**In the Crown Court at Manchester**

**T20207170**

**R v DONALD McPHERSON**

**RULING ON SUBMISSION OF NO CASE**

**The Honourable Mr Justice Goose:**

*Introduction*

1. On the 6.6.17 Paula Leeson, whom I shall refer to as "the deceased", died from drowning in a swimming pool in a holiday home in a remote part of Denmark. She had travelled there with her husband, the defendant, on the 3.6.17. Their intention was to return home to the UK on the day that the deceased died. When the emergency services arrived it is probable that the deceased was already dead, but this was confirmed later by a doctor. She was aged 47.

2. The Danish police conducted an investigation into the death of the deceased. She was the subject of a post mortem examination, which was conducted by Professor Peter Leth, who has given evidence in this trial, and Doctor Schou. Their opinion at that stage, after being informed of the defendant's account to the Danish police, was that the cause of the deceased's death was from drowning and that it was assumed that it was accidental.

3. The defendant was interviewed by the police in Denmark. He told them that he had been in bed for most of the day when she died. He could not remember when he awoke but that they had spent time together in the bedroom. He could not remember precisely what they did, but that he had put their suitcases in the hire car, ready for their departure later in the day. He had been tired and had returned to the bedroom where he slept further, before having a swim. Both the defendant and the deceased rested further. The deceased had complained of stomach ache and toothache and she had been sick, using a toilet next to the indoor swimming pool. She returned to the bedroom and they both slept. When he awoke, the defendant saw that the deceased was no longer in the bedroom. He went to look for her, finding her face down in the swimming pool. She was fully clothed and not moving. The defendant jumped into the pool and attempted to lift her out of the pool, which was 1.2 metres deep. He was unable to do so because, he said, she was taller and heavier than him and he had pain from a previous injury to his right shoulder.

4. The defendant also said that he had left the house briefly, to seek help from two neighbouring properties, but they were unoccupied. He returned and managed to pull the deceased out of the pool and then called the emergency services. Following the advice he was given on the telephone, he attempted CPR until the paramedics arrived. They took over attempts to resuscitate until she was declared to have died.

5. The Danish authorities concluded their investigation and took no further proceedings against the defendant who was allowed to return home.

6. After his return, the Greater Manchester Police began their own inquiry and obtained further evidence relating to apparently excessive life insurance on the deceased's life of £3.5 million, of which the defendant was substantially the beneficiary. Other evidence, to which I shall refer later, was also obtained amounting to circumstantial evidence to support the defendant's prosecution for the murder of the deceased. He was later arrested and interviewed by the police. He maintained that he had found the deceased in the swimming pool and that he had tried to rescue and resuscitate her.

*The Defendant's application*

7. At the close of the prosecution's case, the defence submit that there is insufficient evidence for the Jury properly directed to convict the defendant of the murder of the deceased. The application is made under *R v Galbraith [1981] 73 Cr. App. R 124.* On behalf of the defendant Mr Ryder QC submits that the prosecution have no evidence for the jury to reject the reasonable and alternative explanation for the drowning of the deceased, namely accident. Further, it is submitted that the remaining, circumstantial evidence cannot address this weakness in the prosecution's case, such that the case should be stopped.

*The Prosecution's response*

8. On behalf of the prosecution Mr McLachlan QC submits that the evidence of blunt force injuries on the body of the deceased is consistent with unlawful force being used against the deceased in the act of causing her to drown. He accepts as he must, however, that Professor Leth's opinion when he gave evidence for the prosecution, was that those injuries are also consistent with attempts to rescue and resuscitate the deceased. Mr McLachlan argues that the circumstantial evidence may be used by the jury to reach a proper and sure conclusion that the explanation for the drowning was unlawful force by the defendant. Further, that the pathological evidence cannot be viewed in isolation and that as long as there is some evidence consistent with unlawful force, it is sufficient for the jury to convict.

*The evidence of injury to the deceased found on post mortem examination*

9. Professor Leth and Doctor Schou produced a body plan of the injuries to the deceased, excluding those that were obviously related only to medical treatment, which is contained within the Jury Bundle 1 tab 16. There were 13 separate superficial injuries, comprising bruising or abrasions. Injury numbers 1 – 3 were to the face; numbers 5 – 10 were to the arms and hands and numbers 11 – 13 were to the legs. Professor Leth also found evidence on internal examination to the back of the head of some bleeding under the skin, which had not produced any surface signs. Other injuries to the neck were discounted because they were considered to be obviously related to resuscitation. His opinion was that what caused the deceased to drown must be assumed to be an accident. This was based on the examination of the deceased as well as the information submitted to him by the Danish Police. That included the defendant's explanation in his interview in Denmark. Professor Leth also stated in evidence:-

> *"Violence inflicted by another person cannot be completely ruled out. We found that there were more lesions than we would normally see, but there may have been injuries caused in the resuscitation…The cause of death was, in my opinion, drowning. We found water in her lungs and she was found in the swimming pool. Also, we did not find any other causes of death. My initial opinion as to the most probable manner of causing the drowning… was… an accident."*

10. Before giving evidence Professor Leth was invited to reconsider his opinion in the light of the circumstantial evidence obtained by the Greater Manchester Police, and also that the swimming pool was only 120cm (just under 4 feet) and not 180cm (just under 6 feet) in depth. He changed his opinion from assumed accident to undetermined, but emphasised that this classification was for statistical rather than legal purposes.

11. In cross examination Professor Leth accepted the conclusions contained within the Defence Pathologist report of Dr Shepherd. He said:-

> *"I agree that there were a number of blunt force injuries and that none can be considered serious. I agree that the facial injuries could have been caused in a fall, and that the injuries to the arms, neck and chest could have been caused in resuscitation. I agree that there were no injuries consistent with a fight or struggle. I agree also that no marks would be left on the body if there was a fall, a push or a jump into the water. I cannot exclude the possibility of an episode of fainting. On the pathological evidence I can't say how the deceased ended up in the pool. From a pathological point of view, examining the body, I cannot exclude the possibility that the dec jumped into the pool or fainted and fell in".*

12. Professor Leth also agreed in cross examination with the observation of another pathologist Dr Wilson, who had been instructed but was not called by the prosecution, that it was not possible to say from a pathological view point that the bruising to the arms (5, 7 and 8) was from gripping the deceased to save her or to restrain her.

13. It follows from this evidence that whilst some of the injuries to the deceased are consistent with physical restraint at the time of the drowning, they are also consistent with attempts to rescue and resuscitate her. Save for Professor Leth's observation that there were more injuries than he would expect to find from resuscitation, there was nothing in the pathological evidence to direct whether the injuries were caused by lawful or unlawful force.

*The circumstantial evidence*

14. A significant part of this trial has concentrated on the defendant's actions before during and after the trip to Denmark. They can be summarised as follows:-

a. The deceased did not complain to her family of feeling unwell whilst in Denmark, when she contacted them; she was very close to her family and would be expected to have told them.
b. The defendant has repeatedly told lies about his background growing up in New Zealand; that he had been brought up in foster care when he had lived with his birth family until the age of 19; also that he had lied about owning 5 properties in New Zealand in order to support greater life insurance cover.
c. The disproportionate level of life insurance amounting to £3.5 million, compared with his own debts from property investment.
d. Obtaining joint life insurance cover on his and the deceased's life for substantial amounts which the deceased appears to have been unaware of; she didn't mention it in the hand written statements of her assets in the event of her death, all of which were intended for her son.
e. The defendants repeated checking with the insurers that the joint life policies would pay out directly to the surviving life; the most recent of these was within two months of the trip to Denmark.
f. Some life policies and the deceased's second Will, made in 2014, bore false witness signatures. Some of these, however, also bore the correct signature of the deceased.
g. The defendant caused some insurance documents to be sent to another address he owned, apparently in an attempt to hide them from the deceased.
h. In 2016, the year before the deceased's death, the defendant lied to his financial advisor as to the extent of his mortgage debts on property investments, in order to support further life insurance.
i. By the time of the deceased's death, his personal financial position had deteriorated substantially.
j. The defendant's repeated lies in life insurance and travel insurance forms when asked if he had other insurance for the same risks.
k. In some of the Trust documents for the life insurance on the deceased's life, the defendant forged witness signatures; he did not forge the signature of the deceased, however.
l. The defendant complained of a shoulder injury when he said that he was unable to lift the deceased out of the pool, but there was evidence that on other occasions, before the trip to Denmark, he appeared to have no injury and had full use of his shoulder.
m. In the hours before the emergency services were called, the personal devices of the defendant and the deceased showed periods of movement by both, possibly inconsistent with the defendant's account to the police.
n. In the days after the deceased's death, the defendant transferred approximately £20,000 from their joint bank account into the defendant's other, overdrawn accounts and unpaid credit card debts. Against this particular point, however, is the fact that he had paid over £70,000 into that account after the sale of one of his investment properties.
o. Evidence that during this time the defendant deleted from the deceased's iPhone some call, SMS, Chat and image records.
p. The defendant's use of an alias email address after the deceased's death, in which he discussed his plans for expensive travel once he had sold some properties.
q. The defendant's failure to provide the passwords necessary to open an ACER laptop seized from his home.

15. Mr McLachlan argued that this circumstantial evidence, taken together with the evidence from pathological examination, is sufficient for the jury to safely convict the defendant of murder.

*Discussion and Conclusion*

16. The central issue in this trial is whether there is sufficient evidence for the jury properly to convict the defendant of using unlawful force, to cause the deceased to die from drowning. There are two available possibilities on the evidence: - firstly, that the defendant physically restrained the deceased under water or otherwise overcame her in a struggle or pushed her to cause her to drown; secondly, that the deceased drowned by an accident, whether by a trip, fall or a faint, causing her to fall into the water to drown. Whilst the first of those alternatives is clearly more likely, that does not mean that a jury, on the face of the pathological evidence alone, could be sure of it. Indeed, it is clear from the evidence of Professor Leth that the injuries to the deceased were consistent with both physical restraint to cause drowning, and physical handling in acts of rescue and resuscitation.

17. Where the alternative possibility or inference from established facts is in reality a fanciful or only a theoretical possibility, it is not necessary for the prosecution to disprove it; it is for the jury to consider that possibility as part of all the evidence – see for example *R v Bracewell [1978] 68 Cr App R 44; R v Dawson [1985] 81 Cr App R 150* and more recently *Lon Trach Gian v The Crown Prosecution Service [2009] EWCA 2553.*

18. Where, however, the alternative possibility or inference is not a fanciful or theoretical possibility, but is a reasonable and obvious one, then it is for the prosecution to disprove it; without such proof the jury will have insufficient evidence to be sure. In the case of *R v Younis Masih [2015] EWCA Crim 477,* where the death of the victim was caused either by the accused or it was an accident, and circumstantial evidence of the actions of the accused in telling lies and disposing of evidence after the death were relied on to establish that he was murdered, Pitchford LJ stated:-

> *"3. The prosecution case was based upon circumstantial evidence. There is no dispute between the appellant and the respondent as to the correct approach in law to a submission of no case to answer when all the critical evidence is indirect and inferential. The ultimate question for the trial judge is 'could a reasonable jury, properly directed, conclude so that it is sure that the defendant is guilty?' It is agreed that in a circumstantial case it is a necessary step in the analysis of the evidence and its effect is to ask 'could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?' ....*
>
> *21. The reasonably possible alternative to deliberate, unlawful action by the appellant was accident. It was this this possibility that the circumstantial evidence was required to exclude before the appellant could be convicted of murder. The issue for the judge was whether on the evidence a reasonable jury could*

*safely exclude the possibility of accident and draw the inference of guilt so that they were sure."*

19. This principle was further applied in the cases of *R v Banfield [2013] EWCA Crim 1394* and *R v Jordan Bassett [2020] EWCA Crim 1376.* Also, in the context of the issue of causation in gross negligence manslaughter, see *R v Broughton [2020] EWCA Crim 1093; [2021] 1 Cr App R 3.*

20. On the evidence of Professor Leth, it is without argument that the reasonable, alternative possibility or inference for the cause of the deceased's drowning, is accident. Therefore it is neither a fanciful nor a theoretical possibility, nor is it the subject of any dispute between the pathologists. The question is whether there is sufficient evidence for the jury to reject that alternative in order to convict the defendant of murder.

21. The prosecution have relied on circumstantial evidence to argue that the deceased did not drown by accident. However, that evidence rests on the behaviour of the defendant before during and after the trip to Denmark. Does it assist in proving that the deceased did not suffer an accident which caused her to drown? Plainly it might establish a financial motive, as well as some dishonest behaviour in relation to obtaining insurance. Also it creates clear and obvious suspicion against the defendant, that he had a clear reason to cause the death of the deceased: it would provide him with very substantial insurance money for him to pay off his debts and to pursue his desire for travel, as he stated in his emails under the name "Rob Jones". However, at its highest it only makes it less likely that the deceased died by accidental drowning; it does not exclude that possibility or reduce it to fanciful.

22. Further, any lies told by the defendant cannot of themselves prove that the deceased did not die accidentally. Lies told through consciousness of guilt, may support the prosecution's case, but on their own they do not prove positively that the defendant deliberately caused the deceased to drown – see *R v Strudwick & Merry [1994] 99 Cr App R 326.* The fact that most of the lies were told over a long period before the trip to Denmark, makes them less relevant.

23. It follows, therefore, that whilst the substantial body of circumstantial evidence relied on by the prosecution has caused strong suspicion that the defendant may have caused the death of the deceased, it is insufficient to prove the obvious and reasonable alternative explanation identified in the pathological evidence. That is, there remains a clear, reasonable and obvious possibility that she died accidentally, although no less tragically. The prosecution have not been able to provide evidence to disprove the innocent alternative to their case of murder. I have no doubt myself that this difficulty, which was obvious in the investigation from the beginning, will have troubled the prosecution and helps to partly explain the delay in these proceedings. Also, I have no doubt that the family of Paula Leeson, whom I have observed in this trial to have shown great dignity, will not welcome my ruling in this case. However, I am required to apply the law, notwithstanding any inevitable sympathy this court has for the tragic death of Paula Leeson. In the circumstances I am unable to conclude that there is sufficient evidence for a reasonable jury, properly directed to conclude that the defendant is guilty of murder. I must, therefore, grant the application of the defence to withdraw this case from the jury.