

REPORT OF THE POLICE COMPLAINTS AUTHORITY INTO THE ADEQUACY OF THE 1992 INVESTIGATION INTO THE DEATH OF AGNES ALI'IVA'A

On 14 February 1992 at about 8.00am a workman walking through Keith Hay Park, Mt Roskill, Auckland, spotted a body at the bottom of a drainage canal which runs through the park. The body was that of Agnes Ali'iva'a, aged 12 years. However her identity was not established until 18 February.

A Police photographer took photographs of the body in situ. Hence I have a very good appreciation of the scene at the time.

The open drain in which the victim was found was approximately 8 metres deep and 6.8 metres in width at the relevant point. The sides of the drain slope inwards and at that time it carried about 18 inches of water. It had a silty muddy bottom. The victim when first discovered was lying face downwards in the water. Photographs of her were taken in that position. She was then turned over and photographs were again taken. The photographs show she was naked from the waist up. She was wearing underpants which were intact. However her maroon tracksuit pants although they were on were on inside out. She was wearing only one sock. This was on the right foot. She also had a shoelace tied around the right ankle. Her shoes and the rest of her clothing were missing and have never been found. Because of her physical maturity Police initially believed she was around 20 years of age.

The body had a number of injuries. On 16 February 1992 Police attended the mortuary to take a photograph of the victim in the hope that a media release might lead to her identification. It was then a Sergeant noticed abrasions, scratches and small wounds on the upper arms and torso. He has noted:

"These injuries had the appearance of force having been applied to the body of the deceased as opposed to accidental or natural causes."

He then learned the body had not been photographed during the post mortem so directed the photographer to take photographs of the injuries. I have copies of those photographs. It is often said that one picture is worth a thousand words and the photographs have been very useful to me in assessing the injuries to this victim.

These injuries were described at the recent Inquest on 5 August 1997 as follows:

“Examination of the deceased’s body revealed a number of unexplained injuries. These consisted of bruising, abrasions and markings to the shoulders, chest, upper arms and breasts. She had scratching and abrasions to her elbows and back. The deceased had a small cut over her right eye and a 4 cm bruise on the right side of the scalp towards the front of her head.”

The post-mortem was carried out the day the body was found. The finding was that the deceased had died as the result of drowning. Hence there is an inescapable inference that none of the injuries contributed to her death. The Police certainly later believed there was an innocent explanation for these injuries.

The impact of the post-mortem finding on Police was immediate.

The status of the investigation changed from a suspicious death/homicide enquiry to an enquiry dealing with a non-suspicious sudden death with the principal focus of the ongoing enquiry being to determine the identity of the deceased.

It was this decision to radically alter the status of the investigation on the day the body was discovered which has been a central factor in subsequent criticism.

The decision not to investigate on the basis of a suspicious death did not satisfy the family of the deceased and it appears also did not satisfy some junior members involved in the case who expressed misgivings about the findings of senior officers.

Towards the end of 1995 the Hon. Phil Goff, Member of Parliament, raised the matter at a Parliamentary Select Committee.

In the result Assistant Commissioner Duncan instructed Superintendent Hartley to review the decision to close the case. In his report to Assistant Commissioner Duncan on 20 February

1996 he said:

“(The Officer in Charge) decided the death should be treated as a homicide, and that status be changed immediately after the Post-Mortem. In my opinion, he erred in his status decisions; it was a judgement call which he got wrong. Those decisions were supported by two key advisers ... I am, though, completely satisfied all three members acted in good faith and with honesty of purpose.”

Earlier he had said something which I think goes very much to the nub of this concern about the early shut down of enquiries. I endorse wholeheartedly these words.

“I think the Police team leaders ... failed to take due cognisance of a number of factors, but one stands out: the state of the deceased’s clothing. She was wearing only a pair of panties, a pair of trackpants which were inside-out, and one sock. She was naked from the waist up, and one sock and her footwear were missing.”

As a result of receiving this report in a memo dated 22 February 1996 addressed to the District Commander, Assistant Commissioner Duncan states:

“I duly instructed Superintendent Hartley to review the decision to close the case and I am now in receipt of his report. On the basis of its contents I believe that further attention is warranted and have ordered that the investigation be reopened. Detective Inspector Manning will lead that enquiry.

It is now necessary to examine more closely the decision of (the Officer in Charge of the case) to call off enquiries in 1992 and to determine if there were any shortcomings in his investigation and the procedures he adopted.

Given that Detective Superintendent Marshall has had no prior involvement in this case and can give a totally independent opinion, I should be grateful if you would make him available for the task. The original file and other relevant papers may be accessed through my office.”

The function of the Authority is to consider allegations of Police misconduct or neglect of duty. In this case then the concern of the Authority is the standard of the initial investigation and whether there are now revealed shortcomings in that investigation. In particular the Authority will consider the report of Detective Superintendent Marshall dated 19 March 1996 which focuses on that question.

It has not been possible to release this report until the conclusion of the second Inquest which was held on 5 August 1997. The Authority cannot be seen to pre-empt any decision or indeed views which a Coroner may express.

Before expressing my views on the standard of the 1992 investigation it is necessary for me to briefly set out the legal basis for the Authority’s present involvement.

On 26 March 1993 a barrister acting for the mother and sister of the victim wrote to the Authority alleging neglect of duty by Police in carrying out the investigation. At that time more than a year had passed since the body was discovered and already the first Inquest had been held on 30 April 1992.

Following the lodging of the complaint further documentation from the Police was presented to the barrister representing the complainants.

This office subsequently enquired of the barrister whether the complainants wished to continue the complaint following the perusal of the further information.

No reply was received to two letters making this enquiry and a further letter advising that the Authority would accordingly pursue the matter no further was also not responded to.

Mr John Roberts, the Senior Investigating Officer for the Authority, attended the Inquest in Auckland on 5 August this year. The Coroner on that occasion held Agnes Ali'iva'a died as the result of drowning in suspicious circumstances.

He also said:

"For reasons which I do not pretend to understand the first police inquiry was downgraded from a suspicious death immediately the cause of death was established to be drowning.

The reasons that the inquiry was downgraded are beyond the scope of this inquiry although they are subject to further investigation by the PCA."

After the completion of the Inquest the Authority could then take further action. The Authority was aware of the findings of Detective Superintendent Marshall and Superintendent Hartley. In respect of the complaint made on behalf of the mother and the sister the Police proposal in 1992 was not to uphold the complaint. In light of this new information, by letter dated 18 August 1997, I directed Police to reconsider this proposal. This direction was given pursuant to section 19(e) of the Police Complaints Authority Act 1988 which states:

"The Authority may at any time -

...

(e) Direct the Police to reconsider their proposals for action on a complaint."

By letter dated 21 August the Superintendent of Internal Affairs responded to my direction. He said unequivocally:

“It is my recommendation to you that the complaint that there was a failure of Police to investigate the death properly, should be upheld.”

The Internal Affairs Division in carrying out my direction had access in particular to the report of Detective Superintendent Marshall made at the request of Assistant Commissioner Duncan. After an exhaustive analysis of the facts that report dated 19 March 1996 concluded that there were significant shortcomings in the investigation and procedures adopted by the Officer in Charge of the case concerning his investigation into this death.

To his credit the Assistant Commissioner accepted the report and in August 1996 apologised to the mother of the victim. He said the new enquiry confirmed drowning as the cause of death but added that the 12 year old victim had died in highly suspicious circumstances. Indeed I need note that one Detective Sergeant involved in this enquiry said expert opinion indicated the victim died in “sinister circumstances”. I do not regard that as an overstatement.

The Assistant Commissioner accepted that there were significant shortcomings in the first enquiry. He said investigators were too quickly withdrawn from the case when the pathologist advised the girl had been drowned in the ditch. He said more time should have been spent in tracing her movements on the night, more effort should have been put into collecting physical evidence, greater attention should have been directed to examining the body and concentrated efforts should have been made to determine who had been in and about the park at the time.

I have now concluded my own comprehensive review of the very considerable material on the Police files. As a result I am able to endorse what the Assistant Commissioner has said.

I have also considered the very comprehensive and critical analysis of the investigation set out in the report of Detective Superintendent Marshall.

He found it difficult to understand what he described as a “*quantum leap*” from suspected homicide to accident, made by the investigating officers on the basis that (a) the pathologist

found death was caused by drowning and (b) marks on the body did not contribute to her death.

It must be stated again that this downgrade to accident apparently occurred on the very day the body was found and after the post-mortem. However I add this. From my own reading of the file it seems that even before the result of the post-mortem was known the officers in charge inclined to the view this was an accident not a suspicious death enquiry. In his report Superintendent Hartley expressed the view that the homicide enquiry was more in name only rather than in fact and further that the enquiry status was actually between a homicide and accidental death, finding no conviction evident of a homicide enquiry.

I do not for a moment overlook the fact that it is very easy to be wise in hindsight. However if there was a determination to treat this as a suspicious death at the outset I do not understand why a pathologist was not called to the scene as is required by the Criminal Investigation Manual and which is standard procedure.

Further, after the body was removed from the scene at 9.25am the events at the post-mortem appear to lend support to the view that already the event was being regarded as accidental death rather than suspicious death. A relatively junior Uniform Branch Constable was tasked to stay with and accompany the body to the Mortuary. Detective Superintendent Marshall has spoken to him and he said he was not present either at the commencement of the post-mortem examination or during it. He said he "got word" before the post-mortem commenced that drowning was the obvious cause of death and as a result he was not required. He could not recollect who told him that.

Then again there was no Police photographer present as he is said to have been called away as the post mortem was about to commence. Detective Superintendent Marshall records that there was no explanation as to why the photographer was suddenly called away from a post-mortem examination involving a suspected homicide enquiry.

I add the comment that indeed if Police had not returned to the Mortuary on 16 February to take photographs to try and identify the victim through the media, no vital photographs of the injuries would ever have existed.

The Officer in Charge of the case was present at the post-mortem. I, like Detective Superintendent Marshall, am at a loss to understand why he did not direct the pathologist to

take anal, vaginal and related swabs. After all, the condition of the victim's clothing and the circumstances of her discovery should have created immediate suspicion that she could have been the victim of a sexual assault.

As Detective Superintendent Marshall comments:

"The reality of this situation is that there may have been a second party 'involved' with the deceased in the sexual sense before her death, however we may never know because Police personnel at the Mortuary that morning never secured swabs from the deceased."

It should also be noted that the identity of the victim was not established until 18 February after a publication of a photograph in *The New Zealand Herald*. So at the time the decision was made to downgrade the enquiry nothing was known of her background or indeed her true age.

One other important event in the mix of what happened on that night deserves mention. It was established later that this victim had jumped from a slow moving car around 10.15pm that night. It was later claimed that her injuries could have been caused by that event.

However Detective Superintendent Marshall makes what I see as an unanswerable comment that this could not have been a factor in the decision to downgrade the status of the enquiry for that decision was made five days before the driver of the car was located and spoken to.

As I have indicated earlier, there appears to be some evidence that even before the post-mortem the conclusion had been reached this was an accidental death and all the post-mortem did was to confirm an already held belief.

The Internal Affairs review conducted in August 1997 identified the following deficiencies:

"A failure to complete a proper scene examination.

The failure to photograph the body at the mortuary prior to post-mortem.

No proper samples taken from the body for ESR testing.

Once it was determined that the cause of death was drowning the file was downgraded despite the marks on the body and the state of undress.

It was assumed that the cord marks on the shoulder were caused by a jacket draw cord (without confirmation and an incorrect assumption).

It was assumed that the other injuries were caused when she fell from a car, rather than gaining the opinion of the pathologist, (who during this review said they were inconsistent and this was corroborated by other pathologists).

The clothing was destroyed by mortuary staff.

No proper follow-up enquiries were made.

The state of undress should have been sufficient to investigate further.”

I repeat my view that the state of the victim's clothing alone should have rung loud alarm bells, especially when linked to marks on the body, the track pants being on inside out, and missing footwear and clothing. To this can be added that there was no explanation of how she ended up in that drain.

The investigation was for the reasons I have outlined surprisingly substandard. Especially surprising because as Internal Affairs have pointed out, the Officer in Charge of the case and the officer assisting him “*both were very experienced and knowledgeable members of Police*”. Both officers reject any fault on their part.

The report from Internal Affairs concludes by pointing out that both officers have retired from Police. It continues:

“Those retirements were pre-planned and not as the result of these file review findings. The lapses in this case were totally unexpected as both had exemplary service records and considerable extensive experience in homicide investigation.”

I can no more explain the lapses in this case than can the writer of that letter. However I am satisfied they did occur as I have outlined and accordingly I endorse the finding of the Commissioner that this complaint that there was a failure of Police to investigate the death properly should be upheld.

The criminal investigation file still remains open. It is not proper therefore for me to speculate on just what may have happened on that fateful night. The Coroner in his decision concluded by saying:

“Even today, with the benefit of a very comprehensive Police inquiry, we cannot completely exclude accidental drowning, however unlikely it may seem.”

To this I add my own comment:

"Unlikely indeed".

Judge N C Jaine
POLICE COMPLAINTS AUTHORITY
3 September 1997