



Coroner's Court of Western Australia

RECORD OF INVESTIGATION INTO DEATH

Ref: 35 /19

*I, Evelyn Felicia VICKER, Coroner, having investigated the disappearance of **Francis Joseph NEWBY** with an inquest held at the **Coroner's Court, Court 83 Central Law Courts, 501 Hay Street, Perth, on 7 August 2019** find the death of **Francis Joseph NEWBY** has been established beyond all reasonable doubt, and that the identity of the deceased person was **Francis Joseph NEWBY** and that death occurred on or about **1 April 1978** at **sea off Turtle Bay, Dirk Hartog Island**, in the following circumstances:*

Counsel Appearing:

Senior Constable Craig Robertson assisting the Coroner.

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INTRODUCTION

On 1 April 1978 Francis Joseph Newby (Mr Newby) was reported as a missing person to Carnarvon Police when he was swept overboard from the fishing vessel the “Lucca” and last seen clinging to an icebox with one other person, Duncan Patrick Forbes (Mr Forbes), when a wave swept Mr Newby away from the icebox and Mr Forbes lost sight of him.

The inquest into the disappearance of Mr Newby was held in Perth. The documentary evidence comprised the brief of evidence, exhibit 1, attachments 1-19 and exhibit 2, the Public Notice advertisement dated 17 July 2019. Oral evidence was heard from five witnesses, Kenneth Charles Firns (Mr Firns), the son of the skipper of the rescue vessel “Julie-Ken”, Peter John Burgoyne (Mr Burgoyne), an off-duty police officer on board the rescue vessel, Brian Maurice Callaghan (Mr Callaghan), and Gary John Sparks (Mr Sparks), police officers located at Carnarvon Police Station and Senior Constable Smith, the report writer from the Coronial Investigation Squad (CIS).

Long Term Missing Person’s Project (LTMP)

In 2017 it was confirmed there were a number of files relating to the long term disappearance of people who had been in Western Australia at the time of their reported disappearance.

Section 23(1) of the Coroners Act 1996 WA (the Act) allows the State Coroner to direct an investigation into a suspected death in certain circumstances without a body, for the purposes of allowing a coroner, under s 23(2), to establish beyond all reasonable doubt that death has occurred. The investigation must be completed by way of inquest and will attempt to clarify how the death occurred and the cause of the death. This effectively brings the suspected death into the ambit of s 25 of the Act and allows registration of the death under the Births, Deaths and Marriages Registration Act 1998.

The reported number of LTMP made it unrealistic for the Office of the State Coroner (OSC) to absorb those matters into the already long outstanding inquest list in a timely manner. A plan was proposed for a project to clear the backlog of LTMP files once it had been determined the matters fitted the circumstances set out in s 23(1) of the Act. That is, the State Coroner or delegate had reasonable cause to suspect the person had died and the death was a reportable death (s 3 of the Act).

In 2018 approval was given for a coroner to work exclusively on the LTMP cases on a part-time basis for twelve months, as a separate listing from the OSC general inquest list. This followed a pilot project of four inquests conducted in 2018.

In 2019 a coroner was appointed for that project with the support of an in-house Coronial Investigation Squad (CIS) police officer as Counsel Assisting (CA).

Work on the files indicated a number of disappearances related to specific areas for Western Australia such as the Kimberley around Kununurra or Broome, and Albany. For these matters it was decided that, while there is always a preference for inquests to be held in the communities to which they relate especially for

indigenous communities where there is an emphasis on oral history, resources would not be effectively utilised for all matters to be heard in the place of disappearance. Instead matters where the disappearance occurred in places outside the metropolitan area were considered from the perspective of the best availability for relevant witnesses. In the case of Mr Newby a number of relevant witnesses were located who were all best placed to give evidence in Perth.

The anticipated outcome of the project was that by June 2020 the majority of LTMP matters would be resolved and that further future missing person files would be dealt with in the normal course of OSC business.

THE DECEASED

Mr Newby was recorded on the WAPF database, as having been born on 1 October 1925 in Onslow. He was an invalid pensioner. He was described as being 212 cm tall, of slim build, with brown hair, blue eyes and with a fair complexion.¹

Mr Newby resided with his mother, now deceased, in Carnarvon and he had a younger brother. He was not married and he had no children.² Mr Firms described Mr Newby as frequently intoxicated.³

In a letter from Dr Board, Carnarvon Regional Hospital on 24 July 1978, Mr Newby was described as having a depressed breast bone (developmental or congenital sternal depression) and that in 1972 he had experienced a fractured lower end of his left ulnar bone and a fracture of the lower tip. These had healed by 1978. In addition Mr Newby had a glass eye following an injury in 1943 resulting in a loss of sight in the left eye, and in 1972 had both upper and lower dentures although the record did not exclude natural teeth as well.⁴

Mr Newby also suffered tuberculosis (lung changes) with considerable fibrous. He effectively had only one working lung which would have depleted his respiratory capacity in adverse conditions. On 1 April 1978 Mr Newby was 52 years old.

Mr Newby held a Grade 2 Skippers ticket and had over 30 years sailing experience this type of vessel although Mr Firms indicated Mr Newby was not a serious fisherman and not as experienced as his length of time as a registered skipper would indicate. He thought that by 1978, presumably in view of various health difficulties, Mr Newby generally only went fishing when he was seeking additional funds. Mr Firms explained Mr Newby was frequently intoxicated and needed money for alcohol.⁵ Mr Sparks confirmed his limited experience of Mr Newby was seeing him in his favourite spot at the Gascoyne Hotel.⁶

The Vessel

The vessel being used by Mr Newby for fishing on 1 April 1978 was called the "Lucca" and was owned by Carnarvon resident, Antonio Buemi. The "Lucca" was

¹ Exhibit 1, tab 4

² Exhibit 1, tab 2, p.7

³ t 7.8.19, p.9

⁴ Exhibit 1, tab 8

⁵ t. 7.8.19, p.10

⁶ T 7.8.19, p.38

professionally built in 1973 and was of timber construction. She is described as a Round Bilge Fishing Boat, 32 feet in length and 12 feet across the beam. She was fitted with a deck and cabin, powered by a 120 horse powered Ford Lees engine and also contained a radio, four life jackets, a life raft and flares, including distress flares. In evidence Mr Firms confirmed “Lucca” was a registered fishing vessel and as such was licenced and certified as fit for purpose.⁷

The circumstances

According to the statement of Duncan Patrick Forbes (Mr Forbes)⁸ he was approached by Mr Newby on Sunday 26 March 1978 to go fishing with Mr Newby on “Lucca” for a percentage of the catch. Mr Forbes (now deceased) was a shearer, but explained there was little work in the area at that time of year, so he was interested in the proposal. He had little experience as a fisherman or crew, but it was clear the “Lucca” was well equipped with safety requirements.

Mr Forbes stated he and Mr Newby left Carnarvon on 29 March 1978 to go fishing. By about 6.30 pm on Friday 31 March 1978 the “Lucca” was anchored a quarter mile off Turtle Bay on the northern tip of Dirk Hartog Island, approximately half a mile east of Hartog Landing. Mr Forbes stated they intended to stay there for the night, however, they noted the sea was building, although the swell was only moderate, so decided it would be safer to ride out the conditions on board “Lucca”.

It is unclear as to whether Mr Newby and Mr Forbes were aware of the presence of Cyclone Alby off the coast at that time.

Mr Firms, son of the skipper of the “Julie-Ken” who later rescued Mr Forbes, and who assisted in the search for Mr Newby, advised the court that in view of the presence of Cyclone Alby in the area the tip of Dirk Hartog Island was not a desirable anchor and that the “Julie-Ken”, also out fishing at the time, had moved to a more protected anchor that night in view of the high seas.⁹ The “Julie-Ken” did not have sight of the “Lucca”.

DISAPPEARANCE

At about 1.00 am on 1 April 1978 Mr Forbes stated he and Mr Newby were asleep on the deck of the “Lucca” when a wave broke over the boat causing it to completely roll over and capsize. Both he and Mr Newby were washed overboard and forced towards the sea bed, receiving bruises and grazes from debris in the process. Both men surfaced and observed the “Lucca’s” ice box floating nearby. They both swam to the ice box. Mr Forbes described the ice box as about 6 feet long by about 4 feet wide and 3 ½ feet deep; it was made of fiberglass. He described handles at each end with ropes tied to them and he and Mr Newby took hold of the ropes at one end and held on. Mr Newby informed Mr Forbes that he was coughing up blood and Mr Forbes assumed he had hurt himself when the wave hit him and they were tipped overboard. Mr Forbes noted Mr Newby to have trouble breathing and that he was getting weaker.

⁷ t 7.8.19, p.28

⁸ Exhibit 1, tab 14

⁹ t. 7.8.19, p.6

Mr Forbes saw the “Lucca” had righted itself, but on surfacing the whole of the deck, bridge and top of the boat was missing and broken away. While they were clinging to the ice box Mr Forbes noticed a 12 foot wave approaching them and he warned Mr Newby to hang on tight as they were only about 200 hundred yards off shore. The wave broke over the ice box and when it passed Mr Forbes noticed Mr Newby was no longer clinging to the rope on the handles. He was unable to see him anywhere.

Mr Forbes did not let go of the ice box and did not see Mr Newby reappear in its vicinity. The ice box was swept inshore to Turtle Bay and reached the shore approximately 30 minutes later. He described the place he had beached as about 500 yards south of Cape Levillain. Mr Forbes then searched the shore looking for Mr Newby. He was wet and cold and dug a hole in which to rest until he could search again. At first light Mr Forbes again searched the beach for Mr Newby, but could not find him. He located a number of flares from the “Lucca” which had been washed ashore and set them off.

By this time Mr Firns senior, skipper, on board the “Julie-Ken” was anchored around the top of Dirk Hartog Island¹⁰. His son, Kenneth (Mr Firns), noticed a disturbance amongst the birds on the beach at Turtle Bay. He used the binoculars and observed Mr Forbes running up and down the beach. Those on board the “Julie-Ken” had not seen the flares and it was the birds which drew Mr Firns’ attention. He recognised Mr Forbes because he happened to be his next door neighbour.¹¹ Mr Firns described Mr Forbes as naked and running.

Also on “Julie-Ken” that day were Mr Burgoyne, an off-duty police officer who was on a fishing holiday with another police officer on holiday, Mr Rowlands. Mr Burgoyne’s recall was they were cooking breakfast on the “Julie-Ken” when Mr Firns recognised Mr Forbes on the beach. Mr Burgoyne and Mr Firns swam to shore to assist Mr Forbes. Mr Burgoyne took a life ring and Mr Firns a water bottle. They both described it as very difficult to get Mr Forbes to leave the beach, he wanted to keep looking for Mr Newby once he had explained to them what had happened. The skipper of “Julie-Ken”, Mr Firns senior radioed a report through to Carnarvon Coastal Radio.

Mr Burgoyne described the seas as “horrendous” and Mr Burgoyne said he was concerned at one stage they would not make it.¹² Mr Burgoyne and Mr Firns walked the shore to see if they could find Mr Newby once they had ensured Mr Forbes was on the “Julie-Ken”. They located the remains of the “Lucca” off shore and also located the ice box which had been swept up onto the beach. It was apparent Mr Forbes had walked over 4 miles from where he had first been washed ashore to where he was seen by the “Julie-Ken”.

After contacting Carnarvon Coastal Radio and making contact eventually with Canberra, Mr Burgoyne was told as a serving police officer, to implement the search for Mr Newby.¹³ Other vessels approached the area and further attempts to walk the shore in an effort to locate Mr Newby were unsuccessful. During this time the

¹⁰ Exhibit 1, tab 15

¹¹ t 7.8.19, p7

¹² t 7.8.19, pg13,15

¹³ t 7.8.19, pg14

swells remained extremely high due to the passing of Cyclone Alby. The search failed to locate Mr Newby. Mr Forbes returned to Carnarvon with the “Julie-Ken” on the afternoon of 2 April 1978.¹⁴

INVESTIGATION

Carnarvon Coastal Radio contacted Carnarvon Police Station and spoke to Constable Sparks. He was advised that Mr Firms senior had reported the remains of the “Lucca” approximately 2 miles off the south of Cape Levillain Shoals, Dirk Hartog Island. Constable Sparks called additional vessels to the area and a plane was organised to assist in the search.¹⁵

Mr Firms senior described the search plane as arriving at approximately 2.30 pm on the afternoon of 1 April 1978 and the “Julie-Ken” was advised via the radio from the plane, through the Carnarvon Coastal Radio, that the waters near the “Lucca” were now safe so he pulled anchor and went to Turtle Bay.

Mr Firms senior considered the seas still far too rough and dangerous to search so he went back to the shoals to wait for the arrival of the “Freycinet”, the Fisheries and Fauna vessel. The “Freycinet” arrived approximately an hour and half later and all the vessels stayed behind the shoals until the morning of 2 April 1978. Despite not searching for the “Lucca” at that point, crew members from the “Julie-Ken” were put ashore and searched the shoreline for Mr Newby.

Mr Burgoyne, Mr Firms and an officer from the “Freycinet” returned to Turtle Bay to search the area. While they were searching the beach the “Julie-Ken” and “Freycinet” continued to search the seas around Cape Levillain Shoals and Turtle Bay, however, they were unable to find Mr Newby. They remained in the area until the aircraft had finished its search and then sailed back to Carnarvon.¹⁶

Mr Callahan had been one of the police spotters on the fixed wing aircraft that had searched the area on 1 April 1978. He stated there were two sergeants plus a civilian as well the pilot of the plane¹⁷.

Mr Callahan described the sea as mostly white and very choppy making it almost impossible to see someone in the water. The aircraft flew for 3 hours on both 1 April 1978 and 2 April 1978 on the eastern side of Dirk Hartog Island. There were 5 people in the aircraft, but no-one was able to observe Mr Newby.

It was Mr Callahan’s view, having observed the seas, that it would be very unlikely anyone would survive those seas and Mr Forbes had been very lucky and strong to last until he was rescued.

Mr Callahan said they saw the wrecked “Lucca” but there was no debris on the first day along the beach, although by the second day there was debris on the beach

¹⁴ Exhibit 1, tab 14, 16

¹⁵ T 7.8.19 p37

¹⁶ Exhibit 1, tab 15

¹⁷ t 7.8.19, p19

from the “Lucca”¹⁸. Mr Firms advised the court they had collected the ice box and used it¹⁹.

A missing person’s report (MPR)²⁰ was completed by Carnarvon Police on behalf of Mr Newby’s mother, Maria Newby, and submitted on 3 April 1978 with ongoing enquiries recorded in the Occurrence Book. On 21 May 1978 Mr Callahan compiled a report from the Occurrence Book to Sergeant Duff to submit the formal MPR²¹.

In the MPR Mr Callahan described the land search, but pointed out in evidence he was not involved in the land search and he had taken that information from the Occurrence Book at Carnarvon Police Station at that time.²²

After the conclusion of the sea and land search it was the intention of the Shark Bay police to continue searches for Mr Newby on Dirk Hartog Island in case anything washed ashore at a future date.

Once the remains of “Lucca” were retrieved the police collected property belonging to Mr Newby from the stricken vessel including his passport which was returned to his younger brother.²³ As well as Mr Newby’s passport there was a record of Marine Services, a knife a fork and two spoons, an overnight bag containing soiled clothing, and a writing pad folder containing personal papers.

Mr Newby was never seen again and his remains were never located.

Enquiries by WAPF in 1999 with Centrelink revealed there were no records held with Centrelink for Mr Newby, despite the fact he was recorded as a pensioner. There are no recorded police contacts listed for Mr Newby nor medical records since 1978 in this State or the Territory or Commonwealth Services.²⁴

HAS DEATH BEEN ESTABLISHED?

I note Mr Newby would have turned 94 in 2019 had he survived his second immersion on 1 April 1978. In view of his recorded state of health at that date and the fact there is no evidence of any reason for him to voluntarily disappear, I am satisfied that Mr Newby is deceased.

Unfortunately, Mr Forbes is no longer alive and was unable to provide evidence for the inquest, however, he had provided a good and comprehensive record of what had occurred in the early hours of 1 April 1978.²⁵ While no-one else observed the actual swamping of the “Lucca”, it is clear from the descriptions of those aboard the “Julie-Ken” that everything Mr Forbes described was consistent with the prevailing conditions at the time, including the state in which he was found, the

¹⁸ t 7.8.19,p20

¹⁹ t 7.8.19,p20

²⁰ Exhibit 1, tab 3

²¹ Exhibit 1, tab 7

²² T 7.8.19 p23

²³ Exhibit 1, tab 17

²⁴ Exhibit 1, tab 2

²⁵ Exhibit 1, tab 14

ice box on the beach, and the remains of the “Lucca” with the top part of the vessel missing. It appears Mr Forbes was an entirely reliable raconteur.

In addition, Mr Newby’s state of health by April 1978 was such that it would be extremely unlikely for him to have survived the second swamping by a wave when he was coughing up blood as described by Mr Forbes, after the first swamping. Had he been able to continue to cling to the ice box he would have reached shore, but he was neither as strong, or as fit Mr Forbes.

Mr Newby lived with his mother, who was survived by Mr Newby’s younger brother. There is no indication Mr Newby had any reason to voluntarily disappear, and it is clear his family never heard from him again. I am quite satisfied Mr Newby had no reason not to contact his family had he survived.

Consequently I am satisfied beyond a reasonable doubt that the death of Mr Newby has been established.

MANNER AND CAUSE

On the evidence revealed on the papers and the oral testimony of the witnesses, not only am I satisfied beyond a reasonable doubt as to the death of Mr Newby, I am also satisfied that Mr Newby died when he disappeared after the ice box was struck by the large wave described by Mr Forbes. He already had reduced lung capacity as a result of his general state of health and at that time he was clearly injured and coughing up blood as he recounted to Mr Forbes at the time.

From the evidence there is I am satisfied that when Mr Newby let go of the rope attached to the ice box and disappeared beneath the water for the second time on 1 April 1978 he became fully immersed and as a result died by drowning in his weakened and injured state.

CONCLUSION

I am satisfied Mr Newby was a resident of Carnarvon and perfectly comfortable in his life, despite his disabilities. There is no indication he was dissatisfied with his circumstances. He was content to skipper a fishing boat from time to time when one became available in an effort to supplement his income.

There is no indication there was anything else on his mind, other than a lucrative fishing trip, when he took to the seas with Mr Forbes on the 29 March 1978 to go fishing.

It is clear the swell was affected by the presence of Cyclone Alby, although Mr Firms described the conditions as not so bad as to preclude people from fishing. He described the peaks as very close together.²⁶

I am satisfied that in the early hours of 1 April 1978, sometime between 3.30 and 4.30 am,²⁷ Mr Newby died when he was again swept under the water by a wave swamping the ice box to which he had been clinging. As a result I am satisfied

²⁶ t. 07.08.19, p.9

²⁷ Exhibit 1 tab 14

beyond a reasonable doubt Mr Newby died, and he died as a result of drowning, whether he was otherwise injured or not.

I find death occurred by misadventure.

E F Vicker

Coroner

5 September 2019