Neutral Citation No: [2021] NIQB 132	*Ref:* McA11671
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:*
	Delivered: 20/10/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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M4

v

THE CORONER'S SERVICE FOR NORTHERN IRELAND

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Mark Mulholland QC (instructed by MTB Solicitors) for the Applicant
Mr Philip Henry (instructed by Crown/Departmental Solicitors) for the Respondent

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McALINDEN J

Introduction

[1] I think it is important that this matter is addressed now rather than delayed any further. I think the first point that has to be made here is that the privilege against self-incrimination is a fundamental right and it is one that the courts must assiduously protect and only in clearest statutory language should the right against self-incrimination be in any way diluted or restricted. That is, I think, the fundamental issue that the court grapples with in this application.

[2] Secondly, the *Rio Tinto* decision of the House of Lords clearly gives a steer to those who have to consider the invocation of the right that a very liberal approach should be adopted when an individual claims the right not to answer questions on the basis of a risk that those answers may give rise to a risk of self-incrimination. It is against that background that the court has to examine this particular application. The process if the witness was in the jurisdiction is now set out in the amended section 17 of the primary Coroner's Legislation and it is quite clear that if this individual resided within the jurisdiction the matter would be the subject of a notice served by the coroner and the potential for the witness in question to make an application to the coroner on the basis that he is unable to comply with the notice or on the basis that it is not reasonable in all the circumstances to require him to comply

with the notice. It is quite clear that if the witness in this particular case had been within the jurisdiction it would have been on the basis of a written submission to the coroner that it was not reasonable in all the circumstances to require him to comply with the notice and the coroner would have had to consider that application and it is quite clear that the coroner would have to have considered the issue of the risk of self-incrimination when addressing that particular submission by the witness.

[3] In this particular instance because the potential witness resides outside the jurisdiction the process is different, the process must be initiated under section 67 of the Judicature Act. Section 67(1) deals with the issue of a summons to a person outside the jurisdiction and the key test is whether it is proper to compel the witness to give evidence. In relation to section 67 it is quite clear that, in respect of a failure to comply with a summons issued under section 67, it is a matter for this court, the High Court, to deal with and it is clear that if such a summons is not complied with section 67(5) states that the High Court may transmit a Certificate of Default to a Court of Competent Jurisdiction in the jurisdiction where the witness resides. It is not, must or shall, but may, so it is an issue that this court would have to determine whether such a Certificate of Default should be issued.

[4] In relation to the test as to whether the right not to give an answer in the context of a risk of self-incrimination is appropriately invoked in the context of an inquest it is quite clear that the judicial officer making that assessment is the coroner. It is quite clear that any assessment by the coroner in relation to the proper or improper invocation of the right against self-incrimination is a matter which would be subject to potential review by a superior court by means of judicial review. So again, those are issues that have to be seen in the overall context of this application.

[5] The last general point that I want to refer to is the issue of proper and the use of the phrase 'proper' to compel in section 67(1). Does it equate to necessary in the sense of the use of the phrase in the context of cases dealing with adversarial proceedings where necessary is seen to include issues of oppression and is seen to require the question to be addressed as to whether the disclosure is necessary for the fair disposal of the case. It is quite clear that there is a distinct and meaningful difference between adversarial proceedings in the context of civil proceedings and the inquisitorial nature of an inquest where the coroner himself is tasked with a duty to carry out a meaningful investigation into the circumstances of the death of a person who died within his jurisdiction. I think that is a key issue and it is a key difference and it means that the phrase 'proper to compel' in the context of a coroner's inquest has to be looked at and has to be interpreted somewhat differently from the interpretation placed on the phrase when considering civil adversarial proceedings especially in the context of seeking third party discovery from a person or body that is not a party to the civil proceedings.

[6] So again, that is all part of the mix that the court has to take account of, these are very relevant matters which the court has to take account of and the court has to pay due regard to the particular context in which a coronial investigation has been

carried out and the degree of latitude that has to be afforded to the coroner in the exercise of his independent judicial functions. Again, that is an important issue in this case.

[7] One has a clear legislative steer in relation to this matter by reason of the amendment of Rule 9 which means that this witness is now a compellable witness whereas previously would not have been a compellable witness.

[8] But one also has a clear legislative steer from what factors and what matters the coroner should take into account if a witness is requested or required to attend on foot of a notice issued under 17A, it is quite clear that the coroner when considering an application to have such a notice set aside the coroner has to consider whether it is reasonable in all the circumstances to require him to comply with such a notice.

[9] So is it the case that in terms of 'proper' in section 67(1) of the Judicature Act in the context of an inquest is that to be interpreted in the way in which the coroner has to act in response to a claim brought under section 17A(4) in other words does proper to compel equate to reasonable in all the circumstances to require him to comply with such a notice? I think that is an important legislative steer in the context of the interpretation of section 67(1) and it is the approach that I will adopt in this particular case. Proper to compel in my view when interpreting that phrase one has to have regard to section 17A(4) and one has to ask the question whether it is reasonable in all the circumstances to require this witness to comply with the summons.

[10] When one looks at how the coroner is to be guided in respect of making such an assessment one has to look at section 17A(5) which states:

> "(5) In deciding whether to revoke or vary a notice on the ground mentioned in subsection (4)(b), (and subsection 4(b) is not reasonable in all the circumstances to require him to comply with such a notice) the coroner shall consider the public interest in the information in question being obtained for the purposes of the inquest, having regard to the likely importance of the information."

[11] Looking at the case in the round this is an Article 2 inquiry into the death of an individual who died as a result of being shot in 1972, it is something that is of great importance to the relatives of Thomas Mills that as much information as is possible is brought into the public domain to enable the coroner to make his findings in respect of the death of Thomas Mills and to comply with the requirements which are quite clearly set out in the European Jurisprudence the requirements in respect of Article 2 of the Convention. One has in a sense the conflicting interests here of an

Article 2 compliant investigation on the one hand, and the right of a witness not to be required to answer questions which subject him to a risk of criminal proceedings.

[12] The tension between these two rights is acute and the tension between these two rights has been brought into particular focus in this particular case. However, having regard to the safety net provisions that are in place in respect of the right against answering questions which have the potential to incriminate the witness I consider that the amendment to Rule 9 would be rendered meaningless if individuals were entitled by matter of course to invoke the privilege against self-incrimination before being asked any questions by a coroner in the context of an Article 2 complaint investigation. It is quite clear that the common law does point towards a requirement for an individual to invoke the right against self-incrimination under oath and in the context of the coroner's investigation as I stated earlier I think the default position should be that that exercise of the right is crystallised when the witness is in the witness box and is asked questions by the coroner's counsel or by the counsel for other properly interested parties. As a default position I am not attracted to the proposition that it can and should be invoked in a blanket approach prior to the witness giving evidence or prior to the witness being sworn in the context of an inquest. However, that is not to say that in some very limited or exceptional circumstances it would be inappropriate to make such a claim and section 17A(4), I think, does envisage the possibility that such a claim certainly could be made in advance and could be accepted in advance although the acceptance in advance by the coroner might well be the subject of review by the next of kin.

[13] Bearing in mind the amendment to Rule 9, bearing in mind the context in which section 67(1) has to be interpreted and that is in the context of 17A(4) and (5), bearing in mind that this is an Article 2 compliant investigation there has to be an Article 2 compliant investigation. Bearing in mind the safety nets that are in place and I list those safety nets. First of all if the witness chooses not to comply with the summons it is for this court to determine whether to transmit a Certificate of Default to a Court of Competent Jurisdiction in the other jurisdiction and it is not a mandatory requirement that such a Certificate of Default be transmitted it is couched under section 67(5) in the context of the word 'may' being used. Bearing in mind that that is one safety net and it will be for this court to determine whether in all the circumstances it would be appropriate to serve or to transmit a Certificate of Default.

[14] Bearing in mind the safety net that the coroner has indicated that he is aware, acutely aware, of the privilege that the witness may enjoy in respect of the right against self-incrimination and bearing in mind the information that he has provided in his two affidavits as to how he will approach the situation if the right is invoked. He will consider that application, he will take on board submissions made in respect of that and he will make a decision and if that decision is to the effect that the right against self-incrimination does not apply to the line or theme of questions that are being put to the witness and there is a request for the proceedings to be adjourned so

that that issue may be the subject of a challenge before a superior court. Bearing in mind the existence of that safety net also I consider that it is in the public interest that this summons be permitted to be served, that the application to set aside the summons should not be acceded to and I do so on the basis that having considered all the relevant material and having considered the very helpful and detailed submissions of both Mr Mulholland and Mr Henry, counsel for the coroner, and having considered carefully the various authorities that have been provided to me I consider that it is proper to compel the attendance of the witness at the inquest in this particular case but I do so on the clear understanding that the coroner will be assiduous in ensuring that the witness's right against self-incrimination is accepted in proper cases in respect of lines of questioning that are put to him and that if a decision is made in respect of a line of questioning where the coroner does not uphold that right that the coroner will then give meaningful consideration to an application to adjourn the matter to allow a superior court to address that issue. Bearing in mind his assertions in his affidavits that he is acutely aware of the importance of the right against self-incrimination and the latitude to be applied in respect of the claim of that right that any request for such an adjournment for an application for judicial review would in all likelihood be a request that would be acceded to.

[15] It is in the context of that understanding that the application to set aside this summons is refused.