SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2019] FAI 21

B45/19

DETERMINATION

BY

SHERIFF GILLIAN A WADE QC

UNDER THE INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC (SCOTLAND) ACT 2016

into the death of

ALEXANDER BIRRELL

PERTH, 22 May 2019

The Sheriff, having considered all the evidence adduced,

Determines:-

1. In terms of Section 26(2)(a) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, that Alexander Birrell died on 29 May 2018 at 1850 hours at Perth Royal Infirmary.

2. In terms of Section 26(2)(b) of the said Act, makes no finding in respect that the deceased's death did not result from an accident.

3. In terms of Section 26(2)(c) of the said Act that the cause of his death was
   I (a) small cell lung carcinoma
   II chronic obstructive pulmonary disease

4. In terms of section 26(2)(e) There are no precautions which could reasonably have been taken to prevent the death.

5. Makes no findings in terms of sections 26(2)(d), (f) and (g).

NOTE

[1] The fatal accident inquiry into the death of Alexander Birrell was held on 22 May 2019. The Crown was represented by Mr Sadiq, Procurator Fiscal Depute, Dundee. Ms Stronach, solicitor, appeared to represent Tayside Health Board. Mr Shand, solicitor, appeared to represent the Scottish Prison Service.

[2] The deceased was born on 3 September 1951. Shortly prior to his death he was an inmate at HMP Perth and was housed within cell 62 flat 2, C Hall.

[3] The deceased was a serving prisoner. He had been convicted of murder on the 24 October 1991 at Edinburgh High Court. He was liberated on licence on 6 September 2016 but was recalled to HMP Perth on the 21 November 2016 after a conviction for a contravention of section 39 of the Criminal Justice (Scotland) Act 2010.

[4] Accordingly at the time of his death he was in lawful custody and an inquiry was mandatory in terms of section 2(3) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. Being subject to a life sentence the deceased had no earliest release date (EDL).

[5] A preliminary hearing was assigned to take place on 16 April 2019. At that Hearing I was advised that a number of matters had been agreed and a joint minute would be provided in due course. The Crown indicated that due to the extent of the matters agreed there would be no requirement to hear any oral testimony and that at the conclusion of the proceedings all parties would be inviting me to make formal findings only.

[6] I was mindful of the observations of Sheriff Foulis in a recent fatal accident inquiry which took place in similar circumstances under reference [2018] FAI 40. In that case there were no contentious matters and parties also sought to proceed by way of joint minute in terms of Section 18 of the Act under reference to the Act of Sederunt (Fatal Accident Inquiry Rules) 2017. In that case the learned Sheriff observed that,

> "It should not, however, be lost sight of that the role of the sheriff at an inquiry is different from that played in adversarial proceedings. This is made clear by reference to the provisions of section 20(2) of the 2016 Act. It accordingly appeared to me that the parties entering a joint minute and intimating to me that this dealt with the matters which were to be the subject matter of the inquiry did not constrain me from seeking certain information to ensure that there were not matters upon which I should consider evidence in an appropriate form to be presented to me."

[7] In that case the learned Sheriff ordered the Crown to lodge a list of witnesses and a synopsis of the matters to which they spoke in order that he could determine whether there were indeed any matters upon which he required further information.

[8] In this case I did not consider that to be necessary. It seemed to me that on the basis of the information before me, to which no one took exception, the deceased's death was the result of his terminal condition and all that could have been done to offer suitable palliative care at the end of his days was indeed done.

[9] I was however aware that his demise had come relatively quickly at the end although a terminal diagnosis had been given. I therefore sought to satisfy myself as to the full nature and extent of his medical condition and the end of life care administered. I ordered that affidavits be provided by the health professions having responsibility for his care and treatment. Affidavit evidence was obtained from Dr Paul Cadden,

Consultant Respiratory Consultant at Perth Royal Infirmary, and Dr Caitlin Scott Bartrop, the junior doctor involved in his care.

[10] I could not identify any other witnesses who would have been able to provide affidavit evidence which would have enlightened me further and considered this would be a waste of the Crown's resources in this instance.

[11] The deceased's next of kin had indicated that they did not wish to be represented at the inquiry.

[12] At the inquiry itself the Crown sought to rely on the affidavit evidence and the Joint Minute of Agreement. The other parties led no evidence and made no substantial contribution in the course of the hearing. I was therefore satisfied that it was indeed appropriate for me to make formal findings in relation to the cause of death and the place of death only. I did not consider that any additional findings or recommendations in terms of the 2016 Act were required.

[13] The deceased had a history of metastatic small cell lung cancer, ischaemic heart disease, chronic obstructive pulmonary disease, peripheral vascular disease and diverticular disease.

[14] On Tuesday, 15 May 2018 the deceased had complained of increased breathlessness over the previous four days, difficulty expectorating and pleuritic chest pain. The deceased was conveyed to Perth Royal Infirmary by prison staff at 1705 hours and was admitted to ward 4.

[15] On examination the deceased was found to have crackles at the left base and worsening cachexia. His condition was treated as pneumonia and dehydration with

fluids and oral antibiotics. The deceased was increasingly symptomatic over the next 2 days with evidence of delirium. A CT brain scan revealed evidence of brain metastases. A CT scan of the thorax and head showed evidence of disease progression. Inflammation of the cancer was also noted in the lungs. Over the next few days there was further deterioration and the decision to aim for palliative care was made 23 May 2018. A "do not attempt CPR" form was completed. Regular medication was stopped.

[16] The deceased experienced further symptomatic deterioration over the next few days and was cared for in a side room in the ward. On the 26 May 2018 the deceased's family were updated and they wished to be informed of his death.

[17] On 29 May 2018 a palliative care review was carried out and it was recognised that the deceased was in the last hours of life. At about 18:50 hours on the same date Dr Caitlin Bartrop pronounced life extinct and certified the cause of death as I (a) small cell lung carcinoma and II chronic obstructive pulmonary disease.

[18] The affidavit evidence obtained made clear that the deceased had been diagnosed with lung cancer in 2010 at which time he underwent an operation at the Golden Jubilee Hospital in Glasgow. He underwent a lobectomy for moderately differentiated adenocarcinoma. This is an early stage non-small cell lung cancer which, if operated upon early offers a good chance of survival at five years. It appears that this treatment was successful on follow-up. However in 2017 deceased presented with further symptoms namely persistent cough and blood in his sputum. He underwent further examination including a bronchoscopy on 26 April 2017 and 18 May 2017. There was concern over an area in the scapula and the large bowel.

[19] The deceased underwent an MRI scan of the scapula and on review he was diagnosed with lung cancer at an advanced stage. Discussions took place about the best potential treatment options. In particular consideration was given to the possibility of surgery as opposed to oncology treatment. On 27 July 2017 a further discussion took place at which the risks of breathlessness after surgery were discussed with the deceased. He indicated his wish to be considered for surgery nonetheless. As a result he underwent surgery in Edinburgh on 21 September 2017 and the results of the biopsies suggested that he actually had a small cell lung cancer which was found in the subcarinal and right paratrachael node. As a result of these findings he was referred to oncology with a plan for a further CT scan.

[20] The deceased was referred to oncology and saw a Dr Dougal Adamson on 5 October 2017. A discussion took place with the deceased regarding the risks and benefits of palliative chemotherapy treatment but he was keen to proceed with treatment and understood that he may only live a few months longer with treatment compared to receiving no treatment for his cancer. In view of the fact that his cancer was now at stage III the prognosis was very limited. The five-year survival for disease at this level is less than 10%.

[21] He was admitted to Ninewells Hospital between the 28 October 2017 and 1 November 2017 with neutropenic sepsis which is a known, severe, potential life-threatening side effect of chemotherapy. It was decided that he could continue chemotherapy after this at a lower dose and it was explained to him that the chances of cure were now about 3%.

[22] He was admitted to Perth Royal Infirmary on 26 February 2018 with community-acquired pneumonia, small cell lung cancer and drowsiness secondary to opiates. The scan showed no evidence of brain metastases. He was discharged the next day with antibiotics. His radiotherapy continued between 12 March 2018 and 28 March 2018 on an outpatient basis.

[23] On the 18 May 2018 Dr Adamson reviewed CT scans and wrote to Dr Martindale to advise that unfortunately there were signs of significant progression in the cancer despite the deceased's treatments with changes in the lungs, probable bone metastasis and the suspected liver metastasis. The opinion was the patient was likely to have a prognosis in the timeframe of weeks.

[24] The deceased was admitted to Perth Royal Infirmary on 15 May 2018 as previously noted. The affidavit of Dr Caitlin Bartrop records that he was transferred from ward 4 to ward 1 on 17th or 18th of May but there was continued deterioration and on 21 May 2018 it was decided to stop regular medication and provide palliative care. Mr Burrell's sons (James and Mark) visited him on 26 May. At that time they stated that they wished to be informed when their father passed away but did not want to be involved in the funeral arrangements or in registering the death.

[25] On 29 May 2018 the deceased was yet again seen by the palliative team who were of the view that he was in his last few hours of life. At 1850 hours on 29 May 2018 Dr Bartrop pronounced life extinct.

[26] Accordingly while I whole heartedly endorse the views of the learned sheriff regarding the inquisitorial role of the Court in an Inquiry such as this and acknowledge

that the court should be wary of the dangers of the court's role being overlooked in an attempt to avoid unnecessary use of public resources and court time, each case must be looked at on its merits.

[27] I was satisfied that in this case the deceased was well cared for and received all appropriate treatment for a long standing and ultimately terminal condition. There were clearly no issues in contention and accordingly I was content to allow the Inquiry to proceed on the basis of the affidavit evidence and the joint minute of agreement only.

[28] No failings or issues have been identified which may have caused or contributed to the deceased's death. There are no reasonable precautions which might realistically have prevented his death and there are no systemic defects which have been identified or require to be addressed.

[29] On behalf of the Court and all parties condolences are extended to the family of the deceased.