SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2016] FAI 16

B144/16

DETERMINATION

BY

SHERIFF VALERIE JOHNSTON

UNDER THE FATAL ACCIDENTS AND SUDDEN DEATHS INQUIRIES (SCOTLAND) ACT 1976

into the death of

STEPHEN CHRISTOPHER KEARNEY

Perth, September 2016

The Sheriff, having resumed consideration of the Fatal Accident Inquiry into the death of Stephen Christopher Kearney, Determines in terms of section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 as follows:-

In terms of section 6(1)(a)
The late Stephen Christopher Kearney (date of birth 7 July 1965) was pronounced dead at 7:20 am on 14 September 2014 within cell 3, C Section Murray House, HMP Castle Huntly.

In terms of section 6(1)(b)
The cause of Mr Kearney's death was:
I (a) Cor Pulmonale
(b) Chronic Bronchitis and Emphysema;
II Adverse effects of Methadone and Heroin.

In terms of Section 6(1)(c)
There are no reasonable precautions whereby the death might have been avoided

In terms of Section 6(1)(d)
There is no finding about defects in any system of working which contributed to the death.

In terms of section 6(1)(e)

There are no other facts which are relevant to the circumstances of the death.

Note:

[1] The inquiry into Mr Kearney's death took place on 29 August 2016. The Crown was represented by Mrs Davidson, Procurator Fiscal Depute, Perth, Mr Kearney's brother, Mr Clark Kearney, was represented by Mr O'Donnell, Solicitor, Glasgow and The Scottish Prison Service was represented by Miss Russell, Solicitor, Edinburgh.

[2] This was a mandatory inquiry as Mr Kearney was in legal custody at the time of his death.

[3] At the commencement of the inquiry the Sheriff Clerk Depute read a Joint Minute into the proceedings. I also heard the evidence of three witnesses.

[4] Mr Kearney was held at Castle Huntly on the authority of warrants of imprisonment.

[5] Mr Kearney suffered from Chronic Obstructive Pulmonary disorder (COPD). He suffered from Asthma and was prescribed steroids and inhalers. He suffered from Depression and was prescribed Mirtazapine. He had a history of drug abuse and was prescribed 18mls of Methadone once daily at the time of his death. He was also a heavy smoker.

[6] While in custody on 1 September 2014 he was seen by a prison doctor. He was diagnosed as suffering an exacerbation of the COPD and was short of breath. He had a cough and green-flecked sputum. He was prescribed a course of antibiotics and prednisolone.

[7] Mr Kearney shared cell 3C in Murray House, HMP Castle Huntly with Gary Joseph McGowan. He slept in the bottom bunk with Mr McGowan sleeping in the top bunk. After lockdown inmates can walk around freely within section C and can choose whether to lock their cell doors.

[8] During the day on 13 September 2014 the prisoner Ronald Shane McKay had been with Mr Kearney and had visited him in his cell for about ten minutes in the evening. They were friends. When interviewed on 14 September 2014 he told the police that at 21:00 Mr Kearney was watching X-Factor on the television. He could not recall the time or programme when he gave evidence but was clear that although Mr Kearney was breathless and unwell most days he had been fine during that day and had made no complaint to him.

[9] Mr McGowan in a statement given to the police on 14 September 2014 at 10:10 said that he did not know what time he had returned to the cell but he had watched a bit of the X-Factor before going to sleep in his bunk. He thought Mr Kearney had 'taken something' as he couldn't make out what he was saying.

[10] When giving evidence Mr McGowan was shaky on some of the details recorded in his contemporaneous statement. Many things affect a witness's ability to recall events. These include the stress of the event, what condition of sobriety or wakefulness the witness was in at the time of the event, the passage of time, and, of course, the stress of giving evidence. Mr McGowan was very nervous. It was clear that the presence of members of Mr Kearney's family in the courtroom was causing him anxiety and there was at one point a brief interruption from the public benches while he was speaking.

[11] In the police statement Mr McGowan is recorded as saying:-

> "I don't know what time it was but I must have got woken up by the sound of Steven breathing deeply, it sounds as though he is gasping. I could see that he was crouched on his knees with his forehead on the floor. He was in front of the cell door which was closed. I got up and could see slavers on the floor. I have seen him like that before and I normally give him a shake and he stops.
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> I gave him a shake and had to really shake him. He was grumbling and I heard the sound of liquid coming up and down the throat. I stood behind Steven and helped him to his feet. I put him on the bottom bunk and tried to get him onto his side but I couldn't lift his right leg on to the bed. He is quite a stocky lad, bigger than me.
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> I went back to sleep and was woken up by Steven being sick into his bin. I looked over the bed and could see Steven sitting on the bed with the bin between his legs. I think he was sick because I could hear something being brought up.
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> I went back to sleep again. I did put the telly on to get the time a couple of times and I remember it being about half past twelve (0030 hours) and the second time just before I pressed the buzzer."

[12] In evidence he took issue with the suggestion that he had told the police he heard Mr Kearney gasping. I noted that the reference to gasping in the statement is in the present tense and I read that as an explanation of Mr Kearney's presentation in general when he was breathing deeply rather than an exceptional event on that night. The position of Mr Kearney crouched down on his knees with his forehead on the floor was something he agreed that he had not seen before and yet it is in his statement that he had. It was put to him that he had not spoken to Mr Kearney as he had not mentioned that in his statement but he maintained that he had and that is supported by the reference in the statement to him shaking Mr Kearney who grumbled. Neither Mr McGowan nor Mr Kearney alerted the prison or medical staff to this episode of illness. Mr McGowan went back to sleep.

[13] When Mr McGowan woke up to the sound of Mr Kearney being sick into a bin the bin had been moved by Mr Kearney from its position near the cell door where the alarm button is situated. Neither Mr McGowan nor Mr Kearney alerted the prison or medical staff to this episode of illness and Mr McGowan went back to sleep. At some point Mr McGowan heard a bang but didn't look to see what it was that caused that. In evidence he indicated that he did not know if the bang was inside the cell or not. He explained that due to being quite tired he had been in a deep sleep.

[14] When Mr McGowan woke up at about 07:00 hours on 14 September 2014 he saw Mr Kearney lying face down on the floor next to the bottom bunk. He pressed the alarm next to the cell door.

[15] Prison Officers Norman Dyce, Ewen Christie, Brian Smith and David Hadden all attended at the cell. Mr Christie checked the deceased's wrist and neck for a pulse but did not find any signs of life. Mr Christie was formerly employed as an Undertaker and could see that Mr Kearney was cold and that *rigor mortis* had set in. Due to his experience he was of the opinion that the death had occurred quite a few hours earlier. He advised that prison staff were trained in basic first aid. For a medical emergency staff would call 999. He did not know where the ambulances came from but they could take between 25-40 minutes to arrive.

[16] The Scottish Ambulance Service (SAS) received a call to attend at HMP Castle Huntly at around 07:05 hours. SAS Ambulance Technicians Jenny Dodd and Lauren Kohler attended immediately. Ms Dodd checked Mr Kearney for a pulse but could see

that he was showing signs of *rigor mortis* and lividity. She pronounced Mr Kearney's life extinct at 07:20 hours on 14 September 2014.

[17] Police Scotland Force Medical Examiner, Doctor Bernard Riley, attended at Mr Kearney's cell at about 11:00 and examined him. He saw that Mr Kearney was lying face down and was showing signs of *post mortem* staining consistent with him dying in that position. There were no signs of violence and no signs of intravenous drug use. Mr Kearney had *rigor mortis* in his large joints but not in the smaller ones.

[18] Police Scotland Officers Wayne Brand, Jamie Webster, Terry Reid and Nicola Kerr carried out a search of Mr Kearney's cell at about 13:55 hours. No controlled drugs were recovered.

[19] The joint minute incorporated a report by Forensic Pathologist Doctor Graham Whyte (Deceased), who carried out a *post mortem* examination on Mr Kearney on 16 September 2014. He attributed death to cor pulmonale as a consequence of chronic bronchitis and emphysema.

[20] The joint minute incorporated a Toxicology Report by Forensic Toxicologists Denise Anne McKeown and Hazel Jennifer Torrance. They identified the following substances in samples taken from Mr Kearney: Chlorpheniramine; Methadone; Zopiclone; Heroin metabolites; Mirtazapine; Codeine; Morphine; 6-Monoacetylmorphine. Their findings were consistent with Mr Kearney having used heroin and having survived for more than three hours after doing so.

[22] The Crown invited me to make formal findings in terms of section 6(1)(a) that Stephen Christopher Kearney was pronounced dead at 07:20 on 14 September 2014

within cell 3 C section Murray House, HMP Castle Huntly, and section 6(1)(b) that the cause of death was 1(a) Cor Pulmonale, 1(b) chronic bronchitis and emphysema, and 2 adverse effect of methadone and heroin. I was asked to make no findings in terms of section (1)(c)(d) or (e).

[23] Mr O'Donnell on behalf of Mr Clark Kearney adopted the Crown position on section 6(1)(a) and (1)(b) in accordance with the findings of the Post Mortem. He sought no findings with regard to sections 6(1)(c) and (d). He asked for a finding under section 6(1)(e) that:

> (i) had the alarm within the cell been activated by Mr McGowan when he encountered Mr Kearney on the floor of the cell in distress then prompt medical attention would have been provided and Mr Keaney's life may have been saved;
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> (ii) had Mr McGowan activated the alarm when he later saw Mr Kearney being sick into the bucket prompt medical attention would have been given and Mr Kearney's life may have been saved; and,
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> (iii) it would be a reasonable inference from the information relating to the death that the third bang would in all likelihood have been Mr Kearney's collapse onto the floor and had the alarm been activated at that time prompt medical assistance would have been provided which may have saved his life.

[24] Mr O'Donnell accepted that I did not have the benefit of medical evidence to categorically answer these questions. He submitted that I could infer that prompt action would have resulted in medical attention which may have saved Mr Kearney's life.

[25] The inaction of Mr McGowan was heavily criticized starting from the premise that the first sight he had of Mr Kearney that night was of a man in very serious and unusual circumstances. He knew that Mr Kearney had breathing difficulties and health problems. It was suggested that Mr McGowan's primary thoughts were for the potential repercussions to himself and not for the wellbeing of Mr Kearney. I was asked to apply an objective test of what a reasonable person in the circumstances of that night would have done. I was asked to reject as unreliable the evidence given by Mr McGowan that he had spoken to Mr Kearney as he had not mentioned doing so in his statement to the police and it was unlikely due to Mr Kearney's condition. Mr O'Donnell's proposition was that if Mr McGowan had behaved as a normal person within the time period of about an hour and a half to two hours Mr Kearney's life could have been saved or, at the very least, there could have been some medical intervention before his death.

[26] Mr O'Donnell accepted that Mr Kearney himself had the power to raise the alarm and had been able to move to the door on two occasions but stated that Mr Kearney's decision-making ability must have been affected by the physical stress he was under. He asked me to draw an inference on balance of probabilities that the bang heard by Mr McGowan was caused by Mr Kearney falling. He conceded that it could not be said whether by summoning help at that time it would have been possible to assist him or if that was the point of death.

[27] On behalf of The Prison Service Miss Russell gave her condolences to Mr Kearney's family and adopted the Procurator Fiscal Depute's submissions for section 6(1)(a) and (b) findings only.

[28] It is clear from the Post Mortem examination Report that Mr Kearney suffered from significant natural disease. In the pathologist's opinion sudden death could have occurred "*at any time with little or no warning sign preceding it due to an abnormality in the electrical conduction system of the heart (cardiac arrhythmia).*" The presence of chronic lung disease increased the risk because Mr Kearney's blood oxygen levels were chronically low, resulting in hypoxia. This was made worse by the presence of the prescribed Methadone and the heroin Mr Kearney had taken both of which slowed his breathing rate thereby making the hypoxia worse and significantly contributing to his death.

[29] Although Section 6(1)(e) of the Act is very wide and entitles the Court to make comments and recommendations in relation to matters which have been explored in the inquiry it is not always possible to answer all of the questions raised. The purpose of a Fatal Accident Inquiry is to determine –

(a) Where and when the death, and any accident resulting in the death, took place,

(b) The cause, or causes, of such death or any accident resulting in the death,

(c) The reasonable precautions, if any, whereby the death, and any accident resulting in the death, might have been avoided,

(d) The defects, if any, in any system of working, which contributed to the death, or any accident resulting in the death,

(e) Any other facts which are relevant to the circumstances of the death.

The Sheriff is required to examine the facts as far as possible and see what lessons can be learned and steps taken to prevent or reduce such accidents in the future.

[30] It is important to remember that a Fatal Accident Inquiry is an exercise in fact finding, not fault finding. In these proceedings the Court does not make findings or express opinions on questions of fault or liability or attempt to apportion blame.

[31] It is natural for the close family of Mr Kearney to feel that Mr McGowan ought to have done something to assist Mr Kearney that may have made his last moments more bearable if not saved his life. Most people would see that as a normal human response to another's suffering. It is very difficult, however, to say what constitutes normal conduct in a prison setting where patterns of behaviour are not the same as found outside such establishments in day-to-day life.

[32] Mr McGowan cannot be judged too harshly. On 14 September 2014 he was 30 years of age and had been in prison since the age of 15, half of his life. He had grown to adulthood in a prison setting. He had no medical training. He too was a drug addict who was prescribed Methadone and Mirtazapine. The latter made him drowsy. His decision-making ability was also likely to have been adversely affected. Mr Kearney was a much more experienced, older man who had kindly agreed to share a cell with Mr McGowan while others had refused. Mr McGowan suspected Mr Kearney had taken an illicit substance and was aware that Mr Kearney had a high tolerance to drugs. He did what he could to help Mr Kearney. He agreed that in hindsight he should have called for assistance and wished that he had. He accepted that in general a prisoner would not want to get another into trouble which could result in the other being downgraded and

sent back to a closed prison. He was adamant that his concern was not for the possible repercussions he would have suffered. He stated that he would have called for help if he had known that Mr Kearney needed a doctor. I can find no reason to doubt him. It is correct that a statement given close to an event is likely to be more accurate but what is noted depends heavily on the questions asked and the skill of the questioner in accurately recording the answers. The officer who took Mr McGowan's statement did not manage to spell Mr Kearney's name correctly.

[32] Even if Mr McGowan had summoned assistance there was no medical evidence before me to say what intervention would have been required or what the prospects of success would have been and at what time. There was no evidence as to when Mr Kearney's condition became a medical emergency. He had not looked ill earlier and had a normal presentation of breathlessness. He was able to move to get the bucket into which he was sick for an unknown reason and yet he did not use the alarm. With his significant health issues his use of heroin created a further layer of unpredictability. He had taken the heroin at some time at least three hours prior to death which was too much for his weakened system to support. He would not have been aware of just how weakened his system was. The pathologist noted that *"Drug tolerance is an unpredictable effect which varies between both individuals and also within a single person over time."* He included the adverse effects of methadone and heroin as significant contributory factors in Mr Kearney's death.

[33] The evidence that was before me supports the conclusion that Mr Kearney's death was an acute event. The *post mortem* report recorded a sudden death that could

have occurred at any time. I am unable to make any determination under section 6(1)(e) that sounding the alarm when he was first found on the floor or when he was seen being sick may have saved Mr Kearney's life.

[34] It is possible that the bang heard by Mr McGowan was that of Mr Kearney collapsing onto the ground. I can take it no higher than that. If it was Mr Kearney it is likely on balance of probabilities that this was the terminal event. I base this on the evidence of Mr McGowan that Mr Kearney was alive at around half past midnight and the pathologist's opinion that death was a sudden event that had occurred in the early hours of the morning. By the time Mr Kearney's body was discovered at 07:00 *rigor mortis* was already in his major joints and there was *post mortem* lividity present. It follows that obtaining medical assistance at the time of the bang, if that was caused by his collapse, would not have saved his life.

[35] I would like to conclude by extending my sincere condolences to the family of the late Stephen Christopher Kearney.