Neutral Citation Number: **[2020] EWCA Crim 1194**

Case No: B5 202001725

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BASILDON CROWN COURT
HIS HONOUR JUDGE BLACK
T2015-7188

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2020

Before :

LADY JUSTICE CARR DBE
MRS JUSTICE MCGOWAN DBE
and
MR JUSTICE MARTIN SPENCER

- -

Between :

JAKE TIERNEY-CAMPBELL	**Applicant**
- and -	
REGINA	**Respondent**

- -
- -

Michael Mather-Lees QC and **Colin Witcher** (instructed by **Tuckers Solicitors**) for the **Applicant**
Mark Milliken-Smith QC and **Emma Nash** (instructed by **the CPS Appeals & Review Unit**) for the **Respondent**

Hearing date: 9 September 2020

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JUDGMENT

Lady Justice Carr DBE :

Introduction

1. On 11 September 2015 the applicant, who is now 25 years old, pleaded guilty in the Crown Court at Southend to a single count of causing grievous bodily harm with intent, contrary to s. 18 of the Offences against the Persons Act 1861 ("s. 18"). The offence involved the applicant repeatedly punching and kicking a man named Daniel Bodimeade, leaving him at that stage in a persistent vegetative state.

2. On 27 November 2015 the applicant was sentenced in the Crown Court at Basildon by HHJ Black ("the Judge") to an extended determinate sentence of 14 years' imprisonment comprising a custodial element of 10 years and an extension period of four years. His attempt in December 2015 to obtain leave to appeal that sentence was unsuccessful. His co-accused, Hannah Cottom, pleaded guilty to a single count of assisting an offender contrary to s. 4 of the Criminal Law Act 1967 and was sentenced to 10 months' imprisonment suspended for 12 months.

3. This is the applicant's application submitted on 29 June 2020 for an extension of time of some four and a half years for leave to appeal against his conviction. He does so on the basis that his guilty plea was equivocal and/or unsafe, having been entered without full and proper advice. It should thus be quashed and a conviction for causing grievous bodily harm contrary to s. 20 of the Offences against the Person Act 1861 (“s. 20”) should be substituted pursuant to s. 3A of the Criminal Appeal Act 1968.

4. The context for the application is this. Following his conviction and sentence, on 23 February 2019, Mr Bodimeade sadly died. With the consent of the Attorney-General, the applicant has now been charged with his murder. The applicant is due to stand trial on this charge next Wednesday, 16 September 2020. The prosecution will seek to admit the applicant's guilty plea at that trial pursuant to s. 74(3) of the Police and Criminal Evidence Act 1984.

5. In these circumstances the Registrar has referred the matter directly to the full court. We have had the benefit of written and oral submissions from Mr Mather-Lees QC and Mr Witcher for the applicant and Mr Milliken-Smith QC and Ms Nash for the respondent in order to assist our determination of the issues arising. Apart from Ms Nash, none appeared below; all are instructed in the forthcoming murder trial.

6. Reporting restrictions under s. 4(2) of the Contempt of Court Act 1981 apply. It appearing necessary for avoiding a substantial risk of prejudice to the administration of justice in the forthcoming criminal trial, we order that the publication of any report of these proceedings be postponed until the conclusion of those proceedings or further order.

The Facts

7. Mr Bodimeade, then 39 years old, lived at an address in Brooke Road in Grays with his partner and three year old son. On 13 June 2015 he and his partner went to a family party; they returned to their home address in the early hours of 14 June 2015. Their young son was not at home. Mr Bodimeade took a shower and then went outside his front door most likely, suggested the prosecution, to have a cigarette. His long-term

partner, Ms Margaret Mwihaki, confirmed that he was fit, well and uninjured when he did so.

8. The applicant was not known to Mr Bodimeade. He had been out to a public house that evening with his girlfriend, Kerri Roberts, and some of her friends including Kelsey Ridley and Ms Cottom. During the evening the applicant got himself into a state of extreme intoxication through drink. Video footage from a mobile phone showed the applicant's high level of intoxication. Ms Ridley described the applicant's behaviour as erratic; he would swing from being nice to aggressive, squaring up to people, and then being nice again.

9. After leaving the public house and on their way back to Ms Robert's address, the applicant and Ms Roberts had a brief argument. The applicant ran off. Shortly thereafter, around 3.15am, the applicant came across Mr Bodimeade standing outside. Whatever the trigger or motive, the applicant proceeded to launch an attack on him.

10. Having heard someone shout for help, and thinking it could be the applicant, Ms Ridley and Ms Roberts ran down Brooke Road. Ms Ridley said that she saw Mr Bodimeade lying on the pavement with his back half up against the wall. The applicant was standing over him and kicking him repeatedly (she said at least ten times) to the upper chest area as if he was "kicking a football". The kicks were so hard that they caused Mr Bodimeade's body to move on each impact. Ms Roberts shouted the applicant's name. The applicant paused, looked at Ms Ridley and Ms Roberts with a look described by Ms Ridley as "evil" and then continued to attack Mr Bodimeade. Ms Ridley said that she saw the applicant punch Mr Bodimeade around five times to the head "really hard", causing his head to hit the wall with each punch.

11. The attack only ceased when Ms Roberts ran over and physically pulled the applicant away. The applicant immediately said "I think I've killed him, I think I've killed him", before walking down the road. Ms Ridley and Ms Roberts remained at the scene and called an ambulance and administered first aid. Whilst they were there, the complainant's partner ran out of the house having heard a female say "You can't leave him like that, call an ambulance". Ms Mwhihaki described seeing him on the floor with blood all over his face and flowing from the back of his head down a drain. She heard blood gurgle from his mouth and a snoring type of sound. Paramedics arrived and took Mr Bodimeade to hospital.

12. Ms Ridley was still present when the police arrived. She made a statement that day saying that she had found Mr Bodimeade on the floor and did not know how his injuries had occurred. She subsequently admitted, voluntarily, that the statement was a lie through fear. After the incident Ms Roberts contacted her and told her to meet her at Ms Cottom's address. When Ms Ridley arrived, the applicant was also present. Ms Roberts asked Ms Ridley what she had told the police and then made it clear that they would know if she told the police anything because she was the only other person in a position to do so. Whilst at the address, the applicant asked Ms Cottom to dispose of his clothing. Ms Ridley gave a second statement on 24 June 2015 in which she stated that she had seen the applicant attack Mr Bodimeade as set out above.

13. Ms Cottom was arrested on 1 July. She initially told the police she had not seen the applicant, however the next day she contacted the police and told them she had lied and that the applicant had asked her to dispose of his clothing and she had agreed. She told

the police she had hidden the applicant's clothing in a certain metal bin. However, investigations showed that no such bin in fact existed. Ms Cottom also admitted texting Ms Roberts twice after the police contacted her on 25 June telling Ms Roberts to get the applicant out of the area as soon as possible.

14. Mr Bodimeade was found to have lacerations to his right temple, eyebrow and left upper lip. The injuries to his head and brain were multiple and catastrophic. He suffered a traumatic subarachnoid haemorrhage in the left frontal convexity as well as multiple fractures of the facial bones, nose, zygoma and left orbit. His initial Glasgow coma score was three out of 15, the lowest possible score. He was admitted to intensive care where he required prolonged ventilator support with a feeding tube for his nutrition and hydration. He suffered several episodes of sepsis and remained unconscious. An EEG examination showed significant global cerebral dysfunction. On 5 August 2015 he was transferred to a rehabilitation unit to manage and assess his prolonged disorder of consciousness. As of 27 November 2015 he remained unconscious and was described as being in a persistent vegetative state.

The applicant's arrest, charge, guilty plea and sentence

15. The applicant was arrested for attempted murder on 27 June 2015. He was attended at the police station by a solicitor, Mr Christopher Whitcombe, of Jerman Samuels and Pearson LLP. On advice he went "no comment". The notes record that Mr Whitcombe gave 108 minutes of advice and continue as follows:

> "**The Law/Elements of Offence**
>
> Fully explained law, evidence and seriousness of the case
>
> **Possible Defence(s)**
>
> Lack of intent to kill/cause gbh
>
> **Client's instructions**…
>
> Client accepts arguing with victim, who would not give him a cigarette and was rud[e]. Pushin[g] match occurs, victim swings at client, who punches him back. Punches traded, causing victim to fall to floor and hit his head. Client then kicked him once to area of the face, which caused the head to go back and hit the wall. Accepts the kick was not in self defence, as victim on the floor and he could have withdrawn. Adamant that neither girlfriend nor Ridley would have seen it as they were at the bottom of the road."

16. After interview the applicant was charged with causing grievous bodily harm with intent contrary to s. 18. Mr Whitcombe's notes record the charge and then state:

> "**Advice/Explain Charge**
>
> Yes"

17. The applicant then instructed Mr David Forsyth ("Mr Forsyth"), a solicitor-advocate and joint senior partner of Goodhand & Forsyth LLP, based in Redhill, Surrey. Mr Forsyth was a criminal practitioner with over 30 years' experience at the time. He had held higher rights of audience since 2015. The applicant selected Mr Forsyth because Mr Forsyth had acted previously for many years for the applicant's mother.

18. The applicant appeared first at the Magistrates' Court on 29 June 2015. Mr Forsyth attended on him at court. His attendance note records him spending some 45 minutes in preparation, 40 minutes in court and 2 hours advising the applicant. Bail was refused. Mr Forsyth instructed counsel to renew that application in the Crown Court at the preliminary hearing listed for 8 July 2015. On that application it was indicated that the applicant denied the s. 18 charge. The renewed application for bail was also unsuccessful.

19. The applicant pleaded guilty by videolink on a basis at the plea and case management hearing which took place on 11 September 2015. Again, Mr Forsyth attended that hearing and on the applicant. His attendance note records that he spent 35 minutes attending on the applicant outside court.

20. In his basis of plea at that stage the applicant accepted "full responsibility" for the injuries sustained by Mr Bodimeade. But he did not accept that he kicked Mr Bodimeade at least ten times and any kicks were to the body and not the head. He accepted punching Mr Bodimeade but denied doing so when Mr Bodimeade was on the ground. He stated that he very much regretted the incident.

21. The matter was adjourned to 30 September 2015 in order to allow the prosecution to consider the basis of plea. By letter dated 23 September 2015 the prosecution indicated that it did not accept the applicant's basis of plea, the main concern being the applicant's denial that he punched Mr Bodimeade whilst Mr Bodimeade was on the ground.

22. At the hearing on 30 September 2015, again attended by Mr Forsyth, there was a further discussion as to the applicant's basis of plea. Mr Forsyth's attendance note records that Mr Forsyth spent around one hour and 10 minutes advising the applicant on this occasion.

23. Based on Ms Ridley's second statement, the prosecution did not accept there were fewer than ten kicks or that the applicant had not punched Mr Bodimeade when on the ground. That latter issue was deemed material to sentence. The applicant abandoned his position on that issue. As to the number of kicks, the Judge took the view that a Newton hearing to resolve this dispute was unnecessary. The kicks were an aggravating factor; the precise number was immaterial. It was the subsequent punching when Mr Bodimeade was unconscious on the ground that led to the bleed on the brain and the traumatic injuries. Determination of the number of kicks would not make a material difference to the sentence.

24. The full sentencing hearing took place on 27 November 2015. Mr Forsyth attended to mitigate on behalf of the applicant. By this stage a Pre-Sentence Report was available. Amongst other things, the report recorded that the applicant had stated in interview that:

    i) Mr Bodimeade punched him twice before he struck back;

ii) He retaliated by punching Mr Bodimeade on five occasions;

iii) He accepted that he committed the offence although was still unsure how things "got out of hand";

iv) He did not kick at any point or punch Mr Bodimeade whilst the latter was on the ground;

v) He pleaded guilty "on the advice of his solicitor and not to argue the point of him not kicking Mr Bodimeade" (sic).

25. The Probation Officer's view was that the applicant "significantly minimised the seriousness of his actions and sought to blame [Mr Bodimeade] in interview".

26. The Judge raised the comment by the applicant as recorded in the Pre-Sentence Report to the effect that he had initially acted in self-defence. The Judge asked whether that position was maintained. Mr Forsyth responded to the Judge's query as follows:

> "…..no. He stands by what he said in the basis of plea, that he takes full responsibility for what he's done, and he stands by the fact that he not only kicked the victim, but he also punched the victim… I appreciate on its face it could be interpreted as somewhat as an equivocal situation, but no,… he stands by his pleas".

27. Further, the applicant had written a letter by himself in advance of the hearing to Mr Bodimeade's family expressing his remorse ("the letter of remorse"), relied upon by way of mitigation. In it he wrote:

> "I have no excuse and I take full responsibility….it makes me physically sick knowing what I have done to another person. I cannot believe the amount of injuries I have caused and the condition in which Daniel had been left….I really had not meant to cause the amount of harm I have…..What happened that night was a drunken moment of madness which had devastating consequences…"

Trial advocate's response

28. Given the express criticism being made of Mr Forsyth, the applicant waived privilege and responses have been sought from Mr Forsyth pursuant to the guidance of the Court of Appeal in *R v McCook* [2014] EWCA Crim 734; [2016] 2 Cr App R 30; [2015] Crim LR 350; *R v Lee (James)* [2014] EWCA Crim 2928; and *R v McGill* and others [2017] EWCA Crim 1228. Solicitors' notes have been provided and Mr Forsyth has responded, in summary stating as follows:

i) He held five video conferences (on 2 July, 12 August, 3 September, 8 October and 17 November 2015) with the applicant and three conferences at court (on 11 September, 30 September and 27 November 2015) in total with the applicant when detailed consideration was given to the evidence against the applicant and his intended plea;

ii) The applicant was sent Ms Ridley's statements (under cover of letter dated 29 June 2015). He specifically accepted her evidence, namely that he had kicked Mr Bodimeade on a number of occasions (though not to the head) and that he had punched Mr Bodimeade on around five occasions whilst on the ground;

iii) The applicant was fully advised on the ingredients of the s. 18 offence and that it was necessary for the prosecution to prove that he intended to cause really serious harm. He accepted from the evidence that the gravity of the injuries and the manner of their infliction were such that they could only have been caused by someone who intended to cause really serious harm. Even if the applicant did not specifically assert in terms that he intended to cause serious harm it was apparent to the applicant that that was an ingredient of the offence which the prosecution had to prove and that was what he wished to plead guilty to;

iv) The applicant was "fully aware of the prospect that in pleading guilty to the s. 18 offence he would be admitting murder in the event that [Mr Bodimeade] were to die". There is a note on file dated 7 September 2015 from Mr Goodhand, Mr Forsyth's joint senior partner, stating that this was a "clear s. 18 - there must be some risk that this becomes a murder case given the final para of the medic's statement". The applicant was advised that his plea to s. 18 would be admissible at any subsequent murder trial;

v) The advice was not confirmed in writing, nor was there any written proof. The applicant was clear in his instructions and in the circumstances no endorsement was required. There was no occasion when the applicant indicated that he did not intend to cause serious injury;

vi) Reference was made on several occasions to the Sentencing Council Guideline and categorisation of the offence. The applicant knew that the offence was liable to be classified as a category 1 case with a starting point of 12 years' imprisonment and a range of 9 to 16 years. He was advised to plead guilty in order to secure a lesser sentence, advice which was "perfectly proper". The applicant was advised that it remained his choice and that if he disputed anything alleged against him, he would be entitled to a trial;

vii) The applicant's revised basis of plea was not accepted but it was agreed that the disputed issue would not make a material difference to sentence;

viii) Mr Forsyth's comments are based on his recollection of the case (which he remembers well because of the serious nature of the allegation), from his notes as supplied and on the basis of his usual practice.

Grounds of appeal

29. For the applicant, Mr Mather-Lees submits that the applicant's plea was equivocal. Further, it was entered without full knowledge as to the consequences of that plea, such that it can properly be termed non-deliberate with ambiguity. The conviction that flows can be termed unsafe in all the circumstances.

30. First, at no time did the applicant admit that he intended to cause really serious injury to Mr Bodimeade or give instructions to that effect. This is consistent with the police

station notes where "lack of intent to kill/cause GBH" is noted under the heading of "Potential Defences". There is no contemporaneous record of such an admission and no endorsement as to plea or the requisite intent. Mr Forsyth's response is said to be ambiguous on the point. The applicant's position that he pleaded on advice is borne out by the contents of the pre-sentence report which state as much. Reliance is placed on the letter of remorse where he stated that he "really had not meant to cause the amount of harm that I had". It is submitted that there are documents showing a continuing theme supportive of his contention that he pleaded guilty in order to secure credit on sentence and without accepting the necessary intention for a s. 18 offence. Reference is made, amongst other things, to an undated note in Mr Forsyth's file recording instructions to the effect that he and Mr Bodimeade pushed and punched each other. Mr Bodimeade sustained no significant injury but fell and hit his head on the floor. Ms Roberts and Ms Ridley then came around the corner.

31. Secondly, once Mr Forsyth had a Pre-Sentence Report that was at odds with a guilty plea, that addressed a s. 20 offence, advanced self-defence and made no reference to the applicant having an intention to cause really serious physical harm, coupled with the letter of remorse, Mr Forsyth should have withdrawn.

32. Thirdly, the applicant is said to have been ill-advised. He had no knowledge as to the implications of any plea if Mr Bodimeade were later to die. There is no record of the applicant having been advised in this regard. The court is invited to reject Mr Forsyth's belief to the contrary. Had the applicant known the consequences of his plea in the event of Mr Bodimeade dying, he would never have accepted the advice to plead guilty to secure credit. Nor was the issue of causation of the neurological trauma explored, something which was essential in a case of this gravity.

Grounds of opposition

33. For the respondent, Mr Milliken-Smith submits that the application is without merit. It arises simply because of Mr Bodimeade's death and not because of any meritorious criticism of the applicant's previous solicitor. The lack of any query by the applicant until after the murder charge was laid makes it clear that the applicant's guilty plea was made voluntarily and with the benefit of proper advice.

34. As for intent, the applicant pleaded guilty of his own volition. The wording of the offence was clear. The case against him was strong. Ms Ridley's evidence and the medical evidence were clear. An intention to cause really serious bodily harm could be inferred. Further, there was clear evidence that Mr Bodimeade had no injuries before the attack.

35. Mr Forsyth was clear that the applicant was unambiguous with his instructions. Further, the applicant sat through four hearings (including at the Magistrates' Court) during which the offending was outlined and discussion took place about his basis of plea. The privileged material provided does not assist the applicant, nor does the Pre-Sentence Report or letter of remorse. The evidence on the Mr Forsyth's file, the nature of the facts and concessions made during the course of the hearings demonstrate the applicant's understanding of the issues he faced and the question of intention to cause really serious harm.

36. The cause of the injuries was plain from the evidence; there was evidence of Mr Bodimeade's health before the attack and after. Further, the applicant's own grounds state that causation was not an issue, only intention.

Evidence for the purpose of the appeal

37. Albeit that no written evidence was served to support the applicant's case on this application, the case advanced on his behalf through submissions raised a number of factual disputes, centrally:

    i) Whether or not the applicant understood that, in order to be guilty, he needed to have intended to cause really serious bodily harm at the time of his attack and admitted such intention;

    ii) Whether or not the applicant was advised of the consequences of his guilty plea to the s. 18 offence in the event that Mr Bodimeade were to die.

38. There was also a (lesser) dispute as to the number of video conferences held between Mr Forsyth and the applicant.

39. The applicant gave oral evidence, in brief summary, as follows. He only ever had two video conferences with Mr Forsyth. He saw Mr Forsyth when he went to court. He intended to cause "no harm whatsoever" to Mr Bodimeade. He said so to the probation officer and to Mr Forsyth on a number of occasions. He was not "totally" advised about intent. When he was told that for the s. 18 offence to be committed he had to have intended to cause really serious physical harm, he had responded by saying that he was sure that that did not apply to him. He went on to say that the offence had not been explained to him "whatsoever". He stated that he was told on almost every occasion that he saw Mr Forsyth that he would receive a sentence of nine years' imprisonment, reduced for an early guilty plea to six years' imprisonment of which he would serve only three in custody. He never thought that Mr Bodimeade would die and was never told the consequences for him of a guilty plea to the s. 18 offence if that were to occur. He only punched Mr Bodimeade twice and kicked him once. He knew that on a Newton hearing any disputed facts would be determined. When he pleaded guilty on 11 September 2015 he was "not aware totally" of what he was being charged with; he thought that he had no alternative. He tried every time to argue with Mr Forsyth that he did not intend to cause any harm. He said that he said to Mr Forsyth:

> "…this is not right. I am being charged with intent to cause GBH. Mr Forsyth did go into s. 20 and explained it "a little bit". He said that it was the same as a s. 18 offence but without the intentional part. I said s. 20 was what I would agree to…"

40. He stated that when he pleaded guilty he wanted to say that he had not intended to cause really serious harm but felt that it would be rude to interrupt.

41. The applicant was cross-examined. Again, in summary, he said that he could not remember how his basis of plea came to be altered. He did not believe it was because he had discussed it with Mr Forsyth. He did not complain to Mr Forsyth between 30 September and 27 November 2015 because he was not thinking clearly. He stated that Mr Forsyth advised him that the offending would be "high end" category 2 or "low

end" category 1 with the Sentencing Council Guideline as maximum. Mr Forsyth did not explain dangerousness (for the purpose of ss. 226A of the Criminal Justice Act 2003) ("dangerousness"), something about which he was not warned. When dangerousness was mentioned by the Judge on 30 September 2015, the applicant stated that he did not understand what was going on in court. He would never have pleaded guilty to the s. 18 offence if he had known would that entailed.

42. Mr Forsyth gave oral evidence in a calm, low-key and professional manner. He confirmed the accuracy of his written responses as set out above (subject to minor modification of the court hearing dates). He confirmed that he had explained the difference between s. 18 and s. 20 offending to the applicant before he entered his guilty plea. Realistically, s. 20 was not an option, as reflected in the notes made by Mr Goodhand, which Mr Forsyth read on or about 7 September 2015 and before the applicant pleaded guilty. The applicant never said to him that he did not intend to cause really serious harm. He advised the applicant on the merits but left the decision whether or not to plead guilty to him. He "absolutely" did not advise the applicant that he would receive a sentence of 6 years (after credit for guilty plea from a term of 9 years). Even at an early stage he was referring to a category 1 starting point of 12 years. As for a record of admission, Mr Forsyth referred to his manuscript notes in the margin of Ms Ridley's second statement which recorded the applicant accepting the central parts of her evidence, namely that she saw him kicking Mr Bodimeade on a number of occasions (though not to the head) and punching Mr Bodimeade on around five occasions whilst on the ground. The applicant did not state that Ms Ridley was not present. Mr Forsyth said that he advised the applicant on more than one occasion before his guilty plea as to the potential for a murder charge and his liability as a result of a guilty plea to the s. 18 offence. The applicant committed to a guilty plea in the course of discussions with Mr Forsyth on 3 and 11 September 2015. Mr Forsyth did not accept the applicant's version of events on this application.

43. We have no hesitation in preferring the evidence of Mr Forsyth over that of the applicant on any material areas of factual dispute. The applicant was a wholly unreliable witness. By way of example only;

i) He accepted that he was advised about the necessary intent for a s. 18 offence but in the same breath said that he was not advised about the s. 18 offence at all;

ii) Before oral evidence, Mr Mather-Lees informed the court that the applicant's case was that the distinction between a s. 18 offence and a s. 20 offence was not explained to him. In oral evidence, however, the applicant stated that that distinction was in fact explained to him (and, we add, accurately so);

iii) The suggestion that the applicant was unaware of, and not advised, as to dangerousness is incredible. Dangerousness was mentioned in open court on 30 September 2015. It was the reason why a Pre-Sentence Report was commissioned and expressly addressed in that report. Moreover, once the applicant had received an extended sentence based on a finding of dangerousness, he made no complaint about the advice that he had received, including in the context of his application for leave to appeal against sentence (including against the finding of dangerousness).

44. We set out our key findings on the facts so far as necessary below.

Analysis

45. The principles on which a defendant may be permitted to go behind a plea of guilty are well-established: for a useful summary see the judgment of Lord Hughes in *R v Asiedu* [2015] EWCA Crim 714 at [19] to [25]. The trial process is not a "tactical game" (see [32]). A defendant who has admitted facts which constitute an offence by an unambiguous and deliberately intended plea of guilty cannot ordinarily appeal against conviction, since there is nothing unsafe about a conviction based on his own voluntary confession in open court. A defendant will not normally be permitted on appeal to say that he has changed his mind and now wishes to deny what he has previously admitted in the Crown Court.

46. Apart from pleas which are equivocal or unintended, the two principal exceptions are i) whether the plea was compelled as a matter of law by an adverse ruling by the trial judge which left no arguable defence to be put to the jury and ii) where, even if on the admitted or assumed facts the defendant was guilty, there was a legal obstacle to his being tried for the offence.

47. Beyond that, there is the general jurisdiction under s. 2(1) of the Criminal Appeal Act 1968. If a defendant who has pleaded guilty can bring himself within that section, the court will be bound to quash the conviction (see *R v Boal* [1992] 1 QB 591; [1992] 95 Cr App R 272). However, the fact that the defendant had been fit to plead, known what he was doing, intended to plead guilty and had done so without equivocation and after receiving expert advice will be highly relevant to the question of whether or not the conviction is unsafe (see *R v Lee (Bruce)* [1984] 1 WLR 578; [1984] 79 Cr App R 108).

48. Where a defendant enters a guilty plea and subsequently appeals on the basis that the plea was entered following erroneous legal advice, the facts must be so strong as to show that the plea of guilty was not a true acknowledgement of guilt; the advice must have gone to the heart of the plea (see *R v Saik* [2005] 1 Archbold News 1). However, a conviction based on a plea of guilty may be held to be unsafe on account of erroneous legal advice, or a failure to advise as to a possible defence, notwithstanding that the advice may not have been so fundamental as to have rendered the plea a nullity. But the court will only intervene if it believes that, with the benefit of correct advice, there would probably have been an acquittal and that therefore an injustice has been done. In *R v K* [2017] EWCA Crim 486; [2017] Crim LR 716 (at [12]) this court emphasised the observations in *Boal* (supra) to the effect that this court will only intervene where it believes that the defendant has been deprived of what was in all likelihood a good defence which would quite probably have succeeded and thus a clear injustice has been done: "[i]t would not happen often".

49. We conclude that it is not arguable that the applicant's guilty plea was equivocal or that his consequent conviction is unsafe in all the circumstances.

50. A plea will only be equivocal if its terms include an assertion or qualification which amounts to a denial of an essential ingredient of the offence. There is nothing on the facts here that comes close to such an assertion or qualification.

51. The applicant points to the record of what he said in his interview with the probation officer for the purpose of the pre-sentence report to the effect that it was Mr Bodimeade who first punched him (twice). This is to place undue weight on the applicant's version

of events in interview. As the respondent points out, the applicant has given variously inconsistent versions of events. His defence case statement served in the current murder proceedings is not consistent with what is recorded in the pre-sentence report. Further, the Probation Officer was of the view that the applicant was deliberately minimising his gravity of his offending. That aside and in any event, the Judge's query arising out the pre-sentence report related to the suggestion of a defence of self-defence (and even then only at the outset), not lack of intent. The two issues are not intrinsically linked, as Mr Mather-Lees submits. And Mr Forsyth, in the presence of the applicant, made it crystal-clear that self-defence was not pursued in any way by way of defence - nor could it realistically ever have been pursued. Further, the Pre-Sentence Report records the applicant "accept[ing] that he committed this offence".

52. The applicant also points to the letter of remorse. Whilst the applicant may say that he did not intend the full extent of the injuries that he in fact caused (as he said in his letter of remorse produced in mitigation), that is in no way the equivalent of meaning that he did not intend to cause really serious bodily harm. The letter of remorse was not in any way at odds with an admission of the necessary intent.

53. We turn then to the question of overall safety of the conviction. The thrust of the application is that the applicant was so poorly advised and represented that his conviction on his unequivocal guilty plea is unsafe. He never admitted the necessary intent to cause really serious bodily harm. His instructions to the effect that he did not have such intention were ignored or overridden. He did not know that, were Mr Bodimeade to die, his admission to intent to the s. 18 offence would amount to an admission of the necessary intention for the offence of murder.

54. We are not persuaded that there is any arguable merit that there is any overarching lack of safety of conviction.

55. There was a compelling, if not overwhelming, case on the question of intention, given, amongst other things, i) the nature of what was a vicious and sustained attack involving blows to Mr Bodimeade's head as well as his upper body ii) the fact that the applicant did not cease the assault of his own accord and iii) the evidence as to what the applicant said in the immediate aftermath, namely that he believed that he had killed Mr Bodimeade.

56. We are sure that the applicant was in no doubt as to the scope of his plea of guilty, and that he knew that he was thereby admitting an intention to cause really serious harm to Mr Bodimeade at the time of his attack, and that he pleaded guilty of his own free will.

57. We have set out above our overall finding as to the applicant’s credibility in his evidence on this application. Beyond that;

    i) The Police Station Notes record that the applicant was fully advised as to the law in the context of a contemplated charge of attempted murder or under s. 18. He was fully on notice that an ingredient of a s. 18 offence was an intention to cause really serious physical harm. The applicant accepted that it was discussed on this occasion. It was also clear that he was aware of the necessary intention for attempted murder. The fact that lack of intent to kill or cause grievous bodily harm was noted as a potential defence does not assist, not least since it was a comment made at a very early stage in the proceedings;

ii) The relevant intention is spelt out clearly in the ingredients of the offence set out on the face of the indictment in the words of the count to which the applicant responded and pleaded guilty;

iii) The applicant is literate, eloquent and was fully engaged in the criminal process, as evidenced for example by his original basis of plea. He was an apprentice in employment at the time of the attack. He attended several court hearings where the evidence and detail of the case were ventilated. He was there to hear Mr Forsyth spell out his position to the Judge by reference to the pre-sentence report and made no intervention, nor did he indicate any disagreement. In his evidence before us he demonstrated a good understanding of what a Newton hearing was and of the relevant Sentencing Council Guideline;

iv) We find that the applicant was advised fully by Mr Forsyth over the course of several video[i] and 2 court conferences where detailed consideration was given to the evidence against him and his intended plea. The applicant was sent the prosecution witness statements, including those from Ms Ridley. The applicant was, as Mr Forsyth says and indeed as the applicant accepted in his oral evidence, fully aware that an essential ingredient of the s. 18 offence was an intention to cause really serious bodily harm;

v) We accept the evidence of Mr Forsyth that the applicant was clear in his instructions and knew precisely to what he was pleading guilty. Mr Forsyth was a qualified solicitor with over 30 years' experience. He had a good recollection given that the case stuck out in his mind because of the gravity of the offending. There is evidence of careful consideration by him of his brief. So for example he spoke with the author of the Pre-Sentence Report. He was perfectly prepared to take issue on behalf of the applicant where necessary, for example mounting his application for leave to appeal against sentence. Mr Goodhand also read the file and made notes to the effect that this was a "clear" s. 18 offence. It is fanciful to suggest that he would somehow have ignored and/or overridden any instructions from the applicant to the effect that he did not have the necessary intention;

vi) The lack of written record only helps the applicant so far in circumstances where there is no written record of any of the advice which it is common ground was given to the applicant before he entered his guilty plea. It is common ground that the applicant was advised, for example, that it would be in his interests to plead guilty. So this is not a case of there being a record of the advice given which is silent on the question of intention, which could be said to give rise to an inference that advice on the question of intention was omitted;

vii) The fact that the applicant did not raise any concerns in relation to his guilty plea until after Mr Bodimeade's death is significant. He had the opportunity both in the context of his application for leave to appeal sentence and in the following years in custody to raise the issue. He did not do so.

58. Not only did the applicant write the letter of remorse, he also entered a basis of plea in which he accepted "full responsibility" for Mr Bodimeade's injuries. There was a dispute as to the number of times that he kicked Mr Bodimeade whilst unconscious. But that was immaterial given that he accepted i) that he did kick Mr Bodimeade (to

the chest) and more importantly ii) Miss Ridley's account that he punched Mr Bodimeade around 5 times to the head whilst he was unconscious and with such force that Mr Bodimeade's head hit the wall on each occasion. We find the manuscript notes made by Mr Forsyth on Miss Ridley's second statement recording the applicant's acceptance of her evidence compelling. It was this punching that caused the brain damage. We see no arguable merit in the complaint that expert evidence on causation was not obtained on behalf of the applicant. There was clear evidence of the attack and of the resulting injuries consistent with the attack as described by the witnesses. There was no sensible basis for contending that the applicant's actions were not responsible for causing all of Mr Bodimeade's head injuries.

59. It was Mr Forsyth's duty to advise the applicant on the merits of the case on the evidence against him. The applicant was advised, unsurprisingly, that it was in his interests to plead guilty. As already indicated, there was a compelling, if not overwhelming, case against him and he would receive the benefit of a significant reduction in sentence by way of credit for his plea. It is misconceived to suggest that a defendant who pleads guilty on the basis of his lawyer's advice as to the strength of the evidence and the advantage to be gained in relation to sentence can then assert that his guilty plea was equivocal because it was entered merely because of the lawyer's advice.

60. Further, ignoring for present purposes the question of whether or not he was under a duty to do so, we find that Mr Forsyth did advise the applicant that his plea to the s. 18 offence would leave him open to a conviction of murder should Mr Bodimeade die, as has sadly happened. We accept Mr Forsyth's evidence in this regard. There was focus throughout the proceedings as to whether or not Mr Bodimeade would survive. The applicant was charged originally with attempted murder. This finding is consistent with the notes on file dated 7 September 2015 from Mr Goodhand prepared for Mr Forsyth's "assistance". From these it is apparent that the applicant's solicitors were very much alive to the risk that this could become a murder case given the medical evidence available. The possibility of a murder charge was also mentioned in open court on 11 September 2015 when the applicant entered his guilty plea. The letter from Mr Forsyth dated 25 March 2019 notifying the applicant of Mr Bodimeade's death does not suggest that the possibility now of a murder charge would be a shock or unexpected to the applicant (although the death so many years after the attack was).

61. But even if the applicant was not so advised, we do not consider that that would render his conviction unsafe. It would not undermine his admission of the necessary ingredients of the s. 18 offence. Either he committed the s. 18 offence or he did not. The issue did not go to the heart of the plea; rather it ran parallel to it.

62. In short, we accept the respondent's submission that this appeal arises out of the death of Mr Bodimeade and the consequent murder charge, as opposed to any underlying substantive merit in the proposition that the applicant's plea to the s. 18 offence was equivocal or his conviction unsafe. It was clear from the applicant's evidence before us, including from his demeanour and lengthy and exercised answers, that his over-arching concern is and always has been the length of time that he would or may have to serve in custody. This application is a misconceived reaction to the potential conviction and resulting sentence that he now may face on a charge of murder. The applicant cannot now attempt to unravel his guilty plea because of the potential consequences that he faces in the circumstances which have now arisen. There has been no arguable injustice, let alone a clear one.

Extension of time

63. An extension of time will only be granted where there is good reason to give it and ordinarily where the defendant will otherwise suffer significant injustice: see *R v Hughes* [2009] EWCA Crim 841 at [20]). The principled approach is to grant an extension if it is in the interests of justice to do so: see *R v Thorsby* [2015] EWCA Crim 1. The court will examine the merits of the underlying grounds before decision whether to grant an extension of time.

64. In circumstances where we have found no arguable merit in an appeal, and where the delay in question is very significant, we do not consider it appropriate to grant the necessary extension of time.

Conclusion

65. For all these reasons, we dismiss both the application for leave to appeal and for an extension of time.

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[i] The precise number may not matter but there were at least two video conferences before the applicant entered his guilty plea: one on 12 August and one on 3 September 2015.