Neutral Citation Number: [2020] EWCA Crim 1314

Case No: 201802236 B3, 201802376 B3 & 201802397 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM CROWN COURT LEICESTER
HHJ MOONCEY
T20177047 & T20177330

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2020

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE JAY
and
MR JUSTICE HENSHAW

- -

Between :

Liban YARYARE	**1st Appellant**
Khalid HASSAN	**2nd Appellant**
Yahaya OSMAN	**3rd Appellant**
- and –	
REGINA	**Respondent**

- -
- -

Mr B Bhatia QC & Ms I Nedelcu (instructed by **Hampton Solicitors**) for the **1st Appellant**
Mr B Bhatia QC & Mr N Murphy (instructed by **Hampton Solicitors**) for the **2nd Appellant**
Mr C Witcher and Ms E Thornber (instructed by **MFI Law**) for the **3rd Appellant**
Mr P Jarvis & Mr D Bishop (instructed by **CPS Appeals & Review Unit**) for the **Respondent**

Hearing dates: 28th July 2020

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Approved Judgment

Lord Justice Fulford :

Introduction

1. On 10 May 2018 at Leicester Crown Court before Judge Mooncey and a jury, Liban Yaryare, Khalid Hassan and Yahaya Osman were convicted of the various offences described below, for which they were sentenced on 12 October 2018.

2. Liban Yaryare (now aged 24) was sentenced on count 1 (violent disorder at the High Cross Shopping Centre, contrary to section 2 Public Order Act 1986) to 12 months' imprisonment; on count 2 (conspiracy to commit violent disorder at Lower Brown Street, contrary to section 1 Criminal Law Act 1977) to 12 months' imprisonment, to be served consecutively to the sentence on count 8; on count 6 (a like conspiracy to count 2, an offence at the Bede Park) to 2 years' imprisonment; and on count 8 (attempted murder) to 13 years 6 months' imprisonment. The total sentence, therefore, was 14 years 6 months' imprisonment, to be served consecutively to a sentence he was already serving of 3 years' imprisonment. On 25 January 2019, following an Attorney General's Reference ([2019] EWCA Crim 78), the sentence on count 8 (attempted murder) was increased to 17 years 6 months' imprisonment. The other sentences were unchanged and the sentence on count 2 remained a consecutive sentence to that imposed on count 8. The total sentence, therefore, following the Reference, was 18 years 6 months' imprisonment (to run consecutively to the sentence of 3 years).

3. Khalid Hassan (now aged 26) was convicted on counts 6 and 8 (respectively conspiracy to commit violent disorder at Bede Park and attempted murder) and he was sentenced to 2 years' imprisonment on count 6 and 13 years' imprisonment, to be served concurrently, on count 8.

4. Yahaya Osman (now aged 24) was convicted on counts 2 and 6 (conspiracy to commit violent disorder at Lower Brown Street and Bede Park respectively), and he was sentenced to 1 year's imprisonment on count 2 and two years' imprisonment, to be served consecutively, on count 6. As a result of the commission of these offences, the appellant was in breach of a Suspended Sentence Order of 12 months' imprisonment for robbery, which was activated in full. His total sentence, therefore, was 4 years' imprisonment.

5. They stood trial with various co-accused, who, as relevant, are referred to in the summary of the facts below.

The Issues

6. Yaryare appeals against his conviction by leave of the single judge, limited to ground 1 (the judge's refusal to exclude the recognition evidence of DC Bee pursuant to section 78 Police and Criminal Evidence Act 1984 ("section 78")) and ground 2 (the judge's refusal to direct the jury as to the dangers identified by the Court of Appeal in *R v Smith and Others* [2008] EWCA Crim 1342; (2009) 1 Cr App R 36 and to correct a suggested false impression created by DC Bee as to the lack of an obligation to take notes). He renews his application for leave to appeal against conviction on ground 3 (the submission of no case to answer). On 31 March 2020 the full court refused Yaryare's renewed application in respect of ground 4 in which he sought to leave to adduce fresh evidence ([2020] EWCA Crim 661).

7. Hassan appeals against conviction by leave of the single judge on ground 1 (which mirrors ground 1 as advanced by Yaryare). He renews his application for leave to appeal against conviction on ground 2 (the submission of no case to answer).

8. Osman appeals against conviction by leave of the single judge, limited to grounds 1 and 2 (which mirror grounds 1 and 2 as advanced by Yaryare). He renews his application for leave to appeal against conviction on ground 3 (the admission of bad character evidence).

9. In summary, therefore, the single judge granted leave on two grounds: first, whether the judge erred in admitting the recognition evidence of DC Emma Bee and, second, whether the judge erred in failing to direct the jury as to the dangers identified by the Court of Appeal in *R v Smith* and in failing to correct a suggested false impression created by DC Bee, to the effect that there was no obligation to take notes in a recognition case such as the present. During the hearing of the appeal this latter ground was, with the leave of the court, argued by all three appellants, it having not been included as one of Hassan's grounds of appeal.

10. Additionally, Yaryare and Hassan renew their applications for leave to argue that the judge should have upheld their submissions of no case to answer and Osman renews his application for leave to argue that the judge erred in admitting bad character evidence.

The Facts

Introduction

11. During Thursday 30 April 2015 there were a number of violent altercations between two opposing groups (identified at trial as Group 1 ("Green Group") and Group 2 ("Blue Group")), which culminated in the attempted murder of Gideon Buabeng, who was stabbed 11 times in Bede Park, Leicester.

12. Group 1/Green Group consisted of men mainly of Somali descent, amongst whom were Liban Yaryare, Abdulhakim Yassin, Khalid Hassan, Abass Hudur, Soubane Ismail, Anwar Mire, Khalid Abdirahim, Yahaya Osman, Ahmed Abdullahi, Sakariye Garane and Lydon D'Costa.

13. Group 2/Blue Group consisted of men of either African or Asian heritage and included the twin brothers, Alfred and Wilfred Yimbo, the brothers Ahmad Siyar Hakimi and Ahmad Sayam Hakimi, Aslam Sakha, Vahees Nagulesparan, Abdullah Imran, Jermain Felix, Goncalo Teixeira, Joel Adu-Bosompem, Mozes Junior Banjo, Mahad Ahmed and Anthony Ekundayo.

14. It is necessary to explain the structure of the indictment. It contained 8 counts, which reflected the entirety of the violence:

The first set of events

i) Count 1 related to events at the High Cross Shopping Centre, Leicester, in that eleven of the defendants were charged with violent disorder at that location during the course of the afternoon of 30 April 2015.

The second set of events

ii) Counts 2 – 5 concerned events, during the early evening, in Lower Brown Street, Leicester. In this regard there were two charges of conspiracy to commit violent disorder (one for each group), and two charges of having an offensive weapon (a large knife) against two of the defendants from Group 2.

The third set of events

iii) Counts 6 – 8 reflected events later that night at Bede Park, Leicester. 15 defendants were charged. There were two counts of conspiracy to commit violent disorder (one for each group). Four of the defendants from Group 1 were also charged with attempted murder at this location.

The first incident: High Cross Shopping Centre (Count 1)

15. The first event, therefore, related to a violent disorder at the High Cross Shopping Centre. This occurred at approximately 4.30 pm 30 April 2015,

and it involved the defendants Liban Yaryare, Abass Hudur and Khalid Abdirahim from Group 1 and Jermain Felix, the Yimbo brothers, the Hakimi brothers, Aslam Sakha, Vahees Nagulesparan and Abdullah Imran from Group 2. As set out above, this was the subject matter of count 1.

16. The precise cause of the disturbance remains unknown. CCTV footage showed a confrontation between the two groups which culminated in a brief but intensely violent fight. Security staff intervened and separated those involved. The members of Group 1 came off worse and some of them made contact with their associates via their mobile telephones, and shortly afterwards other young men arrived. By that time Group 2 had left the scene.

17. Following the events at the High Cross Shopping Centre, call data evidence suggests there was contact between the two groups and arrangements were made to meet. These exchanges, in the main, involved Joel Adu-Bosompem, Goncalo Teixeira and Ahmed Abdullahi. An attempt by members of the two groups to gather at Bede Park at about 6.30 pm failed, albeit CCTV footage showed some of Group 1 in the area of Bede Park when two vehicles arrived at the scene. The first was a dark blue series 5 BMW containing Liban Yaryare, Abass Hudur, Sharmarke Yaryare and two unidentified males. Shortly afterwards, a grey BMW series 1 arrived, driven by Sakariye Garane with Abdulhakim Yassin and Lydon D'Costa as passengers. They had planned to meet with Goncalo Teixeira who, for reasons that are unclear, failed to appear at the time arranged. Instead, he was caught on CCTV footage with Anthony Ekundayo, Joel Adu-Bosompem, Gideon Buabeng and two unidentified men walking back towards Buabeng's house.

The second incident: Lower Brown Street (Counts 2 – 5)

18. There was further contact between the two groups and a meeting was arranged once members of Group 1 started to threaten the safety of Goncalo Teixeira's mother. At about 7.20 pm the groups came together on Lower Brown Street in Leicester. By this time each group had grown in number and there were, overall, in excess of 30 people now involved. Call data confirmed that Goncalo Teixeira made a call at 6.59 pm to Jermain Felix to request the help of him and his friends, all of whom had been involved in the earlier incident at the High Cross Shopping Centre.

19. Elizabeth Rutherford saw Mahad Ahmed and Goncalo Teixeira pass a large kitchen knife between them as she stood in the street waiting for a friend. There were a number of calls to the police. Officers attended but the defendants and their associates left, some on foot and some in cars. No one was detained. Among those present from Group 2 were Anthony

Ekundayo, Goncalo Teixeira, Joel Adu-Bosompem, Mahad Ahmed, Mozes Junior Banjo, Jermain Felix, Alfred Yimbo, Wilfred Yimbo, Ahmad Siyar Hakimi, Ahmad Sayam Hakimi, Aslam Sakha, Vahees Nagulesparan and Abdullah Imran. From Group 1 there were Liban Yaryare, Abdulhakim Yassin, Abass Hudur, Yahaya Osman, Sakariye Garane, Ahmed Abdullahi, Lydon D'Costa, Soubane Ismail and Anwar Mire.

The third incident: Bede Park (Counts 6 – 8)

20. As regards counts 6 – 8, from about 8.00 pm members of Group 1 started to congregate in Bede Park. There were a number of vehicles at the scene, some of which were not stationary. There were a number of calls to the police, starting at 9.01 pm. A police vehicle drove along Briton Street and along Western Road near Tarragon Road. The officers then left the area.

21. Buabeng was called by his friend, Joel Adu-Bosompem. Adu-Bosompem asked him if he could join them to help him sort out a problem but he was not given any details. Call data showed that Group 1 had planned to meet members of Group 2. The members of Group 2 that attended Bede Park at this time were Anthony Ekundayo, Goncalo Teixeira, Joel Adu-Bosompem, Mahad Ahmed, Mozes Banjo and two unidentified males. Upon arrival they were met by a large group of Somalian males. They initially retreated, but Teixeira made the decision that they had to go back into Bede Park to sort out the problem. As they walked into the Park, more Somalian males joined them, with the result that there were 30-40 Somalian males in total.

22. Liban Yaryare, Abdulhakim Yassin, Khalid Hassan, Abass Hudur, Yahaya Osman, Sakariye Garane, Khalid Abdirahim, Ahmed Abdullahi, Soubane Ismail and Anwar Mire, all from Group 1, were in Bede Park. Call data showed that the two defendants most involved in arranging the meeting were Ahmed Abdullahi (from Group 1) and Ekundayo (from Group 2). A large number of those in Group 1 remain unidentified.

23. Buabeng testified that as they got nearer to the opposing group on Bede Park it was clear they were brandishing weapons, and as a result they decided to leave. Although the members of his group ran away from the Park back over the bridge, towards Briton Street, Buabeng ran into the Park chased by members of Group 1, who were brandishing weapons. He was pushed to the ground and attacked with multiple weapons by many individuals. He received 11 stab wounds to his body.

The prosecution's evidence

24. At trial, in addition to the testimony of Buabeng, the prosecution relied principally on four strands of evidence. First, given each of the incidents was

captured by CCTV recordings, recognition evidence from the officer in the case, DC Emma Bee. Second, evidence from a facial mapping expert, William Platts, which provided support for DC Bee's identifications. Third, evidence showing the movements of some of the relevant mobile telephones and the details of contact between some of those involved. Fourth, various exhibits seized from the respective defendants.

The appellants' defence

25. The defence of these three appellants was that they had been incorrectly identified by DC Bee.

The Grounds of Appeal

Ground 1 (the admissibility of DC Bee's evidence)

26. The prosecution sought, therefore, to rely upon the evidence of DC Bee who had recognised a number of suspects from the CCTV footage of these incidents, which she stated she had studied for many hours ("hundreds/thousands"). From the outset the appellants accepted that DC Bee, as a matter of law, was entitled – subject always to the particular circumstances of the case – to give evidence as an expert on the CCTV footage. This included giving evidence as to those she recognised as allegedly participating in the relevant offences.

27. However, there were substantive objections to the admissibility of this evidence, founded on the circumstances of the recognition. Most notably, it was highlighted that DC Bee first provided a witness statement setting out why she had arrived at her conclusions as to the identification of the suspects considerably after she commenced viewing the CCTV footage and she had failed to maintain a satisfactory log.

28. In her first relevant statement dated 25 May 2017 (served on 2 June 2017), DC Bee indicated:

> "(The) compilations show footage relating to each incident and footage relating to that individual defendant, who is highlighted with an identifying marker for the first few frames of each clip. I have identified each on the footage through a number of means. I have met all of the defendants in person. I have interviewed most of the defendants, some of the defendants have identified themselves during interview on the CCTV, and I have viewed the CCTV footage over prolonged periods on numerous occasions throughout this investigation. I have also had the assistance from the identifications

provided by facial recognition expert William Platt from Forensic Visual Services.

I will provide a more detailed explanatory statement regarding how I have identified the defendants on the footage, and how I compiled the CCTV compilations in due course."

29. On 1 August 2017, she dealt with the issue in more detail:

"All of the CCTV has been gathered by other officers during this investigation. This CCTV has been gathered and reviewed and a compilation of relevant footage has been produced. I have continually reviewed this CCTV throughout this investigation.

I have viewed this footage hundreds of times since starting this investigation, over many hours. Some of the footage I have watched over and over again. It is difficult to quantify the hours that I have watched the footage over the last 2 years, but I have watched the footage hundreds of times in detail, scrutinising the various people featured on the footage and looking at their actions and their movements. As a consequence of this viewing I have become familiar with the people it features and I am able to recognise and identify the various people as they move from one piece of footage to another.

I have liaised with expert witnesses to assist on this case. This has involved me reviewing the CCTV for hours to enable me to produce chronologies of events to assist them.

Throughout the investigation I have met all of the 23 defendants in this case, having done so I have made the following identifications from the CCTV.

Liban Yaryare: Subject A

Liban Yaryare has denied presence at every scene.

I have met Yaryare personally when I interviewed him. I also charged Yaryare and have seen him on numerous occasions at court. I have viewed public social media sites where I have seen images of him. I have viewed footage of him whilst he has been in police custody and in the police station front enquiry office. I

have also viewed CCTV footage of him in relation to unrelated matters.

Appendix G shows a number of CCTV stills where I am satisfied that the man highlighted is the defendant Liban Yaryare.

I am satisfied that I have identified him at the Highcross incident, the first failed attempt to meet at Bede Park, the Lower Brown Street incident and at the final incident at Bede Street.

Khalid Hassan: Subject C

Khalid Hassan made no comment to all questions relating to his presence at every scene.

I have met Hassan personally when I interviewed him. I also charged Hassan. I have viewed public social media sites where I have seen images of him. I have viewed footage of him whilst he has been in police custody and in the police station front entry desk.

Appendix I shows a number of CCTV stills where I am satisfied that the man highlighted is the defendant Khalid Hassan.

I am satisfied that I have identified him outside the shopping centre after the High Cross incident and at the final incident at Bede Park.

Yahaya Osman: Subject J

Yahaya Osman made no comment to all questions relating to his presence at every scene.

I have met Osman personally when I interviewed him. Albeit I did not charge him, I was present when he was charged. I have viewed public social media sites where I have seen images of him. I have viewed footage of him whilst he has been in police custody and in the police station front enquiry desk.

Appendix O shows a number of CCTV stills where I am satisfied that the man highlighted is the defendant Yahaya Osman.

I am satisfied that I have identified him outside the shopping centre after the High Cross incident, at the Lower Brown Street incident and at the final incident at Bede Park."

30. She annexed photographs, *inter alia*, of the individuals who she said matched these three appellants from the CCTV footage.

31. Written applications were served to exclude her evidence, and this led to a further short statement from DC Bee dated 26 February 2018 in which she explained that over the course of the investigation she had completed 21 investigation workbooks and 3 interviewing workbooks. She exhibited extracts from this material that related to her consideration of the CCTV footage (served on 6 March 2018).

32. On 1 March 2018 (three days after the trial had commenced), she completed a further statement in which she set out in greater detail the grounds for her identifications (also served on 6 March 2018). She rehearsed that she had been involved in the investigation for nearly 3 years as the sole investigating officer. She had viewed the CCTV on multiple occasions and, working with experts, she had compiled an edited CCTV compilation of each of the defendants, which she continually reviewed. She said that it was difficult to quantify the exact number of hours she had spent watching the footage, but it amounted, at least, to hundreds of separate occasions. She considered each relevant individual, focussing on their appearance, action and movements. She became familiar with those featured and was able to recognise some but not all of those involved as they moved from one section of footage to another. Additionally, her work with the telephone analyst and interviewing the suspects (which involved reviewing the footage), resulted in further detailed consideration of the footage.

33. She obtained photographs and CCTV footage of the appellant **Yaryare** from a number of different sources, including from his Facebook page, CCTV footage of him in the front enquiry office at Mansfield House Police station and footage whilst he was in custody. She worked from a compilation of the still photographs from which she had identified Yaryare at the separate incidents. As already indicated, she interviewed Yaryare, and took him in detail through the relevant parts of the CCTV footage. She explained her reasons for identifying him, namely by reason of height, age, ethnicity, walk and posture ("stands with his shoulders rounded and his hips forward"), hairline, shape of his lips, ear position and skin colour. Subject A had been wearing the same clothing in all the footage. In evidence DC Bee referred also to the shape of his eyes.

34. She interviewed **Hassan**, but he was not shown the footage during this process, as he had not been identified by that stage. There is no CCTV

evidence placing Hassan at the Lower Brown Street incident. She was in possession of photographs and CCTV footage of Hassan from a number of sources, including from a Facebook page ("Kh Al id") and his Cash Convertors account. DC Bee looked at footage of Hassan at the front desk enquiry office at Beaumont Leys Police Station and footage of him whilst in custody. She worked from a selection of still photographs from which she identified Hassan as being present at the incidents, and she provided a compilation of the relevant CCTV footage. She noted his height (approximately 5' 10"), that he was of medium to large build, with "wider hips and posterior". DC Bee took account of the similarities between Hassan and subject C, as regards age, ethnicity, and skin tone. She remarked on the similar distinctive features of shape, build and posture which were reflected in the way the appellant and the suspect moved and their style of walking. When standing, the two appeared to "lean" on one side and their walk is described as a prominent "waddle". Against that background, DC Bee suggested that when comparing these features with subject C in the Highcross and Bede Park footage, the "stance and walking style have distinct similarities". DC Bee observed that on the Highcross footage, notwithstanding the fact that the suspect is wearing a hood, the viewer is afforded "glances" of his face, which reveal the same shaped mouth as Hassan, with dark shadowing on the upper lip. She opined that this is likely to be dark short facial hair, the same as seen on Hassan. For the Bede Park footage, subject C had been wearing a hood, but on occasions the viewer got glimpses of his hair and hairline as the hood moved back. Again, this matched Hassan's hair and hairline. The clothing was identical throughout the footage. Finally, there were strong other links between Hassan and some of his co accused.

35. DC Bee interviewed **Osman** and she charged him when he answered to his bail. She looked at Yaryare's Facebook page entitled "Liban Ya", where there were photographs of him along with Osman. She also obtained a photograph of him from his Cash Converters account. As with the other two appellants, she reviewed CCTV footage of Osman at the police station (albeit in relation to a different investigation). She created a compilation video. Osman was approximately 6' tall. He and suspect J shared the same slim build, they were of the same age group and ethnicity, and had the same skin tone. They each had a prominent hooked nose, which was indistinguishable as between the two men. Throughout the relevant footage of the incidents, J was wearing the same top with a blue stripe down the shoulders and the arms (the only difference being that on the Bede Park footage he was also wearing a body warmer). Osman attended Keysham Lane Police Station wearing a distinctly similar garment. DC Bee concluded that Osman and J were the same person,

and that the top worn at the police station was "extremely similar" to the one viewed in the footage.

36. As set out above, the defence were served with DC Bee's workbooks which contained her contemporaneous notes or jotting concerning aspects of the investigation. They have the semblance of hasty entries, that are far from complete. They appear to represent a handwritten record of particular matters that attracted the officer's attention or which for some reason were thought to require a brief record. They did not contain any record as to why, at any particular stage in this process, the officer concluded a particular individual shown on the CCTV footage was one of the defendants, and they did not amount to contemporaneous notes made by her when watching the CCTV. She indicated in cross-examination that she relied to a significant extent on her memory ("it's all up here").

37. The applications to exclude the evidence of DC Bee pursuant to section 78 were made on 26 March 2018.

38. Before analysing the judge's approach to this issue, it is necessary to have in mind that this court has previously considered the circumstances when an identification takes place broadly in line with the procedure adopted by DC Bee. In *AG Ref. No.2 of 2002* [2002] EWCA Crim 2373; [2003] 1 Cr App R 21 the court at [19] stated as follows:

> *"In our judgment, on the authorities, there are, as it seems to us (at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, subject to appropriate directions in the summing-up) a jury can be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:*
>
> […]
>
> *(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare & Peach);*
>
> […]

39. The appellants particularly relied on *Smith* as indicating the kind of procedural safeguards that should have been in place in the present case. In *Smith* police officers, who had not been present during the events in question, purported to recognise suspects from viewing CCTV footage. In accepting that Code D PACE applied in these circumstances, the court observed:

> "66. There was some controversy as to whether Code D has specific application to the process undertaken in this case, as in many other cases, when police officers are asked to view CCTV records in the hope that they might pick out someone of whom they have previous experience. The introduction to the Code at D1 provides:
>
> > 1.1 This code of practice concerns the principal methods used by the police *to identify people in connection with the investigation of offences* …(our emphasis)
> >
> > 1.2 Identification by witnesses arises, e.g., if the offender is seen committing the crime and the witness is given an opportunity to identify the suspect in a video identification, identification parade or similar procedure …"
>
> 67. A police officer asked to view a CCTV is not in the same shoes as a witness asked to identify someone he has seen committing a crime. But, as the prosecution accepted, safeguards which the code is designed to put in place are equally important in cases where a police officer is asked to see whether he can recognise anyone in a CCTV recording. The mischief is that a police officer may merely assert that he recognised someone without any objective means of testing the accuracy of such an assertion. Whether or not Code D applies, there must be in place some record which assists in gauging the reliability of the assertion. In cases such as these, there is no possibility of comparing the initial observation of a witness, as recorded in a contemporaneous note of description or absence of description, who purports to make a subsequent identification. The police officer can hardly be asked to record his recollection of a description of a particular suspect before he has picked that suspect out from the CCTV recording.
>
> 68. Absent any such check as would be available had a witness described the commission of an offence and recollected his description of the offender, it is important that the police officer's initial reactions to the recording are set out and available for scrutiny. Thus if the police

officer fails to recognise anyone on first viewing but does so subsequently those circumstances should be noted. The words that officer uses by way of recognition may also be of importance. If an officer fails to pick anybody else out that also should be recorded, as should any words of doubt. Furthermore, it is necessary that if recognition takes place a record is made of what it is about the image that is said to have triggered the recognition.

69. Absent any such record, it will not be possible to assess the reliability of the recognition. We were told that a protocol is being prepared for such cases. With the increasing use of CCTV recognition it is vital that a protocol is prepared which provides the safeguard of measuring the recognition against an objective standard of assessment. Only by such means can there be any assurance that the officer is not merely asserting that which he wishes and hopes, however subconsciously, to achieve, namely the recognition of a guilty participant."

40. The version of Code D of the Police and Criminal Evidence Act 1984 ("Code D") (effective from 6 March 2011) in force at the time of this investigation was introduced, in part, in consequence of the concerns expressed in *Smith* (see *R v JD* [2012] EWCA Crim 2637 at [13]). From 3.34 onwards, it addressed recognition by way of showing films, photographs and other images. The relevant parts of the Code were set out at paragraphs D:3.35, 3.36 and 3.37:

"D:3.35 The films, photographs and other images shall be shown on an individual basis to avoid any possibility of collusion and to provide safeguards against mistaken recognition (see Note 3G), the showing shall as far as possible follow the principles for video identification if the suspect is known, see Annex A, or identification by photographs if the suspect is not known, see Annex E.

D:3.36 A record of the circumstances and conditions under which the person is given an opportunity to recognise the individual must be made and the record must include:

(a) Whether the person knew or was given information concerning the name or identity of any suspect.
(b) What the person has been told before the viewing about the offence, the person(s) depicted in the images or the offender and by whom.
(c) How and by whom the witness was asked to view the image or look at the individual.

(d) Whether the viewing was alone or with others and if with others, the reason for it.
(e) The arrangements under which the person viewed the film or saw the individual and by whom those arrangements were made.
(f) Whether the viewing of any images was arranged as part of a mass circulation to police and the public or for selected persons.
(g) The date time and place images were viewed or further viewed or the individual was seen.
(h) The times between which the images were viewed or the individual was seen.
(i) How the viewing of images or sighting of the individual was controlled and by whom.
(j) Whether the person was familiar with the location shown in any images or the place where they saw the individual and if so, why.
(k) Whether or not on this occasion, the person claims to recognise any image shown, or any individual seen, as being someone known to them, and if they do:
(i) the reason
(ii) the words of recognition
(iii) any expressions of doubt
(iv) what features of the image or the individual triggered the recognition.

D:3.37 The record under paragraph 3.36 may be made by:

• the person who views the image or sees the individual and makes the recognition.
• the officer or police staff in charge of showing the images to the person or in charge of the conditions under which the person sees the individual."

41. In paragraph D:3.35 it is stated that, so far as possible, the showing should also "follow the principles for video identification if the suspect is known, see Annex A". Annex A states at paragraphs D10 and D11:

"10. The identification officer is responsible for making the appropriate arrangements to make sure, before they see the set of images, witnesses are not able to communicate with each other about the case, see any of the images which are to be shown, see, or be reminded of, any photograph or description of the suspect or be given

any other indication as to the suspect's identity, or overhear a witness who has already seen the material. There must be no discussion with the witness about the composition of the set of images and they must not be told whether a previous witness has made any identification.

11. Only one witness may see the set of images at a time. Immediately before the images are shown, the witness shall be told that the person they saw on a specified earlier occasion may, or may not, appear in the images they are shown and that if they cannot make a positive identification, they should say so. The witness shall be advised that at any point, they may ask to see a particular part of the set of images or to have a particular image frozen for them to study. Furthermore, it should be pointed out to the witness that there is no limit on how many times they can view the whole set of images or any part of them. However, they should be asked not to make any decision as to whether the person they saw is on the set of images until they have seen the whole set at least twice."

42. Finally, in the notes for guidance, at D:3A it was provided that save for one exception (immaterial for these purposes), "a police officer who is a witness for the purposes of this part of the code is subject to the same principles and procedures as a civilian witness".

43. The Association of the Chief Police Officers' Practice Advice 2011 on the use of CCTV in criminal investigations, supports the instruction that viewing logs are always to be kept (section 6.6, page 48):

"A viewing log should always be completed when viewing CCTV. […]

Viewing logs should:

- Document what has been seen in the footage;
- Describe the actions of individuals (especially victims and suspects) in a neutral manner.

  Emotive language such as 'viciously' or 'unprovoked' should be avoided.

  Defence solicitors may apply to view unused and unviewed footage. If all relevant CCTV images have been viewed and the viewing logs completed, this will reduce the risk of defence

> solicitors discovering further relevant footage from CCTV that officers have not viewed."

44. Furthermore, the Advice (appendix 2, page 82) summarises the relevant part of the judgment in *Smith* as follows:

> "Regardless of whether Code D applies, a record must be made of the following:
>
> (i) Any initial reactions to seeing the CCTV images;
>
> (ii) Where a police officer fails to recognise anyone on the initial viewing but does so at a later date;
>
> (iii) Where a police officer fails to recognise anyone at all;
>
> (iv) Anything that an officer may say with regard to any doubt;
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> (v) Where there is recognition, any factors relating to the image that caused that recognition to occur.
>
> The record must be available to assist in measuring the reliability of the claim that a police officer recognises a particular individual. In addition, it is important that any initial reactions are made available for examination as required."

45. On this issue, the judge ruled as follows:

> "6. As far as the visually recorded evidence is concerned, DC Bee took on the task of observing it and analysing it. It is said she spent some 300 hours viewing it and thus it can be said she has observed it "extensively". She has had inter-actions with the defendants and had an active role in the investigation of this case and has the role of the "Officer In the Case" dealing with many matters including disclosure requests and the like. She has provided her workbooks and in statement sets out her involvement in the investigation and how it is she comes to her conclusions about her "recognition" of the defendants where necessary.

7. It is unarguable that DC Bee has "acquired special knowledge" as envisaged in the authorities cited. In that regard the authorities do not have a useful role in this application. Essentially, the defence concern is that DC Bee has not made viewing notes that are contemporaneous, spontaneous, setting out her reasonings and analysis of what she is watching. She has not articulated her thoughts and responses as she made her observations. The defence say this deprives them potentially of materials on which to base cross examination of her reliability.

8. The prosecution submit that there is more than ample material that has been provided by DC Bee about her work in this case. The quality of her work and the reliability and matters of that ilk are matters that can be dealt with in the trial process. If it is felt she is lacking in any part of her role, the "trial process" provides for those issues to be dealt with. It is an issue that goes to the weight of the evidence and therefore it is materials that should be left for consideration by the jury with the usual directions that would be given.

9. Having carefully considered the matters, I am of the view that DC Bee's evidence can be introduced. Overall, I find favour with the submissions made by the prosecution. […] the authorities cited all find favour with the prosecution being able to call witness whose familiarity with materials allows them to give "expert" evidence of this nature.

10. Except for the case of SMITH, none of the authorities deal with the issue raised by the defence about the nature of the notes that should or must be made by a witness in the position of DC Bee. In Smith, at paragraph 67, the court identifies the mischief that has to be guarded against, namely "that a police officer may merely assert that he recognised someone without any objective means of testing the accuracy of such an assertion". The court made reference to say there "must" be in place some record of what was done. Apart from observing that that case had features which are wholly different to the present case – here there are work books and statements clarifying her work. It is to be noted by paragraph 73, the court in SMITH observed the evidence was not confined to that evidence of the purported identification and recognition and therefore did not think the verdict was unsafe. In this case, the jury will have additional materials to consider too.

> What they make of DC Bee's evidence in terms of quality and reliability and the other evidence is a matter for them.
>
> 11. Even if it is accepted that the case of Smith led to changes in the guidance offered to the investigators, it is to be noted that it is still "advice" and at 6.6 of the ACPO guidance, it advises that a viewing log "should" be kept and a higher requirement than that is not made. Finally, from a practical level, it may be impossible to note every thought that one has when watching a piece of video footage. In the presentation of this case, the prosecution have played clips a number of times so that what is viewed becomes familiar. More viewings reveals more details. It is difficult for instance to say it was on say my third viewing that I noticed a particular feature of the recording. What the defence seek may be counsel of perfection.
>
> 12. For those reasons, I conclude, DC Bee's evidence is admissible. The mischief identified by the court in previous cases can easily be met with guidance given to the jury in the usual way. Appropriate directions can be given to the jury. The defence can have a fair trial."

46. At trial the judge gave the jury the following relevant directions in law:

> "You've heard evidence in this case which is termed as being expert evidence. This has been scientific, telephonic, motor vehicular and also visual imagery. The purpose of expert evidence is to provide you, the jury, with evidence of findings, and the conclusions that may be drawn from those findings, in matters about which you could not be expected without assistance to form conclusions. However, the experts are dealing with matters of facts. So, ultimately it is your view that matters. Even where there is a single unchallenged expert opinion, it remains a matter for you, the jury, to decide whether or not you accept it. Where necessary, you will need to look whether an opinion has been subjected to a recognised peer review process, the experience and qualifications of the expert witnesses, whether the expert witnesses have acted improperly, and so forth.

Where an expert has expressed conclusion in relative terms, for example low support, limited support, moderate support, strong support, powerful support, or other measures have been used, please remember these terms are merely the labels which a witness has applied to his opinion of the significance of his findings, and that because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability. You can't reduce the opinion into numerical, what can mean other scale.

So, the point is, there are still matters of fact, you are going to have to decide as a jury. You couldn't have sat here, watching those videos and made analyses like an expert would have about, you know, light and shade and size and all the rest of it. But the expert has given their opinions -- here, Mr Platts and Mr Zjalic -- and you have to assess that and it's matters of fact, so you make the ultimate decision.

PC Bee is not an expert witness in the normal sense of the word. However, she is committed to give opinion evidence as she has developed expertise by an extensive viewing of the visual footage and stills of images. This is not unusual. It is for you to consider whether you accept her evidence, or not; either in its entirety or in part. DC Bee has given evidence about her extensive viewing of the imagery and has used her interactions with the defendants as added support for opinion of identification.

Some advocates have questioned her note taking. The number of hours she spent considering the imagery, her credibility, and so forth; others have made no criticism at all. A matter for you what you make of her evidence. Those that criticise do so on what they say is her lack of detail about initial reactions to the recording when she made recognitions, what features stood out and so forth.

So, full analysis could be done of how she arrived at her conclusion. If you think there is (force) in that, then you no doubt make the appropriate allowances when you consider her evidence.

DC Bee's response was that she has made notes but that they're for her own usage as an investigating officer. She points to the pile of her workbooks, some 25 books. She says information is also kept elsewhere, such as crime logs, custody record, briefing notes, emails, memos, and the like. DC Bee said she had spent the best part of three years on this case during which she has repeatedly watched the footage and imagery. Her repeated exposure, she says, allows her to make the identifications. She says she has interacted with the defendants to add to the correctness of the identification. Finally, the prosecution that there is support from other sources of evidence to what DC Bee has concluded.

So, you have to look at DC Bee's evidence, considering what has been said by different people and see if you think there is mileage in that, or do you think that you can accept her identifications. The prosecution say: Of course, it's not just DC Bee's evidence you're looking at in isolation, there is other evidence to support in relation to each defendant.

Visual identification. The prosecution case depends on visual identification to some degree. Certain defendants accept the identification and some do not. Where a defendant disputes the identification, great caution is needed. There are, of course, different kinds of identification; for instance, where a witness sees a crime being committed. They would be able to say how long they saw the perpetrator for, from what distance, for how long, what the lighting was like, and so forth. They would be able to note the features of the person the witness saw. They may well say, "I can recognise that

> person that I saw briefly." In those circumstances, an identification procedure can be conducted to see if the witness can pick out the perpetrator from a line-up. Reference can be made to the witness's first description of the perpetrator for similarities and dissimilarities. This case doesn't involve that kind of identification. Here, it comprises of footages being viewed and then identification being made from that.
>
> […]
>
> I have to give you the following warnings: the need for caution to avoid the risk of injustice. That a witness who is convinced in his or her own mind may be wrong. That a convincing witness may be wrong. That a number of the witnesses may be wrong. That a witness who purports to recognise a defendant, even when they know the defendant well, may be wrong. The identification is made by DC Bee, and separately by Mr Platts, where they have both made identification, you must look and consider the quality of each identification separately and must have regard to the possibility that more than one person may be mistaken. However, as long as you are alive to the risks of mistaken identification, you are entitled to use one witness's evidence on identification, if you're sure that it's correct, as partial support for the other."

47. This ground of appeal is argued on behalf of the appellants on the basis that, although it is accepted that an officer could give evidence of the kind provided by DC Bee, there were fundamental difficulties with her evidence. It is contended she had insufficiently explained why she had identified the various suspects. She did not at any stage indicate when or why she first recognised any of the appellants; instead, as late as 1 March 2018 she set out the significant individual characteristics that she claimed she had observed in relation to each of them. It is highlighted that her statement of 1 August 2017 was completed more than 2 years after the incident, and the later statements were at even greater remove

from the incident. It is complained that it is unclear whether this was an "identification" or a "recognition" case.

48. It is suggested that Code D clearly applies and that there should have been a contemporaneous written record to protect against an officer merely asserting that he or she recognised an individual without any objective means of testing the accuracy of the assertion. It is complained that there is no record of any spontaneous or genuine reaction to the CCTV footage, which could have been recorded in viewing logs (which in the instant case are said in any event to have been wholly inadequate in their content). The appellants underscore, therefore, that the logs failed to a) record any initial reactions to viewing the CCTV images; b) explain the developing position as regards recognition; c) record any areas of doubt; and d) identify the image or images (the still or stills) that led to the recognition. The appellants contend that if the procedure had been properly followed, it would have been possible to follow, over time, the key moments in the process of recognition.

49. Against that background, the appellants argue that the judge was wrong to rule that the steps they suggested should have been followed by DC Bee amounted to a "counsel of perfection" (see [45] above); instead, the judge should have determined that the prosecution had acted substantively in breach of the requirements of *Smith* and Code D, as analysed below.

50. Turning to the discrete submissions advanced by the three appellants, Mr Bhatia Q.C., on behalf of Yaryare, highlights that two other officers who had viewed a still from the CCTV footage had suggested to DC Bee that subject A might be Yaryare, prior to her viewing the footage. Yaryare emphasises that he challenged the suggestion that he was subject A during the interviews, pointing out at that stage certain suggested differences between his appearance and that of the suspect. It was submitted on his behalf that there was a marked absence of other evidence implicating him. The clothes recovered from his home address did not match those worn by subject A and there was a lack of any relevant cell site evidence.

51. Hassan emphasises that subject C, at an early stage of the investigation, had been identified as a man called Sade Ibrahim who was interviewed and who shared some physical characteristics in common with the Hassan. DC Bee positively recognised Hassan as subject C on 25 November 2016, although she had made the link before he was interviewed. It is not entirely clear what prompted this significant

change of recognition from Ibrahim to Hassan, albeit she stated she was certain it was the latter of the two men. Mr Murphy, on behalf of Hassan, submitted that the record, as a minimum, should have recorded when the officer viewed the CCTV footage and thereafter her reaction when she saw Hassan in interview. Otherwise, it should have included the kind of material included in the 1 March 2018 statement ([32] above).

52. Mr Witcher, on behalf of Osman, submits the log, *inter alia*, should have reflected i) the dates when the footage was viewed; ii) the exact sections of the footage then under consideration; iii) a summary/review of the critical developments in the officer's assessment (*e.g.* when she made a link with one of the subjects and any suspect); iv) the particular features, as noted by the officer, of the appearance of the subject and the suspect whenever something emerged that affected her appraisal; and v) the moment when she made a link between a subject and a suspect. Mr Witcher emphasises the extent to which DC Bee was uncertain as to how long she had spent viewing this footage.

53. Mr Jarvis, on behalf of the respondent, submits that this was not a case "where Code D strictly applied". The basis for this submission is that DC Bee was not instructed to sit down to view the CCTV footage in order to identify the suspects. Instead, she was tasked to follow the movements of the individuals involved in these offences, given some of them could be seen at one or more of the various locations. During this process of tracking their whereabouts, she started to realise that she might be able to recognise some of them. It is highlighted that in certain instances her ability to do so only emerged over time, whilst watching the relevant footage, whereas in other situations she recognised a suspect as soon as she saw them in person. However, it is accepted by Mr Jarvis that although Code D, as then formulated, did not – as he contends – strictly require DC Bee to make an immediate note of her recognition, on the basis of a broad view of the jurisprudence (particularly *Smith*) it would have been preferable if she had done so "once her view that she could recognise a named defendant as a suspect had crystalised" (Mr Jarvis described this as a "Red Letter" moment/event). However, it is contended that her failure to do so did not render her recognition unreliable.

54. In conclusion, Mr Jarvis submits that the key question is whether DC Bee's recognition of the suspect was reliable and whether the jury were in a position to test the reliability of the recognition during the course of the trial.

Ground 2 (the suggested direction based on Smith and DC Bee's evidence)

55. Following the judge's ruling concerning DC Bee, the appellants submitted the judge should direct the jury in accordance with the relevant part of the decision in *Smith* (see [39] above) and, on a linked issue, that he should correct a suggested false impression in DC Bee's evidence, when she suggested that the Police and Criminal Evidence Act Code D did not apply to her identifications and that she was not obliged to keep notes.

56. The judge declined to take either of these steps. Instead, he directed the jury as set out at [46] above.

57. In essence, Mr Bhatia submits that the judge should have directed the jury in accordance with *Smith*, and in particular that the law requires that a record is kept of i) any initial reactions to seeing the CCTV images; ii) any failure initially to remark on someone who is recognised at a later stage; iii) any failure by an officer to recognise a particular individual at any stage; iv) any expressions of doubt as regards an identification; and v) the factors that led to a recognition. Otherwise, Mr Bhatia submitted that in accordance with *Smith* at [72] the judge should have directed the jury that by reason of the inadequacies in the procedure and the record of recognition, there was no objective standard or record against which to measure the assertions made by DC Bee.

58. The appellants rely on the following passage in the judgment of this court in *R v Fergus* (1994) 98 Cr App R 313 at 318:

> "Generally, it has often been said that it is not essential that a trial judge should rehearse all the arguments of defence counsel: *McGreevy v. Director of Public Prosecutions* (1973) 57 Cr.App.R. 424, 430; [1973] 1 All E.R. 503, 507. That is so. But in a case dependent on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury."

59. It is submitted that these observations highlight the need for the judge to explain in detail the potential failures highlighted in *Smith.*

60. Mr Jarvis contends that the passages from the summing up, cited above, demonstrate that the judge directed the jury as to the matters that they needed to bear in mind as regards the identification evidence (e.g. the need for caution and a direction that confident witnesses can be mistaken), save that he failed to indicate that the law requires that a sufficient log should have been kept, broadly in accordance with the decision in *Smith*. We are reminded that the judge gave a full summary of DC Bee's evidence, including the criticisms made of it.

Yaryare Ground 3 (submission of no case to answer)

61. On the basis that there was no other evidence against Yaryare, it is submitted that if DC Bee's evidence should have been excluded, then as an inevitable consequence the submission of no case to answer ought to have been upheld at the close of the prosecution case. Without DC Bee, there was no case against Yaryare on which the jury could be sure.

62. Mr Jarvis submits that the case against Yaryare was strong, based on the extent of the recognition evidence. DC Bee had had extensive opportunities to study his appearance and there were a number of sightings of person A on the footage which provided a clear basis for making comparisons. Furthermore, Mr Platts, the imaging analyst, found "strong support" for the suggestion that Yaryare and person A were the same individual.

63. Additionally, there was unchallenged evidence from the security staff at Leicester College (Mullins and Bains) that the appellant had an association with a number of the offenders, and in particular Hudur, Felix, Teixeira, Yimbo (Wilfred), Yimbo (Alfred), Hakimi (Siyar), and Hakimi (Sayam). There was also evidence from his mobile phone contacts list that he had close contact with the offenders D'Costa, Osman, Abdullahi, Ismail, and Mire. Finally, he lied in his interviews under caution about his friendship and association with Hudur. In fact Hudur had been with the appellant at the time of the offences and he was convicted by the jury.

64. The Crown accept there were points that could properly be made on Yaryare's behalf. Mr Zjalic, the defence imaging analyst, found there was only "some support" for the conclusion that they are the same person. A jacket with the distinctive markings seen on person A was not found either at the appellant's address when it was searched two months later or amongst the images on his Facebook account. Furthermore, there is no relevant cell site evidence indicating the use of his mobile telephone at the scene of these

events. However, it is contended that these were all points properly for evaluation by the jury, and there was a clearly sufficient basis for him to be convicted as charged, given the unequivocal evidence of DC Bee, supported by Mr Platts.

Hassan Ground 3 (submission of no case to answer)

65. The appellant relies on the criticisms of DC Bee set out above, with the result that the evidence should have been excluded or, alternatively, treated as inherently weak. Mr Platts' conclusions on the imagery provided no more than limited support for the proposition that Hassan and subject C were the same person. Otherwise, the evidence against Hassan is said to have been extremely limited, namely i) three unanswered telephone calls that involved his telephone and the telephones of other defendants at times relevant to these events; ii) a bank paying-in slip dated 6 months after the incident bearing Hassan's name and account details which was found in a co-defendant's grey BMW (that of Sakariye Garane, a member of Group 1, who was driving one of the convoy vehicles), which was said to show continued association with a member of a group of individuals who were alleged to have been involved in these offences; and iii) his having driven a white Audi 9 months after the offences that was connected with the offences in question.

66. Mr Jarvis relies on the evidence of DC Bee, but he also stresses the potential significance of the three telephone calls. Different members of Group 1 tried to contact Hassan, and of these the last two calls were particularly noteworthy given they were from individuals involved in the High Cross Shopping Centre incident (Abdirahim and Hudur).

Osman Ground 3 (the admission of bad character evidence)

67. At the conclusion of the cross-examination of DC Bee by Mr Witcher, the prosecution foreshadowed an intention to apply to adduce Osman's bad character under section 101 (1) (g) Criminal Justice Act 2003 ("CJA 2003"):

> **"101 Defendant's bad character**
>
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> […]
>
> (g) the defendant has made an attack on another person's character."

68. The convictions relied on by the Crown in this regard were:

i. 16 June 2012: possessing an offensive weapon in a public place (a formal reprimand, when a youth). He took a knuckleduster to school.
ii. 23 September 2014: battery (a conviction). After being sent off in a football match, he headbutted a match official and then spat at him and at another official.
iii. 24 April 2015: robbery (a conviction). At a hotel, with three other men carried out a knifepoint robbery of two hotel guests, stealing their mobile phones

69. Initially, this application was unopposed, albeit in due course Mr. Witcher resisted the application. The basis for the application, and the judge's reasons for admitting the evidence, were set out in his ruling on the issue:

> "5. The evidence in this case is that DC Bee has spent nearly 3 years investigating this case. She is the lead officer in the investigation of this case. From the collection of evidence, instructing experts, interviewing defendants, charging defendants and so forth. As a result of repeated viewing of footages and images from the alleged Crime Scenes and police stations and postings on Social Media and spending time with the defendants, she has gained expertise to give evidence before a jury about her view about the identity of certain individuals. The prosecution put her forward as a reliable witness and they say there is supporting evidence from other sources. […]
>
> 6. There is evidence before the jury that the police keep records of their investigations in various sources, Crime Logs, Custody Records and the like. DC Bee has also kept her own "Workbooks" of which there are some 20 plus. These Workbooks as with other materials have been the subject to review for disclosure including by Independent Counsel not instructed to appear as an advocate in this case. The defence had been given extract of some of the Workbooks under the Disclosure principles. Essentially, DC Bee's position is that: I have spent a very long time looking at the footages and materials, I have not kept a precise log as to how many hours but when I look back over the 3 years, "*I would say it's more accurate to say 1000s not 100s of hours spent watching this material"* [she said in cross-examination by Mr. Bhatia for Liban YARYARE]. She readily accepts she used the phrase "hundreds of

hours" in her statements. DC Bee is steadfast in saying that in using these expressions, she has not lied or exaggerated the amount of work she has put into this case by way of examining the imagery.

7. Mr. Witcher explored this issue further in his cross-examination and when nearing the end of his cross-examination, the following exchanges took place:

> **Q: You have probably done tens of thousands of hours on this operation?**
> ***A: 3 years is a very long time***
> **Q: Do you accept, against that background, you are anything but independent?**
> ***A: I don't get what you mean***
> **Q: Do you accept you have invested a lot in this case and you want a result?**
> ***A: Only if it is the right result.***
> **Q: That you may have approached the identification evidence with at least subconscious bias?**
> ***A: No, absolutely not. The identifications are supported by other evidence that the jury have heard…***
> **Q: …that you have been at pains to exaggerate how many hours you have spent working on the footage because before you stepped into the witness box, you had done 100's of hours…it becomes 1000's when you know you are about to be challenged about how good you are at your job? That's the proposition, that your evidence is anything but sure?**
> ***A: I am satisfied it is him [Yahaya OSMAN].***

8. The prosecution submits that the cross examination by Mr. Witcher went so far enough to engage the Bad Character provisions. The prosecution asked me to consider the manner and tone of the cross examination but I do not regard that as being of significance. I did detect some exasperation on the witness part but nothing in my view turns on that. However, I do regard the content of the exchange as very significant. In my view:

a. to say: "you are anything but independent" equates logically to saying you are partial or biased.
b. to say: "you have invested a lot in this case and you want a result" suggests that her motivation is to simply

get a result meaning a conviction, otherwise she would have wasted a lot of time and effort.

c. to say: "you have been at pains to exaggerate how many hours you have spent working on the footage because before you stepped into the witness box, you had done 100's of hours…it becomes 1000's when you know you are about to be challenged about how good you are at your job? is suggestive of deliberately misleading (at pains to exaggerate). This is followed by her motivation being that she fears her professionalism is being challenged – "good at your job".

9. Cumulatively, the exchange does suggest she has not spent that long on viewing the footages to gain expertise she claims to have, that she is cavalier about her identification of Osman, that she is intent on getting a conviction and keeping her reputation intact. That in my view clearly demonstrates an attack on DC Bee's character. This went far beyond suggesting simply that she was mistaken. The questioning was clear as to what impact it would have. The suggestion by Mr. Witcher that he can in the presence of the withdraw the question about "at pains" in my view would not resolve matters.

10. In arriving at my decision, I have considered the issue of how many hours DC Bee says she has spent on viewing footages. As a matter of record, she has used expression hundreds and then thousands. She has never specified exactly how many hours she has spent on viewing the footages. Whether it is an exaggeration, deliberate or otherwise, or whether it is just an endeavour by her to convey she that she has over 3 years watched the footages so many times as to lose track on measuring it will be a matter for the jury – logically hundreds and hundreds does then take the measurement in to the thousands.

11. In arriving at my conclusion, I have considered as a whole the cross examination of DC Bee. I have also considered any adverse effect in can have on the fairness of the trial. The questioning I have referred to above leaves me with no choice than to accede to the prosecution's application. My ruling is that the Bad Character evidence in relation to Yahaya OSMAN can go before the jury."

70. The judge directed the jury as follows on this issue:

> "Bad character. You've heard the defendant Yahaya Osman has previous convictions. You will find them in the agreed fact document. Through his counsel, an attack was made on the character of DC Bee, as he is entitled to do. It was put to her that she was anything but independent; i.e. she was partial and not speaking the truth. The expression, "subconsciously biased", was used, where she was after a result, a conviction, otherwise she would have wasted a lot of time and effort. It was also suggested she was at pains to exaggerate how many hours she had spent working on the footage, changing hundreds in three witness statements to thousands in evidence, and so forth. You, the jury, are entitled to know of the character of a defendant who's made that attack. You have information both about the defendant who made the attack and about the person attacked when you are deciding where the truth lies. Previous convictions do not establish a tendency to commit offences of this type with which the defendant is charged. Do not put an over-reliance on the previous convictions, or be prejudiced against the defendant arising from the evidence of previous convictions. You must not convict the defendant wholly or mainly on the basis of previous convictions. It's the same thing, you can't say, "Oh, bad character equals guilt", it becomes part of the mix, as it were."

71. On behalf of Osman, it is submitted that he had not alleged that DC Bee's identification had been brought about by a dishonest intent. Instead, it is suggested the defence had explored whether DC Bee was i) a mistaken witness, who ii) lacked independence, and was iii) unable to recognise sub-conscious bias on her part, and it was suggested she had a natural and understandable desire to be right. It was accepted, however, that in the robust way in which these points had been developed in questioning there had been an attack on the officer's integrity. Critically, however, Mr Witcher contends that the evidence should have been excluded under section 101 (3) CJA 2003:

> "(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

72. The central submission is that "the evidence of the bad character of the defendant had little if any bearing on his credibility in being the maker of the attack" and that there was no benefit to the proceedings in admitting this evidence, and instead only manifest prejudice. It is suggested that the appellant was not positing that he "knew" she either lacked independence or was unable to recognise that she had a desire to be right or that she was subconsciously biased. It is contended there was nothing coming from the defence that required an assessment of the appellant's credibility. Instead, the jury needed to assess the credibility of DC Bee.

73. In the respondent's notice, it is suggested that the appellant, through his counsel, made a number of serious attacks on the character of DC Bee by implying that she had lied on oath during the trial, that she had deliberately exaggerated the true position in the course of her evidence and had acted in bad faith in order to secure the conviction of the applicants. On that basis, the judge was correct in not excluding this evidence.

Discussion

Ground 1 (the admissibility of DC Bee's evidence)

74. Counsel have relied on six authorities, in addition to those considered above, which have potential bearing on this appeal, and which are summarised below.

75. In *R v Abnett (Gary)* [2006] EWCA Crim 3320, the officer in the case viewed the relevant CCTV footage and a number of still images. On the basis of particular features and characteristics he determined that the appellant and the suspect were the same person. The court concluded:

> "20. The fact is that DC Greer had spent a whole day with this appellant. He had watched the video several times. He had created the large still from it. He had considered four stills in all. His acquaintance with the appearance of the man in the CCTV and the appearance of the appellant was inevitably deeper or greater or more considered than could have been arrived at by the jury. In these circumstances, in our judgment, the recorder was entitled to hold that this put the officer at a particular advantage, or to use the words of the Attorney General's Reference case gave him special knowledge, so that his identification from the CCTV had particular independent objective value. Accordingly, the recorder rightly admitted it before the jury."

76. In *R v Chaney* [2009] EWCA Crim 21; [2009] 1 Cr App R 35, as summarised in the judgment at [14] and [21] – [25], an officer who knew the defendant viewed CCTV stills, and on the basis particularly of his hairline, facial features and stature, concluded that the man in the stills and the defendant were the same. The court had the officer's initial reactions to the images (he indicated in an email that he had identified the defendant). It was highlighted that the only justifiable complaints were, first, that it had been suggested to the officer in advance of the viewing that the man in the CCTV may be the defendant; second, the officer failed to identify at the time which features of the man depicted in the photographs led him to the conclusion that it was the appellant; and, third, the judge failed to give any warning in the summing up as to the dangers of identification evidence. However, as the court observed, the relevant evidence in this regard was before the jury, and they were able to consider the images when evaluating the reliability of the officer's evidence. The images were relatively clear and sufficiently so for it to have been open to the jury to conclude that the officer's identification was accurate. The court was seemingly unconcerned that the officer did not at the time identify the features in the photograph that led to his identification of the defendant. On this issue, the court observed at [24]:

> "[…] However, it may be difficult to identify those features of a person that enable one to recognise him. A vague description is not inconsistent with subsequent recognition; indeed, it is not unknown for an accurate recognition to be preceded by a description which is materially inconsistent with that of the person identified. When he gave evidence the officer did state what features led him to his identification: the appellant's hairline, facial features and stature. The jury were able to assess whether the first two of those features at least were visible in the still photographs […]."

77. Although this was a case of recognition rather than identification, the court concluded it would have been appropriate for the judge, in his summing up, to have referred to the need for caution, although a full *Turnbull* direction would have been inappropriate as this was a recognition case, not an identification case.

78. In *R v Henry McGrath* [2009] EWCA Crim 1758 this court upheld a conviction based substantially on an officer's recognition of the accused from CCTV footage, when there was no contemporaneous record of the procedure during which the officer made her recognition (no notes were made at the time) and the officer had prior knowledge of the appellant as a suspect [15]. The judge had given a clear and full direction to the jury on the issue.

79. In *R v Moss* [2011] EWCA Crim 252 the officer who viewed the CCTV in a relatively informal setting made only the most cursory record of his identification at the time in his pocketbook, simply stating he was sure that the perpetrator was the accused. 6 months later he made a statement setting out in somewhat greater detail the basis of his recognition. This court stated as follows:

> "23. In the present case, PC Osmond was in a position to describe the circumstances in which he saw the CCTV film and recognised the appellant. He was also in a position to explain how he had come to know him, when he had last seen him and which of his features he particularly relied on to identify him. Of course he could have been telling a lie or could have been mistaken when he said he recognised the appellant, but it is impossible to exclude that possibility however carefully the process is recorded otherwise than by examining the basis upon which the recognition is said to have been made and judging the credibility of the officer in cross-examination.
>
> 24. In our view in a case of this kind it is important not to lose sight of the essential principles. PC Osmond reported the recognition to his superior, he made a note of it when he returned to work, he gave a description of his previous contact with the appellant, and thus an explanation of his ability to recognise him, all of which provided a basis on which the jury could judge the reliability of his evidence.
>
> 25. The judge had a discretion to exclude the evidence of PC Osmond but declined to do so. In his summing-up he gave the jury a clear warning of the dangers inherent in recognition evidence and of the risk that an honest witness who says that he recognised someone known to him may nonetheless be mistaken. He also gave them a clear warning of the need for special caution and of the danger of a witness digging his heels in when challenged. In our view the judge was right to allow the evidence to be given. He directed the jury correctly in relation to it and this ground of appeal fails."

80. *R v JD* (*supra* at [40]) was another case in which the case against the accused depended entirely on an officer having recognised him when viewing the CCTV footage of the incident. There were the following uncontested features relied on by the appellant:

> "22. First, the officer had to rely on recollection some 6 months after the event with regard to the circumstances of the viewing and the defence

> could not test his account that he watched the footage alone and that nobody else was present. Second, the officer was given the name of the suspect rather than being asked to watch the video to see if he recognised anybody. Third, no record was made of any question of doubt. Fourth, no record was made as to what features of the image triggered the recognition. Fifth, no record was made as to the words of recognition. Sixth, no contemporaneous note was made as to the officer's recollection at the time of viewing as to what he recalled about seeing the appellant on earlier occasions."

81. The identifying officer had visited the appellant at his home (between 2002 and 2006, when the incident occurred in 2011) and he had interviewed him for a number of minutes on two occasions in 2010. He looked at the CCTV three times.

82. Against that background, the court concluded:

> "24. This court is of the clear view that this recognition evidence of (the officer) should have been excluded. This was a wholesale breach of Code D, "lamentable" in the judge's own word, which undoubtedly would have created very significant difficulties for the defence in testing the validity of the position being articulated by the police and indeed posed precisely the kind of difficulty which had been identified in the case of Smith.
>
> 25. A matter of particular concern, in this court's view, is that Police Constable Gorringe had actually told Detective Constable Churton shortly prior to his examining the CCTV to see if he could recognise the appellant: in circumstances where, as she herself says, she believed the appellant was involved in the public order offence and where, as she actually told Detective Constable Churton, she believed the appellant was on this CCTV. This was highly suggestive and should never have happened. […]"

83. The court recognised that whether the breaches of the Code in this context (including asking the officer whether he could pick a particular named individual) will render a verdict unsafe, will turn, for instance, on the whether there was other evidence against the appellant (see [27] and [28]).

84. In *R v Lariba and others* [2015] EWCA Crim 478, it was held that although there had been breaches of Code D as regards recognition evidence by police officers viewing CCTV footage (such as the absence of a contemporaneous recording of the reason for the identification, the words used, any expressions

of doubt and the features of the suspect and the appellant on which the witness relied), the officers described the basis for their recognition (such as hairline, skin tone, build and clothing); the images and the witnesses were available to the jury; the witnesses could be expertly cross-examined; the appellant was able to demonstrate that not all the officers who knew him were able to recognise him from the images; the judge was able to describe the breach of the Code and the need for caution; and there was supporting evidence against the appellant (see [46]). Given the issues in the present case, it is helpful to set out one part of the judgment in full:

> "39. We emphasise that in the present case the jury were not being invited to form their own judgment as to identity by comparison between the images of the suspect and the defendant in court. The images were of insufficient quality to permit such a comparison and a good deal of time had elapsed since the CCTV images had been captured. The danger in such a case is that the jury will simply take on trust a convincing assurance from the witnesses when they are unable to make the judgment themselves; hence, the importance of directions to the jury as to the caution with which they must approach their task. Once the judge concluded that the images were of sufficient quality to permit the evidence to be given, it remained the task of the jury to assess whether they could be sure that the recognition based upon it was reliable. The advantage that a jury has in a case of recognition from a scene of crime image is that they can see exactly what the witness saw and the image is permanent. That is not the position when there is no photographic record and the jury is considering only the quality of identification evidence given by an eye-witness to an ephemeral scene. In our judgment, these images were of sufficient quality to enable the jury to assess whether a recognition made from them was one on which they could rely even though they were not of sufficient quality to permit an identification of their own."

85. We highlight that the following conclusions, relevant to this ground of appeal, are to be drawn from this jurisprudence.

86. First, at the time of this investigation, following, *inter alia,* the decisions in *Smith*, *JD* and *Chaney*, the germane provisions of Code D as then in force should have been followed (whether or not Code D was directly applicable, given there is some tension in the authorities on this issue), and particularly as regards creating a contemporaneous record that would have assisted in testing DC Bee's recognition evidence. The current version of Code D (in force since 23 February 2017) deals with a closely related situation, in that D:3.34

("Recognition by controlled showing of films, photographs and images") is introduced with the words:

> "This Part of this section applies when, for the purposes of obtaining evidence of recognition, arrangements are made for a person, including a police officer, who is *not* an eye-witness (to view a film etc.)"

87. Second, whether a failure to follow Code D renders the verdict unsafe will depend on the particular facts of the case, and the court will need to consider the extent and significance of any breaches of the Code and any consequential unfairness that have been caused (see *JD* at [28]).

88. Third, although the impact of the breach or breaches of Code will, therefore, vary between cases, two notable strands are to be discerned from the authorities. On the one hand, there are cases such as *Smith* and *JD* in which no contemporaneous record was kept and the recognition evidence was inherently poor. In *Smith* the recognition was based on no more than his stature and his clothing "it's everything, it's not one particular thing, it's the whole really" but not including recognition of his face (see the judgment at [64] and [65]). In *JD*, the officer who suggested he recognised the appellant gave no details as to what features led him to this conclusion, and instead simply stated that he was in no doubt that the man in the green T-shirt was the appellant (see the judgment at [7]) having viewed the footage 3 times. On the basis that the evidence should have been excluded, the conviction in *Smith* would have been quashed had there not been additional material implicating the appellant and in *JD* the conviction was quashed. On the other hand, in cases such as *Chaney* and *Lariba*, notwithstanding the failure to apply Code D (including in *Chaney* promptings by other officers that the defendant may be in the stills or CCTV footage), if a detailed explanation is given of the basis for the recognition, particularly when the jury is in a position to view the relevant material itself, it may – depending always on other factors – be fair to admit the recognition evidence.

89. In the present case, during her evidence DC Bee set out that, whilst viewing the footage over the course of hundreds or thousands of hours, she observed the finer details of the movements and other relevant characteristics of those involved, and over time she became familiar with some of the people who feature in this case. Further, she began to recognise some, but not all, of them. She viewed the footage on a variety of different types of equipment, from ordinary laptops to "high tech machines". All of the CCTV material and the visual imagery evidence relied on by DC Bee was exhibited and adduced at trial, and the jury would have been very familiar with the images – both stills and moving images – which were said by DC Bee to provide the link between

the suspects and the appellants. The remaining footage was disclosed to the defence, for them to introduce during the evidence to the extent relevant. Furthermore, it was open to the appellants to call visual imagery evidence on the issue of recognition, a course which Yaryare took by calling expert evidence.

90. We consider there is some force in the judge's observation at the end of his ruling ([45] above), that from a practical point of view it may be unrealistic to expect an officer to note all of his or her passing thoughts whilst watching CCTV footage time and again. Any conclusions in a case such as the present are likely to emerge incrementally, and the fine detail of an improving or changing recognition may be difficult to record in a log. However, that said, the officer should record, in accordance with the approach established in Code D, at the least, the "Red Letter" events as described by Mr Jarvis – the moments, for instance, when they first begin to note similarities with a particular individual, along with any significant features that occur to them during the process of viewing. They should also note any factors that tend to indicate the suspect does not match a particular individual who is being considered. Otherwise, whether or not it is directly or entirely applicable in this particular context, D:3.34 – 37 of the present Code, which match the provisions then in force, sets out the steps (as relevant) that should be followed.

91. For each of the appellants, DC Bee explained the reasons for her recognition of them by reference to the relevant features of their appearance, and the jury, as in *Lariba*, were able, from the footage and the stills, to see exactly what the witness saw from these permanent images. Moreover, given the relative good quality of the images, they were able to assess whether a recognition made from them was one on which they could rely even though they were not making an identification of their own. They would have been well aware for Yaryare that other officers had suggested he may be one of the suspects and that for Hassan the recognition changed from Ibrahim to Hassan. It is to be regretted that DC Bee failed to apply the relevant parts of Code D and the guidance given in *Smith*, and we accept that the appellants and the jury were put at a disadvantage as a result, but given the extent of the opportunities to test and assess the reliability of the recognition evidence, and in the particular circumstances of this case, we consider that this expert evidence which it is accepted was *prima facie* admissible did not fall to be excluded under section 78. The evidence did not have such an adverse effect on the fairness of the proceedings that the court ought not to have admitted it.

Ground 2 (the suggested direction based on Smith and DC Bee's evidence)

92. It has been of some concern to the court that the judge failed to direct the jury that the law required DC Bee to maintain a sufficient log whilst she was viewing the CCTV footage, broadly in accordance with the decision in *Smith* (in this regard it is immaterial whether Code D was directly applicable). Similarly, the court failed to correct DC Bee's assertion that the approach provided in *Smith* and Code D did not apply in this case.

93. The judge, however, did remind the jury of the main criticisms that were made of DC Bee's failings in this regard, as set out above: the lack of detail as to her initial reactions when she individually recognised the suspects; the particular features that then struck her; and, overall, the lack of a contemporary record to enable the jury to follow the progress of her identification of the appellants. The judge invited the jury to make appropriate allowances if they considered there was force in those contentions. Although the judge's directions would have had undoubted additional force if the jury had been told that these were legal requirements, once the judge – clearly correctly – concluded that the images were of sufficient quality to permit the evidence to be given, it was the task of the jury to assess whether they could be sure that the recognition based upon it was reliable. The jury had the advantage of having seen exactly the same material as DC Bee – the CCTV footage and the stills – and they were able to assess the reliability of her suggested recognition.

94. We do not underplay the importance of the jury receiving accurate and full directions as to the law, but given the jury had heard the clearly articulated criticisms of the approach adopted by DC Bee, criticisms that were summarised by the judge in the summing up, we do not consider that the verdicts are unsafe as a result of this failure by the judge to direct the jury that the law required DC Bee to maintain a sufficient log whilst she was viewing the CCTV footage or to correct DC Bee's assertion that the approach provided in *Smith* and Code D did not apply to the work she undertook as regards recognition. In assessing the officer's reliability, the jury would have undoubtedly focussed on whether the notably detailed reasons she provided for recognising each of the appellants was undermined, principally, by the absence of a contemporaneous record. Given the overall quality of the images and the footage, and the detail provided by DC Bee, we do not consider this to be "poor" recognition evidence (see *Turnbull*).

95. Moreover, in each case there was some other evidence. For Yaryare, Mr Platts, the imaging analyst, found "strong support" for the suggestion that Yaryare and person A were the same individual. For Hassan, Mr Platts suggested the imagery provided limited support for the proposition that Hassan and subject C were the same person. Perhaps more significantly, the evidence included i)

the three unanswered telephone calls that involved his telephone and the telephones of other defendants at times relevant to these events (the last two calls were particularly noteworthy given they were from individuals involved in the High Cross Shopping Centre incident); ii) a bank paying-in slip dated 6 months after the incident bearing Hassan's name and account details which was found in a co-defendant's car (a member of Group 1), which was said to show continued association with a member of a group of individuals who were alleged to have been involved in these offences; and iii) his having driven a white Audi 9 months after the offences that was alleged to have been connected with the offences in question. For Osman, not only was he involved in the second and third incidents, but he was identified as being with other members of Group 1 in the aftermath of the first incident. The mobile cell site evidence locates his mobile telephone at the failed meeting at Bede Park and leaving the Bede Park area with Yaryare after the third incident.

Yaryare Ground 3 (submission of no case to answer)

96. We accept Mr Jarvis's submission that there was a case against Yaryare that was of sufficient strength to go to the jury, based on the detail of the recognition evidence. As described above, DC Bee had had extensive opportunities to study his appearance and there were a number of sightings of person A on the footage which provided a clear basis for making comparisons. Mr Platts, the imaging analyst, found "strong support" for the suggestion that Yaryare and person A were the same individual.

97. The evidence of association, summarised in detail earlier ([63] above), was relevant background evidence. This was not poor identification evidence; instead there was a clear and sufficient basis for him to be convicted as charged, given the unequivocal evidence of DC Bee, supported by Mr Platts.

Hassan Ground 3 (submission of no case to answer)

98. The applicant was recognised by DC Bee on the CCTV footage, first outside the Highcross Shopping Centre at the time when the violence was being planned and thereafter as one of the armed men at Bede Park who pursued Gideon Buabeng as part of the attack on him. Mr Platts could find no differences between Hassan and person C. We have summarised above ([95]) the other evidence against Hassan. On the basis of our conclusion that the evidence of DC Bee should not have been excluded, there was a clear case against him for the jury to consider, in that the judge was entitled to conclude that the identification evidence was not poor.

Osman Ground 3 (the admission of bad character evidence)

99. As set out above, it is argued by Mr Witcher that the evidence of the bad character of the appellant had no real bearing on his credibility as the author

of the attack and that there was no benefit to the proceedings in admitting this evidence; instead, it is suggested it constituted manifest prejudice. It is argued that since the appellant was not claiming that he personally "knew" that DC Beee either lacked independence or was unable to recognise that she had a desire to be right, or that she was subconsciously biased, the evidence of the appellant's bad character was of no evidential value. It is contended, therefore, that there was "nothing coming from the defence" that required an assessment of the appellant's credibility. Instead, the jury simply needed to assess the credibility of DC Bee.

100. In our judgment, Mr Witcher is seeking unjustifiably to limit the purposes for which bad character evidence can be introduced when an attack of this kind is made and his submissions fail to take into account section 106 CJA which is in the following terms:

> "1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—
>
> (a) he adduces evidence attacking the other person's character,
>
> (b) **he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so**, or
>
> (c) evidence is given of an imputation about the other person made by the defendant—
>
> (i) on being questioned under caution, before charge, about the offence with which he is charged,
>
> or
>
> (ii) on being charged with the offence or officially informed that he might be prosecuted for it. (2) In subsection (1) 'evidence attacking the other person's character' means evidence to the effect

> (2) In subsection (1) 'evidence attacking the other person's character' means evidence to the effect that the other person—
>
> (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
>
> (b) **has behaved, or is disposed to behave, in a reprehensible way; and 'imputation about the other person' means an assertion to that effect.**
>
> […]" (emphasis added)

101. It is clear from this section that the introduction of the accused's bad character is not dependent on either the defendant giving evidence or having "personal knowledge" of the matters that constitute the attack. Instead, it is sufficient that the defendant's advocate asks questions in order to elicit evidence that the witness has behaved, or is disposed to behave, in a reprehensible way. That is what happened during the course of Mr Witcher's cross-examination of DC Bee and it is useful to have in mind the nature of the suggestions that were made. The questions were not framed on the basis that she had simply made an unintended mistake in her identification of Osman. Instead, as the judge summarised the matter in his ruling, Mr Witcher suggested, first, that DC Bee had not made a dispassionate and impartial assessment of the evidence ("you are anything but independent"); second, that she had not told the truth about the time she had spent viewing the footage ("you have been at pains to exaggerate how many hours you have spent"); and that she did not care whether she had made a correct identification ("you have invested a lot in this case and you want a result"). In summary, the suggestion was that she was intent on getting a conviction and keeping her reputation intact.

102. That was a serious attack on the integrity and the honesty of DC Bee, to the effect that she had taken improper steps to secure Osman's conviction and that her identification of him was either false or based on deliberately exaggerated testimony, albeit we wish to stress that these were entirely proper questions asked by Mr Witcher on Osman's behalf, no doubt on the basis of his instructions.

103. Although all cases will turn on their own facts (and subject to section 103 (1) CJA: see [70] above), as a matter of general principle when an attack is

made by a defendant on the character of another person, the character of the accused is admissible in order to assist the jury in assessing the general credibility issue of whether the attack is worthy of belief. It does not matter whether the defendant gives evidence. The editors of Blackstone's Criminal Practice 2020 at F13.90 put the matter, in this context, thus:

> "**Where the Accused Does Not Testify** Under the CJA 2003 the accused's bad character may be deployed against him whether he gives evidence or not. This reform was part of the package recommended by the Law Commission, and it is submitted that it is sound in principle. Where the jury must decide between competing versions of events, the argument that they need to know the character of the person making the attack is as strong where the accused testifies as where he declines to do so."

104. Although many of the authorities in this context relate to appellants who gave evidence at trial, and therefore the discussion of admissibility tended to focus on his or her credibility as someone who testified in the proceedings, the decisions do not limit the ambit of section 101 in the way urged on us by Mr Witcher. In *R v George* [2006] EWCA Crim 1652, a trial which concerned the kidnapping and murder of an elderly victim, the appellant sought to blame his brother for the attack on the victim and for persuading him to engage in inappropriate sexual behaviour. One of the grounds of appeal related to the directions given by the judge on the issue of the appellant's bad character, and in the course of his judgment Moses LJ reflected on the reasons why this evidence had been introduced:

> 29. It is important to appreciate the basis upon which this evidence of bad character was admitted and the use to which the prosecution sought to put that evidence. The evidence was admitted under section 101(1)(g). The defendant had made an attack on another person's character, *in casu* his brother Stephen. Thus the evidence was admitted, as it always could have been admitted, pursuant to the Civil Evidence Act 1898. **The evidence was admissible not to show propensity but so that the jury could assess the accusations he had made against his brother in the light of the character of the source of those accusations**. The jury could weigh, on the one hand, this appellant's criminal career against the criminal career of his elder brother (one year older) who had far fewer convictions, one for gross indecency some time later but had settled down and led, once he had achieved adulthood, a wholly creditworthy life living with his wife and children. (emphasis added)

105. This was described in a similar way in *R v M (E)* [2014] EWCA Crim 1523; [2014] 2 Cr App R 29, a case which involved an attack by the defendant on the character of the victim in a murder trial. Pitchford LJ dealt with the present issue as follows:

> 19. […] **the principal purpose of the s.101(1)(g) gateway is to provide the jury with information relevant to the question whether the defendant's attack on another person's character is worthy of belief. The issue is one of general credibility** (see for example *R. v George (Andrew Harold)* [2006] EWCA Crim 1652, *R. v Lalametie* [2008] EWCA Crim 314 and *R. v Singh (James Paul)* [2007] EWCA Crim 2140 at [10]) and not propensity to falsehood. […]" (emphasis added)

106. In *R v Johnson* [2019] EWCA Crim 1025 the appellant did not testify and in the course of his interviews following his arrest suggested that he had been the victim of a sustained attack by the deceased, and that the latter had met his death, having produced a knife, as the result of an accident. This court upheld (at [25]) the following direction, amongst others, by the judge to the jury:

> "In fairness in such circumstances it would have been wrong for you to be left in ignorance of the character of the man making those accusations. You are entitled to have regard to the defendant's own bad character when deciding what the truth is in this case. Whether and to what extent his previous character assists you in that respect is a matter solely for your judgment."

107. The judge's direction in that case was clearly based, at least in part, on the suggested wording for a judicial direction in this context as set out in the Crown Court Compendium at [12.9], which is in the following terms:

> "You have heard that D has previous convictions for XXX. The reason you heard about them was because D has alleged that W is/has XXX **and you are entitled to know about the character of the person who makes these allegations when you are deciding whether or not they are true**." (emphasis added)

108. In conclusion on this issue, if an accused advances a relevant attack on the character of another person, it is not in any sense determinative of an application to introduce his or her bad character whether the attack was based on the defendant's personal knowledge of the facts or his or her own

testimony, or whether it is simply the way in which he or she chose to run the case (as a consequence, for instance, of a favoured interpretation of the evidence). Whatever the basis, it is potentially open to the judge to admit bad character evidence so that the jury, as the judge put the issue in *Johnson*, are not left in ignorance of the character of the defendant making those accusations. Mr Witcher's contentions in this regard would impose a limitation on section 101 that is not to be found within the statutory provisions and in support of which he has not advanced any authority.

109. Section 101 (3) provides an important protection (see [71] above). However, we consider the judge was entitled to conclude that the admission of this evidence would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. These were three offences with convictions in 2012, 2014 and 2015 which were relevant to the appellant's character and his general credibility as the person making these allegations against DC Bee (respectively, possession of an offensive weapon, battery and robbery). Whilst providing assistance to the jury in the context of the attack on the police officer, they would not have had such a profound prejudicial effect on the fairness of the trial that the judge should have excluded this evidence.

110. The judge impeccably summed up the relevance of this evidence for the jury, and there has been no complaint in this regard.

Conclusion

111. For the reasons set out above, these appeals are dismissed.

Postscript

112. The representation orders were limited by the Registrar to one counsel for each appellant (Mr Bhatia for Yaryare and Hassan and Mr Witcher for Osman). At the hearing of the appeals Ms Nedelcu, Mr Murphy and Ms Thornber appeared in addition for Yaryare, Hassan and Osman respectively. We were asked at the end of the hearing to extend the representation orders to cover their involvement in the appeal.

113. It is important in this context to emphasise that decisions as regards representation orders should be made, save exceptionally, well in advance of the hearing of an appeal. This is pre-eminently a matter for the Registrar, albeit the issue can be put before the presiding Lord or Lady Justice, or the Vice President of the Court of Appeal (Criminal Division), in advance of the hearing if there is a substantive basis for appealing her decision. These decisions require careful evaluation of the criteria set out in Regulation 18(2) of the Criminal Legal Aid (Determinations by a Court and Choice of

Representative) Regulations 2013 (SI 2013/614 as amended by 2013/2814. This should not be left, without good reason, until the day of the hearing because it requires a 'forward-looking' assessment of whether the case can be adequately presented without two counsel. The court needs to consider variously (depending on the application) the exceptional condition, the counsel condition and the prosecution condition. Although it is not impossible to make this judgment *ex post facto*, as a matter of principle it should be dealt with in advance of the hearing. Although we are grateful for the assistance of the three juniors and we recognise they have undertaken work on behalf of the appellants *pro bono*, we are not at this stage prepared to amend the representation orders. In our judgment, given the limited ambit of the grounds of appeal, these arguments could properly be made on behalf of each appellant by a single advocate, in this case a Q.C. for two of the appellants and a junior for the third, without the assistance of juniors.