar was made a respondent to that appeal in addition to Miss Bilbao. The other appeal was one lodged on behalf of Mr. Farquhar himself, the only respondent thereto being Miss Bilbao. The notice of appeal filed on behalf of the constables, and written submissions provided on their behalf before the hearing of the appeals, indicated that the matter argued before us on behalf of Mr. Farquhar was comprised within the case of these appellants. The notice of appeal filed on behalf of Mr. Farquhar, as well as challenging the jurisdiction of Lee J. to make the order made, challenged, on numerous grounds, the correctness of the decision of Lee J. and asserted numerous factual errors on the part of the judge. On the hearing of the appeal, however, all grounds of appeal in Mr. Farquhar's appeal other than the challenge to jurisdiction were abandoned. Despite comment made by this Court as to the unusual course taken by the magistrate in challenging, on the grounds set out in the notice of appeal, an order made by a judge of the Supreme Court ordering a fresh inquest upon a finding that there had been insufficient inquiry and, in the circumstances above stated pursuing the challenge on jurisdictional grounds, senior counsel who appeared for Mr. Farquhar, instructed by the Crown Solicitor, continued to press Mr. Farquhar's appeal, and was heard on the jurisdictional question following submissions made on the same matter by senior counsel on behalf of the appellants. To regularize Mr. Farquhar's appeal the two police officers were joined as respondents.

C

D

E

The matter of substance argued was the challenge to the jurisdiction of Lee J. to make the order that he did. In addition to supporting the finding based on s. 37 (2), the respondent made submissions that, in the alternative, prerogative powers still subsisting provided jurisdiction to make the order as asserted in paragraphs (1) and (2) of the summons earlier set out. However, it is to the question whether jurisdiction to make the order is conferred by s. 37 of the *Coroners Act*, as found by Lee J. to which I first turn.

F

The *Coroners Act*, s. 37 provides as follows: "(1) Where the Supreme Court upon an application made by, or under the authority of, the Minister is satisfied that it is necessary or desirable in the interests of justice that an inquest, inquiry or magisterial inquiry should be held, the Supreme Court may order that the inquest, inquiry or magisterial inquiry be held.

G

(2) Where an inquest, inquiry or magisterial inquiry has been held and the Supreme Court, upon an application made by, or under the authority of, the Minister is satisfied that, by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, discovery of new facts or evidence, or otherwise, it is necessary or desirable in the interests of justice that the inquest, inquiry or magisterial inquiry be quashed and

another inquest, inquiry or magisterial inquiry be held, the Supreme Court may order that the first inquest, inquiry or magisterial inquiry be quashed and that instead thereof another inquest, inquiry or magisterial inquiry, as the Supreme Court directs, be held.

(3) Upon service on the Minister of any order made by the Supreme Court under subsection one or two of this section, the Minister shall endorse on a copy thereof the name of some coroner, justice or justices, as the case may require, and shall send that copy so endorsed to the coroner, justice or justices whose name or names he has endorsed thereon.

"Upon receipt of the copy so endorsed, such coroner, justice or justices shall have jurisdiction, and it shall be his or their duty, subject to this Act (subsection two of section eleven and of section twelve excepted) to hold the inquest, inquiry or magisterial inquiry, as the case may be, ordered to be held.

(4) The power vested by this section in the Supreme Court may be exercised by any Judge of that Court."

This and other sections relate to an inquest, inquiry or magisterial inquiry, the same being defined by s. 4. The first and last refer to an inquiry in relation to a death and "inquiry" relates to a fire. For convenience hereafter, I shall simply refer to an inquest by a coroner being the first of the three, and being applicable in the present instance.

The submission of all the appellants is that s. 37 (2) does not apply to the inquest which was commenced by Mr. Farquhar, but which he declined to resume as provided in s. 28 (3), because, so it is submitted, it does not answer the description of an inquest which "has been held" the subject of the power provided by s. 37 (2). This raises, first, a question as to the construction of s. 37 (2) in the context of the Act as a whole and in particular s. 37 (1). Second, it raises a question as to the nature of an inquest which has been commenced, but adjourned as required by s. 28 and the consequence of a decision pursuant to s. 28 (3) not to resume that inquest. As to the first the appellants argue "has been held" means "has been completed". As to the second the appellants argue the decision not to resume the inquest left the inquest an incomplete inquest. Each is open to argument which I will now proceed to examine. For this purpose it is necessary first to examine the operation of s. 28.

Section 28 makes a novel provision intended to suspend or eliminate defined parts of an inquest before a coroner in cases where a person is or may be charged with an indictable offence in which there is in issue the question whether the person charged or to be charged caused the death of the deceased person. Section 28 (1) imposes restrictions in cases where, before the coroner commences an inquest or, where, having commenced the inquest, before he completes it, he is informed by a member of the police force that a person has been charged with an offence of the type earlier stated. In this event he may commence or continue the inquest only for the purpose of taking evidence of the identity of the deceased person concerned and the place and date of his death and "shall thereupon adjourn the inquest … without fixing a date or place for the resumption thereof". It was pursuant to s. 28 (1) that Mr. Farquhar, having commenced the inquest, adjourned it, upon being informed by the police prosecutor that charges of murder of Bilbao had been laid against the two police officers.

Section 28 (2) deals with the case where the coroner, having heard evidence given before him, forms the opinion that that evidence establishes a prima facie case against any person for an offence of the

type earlier stated. Then, before making his finding or, where there is a jury, before taking its verdict, the coroner is required to adjourn the inquest without fixing a date or place for the resumption thereof.

It will be seen that s. 28 (1) protects a person, in respect of whom committal proceedings under the *Justices Act*, 1902 are pending, from exposure to publicity from evidence which might be given in the course of a coronial inquest, but would not be received in the course of committal proceedings, and from publicity from the findings of the coroner or coroner's jury. It will also be seen that, where no such committal proceedings are pending, so that the step has not been taken to lay a charge of the type in question, no protection is provided against the possibility of a charge later being laid and the coronial inquest continues until the evidence "has been taken". It is then only that s. 28 (2) intervenes to protect the person possibly to be charged by the decision of the Attorney-General. The protection given is only from the publicity of the finding of the coroner or the jury. If the coroner then forms a view of the evidence which might result in the Attorney-General so deciding, then s. 28 (2) intervenes to prevent the coroner taking the usual course of announcing his finding or taking the finding of the jury. Section 28 (2) (ii) provides that in the circumstances he shall: "… forward to the Attorney General the depositions taken at the inquest, inquiry or magisterial inquiry together with a statement signed by the coroner, justice or justices setting forth the name of the person against whom a prima facie case for an indictable offence has, in his or their opinion, been established and particulars of such offence, …"

Where s. 28 (1) or (2) have led to an adjournment of an inquest, s. 28 (3) makes provision for the resumption of the inquest in certain circumstances as follows: "The coroner … may if he thinks … fit to do so resume an inquest … adjourned under subsection one or two of this section but shall not do so until—."

There are then set out detailed provisions which make exercise of the jurisdiction to resume an inquest conditional upon defined procedures in relation to charges referred to in s. 28 (1) or consequent upon action under s. 28 (2) (ii) being first exhausted. Section 28 (3) (a) (i) and (ii) deal respectively with cases where the person charged is committed for trial, and where he is to be dealt with as provided by s. 51A of the *Justices Act*. Section 28 (3) (a) (iii) covers a case such as the present, where the charges are dismissed by the magistrate hearing the committal proceedings. Thereafter, in a case such as the present, there is no restriction on the exercise of the power to resume the inquiry.

Section 28 (4) provides that, where the coroner resumes an inquest, he "… shall proceed in all respects as if the inquest or inquiry had not previously been commenced, and the provisions of this Act shall apply accordingly as if the resumed inquest or inquiry were a fresh inquest or inquiry, as the case may be."

The appellants' submissions that "held" in s. 37 (2) means "completed", and that an inquest which falls within s. 28 (1) or (2) is not a completed inquest, and hence is not one that has been held, it seems, merely takes such an inquest from s. 37 (2) and places it within s. 37 (1); and, if it does not, the submission has the consequence that any inquest to which s. 28 (1) or (2) applies is outside the supervisory powers of the Supreme Court. For present purposes, the case where a coroner resumes the inquest as provided in s. 28 (3) can be put to one side, because the effect of s. 28 (4) is that, once he makes the decision to resume the inquest, he holds in effect

a fresh inquest which, of course, on any view falls within s. 37 (2). The appellants' submission would place outside the supervisory power some inquests which one would expect would warrant supervision, in common with inquests not subject to s. 28. The clearest example is the inquest which under s. 28 (2) continues until all the evidence is taken and the coroner issues a statement instead of making a public finding. Such an inquest or exercise of coronial jurisdiction could be vitiated, warranting a fresh inquiry for any of the reasons stated in s. 37 (2) equally with any other inquest. Another example is where most of the evidence is given before the coroner before a charge is laid causing s. 28 (1) to operate, and e.g. there later appears to be a fraudulent suppression of evidence tending to show that other persons or causes are involved in the death, but the coroner declines or has already declined to proceed under s. 28 (3). While s. 28 delays or limits in certain respects the exercise of the powers of a coroner, the exercise of his jurisdiction still remains and, in some circumstances, is almost as extensive as that where s. 28 does not apply.

There can be discerned from s. 28 no purpose other than to provide the protection above referred to. The limitation, which in some cases may be slight, upon the exercise of coronial jurisdiction in order to provide this protection, provides no logical reason why the exercise of coronial jurisdiction that remains should be placed outside supervisory control. Indeed, where crime possibly is involved, and the ground of intervention includes fraud or the discovery of new facts or evidence, it would be surprising if the supervisory jurisdiction of the Supreme Court were denied. If inquests to which s. 28 apply were intended to be placed outside the supervisory powers, it would have been simple to have done so by express words. The orders provided for by s. 37 (1) and (2) point to an intention to comprehend all cases. Section 37 (1) provides for an order being made to hold an inquest, and s. 37 (2) provides for an order being made to hold a fresh inquest, coupled with quashing what has been done. It will be necessary to return to the nature of the provision in s. 37 (2) to quash. The analysis I have made renders it difficult to think, if there were a legislative intent to omit from supervision so important an area of coronial jurisdiction, that the intention to do so would not be manifested by express exception and would, as the appellants submit, be left to be implied. Their submission is that inquests covered by s. 28 are left outside s. 37 because the words of that section properly construed are not wide enough to comprehend them.

As will be seen, the appellants, in making this submission, are met with the difficulty that at best the words relied on are not free from ambiguity and that, to achieve the construction contended for, they must argue, as they do, that the words used in s. 37 (2) have a meaning equivalent to other words which could easily have been used and were not. They argue the words in s. 37 (2) “has been held” bear the meaning “has been completed”. It is significant that, in other parts of the Act when reference is made to a completed inquest, the word “complete” or “completed” is used: s. 28 (1), s. 35. In s. 28 (1) the word “completed” must mean not only taking the evidence but also announcing the finding. Although s. 35 gives rise to some other difficulties, the phrase “has been completed” is used in a section in which the word “held” is used in contrast to “completed”. The difficulty is that one of the three cases where an exhumation may be ordered is where an inquest “(c) has been completed and the Supreme Court has quashed such inquest and has ordered a fresh inquest to be held”. Arguably this provides an acknowledgment in the Act that the

occasion for quashing and ordering a fresh inquest is *only* where an inquest has been completed. If this were so, it is remarkable that two sections later: s. 37 (2), there is a change of language to "has been held". Of course, on any view, these words, and hence s. 37 (2), include inquests which have been completed i.e. those referred to in s. 35 (c). The words of s. 35 (c) are explicable on the basis that s. 35 was only concerned to attach the power to exhume to cases where there was a coroner who still had jurisdiction. For this purpose s. 35 (a), (b) and (c) are sufficient. It should be added further that standing in contrast with s. 35 (b) and (c) the words of s. 35 (a) "has not been held" can only mean "has not been commenced". If "held" there means "completed" s. 35 (b) is otiose. Whatever view be taken of s. 35, the terms used in that section and in s. 28 (1) deprive of force the argument that "has been held" carries the clear meaning "has been completed", so as to provide the alleged gap in the supervisory power in respect of s. 28 cases.

The word "held" may bear different meanings, depending upon the subject and the context. The words "inquest" and "inquiry" themselves are capable of having different meanings in that they may refer only to the process of making inquiry into the subject death or fire, or they may refer to both making the inquiry and announcing the finding. The distinction between inquiry and finding is as drawn by expressions such as "hear and determine" used repeatedly in the *Justices Act*; and see *Coroners Act*, s. 29.

I turn for the moment to s. 28 (3). It is clear that, prior to exercise of jurisdiction under s. 28 (3), the inquest is merely adjourned: s. 28 (1) and (2). At an appropriate time, the coroner may exercise jurisdiction under s. 28 (3). If he determines to "resume" the inquest, as s. 28 (4) shows, he shall proceed in all respects as if the resumed inquest were a fresh inquest. As the earlier decisions in this Court in relation to Mr. Farquhar's decision under s. 28 (3) establish, once the question under s. 28 (3) arises, as upon an application by a relative, the coroner must exercise the jurisdiction to resume or not resume the inquest. The effect of the decisions in this Court and the High Court following Mr. Farquhar's second refusal to resume the inquest was that on that occasion he had exercised the jurisdiction conferred on him by s. 28 (3). As Mr. Farquhar put it on that occasion: "I do not continue the inquest." This decision brought the inquest to an end. A decision under s. 28 (3) falls to be made, when all proceedings in relation to any charge are at an end. Then, having regard to all relevant circumstances then existing but, no doubt, having regard to what has transpired in the course of, and as a result of, committal proceedings and any trial of the charges, the coroner is bound to exercise the jurisdiction provided by s. 28 (3) and, when he does so, it is a final decision, except so far as it is open to review by a superior court. Section 28 (3) does not provide that the power is one to be exercised from time to time. To leave the power to resume open is not justified by the terms of s. 28 (3), and could only produce an unsatisfactory situation enduring indefinitely. A final decision having been made not to resume the inquest, such inquest as there was has come to an end, so that even if "held" in s. 37 (2) means "completed" the inquest "has been held".

If I am wrong in my last conclusion, so that it is still open to Mr. Farquhar to make a fresh decision to resume the inquest which he had decided not to resume, the question would still arise whether such inquest, not resumed, was one which "has been held". In my view, such an inquest would still be one which "has been held". Upon a decision being made not

to resume it, or as Mr. Farquhar did "not to continue it", the quality of it being adjourned by operation of s. 28 (1) or (2) would cease. The necessary time having elapsed, the coronial inquiry again came before him, and the statutory adjournment came to an end. He exercised jurisdiction in the inquiry as coroner and determined not to continue it. He did not further adjourn it. If, contrary to my earlier conclusion, it is still open to him to resume the inquest, it can only be to revive an inquest which has ended. Unless and until so reviewed, it would be an inquest which "has been held". I regard this alternative as unsatisfactory, as the earlier view is clearly to be preferred.

It will be seen that, for the purpose of the foregoing conclusions, the circumstance is relied on that there was a decision not to resume the inquest, so that the present case differs from that where the inquest has been merely adjourned under s. 28 (1) or (2) and the exercise of power under s. 28 (3) has not been considered. In the latter instance, clearly the inquest is not completed in any sense. The appellants argue that this distinction ought not be drawn because, so it is said, the subject inquest is still adjourned following the refusal to resume it. Thus it is argued the present case does not differ from any other case under s. 28. As this and the exclusion of all s. 28 cases from s. 37 has been the substantial submission of both senior counsel for the various appellants argued at length, and as in my view it lacks substance, I propose to deal with it as an alternative basis for rejecting the appellants' submission on the question of jurisdiction. For this purpose reliance must be placed on the observations which I have already made as to the meaning of the words "has been held", and the general nature of the provision made in s. 28.

For the reasons which earlier appear, I do not think the word "held" should be construed as "completed" and that, in its context, "held" should be contrasted with an inquest which has not been held in the sense of "not embarked upon". Where the subject matter of the verb "hold" is some continuing activity, it is sometimes not inapt to use the word "held" to relate to part of the activity when such activity as a whole is incomplete, e.g. "the trial was held at Newcastle but has been adjourned to Sydney to receive medical evidence", or "the inquest was held for a week and then a charge was laid against A, so that the inquest was adjourned under s. 28 (1)". Having regard to the general considerations earlier referred to, the distinction open to be drawn between "held" and "completed" stands against the latter word being substituted for the former. However the appellants argue that other words in s. 37 (2) warrant this being done.

First they rely upon the nature of the order provided by s. 37 (2) as the step preliminary to ordering another inquest, namely that the "first inquest … be quashed". It was argued that only an order could be quashed and that to quash an inquest meant only to quash the ultimate finding. In support they called in aid the alleged nature of the prerogative power to quash in relation to inquests. No authority was produced which supports this submission. Of course, it is fairly unlikely that such a question would arise, except where there existed some provision such as s. 28. In any event, reliance on the alleged earlier law is inconsistent with the appellants' arguments that seek to reject the prerogative powers on the basis that they have been displaced by the *Supreme Court Act*, 1970 by reason of it being a code. If this were so, and indeed in any event, the question is: What meaning is to be given to the word "quashed" in this Act with the novel provision made by s. 28? and not: "What were the

limits of the common law power to quash?" I would not agree that the word "quash" has the limited meaning contended for. The Oxford English Dictionary provides the following: "1. To annul, to make null, or void, (a law, decision, election etc.); to throw out (a writ … etc.) as invalid; to put an end to … (legal proceedings). 2. To bring to nothing; …"

The words used in s. 37 (2) provide that it is the "inquest …" which may be quashed. In terms the power is not confined to the finding. In any event, I find no difficulty in applying the word "quash" to an inquest where there has been a decision not to resume it, or to an inquest where the evidence has been taken and the coroner has come to a conclusion the subject of a statement which he transmits to the Attorney-General. An order made by the Supreme Court quashing such an inquest nullifies the proceedings of the coroner, including any decision come to by him in exercise of his jurisdiction as a coroner, so the new inquest then ordered takes its place.

It was also argued that it was inapt to provide "insufficiency of inquiry" as a ground for intervention where s. 28 (1) applies because no inquiry would have been held by the coroner. A consequence of this, so it was argued, is that s. 37 (2) could not have been intended to apply to inquests touched by s. 28. However "insufficiency of inquiry" could be appropriate in inquests within s. 28 (2), and the other grounds provided in s. 37 (2) could be applied to inquests to which either s. 28 (1) or (2) apply. Any doubt as to how "insufficiency of inquiry" is to be applied to cases under s. 28 (1) in the end causes no difficulty. If it means insufficiency of inquiry in the inquest itself then, in a s. 28 (1) case, the answer in any case would be: "Yes." However, as the Supreme Court has a discretion whether or not it should order a fresh inquest, and is empowered to do so only if it is necessary or desirable in the interests of justice, the Court would inevitably address its mind to the question whether the committal proceedings remedied the insufficiency and indeed, in coming to its conclusion, it is likely that the Court would consider for itself the very class of question proper to be considered by the coroner in exercising his discretion under s. 28 (3). In so far as the same matter arose for consideration under s. 37 (2), the Supreme Court would make its own determination in exercise of an original jurisdiction. In no sense would it be exercising jurisdiction on appeal from the discretionary decision of the coroner under s. 28 (3). The situation is equivalent to decisions of the Supreme Court in other s. 37 cases, e.g. cases falling under s. 37 (1) where a coroner has dispensed with the holding of an inquest under s. 11 (2) (b). The Supreme Court makes its own decision. The alternative is that the inquiry referred to in the phrase "insufficiency of inquiry" includes, in cases covered by s. 28 (1), such inquiry as takes place by the operation of s. 28 (1) and thereby includes such inquiry as takes place by reason of the committal proceedings. In practical terms either meaning would lead to the same result under s. 37 (2).

The arguments of the appellant which rely on particular words of s. 37 (2) to demonstrate an intention to exclude cases under s. 28 are rejected.

Short further reference should be made to the general considerations which weigh heavily against the appellants' submission. Rejection of their submission has the consequence that the supervisory power provided in s. 37 is available in respect of the exercise of coronial power in relation to all inquests whether controlled by s. 28 or not. This is a conclusion which should be embraced rather than avoided in respect of a

provision such as s. 37. To decide otherwise would give rise to inconvenience and injustice in some cases. A

Many examples could be given of the inconvenience and injustice which would flow from the submission. Let me give one. Where s. 28 (2) operates, the coroner receives all the evidence and all that s. 28 (2) does is to substitute for his public findings a statement by him to the Attorney-General. Although sufficient material to establish a mere prima facie case against one person may have appeared, there may, nevertheless, have been an inadequate inquiry in relation to his involvement in causing the death. It may have been unfair to him by reason of irregularity of proceedings or of fraud. It may have omitted material favourable or adverse to him. It may be that the conduct of some other person being a cause of the death may have been suppressed or not discovered. Fresh evidence may have been discovered which tends to exculpate the person against whom there is a prima facie case. It may tend to establish there was a different cause of death. Any of these matters may have come to the notice of the Attorney-General after he has received the statement from the coroner pursuant to s. 28 (2) (ii). By operation of s. 28 (2) the inquest is adjourned and cannot be resumed under s. 28 (3) until the Attorney-General has made a decision not to proceed: s. 28 (3) (a) (i) (b). However, the Attorney-General, in the supposed circumstances, may well not be satisfied to make a decision one way or the other in reliance on the statement and depositions. The depositions are to aid him to make a decision but, by assumption, they are inadequate or unsatisfactory. He may be disinclined to make any independent decision, except following a proper inquiry in substitution for the supposed unsatisfactory inquiry. It is difficult to see any reason why the legislature would have wished to exclude cases of which the foregoing is an example, from the supervisory power of s. 37 (2), particularly as it is exercisable where "it is necessary or desirable in the interests of justice". B C D

For the foregoing reasons I conclude that Lee J. had jurisdiction under s. 37 (2) to make the orders made by him. It is unnecessary to consider the alternate submission of the respondent based on pars. (1) and (2) of the summons. E

Counsel who appeared for the appellants Swift and Abel made further limited submissions that Lee J. erred in the order made by him. No argument was put to us that Lee J. made any error in respect of any finding of fact. It was argued that it was not open to Lee J. to order a fresh inquiry on the ground of insufficiency of inquiry, unless he first determined that the finding of the coroner "would probably be replaced by a different verdict if a new inquest were to be held". Reliance was placed on *Re Davis, deceased* (5). The headnote to that case states a general proposition, but the judgment of Sellers L.J. (6) makes it clear that the proposition there stated and relied upon by counsel before us is not a general proposition, but relates to "the circumstances of this case". That case falls into a particular class, being where it was sought to set aside a verdict of suicide, (presumably having some life insurance consequences) on the basis that there was available other specific evidence. Not unnaturally the court applied a rule somewhat akin to that applied upon an application for new trial, and refused a further inquest which it did not appear would produce a different result. It is quite different, where as here, according to the findings of Lee J., the inquiry F G

(5) [1968] 1 Q.B. 72.

(6) [1968] 1 Q.B. 72, at p. 82.

had been insufficient in a number of respects, and where the subject matter of the insufficiency was apparent, but its content would only appear if and when there was a fresh inquest. The submission leads to an absurdity. If it is correct that a fresh inquiry cannot properly be ordered, unless the probable result of the failure properly to inquire can be determined before ordering the fresh inquiry, then the greater the insufficiency of inquiry and hence, prima facie, the greater the reason to order a fresh inquest, the less likely would it be that the Court would be entitled to order a fresh inquest. This submission fails.

It was then argued that, as this Court decided that Mr. Farquhar on the second refusal to resume the inquest, had done so in the exercise of a discretion under s. 28 (3), Lee J. erred in ordering a fresh inquest. This submission can be disposed of shortly. The Court on the applications for orders in the nature of mandamus considered a different question. In the proceedings under s. 37 (2), as has been earlier stated, Lee J. had to come to his own conclusion based on his own view of the facts. This he did.

It was finally submitted that, as Mr. Farquhar had dismissed the charges against the appellants, Swift and Abel, it would be unjust to them to have the same evidence given again, and to have the same reviewed upon a fresh inquest with the attendant publicity. It was argued that for this reason the requirement of s. 37 (2) that it must appear that it is necessary or desirable in the interests of justice that there be a new inquest could not be met so Lee J. erred in ordering a fresh inquest.

The submission involves some misconceptions. The dismissal of charges by a magistrate in committal proceedings provides no estoppel or res judicata. It does not prevent the filing of an ex officio indictment by the Attorney-General. He may well take this course by reason of fresh evidence, or a different view of the evidence, or for some other reason.

Upon a fresh inquest, the coroner conducting that inquest would be obliged to make his own finding as to the cause of death and if, in his opinion, the evidence given before him established a prima facie case against any known person for an indictable offence, then he would be bound to act in accordance with s. 28 (2) and transmit the relevant statement to the Attorney-General. In the present case, the Court would not wish to express any view on the facts, but it is proper to observe that, as a matter of procedure, if the coroner in the fresh inquest formed the opinion that there was a prima facie case established against some identified fellow prisoner or some indentified police officer, whether one or other of the appellant police officers or some other person, it would be his duty to proceed under s. 28 (2), despite the conclusion come to in the earlier proceedings. There is no reason why the Attorney-General should not determine whether or not to indict any person, having regard to a statement made by the coroner on a fresh inquest, or having regard to the depositions taken at that inquest.

The interests of justice in relation to whether there should be an inquest, or further inquest, may involve wider considerations than the interests of particular individuals. It appears to be clear, and was so found by Mr. Farquhar, that Bilbao received physical injuries within about twelve hours of his arrest, and whilst in a jail. He died a day later as a result of such injuries. At his death he was found to have extensive and severe recent injuries. Lee J. found that there was an inadequate inquiry. There had been no finding made as to the cause of his death. The course of events in the prior proceedings has been such that the legal representatives of relations of the deceased man were debarred from

questioning witnesses and, as Lee J. has shown, some important matters have not been investigated. The public interest in relation to a death in such circumstances, and the interests of the relatives, provide ample reason to justify finding that it was necessary or desirable in the interests of justice that there be a fresh inquest. If it turns out that, in the opinion of the coroner, on the fresh inquiry, there is a prima facie case against some person for an indictable offence, and the coroner so states to the Attorney-General under s. 28 (2) (ii) there is no injustice to the person involved, but rather the interests of justice would have been served by the fresh inquest and the statement.

Mr. Herron Q.C., indicated that other matters set out in his written submissions were not pressed, so they need not be referred to.

By the summons before Lee J. the relatives sought to have added an order that a different magistrate than Mr. Farquhar be the coroner in any fresh inquest ordered. Lee J. did not make such an order for the obvious reason that s. 37 deals with this matter. When a fresh inquest is ordered, this does not entitle the same coroner to hear the fresh inquest, but s. 37 (3) provides that the Minister of Justice shall nominate the coroner. Mr. Porter Q.C., informed the Court that the usual practice is for a different coroner to hold the fresh inquiry. As the history of this matter goes back over six years, and we have been involved in considering a great volume of material over some days, I think it is proper that this Court should direct the attention of the Minister to some matters which he may find relevant to his decision under s. 37 (3). Mr. Farquhar has twice declined to resume the inquest, on the first occasion on a basis which was found by this Court not to be an exercise of jurisdiction, and on the second occasion upon a decision which was within his discretion, but was such that it has now been factually found that there had then been an insufficient inquiry. There is not now any challenge to that factual finding. However, upon Lee J. giving his decision, Mr. Farquhar took the unusual course by his notice of appeal of seeking to have the order for a fresh inquiry set aside on grounds which asserted that the finding of Lee J. was against the evidence and weight of evidence, and that he erred in the determination of numerous specific factual matters which it will be necessary to consider on a fresh inquiry. The matter of course is entirely for the Minister to decide and the foregoing is mentioned with respect and for his assistance.

In my view, each of the appeals should be dismissed with costs.

HUTLEY J.A. I agree with the judgment of Moffitt P., and with his reasons therefore.

GLASS J.A. I concur in the reasons for judgment prepared by Moffitt P., which I have had the advantage of reading.

Appeals dismissed with costs.

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O. M. L. DAVIES,
Barrister.