



## STATE CORONER'S COURT OF NEW SOUTH WALES

<b>Inquest:</b>	Inquest into the disappearance and suspected death of <b>Andrew Stephen Russell</b>
<b>Hearing dates:</b>	14 September 2016
<b>Date of findings:</b>	13 October 2016
<b>Place of findings:</b>	State Coroners Court, Glebe
<b>Findings of:</b>	Magistrate Harriet Grahame, Deputy State Coroner
<b>Catchwords:</b>	Coronial Law- Missing Person- Referral to Unsolved Homicide Unit.
<b>File number:</b>	2011/390046
<b>Representation:</b>	Ms Sasha Harding, Senior Sergeant, NSW Police – Advocate assisting.
<b>Findings:</b>	I find that Andrew Russell died on or shortly after 2 June 2009. While it is likely Andrew died in the Bathurst/Sofala area, I am unable to determine the exact place of his death. His death is suspicious.
<b>Recommendations</b>	The investigation into the death of Andrew Stephen Russell should be referred to the Unsolved Homicide Unit of the NSW Homicide Squad for further investigation in accordance with the protocols and procedures of that unit.

IN THE STATE CORONER'S COURT  
GLEBE  
NSW  
SECTION 81 CORONERS ACT 2009

## REASONS FOR DECISION

1. This inquest concerns the disappearance and suspected death of Andrew Stephen Russell.

### Introduction

2. Andrew was born on 11 October 1985. At the time of his disappearance he was 23 years of age. Andrew was single and in poor health. He was receiving a disability support pension due to the chronic liver disease he had experienced since birth. He was known to drink to excess from time-to-time and had recently been assaulted. Andrew required a liver transplant and was receiving medication.<sup>1</sup>
3. At the time of his disappearance Andrew had a variety of problems including unstable accommodation, and an upcoming court matter. However he had a number of relatives and friends who were supportive and with whom he socialised.
4. Andrew was described by his family as extremely kind and polite. He was generous to others and close to his family.<sup>2</sup> They said Andrew mostly drank to impress others or to be “part of the crowd” and it was only when drunk that he would get himself into trouble.
5. Andrew was reported missing on 20 June 2009 by his father, Bruce Herbert and his step-mother Susan Wallace. It appears that Andrew had failed to attend court and nobody knew where he was. At that time there were no confirmed sightings of Andrew

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<sup>1</sup> Exhibit 1, Statement of Detective Joel Fawkner, (13/3/2013) paragraph 5 onwards

<sup>2</sup> See Family statement (letter to the Court from Susan Wallace) Exhibit 4

since 2 June 2009 when he had been with family and friends. This complete lack of contact was out-of-character.

6. Police commenced an investigation which included taking statements and executing search warrants. From the outset, a number of persons of interest were identified and the matter appears to have been treated as a possible homicide. There were media appeals for information and later police used a range of investigative methods including the use of telephone intercepts, forensic testing, the seizing of motor vehicles and the use of cadaver dogs.<sup>3</sup>
7. In late 2009, all avenues of investigation had seemingly been exhausted. Andrew's body had not been located despite substantial searches and no clear crime scene had been identified. Police involved in the investigation had grave suspicions that Andrew had been murdered by known persons but were unable to establish this with anything like the certainty required. At some point a decision was made to refer the matter to the Coroner.<sup>4</sup>
8. Investigations nevertheless continued. Although there were many rumours spreading among the local community, by September 2012, another dead end in the investigation had been reached.<sup>5</sup> As a result, the officer in charge of the investigation, Detective Sergeant Fawkner, in conjunction with the Co-ordinator of Covert operation, Detective Sergeant Lukacs made a decision to employ a new strategy in the investigation of this case. It was decided to employ the "unsolved homicide technique" whereby the prime suspect in Andrew's disappearance and suspected death, Mr Tony Simmons would be targeted and encouraged to join a (fake) established criminal organisation. Trust with undercover operatives posing as criminals would be developed over a period of months and Mr Simmons would be encouraged to share aspects of his past to prove himself to his superiors in the organisation. It was a fairly sophisticated operation and it was hoped that police would thereby gain a relevant and admissible admission to Andrew's murder.

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<sup>3</sup> Exhibit 1, Statement of Detective Joel Fawkner, (13/3/2013) paragraph 5 onwards

<sup>4</sup> Exhibit 2, Report of suspected death to the Coroner

<sup>5</sup> Exhibit 3, See summary of this process contained in *R v Simmons* (no 7) [2015] NSWSC 574 at paragraph [246] onwards.

9. The elaborate charade continued over four months. During that time Tony Simmons made a number of admissions<sup>6</sup> and even attempted to show undercover operatives where he had disposed of Andrew's body.
10. On 16 January 2013, after the most comprehensive of the admissions, Tony Simmons was arrested for the murder of Andrew Russell. He immediately expressed surprise and said that he was "only talking shit". This remained his response throughout his subsequent trial. Mr Simmons claimed to have been "big noting" himself or making things up, in line with the rumours he had heard around town. He was cross-examined at trial and completely denied having been involved in Andrew's death.
11. A few days after Mr Simmons's arrest and as a direct result of his admissions to undercover police, along with evidence that had already been collected, another man, Kieran Moore was also arrested and charged with Andrew's murder. This charge was later reduced to being an accessory after the fact. The prosecution later sought to rely on admissions allegedly made by Keiran Moore after his arrest. However, prior to his trial commencing, a voir dire was held and these admissions were excluded. The case against Mr Moore was subsequently no-billed.
12. Mr Simmons, however, faced a lengthy trial for the murder of Andrew Russell, which commenced in February 2015 and extended over 26 sitting days. The trial was a judge alone trial and was presided over by His Honour Judge Peter Hamill. Mr Simmons was acquitted of Andrew's murder on 20 May 2015.
13. Coronial proceedings had been suspended on 25 January 2013, to allow the criminal proceedings to be finalised. Once the acquittal had taken place, a decision was made to recommence coronial proceedings.

### **The role of the Coroner**

14. The role of the coroner in a case such as this is to make findings firstly as to whether the nominated missing person is actually dead. If that can be safely established the

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<sup>6</sup> These admissions are summarized and detailed in the *R v Simmons* (no 7) [NSWSC] 574 at paragraph [241] onwards.

Coroner must continue to make further findings as to the date and place of death and in relation to the manner and cause of death.<sup>7</sup>

15. It is important to note that the laws of evidence do not apply in the usual way in the coronial jurisdiction, and for that reason a coroner is sometimes presented with evidence that would properly be excluded in a criminal or civil trial. Similarly, it appears possible that the lower standard of proof required in relation to the making of coronial findings could, in certain limited circumstances, produce a result seemingly inconsistent with earlier findings made in a criminal court. The principles of fairness are nevertheless paramount and great care has been taken in these proceedings to ensure procedural fairness in analysing the evidence presented before this court.

### **The Inquest**

16. The inquest commenced on 14 September 2016. A six volume brief was tendered including a substantial number of statements which had been prepared for the criminal trial. In addition, further statements from Detective Sergeant Fawkner, prepared for the coronial proceedings were tendered, along with various police records. His Honour Judge Hamill's comprehensive decision was received<sup>8</sup>. With respect, it proved extremely useful for in its detailed analysis of the evidence given at the criminal trial by 53 witnesses, over 26 sitting days.
17. Detective Sergeant Joel Fawkner also gave additional oral evidence. He expressed his belief that, despite the verdict, Andrew Russell had been killed by Tony Simmons, with the assistance of Keiran Moore. He explained some of his reasons for holding these beliefs. No fresh or compelling evidence, that had not been available to the Crown at the time of the criminal proceedings, was presented. No other witnesses were called.
18. Detective Sergeant Fawkner told the Court that without finding Andrew's remains, there was little else the local command could do. He accepted that the matter should now be referred to the Unsolved Homicide Unit.
19. Both Mr Simmons and Mr Moore were notified of the coronial proceedings and subpoenaed to attend. They were advised of their right to legal representation,

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<sup>7</sup> Section 81 *Coroners Act 2009* (NSW)

<sup>8</sup> *R v Simmons* (No 7)[2015]NSWSC 574, Exhibit 3

although it was never envisaged that either man would be called to give evidence, unless they requested the opportunity. Neither man attended the inquest. The court received no response from Mr Simmons. After proceedings had already commenced on the day of the inquest, the court received a telephone message from someone claiming to speak for Mr Moore, advising the court that he was sick. There was no further communication with either man.

### **Is Andrew dead?**

20. The first question to be answered, is whether or not Andrew Russell is dead.
21. The last confirmed sighting of Andrew was on 2 June 2009. I accept that he left a house in Slim Street, Bathurst about 9 pm with the intention of going to the Dudley Hotel. There is also evidence that he may have been seen by a Mr O'Neill later that night. I do not accept a possible sighting of Andrew by Ms Coloton on 17 June 2009 as reliable in the circumstances.<sup>9</sup>
22. Andrew was a man who accessed medical services frequently. There is no evidence that he saw a doctor or had any medical treatment after 2 June 2009. He had a habit of withdrawing his Centrelink payment the day it was paid. Andrew's payment on 16 June 2009 was not accessed.
23. In July 2011, a police officer attached to the Missing Persons Unit made a number of routine inquiries in relation to Andrew. As expected, the inquiries revealed that there was no evidence that Andrew had left the country, his bank account had not been accessed since he had been reported missing, and there had been no Medicare or pharmaceutical benefits paid under his name since his disappearance. Similarly, the records of the RTA and the Electoral Commission revealed nothing. Requests were also to each State and Territory's Police Missing Persons Units, with no result.<sup>10</sup>
24. Undoubtedly the most compelling evidence available that supports a conclusive finding that Andrew is dead is his sudden and inexplicable lack of contact with his family and

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<sup>9</sup> The dangers of identification evidence are well known. See discussion of this evidence in *R v Simmons* (No 7) [2015] NSWSC 574 from paragraph [86] onwards.

<sup>10</sup> Statement of Senior Constable Danielle Woodroffe, Exhibit 1

friends. It was entirely out-of-character that he should suddenly completely disappear, without explanation.

25. Given the seriousness and finality of finding that a person has died, proof of this issue “must be clear, cogent and exact” before a finding can be made<sup>11</sup>. The evidence in Andrew’s case clearly reaches this threshold. It is now seven years since Andrew was last seen. While his body has never been located, on the balance of probabilities it is comfortably established that he is dead.

**When did Andrew die?**

26. Given that there is no evidence that Andrew had ever gone missing or not contacted family or friends for any length of time before, I am of the view that it is likely that Andrew died on or shortly after his disappearance on 2 June 2009.

**What was the cause and manner of Andrew’s death?**

27. Without his body or any reliable account of his death it is impossible to determine exactly what caused Andrew’s death or to determine exactly how he died. However, we are certainly able to exclude some possibilities.
28. There is nothing to suggest a self-inflicted death. There is no evidence that Andrew was or had ever been suicidal. There are no indications of planning, no preparations made or communications left. In fact all the evidence is to the contrary. In my view, suicide can be safely ruled out.
29. There is also no evidence that Andrew’s death was accidental. While Andrew was known to drink to excess at times, if he had fallen over drunk it is most likely that he would have been found quite quickly. Equally, while it is known that Andrew had a number of medical issues, had he experienced a sudden health crisis, it is most likely that he would have been able to get help or that his body would have been recovered shortly afterwards. He was not known to venture far from his local area and his local haunts were well known.

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<sup>11</sup> See *Briginshaw v Briginshaw* (1938) 60 CLR 336, Inquest into the Suspected Death of Tegan Lee Lane (State Coroner Abernathy, 15 February 2006)

30. In my view, death by misadventure or natural cause can be safely ruled out.

### **Andrew's death and suspicions of murder**

31. There is considerable evidence to establish that Andrew's death is suspicious. Certainly the general consensus amongst those who knew him is that Andrew was killed on the night of 2 June 2009.

### **The Trial of Tony Simmons**

32. As I have said, the case brought against Tony Simmons relied heavily on his admissions to undercover operatives, some years after Andrew's disappearance. His Honour Judge Hamill expressed "grave suspicions" that Tony Simmons killed Andrew, but found there was a "significant possibility that the accused was big-noting himself to the undercover officers posing as criminals".<sup>12</sup> His Honour identified a number of claims made by Mr Simmons which formed part of his overall admission, which were unlikely to be true, given other evidence presented in the Crown case.<sup>13</sup> This made it difficult to comfortably rely on crucial aspects of the admission.

33. The Crown case produced evidence of Tony Simmons's known animosity towards Andrew Russell. In March 2009, around three months prior to Andrew's disappearance, Tony Simmons had seriously assaulted Andrew, who hospitalised as a result of his injuries. There is credible evidence to suggest that Andrew remained frightened of Tony Simmons after that time.

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<sup>12</sup> *R v Simmons* (No 7) [2015] NSWSC 574 at paragraph [482]

<sup>13</sup> There were a number of discrepancies which emerged in the various versions given by Mr Simmons. There were also difficulties in reconciling what Mr Simmons told undercover operatives he did when one takes into account the time it would have taken and the window of time Mr Simmons apparently had, given what we know from the mobile phone records. The account he gave in relation to the motor vehicle he was driving was implausible, given other investigations. There were many unanswered questions about where the body was disposed of and uncertainties surrounding why it had not been found. The Crown appeared to accept that there were "embellishments" in the version given to the undercover operatives by Mr Simmons. He certainly exaggerated various things to make himself "sound tough" including the severity of the March assault. These and other issues made the admission difficult to rely upon. See *R v Simmons* (no 7) [2015] NSWLR paragraph [463] onwards for a discussion of the way these issues were dealt with at the trial.



34. I do not intend to review in detail all the evidence produced at the trial and present before me, in statement form. In short, the Crown alleged that Tony Simmons and Keiran Moore came upon Andrew Russell near the bridge on the road from Sydney to Bathurst during the evening of 2 June 2009. It was a chance sighting but it was alleged that Mr Simmons decided to take the opportunity to seriously harm, and in fact kill Andrew. It was alleged that the men then disposed of his body, most likely in the Sofala region. Mr Simmons made a number of later admissions, some to his associates and later to undercover operatives. While there were inconsistencies in these versions and they likely contained exaggeration, it was the Crown position that they nevertheless indicated his guilt. The Crown also alleged that after Andrew disappeared, Mr Simmons demonstrated a consciousness of guilt in aspects of his later behaviour.
35. I have reviewed all the evidence presented to me. I have formed my own opinion that the admissions are unreliable for a firm finding in this jurisdiction. Without fresh evidence I am unable to establish the manner, cause or place of Andrew's death.

#### **Findings required by section 81(1) *Coroners Act 2009***

36. I find, on the balance of probabilities, that Andrew Stephen Russell is dead. He died on or shortly after 2 June 2009. While it is likely that Andrew died in the Bathurst/Sofala area, I am unable to determine the exact place of his death. Andrew's death remains suspicious. The manner and medical cause of his death are not established.

#### **Recommendation**

37. I recommend that the investigation of Andrew's death is referred to the Unsolved Homicide Unit of the NSW Homicide Squad in accordance with the protocols and procedures of that unit. This will ensure the matter will be reviewed again by police over the coming years. There is always a small possibility that fresh evidence will emerge.
38. Finally, I offer Andrew's family and friends my sincere and heartfelt condolences. I thank Andrew's father and step-mother for attending this inquest. I acknowledge the pain Andrew's family must feel where Andrew's death is clearly suspicious, and yet no person has been convicted.

39. I close this inquest

Harriet Grahame

Deputy State Coroner

13 October 2016