A excessive lapse of time that there has been in bringing the approval of the voluntary arrangement that was proposed to a conclusion since the interim order was first made in October 1988. For those reasons I dismiss this appeal.

Appeal dismissed.

B *Solicitors: Hempsons.*

T. C. C. B.

C

D

[COURT OF APPEAL]

*REGINA v. WOLVERHAMPTON CORONER, *Ex parte* McCURBIN

1990 March 12 Lord Donaldson of Lymington M.R., Stocker and Woolf L.JJ.

E

Coroner—Inquest—Standard of proof—Death in course of police arrest—Coroner's directions on verdicts of unlawful killing and misadventure—Whether jury required to be satisfied beyond reasonable doubt—Whether misdirection by coroner—Whether relief appropriate

F During a violent struggle with police officers the deceased died attempting to escape arrest. At a coroner's inquest to inquire into the cause of his death one of the police officers gave evidence that having forced the deceased to the ground, he had held him there with his arm around the deceased's head. There was other evidence that the officer's arm had gone around the deceased's neck and it was further suggested that the officer's arm might have inadvertently slipped down from G the chin to the neck in the struggle. The medical evidence was that the deceased had died from asphyxia. In indicating possible verdicts of death by misadventure and unlawful killing, the coroner directed the jury in relation to the latter to apply the criminal standard of proof, namely, that they should be satisfied beyond all reasonable doubt. He further directed them that unlawful killing amounted to death caused by gross negligence or recklessness, or resulting from an unlawful and dangerous act H which would necessarily involve the use by the officer of greater force than was reasonable in making the arrest. The jury returned a verdict of death by misadventure. In proceedings for judicial review the applicant, the brother of the deceased, challenged the jury's verdict on the ground that the coroner had misdirected the jury in requiring them to apply the criminal rather than the civil standard of proof and by wrongly directing them as to the elements of unlawful killing. The Divisional Court dismissed the application.

On appeal by the applicant:—

Held, dismissing the appeal, (1) that, although there was a technical distinction between the standard of proof in criminal proceedings and that in civil proceedings, the civil standard appropriate to a verdict of unlawful killing would, having regard to the gravity of the issue, be so high that it was effectively the same as the criminal standard, so that the result would be the same whichever were applied; that a coroner's direction on the standard of proof appropriate to a verdict of unlawful killing should therefore indicate that the jury were to be satisfied beyond all reasonable doubt or so that they were sure; but that in respect of a verdict of death by misadventure they should be directed to apply the less heavy standard of the balance of probabilities; and that, accordingly, the coroner had not misdirected the jury on the appropriate standard of proof (post, pp. 726E–F, 727G–H, 728A, C–E, 731B).

Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247, C.A. and *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74, H.L.(E.) applied.

Dicta of Watkins L.J. in *Reg. v. West London Coroner, Ex parte Gray* [1988] Q.B. 467, 477–478, D.C. approved.

(2) That in referring to manslaughter due to gross negligence or recklessness, which was inappropriate in the present circumstances, the coroner had introduced an irrelevant matter for the jury's consideration; but that since the remainder of his direction on unlawful killing was satisfactory and since it was clear that the introduction of the irrelevant matter, even if it amounted to a misdirection, had had no bearing on the outcome so that the jury had returned a proper verdict, the court in the exercise of its discretionary judicial review jurisdiction would not intervene (post, pp. 729F–H, 730C–D, H—731A).

Decision of the Divisional Court of the Queen's Bench Division affirmed.

The following cases are referred to in the judgment of Woolf L.J.:

Hornal v. Neuberger Products Ltd. [1957] 1 Q.B. 247; [1956] 3 W.L.R. 1034; [1956] 3 All E.R. 970, C.A.

Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74; [1983] 2 W.L.R. 321; [1983] 1 All E.R. 765, H.L.(E.)

Reg. v. West London Coroner, Ex parte Gray [1988] Q.B. 467; [1987] 2 W.L.R. 1020; [1987] 2 All E.R. 129, D.C.

The following additional cases were cited in argument:

Reg. v. South London Coroner, Ex parte Ruddock (unreported), 8 July 1982, D.C.

Stirland v. Director of Public Prosecutions [1944] A.C. 315; [1944] 2 All E.R. 13, H.L.(E.)

APPEAL from the Divisional Court of the Queen's Bench Division.

By notice of application dated 17 April 1989 the applicant, Desmond Anthony McCurbin, the brother of the deceased, applied for judicial review of the verdict of the Wolverhampton coroner's jury on 1 November 1988, at the conclusion of the inquest into the death of Clinton Ludlow McCurbin at the "Next" shop in Dudley Street, Wolverhampton on 20 February 1987, that the cause of death was misadventure. The applicant sought an order of certiorari to quash the decision of the jury, and an order of mandamus directing that a new inquest be held before another of H.M. coroners on the grounds, inter alia, that (1) in his summing up the coroner failed to direct the jury

A properly on the burden of proof in an inquest in that (a) there should have been no different standard of proof between a verdict of unlawful killing and any other verdict, such as misadventure, (b) being an inquisition and not a criminal trial the standard of proof was not the criminal standard of "beyond reasonable doubt" as the coroner directed in respect of a verdict of unlawful killing, (c) alternatively, if a criminal standard were to apply, the same standard ought also to apply to a B verdict of misadventure and the coroner should so have directed the jury; (2) in summing up the coroner failed properly to direct the jury, or alternatively misdirected them as to the requirements in law of a verdict of unlawful killing or why such a verdict might or might not have been appropriate in that (a) having correctly directed the jury that a verdict of unlawful killing meant that someone had committed murder or C manslaughter he failed to direct them as to the constituent elements of either, (b) he muddled up and confused the elements of manslaughter through an unlawful act and manslaughter by gross negligence, and (c) he wrongly directed the jury that they could have a verdict of unlawful killing by neglect or lack of care. On 29 June 1989 the Divisional Court (Glidewell L.J. and Rose J.) dismissed the application.

By a notice of appeal dated 25 July 1989 the applicant appealed on D the grounds, inter alia, that (1) *Reg. v. West London Coroner, Ex parte Gray* [1988] Q.B. 467 was wrongly decided and the Divisional Court were wrong to follow it; (2) being an inquisition and not a criminal trial the proper standard of proof was not the criminal standard of "beyond reasonable doubt" as directed by the coroner, but the civil standard of a balance of probabilities; (3) except in the case of an open verdict there E should be no different standard of proof as between a verdict of unlawful killing and any other verdict such as misadventure; (4) if, alternatively, the criminal standard of proof were appropriate, the same standard should have applied to a verdict of misadventure and the coroner ought, but failed, to have so directed the jury; and (5) having accepted that the coroner had misdirected the jury on the issue of manslaughter and that therefore there was an error of law, the Divisional F Court erred in holding that nevertheless the application for judicial review should be dismissed in that (a) the test proposed by the Divisional Court, namely that an applicant for judicial review had to show not only that there had been an error of law but also that the error had or might have resulted in a wrong verdict, went too far and placed too great a burden on the applicant, (b) a court should have refused to exercise its G discretion to grant certiorari or mandamus where there had been a material error of law, as in the present case, only if the court found that the jury would inevitably have come to the same conclusion if properly directed, and (c) on the present facts it was not possible to say whether the jury properly directed would not have brought in a different verdict.

The facts are stated in the judgment of Woolf L.J.

H

Ian Macdonald Q.C. for the applicant.
Nicholas Underhill for the police officers.
Patrick McCahill for the coroner.

WOOLF L.J. This is an appeal from a decision of the Divisional Court presided over by Glidewell L.J. on 29 June 1989, when the Divisional Court refused an application for judicial review seeking to set

aside a decision of a coroner sitting with a jury on 24 October and 1 November 1988. A

The facts giving rise to the application for judicial review and the coroner's inquest to which the application relates are set out clearly and very succinctly in the judgment of Glidewell L.J. in the Divisional Court and I cannot do better than repeat what he had to say.

He points out that it was an inquiry into the death of Clinton Ludlow McCurbin in respect of which the jury had returned a verdict that the deceased died as a result of misadventure. Glidewell L.J. indicated that many of the facts were not in dispute and then he went on to say: B

> "They are, shortly, that on the afternoon of 20 February 1987 the deceased went into the 'Next' shop in Dudley Street, Wolverhampton. He was in possession of a stolen visa credit card, which he attempted to use to buy goods. The shop staff became suspicious and the police were alerted. Two uniformed police constables, Hobday and Thomas, went to the shop. They asked the deceased to go with them. He made it clear that he had no intention of doing so and made to leave. They attempted to arrest him; a violent struggle ensued and the deceased tried to escape. In the struggle, the deceased fell or was pushed to the floor of the shop. He finished up lying face down; Hobday was at his head, with an arm round either his head or his neck; Thomas was somewhere around his waist; and a customer, a Mr. Belcher, who took the view that the police were not succeeding in the struggle, joined in to help them, holding McCurbin's feet. I should say that the evidence showed that McCurbin weighed 10½ stone, or perhaps something less, and that Hobday weighed 17 stone. Nevertheless it is quite obvious from the evidence that McCurbin was putting up a very violent struggle and there was a prospect of him escaping. The officers and Mr. Belcher held the deceased in that position until other police officers arrived; and then the deceased was handcuffed and carried to the rear of the shop. At that point it was seen that he was not moving. The police officers, and then some ambulance men who arrived, tried mouth-to-mouth resuscitation, but to no avail; a police surgeon who was summoned found him to be dead. The whole incident, from the first arrival of the two police constables until the ambulance was summoned, lasted no more than 12 minutes. Until this incident the deceased was a fit young man, 24 years of age. There were two pathologists who gave evidence at the inquest, Dr. Kenneth Scott on behalf of the Home Office and Dr. Ian West on behalf of the family. They expressed the cause of death, in somewhat different words, as being asphyxia as a result of compression of the neck. There were three possible verdicts open to the jury: unlawful killing, misadventure or an open verdict. In the context of this case it is agreed that unlawful killing meant manslaughter; there was no question of murder." C D E F G H

Glidewell L.J. then turned to the facts and he pointed out, first of all, that:

> "Both pathologists agreed that the asphyxia probably occurred as a result of an arm being held tightly around the neck of the deceased under his chin."

A He indicated that the first and, indeed in my view, the primary question of fact that was in issue was:

> "'Did P.C. Hobday have his arm around the deceased's neck? In evidence he denied it. He said that his arm was around the deceased's head. Other witnesses in the shop, and there were a number of civilian witnesses in the shop who gave evidence at the
> B inquest, said that Hobday's arm was around the deceased's neck."

Glidewell L.J. then goes on to point out that Dr. West, the pathologist called on behalf of the family, in the course of his evidence, suggested a hypothesis, namely that:

> "P.C. Hobday's arm might have been originally around the deceased's chin, which would not have caused any serious injury,
> C but may have slipped during the course of the struggle so that it then lay around the deceased's neck."

He then finally referred to a third piece of evidence. That was evidence from Mr. Belcher, the person who had been at the deceased's feet. He said that he heard the constable say at one point: "Hold his neck—I'll break his bloody neck." Glidewell L.J. said with regard to that: "Did
D Hobday say that and, if he did, did he mean it?"

Having referred to those facts, I turn to deal with the three submissions which Mr. Macdonald, on behalf of the family, has advanced before this court (they being the same submissions which he advanced in the court below and which were rejected by that court) for saying that the jury's verdict in this case should be set aside.

E The first is that the coroner incorrectly directed the jury as to the burden of proof. There is no doubt that, at one stage of his summing up, he clearly directed them in accordance with the criminal standard of proof. In the passage to which I would draw attention the coroner said:

> "As you will naturally be considering a verdict of 'unlawful killing' I must now direct you as to the standard of proof which is required by law. It is that you must be satisfied beyond all reasonable doubt
> F that some one person has been guilty of the highest degree of negligence or recklessness known to the law, thereby committing a criminal offence. If you have any doubt in this respect it would be quite wrong to bring in a verdict of 'unlawful killing.'"

Mr. Macdonald submits that the coroner was in error in giving that direction. He submits that, although a verdict of unlawful killing would
G be one which involves a finding of serious misconduct, the appropriate burden of proof is not the criminal burden of proof but the civil burden of proof, albeit that he accepts that, in applying the civil burden of proof, it would be right for the jury to be reminded that, the more grave the allegation, the more clear must be the proof.

In approaching this question, I have been helped by the skeleton
H argument which has been put before the court by Mr. McCahill on behalf of the coroner, albeit that the court did not find it necessary to call on Mr. McCahill to address the court. In that skeleton argument Mr. McCahill reminds the court that the law with regard to coroners was codified by the Coroners Act 1887 (50 & 51 Vict. c. 71). Section 4(3) in dealing with the functions of a coroner's jury, stated:

> "After viewing the body and hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting

forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder."

I draw attention to section 4(3) because it clearly sets out the task of the coroner's jury at that time. Section 5(1) went on to provide:

"Where a coroner's inquisition charges a person with the offence of murder or of manslaughter . . . the coroner shall issue his warrant for arresting or detaining such person . . ."

The task of the jury, as set out in section 4 of the Act of 1887 has since been modified by section 56(1) of the Criminal Law Act 1977, which provides:

"At a coroner's inquest touching the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition shall in no case charge a person with any of those offences."

So the historical position has got to be considered in the light of those provisions of the Act of 1977, which clearly modified what was previously the task of a coroner's jury.

Nonetheless, in my view, considerable assistance is provided still by section 4(3) of the Coroners Act 1887 in considering the question of the standard of proof which is applicable. That section made clear the importance of the decision of the coroner's jury and the gravity of the issues which they had to determine which could result in a person being at that time arrested and in due course tried for murder or manslaughter.

In his skeleton argument counsel compares the position of the coroner and his jury with that of the former grand jury in cases of homicide, and he says that the task is very much the same as that of the grand jury. They were required to see whether or not there was a true bill against any named individual.

Having referred to the historical background, it is convenient to consider the usual distinction which exists between the approach to the burden of proof in civil proceedings and the approach in criminal proceedings. This was considered by this court in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247. In that case the court was concerned with a possible acute distinction between different degrees of liability which could occur depending upon the approach adopted by the judge in trying the case. The case was concerned with a possible finding of breach of warranty and a finding of guilt of fraud arising out of the same facts. The county court judge in the court below had indicated that, whereas he would, in relation to the same facts, find the defendant in breach of warranty, he would not be prepared to find that he had been guilty of fraudulent misrepresentation. With regard to this decision Denning L.J. on appeal said, at p. 258:

"In setting himself this problem the judge showed an uncommon nicety of approach. I must say that, if I was sitting as a judge alone, and I was satisfied that the statement was made, that would be

A enough for me, whether the claim was put in warranty or on fraud. I think it would bring the law into contempt if a judge were to say that on the issue of warranty he finds the statement was made, and that on the issue of fraud he finds it was not made. Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more B serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach the very high standard required by the criminal law. Take this very case. If Mr. Neuberger did represent that the machine was Soag reconditioned he did very wrong because he knew it was untrue. His moral guilt is just as great whatever the form of the action, no matter whether in C warranty or in fraud. He should be judged by the same standard in either case. I have already expressed my views on this subject in *Bater v. Bater* [1975] P. 35 and I need not repeat them here."

Denning L.J. went on to develop the matter. Summarising the effect of what Denning L.J. was saying, it was that, technically, there can be a distinction between the civil and the criminal standard of proof. D However, judges (and, I would add, all tribunals) should be cautious not to create problems for themselves by approaching the question of burden of proof in an artificial manner. From a practical point of view, where a serious allegation is being made, obviously, a high standard of proof is required, however technically you define that burden.

Having referred the court to that authority, Mr. Macdonald went on to draw attention to a similar approach which was adopted by Lord E Scarman in *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74, 112. That was a case which deals with very different facts from those which had been considered by Denning L.J. in the earlier case to which I have made reference. It was a case where the House of Lords was considering the standard of proof which has to be adopted where the Home Office is suggesting that an immigrant has F entered this country unlawfully. Lord Scarman started off by saying, at p. 112:

"The law is less certain as to the standard of proof. The choice is commonly thought to be between proof beyond reasonable doubt, as in criminal cases, and the civil standard of the balance of probabilities: and there is distinguished authority for the view that G in habeas corpus proceedings the standard is beyond reasonable doubt, since liberty is at stake."

Lord Scarman then refers to a number of authorities, including *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247 to which I have just made reference. Then Lord Scarman adds:

"My Lords, I have come to the conclusion that the choice between H the two standards is not one of any great moment. It is largely a matter of words. There is no need to import into this branch of the civil law the formula used for the guidance of juries in criminal cases. The civil standard as interpreted and applied by the civil courts will meet the ends of justice. The issue has been discussed in a number of cases. In *Bater v. Bater* [1951] P. 35, the trial judge had said that the petitioner, who alleged cruelty by her husband, must prove her case beyond reasonable doubt. This was held by the

> Court of Appeal not to be a misdirection. But Denning L.J. observed that, had the judge said the case required to be proved with the same strictness as a crime in a criminal court, that would have been a misdirection. He put it thus, at pp. 36–37: 'The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case.'"

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After a further citation from Denning L.J., Lord Scarman goes on to say, at p. 113:

> "It is clear that all three members of the court (Bucknill, Somervell and Denning L.JJ.) found difficulty in distinguishing between the two standards. If a court has to be satisfied, how can it at the same time entertain a reasonable doubt (Bucknill L.J. at p. 36)?"

C

Lord Scarman summed up his views, at p. 114:

> "Accordingly, it is enough to say that, where the burden lies on the executive to justify the exercise of a power of detention, the facts relied on as justification must be proved to the satisfaction of the court. A preponderance of probability suffices: but the degree of probability must be such that the court is satisfied. The strictness of the criminal formula is unnecessary to enable justice to be done: and its lack of flexibility in a jurisdiction where the technicalities of the law of evidence must not be allowed to become the master of the court could be a positive disadvantage inhibiting the efficacy of the developing safeguard of judicial review in the field of public law."

D

E

The approach of Lord Scarman to the burden of proof was expressly adopted by the other members of their Lordships' House. I would summarise Lord Scarman's guidance in this way. Technically, there is a distinction between the standard of proof in civil proceedings and criminal proceedings. However, although there may be that technical distinction—and particularly in judicial review this makes it undesirable to use the criminal standard—from a practical point of view the result in the end will be the same, whichever approach is adopted.

F

It is now necessary to refer to a decision of the Divisional Court, presided over by Watkins L.J., in *Reg. v. West London Coroner, Ex parte Gray* [1988] Q.B. 467. The Divisional Court was faced with exactly the same problem as this court is faced with today, and the judgment of Watkins L.J. in that case was expressly followed by Glidewell L.J. in the court below in the present case. In relation to a possible verdict of unlawful killing, Watkins L.J. said, at pp. 477–478:

G

> "I turn now to the standard of proof. We heard much argument about this. There is a lack of direct authority on the point. We were referred to cases on suicide going back into the last century, all of which emphasise the presumption against suicide, and the requirement of rebutting that presumption. Suicide was then a crime. It no longer is. But it is still a drastic action which often leaves in its wake serious social, economic and other consequences. Lord Widgery C.J. in *Reg. v. City of London Coroner, Ex parte Barber*

H

A [1975] 1 W.L.R. 1310, 1313, said: 'If that is a fair statement of the coroner's approach, and I sincerely hope it is because I have no desire to be unfair to him, it seems to me to fail to recognise what is perhaps one of the most important rules that coroners should bear in mind in cases of this class, namely, that suicide must never be presumed. If a person dies a violent death, the possibility of suicide may be there for all to see, but it must not be presumed B merely because it seems on the face of it to be a likely explanation. Suicide must be proved by evidence, and if it is not proved by evidence, it is the duty of the coroner not to find suicide, but to find an open verdict. I approach this case, applying a stringent test, and asking myself whether on the evidence which was given in this case any reasonable coroner could have reached the conclusion that the C proper answer was suicide.'

"It will be noted that Lord Widgery C.J. alluded to the stringent test, but without reference to what may be called the conventional standards of proof. I cannot believe, however, that he was regarding proof of suicide as other than beyond a reasonable doubt. I so hold that that was and remains the standard. It is unthinkable, in my estimation, that anything less will do. So it is in respect of a D criminal offence. I regard as equally unthinkable, if not more so, that a jury should find the commission, although not identifying the offender, of a criminal offence without being satisfied beyond a reasonable doubt. As for the other verdicts open to a jury, the balance of probabilities test is surely appropriate save in respect, of course, of the open verdict. This standard should be left to the jury E without any of the refined qualifications placed upon it by some judges who have spoken to some such effect as, the more serious the allegation the higher the degree of probability required. These refinements would only serve to confuse juries and, in the context of a jury's role are, I say with great respect to those who have given expression to them, I think, meaningless. Such matter as that led the coroner astray in this case, by providing the jury with no plain F standard of proof to be guided by. He cannot be blamed for that, but it is another factor which must cause this verdict to be quashed."

As appears from the passage from the speech of Lord Scarman in *Reg. v. Secretary of State for the Home Department, Ex parte Khawaja* [1984] A.C. 74, 112–114, which I have cited, in different proceedings there are different considerations which lead to what is the appropriate G test which it is useful to apply, having regard to the role of the decision-making body who has the task of coming to the conclusion on the facts. As I have sought to indicate, whether in a case of a serious nature such as unlawful killing you adopt the standard of proof which is technically a civil standard but you elevate it because of the gravity of the issue, or whether you use the criminal standard of proof, the result will almost H inevitably be the same.

I can see that there may be force in Mr. Macdonald's submission that perhaps in the case of a coroner's inquest, theoretically speaking, the appropriate standard might be said to be a very high standard indeed on the basis of the civil standard of proof. However, whether that be right or not, what I am absolutely satisfied about is that the practical guidance which is given by Watkins L.J. in *Reg. v. West London Coroner, Ex parte Gray* [1988] Q.B. 467 is correct, bearing in mind that

it is given in relation to the coroner's role in respect of his duty to direct a coroner's jury as to how that jury is to perform its task. A

I am quite satisfied that, in a case where it is open to a jury, as a result of a coroner's inquest, to come to a verdict of unlawful killing, the appropriate direction which the coroner should give to the jury is the simple one that they should be satisfied beyond all reasonable doubt or, as sometimes said, satisfied so that they are sure. That provides clear guidance to the coroner's jury which they will be able to follow, and it is not necessary for them to be involved with sliding scales which are more appropriate for a judge than a jury. B

It is true that, in many cases where it is open to a coroner's jury to find a verdict of unlawful killing, they may also have to consider the question of death by misadventure. However, in my view, this does not and should not give rise to problems. The coroner should indicate to the jury that they should approach, initially, the question as to whether or not they are satisfied so that they are sure that this is unlawful killing. If they come to the conclusion that it is unlawful killing, there is no need for them to go on to consider death by misadventure. But, if they come to the conclusion that it is not unlawful killing, they are not satisfied so that they are sure that that verdict is appropriate, then they will consider the question of misadventure and, in so doing, they do not need to bear in mind the heavy standard of proof which is required for unlawful killing. They can approach the matter on the basis of the balance of probabilities. The situation is that, just as it is important that a jury should not bring in a verdict of suicide unless they are sure, likewise they should not bring in a verdict of unlawful killing unless they are sure. C D E

I therefore do not consider that this jury were misled by the coroner when he directed them in the terms to which I have referred on the question of burden of proof in relation to unlawful killing.

Mr. Macdonald's second submission is that the coroner misdirected the jury on the question of what constitutes unlawful killing in the circumstances of the facts which were before the jury. It is right to say, as was accepted in the court below by the Divisional Court, that the coroner made his task more difficult than it needed to be. This was a case where, if the jury were satisfied on the facts that the police officer concerned had deliberately applied force to the deceased's neck as opposed to his chin, then that would almost inevitably result in their coming to a verdict of unlawful killing. However, the pathologist called on behalf of the family gave an explanation for the death which, if right, would indicate that the police officer's arm could have gone round the deceased's neck by accident in the course of the struggle. If that is the explanation for how the deceased met his unfortunate death, then that would clearly lead appropriately to a verdict of death by misadventure. F G

Having said that, I will now draw attention to the way the matter was dealt with by the coroner. He started off, in dealing with this critical matter, in these terms in his summing up: H

> "I would now like to remind you of the question of the hold which P.C. Hobday had on McCurbin when they were on the floor of the foyer. P.C. Hobday has consistently maintained he held McCurbin around the head or chin but not around the neck. However, various witnesses have spoken of having seen Hobday's arm firmly around McCurbin's neck and forcing his head upwards. You have seen two

A practical demonstrations here in court by P.C. Hobday, with the help of a young volunteer, showing exactly how he reckons he held McCurbin. What struck me about those demonstrations was how difficult it would have been for any onlooker to have seen with any certainty the exact nature of Hobday's hold. Bearing in mind the medical evidence as to the cause of death I would here like to remind you of the suggestion made by Dr. West. That suggestion B was that to start with the hold was centred on McCurbin's chin but probably due to McCurbin's struggling the hold slipped down to the neck."

He then refers to the interruption when there was a comment which Mr. Belcher heard and the coroner concludes this part of his summing up by C saying: "If this was in fact the true sequence of events could anyone think the slipping of the hold was anything other than a tragic accident."

I now refer to the passage in the summing up where the coroner deals with the verdict of unlawful killing. He says:

"A verdict of 'unlawful killing' in the circumstances of this case would mean that in your opinion some particular person who on no account can be named is guilty of murder or manslaughter. For such D a verdict you must be sure that the 'unlawful killing' was caused by gross negligence or recklessness. There must be such disregard for life and safety as would amount to a crime against the state and be conduct deserving punishment. Simple lack of care is not enough. A very high degree of negligence is required to be proved for unlawful killing to be established. In other words you have to be completely E satisfied that Mr. McCurbin died as a result of an unlawful and dangerous act. Bearing in mind the facts of this case and the burden of proof, you have to be certain that there could not have been self-defence and you have to remember the right to use reasonable force in making a lawful arrest. The issue for you is whether the force used by the officers and Mr. Belcher was reasonable in the circumstances. And this means you have to decide what force was F used by each of the individuals concerned in the arrest of McCurbin."

Unfortunately, the coroner is there referring to manslaughter due to recklessness and gross negligence. It was not necessary for him to deal with that type of manslaughter on the facts of that case, and so the initial part of the passage to which I have referred really was irrelevant G to the considerations which the jury had to consider.

However, the second half of that passage was appropriate. He was right to tell the jury that they had to be satisfied that McCurbin died as a result of an unlawful and dangerous act. Furthermore, he was right to say that they had to be satisfied that the police officer had used more force than was reasonably necessary in order to make a lawful arrest. If H the police officer had only used reasonable force in making a lawful arrest, his act would not be unlawful, and so his act could not amount to manslaughter.

Later on in his summing up the coroner added to the passage to which I have just referred, by saying:

"Nevertheless, members of the jury, if you not only believe that P.C. Hobday said those words but what is more intended to carry out the threat then in the light of McCurbin's death a verdict of

> unlawful killing would appear prima facie to be right and proper. However, no doubt you will bear in mind Mr. Belcher's explanation of this incident and my earlier remarks. The matter is one for you to decide. To put this question of a verdict of unlawful killing to you in a slightly different way, I would tell you that you must be satisfied that the act or omission of a single person amounted to unlawful conduct which was a substantial cause of death."

A

B

There, again, the coroner was dealing with the matter satisfactorily.

Later in his summing up the coroner did again return to the question of recklessness and, having done so, concluded with these words:

> "I have felt it right and proper that I should deal with the subject of unlawful killing by neglect or lack of care in some detail though in my view it does not apply in this case . . ."

C

He was absolutely right to tell the jury that it did not apply in this case. It is only regrettable in these circumstances that he mentioned the matter to the jury at all.

Having referred to those passages in the summing up of the coroner, I ask myself, first of all, "was there a misdirection?" and to refer to a matter wholly unnecessarily in the way that the coroner did, I accept, can amount to a misdirection. However, having said that, I ask myself, "did the misdirection have any bearing on the verdict which the jury came to in this case?" and I say, with regard to that, that I am absolutely satisfied that it had no possible bearing on the outcome.

D

The position is this. The jury brought in a verdict of death by misadventure. That means that the jury were satisfied, on the balance of probabilities at any rate, that there was here a death caused by an accident. That was the critical matter which they had to determine. In other words, was it a case where the police officer's arm was deliberately round the deceased's neck or was it a case where his arm slipped? I then take into account the fact that, although the coroner's direction was unsatisfactory, it was only unsatisfactory because, as he himself said to the jury, he was dealing with something which was unnecessary to deal with. In other respects the summing up was satisfactory.

E

F

For those reasons, I come to the conclusion which I have indicated that the misdirection, if it be a misdirection, was not one which affected the outcome.

Having come to that conclusion, I turn to the question as to whether or not the applicant is entitled to relief by way of judicial review. In doing so, I adopt exactly the same approach as was adopted in the court below. Glidewell L.J., having recited the facts, went on to say:

G

> "On judicial review the test we have to apply is not simply, has there been an error of law. We are concerned to inquire whether the error has or may have resulted in a wrong verdict being entered. If, in our view, on a proper summing up the same verdict would have resulted so that we can be confident there had been no injustice then the verdict should not be quashed."

H

I respectfully agree with that approach.

The position here is that, in the case of any application for judicial review, the remedy is discretionary. If, albeit there has been a misdirection but the misdirection has not affected the outcome in any way, the court were to intervene, they would, in my view, be misusing

A judicial review. Judicial review is required to put right a situation where things have gone wrong and an injustice requires to be remedied. In this case there has been a proper verdict by the coroner's jury. That being so, there is no call for the court to intervene. In its discretion, the court below was right to refuse relief and I would come to exactly the same decision as they did.

B Accordingly, I would dismiss this appeal.

STOCKER L.J. I agree and there is nothing I wish to add.

LORD DONALDSON OF LYMINGTON M.R. I also agree.

C *Appeal dismissed.*
Costs application adjourned.
Leave to appeal refused.

Solicitors: Birnberg & Co.; Russell Jones & Walker; Gregory, Rowcliffe & Milners for Fowler Langley & Wright, Wolverhampton.

D. E. C. P.

D

E

[COURT OF APPEAL]

*DUBAI BANK LTD. v. GALADARI AND OTHERS (No. 2)

F [1989 D. No. 2034]

1989 Dec. 8, 11; 21 Slade and Mann L.JJ. and Sir David Croom-Johnson

Practice—Discovery—Inspection—Reference to documents in defendant's affidavit—Plaintiff applying to inspect documents—Whether documents referred to—Whether inference that documents exist sufficient—Whether inspection to be ordered—R.S.C., Ord. 24, rr. 10(1), 11(1)

G

In an action by the plaintiff to recover moneys alleged to have been fraudulently diverted by the first and second defendants and others, the plaintiff sought an injunction restraining the tenth defendant, a Panamanian company, from disposing of a property into which the plaintiff claimed diverted moneys could be traced. E., a director of the tenth defendant, swore an affidavit describing the tenth defendant's background and the transaction whereby it had acquired the property. The plaintiff served a notice pursuant to R.S.C., Ord. 24, r. 10[1] requiring the tenth defendant to produce for inspection and copying documents to which, it was claimed, reference had been

H

[1] R.S.C., Ord. 24, r. 10(1): see post, p. 735D.
r. 11(1): see post, p. 735E–F.