

<u>IN THE HIGH COURT OF JUSTICE</u> <u>QUEEN'S BENCH DIVISION</u> <u>ADMINISTRATIVE COURT</u> <i>[2019] EWHC 912 (Admin)</i>	<u>No. CO/4530/2018</u>
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Royal Courts of Justice

Tuesday, 2 April 2019

Before:

THE HONOURABLE MR JUSTICE SUPPERSTONE

B E T W E E N :

THE QUEEN ON THE APPLICATION OF
STEPHEN KEOGH Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS Defendant

MRS L. HACKETT (of Hackett & Dabbs LLP) appeared on behalf of the
Claimant.

THE DEFENDANT did not appear and was not represented.

JUDGMENT

MR JUSTICE SUPPERSTONE:

1. The claimant renews his application for permission to challenge the failure of the defendant to permit access to CCTV footage introduced at his criminal trial, or to the forensic file in those proceedings. Permission was refused on the papers by Julian Knowles J.
2. The claimant was convicted at Liverpool Crown Court of the murder of Robert Monteith in Rainhill, Merseyside in November 2008 and his application for permission to appeal against conviction was refused by the Court of Appeal (Criminal Division), in 2011 (see *[2011] EWCA Crim 1888*).
3. The CCTV was said to show the claimant's presence at a particular location, which was relevant to the timeline and the opportunity he had to commit the murder. The forensic file contains details of DNA testing on the claimant's watch,
4. Delivering the judgment of the Court of Appeal, Moses LJ said at para.8:

“The crucial evidence on which the Prosecution relied consisted of a spot of blood on a watch that the Prosecution said the Defendant was wearing that evening, and as seen on the CCTV evidence. That blood, said the Prosecution, came from the deceased. The blood could be shown to be of a DNA constitution that led to analysis that there was a 1 in 1 billion chance of it coming from someone other than the deceased. Besides that spot of blood between the watch face and the strap, there was blood staining found on the lace of the Applicant's trainer showing it contained a mixed DNA profile for the Applicant and the deceased.”
5. Miss Louise Shorter, CEO of Inside Justice, in her witness statement in support of the claimant's application, sets out the reasons for the application. She states at

paras.4 and 5 as follows:

"4. This is a case in which the expert members of the Inside Justice Advisory Panel struggle to understand not only the scientific rationale which underpins the prosecution of Stephen Keogh, but the justification adopted by the CPS for continuing to withhold access to critical exhibits which are likely to have persuaded the jury to find him guilty. Not only could there be an innocent, as well as an evidentially significant, explanation for the presence of what is in all probability the DNA of the victim found in blood on a watch worn by Stephen Keogh; but the CCTV as shown to the jury is also believed by John Kennedy, a member of the Advisory Panel, and a former police officer who is a world renowned expert in CCTV analysis, to be incapable of establishing reliable evidence of his guilt.

5. The other expert member of the Inside Justice Advisory Panel who has played a leading role in questioning the approach of the prosecution scientist in relation to the link between the blood found on the defendant's watch and the victim is Joanne Millington. She is an acknowledged expert in how blood is deposited in a forensic context, using her wealth of experience to determine the activity that could lead to such a deposit, and would evaluate the scientific findings in the context of all the circumstances of the case, rather than relying on the mere presence of DNA to support a less significant inference."

6. At para.10 of her witness statement, Ms Shorter continues:

"The Court of Appeal did not have the benefit of the careful distinction drawn by Joanne Millington in her guidance on the evaluation of scientific findings annexed to the letter sent to the CPS dated 11 July 2018; which emphasised the distinct roles of the scientist as investigator and as the evaluator of the evidence. While Mr Davidson was objectively assisting the police as an investigator when he seized Mr Keogh's watch and submitted it for forensic examination, his evidence as an expert to the jury was that of an evaluator of the scientific evidence; and that distinction was plainly blurred by him in the answers which he gave, and which were correctly exposed as fallacious by the Court of Appeal. Critical to an independent understanding of how Mr Davidson reached the opinion which he presented to the jury is the contemporary forensic file; and access to it is essential if scientists such as Joanne Millington are to be enabled to supply the new evidence which might undermine the safety of this conviction."

7. Ms Shorter concludes at para.14:

"I conscientiously believe that the application to the CCRC which Inside Justice intends to pursue on behalf of Mr Keogh would be actively assisted with the focused criticism not only of the CCTV available at his trial, but of the rationale for the conclusion of the forensic scientists which only access to the forensic file will reveal."

8. Mrs Lorna Hackett, who appears on behalf of the claimant, in her ably presented submissions, and the defendant resisting the application, have relied upon the decision of the Supreme Court in *R (on the application of Nunn) v Chief Constable of Suffolk Police [2014] UKSC 37* . It is to that judgment that I now turn.

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10. Lord Hughes, with whom the other members of the court agreed, at the outset of his judgment identified the question before the court.

11.

"The present proceedings for judicial review raise the question of the extent of any continuing duty of the police and the Crown Prosecution Service to assist [the Claimant] in gathering and examining evidence with a view to a further challenge to his conviction, which he asserts was a miscarriage of justice."

10 At para. 42 Lord Hughes answers that question:

"... after conviction there is no indefinitely continuing duty on the police or prosecutor either in the same form as existed pre-trial or to respond to whatever enquiries the defendant may make for access to the case materials to allow re-investigation. The duty is properly stated at para 72 of the Attorney General's guidelines, read as explained in para 30 above, with the addition that if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made."

11 At para.30 Lord Hughes had considered para.72 of the Attorney General's guidelines, where under the heading "Post conviction" para.72 is set out. It reads:

“Where, after the conclusion of proceedings, material comes to light that might cast doubt upon the safety of the conviction, the prosecutor must consider disclosure of such material.”

Lord Hughes adds:

“The guideline must mean that not only should disclosure of such material be considered, but that it should be made unless there is good reason why not.”

12. At para.20 of his judgment, Lord Hughes considered the role of the CCRC. He noted that it:

12.

“... has the power to review any conviction and which is charged, if it thinks that there is a real possibility that the Court of Appeal might quash the conviction, with the power to refer the case back to that court for, exceptionally, the hearing of a second appeal and on any grounds, whether the same as before or different. Such a referral bypasses the requirement for leave to appeal. An arguable case is assumed. The Court thereupon has the duty to investigate the safety of the conviction and must quash it if it is unsafe. The CCRC's extensive investigative powers include the power to require the production to it of any material in the hands of the police or any other public body, to appoint an investigator with all the powers of a police officer, and to assemble fresh evidence not before the court or trial.”

12. In my judgment, applying the principles set out in *Nunn* , to which I have referred, and because the claimant has an alternative remedy by way of an application to the CCRC, this claim is not arguable. So far as the CCTV is concerned, that evidence was before the jury. Those representing the claimant say they have expert evidence that the CCTV may be unreliable. That submission can be placed before the CCRC for consideration and further investigation. So far as the forensic file is concerned, no more is said than that the claimant's experts need access to it if they are, in the words of Ms Shorter, “to be enabled to supply the new evidence which might undermine the safety of his conviction”. The Court of Appeal had access to both the CCTV and the forensic file.

13.

14. It is not suggested on the claimant's behalf, applying the test in *Nunn* , that there presently exists a real prospect that further enquiry may reveal something affecting the safety of the conviction. Nor has material come to light post-conviction, which, in accordance with the Attorney General's guidelines, requires disclosure of such material unless good reason exists as to why it should not be disclosed. The claimant's request is for material that did exist and was used at his trial. At para.30 of his judgment, Lord Hughes observed that the safety net in the case of disputed requests for review lies in the CCRC. There is, in my view, no good reason in the present case why the claimant should not pursue his challenge to his conviction through the CCRC.

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16. For the reasons I have given, permission is refused.

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