Case No: CO/6888/2003
[2004] EWHC 2729 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2004

Before :

The H^{on}. Mr Justice Collins

Between :

R (Anderson & Others)
v
H.M. Coroner for Inner North Greater London

Mr Michael Bromley-Martin Q.C. & Mr Hugh Davies (instructed by Messrs Reynolds Dawson, Solicitors) for the Claimants
Mr Ian Burnett Q.C. & Ms Clodagh Bradley for the Commissioner of Police for the Metropolis
Mr Patrick O'Connor Q.C. & Miss Phillippa Kaufmann (instructed by Messrs Bhatt Murphy, Solicitors) for the Sylvester Family
Mr Philip Havers Q.C. & Mr Martin Forde (instructed by Hempsons, Solicitors) for Enfield Haringey Mental Health Trust

Hearing dates: 3 – 5 November 2004

JUDGMENT: Approved by the Court for handing down (subject to editorial corrections)

Mr Justice Collins:

1. Roger Sylvester at the time of his death on 18 February 1999 was 30 years old. He was well built and physically fit but somewhat overweight at just over 18 stone. He had the misfortune to suffer from mental illness in the form of bipolar disorder or manic depression. For much of the time he was a thoroughly pleasant person, described by a witness who had known him for some time as the kind of man you would be happy for your daughter to bring home. But he was liable to relapse and this resulted in sometimes violent behaviour and the need for treatment in hospital pursuant to the Mental Health Act 1983. As a result, he was known at the local hospital, St Ann's, where he had been treated when relapses occurred. It was not possible to forecast when any relapse might occur but a trigger was the taking of cannabis.

2. On 11 January 1999 Roger had taken cannabis and this produced a cannabis induced delirium. Shortly after 9.30pm on that evening he was seen behaving in a very strange manner outside where he lived in Summerhill Road, Tottenham. It was a cold winter's night, but he was naked. He was banging on the door of a darkened house and shouting and throwing himself to the ground in movements variously described as like a parachute landing or a goalkeeper diving. He was seen by a neighbour who called the police. At first, two officers arrived in the incident response vehicle. One approached Roger and asked him his name and why he was naked but got no coherent response. Two more officers arrived and decided, not surprisingly, that Roger appeared to be mentally ill and he needed to be taken to a place of safety in accordance with s.136 of the Mental Health Act 1983. This provides by subsection (1): -

> "If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person or for the protection of other persons, remove that person to a place of safety within the meaning of section 135 above".

   By s.135(6) a place of safety includes a hospital.

3. Since Roger was behaving so strangely and was incoherent, it was decided, having regard to his size and physique that it would be sensible to call for a van and some reinforcements. By the time the van arrived, there were eight officers at the scene. Restraint was considered necessary, and so a decision was made to handcuff Roger. Initially, it was thought that his hands should be behind his back and the handcuffs were attached to his left wrist. But it was then decided that it was more sensible to have his hands in front and so he was handcuffed in what is described as the 'stacked' position, that is to say, with one wrist above the other. Unfortunately, as he was struggling, it was impossible to readjust the attachment to the left wrist which, because it had been done with a view to his hands being behind his back, was positioned once his hands were in front so that the key could not be inserted to lock it so as to prevent any tightening. This meant that when he struggled, the handcuffs might tighten and so cause some pain.

4. In due course, he was carried into the van. Neighbours, who saw what was happening did not criticise the officers' behaviour (subject to surprise by one witness that no attempt was made to cover him with something). There was no suggestion that any excessive force was used. The hospital was only about ½ mile away and there was no suggestion that he was treated in any way improperly during the journey. In St Ann's there is a room known as the 136 room to which those brought into the hospital pursuant to s.136 of the Act are taken. Roger was taken to this room. Unfortunately, a doctor was not immediately available and he had to be restrained by police officers for approximately 20 minutes. He then suffered a cardiac arrest which put him in a coma until he died on 18 January.

5. It is entirely understandable that his family should have believed that excess violence must have been used. Roger had been the subject of compulsory admission to hospital

for treatment in the past and he had been violent and restraint had had to be applied. But he had not sustained any lasting injury. He was physically fit. He should not have died. The family's concerns were aggravated by a foolish statement made by the pathologist initially instructed by the coroner that he had taken cocaine. This was untrue and his family knew that it was untrue. It is obviously important in such a situation that a public inquiry or, if appropriate, a prosecution should follow as soon as possible so that what happened can be aired in public. Unfortunately, that did not happen. There was an investigation, initially by the Metropolitan but later by the Essex Police, under the supervision of the Police Complaints Authority. The C.P.S. decided not to institute criminal proceedings against anyone. The family sought judicial review of this decision. That claim was adjourned pending the holding of an inquest. Unfortunately, due largely to the illness of the coroner within whose jurisdiction Roger's body lay, there was a considerable delay before the inquest could be held. Eventually, it was re-opened on 8 September 2003. Evidence was heard over 15 days. The coroner's summing up, which was interrupted by a substantial number of legal submissions, commenced on 1 October 2003 and the jury returned its verdict on 3 October 2003. It decided that Roger had been unlawfully killed.

6. This claim is made by the eight police officers who were involved with Roger on the night of 11 January 1999, all of whom were suspended following the verdicts at the inquest. Two of the eight took no part in restraining him at the hospital and, since the verdict concerned only those six who were involved in the restraint, it is difficult to understand why those two should have been suspended or implicated at all. I am asked to quash the verdict. Three grounds are relied on. First, it is said that the coroner should not have left unlawful killing to the jury since there was no evidence to justify it. Secondly, it is said that the coroner's summing up was wholly inadequate, both as to fact and law. Thirdly, it is said that the jury's findings in the inquisition were perverse and demonstrated that they could not have understood and certainly failed properly to apply the law relating to unlawful killing.

7. At the inquest, the family, the individual police officers and the Commissioner of Police for the Metropolis were all represented by leading and junior counsel and the NHS Trust was represented by experienced junior counsel. It cannot be and has not been suggested that all material evidence was not placed and thoroughly tested before the jury. Before me, Mr Bromley-Martin Q.C., supported by Mr Ian Burnett Q.C., has submitted that the inquisition should be quashed, but that it is not necessary in the circumstances that a fresh inquest should be held. Mr Havers Q.C., has not taken part in the argument whether the inquisition should be quashed, but has submitted that, if I were to decide to quash it, no fresh inquest should be held. Mr O'Connor Q.C. has submitted that the verdict of unlawful killing was proper and properly reached and so should stand but that, if I decided to quash it, a fresh inquest should be held, unless I decided that on the evidence unlawful killing should not have been left to the jury. It was common ground that if I found in the claimants' favour on the first ground of this challenge no further inquest was needed.

8. The powers contained in s.136 of the 1983 Act to remove to a place of safety inevitably require that the person concerned can be kept safe in the sense that harm to himself or others is prevented until he can be seen by a doctor and, if necessary, given some form of sedation. So it is that the 136 room is provided by the hospital and it is anticipated that from time to time persons who are being violent may have to be kept under restraint until they can be seen by a doctor in that room. A protocol had been drawn up between the Tottenham police and St Ann's hospital in October 1996 headed: "Instructions for Persons Detained under section 136 Mental Health Act 1983 and conveyed to Mental Health Emergency Reception Centre at St Ann's Hospital". So far as material, this provided that those detained by the police under s.136 should normally be taken direct to the reception centre at St Ann's and should not be taken to Tottenham Police Station. The necessary paper work was identified and the hospital had to be notified of the impending arrival of a person detained by telephone. Paragraph 9 reads:

> "Where known details must be given to the hospital over the phone prior to arrival giving the name, address, date of birth together with brief details of

> circumstances surrounding detention. This is of paramount importance if the subject is, or has been violent so that proper arrangements for security and safety can be made by the hospital staff who will be present on arrival".

The police officers complied with these obligations so far as possible. Since Roger was in the throes of cannabis induced delirium, he appeared unable to understand what was said to him and was certainly unable to communicate with the officers. Paragraph 10 of the protocol is important. It provides:

> "At the reception centre police officers MUST remain to provide security and ensure safety of hospital staff and the patient until they have been released on the authority of the duty nurse or doctor. Under these circumstances we have a clear lawful duty to ensure security and public safety, preserve the peace, and prevent offences being committed. The safety and security of police, patient and hospital staff are paramount.
>
> St Ann's NHS Trust has made an understanding in respect of all cases that they will ensure that police will not be detained any longer than necessary and will endeavour to ensure that no police officer is required to remain present for longer than 1 hour. The exception to this is where there is a genuine delay and there is a risk that the patient is likely to cause harm or injury to self or others or is likely to cause criminal damage to property".

This shows that normally police would not expect to be required to remain with the detained person for more than one hour, but that it was possible that they might have to restrain him for more than a few minutes.

9. A police officer in exercising his powers under s.136 is entitled to use reasonable force. If someone is violent, he can be restrained and in order to restrain him, it is obvious that force will necessarily be used. Guidelines have been published by the Metropolitan Police and training is given to officers on the use of reasonable force. Apart from the mentally ill who are dealt with under s.136, officers will frequently have to deal with persons who resist arrest and so guidance on what is reasonable is essential. But it will always depend on the circumstances of an individual case. The relevant guidelines in force at the material time were contained in Notice 3/97 which, inter alia, reminded officers of the potential for deaths to occur through positional asphyxia. In the Notice, this is said: -

> **"Positional Asphyxia**
>
> This notice is issued to remind officers of the potential for deaths to occur through 'positional asphyxia'.
>
> Positional asphyxia is defined as occurring when "the position of the body interferes with respiration, resulting in asphyxia".
>
> Positional asphyxia is likely to occur when a person is in a position that interferes with inhalation and/or exhalation and cannot escape that position.
> Positional asphyxia can occur extremely rapidly.
>
> **Risk factors**
> The following factors can contribute to death through positional asphyxia.
>
> - The body position of a person results in partial or complete airway obstruction and the subject is unable to escape from that position
> - Pressure is applied to the back of a person held in the face down prone position

- Pressure is applied restricting the shoulder girdle or accessory muscles of respiration whilst laid down in any position
- The person is intoxicated through alcohol or drugs
- The person is left in the face down, prone position
- The person is obese (particularly those with large 'beer bellies')
- Where the person has heightened levels of stress
- Where the person may be suffering respiratory muscle fatigue, related to prior, violent muscular activity (such as after a struggle).

Signs and symptoms

Officers must be aware of the following signs and symptoms and take immediate remedial action to relieve the symptoms and give first aid:

- Gurgling/gasping sounds
- An active person suddenly changes to being passive (that is, loud/violent to quiet/tranquil)
- The person appears to be panicking
- Verbal complaints of being unable to breath, probably associated with an increased effort to struggle; or
- Cyanosis (blue colouration in facial skin)

Cyanosis is very difficult to detect in some individuals (for example, those with dark skin, whose complexion may instead display a purplish/blue tinge around the lips or nail beds) or in poor lighting conditions.

Reducing the risk

The risk of positional asphyxia can be reduced:

- Once handcuffed, the person should be placed in a seated, kneeling or standing position, as soon as possible.

- A prisoner's condition and life signs should be monitored before, during and after transportation. The rapidity of the onset of problems, especially if multiple factors are present for example large, obese individuals who have consumed alcohol and have been stressed by physical struggle, can be very fast – seconds not minutes. Vigilance is of the utmost importance.

- Unless wholly unavoidable, prisoners should not be transported in the prone, face down position. In the exceptional circumstances where this is necessary, constant attention should be paid to the condition of the prisoner and immediate steps taken to alleviate any breathing difficulties.

If there is any doubt about the medical well being of a prisoner, first aid must be given and medical assistance obtained immediately.

When any prisoner, in the course of arrest or afterwards, is physically restrained, full details must be recorded and drawn to the attention of the custody officer".

A later Notice, number 12/99, was produced before the jury. This post-dated the events of 11 January 1999. It dealt particularly with persons who displayed violence induced by mental illness. This emphasised the dangers of the prone (face down) position and the need to place a 'resistive subject' into a seated, kneeling or standing position, as soon as possible once control had been achieved, either by handcuffing or other means.

10. Evidence of what was occurring in Room 136 while Roger was being restrained came from the officers and from four members of the nursing staff at the hospital and one doctor. None of the hospital witnesses was present for the whole time Roger was under restraint and some only saw events over a very short period, in one case for a couple of seconds. None of them thought that excessive force was being used. Roger was struggling violently and the delirium gave him extra strength. The officers in cross-examination by Mr Ian MacDonald, Q.C. on behalf of the family were asked whether they were aware that if Roger had been restrained while lying prone on his front that would have been dangerous. The flavour of the cross-examination can be sensed from the following questions to and answers by the first police officer to give evidence: -

> "Q. … I think you would appreciate that if in fact you had been restraining Mr Sylvester prone and flat on his tummy, that would have been quite dangerous"
> A. Yes
> Q. I think you have accepted, so far as positional asphyxia is concerned, that it would have been extremely dangerous to have held Mr Sylvester flat on his stomach, prone, on the hospital floor?
> A. Yes
> Q. That would have been unsafe, and I think you would agree with me, that would have been an unreasonable use of force?
> A. Yes, but the training is where possible and practicable to try and put somebody on their side".

It was suggested to each officer, but denied by each, that Roger had been held face down on his tummy. Each officer was adamant that he had been held so far as possible in what was described as the 'recovery position', that is to say, on his side and one officer at all times was holding his head sideways to ensure that he could breathe properly.

11. Before commencing his summing-up, the coroner received detailed submissions, both written and oral, as to what had to be established in order to justify a verdict of unlawful killing and whether that verdict should be left to the jury. It was accepted by Mr MacDonald on behalf of the family that only manslaughter resulting from an unlawful act could be left to the jury and it was not contended that the facts would require the coroner to leave a verdict of unlawful killing based on gross negligence. Mr O'Connor had sought to question that decision, submitting that the failure to put Roger into a kneeling or sitting position was negligent, but he did not at the hearing pursue this point. I am entirely satisfied that Mr MacDonald was correct to concede as he did. The evidence from all witnesses was that Roger was struggling throughout and was not compliant. He may have been controlled by the officers, four of whom were needed at all times to restrain him, but it was not suggested by any witness that the control had reached a level which made it safe or appropriate for him to be raised from the floor.

12. But even if it could be said there was negligence, it is not even arguable that it reached the standard to establish the offence of manslaughter. I shall have to consider what happened in the 136 room in greater detail when I deal with the first ground of the claim, but it suffices to say at this stage that there is no evidence of gross negligence. Reliance is placed on the evidence of a Mr Morris, a specialist clinical nurse, who spoke of the management of aggressive patients at Broadmoor. He had not seen anything of the events on 11 January 1999. No doubt it might have been possible for the officers to have acted differently, but that is not the point. As I have said, the evidence from those who did see what was happening was all one way: the officers were acting reasonably and Roger's struggles were such as to require continuing restraint. Mr O'Connor asserted that, although aware of the risk of a heart attack, the officers chose to run that risk in order to avoid the quite different and lesser risk of some relatively minor injury if Mr Sylvester were lifted to his knees or to a seat and full control were lost over him. That I regard as wholly unfair since it ignores both the strength of Roger's struggles and the officers' reasonable reaction to what was a fraught and difficult situation.

13. In his skeleton argument prepared for the coroner, Mr MacDonald submitted that the jury would be entitled to conclude that Roger was restrained in a prone or face down position other than merely momentarily and that restraint of that nature amounted to the use of dangerous and excessive force. He also submitted that restraint when Roger was in a three quarters prone position was also dangerous and so constituted an unlawful act because it amounted for all practical purposes to fully prone restraint. He submitted that the unlawful act was the application of more force than was reasonably necessary or the application of force for longer than reasonably necessary. That was in my view an unfortunate formula since it could, unless the acts which were capable of establishing excessive or unduly lengthy restraint were carefully identified, persuade the jury to find unlawful killing even though the restraint was reasonable. In reality, it was only if Roger was deliberately kept prone on his stomach for a significant period that it could properly be decided that the force was unreasonable. So much (subject to the submission that in addition to hold him there three quarters prone would suffice) was conceded, and properly conceded by Mr MacDonald. Mr O'Connor did not seek to argue the contrary, recognising that there was no evidence which could conceivably justify a finding of unreasonable force based on the restraint over the time Roger was in the 136 room unless the jury were satisfied that the manner in which the restraint was carried out contravened the guidelines. In his ruling following the argument whether unlawful killing should be left to the jury, the coroner said this (in the absence of the jury): -

> "The facts in this case are that Mr Sylvester was detained/restrained within the 136 Room for between fifteen and twenty minutes on the evening of the 11.01.99. It was on the face of it, a lawful restraint. It was conceded in evidence that restraint is known to be dangerous. It carries a risk of harm. However I accept the submissions made by Mr Thwaites and Mr Bromley-Martin that dangerousness is not to be equated with unlawfulness. Dangerousness is determined by the objective test. This test is satisfied by the officers' own evidence and the evidence of others that any degree of restraint carries a risk of harm. I consider it a matter of fact for the jury to determine if or when and how the restraint that was on the face of lawful became unlawful by the application of unreasonable force or for an unreasonable time. There is nothing in the authorities to which I have been carefully referred which persuades me that unlawful killing, can only arise from a neutral situation. A lawful act can progress on the facts into becoming an unlawful act. On the facts of this case, because prima facie and most times depending on what the jury find, there was lawful restraint, it does not prohibit the jury from determining that at times, to be determined by them, restraint was or became unlawful either for a prolonged period of time or specified period of time or at intervals and there could be a series of unlawful acts".

This passage suggests that the coroner was adopting a test which was not justified, since he seemed to be saying that any restraint carried a risk of harm and so could found an unlawful killing verdict. However, a little later he said this: -

> "In this case, there was conflict about the manner and position of restraint within Room 136. The balance in numbers of witnesses supporting the officers' account may outweigh the contrary witnesses, but there is some evidence upon which the jury might determine the fact that there was an intention to act unlawfully and dangerously by way of excessive restraint and this inadvertently caused Mr Sylvester's death. Therefore I find there is some evidence applying the *Galbraith* test [*R v Galbraith* 73 Cr App R 124] … upon which the jury can determine unlawful killing in this case".

14. This suggests, although he does not spell out what acts could be relied on by the jury, that he recognised that the restraint could only be regarded as unreasonable and so unlawful if the jury found as a fact that the officers did something which they knew to be wrong and that could in context only have been to restrain Roger when he was prone face down.

15. At the conclusion of the coroner's ruling, Mr Bromley-Martin raised what he called the *Palmer* direction based on the decision of the Privy Council in *Palmer v R* [1971] A.C. 814. That case concerned self-defence and the passage in the judgment given by Lord Morris of Borth-y-Gest at p.832B in the following terms was relied on: -

> "If there has been an attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be the most potent evidence that only reasonable defensive action had been taken".

While this is not directly applicable to the need to restrain violent persons or patients, the analogy is obvious and the test is clearly relevant. But it was less appropriate in this case since the officers had all denied that they had deliberately kept Roger prone face down. Since that was the only basis upon which a verdict of unlawful killing could conceivably have been justified, the need for a *Palmer* direction is not obvious.

16. The coroner commenced his summing-up to the jury after lunch on Thursday 2 October 2003. He told them that he was proposing to give them directions orally but that written directions would be provided on the following day. He would, he said, leave four possible verdicts, unlawful killing, accident, an open verdict and non-dependent abuse of drugs. In relation to unlawful killing, he said this: -

> "I will first deal with the highest verdict that I am going to leave you to consider because I think that there is some evidence upon which you might want to return this verdict. The highest verdict is that this was a case of unlawful killing due to an unlawful dangerous act. You can find that there was unlawful killing, if the facts prove that there was an intentional act which was unlawful and dangerous and that act caused the deceased's death. There must be an unlawful act and it must be dangerous. The unlawful act is a matter for you to determine and determine whether more force was applied than reasonably necessary or whether the application of force was for longer than necessary occurred by way of restraint in what was otherwise a lawful detention in the section 136 [room] at St Ann's Hospital. If on the facts as you determine them, the force exceeded that which is reasonably necessary, then that force constituted an assault. Whether the unlawful act was dangerous is to be determined by an objective test, i.e. would all sober and reasonable people recognise its danger. The unlawful dangerous act caused death if you find that it more than minimally contributed to the death.
>
> In determining the factual issues and in determining this, if you decide on the evidence that this was unlawful killing, the burden or standard of proof you have got to satisfy is that it is proved beyond all reasonable doubt in that you are so certain that you are sure".

17. The coroner did not include the *Palmer* direction, although he had told Mr Bromley-Martin that he would. But, more importantly, the direction was in general terms and failed to identify how the jury should approach their task. Since the only basis upon which the jury could find unlawful killing proved was if they were satisfied that Roger had been held prone face down, that should have been made clear. As it was, the direction was unsatisfactory since it would enable the jury to find unlawful killing purely on the ground that the restraint had gone on too long. Furthermore, as will become apparent when I consider ground 1 in more detail, causation was very much in issue and the coroner needed in due course to deal with it with some care. The direction regarding excessive force was also potentially misleading. The reality was that the force could only be unreasonable and so be regarded as unlawful if Roger had been held prone face down. It was the wrong sort of force rather than excessive force, since there was no evidence that the force used to restrain Roger was at any time otherwise excessive.

18. At the end of the afternoon, counsel asked to see the proposed written directions before they were handed to the jury. The coroner asked for further assistance on the *Palmer* direction. Overnight, counsel produced their own drafts, Mr Bromley-Martin's being in the form of an algorithm. Following further argument the next morning, the coroner decided to leave both his and Mr Bromley-Martin's written directions together with a partially completed Inquisition, leaving the jury to amend and complete it as they thought fit.

19. The two directions on unlawful killing given to the jury were as follows. First, that drafted by the coroner read: -

> "**Unlawful Killing due to an Unlawful Dangerous Act**
>
> The jury can find unlawful killing if the facts prove that there was an intentional act that was unlawful and dangerous and that act caused the death.
>
> There must be an unlawful act and it must be dangerous.
>
> The 'unlawful' act is a matter for the jury to determine whether more force was applied than reasonably necessary, or the application of force for longer than necessary by way of restraint in what was otherwise lawful detention in the Section 136 room at St Ann's Hospital. If on the facts force exceeds that which is reasonably necessary that force constitutes an 'assault'.
>
> Whether the unlawful act was dangerous is determined by an objective test. Would all sober and reasonable people recognise its danger.
>
> The unlawful dangerous act caused death if jury find it more than minimally contributed to the death.
>
> The standard of proof required is:
>
> *Beyond all reasonable doubt. So certain that you are sure".*

Secondly, the more elaborate direction in the form of an algorithm asking four questions read: -

> **"Unlawful killing due to an unlawful dangerous act.**
>
> Question 1
>
> Are we satisfied beyond reasonable doubt that the act or acts of restraint of Roger Sylvester by police officers was or were more than a minimal cause of the death?
>
> If the answer is no – there can be no verdict of unlawful killing.
>
> If the answer is yes – go to question 2.
>
> Question 2
>
> Are we satisfied beyond reasonable doubt that any causative act of restraint identified in question 1 was intentional, that is to say not accidental?
>
> If the answer is no – there can be no verdict of unlawful killing.
>
> If the answer is yes – go to question 3.

> Question 3
>
> Are we satisfied beyond reasonable doubt that the restraint identified above was unlawful? That is to say, are we satisfied beyond reasonable doubt that more force was used than was reasonably necessary, or that the force was used for longer than was reasonably necessary? In deciding whether an act was unreasonable or unnecessary you must bear in mind that a person committing it cannot be expected, in the heat of the moment, to measure the exact amount of force that is necessary. If you think that the person committing the act honestly and instinctively thought that what he was doing was necessary that would be evidence that the act was reasonable and necessary. It is for you as the tribunal of fact to say what degree of force is reasonable and necessary in the circumstances as the police officers believed them to be.
>
> If the answer is no there can be no verdict of unlawful killing.
>
> If the answer is yes – go on to question 4.
>
> Question 4
>
> Are we satisfied that the restraint identified above was dangerous? The legal definition of dangerous is as follows:
>
> "The unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to at least the risk of some harm resulting there from albeit not serious harm".
>
> You, the jury, represent sober and reasonable people. You may also ask the question in this way: are we satisfied beyond reasonable doubt that the restraint identified above would have inevitably been recognised by all of us as one which must have subjected Roger Sylvester to the risk of some harm, albeit not serious harm?
>
> In reaching your conclusion you, the jury, may take account of all the evidence of the police officers and staff at St Ann's Hospital and the findings of fact that you make.
>
> If the answer is no – there can be no verdict of unlawful killing.
>
> If the answer is yes – you may return a verdict of unlawful killing and set out the causative, intentional, unlawful and dangerous act or acts in the narrative of the Inquisition".

20. These were general directions. Mr O'Connor submits that Mr Bromley-Martin, having drafted the more elaborate direction, cannot now complain that it was inadequate. There are two answers to this submission. First, Mr Bromley-Martin was perforce having to accept the coroner's original ruling as reflected in his oral direction. Secondly, it was for the coroner to direct the jury's attention to the evidence which was capable of establishing that the force used was unlawful. The generality of the written direction made it all the more important that he should do that.

21. An inquisition cannot identify any individual in a finding of unlawful killing. An inquest is not concerned to attach and is indeed expressly prohibited from attaching civil or criminal liability to anyone in particular. It is concerned only to determine who the deceased was and how, when and where the deceased came by his death. However, a finding of unlawful killing will almost inevitably be regarded as a condemnation of the actions of one or a number of easily identifiable persons. It is presented in the media and regarded generally as a positive finding that that person or those persons between them have been guilty of a criminal offence, in this case, manslaughter. It is for this reason that the

law requires that a verdict of unlawful killing be proved to the criminal standard: see *R v West London Coroner ex p. Gray* [1988] Q.B. 467.

22. It has always been important that any death in custody should be examined with the greatest care and in public. It is now, since the coming into force of the Human Rights Act 1998, essential in order that there should be compliance with the obligations of the state under Article 2 of the European Convention on Human Rights: see *R(Middleton) v West London Coroner* [2004] 2 A.C. 182. This death occurred before the 1998 Act came into force and the obligations arising under it are not applied retrospectively, but nothing turns on that since the jury did explain why they reached their verdict. However, it must be borne in mind that the safeguards applicable to a trial of anyone charged with a criminal offence are not in place. In *Gray's* case, Watkins LJ cited observations of Lord Lane CJ in an unreported case, *R v South London Coroner ex p Ruddock* (8 July 1982), when he said: -

> "The coroner's task in a case such as this is a formidable one … once again, it should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for the one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecution accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use".

The only gloss which should be applied to this dictum is that the establishment of the facts will now extend to considering not only by what means the deceased met his death but also in what circumstances. The absence of any opening or closing speeches at inquests means that the need for clarity in a summing-up becomes all the more important. This is not to say that a summing-up should be subjected to a close analysis or that the absence of a particular form of words or indeed of particular directions will necessarily be fatal. But the jury must know clearly what they must find as facts in order to justify any verdict, especially one which decides that a criminal offence has caused the death. The law must always be applied to the facts of a given case. A general direction is usually not sufficient and may be misleading.

23. In addition to the two written directions on unlawful killing, the jury were given inquisitions appropriate to each of the four verdicts which the coroner was leaving to them. I do not need to refer to those dealing with the verdicts other than unlawful killing. That read: -

> **"Unlawful Killing.**
>
> 1(a) Hypoxic Brain damage
>
> 1(b) Asystolic/bradycardic arrest.
>
> 1(c) metabolic, hypoxic, cardiovascular and respiratory consequence during restraint.
>
> 2. Cannabis induced delirium
> At about 22.25 on 11.01.99 in room 136 at St Ann's Hospital, Tottenham, the deceased collapsed whilst struggling against restraint. The deceased was lawfully detained except, as set out below, when more force was applied than was reasonably necessary and/or the force was applied for longer than reasonably necessary by way of restraint causing a significant contribution to the adverse consequences of restraint.
> 1.
> 2.
> 3.

> 4.
> Roger Sylvester was killed unlawfully".

As will be seen, in 1(a),(b) and (c) were set out the immediate (1(a)) and contributory (1(b) and (c)) causes of death. The finding in 2 gave the reason why Roger was in a state which had led to the need for him to be restrained. Before explaining how the jury should deal with the document, the coroner added the *Palmer* direction to his previous oral directions on unlawful killing but did not help the jury to identify what must be established on the facts of the case before them to justify a verdict of unlawful killing. He then again summarised the evidence at some length.

24. Overnight counsel drafted yet more amendments to the directions and tried the next morning to persuade the coroner to amend his directions. In the course of the argument in the absence of the jury, the coroner said this: -

> "It is going to be a matter for the jury to determine whether Mr Sylvester was ever restrained in that position flat, prone and that is for the jury to determine between the evidence of the officers and those of the Trust staff who gave a different version of the restraint and they as the jury will have to apply the objective test to what they find the officers were doing, whether they find they were effectively pinning him down as Mr Bersabel [a nursing assistant] says or were as some of the evidence suggests they were trying to maintain him on his side".

Although Mr Bromley-Martin said that this would be a misdirection, it suggests that the coroner was alive to the need to identify that the restraint was 'flat, prone' before unlawful killing could be established.

25. The next morning, the coroner again repeated some of the evidence directed to what happened in the 136 room. He repeated his direction on unlawful killing. I do not need to set it out: it followed what he had previously said and was in accordance with the shorter of the two written directions. He then proceeded to explain how they should treat the inquisition. He said this: -

> "I have also suggested a narrative for the time, place and circumstances at room Mr Sylvester sustained his injuries and again the narrative is a matter for you and the wording is a matter for you. But if you think this is unlawful killing, I want you to set out in the narrative and I have left four points blank, you may have one point, you may have more than four points. I want you to set out what constitutes the unlawful killing in that paragraph. And to help you to do that, I have set out some further questions in the second documents. Questions 1, 2, 3 and 4. Are you satisfied beyond reasonable doubt that the acts of restraining Mr Sylvester was or were the minimal cause of his death. If the answer is no, it can't be unlawful killing. If it is yes, go on to question 2. Are you satisfied beyond all reasonable doubt that any of the causal acts identified in question 1, was intentional; i.e. not accidental. If no, it can't be unlawful killing. If yes, go to question 3. Question 3 contains the directions I said I will give you. You don't need to know which case it's from it is a direction that I have given to you and I have amended as I think appropriate, bearing in mind a number of other cases I think. I hope it will assist you. In deciding whether an act was unreasonable or unnecessary, you must bear in mind that the person committing it can't be expected in the heat of the moment to measure the exact amount of force that is necessary. I have used that kind of wording, rather than wording that is sometimes used in other cases. If you think that the person committing the act honestly and instinctively thought that what he was doing was necessary, that would be evidence, and I say that would be evidence, it is a matter for you that the act was reasonable and necessary. It is for you to determine to say what degree of force is reasonable and necessary in the circumstances as the officers believed them to be. If the answer is no, it can't be unlawful

> killing. If the answer is yes, go onto question 4. Question 4, is an objective test. Are you satisfied that the restraint you have identified is a matter of fact was dangerous and the legal definition is set out in that quotation. The unlawful act must be such that all sober and reasonable people will inevitably recognise and must subject the other person to at least the risk of some harm resulting there from or be it not serious harm. It is an objective test. In reaching your conclusion, you may take account of all the evidence in this case, and the findings and fact that you make. Being an objective test, you've got to picture yourself as being there and deciding whether you think it was dangerous. A common phrase now when someone sees an incident is to say 'oh that will hurt' or words to that effect. There is a TV advert at that moment where that phrase is used. Think about what it would be like if you were witnessing the restraint that you find being applied if you answer all the other tests as yes, you get to this test, looking at it objectively, did you think it would cause or subject Mr Sylvester to at least the risk of some harm all be it not necessarily serious harm. It is an objective test. When you've determined the facts, and you've applied those tests and standard of proof is beyond all reasonable doubt, so certain that you are sure. If you are not so certain that you are sure you cannot return a verdict of unlawful killing".

26. He went on to point out that the narratives (which I have referred to as the Inquisition) were suggested only and the wording was entirely a matter for them. He said: -

> "You can reject or include those phrases, you can look at the other suggested narratives and say no, we are satisfied that should be a better phrase, you've heard the evidence yourselves if there is something I have left out in the summary, that you've heard in evidence, and you think it should be included and again, if more the emphasis and comments I have made, and go with what you've heard and with what you've got in your notes".

He then went on to deal with the medical evidence about the cause of death. I shall return to that when considering ground one and causation.

He ended this part of his directions thus: -

> "If you find on the facts that there has been an element of asphyxia, caused by the unlawful dangerous act if you find that there has been such unlawful dangerous act, and you find beyond reasonable doubt that more than minimally contributed to the cause of death, providing you go through the test and set out the findings, 1,2, 3 and 4 about what constitutes those unlawful acts then you can return a verdict of unlawful killing, setting out the details of how, when, and where you find those unlawful acts to occur. You've got to look at all the evidence and apply the tests. You've have heard what they've said about the strength of the struggle. They were aware to a degree subject to their training about the possible complications of prolonged restraint and advised hospital staff of these. They were aware and they were taken to documentation about the need to reposition the patient as soon as possible or when safe to do so. There is no specific guidance about the timing. It is as soon as possible or when safe to do so. You have heard what they have said about their options and lack of alternatives. I referred you to the test in Paragraph 3, or question 3 on unlawful killing about what they believed they were doing. Look at the exact wording in the question when you make a determination and think about what the officers thought and believed was necessary based on all the evidence".

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Just before he sent the jury to consider their verdict, he said this: -

> "So the verdicts are, unlawful killing beyond all reasonable doubt, going through the facts of the case, determining what the officers were doing, the timing of what they were doing, being compared to the descriptions others gave, do you prefer a chain of events on the evidence that Mr Sylvester being restrained in a prone, unlawful, unreasonable way, and looking at that, if you find that, objectively, was it dangerous and it advertently caused his death, if you are satisfied on all the elements including the causes of death beyond all reasonable doubt then you can return that verdict, if you are not satisfied, move on the next determining accident, the elements of the accident, the causes of death on the balance of probabilities, your narrative for the accident on the balance of probabilities, and complete the rest of the inquisition. Abuse of drugs likewise and if having gone through all the evidence, you are not satisfied that you can reach the other conclusions, because the burden of proof or the standard of proof has not been satisfied, go for an open verdict. But if you can reach a decision, you should".

Mr O'Connor relies on the words 'being restrained in a prone, unlawful, unreasonable way' as sufficient to draw to the jury's attention the need for them to be satisfied that Roger was restrained in a prone position before returning a verdict of unlawful killing. I am afraid I cannot agree. Apart from the possibility that the jury may have regarded the adjectives as being disjunctive, this was the only reference to prone in the context of what needed to be established and it did not come anywhere near providing the clear direction that the jury needed.

27. The jury did amend the inquisition. Paragraph 3 read as follows, under the heading 'Time, place and circumstances at or in which injury was sustained': -

> "At about 22.25 on 11.01.99 in Room 136 at St Ann's Hospital, Tottenham, the deceased collapsed while waiting medical assessment. The deceased was lawfully detained except as set out below when more force was applied than was reasonably necessary causing a significant contribution to the adverse consequences of restraint".

The juror who returned the verdict orally continued thus, according to the transcript: -

> "While held in restraint position for too long
> 2) rapid medical attention
> 3) No attempt was made to alter his position of restraint".

This was recorded on the written inquisition in slightly different language in that 2) read: -

> "Lack of medical attention".

I suspect the transcriber mistook 'lack of' for 'rapid'.

28. Mr Bromley-Martin submits that the manner in which the jury amended and filled out the reasons for their finding in the inquisition demonstrated that they could not have applied the right test. The amendment of the first sentence of paragraph 3 consisting of the deletion of the words 'whilst struggling against restraint' and the substitution of the words 'while awaiting medical attention' is, submits Mr Bromley-martin, significant. It shows that the jury were focussing on the length of time that Roger had had to be restrained because no doctor was available to deal with him rather than the nature of the restraint. Somewhat curiously, having regard to the reasons they gave, the jury deleted the words 'and/or the force was applied for longer than reasonably necessary' from the second sentence. That could counter the suggestion that they were wrongly focussing on the length of the restraint. But the reasons are unsatisfactory. Mr O'Connor accepts that 'lack of medical attention' is not capable of being a ground for a finding of unlawful killing. It was conceded that a failure to alter his position (which presumably concerned

the need to lift a person being restrained to his knees or to a sitting position as soon as control was achieved) could not justify a finding of unlawful killing since it would have constituted an omission and not an act. 'While held in restraint position for too long' is inconsistent with the deletion of reference to force being applied for longer than reasonably necessary.

29. Mr O'Connor submits that the jury must be taken to have meant by their reference to 'restraint position' that he was held prone. Similarly, the reference to no attempt being made to alter his position of restraint must, he submits, have been to restraint in the prone position. In my view, it is quite impossible to read the verdict in that way in the light of the jury's obvious concern that he had had to be restrained for too long because no medical attention was able to be given earlier. And in this connection the lack of any direction that it was only if the jury decided that he was deliberately held in the prone position more than momentarily and that was a causative factor in the death is important. The jury's confusion is demonstrated by the manner in which their verdict was recorded and that they were confused is not in the least surprising having regard to the way in which the coroner summed up the case to them. Thus I am entirely satisfied that grounds 2 and 3 are made out and that accordingly the verdict of unlawful killing cannot stand.

30. I must now turn to ground 1 since, if I am satisfied that unlawful killing should not have been left to the jury, no-one would seek to persuade me that a fresh inquest should be held. The test whether a particular verdict should be left to a jury is based on that applicable to a count in a criminal trial. The leading authority is *R v Galbraith* (supra), which establishes that if there is no evidence upon which a jury could properly reach a particular verdict, that verdict should not be left to them. If, however, the strength or weakness of a case depends upon the view to be taken of the reliability of a witness or witnesses, it should be left to the jury to decide. In *R v Inner South London Coroner ex p. Douglas-Williams* [1999] 1 All E.R. 344 at 349a, Lord Woolf, M.R. said this: -

> "The conclusion I have come to is that, so far as the evidence called before the jury is concerned, a coroner should adopt the *Galbraith* approach in deciding whether to leave a verdict. The strength of the evidence is not the only consideration and in relation to wider issues, the coroner has a broader discretion. If it appears there are circumstances which, in a particular situation, where in the judgment of the coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict".

It is, incidentally, while referring to this case, worth citing observations of Hobhouse LJ in the hope that something may be done to provide coroners with the same sort of assistance as is provided to judges in the Crown Court. At p.355, he said:-

> "I also endorse the need for legal directions to be given to juries in a clear and easily usable form. The use of written directions should be further considered in any case which is not wholly straightforward. There is scope for a body such as the Judicial Studies Board to be invited to prepare and provide sets of standard directions which coroners could use in such cases".

31. In considering ground 1, I must be careful to remind myself that whether I would have reached a verdict of unlawful killing is not relevant. The question is whether there was material on a reasonably possible view of the witnesses' evidence upon which the jury could have decided that unlawful killing was proved. I have had put before me transcripts of the evidence given by the witnesses at the inquest and, in addition, helpful

summaries produced by both Mr O'Connor and Mr Bromley-Martin from their respective points of view of what the witnesses said about the manner in which Roger was being restrained. Since no material criticism was levelled at the actions of the police in taking Roger into their custody to remove him to St Ann's or in the course of the short journey or in the manner in which he was taken into the 136 room, I shall concentrate on the twenty minutes or so of restraint while he was in the 136 room.

32. The picture painted by all the witnesses, both police and hospital staff, is of Roger struggling and having to be forcibly restrained the whole time he was in the 136 room. He was only under control in the sense that he was being held by a minimum of four officers. No suggestion is made by any witness that the force being used by the officers was at any time regarded as excessive. Thus the important question was whether there was evidence from which the jury could properly decide that Roger had been deliberately held prone face down for a sufficient period of time to have reduced the oxygen in his blood and thus have contributed to his cardiac arrest.

33. There were four hospital witnesses. Charge Nurse Denny had nursed Roger some two or three years earlier when he was an in-patient. She did not see him on his tummy: he was either on his back or his side and she said that what she saw was consistent with the officers trying to keep him on his side. It seems that she came into the room on some three occasions. Nurse Asamoah was summoned to come down by Charge Nurse Denny. He too knew Roger from a previous admission. He saw Roger being restrained by six officers. He was mainly on his side; in cross-examination by Mr MacDonald he said it was 'sort of recovery, tilting towards the ground'. Two officers were holding his feet, one his shoulders, one his head and one of the others was in the middle. They had him under control in the sense that he could not kick or move, but he was trying to do so. He called Roger by name but got no response. He was asked:-

> "Was there anything that you saw in that Room 136 about the way the police officers were restraining him, that caused you any concern?"

To that question his answer was 'No'.

34. Nurse Ukwunnah was asked to go down to the reception area. He looked into room 136 and saw six police officers restraining a black man on the floor who was naked and face down. He saw this for about 2 seconds. Two officers were holding his legs, two were pressing his shoulders and two were holding his head. He did not regard what he saw as unusual.

35. The main witness relied on to support the contention that Roger was being held face down was a nursing assistant, Mr Bersabel. He spent a considerable time (he reckoned about 10 minutes altogether) at the door of room 136 observing what was going on. He returned just before Dr Lawton arrived. He agreed that Roger was carried into the room and placed on his back, but he said when initially asked about Roger's position by the coroner that he was struggling heavily with his front against the floor and his head always on the side. He agreed with Mr Bromley-Martin that Roger was placed on his side and was facing the wall, but said his arms were underneath his stomach. He was moving all the time. The officers never showed any aggression to him. To Mr MacDonald he said he was sure that he was flat on his stomach with his head to the side. He was kept firmly on the floor by the officers: he was a strong man and they had a hard time with him. He said that Roger had called out 'I want to see a doctor' - he recognised his voice. It is accepted by Mr O'Connor that he cannot have been correct about that since Roger was in a state of delirium and unable to communicate at all. Mr Bersabel must have heard a police officer calling for a doctor. There is other evidence that one did. Mr Bersabel said that he had been trained in restraint procedures and that the officers were doing it in the way he had been taught to do it, face down with the head held to one side to check breathing. He did not criticise what he said he saw the officers doing.

36. Finally, there was Dr Lawton, one of two Senior House officers with psychiatric training on duty. To the coroner, she said that when she came into the room Roger was cuffed with his hands stretched out above his head, lying on the floor, belly side down, his head

turned to the left. The police were not being aggressive but were having a hard time restraining him. She recalled one of the officers pouring with sweat. Roger was tummy side down. She said:-

> "I don't know if he was completely flat, I don't know if he was angled at all, but he was tummy side down".

There then followed this important question and answer:-

> "The coroner: '… If completely flat is fully prone, 100% prone, and at 90^{o} on either the left side or right side in upright, what degree of proneness was Mr Sylvester? You are saying tummy side down, was he fully prone, 10^{o} prone, what would you say?'
>
> Dr Lawton: 'Well he definitely was not 90^{o} and I am unsure as to what angle he was. I am sorry, he was also really moving. Though he was moving his body because the police officer wasn't restraining that bit, that's the bit that he was moving most. I don't remember his limbs moving. But he was really moving his body. I am sorry, I don't know what degree'".

37. Dr Lawton left the room with one of the officers to get more details. On her return, Roger was still resisting the police strongly, his face still turned to his left. She crouched down close to him and noted that he did not seem short of breath. He then ceased struggling momentarily and then suddenly 'reared upwards by lifting his chest off the floor'. One of two officers who had been holding him down was forced up by the power of this movement and had to push him down again. Dr Lawton went to get a sedative and on her return discovered that Roger had stopped breathing and he had no pulse. With the assistance of the police, who were praised for their actions in this regard, Roger's breathing and his heart started again but unfortunately he had sustained irreversible brain damage so that he died on 18 January. She repeated in cross-examination that, although her earlier statements had referred to Roger lying flat, face down on the floor, she had meant belly side down and 'flat' was not completely accurate.

38. Reliance was also placed on evidence given by P.S. Anderson, who was effectively acting as the officer in charge. In his notebook and in an earlier statement he had described 'kneeling on his upper legs on the back'. In evidence, he said that that had been a bad description: what he had meant was that he was kneeling with his knees either side of Roger's thighs and was sitting on the side of his upper legs. There was evidence from the post mortem that there was bruising at the back of Roger's neck. This was, it was submitted, consistent with him having been on his front when he reared up and having been forced back down.

39. Mr Bersabel was clearly not a very reliable witness and had had a tendency to answer questions in cross-examination in a way favourable to whoever was questioning him. Nonetheless, the jury were entitled to believe the core of his account which was that Roger had been held prone face down. Nurse Ukwunnah's brief observation was consistent with that and P.S. Anderson's attempts to explain his earlier statements were not particularly convincing. Dr Lawton's evidence of how Roger reared up was not inconsistent with him having been on his front. In all the circumstances, there was evidence which could have entitled the jury to decide that he had been deliberately held face down. While the ultimate risk was of positional asphyxia, which did not occur or cause his death, there was clearly a risk that his breathing would be made the more difficult and so he would suffer from hypoxia, that is to say, a lowering of oxygen in his blood. A risk of some harm would have been obvious to a sober and reasonable person. The fact that a different sort of harm caused Roger's death does not preclude a verdict of unlawful killing.

40. Causation must also be established. This I have found more difficult. An ECG was taken as attempts were being made to revive Roger and this showed that he had been bradycardic as opposed to tachycardic. I was told, and I confess I found this

extraordinary, that the pathologists who gave evidence had not been informed of this. The importance is that, if his cardiac arrest had been caused by difficulty in breathing because of the position in which he had been held, the heart would have speeded up to try to pump oxygen. But, as the jury accepted in the inquisition, it was bradycardia which had caused the cardiac arrest. This was explained by Mr Wilson, an Accident and Emergency Consultant at the London Hospital. At the conclusion of his evidence, the coroner was asked to explain 'the different medical words used' and he did so in these words:-

> "The hypoxia, in Mr Wilson's evidence, there was a background of hypoxia and he says that was multifactorial and there is evidence, there were problems with metabolism, there was acid going out into the blood from the muscles, we also heard evidence previously, about potassium going out onto the muscles into the blood and some of the muscles enzymes, so there was metabolic problems, there was also an increase of adrenaline, we heard about that, so there was a metabolic problem caused by restraint and struggling. There was also an oxygen problem, oxygen demand, the need of the tissues to get oxygen and oxygen delivered, and that's to do with the mechanics of ventilation, how the muscles work to lift the rib cage up and the chest out to take oxygen to the system. Mr Wilson, having looked at all the clinical evidence and the ECG evidence, he feels that the final common pathway, he says that bradicardiac arrest, where the heart has slowed right down and stopped and gone into cardiac arrest and he is saying in his opinion that is due to vagal stimulation, the vagus nerve is stimulated and the cardiac of the heart is caused to slow right down and that could be caused by that final episode of possible, depending on what you find, breath holding, causing vagal stimulation and inhibition, slowing down the heart and he says the anoxia, lack of oxygen, low oxygen is hypoxia, anoxia is no oxygen, it is unlikely that there was no oxygen then, he held his breath, he strained but he had a background of hypoxia caused by the whole process in which he had been in since whatever you find on the facts, sometime before 22.00 hrs, and the process during St Ann's and he says that all then led to a bradicardic arrest. You still have to deal with the facts about the background of the hypoxia and the metabolic process, you've still got to determine as a fact what you think that final movement was about and you've got to look at the facts how Mr Sylvester was restrained, but I may have to come back and summarise to you, but is that fair to everyone?"

The force of rearing up caused vagal stimulation, but hypoxia could have been a contributory factor.

41. The hypoxia could have resulted from restraint whether he was held prone face down or not. It was more likely, as Dr Vanezis, one of the pathologists, had said if he was prone. But Dr Lawton did not notice any difficulty in breathing. It was only if hypoxia resulting from Roger being held face down had contributed in a more than minimal fashion to his death that causation could be established.

42. In my view, the coroner would have been justified in not leaving unlawful killing to the jury. The evidence to support it was very tenuous and the absence of any criticism of the police was a telling point. But it was more likely that being held face down would have produced hypoxia and so it was open to the jury to find causation proved. It was vitally important that they should have received a careful direction so that they knew that it was only if the holding face down had contributed substantially to hypoxia and that hypoxia had contributed substantially to death that a verdict of unlawful killing could be found. They received no such direction. Thus I am just persuaded that the coroner did not err in law in leaving unlawful killing to the jury. Equally, he would not have erred if he had declined to leave it.

43. I am entirely satisfied that there is nothing to be gained from a fresh inquest. The evidence has been considered in great detail and it is not suggested that there could be

any further evidence available. The parties know what the jury's conclusions are, namely that Roger was in their view restrained for too long. No doubt the CPS will reach a conclusion on its reconsideration following the inquest. I can see no conceivable reason why the family should want the matter to be reconsidered at vast expense when they have heard the evidence and know how and why Roger died. I am entirely satisfied that no jury would be likely to convict any officer of manslaughter – the safeguards applicable in a criminal trial would ensure that, even if the judge left it to the jury. Furthermore, if there were a fresh inquest, the coroner might well not leave unlawful killing and that would not be an error of law. Mr O'Connor informed me that the family did not want an unjust verdict, merely that they believed the jury's decision was a proper one. I entirely understand this approach, and do not in the least criticise them for seeking to uphold the verdict, but I have no doubt that a verdict of unlawful killing was not and would not be a just verdict.

44. This leads me to a final observation. There has been support for the family with the slogan 'Justice for Roger Sylvester'. Justice is impartial, hence her depiction as blindfolded. Of course, there must be justice for Roger, but there must also be justice for the police officers. The law applies equally to them as it does to anyone else. If they use excessive or unreasonable force and death ensues, they will be answerable. But only if the evidence is sufficient to prove unlawful killing should they be condemned by a jury. Justice requires that this verdict be quashed.

45. I will hear counsel on the precise nature of what order should follow, in particular, what verdict should result from my decision.