



**STATE CORONER'S COURT
OF NEW SOUTH WALES**

Inquest:	Inquest into the death of Gary McKell
Hearing dates:	3 and 4 June 2014
Date of findings:	4 June 2014
Place of findings:	Port Macquarie Local Court
Findings of:	Magistrate Michael Barnes, State Coroner
Catchwords:	CORONIAL LAW – Cause and manner of death Violent, unnatural death, assault, self defence
File number:	2012/235420
Representation:	Sgt Sheldon Korneluk assisting the State Coroner Mr Michael Giles representing Mr Biram
Findings:	<p>Identity of deceased: The deceased person was Gary McKell</p> <p>Date of death: Mr McKell died on 28 July 2012</p> <p>Place of death: He died at Camperdown NSW</p> <p>Cause of death: The death was caused by a blunt force head injury</p> <p>Manner of death: Mr McKell died from injuries sustained when he was punched by a known person who reasonably believed it was necessary for him to do so to defend himself from Mr McKell</p>

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The Coroners Act 2009 in s81 (1) requires that when an inquest is held, the coroner must record in writing his or her findings as to various aspects of the death. These are the findings of an inquest into the death of Gary McKell.

Introduction

In July 2012 Gary McKell was living with his de-facto partner in a caravan park in Port Macquarie. After consuming a number of beers, Mr McKell became increasingly upset by the noise being made by power tools being used by the occupant of a near-by cabin. He left his caravan and went to confront his neighbour about the noise.

An argument ensued which quickly deteriorated into a physical fight. Mr McKell was knocked to the ground and suffered a severe head injury. He was taken by ambulance to the Port Macquarie Base Hospital.

He was transferred to the John Hunter Hospital where he underwent a surgical procedure to relieve pressure on his brain. He was then transferred to the Royal Prince Alfred Hospital in Sydney. He progressively deteriorated and died two weeks after the initial incident.

Police concluded his assailant had been acting in self defence and so no criminal charges were laid.

The Inquest

Because Mr McKell died a violent and unnatural death, his death was reported to a coroner. In view of the circumstances an inquest was convened. It proceeded at Port Macquarie on 3 and 4 June, 2014. The issues considered at the inquest are the findings required by Sec 81 of the Coroners Act, namely:

- To confirm that the death occurred;
- To confirm the identity of the deceased person;
- To find the date, place and medical cause of the death; and
- To more fully examine and make findings as to the circumstances of the death.

The inquest also considered whether the evidence gathered by the investigation should be referred to the Director of Public Prosecution pursuant to s78 of the Act.

The evidence

Background

At the time of his death Gary McKell was 67 years of age. He had been in a de-facto relationship with his partner Marjorie Laverty for about 25 years.

In about April 2011 they moved into the Melaleuca Caravan Park in Port Macquarie. They lived there on a permanent basis in a caravan they owned. Soon after they moved to the caravan park they met Graeme Biram and were on friendly terms with him.

In December 2011 they moved their van to site 15 which was next to a cabin in which Mr Biram lived. Their caravan was positioned very close to the carport adjacent to the cabin.

Initially, the friendship between Mr McKell and Mr Biram continued. However some months before the fatal incident it deteriorated as a result of Ms Lavery and Mr McKell becoming annoyed by the mess and noise caused by Mr Biram undertaking carpentry work in his carport and cabin. Relations were also strained by a disagreement over Mr Biram raking gravel near the McKell's caravan.

The cause of these disagreements is not important but they indicate that by July 2012 there was a degree of animosity between the two men.

The fatal incident

On Saturday 14 July, at about 9.30am, Ms Lavery and Mr McKell left the caravan park in their car and went into Port Macquarie, attending to various domestic chores. They returned to the caravan park at about midday. Ms Lavery says that when they got home they could hear Mr Biram "*banging*" in his residence. They did their best to ignore that and went about their daily activities.

At about 2.00pm Mr McKell sat down to listen to the horse races on the radio. He drank beer while he did so. By about 4.30pm he had consumed about six 375ml cans of full strength beer. Ms Lavery says the banging from the neighbouring cabin had continued intermittently throughout the afternoon. She deduced from the scowls Mr McKell cast in the direction from which the sound was coming that it annoyed him.

Ms Lavery says Mr McKell suddenly left the caravan and a short time later she heard raised voices, one of which she recognized as Mr McKell's. She heard him say loudly, "*enough is enough*". She says the arguing continued but she couldn't understand what was being said. She says that at that point she wasn't particularly concerned: she thought they would sought out their differences. However, when she saw a tent pole fly through the air and land in front of the annex next to their van she immediately went outside to investigate.

She says that when she stepped from the van into the annex she he saw Mr Biram and Mr McKell engaged in a physical fight – "*flailing away at each other.*" She said both were throwing punches. In her police statement she said the punches were landing on their targets but in oral evidence she said she was not sure about this.

She saw that they were circling around each other. After a few seconds Ms Lavery saw Mr McKell had his fists up in front of his face in a defensive stance and Mr Biram had his right fist cocked backwards. He threw a punch and hit Mr McKell in the mouth or on the chin. She

said she saw Mr McKell's head go backwards and he fell heavily on his back. She said she heard a "*sickening thump*" as his head hit the roadway.

She yelled out and ran to Mr McKell's aid. Mr Biram assisted by rolling Mr McKell onto his side.

She said after he hit the ground Mr McKell wasn't moving but he was making a "*gurgling sound*". She ran into the caravan to get her phone. As she did so she says she remembers kicking the tent pole which was on the ground near the gutter in front of her annex.

However, when the version of one of the police officers who attended soon after was put to her, Ms Lavery agreed she could have been mistaken. That officer, Constable Drewitt, said when he arrived, the tent pole was near the victim who was lying in the middle of the road in front of Mr Biram's carport. He says he saw Ms Lavery pick up the pole and put it near her caravan.

By this stage Mr McKell was bleeding profusely from a wound to the back of his head and in accordance with instructions given to her by the 000 operator she had called, Ms Lavery was applying pressure to the wound with a tea towel. The sequence of events described by Constable Drewitt would explain how the tent pole came to have a significant amount of blood on it, as seen in the crime scene photographs.

Ambulance records show the call from Ms Lavery was made at 4.37pm. As already mentioned, in accordance with the operator's instructions Ms Lavery got a towel and went back to Mr McKell and applied pressure to a badly bleeding wound on the back of his head. She held that pressure on the wound until the ambulance arrived. She saw them put Mr McKell on a stretcher. She got some personal effects from their caravan and went with her partner in the ambulance to the Port Macquarie Base Hospital.

Police were called and arrived at the park before the ambulance had removed Mr McKell. One of the officers spoke to Mr Biram who told the officer that he had been working inside his cabin when Mr McKell approached and made a loud noise on the wall of the cabin next to the door. He says Mr McKell yelled out "*I've had enough it's time to stop working so I can hear the football*".

Mr Biram told the officer that when he had opened the door to his cabin and saw Mr McKell walking back towards his caravan. He also saw "*a hole*" in the wall next to his door which he assumed had been caused by Mr McKell. He therefore followed him to his van, engaged him.

He said that Mr McKell yelled at him and grabbed an aluminium pole from his caravan annex and hit Mr Biram over the head with the pole. Mr Biram said it seemed that Mr McKell was going to try and hit him again so he grabbed hold of the pole to stop that happening. He said that while they were both holding on and wrestling over the annex pole they walked onto the road out at the front of the caravan. He said he released his right hand off the pole and

punched Mr McKell once to the chin. He saw Mr McKell fall backwards onto the road. He saw his head start to bleed and he heard Mr McKell making a snoring sound.

Mr Biram agreed to be interviewed by detectives three days after the incident. He gave an account largely consistent with his initial version.

He said that on the afternoon of the incident he heard a banging on the side of his cabin and heard Mr McKell yelling out. Mr Biram says that he wasn't making any noise inside the cabin at that time as he had stopped to watch the football, although he acknowledges that earlier in the day he had been building an entertainment unit from timber he had then recently obtained.

He told the detectives that he heard Mr McKell yelling out complaining about the noise he had been making and banging on the side of his cabin. He said by the time he went out Mr McKell was back over near his caravan and he followed him. He said that as he approached him Mr McKell took a tent pole that had been holding up the caravan annex and struck him over the head with it.

He says he stumbled back tripping over the gutter and then Mr McKell "*was right on top of me again with this pole*". Mr Biram says he grabbed the pole because he was sure Mr McKell was going to hit him again. He said he was holding onto the pole with two hands and was Mr McKell. One of his hands was between the grip Mr McKell had on the pole. He said he tried to get the pole away from Mr McKell but was unable to do so. After they had struggled like this for a few seconds, Mr Biram released the grip he had with his right hand and punched Mr McKell flush on the chin.

He said he saw Mr McKell fall back onto the roadway. A short time later he saw blood coming from under Mr McKell's head and so he rolled him into a recovery position. Mr McKell was clearly unconscious.

He said that Ms Lavery called an ambulance and got a cloth which she pressed to the wound on Mr McKell's head. He helped hold up Mr McKell's head.

During this inquest Mr Biram admitted that he had been hammering within his cabin immediately prior to Mr McKell coming and banging of his wall. He also admitted he had not seen the damage done by that hammering before he walked briskly towards Mr McKell's caravan to confront him about his behaviour.

Mr Biram admitted he was frustrated but claims not to have been angry at this time, although he said loudly, word to the effect; "*What the bloody hell do you think you are doing?*"

He was unable to say how closely he approached Mr McKell, who, he says, was standing on the concrete slab beside his caravan, next to a metal tent pole that was in the middle of the leading edge of the annex.

He says that he was suddenly hit across the head with that pole although he did not remember seeing Mr McKell take it up. He says the next thing he remembers is Mr McKell coming at him with the pole and he believes he automatically grabbed it, he presumes to protect himself from being hit again.

Mr Biram says that in the next few seconds he was pushed backwards by Mr McKell as they both tried to free the pole from the other's grasp. He says that on feeling the other man ceasing to push towards him, Mr Biram released the grip of one of his hands on the pole and struck Mr McKell once to the head, causing him to fall down.

Another resident of the caravan park, Mr Rodney Speers witnessed part of the fatal incident. Mr Speers says he had only been staying in the caravan park for three days when it occurred. Mr Speers' evidence on the sequence of events was somewhat confused and inconsistent. It is obvious he had only a partially obscured view and everything happened quickly. By the time of the inquest it seems his memory had degraded.

His caravan was positioned behind Mr McKell's caravan. He says he was sitting outside and at the front of his caravan when he heard a loud banging sound. He looked around and saw two men – one leaving a cabin next to the van behind him and moving towards it, the other near that van. At some stage he saw one of both of them take hold of a metal pole that I am satisfied was the tent pole referred to by the other witnesses. Initially he said the man who came from the cabin had the pole but he later conceded that when he first saw it both men had hold of it and *'they seemed to be wrestling with it'*.

He says he then saw one of the men take his hand off the pole raise his fist up and strike but he could not see whether it or with what it connected as they were behind the caravan and his vision was obscured. He got up to go down to see what was going on. When he got there one of the men was on the ground and a woman was kneeling near him. He had no further part to play in the incident.

The senior paramedic who attended said that when he arrived on the scene Mr McKell was lying on the road obviously unconscious. There appeared to be a large pool of blood near his head. His condition was stabilised as best as it could at the scene, he was transported to the Port Macquarie Hospital.

Hospitalisation and medical care

On arrival at the Port Macquarie Hospital at 5.13pm, Mr McKell was ventilated and stabilised. A CT scan revealed he had suffered a fractured skull to the left rear of his head and a corresponding brain injury to the right front lobe. There were extensive haemorrhages associated with both sets of injuries.

It was apparent that Mr McKell required neurosurgery and consequently, arrangements were immediately commenced for his transfer to the John Hunter Hospital. This was affected at 10.34pm.

Later that night Mr McKell underwent a procedure called a decompressive craniotomy to relieve the pressure on his brain caused by the intracranial bleeding. Due to a lack of neurosurgical intensive care unit beds at the John Hunter Hospital he was transferred to the Royal Prince Alfred Hospital in Sydney, arriving there at approximately 5.00am on 15 July.

Sadly, Mr McKell's condition continued to deteriorate and on 24 July, in consultation with his family, it was decided to remove him from the ICU for palliative care. He died without regaining consciousness on 28 July 2012.

The investigation

Scene examination

From the outset, police were involved in responding to the incident. They were informed of the seriousness of the injuries by staff who examined Mr McKell at the Port Macquarie Hospital.

Scenes of crime officers attended the caravan park, took photographs and gathered physical exhibits. They noted that the tent pole which various witnesses referred to as being involved in the incident was deformed - slightly bent towards one end.

Mr Biram was arrested at his cabin later that evening and exercised his right to silence pending the receipt of legal advice. The police photographed a minor injury to the left front of his head that he said was caused by being struck with the tent pole by Mr McKell.

Three days later, he agreed to be interviewed and gave police a detailed account of what had occurred.

Autopsy

An autopsy was undertaken by Dr Jennifer Pokorny, pathologist under the supervision of an experienced forensic pathologist Dr Rebecca Irvine. A report dated 15 August 2013 contains findings of the post mortem examination.

Mr McKell's skull was found to be fractured with the injury extending from the left posterior cranial fossa to the left occipital bone. Examination of the brain showed features of blunt force head injury and surgical intervention.

Multiple contusions and lacerations were noted bilaterally with a "*burst lobe*" in the right anterior frontal region. A sub-arachnoid haemorrhage along with some residual subdural haemorrhage and a small extradural haemorrhage beneath the occipital fracture. Mild traumatic axonal injury was seen and there were wide ischaemic injuries up to around two weeks old with associated mild cerebral swelling.

Blood taken from Mr McKell soon after his admission to the John Hunter Hospital in the early hours of 15 July was analysed and showed alcohol concentration of 0.015%. By considering the usual rate at which alcohol is metabolised by the body, I consider it likely that at the time of the incident Mr McKell would have had a blood alcohol concentration of around 0.18%

The pathologist suggested the cause of death to be complications of blunt force head injury.

Dr Jo Duflou, a senior forensic pathologist, reviewed the autopsy material and gave evidence at this inquest confirming the findings of the post mortem report.

Conclusions

There is no doubt Mr McKell died as a result of being punched by Mr Biram. The question is in what circumstances that occurred and whether it could reasonably have been avoided.

I have no doubt Ms Laverty did her best to give an accurate account of what she saw. However, it was a volatile, dynamic and very distressing situation. Understandably, she had trouble recalling everything accurately. One issue I believe she is mistaken about is her belief that she saw the tent pole being thrown through the air and landing on the grass in front of the annex. Nobody else saw that and there is persuasive evidence indicating Mr McKell struck Mr Biram with it and held onto it until he was felled, dropping the pole beside him where it was seen by the first police officers on the scene. The blood on it was likely transferred to it by Ms Laverty moving it after tending to Mr McKell's wound, as the officers also witnessed.

Mr Speers was not a particularly convincing witness. He only glimpsed part of the incident and his view was obscured. However, there is no explanation for his being mistaken about seeing the two men wrestling over the pole if it did not happen as Mr Biram alleges.

The officers who saw Mr Biram immediately after the incident saw an injury to his forehead consistent with his having been struck as he claimed.

Having regard to all of the evidence I am satisfied the following sequence of events can be established:

- Mr McKell, angered by the noise being made by Mr Biram went and banged forcefully on the side of his cabin.
- This angered or frustrated Mr Biram who quickly left his cabin and marched towards Mr McKell demanding an explanation.
- Mr McKell took hold of the tent pole he was standing next to and struck Mr Biram over the head and then advanced towards him.
- Mr Biram reeled back and grabbed the pole to prevent further assault.
- When Mr Biram felt he could let go of the pole without immediately being struck, he punched Mr McKell once.
- At the time he did so Mr Biram feared that if he simply let go of the pole and walked away he would be struck again.

For Mr Biram to be convicted of an offence connected with him striking Mr McKell, the prosecution would need to prove beyond reasonable doubt that either: (1) he was not genuinely in fear being harmed unless he struck Mr McKell; or (2) even if he did have that fear, his response to it was disproportionate to the threat he faced.

I accept that Mr Biram did believe he was at risk of being further assaulted and I also conclude that his response to that was not an over-reaction to the situation as he perceived it.

Accordingly, I conclude there should be no referral of the evidence to the DPP for the consideration of criminal proceedings.

When considering those issues a court shouldn't have regard to the ultimate outcome: I'm sure none of those involved foresaw the tragedy that followed. I have no doubt Mr Biram would not have done what he did otherwise.

There were unwise actions on both sides, and as is so often the case, excessive alcohol played a part.

I offer Ms Laverty and Mr McKell's family my sincere condolences for their loss.

Findings required by s81(1)

As a result of considering all of the documentary evidence and the oral evidence heard at the inquest, I am able to confirm that the death occurred and make the following findings in relation to it.

The identity of the deceased

The deceased person was Gary McKell.

Date of death

Mr McKell died on 28 July 2012

Place of death

Mr McKell died at the Royal Prince Alfred Hospital in Camperdown NSW

Cause of death

The death was caused by complications of blunt force head injuries.

Manner of death

Mr McKell died from injuries sustained when he was punched by a known person who reasonably believed it was necessary for him to do so to defend himself from Mr McKell.

I close this inquest.

M A Barnes

NSW State Coroner

Port Macquarie

4 June 2014