

Transcript of the Sheku Bayoh Inquiry

Friday, 2 December 2022

(10.02 am)

Ruling

LORD BRACADALE: Good morning. I'm going to give my decision on the Rule 9 applications.

The original Rule 9 application on behalf of PC Walker, Ms Short and the Scottish Police Federation contained a total of 144 questions.

I should say in passing that what I am looking for in written applications under Rule 9 are proposed lines of questioning rather than a list of questions. Be that as it may, I'm grateful to the Dean of Faculty and Senior Counsel to the Inquiry for significantly reducing the scale of the application. That has made it easier for me to identify and assess the lines of questioning contained in the questions and decide whether any should be permitted.

In addition, the Dean identified a number of specific paragraphs in the Inquiry statement of Martin Graves under reference to which he sought to explore differences between the evidence of Ms Caffrey and Mr Graves.

I remind myself that this is an Inquiry under the Inquiries Act 2005, and subject to the statutory provisions in relation to the examination of witnesses.

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1 In considering whether to permit examination of
2 witnesses by the legal representatives of core
3 participants, I have at the forefront of my mind whether
4 the examination is likely to assist the Inquiry.
5 Against that background I considered whether the
6 proposed lines of questioning would be likely to assist
7 the Inquiry.

8 I think that it is important to note the way in
9 which the evidence of both Ms Caffrey and Mr Graves
10 evolved. In Ms Caffrey's report and in the Inquiry
11 statement of Mr Graves, each was asked to address the
12 primary evidence. In their oral evidence they addressed
13 a number of hypothetical scenarios based on the primary
14 evidence. In each case their oral evidence was given
15 with the benefit of additional information produced
16 since the date, respectively, of Ms Caffrey's report and
17 Mr Graves' Inquiry statement.

18 This means that in each case it will be necessary
19 for me to have regard to their evidence in the light of
20 its evolving nature. Given that evolving nature, I do
21 not think that it would assist the Inquiry for the Dean
22 to explore at this stage, under reference to specified
23 paragraphs in the Inquiry statement of Mr Graves,
24 differences between Ms Caffrey's evidence and specific
25 matters in Mr Graves' Inquiry statement. In my view,

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1 there is sufficient material as a whole before the
2 Inquiry to allow such differences to be explored in
3 submissions in due course.

4 The evidence of Ms Caffrey and Mr Graves has
5 provided me with a framework against which I can test
6 the evidence which I find proved. My assessment of the
7 primary evidence will of course involve assessments of
8 credibility and reliability. That assessment of the
9 primary evidence and whether I accept the evidence of
10 Ms Caffrey and/or Mr Graves, in whole or in part, will
11 be a matter for me.

12 I anticipate that the submissions of counsel for
13 core participants will be of great assistance to me in
14 these endeavours. As a general proposition I consider
15 that it would not assist the Inquiry to engage at this
16 stage in an exercise of putting to this witness details
17 of what primary witnesses said for further comment by
18 this witness. It seems to me that the Inquiry will be
19 better assisted by core participants making submissions
20 based on the primary evidence.

21 I consider that questions in relation to the
22 expertise of Ms Caffrey, questions of the weight to be
23 accorded to her evidence and questions of the
24 application of her expertise to the primary facts are
25 all best dealt with in submission.

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1 I do not consider that it is necessary, as a matter
2 of fairness to the witness, to explore every respect in
3 which criticism might be made of her evidence in
4 submission.

5 I consider the issues in relation to training, if
6 they require further exploration, would be best explored
7 at a later hearing.

8 Having adopted the approach which I have outlined,
9 there are two lines of questioning which I do think
10 would assist the Inquiry. These are the issue of the
11 availability of the dog unit raised in questions 34 to
12 36 and 95 to 96, and the issue of the viability of
13 containment raised in questions 80 and 81. Accordingly,
14 I shall allow the Dean to explore these two lines of
15 questioning.

16 In respect of the applications by Constables Good,
17 Smith and Tomlinson, for the reasons that I have
18 outlined I do not consider that the Inquiry would be
19 assisted by allowing the line of questioning proposed by
20 Mr Jackson and I refuse that application.

21 So can we have the witness back, please.

22 (Pause).

23 MS JOANNE CAFFREY (continued)

24 LORD BRACADALE: Good morning, Ms Caffrey. You're going to
25 be asked questions by the Dean of Faculty of Advocates

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1 who represents two of the attending officers and the
2 Scottish Police Federation.

3 A. Yes.

4 LORD BRACADALE: Dean of Faculty.

5 Questions from THE DEAN OF FACULTY

6 DEAN OF FACULTY: I'm obliged, my Lord.

7 Good morning, Ms Caffrey.

8 A. Good morning.

9 Q. Can I start by looking at the availability of the dog
10 unit, please.

11 A. Yes.

12 Q. And I think your suggestion is it would have been
13 a reasonable option to have waited for the dog unit to
14 have arrived?

15 A. It would be a tactical option to consider that.

16 Q. Mr Bayoh was travelling briskly when he was seen; do you
17 agree with that?

18 A. Yes.

19 Q. You can't let him move on given that there are reports
20 that he is in possession of a knife; do you agree with
21 that?

22 A. No, not necessarily. It would all be around the risk
23 and using the National Decision-Making Model, that you
24 don't unnecessarily put the officer lives at risk
25 either. It's all about the decisions and the tactical

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1 response at the time.

2 Q. We're talking about a situation where the dog unit is
3 some minutes away -- in your report you have adopted
4 10 to 15 minutes --

5 A. Yes.

6 Q. -- I think based on PC Wood's assessment.

7 A. Yes.

8 Q. Am I right in understanding that the viability of
9 waiting turns on the viability of containment?

10 A. Sorry, can you --

11 Q. The viability of waiting --

12 A. Yes.

13 Q. -- turns on the viability of containment?

14 A. It would still be a decision on the day based on the
15 risk of actual risk or hypothetical risk.

16 Q. Given that there are reports that he is in possession of
17 a knife, he has been attacking cars, he is walking
18 briskly; if you can't contain him then something else
19 needs to be done, yes?

20 A. Yes.

21 Q. Okay. Because otherwise there is an unacceptable risk
22 to members of the public, yes?

23 A. Something that needs to be done could include everything
24 from one extreme of withdrawing and observing, up to
25 physical engagement, and again, that would be the

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- 1 decision of the tactical commander at the time.
- 2 Q. You gave example in your own testimony of a situation in
3 which you encountered an arterial bleed, as you
4 described it?
- 5 A. Yes.
- 6 Q. An arterial bleed is a very serious situation?
- 7 A. Yes.
- 8 Q. An arterial bleed left untreated will lead to
9 exsanguination within minutes, if not seconds?
- 10 A. Yes.
- 11 Q. Does that not demonstrate really quite graphically the
12 dangers of waiting?
- 13 A. Yes, because that was an actual risk that we were aware
14 of for preservation of life, which is always the
15 priority.
- 16 Q. Well, the fact that exsanguination would happen within
17 minutes or seconds means that when you arrived and there
18 was an arterial bleed, that wound had been inflicted
19 just very shortly before that?
- 20 A. Yes.
- 21 Q. If the police had arrived a minute earlier that wound
22 might have been avoided, yes?
- 23 A. It may have.
- 24 Q. And that's why you can't leave somebody who is reported
25 to be in possession with a knife to roam the streets?

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1 A. That would be a decision for others than me. All I can
2 say is what the range of tactical options are and at the
3 end of the day it's an evidence-based risk assessment
4 using the NDM.

5 Q. Mr Woods has now accepted that it would have taken him
6 at least 20 minutes to get from Fettes to Hayfield Road.
7 I think you might have seen that.

8 A. Yes.

9 Q. He is noted as being en route at 7.21 am, yes?

10 A. Mm-hm.

11 Q. That's a minute after the police first arrived at
12 Hayfield Road, isn't it?

13 A. Yes.

14 Q. You can't really be saying that Mr Bayoh could sensibly
15 have been left uncontained for at least 20 minutes?

16 A. It would be the tactical commander's decision because
17 if, for example, the belief was that he had a handgun
18 and then we've got a confirmed firearms incident, there
19 would still be the issues there with sending unarmed
20 officers in, or withdrawing them, so again, it's looking
21 at the range of options, tactical options, weighing up
22 the risk and using the National Decision-Making Model to
23 take command.

24 Q. These officers are dealing with a dynamic,
25 rapidly-evolving situation, yes?

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1 A. Mm-hm.

2 Q. There's a limited number of officers --

3 A. Yes.

4 Q. -- all of whom are unarmed?

5 A. Yes.

6 Q. The locus is a busy one --

7 A. Mm-hm.

8 Q. -- you can see that from the amount of cars that are

9 travelling. He is on a footpath that leads somewhere

10 presumably --

11 A. Yes.

12 Q. -- potentially in the vicinity of dog walkers, for

13 example.

14 A. Mm-hm.

15 Q. It's not really viable to contain him, is it, with the

16 number of officers they had?

17 A. Not with two officers, no.

18 Q. No. Not with four officers?

19 A. No, it would be difficult.

20 Q. Yes. Because the Inquiry heard evidence from

21 PC Alan Smith that in order to contain, a lot of support

22 would be required. Do you agree with that?

23 A. Yes.

24 Q. Sergeant Scott Maxwell said in order properly to contain

25 a subject on Hayfield Road approximately 20 officers

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- 1 would have been needed. Do you agree with that?
- 2 A. No. I have been involved in containments with just four
3 or six officers. It all depends on the attempt and then
4 the person's response to that. Sometimes the physical
5 presence of four officers can psychologically contain
6 the person. Each individual is different; unless you
7 try, you don't know whether it's going to work or not.
- 8 Q. A reasonable officer looking at that location at that
9 time would reasonably have thought "It's going to be
10 very difficult to contain in these --"
- 11 A. Yes, yes.
- 12 Q. Do you agree with that?
- 13 A. Yes.
- 14 Q. Thank you. And then once we've got a situation where
15 the officer reasonably believes "I can't contain", then
16 it's a -- it's a fair enough tactical option to approach
17 Mr Bayoh, isn't it?
- 18 A. Yes, it's one of the tactical options, yes.
- 19 Q. And in that situation, if you have got gap closing, if
20 you've got failure to respond to lawful commands, and if
21 you are reasonably of the understanding he is in
22 possession of a knife, deployment of CS and PAVA is
23 again a reasonable option open to a reasonable officer?
- 24 A. It's one of the tactical options, yes.
- 25 DEAN OF FACULTY: My Lord, I think that exhausts those that

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1 I have been permitted.

2 LORD BRACADALE: (Mic turned off).

3 Ms Caffrey, thank you very much for coming to give
4 evidence to the Inquiry. I shall be adjourning the
5 Inquiry in a moment and you will then be free to go.

6 Ms Grahame, I think we adjourn until Tuesday at
7 10 o'clock, is that correct?

8 MS GRAHAME: Yes, that's correct. The next witness is
9 scheduled for 10 o'clock on Tuesday.

10 LORD BRACADALE: Very well. The Inquiry will adjourn until
11 Tuesday at 10 o'clock.

12 (10.17 am)

13 (The Inquiry adjourned until 10.00 am on Tuesday,
14 6 December 2022)

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