Case No: U20150140

IN THE CROWN COURT IN HEREFORD

The Shirehall, St Peter's Square
Hereford HR1 2 HY

Date:19/06/2015

Before:

MR JUSTICE HADDON-CAVE

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THE QUEEN
- v -
FREDERICK DAVID GAZELEY

- -
- -

Mr Linehan QC (instructed by **the CPS**) for the **Crown**
Mr Hankin QC (instructed by K Kimberly, Cocks Lloyd solicitors) for **Frederick David Gazeley**

Hearing date: 22 nd May 2015

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APPROVED RULING

Approved Ruling by the court for handing down

MR JUSTICE HADDON-CAVE:

1. This case raises an important point as to the boundary between murder and assisted suicide in the context of drugs administered orally.

2. The Defendant, Frederick Gazeley (aged 58), is charged with murder and attempted murder of his wife, Mrs Jean Gazeley (aged 54), at home on 2nd of January 2014. He has pleaded not guilty to both charges. The primary defence is that this was a case of assisted suicide, not murder. An alternative charge of assisting suicide contrary to s.2 of the Suicide Act 1961 has been added to the indictment.

3. The Crown submit that the Defence Case Statement discloses no defence to murder.

DPP Policy

4. The prosecution was brought following consideration of the Director of Prosecution's *"Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide"* (published in February 2010). This explains that euthanasia, or so-called 'mercy killings', are quite different from assisted suicide. The act of suicide requires the victim to take his or her own life. It is murder or manslaughter for a person to do an act that takes the life of another, even where this is done in compliance with the wishes of that other person. As Lady Hale said in *R(Nicklinson) v. Ministry of Justice* [2014] UKSC 38 at paragraph 305:

> "Mercy killing is the choice and act of the person who kills, however benevolent the motive. Committing suicide is the choice and act of the person who does it, and that person commits no crime."

The Facts

5. The facts in this case are not contested and can be summarised as follows.

6. Mr and Mrs Gazeley had been happily married for over 35 years and were a devoted and loving couple. They had two children, Zoe (aged 35) and David (aged 30).

7. Jean Gazeley had been suffering for 20 years with a seriously debilitating and progressive disease. This was diagnosed during her lifetime as Multiple Sclerosis (but the *post mortem* results showed she had a type of leukodystrophy called Alexander Disease which mimics the symptoms of Multiple Sclerosis). Mrs Gazeley slowly lost movement of her legs and left arm, became wheelchair bound and was regularly in extreme pain. She had been nursed and cared for throughout this time with great love and dedication by her husband, the Defendant, at their home in Nuneaton.

8. By 2011, Mrs Gazeley was mainly confined to bed and she began to suffer from attacks of spasms and severe pain. It was at this stage that she began discussions

with her family about ending her life. These discussions included the possibility of travelling to Switzerland to use the facilities of 'Dignitas'.

9. The family spent Christmas 2013 together. Between 28th and 31st December 2013, Mrs Gazeley began to suffer from particularly severe spasms and bouts of pain. Her GP, Dr Johnson, visited her at home and concluded that she was having a 'flare'. He prescribed hydration and liquid morphine called *"Oromorph"* as a pain-killer. The *"Oromorph"* came in a 300 ml bottle. The GP told Mr Gazeley that it was to be taken in 5 ml doses as and when needed but no more than once every two hours. The bottle therefore contained 60 doses which would last a minimum of 5 days. Mr Gazeley gave Mrs Gazeley a few doses with a spoon.

10. On the morning of 1st January 2014, Mrs Gazeley's pain had become so serious that an ambulance was called to take her to hospital. She cried out to the paramedics "Help me", "Please let me die" and "I want to die". Mrs Gazeley was admitted to the acute medical ward at George Eliot Hospital. She was X-rayed to see if she had an infection. Mr Gazeley accompanied his wife to hospital and told the doctors that his wife's condition had deteriorated over the past two weeks, she had not eaten any solid food since Christmas and she was spitting out the morphine which had been prescribed for her pain. He explained that she had made it clear to the family that she did not wish to receive medical treatment that would prolong her life. Following a high-level conference of the medical staff, including the senior doctors, it was decided that, in the light of Mrs Gazeley's untreatable illness and her wish not to receive any further treatment, she should be discharged home in accordance with her wishes and those of her family.

11. Mrs Gazeley returned home at about 6 pm on the evening of 1st January 2014. Once at home she was placed in her bed on the ground floor. There she spoke to her family in terms that showed that she was preparing for death, telling them that she loved them and speaking about their future happiness. By late evening, when the other members of the family had gone home or gone to bed, Mr Gazeley was left alone with his wife. He did not tell the others what he planned to do.

12. At 6 am the next morning, 2nd January, Mr Gazeley telephoned the 999 emergency line and said: "My wife has passed away with my help. She's been suffering with multiple-sclerosis for twenty-five years and this weekend she was really bad and everything and we arranged to end it for her. ….. Gave her some morphine that the doctor prescribed for her. … I placed a pillow over her face to make sure. …. I finished about half-past two."

13. Mr Gazeley told the police in interview that, that night, he fed his wife the rest of the bottle of the 300 ml bottle of *"Oromorph"* by squirting the liquid morphine into her mouth using a syringe. He then placed a plastic bag and pillow over her face and held it there for a long time until about 2.30 am. He said that he had read the *"Oromorph"* instructions and knew that it was dangerous to exceed the stated dose. He stated he planned to smother his wife and he gave her the morphine so that she should suffer less when he did so.

Prosecution case

14. The Prosecution case is that Mr Gazeley committed two unlawful acts in order to bring about the death of his wife. The first was the administration of morphine to his wife. The second was the placing of a plastic bag and cushion over his wife's face and holding them there for a prolonged period. The first act was done with the intention of facilitating the second, but both acts were done with the intention to kill. The Prosecution submit that it does not matter which act actually brought about Mrs Gazeley's death, or whether each made a contribution, because, in the result, one or other unlawful act was a significant cause of the death. The two acts were a continuum.

Defence case

15. It seems to me that the Defence Case Statement and submissions can be usefully summarised in the following propositions:

    (1) First, whether or not Mr Gazeley did an act which caused or contributed significantly to the death of his wife is a question of fact for the jury to decide.

    (2) Second, on the current pathological evidence - and notwithstanding Mr Gazeley's account in interview that he believed his wife was still conscious before he smothered her - the jury cannot be sure whether Mrs Gazeley's death was due solely to the effects of the morphine and her underlying disease, as opposed to the smothering.

    (3) Third, Mrs Gazeley's deliberate act of swallowing of the morphine - pursuant to a voluntary, settled and informed decision which she had the freedom and capacity to make - broke the chain of causation between her husband's actions and her death such that he is not guilty of murder (*c.f. R v. Kennedy No.2* [2008] 1 AC 269). In other words, by her voluntarily swallowing of the morphine, Mrs Gazeley 'autonomously' exercised her right to end her own life.

    (4) Fourth, in any event, it was a matter for the jury to determine whether Mrs Gazeley's act of swallowing amounted to 'self-administration' of the morphine or part of a joint process or continuum with Mr Gazeley's actions in feeding her (*c.f. R v. Burgess* [2008] EWCA Crim 516).

The Issue

16. The central issue for decision is: Did Mr Gazeley's action in introducing the morphine into Mrs Gazeley's mouth amount in law to "administering" of a noxious substance within the meaning of that term in ss.22 and 23 of the 1861 Act? Or does the fact, which the Crown accept, that Mrs Gazeley voluntarily and consciously swallowed the morphine mean that it was 'self-administered' by her?

17. In simple terms the question of law is: Was the morphine administered or self-administered? On this issue turns the question of whether or not Mr Gazeley has a defence in law to murder. I am asked to rule on this point now because it will obviously affect any further pleas which the Defendant might wish to make and the scope of any trial. (It should be noted that an alternative defence of

diminished responsibility has also been indicated by the Defence but this does not affect the matters of principle which are the subject of this Ruling).

Elements of murder and manslaughter

18. As a starting point, it is useful to remind oneself of the elements of the offences of murder and manslaughter. The elements of murder and manslaughter are the same, save as to the requirement of intent. The offence of murder is committed where one person, by his or her deliberate and unlawful act, causes the death of another, intending by his act either to kill that other person or to cause him grievous bodily harm. The offence of manslaughter is committed where one person, by his deliberate and unlawful act, causes the death of another, in circumstances where all sober and reasonable people would realise that his or her act would subject that other person to at least some risk of harm, albeit not really serious harm.

19. In charge of murder and manslaughter it is necessary (a) to identify the unlawful act upon which the count is founded and (b) to show that that unlawful act caused, or played a significant role in, the death of the victim.

Unlawful act

20. It is always important to analyse the precise nature of the unlawful act which forms the basis of a charge of murder or manslaughter (*per* Lord Bingham *R v. Kennedy No.2* [2008] 1 AC 269 at paragraph 26). In the present case, the Crown rely upon two categories of unlawful act: one relating to the morphine and the other relating to the smothering. As explained above, the current issue arises on the hypothesis, or a possibility that cannot *ex hypothesi* be ruled out, that the morphine was the sole cause of death.

21. The Crown rely upon two separate unlawful acts in relation to the morphine. The first is the supply of a Class A drug by Mr Gazeley to his wife, by administering it it, contrary to section 4(3)(a) of the Misuse of Drugs Act 1971. Morphine is listed as a Class A drug under Schedule 2 of the 1971 Act. The administration of morphine and other Class A drugs is only lawful if done in accordance with the Misuse of Drugs Regulations 2001. Regulation 7 of the 2001 Regulations provides that a person may "administer" to a patient a drug specified in Schedule 2 if it is done in accordance with the directions of a doctor or a dentist.

22. The second unlawful act relied upon by the Prosecution is the administration of an "overpowering drug" or "noxious thing" thing contrary to s.22 or s.23 of the Offences Against the Person Act 1861. Sections 22 and 23 of the 1861 Act makes the following acts an offence:

> "s. 22 Whosoever shall unlawfully apply or administer to, or cause to be taken by, or attempt to apply or administer to….any person, any….stupefying or overpowering drug, matter or thing, with intent…."

> "s. 23 Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger life of such person…."

23. The term "noxious" has a wide meaning and a substance which may be harmless in small quantities, may yet be "noxious" in the quantity administered (see *R v. Marcus* [1981] Cr App R 49). There is no issue that liquid morphine is a "noxious thing" within the meaning of s.23 of the 1861 Act.

24. It is accepted by the Defence that Mr Gazeley was not complying with the directions of the GP when he gave his wife the remainder of the bottle of *"Oromorph"* on the night in question: he gave her the equivalent of several dozen doses in the space of just a few hours by squirting it into her mouth using a syringe.

25. It is accepted by the Crown that Mrs Gazeley voluntarily swallowed each dose of morphine fed to her by her husband using the syringe. The Crown do not contend Mrs Gazeley was not capable at the time of refusing the morphine or of spitting it out if she had so wished.

Summary propositions and principles of law

26. In my view, the following propositions and principles can be derived from the authorities (in particular Lord Bingham's magisterial analysis in *R v. Kennedy No.2* [2008] 1 AC 269 and the judgments of the Supreme Court in *R(Nicklinson) v. Ministry of Justice* [2014] UKSC 38):

(1) There is a tension between the operation of the principles of causation and *novus actus interveniens* and the principle of autonomy in this arena.

(2) It is never appropriate to find A guilty of the murder or manslaughter of B for simply supplying a controlled drug to B or otherwise carrying out acts merely preparatory to the administration of a controlled drug (*i.e.* filling a syringe and handing it to B), in circumstances where B is an adult and freely and voluntarily self-administers that drug to him or herself with fatal results (*R v. Kennedy No.2*, at paragraphs 2 and 25).

(3) The reason is that criminal responsibility in this context is properly to be analysed through the prism of 'autonomy' rather than simply in terms of pure causation (*R v. Kennedy No.2*, at paragraphs 19-24).

(4) A will only be guilty of murder or manslaughter of B where A has physically administered the controlled drug to B. It is no defence, however, that this was done by A at the express request of B (*per* Lady Hale in *R(Nicklinson) v. Ministry of Justice* [2014] UKSC 38 at paragraph 305).

(5) A will not be guilty of murder or manslaughter where B had autonomously self-administered the drug, *i.e.* where B has made a free, informed and

deliberate choice to take the drug *and* physically administered it to himself (*R v. Kennedy No.2*, at paragraph 19).

(6) It is possible to envisage circumstances of 'joint principalship' where two people could properly be regarded as having acted jointly together to administer a drug (*R v. Kennedy No.2*, at paragraph 24).

(7) The question of what may amount to the "administration" of a drug is a question of law. 'Administering' is something different from merely 'prescribing' or 'dispensing' a drug (see further below).

(8) The distinction between administering a fatal drug to a person and assisting a person or setting up a machine so that they can administer the drug to themselves, is not a mere legal distinction but is founded in morality (*per* Lord Neuberger in *R(Nicklinson) v. Ministry of Justice* [2014] UKSC 38 at paragraph 94).

The Authorities

27. The current authorities have considered the meaning of the term "administered" primarily in the context of the administration of fatal doses of barbiturates by injection. The present case is the first case to consider the issue in relation to the oral administration of drugs.

28. In *R v. Kennedy No.2* [2008] 1 AC 269, the House of Lords considered the following certified question: "Whether it is appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it is supplied, and the administration of the drug then causes his death?" (paragraph 2). Their Lordships answered the question as follows: "In the case of a fully informed and responsible adult, never" (paragraph 25).

29. It is clear from *R v. Kennedy No.2* that questions of criminal responsibility in this area are properly to be analysed through the prism of 'autonomy' rather than simply in terms of pure causation. As Lord Bingham of Cornhill explained (at paragraph 15) "causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises" and cited *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22. Lord Bingham went on to state (emphasis added):

> "18. … The finding that *the deceased freely and voluntarily* administered the injection to himself, knowing what it was, is fatal to any contention that *the appellant caused* the heroin to be administered to the deceased or taken by him."

30. Lord Bingham analysed the unlawful act in question acutely. In paragraph 9, he cited s.23 of the 1861 Act and stated that it created three distinct offences: (1) administering a noxious thing to any other person; (2) causing a noxious thing to

be administered to any other person; and (3) causing a noxious thing to be taken by any other person. Lord Bingham went on to state as follows (emphasis added):

> "10.The factual situations covered by (1), (2) and (3) are clear. Offence (1) is committed where D administers the noxious thing directly to V, as by injecting V with the noxious thing, *holding a glass containing the noxious thing to V's lips*, or (as in *R v. Gillard* (1988) 87 Cr App R 189) spraying the noxious thing in V's face." (emphasis added)

31. In *R v. Rogers* [2003] 2 Cr App R 10 the victim died from an overdose of heroin which he injected himself whilst the defendant held a belt around his arm as a tourniquet in order to raise a vein. The Court rejected a submission that the defendant could be guilty as an accessory to because there was no offence of self-injection (as explained in *R v. Dias* [2002] 2 Cr App R 5 doubting *R v. Kennedy* [1999] Crim LR 65). However, the Court went on to hold that it was unreal and artificial to separate the tourniquet from the injection and the jury were entitled to convict the defendant on the basis he had played a part in the mechanics of the injection. It should be noted that *R v. Rogers* was subsequently disapproved by the House of Lords in *R v. Kennedy No. 2* (*supra*).

32. In *R v. Findlay* [2003] EWCA Crim 3868, the victim died of a heroin overdose by injection. The defendant was charged on the alternative basis that he had either operated the syringe himself (Count 1) or that he had cooked and prepared the heroin, loaded the syringe and handed it to the victim (Count 2). The jury were unable to reach a verdict on Count 1 but convicted by a majority on Count 2. In allowing Count 2 to be added, the Court rejected a defence submission that the victim's act of self-injection broke the chain of causation between the defendant's acts and the victim's death. The Court said that "[i]ntervening acts are only a factor to be taken into account by the jury in looking at all the circumstances…" (paragraph 17) and went on to hold that there was evidence upon which the jury could have concluded that the defendant was guilty on the basis of 'joint principalship' similar to that described in *R v. Rodgers* (*supra*). Lord Bingham said that *R v. Findlay* was wrongly decided because it "conficted with the rules on personal autonomy and informed voluntary choice" (paragraph 16).

33. The House of Lords in *R v. Kennedy No.2* disapproved of the decision in *R v. Rogers* (*supra*) for the following reasons explained by Lord Bingham:

> "20. …There is, clearly, a difficult borderline between contributory acts which may properly be regarded as administering a noxious thing and acts which may not. But the crucial question is not whether the defendant facilitated or contributed to the administration of the noxious thing but whether he went further and administered it. What matters, in a case such *R v. Rogers* and the present, is whether the injection itself was the result of a voluntary and informed decision by the person injecting himself. In *R v. Rogers,* as in the present case, it was. That case was, therefore, wrongly decided."

'Joint principalship'

34. Lord Bingham went on to envisage the circumstances of 'joint principalship', *i.e.* a factual scenario in which two people could properly be regarded as acting together to admininster the injection (see, *ibid*, paragraph 24).

35. In *R v. Burgess* [2008] EWCA Crim 516), the victim died of a fatal dose of heroin administered with a syringe of which he himself had pressed the plunger. However, the defendant admitted laying the tip of the syringe against the skin of the victim and holding the syringe against an appropriate vein there whilst the victim himself pressed the plunger. In these circumstances, the Court concluded that there was evidence which might reasonably have lead a jury to conclude that the defendant had jointly participated in the administration of the fatal dose of heroin and declined to quash the conviction.

Meaning of "administration" of drug

36. I turn to the key question of the true meaning of "administration" of drugs. The question of whether or not Mr Gazeley can be said to have committed an unlawful act depends on whether he can be said to have "administered" the morphine to his wife within the true meaning of that term in Regulation 7 of the 2001 Regulations or section 23 of the 1861 Act. Whether an act is capable of amounting to the "administration" of a drug is a question of law. The construction of the term "administered" should be the same in both pieces of legislation. The primary tenet of statutory interpretation is for the Court to give effect to the plain meaning of the words used by Parliament (*c.f.* Lord Bingham of Cornhill in *R v. Bentham* [2005] UKHL 18).

37. In my judgment, a drug is "administered" if it is physically placed into a victim's body or system. This clearly includes (a) injecting someone with drugs using a syringe or intravenous drip, (b) spraying a drug into somone's face or onto someone's skin, (c) feeding a drug in the victim's mouth using a spoon, syringe, or cup (d) placing a pill onto someone's tongue.

38. I am fortified in this construction by the fact that Lord Bingham stated in *R v. Kennedy No. 2 (*quoted *supra)* that "holding a glass containing the noxious thing to [the victim's] lips" constituted the act of administering under s.23. Whilst *obiter*, this would seem to me to be fatal to Mr Hankin QC's argument. In common parlance, a nurse who tips a beaker of liquid into a patient's mouth or places a pill on a patient's tongue plainly 'administers' the drug in question to the patient. This is to be contrasted from merely 'prescribing' or 'dispensing' a drug. It is also noteworthy that in *R v Gillard* (1988) 87 Cr App R 189, the word "administer" was held to include conduct which, whilst not being the application of direct physical force to the victim, nevertheless brings the noxious thing into contact with the victim's body, such as the spraying of ZS gas from a canister into the face of the victim.

Principle of autonomy impinged

39. Mr Hankin QC argues that Mrs Gazeley's act in voluntarily swallowing the morphine fed to her by her husband amounted to a *novus actus interveniens* which broke the chain of causation between his positive actions and her death. In my view, this argument is flawed for two linked reasons. First, Mr Gazeley had *already* committed the unlawful act of administering the morphine to his wife by syringing it into his wife's mouth by the time she swallowed it. Second, his actions meant that she was *forced* to choose between swallowing or spitting out. His actions in introducing the noxious substance into his wife's mouth meant that she did not have an entirely free choice: she was obliged to take positive action either to swallow or spit. She could not simply remain passive. The drug had already been "administered" to her and she was forced to react physically by taking action to accept or reject it. The principle of autonomy was, thereby, necessarily impinged. The question of *novus actus* does not arise.

Legal distinction consonant with morality

40. In *R (Nicklin) v. Ministry of Justice* [2014] UKSC 38 Lord Neuberger said that in the eyes of English law, there is a large difference between actually performing the act which caused the death, as opposed to enabling the person who wishes to commit suicide to perform the final act (see paragraphs 92-93). Lord Neuberger went to explain:

> "94. To my mind, the difference between administering the fatal drug to a person and setting up a machine so that the person can administer the drug to himself is not merely a legal distinction. Founded as it is on personal autonomy, I consider that the distinction also sounds in morality."
>
> 95. …[I]f the act which immediately causes the death is that of a third party that may be the wrong side of the line, whereas if the final act is that of the person himself, who carries it out pursuant to a voluntary, clear, settled and informed decision, that is the permissible side of the line. In the latter case, the person concerned has not been "killed" by anyone, but has autonomously exercised his right to end his life. "

Conclusion

41. For the reasons given above, on the admitted facts, in my judgement, Mr Gazeley is guilty of having unlawfully administered the morphine to his wife which *ex hypothesi* killed her. It was not self-administered by her. Accordingly, in my judgement, the Defence Case Statement discloses no defence to the charge of murder.

42. I am grateful to Mr Linehan QC and Mr Hankin QC for their most able assistance. I will next hear submissions on the future conduct of this case.