Neutral Citation Number: [2019] EWHC 1130 (Admin)

Case No: CO/2666/2018

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2019

**Before**:

**THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON**
**THE LORD CHIEF JUSTICE OF ENGLAND AND WALES**
**AND**
**MRS JUSTICE FARBEY**

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**Between:**

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| **THE QUEEN on the application of** | **Claimant** |
| **TRACEY JOHN-BAPTISTE** | |
| **- and -** | |
| **THE DIRECTOR OF PUBLIC PROSECUTIONS** | **Defendant** |

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**Ms K Monaghan QC and Mr D Malone** (instructed by **Centre for Women's Justice**) for the **Claimant**
**Mr J McGuinness QC** (instructed by **Crown Prosecution Service**) for the **Defendant**

Hearing dates: 4 April 2019

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# Approved Judgment

**The Lord Burnett of Maldon CJ:**

1. The single issue in this claim for judicial review is whether the decision made on behalf of the Director of Public Prosecutions by senior officials of the Crown Prosecution Service ("CPS") not to prosecute S for manslaughter for the death of Jourdain John-Baptiste was irrational. She died some hours after her fall from the balcony of her fifth floor flat in Gainsborough House in Enfield on 21 August 2015. She was 24 years old. The claimant is Miss John-Baptiste's mother.

2. The claimant accepts that there is no evidence that Miss John-Baptiste was thrown or pushed from the balcony or that S had physically assaulted her that night. The case for manslaughter is founded on the proposition that S committed an unlawful act, namely common assault by putting Miss John-Baptiste in fear of violence, and that she fell whilst trying to flee from the anticipated violence. There is no dispute that such a course of events is capable of supporting a prosecution for manslaughter.

**Disclosure**

3. As will become apparent in the discussion which follows of the outline facts and then the detail of the review decision under challenge, many witness statements were taken by the police from people who heard some of the events leading to the tragedy. Nobody but S saw what occurred. The CPS took advice from three different counsel in aid of deciding whether to prosecute. Shortly before the hearing of this claim a wide-ranging application for disclosure was made seeking the three advices; the witness statements made by those who describe what they heard in the period leading to the fall; full transcripts of anything said by S in explanation of what occurred; all plans made and photographs taken in the course of the police investigation; all phone downloads; all documents generated by the defendant in making the decision; and all internal review notes and investigative actions generated by those review notes.

4. Ms Monaghan QC submitted that the disclosure sought was necessary to dispose fairly of the claim. In particular, she submitted that if the defendant relied upon material in support of the decision the claimant should have the right to see it so that she "can unpick it".

5. We refused the application and indicated that short reasons for doing so would be given in our judgments.

6. The basis of the decision under challenge, the reasons for it and the detail of the factors and evidence taken into consideration have been more than adequately disclosed by the Director. The detailed decision letter itself sets out a good deal of the material, including a summary of the advice received from each counsel, which I set out in paragraph 16 below. Mr McGuinness QC for the Director submitted that privilege had not been waived in the content of those advices, but it is not necessary to resolve that issue. The Claimant has also disclosed the underlying Metropolitan Police case officer's report extending to 26 closely typed pages together with a second "Investigative Hypotheses Considerations" document from the Metropolitan Police, obtained from the Coroner after the inquest. The Director has given a full and

accurate explanation of the decision-making process and in doing so made reference to relevant facts and reasoning. As Lord Bingham of Cornhill explained in *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53; [2007] 1 AC 650 at [3], "The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly." *Tweed* was a proportionality challenge in which extensive disclosure was sought. In that regard Lord Brown of Eaton-under-Heywood observed at [56],

> "In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge."

7. In my view no further disclosure was necessary to resolve the matter fairly and justly. This was an attempt to obtain disclosure of all material in the hands of the Director, as Ms Monaghan candidly accepted, "to unpick" the decision – in short, as it seems to me, a fishing expedition.

**The facts in outline**

8. S was Miss John-Baptiste's long-term boyfriend. At 01.40 in the early hours of the morning of 21 August he called 999 from her mobile phone and stated, "she jumped out of the window. She said, 'I can't take this anymore' and jumped out". Earlier that evening he and she had conducted a vigorous text exchange in which she said she was scared. The background to this exchange appears to be that she had been friendly with a man who S said had previously stabbed him. S arrived at the flat at about 00.45. Neighbours overheard a row, something which one described as happening about every three weeks, including a hysterical female. She was heard by one to say "no" a few minutes before her fall and by two others "someone help me please". S's immediate explanation for the row, both to the police and neighbours, was that Miss John-Baptiste saw he was texting another woman. The balcony from which Miss John-Baptiste fell can be reached from inside the flat either by a door from the living room or through the window from the bedroom. The door from the living room was locked and so all assumed that she had climbed through the bedroom window onto the balcony. The wall and railing around the balcony were high enough to preclude the real possibility that Miss John-Baptiste accidentally toppled over it. The reality is that she must have climbed onto or over them before falling. The question was why?

9. There was a thorough police investigation which included a search of the flat and forensic examination. Statements were taken from numerous friends of Miss John-Baptiste who gave hearsay evidence of her descriptions of a volatile and abusive relationship, including allegations of assault. S's previous girlfriends were interviewed but did not allege violence against him. No domestic violence had been reported against him and he had no convictions for domestic violence. The police report suggested that there was intelligence that he was involved in gang activity. There was evidence that Miss John-Baptiste had self-harmed when she was about 14, but not since then, although in both 2014 and 2015 text messages to friends refer to self-harming. The episode of self-harm followed a move by her family to Kent which separated her from S whom she was already seeing.

10. S gave various accounts of what had occurred. Following his arrest, he was kept under observation because there were concerns from his demeanour that he might harm himself. He spoke to the officer watching him. He explained that the argument had been over a message he had received from a girl and also over her liking another man on Facebook. He explained that Miss John-Baptiste climbed onto the ledge and threatened to jump. He persuaded her down. A little later he heard what sounded like a window opening and then saw her hanging from the balcony asking for help, but he did not make it in time. S was interviewed on three occasions, twice on 21 August and then on 7 February 2016. At the first interview he produced a prepared statement, signed both by him and by his solicitor. It referred to Miss John-Baptiste's self-harm in her teenage years. It said that she threatened to kill herself. S described how she stood on the edge of the balcony and fell before he could get to her. He did not know whether it was an accident or deliberate. He made no comment to all questions asked of him at the second interview that day. At the third interview he gave a full account. He spoke of Miss John-Baptiste's history of self-harm, this time mentioning tablets as well, and gave a different (or fuller) explanation. She had gone onto the balcony in an attempt to take her own life. She got over the railing and was hanging from the other side but he managed to get her back and take her inside through the bedroom window. Things calmed down but he then heard a window "and she was gone". He confirmed that they had argued over something she had seen on his phone but that he had lied over the reference to Miss John-Baptiste's Facebook account. She did not have one. He was also asked about items found in the flat. There was a Stanley knife on the bed with the blade retracted. S's DNA was not found on it. A broken Beretta air pistol was secreted in a carrier bag within a handbag, itself in a pile of other handbags and clothing. Even if working that would not have required a licence but because it was broken it was described in the police papers as an imitation firearm. He denied threatening Miss John-Baptiste with either. Some body armour and a baton were also found. S denied being violent towards her in the past.

**The sequence of decision making**

11. The police referred the case to the CPS for decision. The investigating officer's view was that "the most likely scenario under all the circumstances" was that Miss John-Baptiste was fleeing from harm. He speculated that it was likely that she was threatened with the Stanley knife and that she may have been trying to swing from her balcony to the one below. That thought arose from the fact that her car keys were found on her balcony with the underlying hypothesis being that she was trying to get away and dropped them. The officer wrote:

> "There must have been an unlawful act from [S] given the ferocity of the argument and the presence of the knife. It must have been intentionally performed, and a reasonable person would realise the inevitable risk of some harm coming to Jourdain."

He sought authority to charge S with manslaughter.

12. On 1 August 2016 Elaine Cousins, a Senior Crown Prosecutor in London, wrote to the claimant and her husband to explain her decision not to prosecute. She had taken advice from Treasury Counsel, Tom Little. As a result of his advice and her own

consideration of the material she concluded that there was insufficient evidence for a realistic prospect of conviction for either murder or manslaughter. She and counsel also considered bad character evidence. She offered to meet Mr and Mrs John-Baptiste with counsel to discuss the matter further. She also referred to the right to have her decision reviewed.

13. That review was first carried out locally. On 24 January 2017 Rob Davies, the Legal Manager of the CPS Homicide Team, wrote to Mr and Mrs John-Baptiste to explain that he had reached the same conclusion as Ms Cousins. He had caused some further investigations to be conducted by the police and taken further independent legal advice from Senior Treasury Counsel, Louis Mably. Mr Davies explained that he had applied the evidential test, namely a realistic prospect of conviction: is it more likely than not that a reasonable jury, properly directed, would convict? He concluded that there was no realistic prospect of conviction. The next step in the review process was for an independent decision to be made by the Right to Review Unit.

14. That decision was made by Karen Harrold, the head of the unit, and conveyed to the claimant and her husband in a letter dated 22 March 2018. She concluded that the earlier decision was not wrong. In addition to the advice of Mr Little and Mr Mably (both of whom had taken silk since they advised) she had the benefit of yet further independent and recent advice from Alex Bailin QC, an experienced criminal barrister. That was obtained at the suggestion of Adrian Roberts in the Special Crime Unit. Both Mr Little and Mr Mably had concluded that there was insufficient evidence to support a successful prosecution and, as we have seen, the relevant prosecutors in the CPS took the same view. By contrast, Mr Bailin thought there was sufficient evidence to proceed. Mr Roberts agreed with that view.

15. Before reaching Ms Harrold, the case was also considered by Ms Boland, the Unit Head of the Appeals and Review Unit. She did not agree with Mr Bailin and Mr Roberts. It was in those circumstances that Ms Harrold came to make her own decision with the benefit of the advice of three expert criminal barristers and the earlier reasoned decisions of experienced and senior Crown Prosecutors. She too disagreed with Mr Bailin's conclusion.

16. Ms Harrold accurately summarised the relevant law of unlawful act manslaughter. There is no suggestion that she made an error of law. She then outlined the nature of the advice received from each of the leading counsel:

> "**Tom Little QC** provided a 35 page advice, which considered all the witnesses and circumstantial evidence fully including the post mortem evidence; forensic results; the scene of crime evidence; medical and telephone records; and importantly, the police dealings with the suspect at the scene and during interviews at the police station, and bad character evidence. he presented a balanced view of both the strengths and weaknesses of the evidence. For example, Mr Little considered that the damage to the internal doors may well be indicative of the violent and aggressive pattern of behaviour of the suspect in the past yet, on the other hand, this was less likely to assist the

prosecution case as the forensic evidence had not been able to establish that any of the damage occurred on 20/21 August.

I also noted that Mr Little helpfully set out the content of the text messages exchanged between the suspect and Jourdain. It was accepted that one interpretation of those texts could be that Jourdain was afraid of the suspect, another that she was afraid of losing him. In my review, I felt that there is room for arguing both of these versions … the point is that although there are other words and circumstantial evidence to show she was, on occasions, afraid of the suspect physically, there is also a version that could be put forward that Jourdain simply did not want to lose him despite knowing what had occurred in the past.

Mr Little carefully considered the options as to the cause of Jourdain's death, namely homicide including unlawful act manslaughter; accident or suicide. He concluded that a manslaughter charge would have to be put on the basis of an unlawful act and that act as most likely to be an imminent assault or a chase. He also considered false imprisonment but dismissed that possibility. There was a full analysis of the strands of circumstantial evidence available.

His view was that the judge at any trial would be required to give the jury a standard direction as the prosecution case would be heavily reliant on circumstantial evidence. I agree this direction would have to be given to the jury due to the lack of direct witness evidence in this case and the number of conflicting cases theories. The most telling part of the direction is a section which warns the jury that they should not engage in guess-work or speculation about matters that have not been proved by any evidence.

In summary, the view of Tom Little QC was that the various strands of circumstantial evidence, when taken together, were not sufficient to provide a reasonable prospect of conviction.

**Louis Mably QC** focussed on whether the fall was caused by an assault committed by the suspect without an intention that Jourdain should, in fact, fall from the balcony. In particular, he looked at three evidential matters on the basis that they may be inconsistent with an explanation of accident or suicide namely, the evidence of the neighbours especially hearing a woman screaming for help; the evidence that suggested Jourdain climbed through a bedroom to reach the balcony; and the knife found on the bed.

After summarising the evidence, he provided an overview and considered the question of escape from an assault and also

whether the suspect intentionally or recklessly caused Jourdain to apprehend unlawful violence and in order to escape either jumped from the balcony or climbed onto the balcony and accidentally fell.

I agree that there is no direct evidence as to how Jourdain fell so we are driven back on what can be reasonably inferred from the neighbours together with surrounding circumstances and all the circumstantial evidence …

Mr Mably also highlights the legal requirement that a prosecutor should not only assess the evidence against the defendant but also the likely defences.

He considered whether the evidence could form the basis for a conclusion on the following questions:

- whether the argument between them involved an assault;
- how Jourdain ended up on the balcony;
- why she ended up on the balcony; and
- what the suspect was doing at the time.

He concluded that the evidence was not sufficiently detailed, certain or consistent to enable conclusions to be inferred to the criminal standard. He also looked at the circumstantial evidence and concluded that it was only at the level of mere speculation that an assault did in fact take place.

Mr Mably also asked reasonable questions about whether Jourdain climbed onto the wall and there again there are a number of reasonable theories that could be put forward that could include accident or suicide. Likewise, there are a number of reasonable theories about the screams that neighbours heard of a female saying '*somebody help me'* - namely, she was about to be pushed; or she was being or about to be assaulted; or she was slipping or in danger of slipping.

Mr Mably concluded that all the available evidence raises a possibility – a suspicion – that by the suspect's actions he unlawfully caused Jourdain to fall by pushing her or causing her to endanger herself in an attempt to escape an assault. In other words, there are a number of questions and case theories but that there was not sufficient evidence to afford a realistic prospect of conviction as the same facts were equally consistent with an accident or possibly suicide.

> **Alex Bailin QC** also considered the evidence with care. He too reviewed all the evidence in some detail including the scene/crime scene as well as the post mortem and forensic results. He set out the evidence from the text messages and statements from neighbours in particular. He looked carefully at the account given by the suspect to the police.
>
> Put simply, he arrived at a different conclusion namely that the evidential threshold was met in relation to the offence of unlawful act manslaughter based on the evidence that Jourdain's death resulted from the unlawful and dangerous act of the suspect assaulting her (by threats of violence), Jourdain fleeing the suspect in response and consequently falling to her death whilst trying to escape him. Specifically, that the unlawful act was assaulting her (threats of violence)."

17. Ms Harrold observed that Mr Bailin had not considered any evidence not previously considered by both Mr Little and Mr Mably. His conclusion was that the evidence from neighbours was sufficient to establish that Miss John-Baptiste was verbally or physically threatened on the night of 20/21 August, there being no direct evidence of a physical assault. Given that this issue lay at the heart of the case, namely whether she was put in immediate fear of unlawful violence and fell whilst fleeing, Ms Harrold "looked closely again at what the various advices say about the neighbours' evidence". She set out extracts from the statements of six neighbours and continued:

> "It is accepted by everyone that there was an argument between the two for some time with loud shouting by both and at times crying from Jourdain. However, that is not enough in itself to infer a threat of violence. People do shout at each other when arguing, and clearly emotions were running high but … there is insufficient evidence to prove any unlawful act amounting to threats of use of violence on the part of this suspect which directly caused her to jump off the balcony to escape, or which caused her to fall accidentally while trying to escape an unlawful act.
>
> Again I should emphasise that the entire case against the suspect would rest on the prosecution proving that such an unlawful act took place. I am sorry but despite all the efforts of the investigating officers … no such evidence is available.
>
> I accept it is possible that Jourdain went onto the balcony during the argument, to get away from the suspect because he had just assaulted her or threatened her with immediate violence. However, it is equally plausible that she went out there in a state of high emotion, misjudged the situation and slipped/fell and screamed for help as she realised she was going to fall. That is, of course, speculation, but in my view no more so than the theory that the suspect threatened or assaulted her to the extent that she tried to escape and in doing so, jumped or

> fell off the balcony. The point is that there is not sufficient evidence to support or undermine any of the possibilities as to how she came to fall to the ground."

18. Ms Harrold did not consider that the evidence could prove the unlawful act to the required criminal standard. The various theories about what happened would raise too much doubt for a prosecution to succeed.

**The legal test**

19. A decision of the Director of Public Prosecutions or CPS not to prosecute is amenable to judicial review "but the authorities show that the power is one to be sparingly exercised": *R v DPP ex parte C* [1995] 1 Cr. App. R. 136 per Kennedy LJ at 140 A. "Only in highly exceptional cases will the court disturb the decisions of an independent prosecutor": *R (Corner House Research) v SFO* [2009] 1 AC 756 per Lord Bingham of Cornhill at [30]. That is because the independent prosecuting authority, and not the court, is charged by Parliament to make decisions on whether to prosecute. This leads, as Sir John Thomas PQBD (as he then was) put it in *L v DPP* [2013] EWHC 1752 (Admin) at [7], to the adoption of a "very strict self-denying ordinance". In *R v DPP ex parte Manning* [2001] QB 330 Lord Bingham explained:

> "The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It makes no difference that the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom the jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. … The Director and his officials (and senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decision could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time the standard of review should not be set too high, since judicial review is the only means by which the

> citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

**The claimant's case**

20. Ms Monaghan submits that the view taken of the evidence by Ms Harrold, and thus by Mr Little and Mr Mably as well as Ms Cousins, Mr Davies and Ms Boland, was irrational in a public law sense. She submits that on analysis there is no room for two views in this case. On the material before all these decision makers, and in particular the ultimate decision maker, Ms Harrold, they were not entitled to conclude that the evidential sufficiency test in the Code for Crown Prosecutors was not met. The evidence inexorably supports only one conclusion, namely that it is more likely than not that a properly directed jury would convict S of manslaughter. The unlawful act was the threat of violence (that is a common assault) from which Miss John-Baptiste must have been fleeing when she fell from the balcony. Ms Monaghan relies, in particular, on the following features of the evidence in support of the submission:

- Miss John-Baptiste and S were in the flat alone together;
- What occurred was not an accident in the sense of Miss John-Baptiste toppling over the wall or railing. She must have climbed up before falling.
- Texts sent earlier in the evening could be interpreted as threatening violence;
- The ferocity of the argument between the two, including banging being heard by neighbours;
- Miss John-Baptiste's cry for help;
- The suggestion by one witness that S told a neighbour to call an ambulance but not the police;
- S's different accounts of what occurred;
- Bad character evidence, including intelligence that S was involved in a gang, the presence of the Stanley knife, imitation gun, body armour and baton in the flat and the hearsay evidence from Miss John Baptiste of a history of domestic violence.
- The unlikelihood of suicide being an explanation for what occurred.

21. Ms Monaghan's over-arching submission is that it is "more plausible" that Miss John-Baptiste fell whilst fleeing from threatened violence than that she had gone to the balcony having threatened to kill herself or whilst overwrought as a result of the argument, climbed onto the wall or railing and fallen. She submits that this "was quintessentially a case which should have been left to a jury" and that all questions relating to bad character should have been tested before a judge in the Crown Court.

**Discussion**

22. Ms Harrold recognised that the decision was a difficult one. Despite the unequivocal view of two Treasury Counsel that the evidential test was not satisfied, that difficulty was exemplified by the contrary view taken by Mr Bailin and the conflicting views expressed by different experienced Crown Prosecutors. But the fact that different people with great expertise and experience came to different conclusions when considering all the evidence in this tragic case demonstrates, to my mind, that there was nothing irrational or perverse in the decision ultimately made by Ms Harrold. It confirms that more than one view could be taken on the evidence. Both views were rational. She, both Treasury Counsel and other Crown Prosecutors, were entitled on the evidence to conclude that it was not more likely than not that a jury would convict S of manslaughter.

23. There is a difference between drawing an inference and acting on speculation. An inference may be drawn when disparate pieces of evidence lead to a sure conclusion on a factual matter for which there is no direct evidence, rather than a number of plausible conclusions. Speculation involves filling in gaps in the evidence to reach a conclusion, or guess-work as it was described in Ms Harrold's decision letter. The inference that a jury would be invited to draw in this case is that the only realistic explanation for Miss John-Baptiste's fall was that she was fleeing from a threat of violence. All those involved, whatever their ultimate view, accepted that such a view of the facts was one possible explanation of what occurred. But the question for the decision makers was whether it was more likely than not that a jury would reach that conclusion at the end of a criminal trial.

24. That judgment required an assessment of the evidence and how it would fare at trial, including the evidence of S given in explanation informally of what occurred at the scene, then when under observation, in interview and in his prepared statement. The prospect of using bad character evidence was considered. Mr McGuinness submits that relying on the bad character evidence would have been far from straightforward, particularly that relating to alleged gang-related activity, of which there was no direct evidence. In any event it would be unlikely to be probative of the common assault which it was necessary to prove before this prosecution could get off the ground. He submits that whilst the hearsay evidence of Miss John-Baptiste of violence in the relationship might theoretically have been admissible it would do little, if anything, to enhance the case that in the moments before she went to the balcony and fell, she was threatened with violence and fled. He points to the essential weakness of the case relating to the common assault and the principle that bad character evidence should not be introduced to bolster a weak case; and that it cannot be the primary evidence relied upon to prove guilt: *R v Hanson* [2005] 2 Cr. App. R. 21 at [10] and [18]. Similarly, the fact that there are differences in the various accounts given by S, the essential features of which were consistent, would, he submits, not significantly advance the case.

25. In my opinion the claimant has placed too much reliance on the possibility of bad character evidence forming an important part of the prosecution case. The view taken by both counsel and internal prosecutors about the limited value of the bad character evidence, and the difficulty in relying upon it at all, was a reasonable one in the circumstances of this case. So too the forensic value to be attached to the varying accounts given by S. The ultimate view taken by Ms Harrold, on the basis of her own

review of material and the multiplicity of views others had formed of it, that the evidential threshold was not surmounted, was a reasonable one. To borrow Lord Bingham's language in *Manning*, she exercised her judgment by making an assessment of the strength of the evidence against the defendant at the end of the trial together with the likely defences. It is impossible to stigmatise her judgment as wrong in law.

26. In the result the claim for judicial review must be dismissed.

**The Hon Mrs Justice Farbey**

27. I agree.