

Middle Temple Mooting Competition: Final 2015/2016

Gant v Chief Commissioner of Police for Newcountysire in the Court of Appeal (Civil Division)

Wrongful imprisonment – police failure to disclose evidence assisting prisoner after conviction – whether failure a violation of Article 5 ECHR – effect of Article 5(5) ECHR

Facts

Matthew Gant was arrested on suspicion for murder in October 2009 when it became known to Newcountysire police that he was the last man seen with a woman, Betty Hinks, a known prostitute, late one night outside a cinema. Her body had been found in woodland nearby the following morning. It was clear that she had had sexual intercourse in the woodland and was probably killed shortly afterwards. A DNA sample taken from Gant on arrest matched semen found on Ms Hinks's body. At his trial for rape and murder in July 2010, evidence of his whereabouts and the DNA sample were adduced, as well as evidence of lies he first told to the police about his whereabouts on the night of the murder. The prosecution were also permitted to adduce evidence of assaults by him on former girlfriends and kerb crawling. Gant claimed that he had had consensual sex with Ms Hinks in the woodland and then left her alone, but as he left he saw another man with blond hair in the area. The jury unanimously convicted him of murder. Although Gant was advised that he might have a ground of appeal relating to the admission of bad character evidence, he elected not to appeal.

In July 2011, Newcountysire police arrested Paul Cannon, a man with blond hair, on suspicion of murder, after the death of another prostitute. Cannon then confessed to five other killings of women, all sexually motivated, around the Newcountysire area and offered varying degrees of detail of each incident. Police were able to match his confessions to three missing women, who were found buried or partially concealed in the places indicated by Cannon. One confession related to "someone I just came across in some woods one night". The police believed this might be a reference to the killing of Betty Hinks, and on re-examination, in August 2011, some of the unexplained DNA on her body is linked to Cannon. However the police are not completely sure that he meant to refer to the Betty Hinks case; his DNA sample only suggests that he had some unspecified contact with Hinks shortly before her death and there is not the clear evidence of sexual violence that is observed with his other known victims. In the event, Cannon was charged with the four other murders but not charged with the murder of Betty Hinks. His trial was delayed because he was initially found unfit to plead, but he was eventually arraigned and pleaded guilty in June 2013.

In August 2013, an investigative journalist, Malcolm Keene, sought permission from the Newcountysire police to look through their files in order to prepare a story on the recent killings of women. He was granted limited access. Keene discovered that there was no indication that anyone in the Newcountysire police force had written to Gant or his legal representatives to alert him to the confessions of Cannon and their potential significance to his case. It appeared that different members of the police had assumed that others had been assigned this task, and the matter had not been followed up by the senior officer in charge of

the investigation after it had been decided not to charge Cannon with the murder of Hinks. The material was then hurriedly disclosed to Gant's legal team in September 2013. They were allowed to appeal out of time on the basis of the new evidence. The Court of Appeal (Criminal Division) allowed the appeal in February 2014, saying "we may never know who truly killed Betty Hinks but we can say with some confidence that this new evidence might well have made all the difference at the trial of Mr Gant". The CPS did not seek a retrial.

Action in the High Court

Gant sued Newcountyshire Police for misfeasance in public office, false imprisonment, negligence and under s.6 (1) of the Human Rights Act 1998 in relation to their delay in notifying him of the new evidence, noting that a duty of disclosure of such important evidence was recognised by the Supreme Court in *R (on the application of Nunn) v Chief Constable of Suffolk and another* [2014] UKSC 37 at [35]. Hector J struck out the claim for misfeasance, in the absence of evidence suggesting bad faith rather than mere inadvertence from the police. He also struck out the claim for negligence, holding there was no relevant duty of care at common law, and the claim for false imprisonment, since the decision of a court to imprison a person relieves ministerial officers of responsibility for the imprisonment.

However Hector J held that the state could (and in this case, did) act unlawfully in detaining a person whilst it unreasonably failed to act upon evidence in its possession which might give rise to a successful appeal. Here, the state could not rely upon Article 5 (1) a ECHR in relation to the extra time caused by the culpable delay. Further, when the state failed in its duty, the part of the state which was responsible committed an "unlawful act" under section 6 (1) Human Rights Act 1998. For both propositions he relied on *Zenati v Commissioner of Police of the Metropolis* [2015] EWCA Civ 80. He acknowledged that *Zenati* did not consider delay in disclosure following conviction, but there was no good reason why the police could be sued for failing to disclose vital evidence while the defendant was awaiting trial and not while he was serving a term of imprisonment. He held that the unreasonable delay in notifying Mr Gant lasted two years, between September 2011 and September 2013. But he awarded only nominal damages of £500, on account of Mr Gant's conduct on the night in question and his earlier failure to appeal the conviction. Had it not been for Article 5 (5) ECHR, he would have regarded a declaration as just satisfaction for the violation of Gant's Article 5 right.

Grounds of Appeal

1) The Newcountyshire police appeal to the Court of Appeal on the basis that Article 5 does not cover detention following conviction, because this is the subject of Protocol 7, Article 3 and is also separately treated in English law under Criminal Justice Act 1988, s.133.

2) Gant cross-appeals against the low award, arguing that Article 5 (5) ECHR requires damages to be paid that are commensurate with the extent of loss of liberty. It was wrong to reduce his damages on account of non-criminal behaviour; all that mattered was that he had appealed as soon as reasonably possible after the new evidence was communicated to him.

Jonathan Rogers, Fellow of Middle Temple