[2018] EWCA 2788 (Civ)

Case No: A2/2017/2897

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Stuart-Smith
HQ13X02240

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
LADY JUSTICE HALLETT D.B.E.
and
THE SENIOR PRESIDENT OF TRIBUNALS
(SIR ERNEST RYDER)

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Between :

MICHAEL CIARAN PARKER	**Respondent /Claimant**
- and -	
THE CHIEF CONSTABLE OF ESSEX POLICE	**Appellant /Defendant**

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Lord Faulks QC, **John Beggs QC** and **Cecily White** (instructed by DAC Beachcroft)
for the Chief Constable of Essex Police
Hugh Tomlinson QC and **Lorna Skinner** (instructed by McAlinneys Solicitors)
for Mr Parker

Hearing dates : 20-21 November 2018

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Approved Judgment

Sir Brian Leveson P :

1. In the early hours of 31 March 2001, Michael Parker (a celebrity entertainer who is better known by his stage name, Michael Barrymore) returned to his home with eight guests. What was clearly an alcohol and drug fuelled gathering ensued. Approximately three hours later, one of his guests, Mr Stuart Lubbock, was found unconscious and not breathing in the swimming pool, dressed only in his boxer shorts. He was taken to hospital but, at 8.23 am, pronounced dead.

2. Although inadequate steps were taken to protect the scene at the time, a police investigation followed and, on 6 June 2001, Jonathan Kenney and Justin Merritt, two of Mr Parker's guests, were arrested on suspicion of murder. No charges were brought and, in relation to Mr Lubbock, a subsequent inquest returned an open verdict. There was a further inquiry in 2003 (initiated when Mr Parker challenged one of the conclusions of the pathologist) but the investigation was only formally re-opened in 2006: it was led, as senior investigating officer, by Det. Supt. Gareth Wilson.

3. This re-investigation led to the police concluding that Mr Parker, as well as Mr Kenney and Mr Merritt, were to be considered suspects and a decision was taken that, in an attempt to obtain further evidence, all three (who were in different parts of the country) should be arrested simultaneously on 14 June 2007. In relation to Mr Parker, that arrest was to be effected by Det. Con. Susan Jenkins who had played a central role in the re-investigation and was well aware of the evidence: she believed she had reasonable grounds both to suspect Mr Parker of committing an offence and to conclude that it was necessary to effect his arrest. In the event, she was detained in traffic and a surveillance officer (P.C. Cootes) was ordered to effect the arrest, which he did.

4. Following the arrests, no material additional information came to light and, in September 2007, the police were informed by the Crown Prosecution Service ("CPS") that there was insufficient evidence for any charge to be brought. Mr Parker (who had been released on bail on the day following his arrest) was informed.

5. On 5 April 2013, Mr Parker commenced proceedings against the Chief Constable of Essex Police for substantial damages for false imprisonment following his unlawful arrest. Damages were claimed, valued in the order of £2.4 million, assessed on the basis that Mr Parker was re-establishing his career following the publicity which flowed from Mr Lubbock's death but that, after his arrest, this became impossible.

6. Initially, the Chief Constable contended that the arrest was lawful but, in 2016, it was admitted on his behalf that the arrest was unlawful so that, as a consequence, Mr Parker had been falsely imprisoned. This was on the basis that, in the events which obtained, the arresting officer did not personally have reasonable grounds for the necessary suspicion to justify arrest as required by s. 24(2) of the Police and Criminal Evidence Act 1984 ("PACE"): see *O'Hara v Royal Ulster Constabulary* [1997] AC 28. The alternative argument advanced on behalf of the Chief Constable was that Mr Parker was entitled only to nominal damages on the basis that he could (and would) have been arrested lawfully and so was entitled only to nominal damages. On 21 December 2016, Master Eastman ordered the trial of a preliminary issue articulated as whether (a) Mr Parker could and would have been lawfully arrested but for the delay in attendance of Det. Con. Jenkins, and (b) that as a result he was entitled only to nominal damages.

7. Between 22 and 25 May 2017, that issue was tried by Stuart-Smith J who, on 18 August 2017, held that Mr Parker could lawfully have been arrested by Det. Con. Jenkins, but that he was nonetheless entitled to substantial damages for false imprisonment, because had he not been unlawfully arrested by P.C. Cootes, he would have been unlawfully arrested by another of the surveillance officers present on the scene that day who, similarly, did not have the requisite information to form reasonable beliefs. The judgment of Stuart-Smith J is impressive and thorough: see [2017] EWHC 2140 (QB). Both parties rightly paid tribute to it.

8. Leave to appeal the decision on the grounds that it was wrong to conclude that Mr Parker was entitled to more than nominal damages was refused by the judge but later granted by Flaux LJ. By a Respondent's Notice, Mr Parker seeks to uphold the decision not only on the grounds decided by Stuart-Smith J but also, in the alternative, on the grounds that he should have found that the arrest of Mr Parker was unlawful either because there were no reasonable grounds for the arrest or that it was not necessary. This judgment has contributions from all members of the court.

The Background

9. This summary relies heavily on the detailed analysis of the facts set out in the judgment of Stuart-Smith J (at [58] to [105]) which I gratefully adopt. Although the argument on the appeal turns on a question of law, the cross appeal requires a more detailed examination of the facts and, in order to provide context and to address the arguments advanced, it is necessary, at least in summary, to recount them.

10. After an evening spent in Harlow, Essex, culminating in a visit to the Millennium Club, it was at about 2.45 am in the early hours of 31 March 2001 that Mr Parker returned, with eight other people, to his home in Roydon. The number included Mr Kenney (with whom Mr Parker had started a relationship in February of that year), Mr Merritt, and Mr Lubbock. There was evidence that Mr Parker smoked cannabis with one or more of his guests, and that he took cocaine and offered it to others, including Mr Lubbock. Mr Lubbock was 31 years of age and heavily intoxicated but otherwise in good health.

11. At about 5.47 am, Mr Lubbock was found in the pool, unconscious and not breathing, dressed only in boxer shorts. Attempts to resuscitate him failed and the emergency services were called; they arrived at 5.56 am. Mr Lubbock was taken to Princess Alexandra Hospital in Harlow. As I have recounted, at 8.23 am, he was pronounced dead.

12. After Mr Lubbock was found in the pool, but before the arrival of the police, Mr Parker left his house (apparently carrying a bundle of material) and went to a nearby flat. At 6.10 am, the police arrived and, at 7.03 am, Mr Parker's personal assistant also arrived telling the police where Mr Parker was. By 7.49 am, police officers had left the scene to interview him and a statement was taken. At some stage, having been photographed *in situ* by the police, a pool thermometer went missing; what happened to it remains unknown. Finally, at 5.00 pm that day, Mr Parker and Mr Kenney were admitted to the Priory Hospital in Southampton. Mr Parker stayed in the Priory until 11 May 2001, when he was discharged.

13. The explanation given by and on behalf of Mr Parker for leaving his house was that he left at the suggestion of others to avoid the media frenzy that would be bound to follow.

In his evidence before Stuart-Smith J, Det. Supt. Wilson relied on this leaving of the scene as evidence of Mr Parker's attempt to manipulate matters, but he later accepted that he had no reason to disbelieve the explanation that Mr Parker had proffered.

14. The initial post-mortem was undertaken by Dr Heath on the day of death. It demonstrated alcohol in a blood sample taken from Mr Lubbock at a concentration of 2.23 milligrams per millilitre of blood (nearly three times the drink drive limit) and MDMA at 0.92 micrograms, MDEA at 0.1 micrograms and MDA at 0.04 micrograms per millilitre of blood. These findings suggested the ingestion of ecstasy (towards the higher end of a wide range of values). Cocaine was also found suggestive of use within a few hours of death. At the subsequent inquest, Professor Forrest gave evidence that the level of mixed drug intoxication was sufficient itself to be the cause of death. The post-mortem, however, also revealed serious anal injuries that appeared consistent with recent penetration by a firm object. Otherwise, there was no evidence of natural disease or any mark of violence. In light of these findings, after the post mortem (in the late afternoon of 31 March), the police began to treat the death as suspicious.

15. On 6 June 2001, Mr Kenney and Mr Merritt were arrested on suspicion of murder. Mr Parker was arrested on suspicion of possession and supply of drugs. On 10 October 2001, he accepted a caution for the possession of cannabis.

16. Professor Milroy conducted a second post-mortem on 19 June 2001. By 11 December 2001, all lines of enquiry were considered to have been exhausted and the investigation into Mr Lubbock's death was suspended. On 5 March 2002, the CPS advised Essex Police that there was no evidence upon which any criminal court could conclude that there had been any wrongful act done by any person in relation to Mr Lubbock's death or bodily injury, and that no further action should be taken against Mr Parker, Mr Merritt, Mr Kenney or any other of Mr Parker's guests. In July 2002, the investigation was reviewed but its suspension was not lifted.

17. The inquest into Mr Lubbock's death took place in September 2002 and resulted in an open verdict. In 2003, an investigation was undertaken following Mr Parker's suggestion that Mr Lubbock's anal injuries could have been caused post-mortem. The investigation found no evidence to support this assertion; it concluded that there was strong evidence that the anal injuries were sustained before the arrival of the emergency services.

Re-Investigation

18. There were no material developments until March 2006, when a further review of the police investigation recommended that it be re-opened. This commenced on 4 December 2006. The team working for Det. Supt. Wilson included Det. Con. Jenkins who took the role of Exhibits Officer and Det. Con. Thomas (who was the Case Officer, reviewing the existing material, analysing new evidence and initiating further enquiries). These officers scrutinised all the material arising out of the investigation and re-investigation. Det. Supt. Wilson, on the other hand, relied on summaries and selections of evidence recounted to him. As Stuart-Smith J observed the precise extent of what he read or was told remains unclear.

19. When the re-investigation started, Mr Parker (who had voluntarily provided three statements in relation to the earlier enquiry) was the specific subject of investigation.

He was described as a "significant witness" and agreed to be interviewed so long as it was at his convenience. Det. Supt. Wilson also sought to rely on this requirement as evidence of Mr Parker's intentions to disrupt the police investigation, but Stuart-Smith J found that to be an unjustifiable inference. In the event, Mr Parker was interviewed on 20 December 2006, in what was described as a good-humoured exchange which did not yield any new information; he agreed to be seen again to provide a statement. In the view of the judge, Mr Parker's subsequent behaviour at no point warranted a reasonable suspicion that he was evading contact with the police.

20. The re-investigation was described by Stuart-Smith J as "very extensive". Initially, the police considered as suspects the individuals who had originally been arrested on suspicion of murder, namely Mr Kenney and Mr Merritt, but not Mr Parker. On 10 May 2007, what is described as a Windows of Opportunity Report was produced; this consisted of an analysis of the movements of those in the house to ascertain who had the time and opportunity to have been responsible for Mr Lubbock's death. Stuart-Smith J described the report in these terms (at [69]):

> "It identified [Mr Parker] as a possible suspect based upon suggestions that he might be sexually aggressive, had drunk significantly and was believed to have taken cannabis and cocaine and because his version of events differed from that of others. It also identified a time when [Mr Parker] left his bedroom to fetch swimming shorts as the last known opportunity before Mr Lubbock was found in the pool. There was no evidence at any stage of [Mr Parker] being seen in the vicinity of the pool at any material time."

21. On 14/15 May, Det. Supt. Wilson decided that a full arrest package should be prepared to draw together the evidence against Mr Parker as well as Mr Kenney and Mr Merritt. Thereafter, a decision would be made whether there were sufficient grounds to arrest any or all of the three men.

22. On 18 May 2007, a further pathologist, Dr Nathaniel Cary, produced his first report. He found that there was no possible benign or accidental explanation for Mr Lubbock's anal injuries; the suggestion that they occurred post-mortem was, he believed, "quite absurd". Although he could not "absolutely' exclude the possibility of penile penetration without lubricant, his opinion was that the findings were more consistent with the insertion of an object of larger diameter than the average penis with "fisting" being a "likely possibility".

23. Neither did Dr Cary exclude the possibility that the anal injuries contributed directly to death and he did conclude that the coincidence of death with severe injuries provided "*prima facie* evidence that death occurred in circumstances of third party involvement" whether or not the anal injuries were a direct contributor. He also did not exclude the possibilities of partial asphyxia through the application of a neck lock during a sexual assault; drugs and alcohol in association with hypothermia; or drowning as the final event. In his medical opinion, the cause of death was unascertained.

24. Dr Cary added the non-medical view that "the facts speak for themselves in terms of the involvement of one or more parties in the circumstances leading up to death". In a supplemental statement, Dr Cary confirmed his opinion that the infliction of anal

injuries was temporally closely associated with the time of death. It is important to underline, however, that neither report identified any evidence linking Mr Parker to the anal injuries or to the immediate cause of death.

25. A second Windows of Opportunity Report, dated 23 May 2007 also identified Mr Parker as a possible suspect on the basis of four windows of opportunity. The last in time was that identified in the first report (when Mr Parker went to fetch swimming shorts). This report recorded evidence that the other three opportunities had occurred before Mr Lubbock was last seen swimming in the pool, which, if correct, made these opportunities less likely. Various reasons were, however, advanced why this evidence on timing may not be reliable.

26. According to his witness statement, Det. Supt. Wilson's reaction to the report of Dr Cary was that the possibility of rape having been committed "remained under consideration" as penile penetration had not been excluded. In cross-examination he maintained that rape remained a possibility but accepted that if the injuries were inflicted by a third party, it was likely that they were caused by insertion of an object or by "fisting". In Stuart-Smith J's view, this was a permissible position for Det. Supt. Wilson to hold.

27. Stuart-Smith J found that the development of Det. Supt. Wilson's views as to Mr Parker were materially influenced by his belief that Mr Parker's departure from his home after the body was found was suspicious but, by early June, two further pieces of information were obtained. The first was in the form of a statement made by the cousin of a man who, at some point, had been Mr Parker's long term partner. Neither had been at Mr Parker's house on the night of Mr Lubbock's death but the partner had told his cousin, apparently in relation to the anal injuries, "Did you know it was a hairbrush?" or "It was a hairbrush." Stuart-Smith J noted the weakness of this evidence but did not suggest that the police should have ignored it altogether.

28. The second piece of information was the statement of a Police Community Support Officer dated 14 May 2007. He said that at some time between 2001 and 2006, he had been asked to take a statement from a female working at Springfield Medical Centre in Chelmsford. She had told him that, the day after the death of Mr Lubbock, Mr Parker "had a procedure on his penis" at the centre. He reported speaking again to the female on 17 May 2007. This time she admitted telling the police that she had seen Mr Parker at the centre but claimed not to remember mentioning any injury to Mr Parker's penis because she had not looked after him during his visit; she refused to provide a statement. Off the record she confirmed that he attended the centre "at the time of the incident at [Mr Parker's] address".

29. In his evidence, Det. Supt. Wilson maintained that the information about a visit to the medical centre was important despite its obvious weaknesses and the need to fit it into Mr Parker's known movements on 31 March 2001. The lead was not followed up although the original record of the receipt of the information said that the matter would be put to Mr Parker and consent to examine medical records would be sought. The explanation for it not being followed up was said to be patient confidentiality. In Stuart-Smith J's view, it was possible that by the stage of the meeting Mr Wilson had formed the view that there would be a forensic advantage in presenting the allegation to Mr Parker "cold" after arrest.

30. Although not convinced by this evidence or as to the weight placed on the information, Stuart-Smith J did accept the officer's answer that:

> "…there was the initial revisit of witnesses. Then there was the building of the case. Then we progressed through to a stage where all the suspects were looked at and each individual team did a presentation. I think it's fair that we could have [had] a look at it at that stage."

Stuart-Smith J stated that this was an accurate reflection of the state of the investigation in May 2007 but concluded that the police had lost sight of the inherent weakness of the evidence and the need to pursue it further if any weight was to be attached to it at all. Without further action, the judge did not consider that this was information upon which it was reasonable to rely as contributing to grounds justifying arrest.

31. On 5 June 2007, there was a briefing and forensic meeting attended by Det. Supt. Wilson, Det. Con. Jenkins and others in which it was stated that Mr Parker, Mr Kenney and Mr Merritt were all being treated as suspects. According to Det. Supt. Wilson, Mr Parker was being so treated because of "further information indicating he was actively seeking a sexual encounter during the party and may have approached [Mr Lubbock]", though this explanation was not entered in the Briefing Book which recorded the meeting.

The Arrest Plan

32. Det. Supt. Wilson approved the arrest of all three suspects on 13 June 2007 on suspicion of murder and rape. According to his evidence, this was a decision based on an Arrest Plan produced on 5 June 2007. Bearing in mind the issues in this appeal, I set out the relevant material and the judge's assessment of it (analysed by him at [79]-[97]).

33. Section 1 of the Arrest Plan briefly outlines the facts covering the night in March 2001 up to the beginning of the re-investigation. Section 2, entitled "Arrest Justification", sets out the evidence against each suspect. The material in this section relevant to Mr Parker is roughly three pages long, and divided into two parts, the first of which outlined the potential evidence against Mr Parker relating to the offences being investigated.

34. First, Mr Kelleher, a former work colleague of Mr Kenney, had made a statement on 26 January 2007 to the effect that Mr Kenney had given him an account shortly after the incident. This was that there were often drug-fuelled parties at Mr Parker's home and on the night of the incident Mr Parker started pestering Mr Lubbock for sex whereupon Mr Kenney had told Mr Parker that Mr Lubbock was "straight" and subsequently Mr Kenney and Mr Parker had a "fracas". According to the document, this account was "made all the more credible" by the fact that Mr Kelleher was shown on the scene log as arriving at Mr Parker's address at 8.38 am on 31 March 2001.

35. In cross-examination Det. Supt. Wilson accepted that the account from Mr Kelleher was hearsay, but he did regard the pestering as important. He did not attach significance to the fracas. Stuart-Smith J accepted Mr Wilson's evidence that weight was placed on the evidence relating to Mr Lubbock because it had not been mentioned by Mr Parker at any stage, though he recognised that this could have been because these events did not happen or they were not recalled.

36. Second, reliance is placed on the evidence of the comment as to the use of a hairbrush. The document states that "It is not unreasonable to assume that this information could only have come from [Mr Parker]": this was doubtless because of the source of the statement. In Stuart-Smith J's view, Det. Supt. Wilson was right to accept that, apart from being double-hearsay, this information could have come from Mr Parker or anyone else who was present on the night of the incident.

37. Third, as the judge concluded, there was "ample evidence" to support the assertion that Mr Parker was seeking a sexual encounter on the night of the incident. This leads to the fourth point identified in the analysis that a doorman at the Millennium nightclub on the night of the incident saw Mr Parker in the club toilets "in what is believed to be a compromising situation with another man". There was no suggestion of violence or aggression and, whatever Det. Supt. Wilson might have thought about it, Stuart-Smith J records that the Chief Constable did not rely on it in his defence.

38. Fifth, a taxi driver who had driven Mr Parker and Mr Lubbock back from the Millennium Nightclub, reported Mr Parker telling Mr Lubbock: "I could do with a good fuck now, I'd be happy with that now". The document describes this as "quite a significant comment". This evidence, however, was known at the time of the original enquiry and, at the inquest, the taxi driver gave evidence that he could not say that the remark was indicating a desire for a sexual encounter with anyone in particular or anyone of a particular gender.

39. Sixth, Mr Shaw and Mr Futers, two of Mr Parker's guests, reported that Mr Parker tried to kiss Mr Futers on the mouth. Mr Futers (who was straight) repulsed the advance and complained to Mr Shaw who said, "Don't worry; he's always doing that sort of thing". Mr Futers said that there was no "big deal" made of it. This information was known to the original investigators but not reduced into writing until the re-investigation.

40. The second part of the Arrest Plan consisted of an analysis of what was purported to be bad character evidence relating to Mr Parker. It consisted of five incidents which, in his witness statement, Det. Supt. Wilson considered to be "suggestive of aggressive sexual behaviour on [Mr Parker's] part, although the weight that could be attached to it depended on how reliable it was". When cross-examined, however, he accepted that when he made his decision, there was no evidence available to him of actual aggressive conduct.

41. In the first incident, the complainant alleged that on 8 May 1998 he was anally raped by Mr Parker in the toilets of the Brief Encounter nightclub in London. The Arrest Plan states that "the allegation was denied and no further action was taken". Stuart-Smith J however pointed to several weaknesses in this evidence not apparent from the language of the Arrest Plan but revealed by the CPS Summary, which had been read, at least, by Det. Con. Jenkins. On investigation of the incident the police took swabs and intimate samples from the complainant and found no other person's DNA. Video evidence confirmed that Mr Parker did not join the complainant in the toilets, and showed the complainant soon afterwards making a phone call. The Sun newspaper received a phone call that night and reporters from the News of the World newspaper (who arrived before the police) carried the story on 10 May. In Stuart-Smith J's view no weight at all could or should have been given to this allegation and it served to underline a reason for Mr Parker's concerns about the media. When pressed, Det. Supt. Wilson withdrew his evidence relating to this incident.

42. In the second incident, the complainant alleged that, on 3 August 2000, she was hired as a prostitute to attend Mr Parker's hotel room. Mr Parker paid for her services and then left. Another occupant of the room had sex described as "rough" and at the end of the sexual activity the money she had been paid had been removed from her coat. The Arrest Plan concluded that "The allegation was denied and NFA taken. [Mr Parker] played no part in the sexual activity." Stuart-Smith J added some details from the case summary. Mr Parker accepted a caution for allowing the room he had hired to be used for smoking cannabis.

43. In cross-examination, Det. Supt. Wilson conceded that there was no suggestion of aggressive behaviour by Mr Parker but said that the incident concerned him on the misconceived basis that Mr Parker had been present in the room at the material time. In the view of Stuart-Smith J this was "a very long way" from behaviour suggesting aggressive sexual behaviour.

44. In the third incident, the complainant was a fan of Mr Parker who alleged that in February 2001, Mr Parker offered him drugs and alcohol, put his hand down the complainant's trousers and inserted his finger into his anus. However, the complainant later admitted to the falsity of the allegation and was convicted of attempting to pervert the course of justice. Mr Wilson referred to this in his witness statement without saying that he placed no weight on it. Eventually in evidence he said that he neither should nor had placed any weight on it.

45. Fourth, a complainant alleged that he had been raped by Mr Parker after meeting him in a bar in October 2000. He described consuming alcohol and Class A drugs, going to sleep at Mr Parker's house fully clothed then waking up wearing only his underwear and blood coming from his anus. The police did not believe the allegation originally, so he refused to talk about it when, in 2007, the re-investigation sought to follow it up. A police press release in 2002 records that the complainant reported the allegation to the tabloid press.

46. This allegation appeared in the Arrest Plan despite the re-investigation analyst having concluded that it should not have been believed and was not relevant. Det. Supt. Wilson answered the suggestion that this incident could not be suggestive of aggressive sexual behaviour by saying that he could understand the criticism but suggested that the officer who prepared the Arrest Plan thought it correct to include it. In Stuart-Smith J's view, this begged the question why it was thought appropriate and, in addition, the extent to which Det. Supt. Wilson had read the underlying documents.

47. The final incident (not mentioned in Det. Supt. Wilson's witness statement) concerned an allegation by Mr Parker's ex-chauffeur that, in 2000, Mr Parker would have him drive around London to meet male prostitutes and obtain Class A drugs and that he engaged in promiscuous homosexual relationships at work while being in a relationship with someone else. According to the Arrest Plan the ex-chauffeur had sold this story to the press. Mr Wilson said that he knew that the story had been sold. He said that it suggested homosexual promiscuity but did not rely on it as suggestive of aggressive sexual conduct.

48. On the bad character evidence, Stuart-Smith J accepted the "general thrust" of Det. Supt. Wilson's evidence that he was very familiar with the Arrest Plan, understood the details behind it and that his decision was informed by all the information gathered

during the re-investigation. However, he held that it should have been clear to him that the bad character evidence was flimsy and misleading to such an extent that further enquiries should have been made as to its reliability.

49. The section of the Arrest Plan relevant to Mr Parker concluded with three final paragraphs. The first referred to Mr Parker leaving his property after the body was found while wearing different clothes from those he had been wearing at the nightclub and carrying a "bundle of material" under his arm. The second stated that though it had previously been believed that Mr Parker had never been to the Millennium nightclub before 31 March 2001, staff confirmed him having been there on several occasions. The third referred to the evidence of an injury to Mr Parker's penis.

50. Det. Supt. Wilson also relied on the suspicions of Mr Kenney and Mr Merritt to support, by association, his suspicions of Mr Parker. According to Stuart-Smith J, when pressed as to how this association added to the suspicion, he could not provide any satisfactory answer. At its highest, he referred to the possibility that some sort of joint enterprise could not be excluded. This would not, however, be his leading hypothesis.

51. For Det. Supt. Wilson the available information "far exceeded what might reasonably have been required to found a suspicion to arrest" on the basis of a history of sexual promiscuity, his stated desire to engage in sexual activity, him being one of only three individuals with the opportunity to act on such desires and him having never been open to the police about what he knew. He added that Mr Parker's celebrity status did not alter his decision but did mean that he considered it with particular care.

52. On whether arrest was necessary, reliance was placed on s. 24(5)(e) of PACE, that arrest would "allow the prompt and effective investigation of the offence or of the conduct of the person in question". Det. Supt. Wilson considered that arresting the three suspects was essential to prevent collusion, maintain an element of surprise and enable concurrent interviews to compare their responses in real time. It was intended that a covert surveillance device would be installed in the cell block to capture incriminating evidence. Det. Supt. Wilson was also concerned that Mr Parker would leave for New Zealand, where he was living, and by his perception that Mr Parker's cooperation with the investigation was through third parties. The perspective of Det. Con. Jenkins (who did not know of the planned covert surveillance) was that arrest was necessary as the re-investigation could not reach a breakthrough without evidence arising from arrest and interview.

The Arrest

53. Once the decision was made to arrest the three men, Det. Insp. Mason was given responsibility for organising the arrests. In order to avoid inadvertent disclosure of information in a such a sensitive case (which is always a problem in cases involving celebrities), officers were told only what they needed to know. Having been involved in the detail of the re-investigation, Det. Con. Jenkins was an exception: for Mr Parker, she was the only designated arresting officer. Furthermore, she was briefed by Det. Con. Lovett, who had prepared the Arrest Plan. Stuart-Smith J accepted Det. Con Jenkins' evidence that she was briefed on the basis that the contents of the Arrest Plan were the grounds although her understanding of the case and the justification for arrest also came from the documents she had read generally. Having approved the Arrest

Plan and confirmed the decision to arrest, Det. Supt. Wilson had no involvement in the arrest.

54. Stuart-Smith J found that there was no evidence that any officer gave thought to the legal requirement as to the state of mind that an arresting officer must have and, in particular, that he or she must have reasonable grounds for the requisite suspicion and belief for a lawful arrest. As Det. Supt. Wilson had made clear in his evidence, although arrest by the designated arresting officer was "planned" and "preferable", the plan was to arrest Mr Parker on sight "come what may". As the judge somewhat laconically put it, if Det. Con. Jenkins was not available to effect the arrest, "there was no Plan B to ensure that the arrest … could be lawful".

55. The arrest was planned for 14 June 2007. The night before, a number of surveillance officers were present in the area where Mr Parker was staying. Neither that team, nor Sgt. Phil Smith, the officer in charge, had been briefed sufficiently or at all on the background circumstances so were not appraised of the material which provided reasonable grounds for the requisite suspicion and belief to justify arrest. That is not surprising because they were not intended to effect it. Neither did Sgt. Smith obtain an understanding of the grounds when contacting Det. Insp. Mason or Det. Con. Thomson who were the officers in charge of the arrest operation. Instead, Sgt. Smith was told to arrest Mr Parker if he suddenly appeared before the arrest team arrived.

56. Det. Con. Jenkin's vehicle was unfortunately delayed in traffic and as a result, when Mr Parker left where he was staying in the morning and passed in front of Sgt. Smith's car. Sgt. Smith ordered P.C. Cootes to make the arrest. Sgt. Smith explained that, based on his "standard practice", he would have told P.C. Cootes that Mr Parker was to be arrested on suspicion of rape and murder, the date of the alleged offences, the alleged victim and that there was further evidence to put to Mr Parker. It was only in 2016 that the Chief Constable conceded that the arresting officer could not satisfy the statutory criteria so that the arrest was unlawful.

57. Completing the history, after the arrest of the three men, extensive interviews were conducted, but no material further information was obtained. On 15 June 2007, Mr Parker was released on bail. He answered bail on 10 September 2007 and was further interviewed. Later the same day, the police were informed by the CPS that there was insufficient evidence to charge any of the suspects. The reasons for this conclusion included the fact that the cause of death was "unascertained" and that there was a lack of forensic evidence connecting anyone or any object to Mr Lubbock or to any suspect. In addition, no assistance could be derived from eyewitness evidence and there was a lack of evidence of any sexual event with Mr Lubbock around the house, pool or Jacuzzi. As a result, on that afternoon, Mr Parker was released without charge and told that no further action would be taken against him.

The Judgment

58. In addition to the issue whether Mr Parker could or would lawfully have been arrested, it was contended on behalf of Mr Parker that there were no reasonable grounds upon which he could be arrested and that, in any event, an arrest was not necessary. Stuart-Smith J started by setting out, in considerable detail, the law both as to lawful arrest and as to damages in tort. He noted the substantial agreement in the proceedings as to

the relevant legal principles. It suffices here to set out his findings to the extent that it is necessary to make clear his approach.

59. As to the circumstances in which arrest without a warrant is lawful, Stuart-Smith J identified a list of relevant questions to be asked as to whether the arresting officer had the state of mind required by law. The questions are derived from *Castorina v Chief Constable of Surrey* (1996) 160 LGR 241 but modified to take into account the statutory requirements introduced later. These are now found in s. 24 of PACE as amended by s. 110(1) of the Serious Organised Crime and Police Act 2005 ("the 2005 Act"). The list is as follows:

> "(A1) Did the arresting officer suspect that an offence had been committed? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (A2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the Court.
>
> (1) Did the arresting officer suspect that the person who was arrested was guilty of the offence? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (2) Assuming the officer had the necessary suspicion, did the arresting officer have reasonable grounds for that suspicion? This is a purely objective requirement to be determined by the judge if necessary on facts found by a jury.
>
> (2A) Did the arresting officer believe that for any of the reasons mentioned in [s. 24(5) of the 1984 Act] it was necessary to arrest the person in question? The answer to this question depends entirely on the findings of fact as to the officer's state of mind.
>
> (2B) Assuming the officer had the necessary belief, were there reasonable grounds for that belief? This is a purely objective requirement to be determined by the judge, if necessary on facts found by a jury.
>
> (3) If the answer to the previous questions is in the affirmative, then the officer has a discretion which entitles him to make an arrest and in relation to that discretion the question arises as to whether the discretion has been exercised in accordance with the principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223."

60. The Chief Constable relied on only the reasons set out in s. 24(5)(e) of the 1984 Act to justify the arrest as necessary, that is, to allow the prompt and effective investigation of the offence or of the conduct of the person in question. Stuart-Smith J identified the well-known principle, derived from *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 and central to this case, that it is the officer who in fact makes the arrest who must have the requisite state of mind. He also distinguished between, on the one hand, the question whether, as a matter of law, the police constable in question had a discretion whether to arrest, as governed by the 1984 Act and, on the other hand, the question whether such discretion was exercised in accordance with the

Wednesbury principles. The latter is a public law challenge which has not been suggested in these proceedings.

61. Stuart-Smith J then turned to the issue of damages and started by setting out that the purpose of compensatory damages in tort was to put a claimant in the position he would have been in had the tort not been committed. Thus, the tort committed by P.C. Cootes, for which the Chief Constable is vicariously liable, was his unlawful arrest and false imprisonment of Mr Parker. The question which followed was what that position was.

62. Stuart-Smith J then examined the so-called "*Lumba* principle". Reliance was placed on this principle by the Chief Constable before the High Court and before this court in order to establish that Mr Parker was entitled to nominal damages only. The principle is derived from the decision of the Supreme Court in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 ("*Lumba*") subsequently analysed in two further decisions, namely that of the Supreme Court in *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23 ("*Kambadzi*") and of this court in *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79 ("*Bostridge*").

63. The key finding of Stuart-Smith J on the *Lumba* principle was as follows:

> "50. It is not enough for a Defendant in the position of the Secretary of State in *Lumba* or the Defendant in the present case to show that the counterfactual could have resulted in the same outcome as had been caused by the tort: the Defendant must go on to show that it would have done so. This is the basis of the decision in *Lumba*, is accepted by the Defendant in its formulation of the issue in its pleaded case, is incorporated in the formulation of the present preliminary issue and explains the result in *Kambadzi*…
>
> 51. The principles set out in *Lumba* lead to an award of nominal damages if no loss has been suffered because the results of the counterfactual are the same as the events that happened. If and to the extent that they diverge (e.g. because a lawful arrest would not have occurred at the time but would have occurred later) the Court will have to decide on normal tortious compensatory principles whether and to what extent a substantial award of damages is merited for the divergence in outcome.
>
> 52. What is the appropriate counterfactual in a given case will be acutely fact-sensitive…Where the tortious conduct is the arrest of an individual by a police officer whose state of mind does not satisfy the requirements of s. 24 of [the 1984 Act], the counterfactuals can in theory include (a) that the individual would not be arrested, or (b) that the individual would be arrested (either at the same time as the actual arrest or at some other time) by an arresting officer whose state of mind satisfies the requirements of s. 24 of [the 1984 Act] or (c) that the individual would be arrested (either at the same time as the actual arrest or at some other time) by another officer whose state of mind does not satisfy the requirements of s. 24 of [the 1984 Act]. Which of

> these alternatives applies will be the subject of a finding of fact on the basis of the evidence before the Court in the individual case."

64. Hence, Stuart-Smith J concluded that in a case such as the present a claimant would not be entitled only to nominal damages if it can only be shown that they *could* have been arrested lawfully. He went on to assess, on the facts whether, had the relevant tort not been committed (namely the unlawful arrest and false imprisonment) carried out by P.C. Cootes), Mr Parker *would* have been arrested lawfully.

Could Mr Parker lawfully have been arrested?

65. After identifying the issues in the case and setting out the facts, Stuart-Smith J began his analysis with the question whether Mr Parker could have been lawfully arrested (in other words, whether there was any police officer who could have carried out the arrest). Suffice to say that if it could not be shown that Mr Parker could lawfully have been arrested, there was no prospect of the appellant's *Lumba* challenge succeeding. The trial before the High Court proceeded on the basis that Det. Supt. Wilson and Det. Con. Jenkins were the only people who between them could have had the information on which any decision to arrest could be made. Hence, in his analysis Stuart-Smith J assessed the states of mind of both officers against the relevant legal tests.

66. Stuart-Smith J started by accepting "without hesitation" that the circumstances surrounding Mr Lubbock's death were suggestive of foul play. Thus, it was impossible to ignore Dr Cary's evidence on the anal injuries and, furthermore, it was unlikely that any penetration had been consensual even with the level of intoxication present. Even considering the possibility that the injuries were sustained by accident, a "natural and reasonable" inference to draw would have been that they were or may have been caused by violent assault. Hence the police were reasonably entitled to suspect that Mr Lubbock had been assaulted, and to take into account that the poolside thermometer which could have caused the injuries was present (as identified by photographic evidence) early on 31 March 2001 but later went missing "for no obviously innocent reason".

67. The judge continued that an assault of such violence immediately suggests an intent to cause grievous bodily harm. Noting that cardiac arrhythmia caused by anal injuries was a possible cause of death, and it was not necessary for Mr Lubbock to have been put into or restrained in the pool to have been murdered, it could reasonably be inferred that his death was caused by someone with the requisite intent for murder.

68. Turning to the evidence specific to Mr Parker, on the one hand, there was no evidence linking him with the injuries or with Mr Lubbock being in the pool, and there was no reason to disbelieve Mr Parker's explanation for leaving after the body was found. There was evidence that he removed some thing or things from the scene (a "bundle of material" as described in the Arrest Plan) but no reliable evidence as to what it was. Objectively, what could be said is that his leaving was regrettable from the perspective of the police who wanted to make inquiries and the issue of the bundle of material left questions unanswered. Further, he had otherwise cooperated with police. The judge concluded that insubstantial reasons for suspicion were his absence of explanation (which was consistent with his position that he did not know what happened, although in an interview with Piers Morgan he said he knew of others who were hiding

information) and his departure to the Priory Hospital (there being no evidence that it was not medically justified).

69. On the other hand, Stuart-Smith J recognised that it was important that Mr Parker was one of a closed group of people who could have inflicted the anal injuries on Mr Lubbock. Though the evidence regarding opportunities to commit the offence or offences was confused, taking the evidence at its lowest, Mr Parker could not be excluded. The judge added that a police officer could reasonably infer that if the injuries were caused by sexual activity, they were caused by a man. Making it clear that he was not suggesting that a gay man was more likely to commit such an offence than a man who was 'straight', he went on to conclude that a police officer could reasonably infer that, on the premise that the injuries were caused by sexual activity, they were more likely to have been caused by someone who was gay.

70. Regarding motive and opportunity, Stuart-Smith J found that the evidence of Mr Parker's desire for a sexual encounter did not evidence any support for a suggestion that he desired violent non-consensual sexual activity. It was material that he "backed off" on learning that Mr Lubbock was heterosexual. The suggestion that he reached a level of frustration such that he wished to commit rape on a man he knew to be heterosexual was "unsupported speculation". The bad character evidence provided no evidence as to propensity. Although the maxim "no smoke without fire" may sometimes be of assistance, it was material that celebrity status attracted a particular risk of false allegations.

71. Stuart-Smith J then dealt with nine heads of evidence mentioned by John Beggs QC in his closing submissions on behalf of the Chief Constable:

    i) The reference to the hairbrush corroborated an unlawful assault but not that Mr Parker was involved.

    ii) Evidence of injury to Mr Parker's penis was unreliable.

    iii) Mr Futers' evidence was relevant to a desire to seek a sexual encounter and not to commit rape or murder. Similarly, his evidence that Mr Parker had tried to place cocaine on Mr Lubbock's gums was evidence of illegal or "risky" behaviour but did not contribute to a reasonable suspicion of the relevant offences.

    iv) Mr Kelleher's evidence of pestering Mr Lubbock for sex and the fracas on being told that he was heterosexual was subject to weaknesses and there was a lack of evidence of any continued inclination to sexual contact with Mr Lubbock after the fracas.

    v) The Windows of Opportunity reports provided evidence that Mr Parker could have had the opportunity to assault Mr Lubbock and Det. Supt. Wilson was entitled to take them into account.

    vi) The bad character evidence was "thoroughly misleading" such that it was unreasonable to rely on it.

vii) The evidence of Mr Parker's ex-chauffeur describing his penchant for prostitutes, drugs and alcohol elided "risky" conduct with that demonstrating a propensity to violent sexual conduct.

viii) Dr Cary's evidence was important and on its own provided reasonable grounds for suspicion that a serious criminal offence had been committed but did not link Mr Parker to the injuries.

ix) Although it was claimed that Mr Parker's evidence, given over the years, was incomplete and inconsistent, it was a fact that he had never made a material admission.

72. Stuart-Smith J then turned to the evidence as to the necessity of making the arrest. He noted the Chief Constable's grounds for claiming necessity although Mr Beggs' submissions did not include Det. Supt. Wilson's concerns about Mr Parker leaving the country. The judge accepted that Det. Supt. Wilson believed that the arrest would further the investigation in the ways suggested, and although it was unlikely that he had considered alternatives more than cursorily, the officer did believe arrest was necessary not least because of his suspicion concerning Mr Parker leaving his home after the body was found and the fact that Mr Parker wanted cooperation with the police to be at his convenience.

73. As for the reasonableness of such a belief, Stuart-Smith J pointed to the co-operation of Mr Parker with the investigation, that the police could and did put an alert out to border control in case Mr Parker left the United Kingdom (despite there being no indication of his intending to leave) and that despite a theoretical risk of collusion the re-investigation had established that there had been no contact between the three suspects for approximately six years. The judge found that neither Det. Supt. Wilson nor Det. Con. Jenkins could identify a case-specific risk of collusion but that they took seriously the need to prevent any collusion due to the seriousness of the case. He went on to decide that, when cross-examined, Det. Supt. Wilson answered "with great clarity" about his perception of a need to arrest in order to co-ordinate the interviews and added that despite the lack of known contact there was a risk of collusion if the arrests were not simultaneous.

74. Having analysed the facts and reasoning, Stuart-Smith J then went on to answer all of the adjusted *Castorina* questions in the affirmative. Thus, he found as follows.

i) Both officers suspected that the offences of rape and murder had been committed, as was demonstrated by their evidence.

ii) Their suspicion was reasonable on the basis of the evidence he had already set out.

iii) Both suspected that Mr Parker was guilty of the offences of rape and/or murder, as was demonstrated by their evidence.

iv) Their suspicion of Mr Parker was reasonable (although he described the evidence on this question as "more finely balanced"). In so holding he had regard to the statutory threshold having been interpreted as low, and the fact that

despite the weaknesses in the evidence Mr Parker was one of a closed group of people who could have committed the assault.

v) Both believed that it was necessary to arrest Mr Parker to allow prompt and effective investigation (s. 24(5)(e) of the 1984 Act), as was demonstrated by their evidence.

vi) Their belief as to necessity was reasonable. There was "considerable force" in the submission that Mr Parker had cooperated with police, and he could have been arrested with "no grounds for complaint" if he changed this behaviour. However, he was persuaded of the operational arguments, having regard to the need to co-ordinate interviews and (in relation to Det. Supt. Wilson) to implement covert surveillance.

75. As a result, Stuart-Smith J concluded that Mr Parker could have been lawfully arrested by Det. Con. Jenkins. Det. Supt. Wilson could also have done so, had he been involved in the final arrest operation and it follows on that, had any other officer been sufficiently briefed, that officer would have been entitled to reach the state of mind that an arrest by that officer would have been lawful.

Would Mr Parker have been lawfully arrested?

76. To begin, Stuart-Smith J addressed the starting point taken by Mr Beggs as to what would have happened had the tort not been committed (the counterfactual scenarios). Mr Beggs submitted that only two counterfactuals appeared realistic, namely (i) that the surveillance officers would have called Det. Con. Jenkins in order to be adequately briefed, or (ii) that the officers would have kept Mr Parker under surveillance and waited until Det. Con Jenkins arrived to carry out the arrest. For the judge, this was the wrong starting point, as it assumed that the tortfeasor did not commit the tortious act due to a realisation that it would be unlawful to commit the tort.

77. Stuart-Smith J found that the evidence pointed "all one way". According to Det. Supt. Wilson, Mr Parker was to be arrested "come what may". There was no evidence that the *O'Hara* requirement was borne in mind by any officer before, during or after the arrest or that there was any alternative plan to lawfully arrest Mr Parker. This was evidenced by the fact that Mr Parker was not lawfully re-arrested subsequently.

78. Having found that another member of the surveillance team would have arrested Mr Parker, Stuart-Smith J recounted evidence to the effect that no member of the surveillance team was sufficiently briefed to fulfil the *O'Hara* requirement. He accepted the evidence of Sgt. Smith and that of P.C. Cootes (who did not, in any event, recall the briefing that morning) but he was satisfied that the instruction that P.C. Cootes had received was not enough to fulfil the *O'Hara* requirement. The first that Det. Con. Jenkins knew of the arrest was when she arrived on the scene. Without having been contacted, she did not have the opportunity to provide a fuller briefing to any other officer.

79. Hence, in the light of what he described as the overwhelming evidence, there could only be one plausible counterfactual. The relevant tort was the arrest and false imprisonment by P.C. Cootes. Had Mr Cootes not conducted the arrest, another of the officers present would have done so and this would also have been unlawful. Therefore,

Mr Parker would not have been lawfully arrested and was not, in the judgment of Stuart-Smith J, entitled only to nominal damages.

The Appeal

80. Lord Faulks QC for the Chief Constable (who did not appear before Stuart-Smith J) advances three grounds of appeal all of which turn on the correct approach to the counterfactual and are expressed in these terms:

    i) Stuart-Smith J failed to ask whether Mr Parker could and would have been detained, had the Chief Constable by his officers acted lawfully. This is the question which the court is required to ask by the decisions in *Lumba*, *Kambadzi* and *Bostridge*.

    ii) Stuart-Smith J constructed the wrong counterfactual scenario, namely what the position would have been had P.C. Cootes not performed an arrest at all.

    iii) As to Stuart-Smith J's suggestion that limiting the claimant's entitlement to nominal damages would undermine the constitutional protection of the *O'Hara* principle, there is a strong public interest in applying the *Lumba* principle to situations where an officer could lawfully have arrested a suspect but for the unlawful arrest by another.

81. Lord Faulks agreed that the second ground was the obverse of the first and that the ground relating to public interest did not affect the question whether the analysis of the law in *Lumba* and the following cases was correctly applied to these facts.

82. Lord Faulks began by setting out the three decisions central to damages in this case. To support his reading of *Lumba*, he set out passages from the majority, namely Lord Kerr JSC (at [253]-[256]) and Lord Dyson JSC (at [93]-[96]), the latter of whom held that the decision of this court in *Roberts v Chief Constable of the Cheshire Constabulary* [1999] 1 WLR 662 was incorrect. In *Roberts*, more than nominal damages were awarded for detention which was unlawful due to a failure to conduct a statutory review at the appropriate time (due to a mistake as to the time from which detention ran). This was despite the fact that the continued detention would have been authorised had the review been carried out when it should have been. Turning to the opinions in *Lumba*, Lord Faulks pointed out that although the decision of the court was by a majority, none of the members of the Supreme Court concluded that there should be a full recovery of damages.

83. He then analysed *Kambadzi*. In Lord Faulks' submission, though the factual question as to whether the claimant would have been detained had the defendant acted lawfully was not decided by the Supreme Court, the *ratio* in *Lumba* was affirmed. He points to passages from Baroness Hale JSC (at [74]), who accepted the *ratio* despite having been in the minority in *Lumba*, and from Lord Kerr JSC (at [89]).

84. Turning to *Bostridge*, Lord Faulks referred to the leading judgment of Vos LJ (at [20]-[23]). In that case it was sought to distinguish *Lumba* and *Kambadzi* because in those cases the power to detain was vested in the Secretary of State, whereas in *Bostridge* the defendant NHS Trust did not have the relevant power; the Trust depended on the actions of third parties to approve the detention. Vos LJ rejected this argument; in his judgment,

had the tort not been committed, the claimant would have been in exactly the same position, and the Justices in *Lumba* were not drawing the distinction which the claimant sought to draw.

85. Having thus set out the law, Lord Faulks moved to argue that Stuart-Smith J's formulation of the counterfactual scenario was erroneous. To Stuart-Smith J's suggestion that the formulation is "fact-sensitive" (at [52]), he responded that per *Lumba*, the counterfactual will be fact-sensitive to the extent that it will be based on, in his words, "what it was which rendered the [d]efendant's action unlawful". He then pointed to further passages from Lord Dyson JSC (at [66] and [169]) and Baroness Hale JSC (at [196]) in *Lumba* which in his submission asked the question what the result would have been had the defendant acted lawfully. He added that various types of error giving rise to a claim of false imprisonment were discussed in *Lumba* and no distinction was drawn between them for the purposes of the causation test on damages. In his submission, the error in the present case is akin to that in *Lumba*, in that the power to detain was available had the officers had the legal requirements in mind, and therefore Mr Parker would have been lawfully detained, had the proper procedures been followed.

86. Lord Faulks also contended that the judgments in *Lumba*, *Kambadzi* and *Bostridge* all pointed to that conclusion. In particular, Vos LJ in *Bostridge* considered the counterfactual scenario on the basis that the defendant realised the unlawfulness and corrected it. Hence, Stuart-Smith J was wrong to reject the appellant's proposed starting point (at [141]), and the correct counterfactual in his submission was what would have happened had Mr Cootes been aware that he could not perform a lawful arrest.

87. Lord Faulks submitted that in this counterfactual scenario, on the balance of probabilities, Mr Parker would have been arrested lawfully, either by waiting for Ms Jenkins to arrive or by one of the surveillance officers obtaining sufficient information as to the grounds for arrest from her by a telephone call. He added that otherwise unfairness would result: a claimant who would have been lawfully arrested would be awarded the same damages as someone who would not have been, had the unlawfulness come to light. On this point, he relied on Lord Dyson JSC (at [93]) and Lord Kerr JSC (at [253]) in *Lumba*. He also relied on Lord Brown JSC who in *Lumba* drew a distinction (at [357]-[361]), albeit when deciding whether an action in false imprisonment could be founded at all, between a claimant who suffers an error in the "decision-making process" and one who suffers an error in the "substance of the decision taken"; in the former, the claimant has suffered no prejudice.

88. Hugh Tomlinson QC, for Mr Parker, argued that the test revolves around what, as a matter of fact, would have happened if the tort had not been committed, for which he cites passages from *Bostridge* (at [20] and [21]). He went on to submit that, on the facts, there was no evidential basis for concluding that the officers, or any of them, would have recognised the unlawfulness of the arrest.

The *Lumba* challenge

89. It therefore falls to be considered whether Mr Parker is only entitled to nominal damages as a consequence of the principle in *Lumba*. This requires a close reading of the decisions in *Lumba*, *Kambadzi* and *Bostridge*, which govern the issue. As set out above, the crux of Stuart-Smith J's judgment on this issue is his counterfactual scenario,

which he purports to derive from *Lumba*, where the relevant tort, the arrest by Mr Cootes, had not taken place. It is this reading of the *Lumba* principle which must be assessed.

90. *Lumba* concerned two foreign nationals who, having been convicted of serious criminal offences, were detained pursuant to para. 2(2) of Schedule 3 of the Immigration Act 1971 pending the making of deportation orders and then detained further pursuant to para. 2(3) pending removal from the United Kingdom. It transpired that the Secretary of State had applied an unpublished policy of blanket detention which was inconsistent with the Secretary of State's published policy that there was a "presumption" in favour of release. The claimants contended that the detention amounted to false imprisonment and sought damages. However, a fact which was central to *Lumba* and which creates an analogy with the present appeal was that the claimants could, on the findings of the judge and Court of Appeal, have been detained lawfully even if the lawful, published policy was applied. Notwithstanding this, six of the Justices (Lord Hope DPSC and Lord Walker, Baroness Hale, Lord Collins, Lord Kerr and Lord Dyson JJSC) held that the detention amounted to false imprisonment, the tort being actionable *per se*. Most relevant to the present appeal is the decision of a differently constituted majority that the claimants were entitled to nominal damages only.

91. Lord Dyson, giving the leading judgment, rejected (at [93]) the decision in *Roberts*, as set out above. He then expounded his position on damages as follows (at [95]):

> "The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. *If the power to detain had been exercised by the application of lawful policies, and on the assumption that the Hardial Singh principles had been properly applied*…it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages [emphasis added]."

92. In a similar vein, Lord Dyson said in his conclusion (at [169]):

> "The appellants are, however, only entitled to nominal damages because, *if the Secretary of State had acted lawfully and applied her published policy*, it is inevitable that both appellants would have been detained [emphasis added]."

93. For Lord Dyson, therefore, the appropriate counterfactual scenario was one where the defendant had acted lawfully, that is to say, applied the correct policy. Lord Kerr agreed (at [253]):

> "I believe that a distinction is clearly merited between those cases where it is plain that the detainees *would have been released* and those where it can be shown that they would have

> been lawfully detained, had the correct procedures been followed [emphasis from original quote]."

94. Lord Collins agreed (at [237]) that, for the reasons given by Lord Dyson, he "would…restrict the remedy in this case to nominal damages for the reasons given by Lord Dyson JSC." Similarly, although Lord Phillips PSC dissented on the issue of false imprisonment, finding that there was no tortious liability, he also commented in relation to damages (at [335]) that had he agreed with Lord Dyson, he would have shared his approach to damages.

95. Lord Hope DPSC also adopted Lord Dyson's approach. He did not disagree with the construction of the counterfactual, but only on the point whether vindicatory damages ought to be awarded. He said (at [176]):

> "…for the reasons given by Lord Walker and Baroness Hale JJSC, I would hold that the breach of the appellants' fundamental rights that has occurred in these cases should not be marked by an award only of nominal damages. *An award on ordinary compensatory principles is, of course, out of the question. It is plain that the appellants would not have had any prospect of being released from detention if the Secretary of State had acted lawfully.* So they cannot point to any quantifiable loss or damage which requires to be compensated. But the conduct of the officials in this case amounted, as Lord Walker JSC says (see para 194, below), to a serious abuse of power and it was deplorable [emphasis added]."

96. Lord Walker JSC appears to take the same approach (at [195]), resisting a finding of nominal damages on the basis of vindication, but not on the basis of causation. However, his position is not as clear as that of Lord Hope in that it does not affirm explicitly the counterfactual approach of Lord Dyson:

> "Apart from cases concerned with constitutional rights in the Caribbean, (the line of authority starts with *Attorney General of St Christopher, Nevis and Anguilla v Reynolds* [1980] AC 637, the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation, even if the claimant can prove no special damage…In these appeals, each claimant had a very bad criminal record and would undoubtedly have been kept in custody under the Secretary of State's published policies. They cannot therefore establish a claim to special damages. But the argument on causation does not completely defeat their claims."

97. On this basis, it is clear that a majority of at least five of the nine Justices (six if Lord Walker can be included) follow Lord Dyson's approach on the counterfactual. They do not reach the same conclusion as to the level of damages, but they all agree that due to the counterfactual constructed, namely that the Secretary of State had applied the lawful policy, substantial damages should not be awarded.

98. In *Kambadzi*, the facts were similar to *Lumba*. The claimant was detained firstly pending the making of a deportation order and then pending removal. The procedural flaw was failure to carry out regular reviews of his detention in accordance with rule 9(1) of the Detention Centre Rules 2001 and to carry out the Secretary of State's published policy. On the matter of damages, Lord Hope DPSC affirmed the authority of *Lumba* but remitted the factual question as to whether the claimant would have been detained had the Secretary of State acted lawfully. He said (at [55]):

> "As for the question of damages, the decision on this point in *Lumba* was that the appellants were entitled to no more than nominal damages as their detention was at all times justifiable. But this cannot be assumed to be so in every case, and in this case the facts have still to be established. So I would not foreclose entirely the possibility that the appellant in this case is entitled to more than a purely nominal award."

99. Baroness Hale JSC concurred, adding similarly (at [74]):

> "False imprisonment is a trespass to the person and therefore actionable per se, without proof of loss or damage. But that does not affect the principle that the defendant is only liable to pay substantial damages for the loss and damage which his wrongful act has caused. The amount of compensation to which a person is entitled must be affected by whether he would have suffered the loss and damage had things been done as they should have been done."

100. Lord Kerr JSC (at [89]) affirmed his position in *Lumba*:

> "As the majority in *Lumba* also held, however, causation is relevant to the question of the recoverability of damages. For the reasons that I gave in my judgment in that case, I consider that if it can be shown that the claimant would not have been released if a proper review had been carried out, this must have an impact on the quantum of compensation and that nominal damages only will be recoverable."

Therefore a majority in *Kambadzi* affirmed the authority in *Lumba*. It was necessary to examine what would have happened had "things been done as they should have been done", "had a proper review been carried out".

101. Turning finally to *Bostridge*, the issue in the case was whether a mentally disordered patient unlawfully detained in hospital was entitled to substantial damages rather than nominal damages in circumstances where he could and would have been detained lawfully had the relevant NHS Trust been aware that the basis of his detention, in fact, was unlawful. An appeal against an award of nominal damages was dismissed.

102. Mr Tomlinson places reliance on the explanation for a nominal award provided by Vos LJ giving a judgment with which Christopher Clarke LJ and Sir Terence Etherton C agreed in these terms:

> "20. … The tort of false imprisonment is compensated in the same way as other torts such as to put the claimant in the position he would have been in had the tort not been committed. Thus if the position is that, had the tort not been committed, the claimant would in fact have been in exactly the same position, he will not normally be entitled to anything more than nominal damages. The identity of the route by which this same result might have been achieved is unlikely to be significant.
>
> 21. The majority of the Justices in *Lumba* make it clear that nothing more than nominal damages can be awarded where the claimant would have been detained anyway. Paragraph 93 of Lord Dyson's judgment (cited above) shows that a detainee who would have remained in detention had the proper procedures been followed (and had no tort been committed) "has suffered no loss because he would have remained in detention whether the tort was committed or not". Lords Phillips and Collins agreed with Lord Dyson as to nominal damages (paragraphs 335 and 237). Lord Kerr was to a similar effect at paragraph 253 where he said: "I believe that a distinction is clearly merited between those cases where it is plain that the detainees *would have been released* and those where it can be shown that they would have been lawfully detained, had the correct procedures been followed" (original emphasis). None of these Justices is making a distinction between situations in which the power to detain is held by the defendant and situations where third parties would have effected the detention. Lords Brown and Rodger agreed that it would be wrong to award substantial compensation (paragraphs 342 and 361). Lady Hale was not in the majority on the question of nominal damages, so it is hard for Mr Drabble to draw support from what she said (see paragraphs 210-13)."

103. These dicta summarise the analysis above but Mr Tomlinson (as did Stuart-Smith J) focused on the references to the fact that the patient "would have been detained" without having regard to the critical premise that the correct procedures were followed. That much is equally clear from the wider analysis of the judgments in *Lumba* and *Kambadzi*. Vos LJ was not intending to suggest that there was a difference in his approach and that of the Supreme Court and, in my judgment, there is not.

104. The test therefore is not what would, in fact, have happened had P.C. Cootes not arrested Mr Parker but what would have happened had it been appreciated what the law required. To Stuart-Smith J this appeared circular: to assume lawfulness was to assume what was sought to be proved. However, the counterfactual scenario envisaged by Lord Dyson and the accompanying majority in *Lumba* did not require the court to assume the lawfulness of the substantive detention. It required the court to assume the lawfulness of the procedure whereby the detention was effected. Lying behind the decision in *Lumba* therefore is the principle that although procedural failings are lamentable and render detention unlawful, they do not, of themselves, merit substantial damages.

105. This conclusion depends on the distinction between the underlying substantive requirements and the process which must be undertaken. In relation to *Lumba*, the substantive requirement was the ability to detain based on the lawful policy; the application of an unlawful policy did not justify substantial damages if the lawful policy would still have led to detention. In this case, Stuart-Smith J held that if P.C. Cootes had not effected the arrest, another surveillance officer would have done.

106. The same might have been said in *Lumba*: if the officer who applied the unlawful policy had not done so, absent recognition that the policy was unlawful, another officer would have done the same thing. Similarly, in *Bostridge*: the decision maker had to appreciate that the background did not justify the order for detention; lawful detention required appreciation of that fact (which did not come about for a considerable period of time). The reason for the case being remitted in *Kambadzi* was that the court was not able to conclude what would have happened if the lawful policy had been applied.

107. In this case, the substantive requirements (that of compliance with s. 24 of the 1984 Act) depended on the facts as found by the judge as to the state of mind of Det. Supt. Wilson or Det. Con. Jenkins. The procedural requirement (the *O'Hara* obligation that the arresting officer personally has reasonable cause etc) would have been followed had either appreciated what was required. The fact that there was no evidence about what would have happened is not to the point: in my judgment, it is clear that if either had been alert to the *O'Hara* obligations, either the arrest would have awaited Det. Con. Jenkins or she would have sufficiently briefed P.C. Cootes (or another officer present at the scene).

108. It is thus clear that substantial damages will not be awarded if, had the defendant acted lawfully, the claimant would have been detained in any case, on the basis that no harm had ultimately been caused. That is not to encourage sloppy practice but, rather, to reflect actual loss. It also permits the distinction to be drawn between those who would have suffered the detriment in any event (in this case, false imprisonment) and those who would not. In the circumstances, in my judgment, assuming that there were reasonable grounds to suspect Mr Parker of committing an offence and a reasonable belief in the necessity of arrest, Stuart-Smith J was wrong to conclude that he remained entitled to substantial, rather than nominal, damages.

Reasonable Cause

109. It follows from the foregoing that it is necessary to consider the Respondent's Notice to the effect that Mr Parker could not lawfully have been arrested even by Det. Supt. Wilson or Det. Con. Jenkins. In Mr Tomlinson's submission, the officers had neither reasonable grounds to suspect Mr Parker nor a reasonable belief in the necessity of arrest. On this point Mr Tomlinson underlines that there is no dispute about the legal principles.

110. As to reasonable grounds to suspect, Mr Tomlinson contended Stuart-Smith J failed to take into account the following crucial matters:

    i) It was known from the outset that Mr Parker was one of a small number of people capable of committing the offences.

ii) No police officer ever considered that this on its own constituted reasonable grounds to suspect.

iii) Several lengthy investigations failed to obtain any evidence directly implicating Mr Parker; the re-investigation had failed to identify any new grounds for suspecting Mr Parker.

iv) The 'bad character' evidence which made Mr Parker a suspect was not capable of providing reasonable grounds to suspect (as the judge held).

111. Mr Tomlinson analysed with care the material obtained in the re-investigation and compared it with what had been known from an early stage. Most of the allegedly new material was found by the judge to be worthless. If it is excluded from consideration, Mr Tomlinson contends the judge was left with just two factors as reasonable grounds for arrest, namely that Mr Lubbock suffered a violent assault and that Mr Parker is one of a small closed group of three men who could have committed the assault. Mr Tomlinson maintains this was not enough. They were both factors known to the original investigators who had not considered them sufficient to justify an arrest.

112. Mr Beggs (who appeared before Stuart-Smith J for the Chief Constable and who argued this aspect of the appeal) supported the findings of Stuart-Smith J for the reasons he gave and for several additional reasons not relied upon by the judge. The judge concluded that there was clear evidence of a violent penetrating assault which may have been anal rape of a straight man and Mr Parker was one of a small closed group of people who could have committed the assault and this, even if it stood alone, constituted reasonable grounds.

113. However, Mr Beggs contended that the judge could properly have taken into account the following additional factors:

i) The evidence of the taxi driver that Mr Parker was seeking a sexual encounter was logically probative.

ii) The evidence of Mr Parker pestering Mr Lubbock for sex was logically probative, especially as he made approaches towards two heterosexual men (Mr Lubbock and Mr Futers).

iii) Mr Parker offered his guests alcohol and cocaine and there was evidence that he placed cocaine on Mr Lubbock's gums. According to Dr Cary, Mr Lubbock's consumption of alcohol and drugs would have rendered him unable to properly perceive pain.

iv) The comment regarding the hairbrush appeared to have come from Mr Parker, as no other guest had any connection to Ms Davis.

v) Mr Parker left the scene after the body was found and then departed to a distant clinic; this demonstrates an attempt to evade the police.

vi) The attendance of Mr Parker's personal assistant after the removal of the body and prior to the anal injuries being discovered coincided with the disappearance of the poolside thermometer.

vii) The evidence regarding an injury to Mr Parker's penis had obvious flaws but could still support a reasonable suspicion; *O'Hara* confirms that information giving rise to reasonable grounds may turn out to be wrong but nonetheless be reliable at the time of arrest.

viii) Mr Parker's interview with Piers Morgan in which he mentioned that he knew of others who were hiding information demonstrated that there was information which Mr Parker had not disclosed to police.

114. Mr Beggs also pointed to some of the purported bad character evidence which was discredited by the judge. In his submission, by performing a discrete analysis of each piece of such evidence, Stuart-Smith J did what was counselled against by Hallett and Arden LJJ in *Armstrong v Chief Constable of West Yorkshire Police* [2008] EWCA Civ 1582 and Hughes LJ in *Buckley v Chief Constable of Thames Valley* [2009] EWCA Civ 356.

115. I can summarise the relevant (and agreed) legal principles. The bar for reasonable cause to suspect set out in s. 24(2) of the 1984 Act is a low one. It is lower than a *prima facie* case and far less than the evidence required to convict: *Dumbell v Roberts* [1944] 1 All ER 326, 329A and *Hussien v Chong Fook Kam* [1970] AC 942 (at 948-9); see also *Castorina* (*supra*) (at 21D) and *O'Hara* (*supra*) (at 293). Further, *prima facie* proof consists of admissible evidence, while suspicion may take account of matters that could not be put in evidence (*Hussien* at 949 and *O'Hara* at 293). Suspicion may be based on assertions that turn out to be wrong (*O'Hara* at 298 D-E). The factors in the mind of the arresting officer fall to be considered cumulatively (*Armstrong* (*supra*) at [19] and *Buckley* (*supra*) at [6]).

116. Applying those principles to these facts, the flaw in Mr Tomlinson's reasoning was to focus on the new material and attempt to undermine it piece by piece. He thereby fell into the trap of over compartmentalisation and ignored the cumulative effect of the material obtained during the various investigations. Det. Supt. Wilson and Det. Con. Jenkins were duty bound to weigh all the material, not just selected parts, in deciding whether there were reasonable grounds for suspecting and arresting Mr Parker. The fact that the original investigating officers had not appreciated the possible significance of Mr Parker being one of only three men who could have been the perpetrator of an assault on Mr Lubbock was irrelevant. As Stuart-Smith J himself observed (at [111]): the earlier investigations were "distinctly suboptimal".

117. Thus, the material gathered over the years revealed that:

i) Mr Lubbock, a guest at Mr Parker's home, suffered a violent assault at about the time of his death and a third party was involved.

ii) Mr Parker was one of only three men who could have committed the assault.

iii) A pool thermometer that may have been the cause of Mr Lubbock's injuries went missing and Mr Parker's assistant was present at the scene "tidying up" during the relevant time.

iv) Mr Parker had expressed a significant interest in having sexual intercourse and had made advances to heterosexual men (including Mr Lubbock) that night.

v) Mr Parker provided Mr Lubbock with drugs on the night of his death.

118. Furthermore, I would not have excluded from my analysis of the grounds for the arrest, the fact that Mr Parker left his home before the police arrived, carrying something, and checked himself into a clinic for several weeks thereafter. His conduct may well have had a reasonable explanation, as the judge found, but it was also something about which the officers were entitled to have their suspicions.

119. Having said that, it is not necessary, in my view, to add to the factors identified by the judge as satisfying the test of reasonable grounds. As he observed, even when one "strips out or downgrades" those aspects of which he was critical, one is still left with the fact that Mr Lubbock had suffered a severe assault, probably anal rape, and Mr Parker was one of only three men who could have been responsible for it. These facts standing alone provided reasonable grounds for an arrest.

Was an arrest necessary

120. Here, again, the law was not controversial. The Chief Constable placed reliance on s. 24(4) and (5)(e) of PACE (as amended) arguing that there were reasonable grounds for believing that it was necessary to effect an arrest to allow the prompt and effective investigation of the offence or of Mr Parker's conduct. What is necessary can and should be applied without paraphrase: see Slade J in *Richardson v Chief Constable of the West Midlands* [2011] EWHC 773 (QB) at [62].

121. The relevant Code of Practice (issued pursuant to s. 66 of the 1984 Act) is Code G governing the statutory power of arrest. Regarding the criteria for necessity of arrest, paras. 2.7-2.8 of the Code in force at the time state:

> "2.7 …the circumstances that may satisfy those criteria remain a matter for the operational discretion of individual officers.
>
> 2.8 In considering the individual circumstances, the constable must take into account the situation of the victim, the nature of the offence, the circumstances of the suspect and the needs of the investigative process."

122. Para. 2.9 of the Code states that the ground of necessity in s.24(5)(e) may encompass cases:

> "(i) Where there are reasonable grounds to believe that the person:
>
> - has made false statements;
> - has made statements which cannot be readily verified;
> - has presented false evidence;
> - may steal or destroy evidence;
> - may make contact with co-suspects or conspirators;

- may intimidate or threaten or make contact with witnesses;

- where it is necessary to obtain evidence by questioning; or

(ii) when considering arrest in connection with an indictable offence, there is a need to:

- enter and search any premises occupied or controlled by a person;

- search the person;

- prevent contact with others;

- take fingerprints, footwear impressions, samples or photographs of the suspect;

(iii) ensuring compliance with statutory drug testing requirements."

123. What is required is actual belief that the arrest was necessary and, objectively, that the belief is reasonable: see *Hayes v Chief Constable of Merseyside Police* [2011] EWCA Civ 911 (at [42] accepting submissions set out at [21]). Hughes LJ (with whom Ward and Richards LJJ agreed) went on:

> "34 …The relevance of the thought process is not that a self-direction on all material matters and all possible alternatives is a precondition to legality of arrest. Rather it is that the officer who has given no thought to alternatives to arrest is exposed to the plain risk of being found by a court to have had, objectively, no reasonable grounds for his belief that arrest was necessary…
>
> 40 …To require of a policeman that he pass through particular thought processes each time he considers an arrest, and in all circumstances no matter what urgency or danger may attend the decision, and to subject that decision to the test of whether he has considered every material matter and excluded every immaterial matter, is to impose an unrealistic and unattainable burden…"

124. It is important that he continued, at [41]:

> "I should add that we have not been concerned in the present case with the position of an arresting officer who, often in a complex inquiry, receives an order to arrest a particular suspect. Such an officer will often not have access to all the material which the officers directing the inquiry will have. The decision to arrest, and to do so at a particular time, will often be part of a closely co-ordinated plan for the inquiry. I pause only to say that it is clear from the *O'Hara* case that this common situation is readily accommodated within the rules as I have set them out to

> be. The arresting officer must himself have reasonable grounds for believing that the suspect has committed an offence, and likewise reasonable grounds for believing that it is necessary, for a section 24(5) reason or reasons, to arrest him. But information given by others, attached to orders issued by them, can be and usually will be part of the information which goes to his grounds for belief of one or both matters, and thus to the reasonableness of the belief. That that is the law provides another reason why section 24(4) ought to be interpreted in the manner stated, rather than as requiring comprehensive consideration by the officer of all matters capable of being relevant to the decision, which would require him to have access to, and time to digest, a much fuller picture of the overall investigation than is realistic."

125. Mr Tomlinson submitted that Stuart-Smith J failed to take account of the following facts:

i) The suspects had previously been interviewed at length and could have colluded at any time, but there was no evidence of them having done so.

ii) There was no proper new evidence to put to the suspects, hence there was no new matter on which they could have colluded.

iii) Therefore, any collusion would already have taken place.

126. Additionally, Mr Tomlinson argued that Stuart-Smith J did not properly take into account the fact that Mr Parker had cooperated throughout the investigations, and that Det. Con. Jenkins was not aware of Det. Supt. Wilson's intention to arrange covert surveillance.

127. On the other hand, Mr Beggs submitted that Stuart-Smith J was correct to find that simultaneous arrest would facilitate a prompt and effective investigation and any alternative short of arrest would have been unsatisfactory. He contended that a voluntary interview would have raised a risk of collusion. Previous interviews had yielded no sufficient evidence of how Mr Lubbock came to be so grievously injured and a simultaneous arrest was necessary for there to be a breakthrough.

128. I have already set out the evidence that the judge accepted (see [72] and [73] above). That included addressing a risk of collusion and maintaining an element of surprise by enabling co-ordinated or concurrent interviews of the suspects to compare their responses in real time. At least so far as Det. Supt. Wilson was concerned, the evidence included addressing the possibility that Mr Parker might leave the country to return to New Zealand where he lived and providing an option of covert surveillance of the suspects while under arrest.

129. It is true that there was no evidence of collusion in the past. However, it cannot be assumed that no risk of collusion arose (let alone that the police could not reasonably be concerned about such a risk). That assumption overlooks the key fact that the arrest plan involved arresting Mr Parker for the first time. That changed the basis upon which the investigation was to proceed which in itself could give rise to a risk which would

not have been present when Mr Merritt and Mr Kenney were first arrested and Mr Parker was treated as a witness.

130. That change of circumstance was also sufficient to raise a serious question about whether Mr Parker would continue to cooperate as, thus far, he had albeit on his own terms. Once again, the police were reasonably entitled to conclude that his co-operation would not necessarily continue if Mr Parker were to be treated, for the first time after several years of investigation, as a suspect. It is not an answer to the necessity question to say that there was no new material to put to the suspects. That goes to the seriousness of the alleged offences in the context of the reasonable grounds for an arrest. That Det. Con Jenkins was not aware of the possibility of covert surveillance device does not remove the reasonable grounds for concluding that, in these circumstances, an arrest was necessary.

131. Stuart-Smith J was accordingly entitled to conclude at [139] of his judgment (and, in my view was correct to do so) that the operational complexities in procuring the simultaneous attendance of all three suspects meant that it was not feasible to take the risk that a voluntary approach would fail to achieve the legitimate objectives of prompt and effective investigation. This was a cold case that has never produced an answer to the question who had committed the very serious offences against Mr Lubbock. Arresting Mr Parker simultaneously with the other two suspects might have led to a breakthrough in the case and it was therefore at least reasonable to believe that his arrest was necessary.

Conclusion

132. For these reasons, I would conclude that Stuart-Smith J was correct to conclude that there were reasonable grounds both to suspect Mr Parker of committing an offence and that it was necessary to arrest him. Equally, however, I have no doubt that had things been done as they should have been done (to quote Baroness Hale in *Kambadzi*), a lawful arrest would have been effected. Thus, I would allow this appeal and, in answer to the issue posed by the Master, declare that Mr Parker is entitled to nominal damages only.

Lady Justice Hallett :

133. I agree.

Sir Ernest Ryder SPT :

134. I also agree.