Neutral Citation Number: [2012] EWHC 1525

Case No: HQ10D01015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/06/2012

Before :

MR JUSTICE BEAN

- -

Between :

Amilton Nicolas Bento	**Claimant**
- and -	
The Chief Constable of Bedfordshire Police	**Defendant**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Hughmans**) for the **Claimant**
Richard Rampton QC, Catrin Evans and Hannah Ready (instructed by **Berrymans Lace Mawer LLP**) for the **Defendant**

Hearing dates: 24th-27th and 30th April, 1st-3rd and 8th-9th May 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE BEAN

Mr Justice Bean :

1. On 24th January 2006 the body of Kamila Garsztka was found in Priory Lake, Bedford. It is clear in retrospect that it had been there since the evening of 13th December 2005 when Kamila (as everyone called her at trial, and as I shall call her) disappeared. The Claimant, her boyfriend, a man of previous good character, was arrested and later charged with her murder. Following a trial in the Crown Court at Luton before Calvert-Smith J and a jury, he was convicted on 25th July 2007 by a unanimous verdict reached after two days of deliberation. For reasons which I shall set out later in this judgment, a crucial part of the prosecution case was the evidence of a forensic video analyst, Mr Casey Caudle, expressing his opinion that in CCTV footage from the evening of 13th December 2005 Kamila can be seen carrying her favourite handbag. No contradictory expert evidence was adduced by the defence at trial.

2. Mr Caudle subsequently committed suicide. In 2008 the Court of Appeal (Criminal Division) ("CACD") allowed fresh evidence to be adduced on appeal contradicting the opinion of Mr Caudle. Once this evidence was admitted by leave of the CACD it plainly threw into question the safety of the conviction. So it was that when a renewed application for leave to appeal against conviction came before the CACD on 26th February 2009 the Crown Prosecution Service accepted that the conviction should be quashed. The Crown sought an order for a retrial: I am told that the defence did not argue against such an order. The Lord Chief Justice, Lord Judge, giving the judgment of the court, said:

> "We have considered the question of a new trial. It seems to us essential to emphasise that the evidence in relation to the CCTV footage, the reconstruction and the expert evidence arising from it is not the only evidence demonstrative of guilt. Without the evidence related to the CCTV footage and the way in which the Crown wished the matter to be considered, the Crown would have lost a significant piece of evidence in support of its case. However, there is, in our judgment, ample evidence for the case to proceed to trial and for the matter to be left for a jury to consider. In those circumstances it seems to us that justice requires that there should be an order for a new trial. We shall make such an order."

3. In July 2009 the CPS decided not to proceed with a retrial. At a brief hearing in the Crown Court the prosecution offered no evidence and a verdict of not guilty was recorded. On 9th July 2009 the Bedfordshire Police issued a press release in the following terms:

> "Bedfordshire Police were told by the Crown Prosecution Service [on] Tuesday evening that the case against Nico Bento has been discontinued.
>
> We are extremely disappointed on behalf of Kamila's family, for whom this reopens a devastating chapter in their lives. The police conducted the most thorough and ethical investigation in this case and did their utmost to secure justice for the family.

> The role of the police in cases such as these is to assemble the available evidence and present it to the CPS. In this case the evidence initially presented resulted in a conviction at the Luton Crown Court where the decision of the jury was unanimous.
>
> The CPS have now taken the view that confusion in regard to the expert evidence in this case means there is no longer a realistic prospect of conviction.
>
> The police investigation found no evidence whatsoever that Kamila killed herself. Therefore, as with all unresolved murder investigations, this case will not be closed and will be continually kept under review in an effort to discover new evidence and build a stronger case."

4. Mr Bento claims that the press statement is defamatory of him. The Chief Constable resists the claim on the alternative bases of justification and qualified privilege.

5. On 6th February 2012 Tugendhat J ordered that the trial should be before a judge sitting without a jury. An appeal against that decision by the Chief Constable was dismissed by the Court of Appeal on 3rd April 2012.

Meaning

6. The Particulars of Claim argue that in their natural and ordinary meaning the words complained of meant and were understood to mean that "the Claimant was guilty of murdering Kamila and wrongly escaped justice as a result of confusion in regard to the expert evidence".

7. The Defendant's pleaded response to this is as follows:

> "In their natural and ordinary meaning the words complained of meant (1) that the decision of the CPS to discontinue the prosecution against the Claimant was wrong because there was sufficient evidence to justify proceeding with his retrial in the reasonable expectation that he would be convicted of killing her; and/or (2) that the evidence against him was such that the Claimant remained the prime suspect. In both (or either) of those meanings the words complained of are true in substance and in fact.
>
> For the avoidance of doubt, the Defendant's case in justification is that the Claimant probably killed Kamila, and that this was either murder or manslaughter."

8. I reject the second of the Defendant's proposed meanings, in so far as it differs from the first and amounts only to saying that the Claimant was the prime suspect. He obviously was the prime suspect in the sense that no other candidate for prosecution has ever been identified; but the press release clearly goes further than that, and on behalf of the Chief Constable Mr Richard Rampton QC did not press for that

meaning with much enthusiasm. Mr Hugh Tomlinson QC for the Claimant accepted that the effect of his pleaded meaning and Mr Rampton's first meaning was very similar.

9. Neither side sought to draw any distinction between "the Defendant probably killed Kamila" and "there was evidence that the Defendant killed Kamila which a trial judge would have been required to leave to the jury under the principles of *R v Galbraith*".

10. I find that the meaning of the words complained of, so far as relevant, is that (a) a jury had already found that the Claimant had murdered Kamila; (b) the evidence as it stood in July 2009 showed that he probably killed her, which was sufficient to justify proceeding with the retrial; (c) the CPS decision to offer no evidence was therefore wrong. It was common ground that any distinction between murder and manslaughter could make no difference; and, for reasons which I shall set out later, any distinction between manslaughter and accidental killing by the Claimant could make no substantive difference either.

Justification: the standard of proof

11. There is no dispute that where justification is pleaded as a defence to a defamation claim the burden of proof is on the Defendant. As to the standard of proof, Mr Tomlinson referred me to the decision of Rougier J in *Halford v Brookes* [1992] PIQR 175. In that case the Claimant, the mother and administratrix of the estate of a 16 year old girl, alleged that her daughter had been murdered by one or both of the Defendants. The claim was for damages for battery. Rougier J decided that:

> "… where the burden of proof is concerned it is my view that I should adopt the equivalent of the criminal standard… I have proceeded, as indeed Mr Scrivener [counsel for the plaintiff] invited me to, on the basis that no-one, whether in a criminal or a civil court, should be declared guilty of murder, certainly not such a terrible murder as this, unless the Tribunal were sure that the evidence did not admit of any other sensible conclusion."

The judge went on to hold that he was sure that both Defendants were party to the murder of the deceased. Strictly speaking therefore, his decision as to the standard of proof was not essential to the result, since the Claimant would have succeeded whatever the standard of proof; and indeed was reached on the basis of a concession by leading counsel for the plaintiff.

12. Whether or not this authority was good law in 1991, it cannot in my judgment survive the subsequent decisions of the House of Lords in *re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 and *re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499. In *re D* Lord Carswell approved observations of Richards LJ in *R(N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must

> be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to proved to a high degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

13. Lord Carswell continued:

> "In my opinion this paragraph effectively states in concise terms the proper state of the law on this topic. I would add one small qualification, which may be no more than an explanation of what Richards LJ meant about the seriousness of the consequences. That factor is relevant to the likelihood or unlikelihood of the allegation being unfounded, as I explain below.....[A] possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

14. In the present case, although it is theoretically possible that Kamila was killed by a stranger or drowned accidentally, the only real possibilities are that she committed suicide by drowning or that she was killed by the Claimant. Both suicide by drowning and homicide are very unusual events. In my judgment I have to decide, after considering the evidence as a whole, whether the Defendant has proved on the balance of probabilities that Kamila was killed by the Claimant.

15. In the course of the trial Mr Rampton conceded that the possibility of suicide cannot be entirely discounted. By the time he first made that concession clear (in the course

of cross-examining Professor Hawton, one of the last witnesses to give oral evidence) I had formed the same view myself. It follows that I cannot be *sure* that the Claimant killed Kamila, and if I were a one-man jury deciding the criminal case my verdict would be "Not Guilty". But that is not the question I have to decide.

The evidence before me on the justification issue

16. Mr Tomlinson called the Claimant and adduced written statements made to the police in 2006 or early 2007 from a number of witnesses who lived in the same house as Kamila (139 London Road, Bedford) in late 2005: Dominik Garsztka, Kamila's first cousin; Anna Kowalczyk, who shared a room with her at 139 London Road; Krystian Srebrny (who moved out on 5th December 2005) and Magda Werno. All these witnesses gave oral evidence at the criminal trial.

17. Mr Rampton QC called Lukasz Garsztka, Kamila's brother; Julio Fortes, with whom Mr Bento spent part of the evening of 13th December 2005; Katarzyna and Tomasz Pietrzsak and Anna Chodor-Olczyk, three friends of Kamila; Grezegorz Aleksandrowicz, a Roman Catholic priest in Bedford; Sarah Morse and David Burroughs, who found what turned out to be Kamila's clothes on 13th December 2005; Daniel Joyce, the Claimant's supervisor at work at the material time; Robert Harrison, who worked in Bedford Council's refuse collection service; and Charlene Payne, a Brighton café owner. He put in written statements from Kamila's mother Gabriela Garsztka; a police officer, Graham McMillan; and Anne Martin, manager of Brighton Pier. Katarzyna and Tomasz Pietrzsak, Ms Morse and Mr Burroughs, Mr Harrison and DC McMillan gave oral evidence at the criminal trial, and the statements of Mrs Garsztka and Mr Joyce were also read there.

18. As to expert evidence, I heard from two witnesses on the subject of the CCTV footage: Grant Fredericks was called on behalf of the Claimant and Edward Burns on behalf of the Defendant. Mr Tomlinson called Professor Keith Hawton, Director of the Centre for Suicide Research at Oxford University. In addition I had before me the undisputed report of a consultant forensic pathologist, Dr Allen Anscombe.

Events prior to 12-13 December 2005

19. Kamila was Polish; the Claimant is Portuguese. They met at work in 2003 and after a short time started living together. In 2004 they spent a month or so together in Portugal. For some months in 2004 or early 2005 the Claimant worked in a bar in Portugal; he occasionally visited Kamila in Bedford and vice versa. He returned to Bedford and the two of them began living at 139 London Road. Other occupants of London Road were Lukasz and Dominik Garsztka, and Katarzyna and Tomasz Pietrzak. Tomasz, who was Katarzyna's brother, shared a room with Lukasz.

20. In September 2005 the Claimant decided to rent a room of his own at 31 Rutland Road, Bedford. He asked Kamila whether she would move in with him. According to him she said that, as Dominik had just arrived and she wanted to help him with his English, she was going to stay in London Road.

21. At the end of June 2005 Mr Bento had started a job at Healthcare Logistics. In November and December 2005 his hours of work were from noon until 8pm unless he

was asked to do overtime in which case he would be asked to stay until 10pm or 11pm.

22. Kamila had a part-time time job as a cleaner at a gym in Bedford. She resigned on 6th December 2005. The evidence of her brother Lukasz is that she was unhappy working at the club and was very stressed.

23. Anna Kowalczyk shared a bedroom with Kamila at 139 London Road. In a statement to the police on 19 January 2006 (before the discovery of the body) she told them that she had noticed that Kamila was "severely depressed" and had been spending a lot of time in her room, crying a lot. Kamila kept repeating that nothing was right in her life and nothing was the way she wanted it to be.

24. On the afternoon of 9th December 2005 Kamila spent several hours talking to Magda Werno, another occupant of 139 London Road who had arrived there from Poland in June. The two women were alone in the front living room. In a witness statement dated 14th January 2006 Ms Werno said:-

> "I was aware that Kamila had lots of problems and tried to support her the best I could. She said she listened to others too much and took their advice. She even asked me, in my opinion as someone interested in psychology, if she was depressed. I considered this strange, as I always considered her to be a strong person… She was asking for advice on her relationship with Nico, about whether to continue with him or end it, but she was almost asking herself that question with what she was saying. … She also talked about leaving Bedford and going to London, leaving her problems behind and starting afresh. I just assumed she would stay with her cousin down there. Kamila also talked about the subject of suicide, but I'm not sure if she was being serious or not, this was talked about many months ago, even before she went back to Poland in August 2005."

25. In the early evening of Saturday 10th December 2005 Dominik was told by Anna Kowalczyk, that Kamila was crying in her room. Dominik went to her room and asked whether everything was OK to which she replied "Yes, of course it is". He decided to phone his parents in Poland (Kamila's uncle and aunt) in an attempt to cheer her up. Kamila told her aunt that she planned to come to Poland at Christmas, although there is no evidence of her having bought a ticket or made arrangements for a lift. On the next day, Sunday, Dominik asked Kamila whether she would come to the evening service at the local church but she declined.

26. It appears that the Claimant and Kamila spent some of the Sunday evening together in the front room at 139 London Road: Lukasz heard them laughing. Later that night the Claimant visited another female friend in Bedford. It is unnecessary to make findings, and neither side sought to explore, what the nature of that visit was, but it would very probably have aroused suspicion or jealousy in the mind of Kamila if she became aware of it.

12th December 2005

27. Julio Fortes was at that time, but is no longer, a friend of the Claimant with whom he would often spend an evening. In evidence before me he said that by 12 December 2005 the relationship between Kamila and Mr Bento had "run its course": he had been aware a few days earlier that it was coming to an end. Like any couple they had had their ups and downs, but these were becoming more and more frequent and their relationship was in his opinion the worst it had ever been.

28. On the morning of Monday 12th December the Claimant removed two pictures belonging to him from London Road. Just after 1pm he sent a text message to Kamila which strongly suggests that an argument had taken place between them. It read:-

> "I can't believe in your words. I wish hate you maybe you are right it's time for I do my live so please tell me if it is that what you really want."

Like many text messages this is not entirely grammatical (and it should be borne in mind in any event that English is the Claimant's second language). Mr Bento's evidence is that he was trying to say "I wish I could hate you" and "maybe you are right that it is time for me to leave". I accept that this is the most likely interpretation of the message. Kamila's reply was short and to the point: "You are free."

29. At 2pm Kamila left 139 London Road having neatly packed almost all her personal belongings. She was captured on CCTV at a cashpoint at 2.45 pm carrying her favourite handbag over her right shoulder using two short straps and cradling the bag to her right side with her right hand. She went to Bedford Station and bought a single ticket to Brighton at a cost of £21.30. (This was a curious thing to do. It was possible to buy an off-peak day return from Bedford to Brighton for £10 from the Bedford Tourist Office, and apparently Kamila had done so in the past. Even when bought at the station an off peak day return would be significantly cheaper than two singles.) She caught the Thameslink train from Bedford to Brighton and arrived at Brighton station at 17:18.

30. Kamila returned to Brighton station shortly before 10pm, having made some telephone calls to which I shall come shortly. There is no CCTV or other reliable evidence to prove where she went during the period of just under five hours which she spent in Brighton. The Claimant's case is that she went to Brighton with the intention of committing suicide by drowning. The Defendant's case is that she went to Brighton to look for work. She had visited the JobCentre in Brighton but nearly a year earlier, in January 2005

31. In support of that case the Defendant called a café owner in Brighton, Charlene Payne. On 16th March 2006 she was shown a poster containing three photographs of Kamila and asking for information from anyone who had seen her on 12th December 2005. Ms Payne claimed she recognised the photographs as being of someone she had seen in her café sometime in December. She remembered that the café was busy with the "second lunchtime crowd", making the time approximately 2pm to 2:30pm or slightly later. Ms Payne's café, according to a statement she made in 2006, had opening hours in December 2005 of 8am to 5pm six days a week, closed on Sundays. She says that the Polish girl did not speak to her but to Ms Payne's employee Joanna Krysian, who is herself Polish and was working on the till. Afterwards Ms Krysian told Ms Payne that the girl had left her CV. The CV was never found, although one

has to bear in mind that Ms Payne was only asked about Kamila 3 months after the date in issue. Shortly before the present trial, on 25th April 2012, Ms Payne signed a further statement saying that her opening hours in December 2005 were 8am to 6pm Monday to Saturday and 8am to 5pm on Sunday. She had no explanation for why her recollection six years later should be more accurate than her recollection three months after the event. I find that it was not, and that the café closed at 5 pm.

32. Ms Krysian herself made a statement on 29 March 2006 which was part of the written evidence before me. She remembers "a girl" coming into the café looking for work some time in mid-December 2005, and believes that she had seen the same woman a week or two earlier at a Polish service held at noon each Sunday at a Catholic church in Brighton. The two of them had a conversation in Polish. Ms Krysian asked when the woman had come to Brighton. The answer was that "she had arrived in the beginning of December". Like Ms Payne, Ms Krysian was shown the poster with three photographs of Kamila in March 2006 and was certain that it was the same woman. Another written statement from a witness shown the poster was by Mr Keyhan Pirayesh, who owned a bar in Brighton at the material time. He too says that the woman shown in the poster came into his bar looking for work in December 2005, and is "99% certain" that it was the same person. The bar was closed on Mondays: Mr Pirayesh says that he might nevertheless have been in the building.

33. There is no evidence that Kamila had been to Brighton in the weeks before 12th December 2005, whether to attend a church service at noon one Sunday or to look for work. It is plain from the CCTV evidence that she did not reach Brighton until 5:18pm on 12th December, either after Ms Payne's café had closed (if Ms Payne's 2006 evidence was correct) or shortly before it closed (if Ms Payne's 2012 evidence was correct).

34. During the evening of 12th December 2005 Kamila was in contact by telephone or text with the Claimant, Lukasz and Dominik. Mr Bento called her shortly after 8pm. She said that she was in Brighton but did not say why. Half an hour later Lukasz called her; she said she was in Brighton looking for a job. Dominik spoke to her three or four times in the next hour. She told him "I'm fed up with Bedford. I don't give a shit about anybody". She said she was in Brighton at the seaside. He asked "are you sure you are at the seaside?" she replied, "Yes" and turned her mobile phone so that he could hear the sea. She said she was standing on a bridge and the sea-water was cold. She was thinking what to do next. She then cut off the call. He rang her back and asked whether she was angry with him; she told him that "It's got nothing to do with you"; she would phone Lukasz and clear things up. Dominik rang a third time to ask her to come home because he was very worried about her.

35. At 9:21pm Lukasz sent Kamila a text reading "do not involve me with him, I am worried about you! All the time even if it does not show".

36. Kamila returned to Brighton station just before 10 pm: again she was recorded on CCTV, this time carrying her handbag by its long strap on her left shoulder and diagonally across her back and chest, with the handbag resting on the back of her right hip. She bought another single ticket and took the 22:07 train from Brighton back to Bedford. Just after midnight she rang the Claimant asking him to collect her from Bedford station when the train arrived at 00:45. Mr Bento took the call while at the flat of Julio Fortes, whose evidence was that the Claimant had said nothing about the

lunchtime text message, and seemed unperturbed by the call. He drove to the station to collect Kamila. They returned to Rutland Road and according to the Claimant, "watched a film, made love and went to bed".

13th December 2005

37. Mr Bento's evidence is that he woke up at about 10 am, went out to buy doughnuts and made Kamila coffee in bed. CCTV footage shows him in Midland Road, Bedford at 10.47. He was due to be at work from 12 noon to 8 pm. He also needed some repairs or servicing to his car and telephoned a car mechanic, Everton Grant, just before 11 am to arrange this. He left Rutland Road at 11.30 to drop his car off with Mr Grant. On his case this was the last time he saw Kamila before her death.

38. There is an issue as to what Kamila said to him as he left. A police Missing Persons Report dated 15th December 2005 records "Told her boyfriend you may never see me again". According to Katarzyna Pietrzak, the Claimant said to her a day or two after Kamila's disappearance that Kamila had "told him he would never see her again": in evidence before me Katarzyna could not remember whether Mr Bento had attributed this conversation to the morning of 13 December or earlier. Tomasz Pietrzak remembers a conversation in which Mr Bento had told him that Kamila had said either "kiss me one last time" or "kiss me, this is the end". The Claimant's evidence was that Kamila had told him "you may never see me again", but a few days or weeks earlier. On 13 December they had simply played a game: "give me a kiss and another one and the last one": it wasn't a case of "you may never see me again".

39. The Claimant was at work at Healthcare Logistics from 12.05 until 7.58 pm. At 2.18 pm his service provider sent a text message to his mobile phone warning him that the credit had run out. His employers had a policy (though it was not rigorously enforced) prohibiting employees from using or carrying mobile phones at work; and allowing them to use a landline for personal calls in exceptional circumstances. The Claimant says that he usually kept his mobile inside a bag on top of the lockers in the locker room.

40. At 3.07 and 3.34 pm Mr Bento made two calls to Everton Grant using the company landline. This suggests either that he had checked his mobile and read the "out of credit" message before doing so, or that he was aware that his credit was very low anyway.

41. There is almost no record of what Kamila was doing during these hours. Between 2.42 and 2.45 pm Dominik made three short calls to her and sent one text message. At 4 pm she bought a packet of 20 cigarettes at Smokemart in Midland Road, Bedford: CCTV pictures show her walking from Rutland Road into Midland Road, then making the reverse journey on her way back. She was carrying her usual handbag by the long strap running diagonally from her left shoulder to her right hip.

42. At 5.16 pm Kamila made a 13 second phone call from her mobile to the Claimant's, on which Mr Rampton placed great emphasis. The call was apparently answered. It is worth noting that she prefaced his number with 141, thus preventing the receiving phone from indicating the calling number. She made a 10 second call to her parents in Poland immediately afterwards, again using 141. (She had used 141 before on a

number of calls, including to Mr Bento.) She made three further attempts to speak to the Claimant between 5.18 and 6.08 pm, all of which were diverted to voicemail.

43. Mr Bento made no further calls from his own mobile that evening and does not appear to have paid for more credit for it. He used the company landline again to make two short calls to Mr Grant at 6.44 and 6.50 pm.

44. The last sighting of Kamila on CCTV was the crucial one referred to at the outset of this judgment. At 7.46 pm she walked along the pavement on The Embankment, a road in central Bedford which as its name suggests runs alongside a river, the Great Ouse. I will return to the subject of the presence or absence of her handbag later. Assuming she walked straight from there to Priory Lake, she would have arrived at the lake between 8.10 and 8.15 pm.

45. Mr Bento left work at 7.58 pm and was given a lift to central Bedford by a colleague, Stanley Madede. Mr Madede's car was captured on CCTV in St Paul's Street, Bedford at 8.08 pm. The Claimant was dropped off nearby and walked to Mr Grant's home to collect the keys to his car which was parked nearby. He is likely to have arrived between 8.15 and 8.20 pm. If he spent two or three minutes with Mr Grant and then drove straight to Priory Lake, as the Defendant argues he did, he could have got there about 8.25 pm at the earliest.

Priory Lake

46. Priory Lake is the largest, though by no means the only, lake in Bedford. I conducted a view (in daylight) at the start of the trial. There is a car park close to a visitor centre in the middle of the north shore, a minute's walk from the lake edge. To the right the lakeside path continues to the north-western corner of the lake where there is a duck feeding area. On the western shore of the lake, behind a locked gate, is a marina with a substantial number of boats. To the left of the visitor centre and car park the lakeside path runs east, with some benches slightly inland from it. A walker along the path passes three trees some 2-3 minutes' walk from the car park and some distance further on has the option of turning left into a nature reserve area known as Finger Lakes. The area from the trees to the Finger Lakes junction is perhaps the most attractive section of the path. There is and was in December 2005 no street lighting along the lakeside.

47. Sarah Morse and David Burroughs lived on a houseboat in the marina. That evening, as they often did, they went for a walk along the north shore towards Finger Lakes. They were surprised to find a woman's coat, scarf and trainers placed neatly by the shore between the first and second of the three trees. They had seen and heard no one on their walk, and did not see the lights of any car arriving at or leaving the car park. They continued to the Finger Lakes area and sat on a bench (from which the lake, or at least the relevant part, is not visible) where Mr Burroughs smoked a small cigar. On their return to the lake the coat, scarf and trainers were still there. There was no sign of disturbance to the ground such as might have been caused by a body being dragged along. They discussed what to do for about five minutes. At 9.24 pm, from the location of the clothes, Mr Burroughs called the police: the call was logged in the usual way, and provides a rare fixed point in the evidence of what happened that evening. He and Ms Morse then returned to their houseboat, which is less than ten minutes walk from the three trees.

48. Ms Morse and Mr Burroughs had no reason to check the time when they first passed the clothes, and did not do so. But they were able to confirm that the excursion to Finger Lakes was a regular evening stroll for the two of them, and that their journey from the three trees to the Finger Lakes bench and back, inclusive of smoking time, would have taken between 30 and 45 minutes: their return journey from the houseboat to Finger Lakes and back typically took 45 minutes to an hour). This evidence, which I accept, indicates that they would have passed the clothes for the first time between 8.35 pm and 8.50 pm.

49. In due course the police took possession of the clothes, but no connection was made between them and Kamila until the discovery of her body six weeks later. One consequence of this lapse of time was that when statements came to be taken the memory of all witnesses – including the Claimant if he was an innocent man – was inevitably lacking in precision as to dates and timings. (For example, Lukasz initially told the police that the Claimant had gone to the London Road house for two or three minutes after finishing work on 13 December: this is accepted to have been a mistake.) Another consequence was that a pathologist who examined the body, Dr Benjamin Swift, was unable to say whether the cause of death was drowning by suicide (with Kamila having walked or swum into the water) or by homicide. Dr Anscombe, whose agreed report was before me, noted that there were no signs of a violent or protracted struggle, but that this did not exclude vagal inhibition (a form of nerve reflex causing the heart to stop beating) caused by the application of momentary pressure to the neck.

50. Mr Rampton put the following scenario to the Claimant in cross-examination:

> "You got there about 8.25, about half past eight. She was waiting…..I suggest that you and Kamila walked out of the car park past the visitor centre, then turned left and went along to where the first three large trees are. You stopped by one of those trees, you had an argument, you were still keen that she should take you back, she refused, you perhaps gave a tug on her scarf, something like that. She fell down, it may have surprised you, and you found that she was dead. You then removed her trainers, her coat and her scarf and dropped them on the shore, and then pushed her body into the shallow water. Then you walked to the car park and drove [off]."

51. As Mr Tomlinson observed, these facts might not even amount to manslaughter, let alone murder, if the tug on the scarf was without the hostile intent necessary to amount to a common assault. But in that event, although the defence of justification would fail, damages could only be nominal. Mr Tomlinson did not pursue the argument, but submitted that "the fact that the justification defence rests on such a weak foundation is…. indicative of the problems which it faces". At no stage in the trial before me was it suggested that Mr Bento had lured Kamila to Priory Lake with the intention of killing her.

The Claimant's movements

52. There is no CCTV or cell site analysis evidence as to the Claimant's movements on the crucial evening after he collected his car from Mr Grant. His evidence is that he

spent the rest of the evening, as he had done the previous day, in the company of Julio Fortes. Mr Fortes agrees, and says that he arrived between 8.30 and 9.30 pm. A potentially significant issue, on which the Claimant has been inconsistent, is whether he went home before going to Mr Fortes' flat.

53. In a witness statement made on 25 January 2006, Mr Fortes said that on either 13 or 14 December – he could not be certain which – "Nico told me Kamila had gone missing. He stated she'd left her phone behind in the flat [at Rutland Road] and all her numbers were deleted from it. In addition she'd left her credit card behind in the flat. Nico stated that he didn't know where she had gone."

54. In interview on 24 June 2006 he said this:

> "Moving on now to Tuesday 13 December 2005, I cannot be exactly sure of the time Nico got to my flat that night but I'd say it was between 8.30 and 9.30 pm. I know that when Nico finished work, he went to pick up his car from the mechanic called Everton Grant. Nico knows Everton through me….Nico went to his flat at 31B Rutland Road before coming to my house. When he got to my house, Nico told me that he [had] found Kamila's phone and credit card just lying on the table of his flat."

55. If the June version is correct, it fixes the date at 13 December, because of the mention of collecting the car from Mr Grant. 14 December is also unlikely because Mr Bento was in Brighton, although that would not have prevented him from speaking to Mr Fortes by telephone. In evidence before me six years later Mr Fortes understandably had no detailed recollection, and indeed was not sure whether Mr Bento had told him about finding the mobile phone and credit card face to face or on the telephone.

56. At 10.12 pm Lukasz rang the Claimant, who was still with Mr Fortes, to ask where Kamila was. The answer was that he did not know: she had told him that morning that she was going to go back to London Road. Lukasz said she was not there. Mr Rampton submits that if by that time Mr Bento had discovered her mobile phone and credit card in his flat, it would be very surprising not to have mentioned it; and that the inconsistencies on this topic are pointers towards guilt. He also submits that if Mr Bento had *not* discovered the mobile phone, the obvious course of action by a concerned boyfriend on learning that Kamila was not at London Road would have been to try to contact her, which he did not. Mr Rampton argues that he did not do so because he knew that there was no point.

57. The Claimant's account in interview on 10 January 2006 (when the case was still a missing person inquiry) was that he went straight from Mr Grant to Mr Fortes' flat, then went home at about midnight, and found the mobile and credit card there. In a later interview on 22 January 2006 he said he was prompted to go home by Lukasz' call. At the criminal trial he said that he had gone home from Mr Fortes' soon after 9 pm to collect a DVD and found them then.

58. Mr Bento made two calls to Tomasz Pietrzsak in the early hours of 14 December. The second, at 2.18 am, was made through the satellite mast which covers London Road. The Claimant's evidence is that he went to London Road to see whether Kamila was

there. But he did not attempt to rouse anyone. Kamila's room was by the back door on the ground floor. The Defendant's case is that any visit he did make to London Road was an elaborate charade, because Mr Bento had killed Kamila and knew he would not find her.

Subsequent events in December 2005

59. The next morning Lukasz rang Kamila's phone. Mr Bento answered it. He said he had found Kamila's phone and handbag in his flat. That afternoon he collected Lukasz from work. They found the addresses of two hotels in Brighton at Rutland Road. They bought two day return tickets at £10 each from the Bedford Tourist Information Office and went together to Brighton to visit those hotels. Lukasz does not suggest that there was anything strange about Mr Bento's behaviour on that visit.

60. The Claimant and Lukasz jointly reported Kamila as missing on 15 December. The officer made a note "Told her boyfriend you may never see me again". Mr Bento's evidence before me was that she had said that, but days or weeks earlier rather than on the morning of 13 December, when she had said "kiss me again for the last time".

61. Various possessions of Kamila were found in the bins at London Road and Rutland Road. Her family photograph albums were found in the London Road bins by Lukasz and the Claimant. Her cousin Dominik had found a pair of her trainers on top of the bins at London Road on 12 December: presumably she had put them there before leaving for Brighton.

62. Mr Bento owned a pair of pyjamas sometimes used by Kamila. He mentioned to Lukasz that they were missing. The pyjamas were then found by the two men in the communal bin at Rutland Road, which was full. An employee of Bedford Council, Mr Harrison, gave evidence that the day of the regular bin collection at Rutland Road was Thursday, that is to say 15 December, though unsurprisingly no one could say whether the bin at number 31 had been put out onto the pavement for collection. There is a dispute as to whether the pyjamas were found on that day (when a police search took place at London Road) or 18 December (as suggested by police records). The Defendant's case is that it was the latter; and that if the bin had been emptied on 15 December, the pyjamas must have been put in the bin subsequently by Mr Bento to lay a false trail supportive of suicide.

The discovery of the body

63. On 24 January 2006 Kamila's body was found floating in Priory Lake close to the marina, over 300 metres from the location by the three trees where the coat, scarf and trainers had been found on 13 December. The police contacted Mr Bento and told him that her body had been found "in a lake" in Bedford (accept the evidence of DC McMillan that the words used were "a lake" rather than "the lake"). Without asking which one, he drove straight to Priory Lake and was there when the body was recovered. His explanation was and is that he and Kamila had been there together in the past and that it was the only lake in Bedford he knew. It is common ground that he was not told where Kamila's clothes had been found.

64. Mr Rampton relies on the fact that in a written statement made in September 2006 Kamila's friend Magda Werno said that she had been told by Mr Bento at Kamila's

funeral on 5 February that after the discovery of the body the police had taken him to Priory Marina: this, he suggested, was an attempt to explain away the mistake of having gone to Priory Lake without being told which lake was the right one. Ms Werno was not available to give oral evidence, and the accuracy and context of her recollection seven months after the event as to who was said to have done the driving could not be tested.

The flowers

65. A more important incident occurred on 3 February 2006. DI Gerald McCarthy, who was at Priory Lake to meet journalists, noticed Mr Bento crouching at the side of the lake next to the tree where Kamila's clothes had been found, throwing flowers into the water. On seeing Mr McCarthy and his party Mr Bento got up, walked 20 metres further (to the east, that is to say away from the visitor centre), and threw some more flowers into the lake. There were no flowers to be seen in the lake to the west of the tree. The following dialogue ensued:

> "GM: What brings you here?
>
> NB: What do you think brings me here?
>
> GM: Yes, but why this spot?
>
> NB: It was where she was found.
>
> GM: She was found by the boat house, you know that.
>
> NB: Yes, but it was the lake."

66. Mr Bento accepted that this had occurred, but gave evidence that he had put flowers in the lake at a number of different spots along the shore.

67. Mr Rampton described the flowers incident as the single most powerful piece of evidence against Mr Bento. Putting the CCTV issue about the handbag to one side for the moment, that is clearly right.

Evidence on the suicide theory

68. Part of the Defendant's case on justification was that Kamila was too devout a Roman Catholic to have committed the sin of suicide (although it had to be accepted that she was living with Mr Bento outside marriage, and using contraception). Father Alexandrowicz, a Catholic priest in Bedford, gave evidence that about two years before she died he had visited Kamila at home at her request: since then, he said, they had not had a conversation beyond greeting one another, for example at the end of a service. In that two year period Kamila had attended Mass about once a month.

69. Professor Hawton gave oral evidence before me. He confirmed that, as is perhaps obvious, someone who is part of a close-knit family or circle of friends, secular or religious, is less likely to commit suicide than a lonely person. He did not consider that one could derive any assistance either way from the fact that Kamila was a Roman Catholic and a monthly churchgoer. I agree.

70. Professor Hawton also told me that in cases of suicide by drowning it is more usual for the deceased to have jumped than to have walked into the water; that in most cases the deceased is fully clothed; that only a minority of people who commit suicide leave a note; and that while in the UK there is a higher than average suicide rate among Polish expatriate men, the rate among Polish expatriate women is about the UK national average.

71. Some lay witnesses expressed the view that Kamila was not the sort of person who would commit suicide. As Calvert-Smith J said in his summing-up to the jury at the Crown Court trial, such views carry very little weight. I respect the views of her family and friends but I have to reach a conclusion based on evidence of fact rather than of lay opinion.

The CCTV evidence about the handbag

72. It is now time to return to the issue of the CCTV evidence about whether Kamila was or was not carrying her handbag as she walked briskly along The Embankment at 7.46 pm on 13 December 2005. Calvert-Smith J said to the jury in his summing-up: "if this case has a centre at all, the centre is this bag, is it not, and the question of - if she was carrying it on The Embankment, how it got back to Rutland Road". In sentencing Mr Bento Calvert-Smith J again referred to the CCTV footage, telling him that "it is that single image which has brought you here." Since Mr Caudle's evidence that she did have the handbag with her, though not undisputed, was uncontradicted, it is highly probable that the jury accepted it: and if Kamila did have the handbag with her when she reached Priory Lake, there is no realistic explanation for its presence at Rutland Road the next day other than that Mr Bento had killed her and taken it away with him.

73. The Embankment is a road in central Bedford with street lights which in December are supplemented by Christmas lights. After the decision of the CACD to admit fresh evidence a reconstruction was held one evening in December 2008, the month being chosen so as to recreate as accurately as possible the original lighting conditions. The CCTV cameras were still in the same places as they had been in December 2005. Both experts who were later to give evidence before me attended, and agreed before the exercise began that the conditions for a "reverse projection examination" were met: in other words, that the conditions were sufficiently similar to those in 2005 to allow a reliable reconstruction to take place. A policewoman acting as a stand-in model ("Sim"), of similar build to Kamila and wearing her coat and scarf, retraced her route carrying and then not carrying her handbag. This enabled a comparison to be made, with the assistance of reverse projection images, between the footage of Kamila and the footage of the Sim with and without the handbag.

74. For the Claimant Mr Tomlinson called Grant Fredericks, a forensic video analyst since 1984 who has given evidence in more than 80 trials in the USA and Canada. Since 1999 he has been the principal instructor for the Law Enforcement and Emergency Services Video Association (LEVA), a non-profit organisation which has trained more than 2000 law enforcement video analysts from throughout the world. Among his students was Mr Caudle. Mr Fredericks was first instructed in the case in August 2008.

75. For the Defendant Mr Rampton called Edward Burns, a former colleague of Mr Caudle's who had assisted him in the original study of the 2005 footage which formed the basis of Mr Caudle's report dated 12 April 2007 and testimony in the Crown Court. Mr Burns signed the report as its "technical reviewer". He had passed LEVA's forensic video analysis certification test in October 2006 and joined Target Forensic Services Lab in March 2007: he was in his third week of employment with them when he and Mr Caudle signed the report. He still works for Target Corporation, but in the course of 2011 he was promoted and his role ceased to include forensic video analysis.

76. As the case of Professor Sir Roy Meadow reminds us, a court must be careful not to be mesmerised by the confidently expressed views of a senior and distinguished expert. But Mr Tomlinson was right to submit that Mr Burns is far less experienced than Mr Fredericks. Mr Tomlinson also submitted that Mr Burns is naturally concerned, even in the teeth of the 2008 reconstruction to defend the 2007 report to which he was party. There is some force in that. I was also not impressed by Mr Burns' attempts, beginning shortly after the reconstruction had been carried out, to suggest that the lighting conditions had after all not been truly comparable to those obtaining in December 2005.

77. A significant point on which the experts are now agreed, but which Mr Caudle's 2007 report did not mention, is that Kamila could not have been carrying the handbag either with the long strap running diagonally across her chest from left shoulder to right hip (as she had done, for example, at Brighton station at 10 pm on 12 December 2005), or cradled under her right arm with the shorter straps over her right shoulder (as, for example, when going out to buy cigarettes at 4 pm on 13 December 2005). Mr Burns' hypothesis therefore involved a third method, with the handbag being down at Kamila's right side and carried by the long strap over the shoulder. None of the CCTV footage of Kamila in the days before her death shows her using this method, which is not an obvious way to carry a large handbag when walking briskly: as the Sim apparently confirmed to Mr Fredericks, it feels unnatural, because the bag tends to slip off the shoulder.

78. I viewed the DVD material produced by Mr Fredericks and Mr Burns several times and, as Mr Rampton said in closing, images are peculiarly resistant to verbal interpretation. Mr Burns considers that it is more probable than not that a light coloured vertical area to the right of Kamila in the 2005 footage is the handbag and its long strap, and a slightly darker line to the right of that (seen particularly in the image taken at 7:46:17 pm just after Kamila has passed a bench) is her right arm. Mr Fredericks, however, considers that the light coloured area is simply the reflection of artificial light from the paving stones, and the darker line in image 7:46:17 is the shadow from one of the slats of the bench.

79. The decisive contrast, which can be expressed in words without difficulty, is between three brightened versions of image 7:46:17: Kamila, the Sim without the handbag, and the Sim with the handbag. In the "Sim with handbag" picture the handbag and long strap appear as bright white. In "the Sim without handbag" and Kamila pictures there is no bright white area, only the same light grey as most of the paving stones. Mr Fredericks' clear conclusion is that "we have had many opportunities to test both theories, and there is absolutely no support for the contention that there was a

handbag there". I accept his evidence, and not merely on the balance of probabilities: in my view it is clear beyond reasonable doubt that he is right.

80. At the end of his closing submissions on the afternoon of 8 May 2012 Mr Rampton said this:

> "No doubt the CCTV evidence is of importance but, as I said a moment ago, it is only on one hypothesis that it can be regarded as decisive. If the court concludes that Mr Fredericks' categorical assertion is right and that the images do not and cannot show that she was carrying a bag (indeed, they demonstrate according to him conclusively that she was not carrying a bag), …I don't have a case. If she is definitely not carrying a bag the rest must be all coincidence. If she is not carrying her bag on the way to the Embankment, it got there [ie to the Rutland Road flat] because she had left it there. That is why it is there. If she left it there, it is impossible to say that Mr Bento took it back from the lake and put it there. Therefore, as I say, that is the end of the case. It must be. The bag did not take itself to the flat: she must have left it there.
>
> But I hesitate, having just said that. I would have to start hypothesising in a big way if I can explain the presence of the bag in his flat and combine that with a theory that he met her at the lake and killed her there. It would be very difficult to do that, logically. May I have permission overnight to think about it with the help of my juniors and see if there is an alternative explanation, but for the moment -- and if there is I will mention it both to your Lordship and to my learned friend first thing in the morning -- I have to say that if she is definitely not carrying the bag, positively not carrying the bag, then my case becomes difficult if not impossible. Yes, that is what we have always felt."

81. I gave Mr Rampton the opportunity to hand in a supplementary submission before Mr Tomlinson's closing speech the following day, and he took it. The supplementary submission accepts that, if Kamila was going to the lake to meet the Claimant, it is unlikely (though not inconceivable) that she would have made a deliberate decision to leave her bag behind. But, it argues, she might have done so by accident. There was only one set of keys to the flat at Rutland Road, which Mr Bento had offered her that morning but she had declined. She might therefore have locked herself out by mistake and forgotten her bag as she left for the rendezvous at the lake, or while going outside for a smoke. The submission goes on to argue that "the fact, if it be one, that she did not have her bag with her does not dilute or diminish the strength of the circumstantial case for the Claimant."

82. Mr Rampton submitted that the CCTV evidence was unclear, and that the circumstantial evidence against Mr Bento is so powerful that in effect Mr Burns must be right. He submitted:

> "It is a big ask, we would suggest, on the back of these pictures, to find that she is definitely not carrying a bag. If she is probably carrying a bag, as Mr Burns thinks, or the images suggest that she could be carrying her bag, then different considerations will apply. If the court thinks she is probably carrying her bag then that more or less concludes the case in our favour. If the court thought, however, that it was unsure – and this is a perfectly permissible, sensible and obvious possibility -- whether she was carrying a bag or not, not sure, because the images are so unclear, one way or the other, whether she is carrying a bag, then that could have the same result but only by reason of the context for that finding. The context being all the other evidence, of which the principal features are – though they are only part of a much broader and more detailed picture which includes motive, timings and the improbability of suicide -- Mr Bento's inconsistent accounts of when he so-called found the bag and his inability to give any credible explanation for that; what he said when he arrived at Mr Fortes' place on the evening of 13 December; his failure to make any credible attempt to find her that night; his immediate and exclusive choice of Priory Lake as the place to go on the evening of 24 January; the placing of the flowers on the 3 February at the exact spot where her clothes were found and again his inability to give any credible explanation for that; conclusively -- this is on the basis that the images could suggest that she is carrying a bag -- against that background the fact that the bag was found in due course, or found its way back to his flat. By that means it is possible to resolve any uncertainty as to what the CCTV images actually show. As I have said, if there is no uncertainty, one way or the other, then the circumstantial evidence retreats into the background. I would observe, however, speaking for myself, that certainty, certainly by reference to Mr Fredericks' evidence, is impossible in relation to those images. And for reasons I have given there is a reasonable chance, a reasonable case, let me say it like that, that those images do show her carrying the bag."

83. Of course the evidence has to be viewed as a whole. But where, as I find to be the case here, the CCTV evidence is clear, it is a better starting point from which to consider the circumstantial evidence than the other way round. Indeed, Mr Rampton conceded as much. I consider that he was right to accept on 8 May 2012 that if Kamila was clearly *not* carrying her handbag on her way to Priory Lake on the fatal night the Chief Constable's case on justification becomes difficult if not impossible.

Summary of the parties' principal arguments on the facts

84. Each side sought to build up a picture from the selective accumulation of a mass of points of detail. I shall concentrate on the principal points. In support of the argument that Mr Bento killed Kamila the Defendant relied in particular on (a) the inconsistencies in his evidence about his movements on the evening of 13 December;

(b) his failure to check that evening where she had gone; (c) his driving straight to Priory Lake on 24 January; and (d) the choice of location for dropping the flowers in the lake on 3 February. Mr Tomlinson's responses were, in outline: (a) Mr Fortes was understandably uncertain about dates and timings when he first spoke to the police on 24 January 2006, and was wrongly persuaded to "firm up" five months later; and even Mr Bento, if an innocent man, would himself not necessarily have a clear recollection of the evening of 13 December weeks later; (b) he had no reason to think that anything was seriously amiss on the evening of 13 December, even when Lukasz rang to ask where Kamila was; (c) the choice of Priory Lake on 24 January was because it was the lake he knew and where he and Kamila had been together; (d) on 3 February he threw flowers into the lake at more than one place, and the choice of the spot where Kamila's clothes had been found was simply a coincidence. The last of these responses is the weakest.

85. The Defendant's argument against suicide is that Kamila's religious belief made it unlikely (I have already considered this argument above) and that she had no motive to commit suicide: she was a strong-minded individual who planned ahead; she had a circle of friends and family members living in the same house as her or close by; she had "thrown the Claimant out" on the morning of 12 December; he was desperate to get her back, not the other way round; and her trip to Brighton had been simply to look for work. The telephone conversation with Dominik about standing on a bridge and being about to jump in was just teasing.

86. If Kamila had terminated the relationship with the Claimant on 12 December, she would surely have mentioned this to Lukasz or Dominik or one of her friends on the phone; and it is not likely that she would have asked Mr Bento to collect her from Bedford station late at night and take her to his flat. The text messages exchanged that day, and the fact that the Claimant took two of his pictures away, do indicate some form of argument, but hardly a decisive one in the light of what occurred later.

87. The Defendant's case also attaches no importance to the evidence of Anna Kowalczyk and Magda Werno. I accept that few of the many people who tell their friends that they are very depressed or who sit crying in their bedrooms go on to commit suicide. But these are at least pointers in that direction.

88. Kamila's trip to Brighton is mysterious. Plainly she was not planning to stay the night there, since she took nothing but her handbag with her. If the purpose of the journey really was to ask about a job in places such as Ms Payne's café, why did Kamila leave it so late in the day that she only arrived in the town after 5.15 pm, and why did she buy a single ticket?

89. My conclusion about the Brighton trip is that Kamila was not in an entirely rational frame of mind when she made it. The most likely explanation is that she may have set off from Bedford thinking, perhaps briefly, about throwing herself into the sea (hence the single ticket), then thought better of it on the journey. She may even have called at Ms Payne's café, though I doubt that. More than that is hard to say: but the Brighton expedition, while far from conclusive, gives some support to the suicide theory.

90. Turning to what Kamila did on 13 December, the rival contentions must be: Suicide Kamila leaves the Rutland Road flat at about 7.30 pm, with no handbag, arrives at

Priory Lake at 8.10-8.15 pm, takes off her coat, scarf and trainers, and wades into the cold waters of the lake until she drowns.

Homicide Mr Bento asks Kamila to meet him after work on a dark December night by Priory Lake, the rendezvous being made in a 13-second phone call at 5.16 pm (or conceivably made in the morning and confirmed at 5.16 pm). She leaves the Rutland Road flat with no handbag and arrives at Priory Lake at 8.10-8.15 pm. The Claimant arrives at 8.25-8.30 pm. They walk to the area of the three trees. Mr Bento tugs at Kamila's scarf or in some other way causes her to suffer vagal inhibition. She falls down dead. He removes her coat, scarf and trainers and places them on the ground; then picks up the body and throws it into the water. He makes good his escape before Ms Morse and Mr Burroughs come on their evening stroll.

91. Either of these scenarios is possible. But the suicide scenario is by far the more probable of the two. That far greater probability is not outweighed by the circumstantial evidence, even of the flowers incident.

92. My conclusion is that while it is possible that Mr Bento killed Kamila, the balance of probabilities is that he did not and that she committed suicide. The defence of justification therefore fails.

Qualified privilege

93. The Defendant's principal argument on qualified privilege is that the press release was issued in pursuance of what Mr Rampton described as "the duty of the police to keep the local public informed about the status of an investigation into a serious crime; and the right and interest of the local public to be given this information". He accepted that any such duty and right must be balanced against the right to reputation of the Claimant who was convicted of the crime but has since been acquitted. The alternative argument is that the press release was protected by privilege because it was distributed in defence or rebuttal of an anticipated attack in the media about the police's handling of the investigation into Kamila's death.

Duty to publish and the interest or right to receive information

94. Mr Rampton submitted as follows:

i) It is recognised that there are occasions where the public interest in ensuring freedom of communication includes the publication of false and defamatory statements where that interest outweighs the competing public interest in protecting the reputation of the individual.

ii) One such occasion is where the person who makes the communication has a legal, social or moral duty to make it to the person to whom it is made and the recipient has a corresponding right or interest to receive it.

iii) The categories of occasion that attract qualified privilege are not closed. As Lord Nicholls said in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 194:

> "Over the years the courts have held that many common form situations are privileged. Classic instances are employment references, and complaints made or information given to the police or appropriate authorities regarding suspected crimes. The courts have always emphasised that the categories established by the authorities are not exhaustive. The list is not closed. The established categories are no more than applications, in particular circumstances, of the underlying principle of public policy. The underlying principle is conventionally stated in words to the effect that there must exist between the maker of the statement and the recipient some duty or interest in the making of the communication. Lord Atkinson's dictum in *Adam v Ward* [1917] AC 309 at 334 is much quoted:
>
> > "A privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."
>
> The requirement that both the maker of the statement and the recipient must have an interest or duty draws attention to the need to have regard to the position of both parties when deciding whether an occasion is privileged. But this should not be allowed to obscure the rationale of the underlying public interest on which privilege is founded. The essence of this defence lies in the law's recognition of the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end the law is concerned to attain. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end. Thus the court has to assess whether, in the public interest, the publication should be protected in the absence of malice."

iv) The circumstances which may give rise to qualified privilege are not only very varied but may change as the requirements of public policy change. As Lord Nicholls explained it in *Reynolds:* "Circumstances must be viewed with today's eyes. The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions."

v) A publisher can be under a duty to publish to the world at large, or at least a section of it, without recourse to *Reynolds* privilege, where the circumstances giving rise to the publication are such that it is in the public interest that it should be made, because the public has a legitimate right or interest to receive the information conveyed.

vi) Where the publisher is a public authority, in order to be protected by qualified privilege the publication must be consistent with its public law duties and in

accordance with its obligations under the Human Rights Act (*Wood v Chief Constable of the West Midlands Police* [2005] EMLR 20; *Clift v Slough Borough Council* [2011] 1 WLR 1774).

vii) If the publication is apt to damage a person's reputation, his Article 8(1) right to respect for private life applies and the public authority must not interfere with that right unless the publication can be justified under Article 8(2) (*Clift* at [32]). In order to be justified the publication must be necessary for a legitimate aim and proportionate to that aim. Ultimately the Court must strike a fair balance between the rights of the individual and the interests of the community.

viii) However, the inclusion of the rights and the adoption of the language of the European Convention must not be regarded as having superseded or displaced the common law defence of qualified privilege, or the public policy behind it merely because the defendant is a public authority. This was made clear by Ward LJ in *Clift* at [39]: "The defence is the common law defence of qualified privilege. To support the defence the defendant must first establish that it is under a duty to communicate the information to those who have a corresponding interest or duty to receive it. The issue is whether or not the Council are under such a duty."

ix) The "new" approach clarified in *Clift* is not settled. Tugendhat J said in *Lewis v Commissioner of Police of the Metropolis* [2011] EWHC 781 (QB) at [116] that: "The law in relation to qualified privilege as it applies to publications by a public authority is difficult and developing [and]…… is fact sensitive."

x) A public authority does not have an Article 10(1) right to freedom of expression. However, Article 10(1) not only protects the right to impart information but also the right to receive information. This includes the right of the public (and media on its behalf) to receive information. That the right now appears to be of wider scope than originally thought, in particular where the media are involved and genuine public interest is raised, was acknowledged by the Court of Appeal in *R (Guardian News and Media Ltd) v City of Westminster Magistrates Court and the Government of the United States of America* [2012] EWCA Civ 420 at [53] and *"A" by his litigation friend, the Official Solicitor v Independent News & Media Ltd and ors* [2010] 1 WLR 2262 at [35] to [38]. Whilst the facts of those cases are different from this case (the media applied successfully under the open justice principle for access to information held as part of court proceedings), the wider scope of Article 10(1) is plainly of general application where it is the public which has a legitimate interest in receiving the information in question and much of the information in question is already in the public domain.

xi) The information relates to the administration of justice; namely the conduct of a criminal investigation, and there are correspondingly "high public interest reasons" for the public having access to it;

xii) It is clearly in the public interest for the police to communicate to the public about the status of an investigation into a suspected serious crime, save when such a communication is calculated to cause a substantial risk of serious

prejudice to current proceedings (which is not asserted in this case). It is a feature of modern policing that the public expect to be kept informed in this way, and the police also benefit from this two-way relationship by the public providing information to them, but also by the resulting maintenance of public confidence in the police properly investigating crime. It was specifically in the public interest for the police to communicate through the media with the public, including the Polish community in and around Bedford, at all stages of the investigation into Kamila's death in order, first, to meet their natural and proper concern to have the fullest information possible and, hence, to retain their confidence that the case was being taken seriously by the police**;** and, second, to encourage the flow of information that might assist the investigation. The police are and were at the material time in any event under a duty imposed by Government requirements for transparency and openness in police investigatory work to provide regular briefings to the media to keep the public informed, the overall aim of which is to engender and maintain public confidence in the police.

xiii) The public interest reasons for keeping the local population informed about the ongoing investigation into Kamila's death applied just as much after the CPS discontinued the prosecution of the Claimant in July 2009 as before he was charged in November 2006. This is because the CPS' decision left the Defendant with an unresolved case given that, in his view and based on the evidence in July 2009, there was no credible evidence of the involvement of anyone else or of suicide and the Claimant remained the prime suspect.

xiv) This left the Defendant with a duty to explain to the public, as far as possible (bearing in mind he did not wish to state that the Claimant was guilty of murder), the nature of the decision by the CPS and why, despite it, the Claimant remained the prime suspect. It was simply not an option for the police to say "We have no comment to make" when asked the sort of questions by the media which were anticipated:

(1) *Now that the prosecution of Mr Bento has been dropped, are the police looking for any other suspect in connection with Kamila's death?* The honest answer was no and the public were entitled to be told this. Otherwise they might be misled into thinking either (a) the killer was at large and/or (b) police incompetence meant the killer (whoever it was) had escaped justice. Given the Defendant's reasonable view that the evidence of suicide was not credible, neither would have been true.

(2) *What will happen to the case now?* The true answer was that the investigation would be kept under review in order to obtain new evidence against the Claimant or, if new evidence were to lead the inquiry in that direction, against another person.

xv) Moreover, because of the state of the evidence, in the Defendant's view the decision to discontinue was wrong because there was sufficient evidence to justify proceeding with the Claimant's retrial in the reasonable expectation that he would be convicted of killing her. The Defendant had a duty to inform the

public of his position in this regard so that they would not be misled in the way described above.

xvi) It was for these reasons that Assistant Chief Constable Richer drafted the press release as he did and caused it to be issued in response to requests from the media for answers.

xvii) If it is accepted that (a) the press release bore the meanings pleaded in [paragraph 7 above] or something similar and (b) the Defendant was under the duty described above to be honest and transparent with the public about the status of the investigation into Kamila's death, and to reassure them that the inquiry was not closed and that the Defendant had conducted a proper investigation, then it is submitted that the duty outweighed the Claimant's Article 8 right to reputation. The provision of information that the police were not looking for anyone else was, to adopt the language of the European Convention, rationally connected to the legitimate aim of keeping the public informed on a matter of high public interest and importance; i.e. the status of and consequences for the inquiry into Kamila's death of the CPS's decision to discontinue. It was necessary for and proportionate to that aim. Without that information there would have been, it is submitted, a real risk that public confidence in the Defendant would be harmed by the inference that they had botched the investigation and/or there was no evidence against the Claimant, and that a third party (who was at large) must have killed her. Set against this, the announcement that the Claimant remained the prime suspect was not in any event precluded by his acquittal. *It is accepted that if the press release had explicitly stated that the Claimant was nevertheless guilty of murder then that would not have been proportionate or necessary*. But it was not, in the circumstances, an unjustified interference with his Article 8 right to state that the evidence still made him the prime suspect. [emphasis added]

95. Mr Tomlinson did not dispute that it is in the public interest for the police to communicate with the public during an investigation into a suspicious death in order both to retain the community's confidence that the case is being taken seriously and to encourage the flow of information that might assist the police; nor that it is desirable for the police to communicate with the public through media briefings. (If it were otherwise, it would be difficult to explain why a county force the size of the Bedfordshire Police had in 2009, and despite budgetary pressures still has in 2012, a team of five Media Officers.)

96. Mr Rampton referred to *Alexander v Arts Council of Wales* (unrep. 20th July 2000, but cited, unchallenged, in the claimant's appeal on another issue in that case at [2001] 1 WLR 1840, paragraph [17]). In that case Eady J held that a representative of the Arts Council of Wales had been protected by qualified privilege in making statements at a press conference held to explain the Council's refusal of a particular application for arts funding, and after the Council's decision had been attacked in the press by the applicant. The meaning of the statement was essentially that the Claimant had a cavalier attitude to the use of public funds and was a reckless, negligent or incompetent administrator: this was why the Council had refused the application. Eady J said:

> "It seems to me that the matter can be put on both bases, that is to say the general duty/interest test and the 'reply to an attack' test. I prefer to place the matter on the more general footing by saying that this was a matter concerning public funding and decisions made in relation to it which were likely to have a considerable impact on the arts in South Wales. It seems to me to be clear that someone in [the second defendant's] position had a duty to explain, as far as she could, the nature of the decision and, if pressed upon it, the reasons for the decision. That is particularly so in a case where the matter had been placed in the public domain very recently and had thereby become a matter of legitimate interest."

97. I agree with those observations: but it will be noted that in the defamatory statement complained of the Arts Council of Wales was explaining the reasons for *its own* decisions, in that case about the allocation of public funds. Here the press release went well beyond that: it expressed the opinion of the police that the CPS' decision was wrong. I was not referred to any case in which it has been held that a public authority is under a duty to state to the world at large, or even to local media, its opinion that the decision of another public authority is wrong.

98. I accept that there is a high public interest in maintaining confidence in the criminal justice system. That public interest underlies much of my working life and that of any judge who sits in the criminal courts. But I do not accept that that public interest is served by encouraging the police to issue statements indicating their opinion that the decision of the CPS not to pursue a prosecution (or, for that matter, the decision of a judge that a defendant has no case to answer) is wrong because the individual concerned is or is probably guilty. On the contrary: such statements reduce confidence in the criminal justice system, as well as seriously damaging the right to reputation of the individual.

99. The Defendant could perfectly well have issued a statement saying any or all of the following: (a) we pursued a thorough investigation into this case (b) a jury convicted Mr Bento of her murder; (c) that conviction was set aside on appeal, for reasons which did not involve any criticism of the police; (d) it is not our decision as to whether the case should be retried; (e) no other suspect has ever been identified, but the real issue was and is whether Kamila was killed or committed suicide; (f) we are disappointed for her family that there has been no resolution of the question of how she died; (g) we are not closing our files. That would have protected its own interests without defaming Mr Bento.

100. The Defendant's submissions accept that it would not have been necessary or proportionate for the purposes of balancing Mr Bento's Article 8 rights with the public's Article 10 rights to say that he was guilty of Kamila's murder. I consider that the same applies to a statement whose meaning is that he probably killed her.

Reply to anticipated attack

101. The Defendant submits, and there is no dispute, that "it is recognised at common law that a person may publish, in good faith, false and defamatory statements about another in reply to an attack by that other, and as a defence to that attack. …..The

rationale is that a person who has been attacked publicly has a legitimate right or interest in defending himself against it, and the [readers or viewers] of the original attack have a corresponding interest in knowing his response to it. The response has to be proportionate to the original attack in that it should not be made more widely than the attack or include irrelevant statements."

102. In *Bhatt v Chelsea and Westminster NHS Trust* (unrep., 16 October 1997) Sir Maurice Drake held, in the course of an interlocutory appeal against a Master's refusal to strike out a claim, that this form of qualified privilege extends to a statement in rebuttal of an anticipated attack. The defendant trust's press officer issued information to the press which was defamatory of the claimant in response to inquiries from the press indicating that articles based on the claimant's criticisms of the trust were about to be published. Sir Maurice observed (at p7) that it would be bad law to treat a response to an attack as privileged but not "a pre-emptive press release intended to stop the mischief which would be done by publication".

103. Sir Maurice's judgment made it clear that as matters stood in October 1997 "no case has been found in which the courts held that a response to an anticipated attack may be covered by qualified privilege"; and there is no record of any case since 1997 so holding either. With respect to Sir Maurice, who as Drake J had tried many defamation cases, I very much doubt whether the decision is correct. I see no policy reason to extend qualified privilege to people who believe they are about to be criticised and decide to get their public retaliation in first. Mr Tomlinson also points out that the decision pre-dates the Human Rights Act, and thus takes no account of the duty of a public authority to respect an individual's Article 8 right to reputation.

104. If, however, *Bhatt* is correct, qualified privilege under this heading must in my view be confined to cases where the defamatory statement is:

> (a) in reasonable anticipation of an imminent attack on the conduct of the maker of the statement; and
>
> (b) limited to a proportionate rebuttal of that anticipated attack.

105. Here the trigger for the July 2009 press statement was a telephone request from BBC2's *Newsnight* programme asking whether the police had a photograph of Kamila. There had been a previous *Newsnight* item about the case in February 2009, at the time of the appeal. It included a strong attack by Mr Fredericks on the evidence of Mr Caudle, but (as ACC Richer agreed in cross-examination) no express criticism of the police investigation. Ms Wilkinson, the Defendant's Deputy Senior Media Officer, accepted, that if the BBC were going to criticise the police on *Newsnight*, their invariable practice in accordance with their editorial guidelines would have been to give the police the chance to put their side of the story.

106. I therefore do not accept that the police reasonably anticipated a public attack on their conduct. Even if I am wrong about that, a proportionate rebuttal of that anticipated attack would have been limited to explaining what the police had done, and would not have extended to saying that Mr Bento was probably guilty.

107. Accordingly I reject the defence of qualified privilege.

Damages

108. Mr Rampton, whose experience of defamation cases is second to none, said in his closing address that if the defences of justification and qualified privilege both failed "there is no need for me to say anything about damages: the damages will be substantial and I am quite happy to leave it there. All I would say….is that it was not a national publication, nor a worldwide publication for that matter. It was a limited publication but a serious matter, and that means if it is untrue and there is no protection of privilege that means substantial damages. The defence of justification has been rehearsed in open court. That is another factor."

109. I accept that this is the correct approach. The press release was e-mailed to various local media. There is no evidence of it having attracted national coverage, although it is a matter of judicial knowledge that a news release published in (for example) the Bedfordshire section of the BBC news website can be accessed by anyone who is interested enough to look for it.

110. The pursuit of the justification defence at trial aggravates the damages to some extent, as Mr Rampton accepted, although I consider that this should be only to a limited extent in view of the courtesy and restraint with which it was done.

111. Taking these factors into account the proper award is one of £125,000.