



OFFICE OF THE STATE CORONER

FINDINGS OF INQUEST

CITATION: Inquest into the death of
Brett Thomas JOHNSTONE

TITLE OF COURT: Coroner's Court

JURISDICTION: Brisbane

FILE NO(s): COR4554/07(8)

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FINDINGS OF: Mr Michael Barnes, State Coroner

CATCHWORDS: CORONERS: Police shooting,

REPRESENTATION:

Counsel Assisting:	Mr Peter Johns
Constable Piers Dickson; and Constable Lee Carseldine:	Mr Paul Smith (Instructed by Gilshenan & Luton Lawyers)
Queensland Police Service Commissioner:	Ms Melanie Dixson (QPS Solicitors Office)

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The *Coroners Act 2003* ('the Act') provides in s45 that inquest findings must be given to the family of the person who died, each of the persons or organizations granted leave to appear at the inquest and to various officials with responsibility for the justice system including the Attorney-General and the Minister for Police, Corrective Services and Emergency Services. These are my findings in relation to the death of Brett Thomas Johnstone. They will be distributed in accordance with the requirements of the Act and posted on the website of the Office of the State Coroner.

Introduction

Late on the evening of 2 October 2007, Brett Johnstone was asleep in the driver's seat of a van parked in a cul-de-sac at Yeerongpilly when he was approached by two police officers. Minutes later, as he drove away in the van, ignoring police instructions to stop, he was struck by a bullet fired by one of the officers. The projectile caused fatal injuries and Mr Johnstone died a short time later. He was 45 years of age.

At the time he was shot Mr Johnstone was attempting to avoid being taken into custody. The Act provides that in such circumstances an inquest into the death must be held.

This report:-

- Contains my findings as to the identity of the deceased person and when, where, and how he died and the medical cause of his death.
- Considers whether the police officers involved acted in accordance with the Queensland Police Service (QPS) policies and procedures then in force.
- Considers whether the conduct of the officer who shot Mr Johnstone should be referred to the DPP pursuant to s48 of the Act for determination of whether a criminal charge should be preferred.

The investigation

As can be readily appreciated, whenever a death is connected with police action it is essential the matter be thoroughly investigated to allay any suspicions that inappropriate action by the officers may have contributed to the death. The family and friends of the deceased person are entitled to expect a thorough investigation and an account of how the death occurred. It is also desirable that the general public be fully apprised of the circumstances of the death so they can be assured the actions of the officers has been appropriately scrutinised. The police officers involved also have a right to have an independent assessment made of their actions so there can in future be no suggestion there has been any "cover up" of inappropriate action.

The investigation of this matter was conducted by the QPS Ethical Standards Command and a detailed report was prepared by Senior Sergeant Robert Campbell.

The scene of the shooting in O'Loan Street, Yeerongpilly and the site at which Mr Johnstone's vehicle, and body, ultimately came to rest in Grosvenor Street, Yeerongpilly were treated as crime scenes and a log of events kept through the ensuing hours. The District Duty Officer and Regional Duty Officer attended the scene shortly after the incident and oversaw initial investigations. Investigators from the QPS Ethical Standards Command arrived at the scene shortly after midnight.

Door knocks of the local area were conducted immediately and the Regional Forensic Service Coordinator arranged for scientific and forensic officers to attend the two scenes. A detailed forensic examination of the vehicle, its contents and the surrounding areas was then conducted. A detailed map of relevant geographical points and of the location of potential exhibits was compiled. An extensive set of photographs of the scene and all potential points of interest were taken on the evening and the following morning.

The two officers involved were isolated from the crime scene as soon as practicable and their accoutrements taken from them. Breath and urine samples were taken from both officers and analysed.

ESC investigators conducted extensive interviews and video re-enactments with both of the officers involved. Records of interview or statements were obtained from all police officers having any connection to the incident; a number of civilian witnesses who heard aspects of the incident; persons who had been in contact with Mr Johnstone earlier in the day; and Mr Johnstone's family members.

A QPS ballistics expert examined the service issued firearms of the two officers along with the firearm located in the vehicle being driven by Mr Johnstone. The same expert also examined the damage, apparently caused by a projectile, on the driver's side of that vehicle. The same area of the vehicle was tested for the presence of gunshot residue. Fingerprint and biological examinations were conducted on items found in the vehicle, cigarette butts found in O'Loan St and a black handled knife found in that location.

Senior Sergeant Campbell accessed a large amount of documentation relating to police intelligence and prior dealings with Mr Johnstone. Hospital and QAS records relating to the medical treatment afforded to Mr Johnstone and to one of the officers involved, Constable Dickson, were accessed.

Mr Johnstone's body was identified by fingerprint analysis; the fingerprints from the body being found by an expert QPS analyst to match those held on QPS records for Brett Thomas Johnstone.

An autopsy examination was conducted later that day by an experienced pathologist, Dr Beng Ong, during which blood and urine samples were taken from the deceased and subsequently analysed.

I am satisfied that this matter has been thoroughly and professionally investigated and that all relevant sources of information have been accessed and analysed. I thank Senior Sergeant Campbell for his considerable efforts in compiling a detailed and well set out brief of evidence.

The evidence

I turn now to the evidence. I have not summarised all of the information contained in the exhibits and transcript but I consider it appropriate to record in these reasons the evidence I believe is necessary to understand the findings I have made

Social history

Brett Thomas Johnstone was born in Darlinghurst, New South Wales on 6 March 1963. He spent his early years living with his parents at Cabramatta and attended Sacred Heart and Patrician Brothers Colleges, ultimately leaving school in Grade 9. Mr Johnstone remained living with his grandmother at Hurtsville when his parents and younger siblings moved to Nowra for work purposes.

It appears that during this period he started to use drugs, in particular heroin, and this led to increasingly serious involvement in criminal activities. He remained close to his family by visiting them in Nowra and later arranging to be transferred to the Queensland Prison system from New South Wales to be closer to his mother who had moved to the Gold Coast in 1998. Prior to this he had suffered the loss of his younger sister Trudy and later, in 2003, the death of his father.

After his release from prison in 2007, Mr Johnstone made a number of efforts to overcome his heroin addiction. He attended a clinic and sought heroin substitution therapy from a general practitioner. These efforts failed however, and it is apparent that at the time of his death he was again engaging in polydrug abuse. This had numerous deleterious effects: it drove him to commit crimes to fund his drug habit; it brought him into contact with professional criminals; and it seems likely that he was suffering from paranoia and/or drug induced psychosis in the months leading up to his death.

Mr Johnstone is survived by his mother Beverley and his younger brother Shane who maintained contact with him up until his death and by whom he is sadly missed.

Criminal history

During the course of his life Mr Johnstone spent, in total, 18 years in jail. In broad terms it is fair to summarise the offences giving rise to this period of

imprisonment as being those commonly associated with long term heroin use and an ongoing association with an outlaw motorcycle gang.

At the time of his death, Mr Johnstone was the subject of an outstanding *Bail Act* warrant issued after he failed to appear in court at Ipswich on a charge of assaulting a police officer. He was recorded on QPS computer records as being a suspect for or wanted for questioning in relation to a number of alleged offences occurring subsequent to his last release from prison in April 2007.

I have no doubt that when he was approached by police officers on the evening of 2 October 2007 Mr Johnstone knew that he would be taken into custody if they were to become aware of his identity and/or that the car he was in was stolen. He would have been well aware that should this have occurred the prospects of him avoiding a further period of imprisonment would have been negligible. Accordingly, I am satisfied that Mr Johnstone died while trying to avoid being taken into custody which pursuant to section 10(1) of the Act means his was a “death in custody”.

Events on the evening of 2 October 2007

Visiting with Mr Tuesley

Early on the evening of 2 October 2007 Mr Johnstone arrived at the home of Anthony Tuesley with whom he had become friends while both were in prison some years earlier. It appears Mr Johnstone had travelled to Brisbane to, amongst other things, meet a female friend. It was his intention to drive back to his normal place of residence on the Gold Coast that evening but he required a rest before doing so.

He had dinner with Mr Tuesley along with Mr Tuesley’s partner and parents at Mr Tuesley’s home, located on the corner of Park Road and O’Loan Street at Yeerongpilly. All of those persons say that Mr Johnstone was visibly tired to the point that they describe him as being “out of it” or “wasted” and being unable to sensibly acknowledge or respond to questions or comments. It seems clear he was affected by illicit drugs.

Although offered a bed for the night, Mr Johnstone insisted on returning to the Gold Coast saying that he just needed to have a brief rest. He left the house but Mr Tuesley found him asleep in the car a short time later. Mr Tuesley suggested that if he was going to sleep in his vehicle, he should move it from the busier Park Road into O’Loan Street.

The stolen vehicle

Mr Tuesley told investigators that some weeks prior he had discussed with Mr Johnstone the habit of some traders at the Rocklea Fruit Market to leave keys in their unlocked vehicles of an evening. He says that Mr Johnstone later attended his residence in a white van which he presumed had been taken from the Rocklea markets as a result of their conversation.

On the evening of his death Mr Johnstone was driving a white Toyota Hiace, registration 678 JNG. On 18 September 2007 that vehicle had been reported stolen after it had been left outside the owner's place of business at Rocklea, as was normal practice, unlocked and with the keys inside to enable employees access at early hours of the morning. CCTV footage showed that the van had been stolen at 4:31am that morning but it did not enable the thief to be identified.

Cameron Walker resides in Park Road, Yeerongpilly. On the evening of 2 October 2007 he parked his employer's White Renault van registration 633 JWB outside his home. He approached police on that evening after seeing the activity associated with Mr Johnstone's death and then discovering that the registration plates on his employer's vehicle had been replaced with registration plates reading 678 JNG.

Police patrol

Constables Piers Dickson and Lee Carseldine, then both attached to Moorooka police station, were performing duty together on a 4.00pm to midnight shift on the evening of 2 October 2007. They were performing patrols of Moorooka and Oxley based on information provided to them on Intelligence Drive Patrol (IDP) sheets provided by the Station Intelligence Officer. At 10:45pm they were patrolling Park Road at Yeerongpilly and paying particular attention to a residence at the corner of Park Road and O'Loan Street because illicit drug activity had previously been detected around and associated with Mr Tuesley. Indeed Constable Dickson had dealt with a drug related matter outside that residence on his shift the previous evening.

Park Road at this point has an approximately north-south alignment. O'Loan Street extends east from Park Road and culminates in a cul-de-sac.

On driving past the intersection with O'Loan Street Constable Dickson noticed the Toyota Hiace van parked in O'Loan Street in what he considered an unusual manner. It was parked near the end of the cul-de-sac with its rear adjacent to the gutter and with its front pointing in a southerly direction towards the centre of the circle. Constable Dickson executed a u-turn and drove into O'Loan Street. He brought the vehicle to a halt approximately 3 to 4 metres from the van. The police vehicle was facing in an easterly direction, adjacent to the northern footpath where the straight section of the street met the circular cul-de-sac. He left the police car's headlights on so they illuminated the driver's side of the van which was parked at a 90 degree angle to the police car. The cul-de-sac was otherwise well lit with a street light adjacent to the vehicles.

Police approach Mr Johnstone

As the officers approached the van they observed the single occupant to be asleep and leaning slightly forward in the driver's seat. After Constable Carseldine tapped on the window, Mr Johnstone awoke and entered into what Constable Carseldine recalls as being a relaxed conversation. Mr Johnstone

related some of his movements from earlier in the evening and confirmed that he had been visiting Mr Tuesley. He denied having any identification on him and, when asked his name, date of birth and address, gave details relating to his brother Shane.

Constable Dickson advised Mr Johnstone that he intended conducting a vehicle check. As it seemed Mr Johnstone was speaking in a slurred manner, he asked Constable Carseldine to conduct a breath test. Constable Dickson says he was surprised when the breath test returned a negative result for alcohol and says he formed the view that Mr Johnstone may have been affected by drugs - a suspicion later borne out by the autopsy results.

Constable Dickson said he then moved to a position 4 to 5 metres in front of the vehicle, towards the centre of the cul-de-sac, to conduct a vehicle registration check. He was informed by the QPS radio operator that the registration plate details corresponded to a Renault van. Constable Dickson then obtained Constable Carseldine's notebook with a view to relaying the details given by Mr Johnstone for the purposes of a name check. As he did this he noticed that the registration details on the windscreen label of the van were different to those on the plates. Constable Dickson returned to a point around 2 to 3 metres directly in front of the van and asked the radio operator to conduct a check on the name Shane William Johnstone and on the registration number 678 JNG; being the correct registration for the Toyota Hiace as shown on the windscreen label.

The vehicle starts

Constable Carseldine had joined Constable Dickson at the front of the van to inquire as to the results of the vehicle checks, although they have different memories as to who was closer to the driver's side of the van: Constable Carseldine recalls he was on his partner's right while that officer has it the other way around. As they waited for the radio operator to respond they heard the ignition of the van being turned on and the engine start. Both officers say they heard or saw the driver mumbling or muttering just before he did this but neither could hear what he said.

Constable Dickson's first reaction was to tell Constable Carseldine to, "*Get the keys*". Constable Carseldine ran towards the driver's door but before he could take further action the van's engine roared to near maximum revolutions and the van lurched forward with a squeal of spinning wheels. As the vehicle began to move Constable Dickson shouted forcefully and repeatedly for Mr Johnstone to, "*Turn the fucking car off!*" or words to that effect. A neighbour who heard the commotion gave evidence she heard a male voice shout a threat to kill. She assumed the threat was made by the driver of the vehicle but she is clearly mistaken. It is likely she heard Constable Dickson issuing the instructions to Constable Carseldine.

The two officers, the only surviving eyewitnesses to these events, agree that the van accelerated at a high rate from its initial standing position, "*faster than I imagined it could,*" according to officer Dickson.

Constable Dickson says that as the van moved forward, he moved quickly to his left, in the same direction as Constable Carseldine.

In the account given during his directed interview and again at the inquest, Constable Dickson stated that as the van set off he had a very clear view of Mr Johnstone. He recalls Mr Johnstone looking directly at him and as he moved to his left, he distinctly recalls seeing Mr Johnstone move the steering wheel so as to direct the van towards him. It became apparent to Constable Dickson over this very short period of time that his continued movement perpendicular to the direction the van had initially been facing was not going to be sufficient to avoid him being hit. He says that he believed Mr Johnstone was intending to hit him with the van and that he was in imminent danger of being seriously injured or killed. Expanding on this in his interview, Constable Dickson stated he also held fears for the safety of Constable Carseldine, although he acknowledged not being sure of where Constable Carseldine in fact was at the point that the van set off.

I am of the view the actions of Mr Johnstone were equally consistent with his attempting to get away from the officers. Being in a cul-de-sac, his only escape route was to his right, down O'Loan Street. That of course does not obviate the danger he posed to the officers. As Constable Dickson was initially in front of and facing the van and then moved further to his left, his movement put him directly in the van's line of travel. However, it is easy to see why the officer felt the driver was deliberately trying to hit him.

When interviewed Constable Dickson said he did not recall exactly when he removed his Glock handgun from its holster but recalled having it in his hand prior to the vehicle reaching him. In evidence in these proceedings he was less sure and conceded it may have been after the collision.

Constable Dickson's fear of being struck by the van proved well founded. He says despite his efforts to remove himself from the vehicle's path, its right front corner made contact with his right leg, thigh and lower ribs, pushing him in its direction of travel and spinning him side on. He says that he was able to maintain balance by pushing away from the vehicle using his left hand.

Constable Dickson considered he was still in mortal danger as he could see the front wheel of the van pointing directly at him - a vision he continues to recall with horror. He therefore bought his gun to approximately rib height, and fired at Mr Johnstone. He fired two shots in quick succession after he had been struck by the van. Various witness corroborate that the shots came one immediately after the other, with estimates of a second between them.

The first shot went through the driver's window and struck Mr Johnstone in the tenth rib on his right side. The second penetrated the sliding side door of the van, just behind the B pillar and travelled forward into that pillar.

In his interview with investigators two days after the incident Constable Dickson said he fired the first shot when the driver's side window of the van had drawn level with his position. In evidence he placed himself further forward; adjacent to the van's front bumper bar. He recalled that due to the forward movement of the van, he was a short distance to the rear of the driver's side window when he fired the second shot.

Constable Carseldine had a limited recollection of Constable Dickson's movements during these relevant few seconds. After moving from in front of the vehicle with a view to grabbing the keys he does not recall focussing on Constable Dickson until the van had passed him and he heard two shots. He spun around and saw Constable Dickson, close to the passing van, holding his firearm in his right hand as the vehicle moved off.

The vehicle drives away

Despite being fatally wounded, Mr Johnstone managed to manoeuvre the van to the other end of O'Loan Street, through the intersection with Park Road and into the opposing Grosvenor Street. There, the van veered to the right, mounting the gutter and came to rest in the front yard of number 7 Grosvenor Street after crashing into a concrete house stump.

Constables Dickson and Carseldine, having already notified police communications of the shooting, located the vehicle very shortly after it had come to rest. The officers, with their weapons drawn, approached the vehicle. They observed Mr Johnstone to be lying to his left over the passenger side seat, clearly unconscious with blood visible on his right hand side. Constable Dickson dragged Mr Johnstone through the passenger side door onto the grass and called for Constable Carseldine to bring a first aid kit from the police vehicle. Constable Carseldine updated police communications on the situation and asked for the QAS to be summoned. Constable Dickson recalls feeling a faint pulse from Mr Johnstone before first aid was taken over by other officers arriving at the scene.

Medical treatment

Queensland Ambulance records show that they received a call from police communications at 11:00pm and arrived at the scene at 11:07pm. Mr Johnstone, by this time, had no pulse and his pupils were dilated. Manual ventilation and CPR were unsuccessful at which time the QAS officers intubated him and over the course of the next 15 minutes administered 3 doses of adrenalin. Ventilation with high flow oxygen and continued resuscitation attempts were unsuccessful and after CPR having been continued for a period of 32 minutes with no sign of change treatment was discontinued at 11:41pm. Mr Johnstone was transported to the QEII Hospital where a life extinct certificate was issued at 5:50am

Investigation findings

Analysis of the breath and urine samples taken from the two officers involved revealed nothing of significance.

Medical records obtained from the QAS and the Emergency Department at the Princess Alexandra Hospital in relation to Constable Dickson note the presence of a contusion to his right leg and right rib area.

Gun shot residue analysis of the van and the Mr Johnstone's shirt revealed the presence of residue suggestive of a weapon having been fired from 1 to 2 metres away.

Ballistics testing confirmed that the projectile located in Mr Johnstone's body had been fired by Constable Dickson's service issued Glock.

Analysis of the point of impact of the second projectile on the van showed that it was consistent with the relevant projectile travelling downwards from a point towards the rear of the vehicle towards the front of the vehicle. The vertical angle of the trajectory of the projectile in relation to the driver's side of the van was estimated to be 10-20 degrees and the horizontal angle was estimated to be 7-17 degrees. The projectile struck the forward edge of the van's sliding door approximately 124.5cm from the ground. The projectile was found to be lodged in the side of the van and ballistics analysis showed that it too had been fired by the service weapon issued to Constable Dickson.

From evidence given by a ballistics officer at the inquest, it is apparent the second shot was fired after the driver's compartment of the van was some distance past the shooter.

The autopsy

Dr Beng Ong, an experienced forensic pathologist, performed an external and full internal autopsy on the body of Mr Johnstone on morning of 3 October 2007. The autopsy was observed by the Investigating and representatives of CSIU and the QPS Coronial Support Unit.

Mr Johnstone was found to have died from a single gunshot wound that entered the right side of the torso adjacent to the 10th rib and was directed to the left in an upward direction with little anterior or posterior deviation. It perforated the liver, right thoracic cage, right lung, posterior mediastinum, left lung and left thoracic cage.

The trajectory of the shot supports the conclusion that the deceased was in a sitting position when shot, however the alignment of the torso could not be determined with certainty. The gunshot entry wound was situated 27.5 cm right of midline (anterior) and 39.5cm above the buttock. The projectile was found in the left axillary tissue.

The injuries were severe but would not have caused immediate incapacitation. According to Dr Ong, it is likely to have taken at least a few seconds before Mr Johnstone became unconscious and at least a minute or more before death.

Needle or “track marks” were present on both forearms. Histology was performed on one of the needle marks to determine whether this was due to self-administration. Results indicated that it had occurred some hours earlier. Toxicology results detected numerous drugs. Morphine and methylamphetamine were detected in high concentrations. The detection of 6 monoacetyl morphine indicated that the morphine present was probably derived from heroin. This is consistent with recent needle marks being the sites of administration of heroin. It is likely Mr Johnstone was affected by drugs at the time of his death.

Findings required by s45

I am required to find, as far as is possible, the medical cause of death, who the deceased person was, when, where and how he came to die. As a result of considering all of the material contained in the exhibits and the evidence given at the inquest I am able to make the following findings.

Identity of the deceased – The dead man was Brett Thomas Johnstone

How he died – Mr Johnstone died as a result of being shot by a police officer while he was attempting to avoid being detained. The vehicle Mr Johnston was driving struck the officer causing him to fear for his safety and prompting the officer to fire two shots, one of which hit Mr Johnstone in the chest.

Place of death – He died in Yeerongpilly in Queensland

Date of death – He died on 2 October 2007

Cause of death – The medical cause of death was gunshot wound to the chest.

Referral to DPP pursuant to s48

The Coroners Act, in s48, requires a coroner who, as a result of information obtained while investigating a death, “*reasonably suspects a person has committed an offence*” to give the information to the appropriate prosecuting authority. However, when determining whether such a referral is to be made, a coroner is not to have regard to evidence given after a witness has claimed that the answer to question may incriminate the witness and has been directed by the coroner to nevertheless answer.¹

¹ s48(1)

I take “*committed an offence*” to mean that there is admissible evidence that could prove the necessary elements to the criminal standard. That would include the evidence necessary to rebut any defence reasonably raised by the evidence.

The use of the term “*reasonable suspicion*” is redolent of the test applied when a search warrant is sought. In that context it has been held that a suspicion is a state of mind less certain than a belief and to be reasonable it must be based on some evidence, but not necessarily well founded or factually correct and be a suspicion that a reasonable person acting without passion or prejudice might hold.²

However, a search warrant is frequently sought when very little might be known about the circumstances of the suspected offence. In that context it is applied when there has been inadequate opportunity to allow the suspicion to gestate into a belief and authority is sought to take the steps that might enable that to occur. As a result, a relatively low level of certainty is needed to satisfy the test. It seems incongruous that a similar approach be taken when there has been an extensive investigation, and a public inquiry in which all relevant witnesses have given evidence under oath and have been cross examined, and world renowned experts have provided reports and also given oral evidence. In those circumstances there is little room for uncertainty and reliance on speculation or conjecture would seem unnecessary. The removal of doubt by the forensic process means that for a suspicion to be reasonable it must be well founded.³

I consider this potential anomaly can be overcome by construing the subsection as requiring a referral to the DPP only when the coroner considers it likely that the Crown could prove all of the elements of an offence.

Section 291 of the Criminal Code provides that it is unlawful to kill another person unless that killing is authorised, justified or excused by law.

Section 300 Criminal Code states that, “*Any person who unlawfully kills another person is guilty of a crime, which is called murder, or manslaughter, according to the circumstances of the case.*”

There are various definitions of murder provided by s.302 of the Code. Most relevantly to this case, s.302(1) provides that a person who unlawfully kills another person with the intention of causing the death or doing grievous bodily harm is guilty of the crime of murder.

² For a discussion of the authorities see Tonc K., Crawford C., & Smith D., “*Search and Seizure in Australia and New Zealand*”, LBC, Sydney, 1996 at p68

³ An analogy: if a detective is told by a usually reliable informant that there is a gun in the glove box of a car, he might have a reasonable suspicion that is the case. However if he searches the glove box and finds none a suspicion to that effect would no longer be reasonable.

In this case there is abundant evidence indicating Brett Johnstone was killed by Constable Dickson shooting him. The evidence of Constable Carseldine details the circumstances in which that occurred.

Therefore, the only issue to be further considered is whether the killing was authorised, justified or excused by law. If it was, that is the end of the matter. If not, I must refer the information to the Director of Public Prosecutions to enable him to determine whether an indictment should be presented.

The only evidence of the intention of Constable Dickson when he fired the fatal shot and any excuse, defence or justification he may have had for doing so is in the evidence of that officer which “*is not admissible against the witness in any other proceeding*”⁴ and is not “*information*” a coroner can rely on when determining whether to refer a matter to the DPP.⁵

That raises the question of whether I can consider the contents of the officer’s compelled police interviews (which is not given voluntarily and would not be admissible against him in criminal proceedings) and the answers given after I overrode his objection to answering on the basis of self incrimination. I am of the view that to ignore that information is too contrived and impractical. It would impose an unnecessary burden on the DPP and unduly clog criminal justice processes. I therefore intend to have regard to that information, conscious that if that leads me to conclude a referral should be made, I can not forward the information to the DPP.

Section 271 (2), short-titled “*Self-defence against unprovoked assault*,” provides that if a person is assaulted in such a way as to cause reasonable apprehension of death or grievous bodily harm, and the person believes on reasonable grounds that he can not otherwise protect himself from that, it is lawful for the person to use such force as is necessary for his defence even though that force may cause death or grievous boldly harm.

That subsection has been exhaustively analysed by the Court of Appeal in a case cited by counsel assisting, *R v Wilmot*.⁶ Most relevantly, the Court adopted observations from earlier cases to the following effect: it is sufficient if the person using the force believed on reasonable grounds that only by using the deadly force employed would he preserve himself even if objectively, there were other non fatal options; it is the belief of the actor that is critical, provided it is based on reasonable grounds.

Counsel for Constable Dickson also helpfully drew to my attention two English cases. In *Beckford v R* the Privy Council observed “*a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot: circumstances may justify a pre-emptive strike.*”⁷ In *R v Whyte* the English Court of Appeal drew attention to the need for latitude when

⁴ s39(3)

⁵ s48(1)

⁶ [2006] QCA 91

⁷ [1987] 3 All ER 116 at 118

considering the response of a person in “*unexpected anguish*” as a result of a sudden attack. In such a case, if the person attacked only does what he “*honestly and instinctively thought was necessary*” it is easy to conclude that the response was reasonable.⁸

I will now attempt to apply that law to the facts of this case.

Constable Dickson said during interview and in evidence at this inquest that he believed Mr Johnstone deliberately drove the van at him, placing him in imminent danger of being killed. He also said that he considered there were no other means by which he could prevent this from happening, other than by shooting Mr Johnstone which he believed would cause the driver to release the wheel and the vehicle would straighten and move away from him. I do not doubt those were his genuine beliefs.

As I have already said, I am not convinced that Mr Johnstone was intent on running over the officer, rather than just escaping, and, as we now know, shooting him did not prevent the officer from being struck by the van. I also consider that had the constable run to his right when the van lurched forward, or concentrated all his efforts on continuing his escape to his left, rather than drawing and firing his gun, he may have escaped unscathed. However none of that means the officer’s beliefs were unreasonable.

Initially, I was troubled by the shot being fired after the van had struck the officer in circumstances where it could be construed that the threat had passed. However, as a result of more carefully considering the very dynamic and dangerous nature of the events as they unfolded, I accept the decision to shoot was made before the collision and that in the second or so after that had occurred the officer believed on reasonable grounds he was still at risk.

Police officers are not above the law. They are liable to be prosecuted if the evidence is sufficient but police officers are also entitled to the protection of the law, in this case that afforded by the self-defence provisions. When one has regard to how Constable Dickson came to be in the position he found himself in on the evening of 2 October 2007, no fair minded person could have any concerns about that. He was acting lawfully and reasonably. He did not create the danger that prompted him to shoot the person who did.

In the circumstances I am of the view the preconditions to a referral under s48 (2) are not met.

The incident that has been the subject of this inquiry harmed numerous people. Brett Johnstone lost his life; his mother and brother lost the only other surviving member of their immediate family. The officer involved was obviously traumatised and I am pleased to see he has had sufficient resilience to continue with his career as a police officer. I offer my condolences to all those affected.

⁸ [1987] 3 All ER

Concerns, comments and recommendations

Section 46, in so far as it is relevant to this matter, provides that a coroner may comment on anything connected with a death that relates to public health or safety, the administration of justice or ways to prevent deaths from happening in similar circumstances in the future.

The only policy issue raised by the circumstances of this case concerned an apparent anomaly in the OPMs that prohibits an officer from firing at a motor vehicle. It was suggested this might be inconsistent with an officer's right to self defence. I was assured this is being reviewed. In those circumstances there is no need for me to make any comment in relation to the issue other than to urge those undertaking the review to ensure any changes do not undermine the very sound policy reasons for prohibiting officers firing at vehicles in circumstances where others could be placed in grave danger as a result.

I close this inquest

Michael Barnes
State Coroner
Brisbane
10 March 2010