

CITATION: *Inquest into the death of Kumanjayi Walker (Ruling No 4)*
[2022] NTLC 020

TITLE OF COURT: Coroners Court

JURISDICTION: Alice Springs

FILE NO(s): A51 of 2019

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DELIVERED AT: Alice Springs

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FINDING OF: Judge Elisabeth Armitage

CATCHWORDS: Coronial proceedings; inquests; death in custody;
application for non-publication order under s 43
of the *Coroner's Act 1993* (NT)

Coroner's Act 1993 (NT), s 43

John Fairfax Publications Pty Ltd v District Court (NSW) (2004) 61 NSWLR 344

Commissioner of the Australian Federal Police v Zhao (2015) 316 ALR 378

Hogan v Hinch (2011) 243 CLR 506

News Digital Media Pty Ltd v Mokbel (2010) 30 VR 248

Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47

David Syme & Co Ltd v General Motors-Holden's Ltd [1984] 2 NSWLR 294

Russell v Russell (1976) 134 CLR 495

Victorian Lawyers RPA Ltd v X [2001] VSC 432

G v Medical Practitioners Board of Victoria [2010] VSC 79

PQR v Secretary, Department of Justice and Regulation (No 1) [2017] VSC 513

REPRESENTATION:

Counsel Assisting:	Dr P Dwyer with Mr P Coleridge
For Zachary Rolfe:	Mr D Edwardson KC and Mr F Merenda
For the Brown Family:	Mr G Mullins with Ms P Morreau
For the Walker, Lane and Robertson families:	Mr A Boe with Mr D Fuller and Ms G Boe
For the Northern Territory Police Force:	Dr I Freckelton AO KC with Ms A Burnnard
For the Department of Health:	Mr T Hutton

For NAAJA:	Mr P Boulten SC with Ms B Wild and Mr J Murphy
For the Parumpurru Committee:	Mr J McMahon SC
For the Northern Territory Police Association:	Ms S Ozolins
For James Kirstenfeldt:	Mr C Gnech
For Lee Bauwens:	Ms KM McNally with Mr JM Suttner
For Paul Kirkby:	Mr SA Robson SC
For Anthony Hawkings and Adam Eberl:	Mr I Read SC
Judgment category classification:	A
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IN THE CORONERS COURT
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. A51 of 2019

In the matter of an inquest into the death of
Kumanjayi Walker

Introduction

1. On 14 October 2022 I published to the parties my reasons for ruling that I would dismiss objections made by Constable Zachary Rolfe, [REDACTED], Sgt Lee Bauwens and Sgt Paul Kirkby to the receipt of certain evidence in these coronial proceedings.¹ I will refer to that ruling as ‘*Ruling No 3*’.
2. In the case of [REDACTED] and Sgts Bauwens and Kirkby, each of the three police officers objected to the receipt of evidence of text-messages they had sent to, and received from, Constable Rolfe in the months before and after 9 November 2019.
3. When publishing my reasons for *Ruling No 3* on Friday, I noted that until now the identities of these and other police officers have not been discussed publicly in connection with the text-messages. However, because the objections were pressed on, in effect, grounds of ‘relevance’, my reasons for *Ruling No 3* discussed the content of at least some of the text messages to which each officer objected.
4. Because their legal representatives were not present in Court when I published *Ruling No 3*, I made a temporary non-publication order until 9:30am today, to allow the three police officers time to advise whether there was any reason why these reasons should not be published more broadly.
5. Yesterday, [REDACTED] applied for an extension of this temporary non-publication order, indefinitely or alternatively until he has completed his evidence. No applications were made by Sgts Bauwens and Kirkby.
6. For the reasons that follow, I am persuaded that there is a proper basis for a non-publication order in the case of [REDACTED] until the conclusion of

¹ *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019.

██████████'s evidence. At that time, I will consider whether there are grounds to extend the order.

7. Although I have not received an application for an extension of the order from Sgts Bauwens or Kirkby, given the obligatory terms of s 43 of the Act, I have nevertheless considered whether I am obliged to make a further order in their cases. Ultimately, I am not persuaded that there is a proper foundation for such an order.

Non-publication orders under s 43 of the Coroners Act 1993 (NT)

8. Open justice is ‘one of the most fundamental aspects of the system of justice in Australia’.² In *Commissioner of the Australian Federal Police v Zhao*,³ the High Court said that the basic ‘rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances.’⁴

9. Section 43 of the *Coroner’s Act* qualifies the open justice principle. It provides that:

- (1) A coroner must order that a report of an inquest or of part of the proceedings, or of evidence given at an inquest, not be published if the coroner reasonably believes that, to publish the report, would:
 - (a) be likely to prejudice a person's fair trial; or
 - (b) be contrary to the administration of justice, national security or personal security; or
 - (c) involve the disclosure of details of sensitive personal matters including, where the senior next of kin of the deceased have so requested, the name of the deceased.

10. In this case, it is not suggested that there is any likelihood that the publication is likely to prejudice the fairness of a trial or to be contrary to national security. Accordingly, the question is whether there are reasonable grounds to believe that the publication would be contrary to the ‘administration of justice’ or ‘personal

² *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344, [18].

³ (2015) 316 ALR 378.

⁴ *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44].

security’ (s 43(1)(b)), or would involve ‘the disclosure of details of sensitive personal matters’ (s 43(1)(c)).

Decision

Sgts Bauwens and Kirkby

11. Sgts Bauwens and Kirkby were senior police members in the Alice Springs Police Station whose role it was to supervise junior police officers, including Constable Rolfe. While they might have important evidence to give that contextualises, explains, or justifies the text-messages, together the messages provide at least *prima facie* evidence of attitudes of racism, misogyny, dishonesty, inappropriate attitudes towards the use of force and contempt for community police. For the reasons I gave in *Ruling No 3*, there may be a nexus between these attitudes and the circumstances of Kumanjayi Walker’s death.
12. I consider that the publication of the reasons in the ordinary course will not be contrary to the administration of justice under s 43(1)(a) of the Act, and may in fact *serve* the ‘administration of justice’⁵ by:
 - (a) Exposing witnesses to public scrutiny, which may discourage them from giving false evidence;
 - (b) Placing law enforcement officers’ conduct under public scrutiny;
 - (c) Promoting public discussion of issues arising out of this case;
 - (d) Increasing public understanding of court procedures;
 - (e) Maintaining public confidence in the integrity and independence of the courts;
 - (f) Increasing the possibility of additional witnesses coming forward; and
 - (g) Facilitating the media’s ability to fully and contemporaneously publish fair and accurate reports of proceedings.

⁵ *Hogan v Hinch* (2011) 243 CLR 506, [20] (French CJ); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, [35] (Warren CJ and Byrne AJA); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50-60 (Kirby P); *David Syme & Co Ltd v General Motors-Holden’s Ltd* [1984] 2 NSWLR 294, 299-301 (Street CJ); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J) and 532-3 (Stephen J).

13. I do not consider that the ordinary publication of the reasons would be contrary to the ‘personal security’ of Sgts Bauwens and Kirkby under s 43(1)(b). For the avoidance of doubt, I have assumed that ‘personal security’ extends beyond ‘physical security’ and ‘encompasses the health, mental or otherwise, of a person whose health might be materially and adversely affected were publicity to be given to these proceedings’.⁶ On the material before me it would be speculative to suggest that the ordinary publication of the reasons would be contrary to the physical or mental security of either police officer.⁷
14. Finally, I am not persuaded that the ordinary publication of the reasons would ‘involve the disclosure of details of sensitive personal matters’ concerning Sgts Bauwens and Kirkby within the meaning of s 43(1)(c). The text messages were sent by two senior police officers to Constable Rolfe, who they each directly supervised, in the context of their communications with him about their work as police officers.
15. For the avoidance of doubt, I have considered whether I could make a further *temporary* non-publication order in Sgts Bauwens’ and Kirkby’s cases until they have completed their evidence. Ultimately, in addition to the fact that I am not persuaded that a further temporary order would be justified under s 43(1) of the Act, I am concerned that it could give rise to practical difficulties. Over the next week or so, Counsel Assisting or other interested parties may seek to cross-examine by reference to the text-messages. When doing so, there may be legitimate forensic reasons why it is necessary for counsel to identify Sgt Bauwens or Kirkby as the author of the messages. Because a large number of Kumanjayi Walker’s community and family members reside in remote parts of Central Australia,⁸ these proceedings are being live streamed to ensure that they are open to, and inclusive of, the public. Accordingly, if a non-publication order were made, it would be necessary to break the live-stream every time it is proposed to cross-examine on these text-messages.

⁶ *Victorian Lawyers RPA Ltd v X* [2001] VSC 432, [21] (Harper J). See also, *G v Medical Practitioners Board of Victoria* [2010] VSC 79, [15] (Emerton J).

⁷ ‘Requiring production of cogent evidence or credible information in support of an application for a suppression order is not matter of mere form. The purpose of this requirement is to assist in ensuring that suppression orders are kept for exceptional cases’: *PQR v Secretary, Department of Justice and Regulation (No 1)* [2017] VSC 513, [54] (Bell J).

⁸ Which makes regular travel to Alice Springs impractical or prohibitively expensive.

This could have the practical effect of temporarily excluding large numbers of Kumanjayi Walker's family and community from the inquest.

[REDACTED]

16. In my view, different considerations apply to [REDACTED]. Unlike the text-messages sent by Sgts Bauwens and Kirkby, in *Ruling No 3* I did not conclude that [REDACTED]'s single text-message provided prima facie evidence of racism, misogyny or contempt for community police. At the conclusion of the evidence, there is a real prospect that the probative value of this text-message will turn out to be limited. Accordingly, in my view it would be contrary to the administration of justice to publish this part of the reasons before [REDACTED] [REDACTED] gives evidence.

Conclusion

17. Accordingly, yesterday I made orders that:
- (1) The temporary non-publication order over the entirety of the contents of my ruling in *Inquest into the death of Kumanjayi Walker (Ruling No 3)* [2022] NTLC 019 (Ruling No 3) made on 14 October 2022 is revoked.
 - (2) Subject to order 3, there be no disclosure or other publication of the redacted passages of the copy of Ruling No 3 now annexed to these orders.
 - (3) Order 2 does not prevent the disclosure or other publication of the contents of the redacted passages of Ruling No 3:
 - (a) to and between the following people for the purposes of these coronial proceedings:
 - (i) The family of Kumanjayi Walker and their legal representatives;
 - (ii) The Commissioner of NT Police and his legal representatives;
 - (iii) Persons granted leave to appear because they have a sufficient interest in the coronial proceedings, and their respective legal representatives;
 - (iv) Those persons assisting the Coroner in her investigation, including legal representatives.

- (4) Subject to any further order, Orders 2 and 3 apply until the conclusion of [REDACTED]'s evidence in these proceedings.

Dated this 18th day of October 2022.

ELISABETH ARMITAGE
TERRITORY CORONER