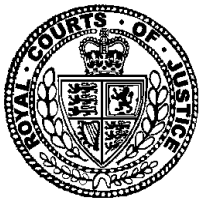

Neutral Citation Number: [2021] EWCA Crim 450

Case No: 202002230 B1 & 202002232 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ DENNIS QC
T20197437

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2021

Before :

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE HOLGATE
and
SIR NICHOLAS BLAKE

- -

Between :

Alex Christopher LANNING	**1st Appellant**
Jonathan Roy CAMILLE	**2nd Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Mr John Femi-Ola QC & Mr Michael Stradling (instructed by **Harris Cuffaro & Nichols Solicitors**) for the **1st Appellant**
Mr Benjamin Aina QC & Ms Shaher Bukhari (instructed by **Noble Solicitors**) for the **2nd Appellant**
Mr Oliver Glasgow QC & Mr Will Martin (instructed by **CPS Criminal Appeals Unit**) for the **Respondent**

Hearing dates: 16th March 2021

- -

Approved Judgment

Lord Justice Fulford V.P.:

Introduction

1. On 6 August 2020, in the Central Criminal Court before Judge Dennis Q.C. and a jury, the appellant Alex Lanning ("AL") (now aged 23) was convicted after a trial of the murder of Tashan Daniel ("TD") (count 1). At a pre-trial hearing on 23 January 2020, he had entered guilty pleas to the offences of manslaughter and having an article with a blade or point (count 3). As a consequence of his conviction for murder the guilty plea to manslaughter was nullified.

2. His co-accused, Jonathan Camille ("JC") (now aged 20), was convicted on the same day of the manslaughter of TD (count 2). He was acquitted by the jury of murder (count 1).

3. On 20 August 2020, AL was sentenced to life imprisonment on count 1, and the period of 25 years, less 318 days spent on remand, was specified as the minimum term under section 269(2) Criminal Justice Act 2003. For having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988 there was a concurrent sentence of 16 months' imprisonment. On the same day, JC was sentenced to 6 years 6 months' (78 months) detention in a Young Offenders Institute. As regards both men there were other consequential orders that are of no relevance to the present proceedings.

4. Before this court AL and JC appeal against their convictions by leave of the single judge.

The Facts

5. On Tuesday 24 September 2019, TD (the deceased, then aged 20) met with his friend Treyone Campbell ("TC") in Hillingdon, West London. They were travelling together to the Emirates Stadium in North London, to watch Arsenal play Nottingham Forest in the third round of the Carabao Cup. The two friends had entered Hillingdon Underground Station and were on platform 2 waiting for an eastbound train, when they had a chance encounter with the two appellants. The deceased and TC were unknown to the appellants.

6. AL (then aged 21) and JC (then aged 19) arrived at Hillingdon Underground Station at about the same time. AL and JC had arranged to meet at the Underground Station to travel to a mutual friend's house.

7. To summarise, at the underground station a short but violent confrontation took place between the deceased, TC, and the two appellants. It was 34 seconds from the first blow to the last act of violence, and the incident as a whole was approximately two minutes. Although, the confrontation was captured on CCTV, the footage is not continuous as the cameras recorded at a rate of a single frame per second.

8. By way of detail, at 3.51pm the deceased and TC entered the Underground station and walked to platform 2. This coincided with JC arriving on a train on platform 1. JC left the station just before 3.52pm but re-entered after receiving a telephone call from AL.

9. AL had entered the station via a different entrance and went to platform 1. As he walked onto the westbound platform, the deceased and TC were on the opposite eastbound platform.

10. AL was standing directly opposite the deceased and TC. They were looking at each other across the train tracks. Six seconds later AL went to the staircase and crossed to the eastbound platform to where the deceased and TC were waiting for their train. As AL was crossing to platform 2, he met JC (who by now had re-entered the station). In the result, they went to platform 2 together, just as a London bound train pulled in. They walked towards the deceased and TC. TC suggested in evidence that when on the opposite platform AL said to the deceased and TC "*what you looking at*". The deceased replied "*just be quiet and get on your train*" which led AL to cross to their platform, by then, as we have indicated, accompanied by JC.

11. The four young men stood face to face in a tight group, and 3 seconds later a physical confrontation began. Some 5 seconds after the violence started AL produced a knife in a sheath that he brandished towards the deceased, and shortly afterwards the confrontation divided into two fights: AL fighting with the deceased and JC fighting with TC. TC said that AL threw a punch at him and he punched back in self-defence. There were then a number of punches thrown during which he quickly became separated from the deceased. He ended up fighting with JC, and he did not see what was happening between TD and AL.

12. The appellant JC and TC exchanged punches and kicks at the foot of the stairway, while the appellant AL and the deceased moved to an area on the platform near a wall-mounted underground map.

13. During the confrontation with AL, the deceased received a fatal injury from the knife that AL was holding. There was a single wound. The knife entered at an angle, going from left to right towards the centre of the chest, piercing the chest cavity and passing through the heart. The knife went into the body to a depth of

17.5 cm (7 inches), scoring the breastbone. The wound was 4 cm deeper than the length of the blade, and the force used to inflict such a wound was described as moderate to severe. The stab wound caused profound internal bleeding and TD died at the scene following this chance encounter with two men who he had never met before.

14. TC said the altercation ended after he heard AL say to JC "*we need to go*". CCTV footage showed AL running from the scene, whilst JC continued to fight with TC at the foot of the stairs. Thereafter, JC joined AL on the stairs although he returned briefly to collect some items from the foot of the stairs.

15. The appellants went together to a car park of a local housing estate, where they discarded items of clothing. AL took some garments from a clothesline. They then made their way separately to the home of a mutual friend in Yew Avenue, West Drayton.

16. The knife used in the fatal stabbing was found in its sheath, hidden behind a paving stone close to where the clothing had been discarded. It was an Eickhorn Aviator 1 knife made to NATO specifications and designed as an emergency rescue knife, capable of sawing through the laminated glass of aircraft. The knife was just over 27 cm long with a blade length of 13.5 cm. Blood staining was visible on the knife and sheath. The deceased's DNA was found on the knife blade.

17. On 4 October 2019 both appellants were arrested as they walked together in the City of London.

18. The prosecution case against AL was that he unlawfully killed the deceased by stabbing him, and at the time of doing so, he intended either to kill him or to cause really serious bodily harm. The case against JC was put on a different basis. It was suggested he had encouraged or assisted AL to attack the deceased, intending that the deceased would be killed or caused really serious harm, and as a consequence was guilty of murder. Alternatively, if he encouraged or assisted AL to attack the deceased but did not intend that the deceased would be killed or caused really serious bodily harm, he was guilty of manslaughter.

19. In addition to the evidence of TC, the prosecution relied on the footage from a number of CCTV cameras; the eyewitness accounts of Estelle Kabia-Caulker, Helen Lamadin, Angeline Jeganath, Shangar Honer, Idrani Saha and Martha Mills-Perkins; bad character evidence concerning AL; adverse inferences relating to the refusal on the part of both appellants to answer questions in interview (JC provided two prepared statements) and their failure as a consequence to mention to police facts relied on as part of their defence at trial; and the

suggestion that AL's explanation for possession of the knife and the circumstances of TD's death were not credible.

20. In evidence, AL admitted that he had unlawfully killed the deceased. He accepted possession of the knife and that he had brandished it in the violent confrontation, but he denied deliberately stabbing the deceased intending to kill or do really serious harm.

21. He said that he had arranged to meet the JC at Hillingdon Station in order to travel together to West Drayton. They did not know each other well but were travelling to a mutual friend's house.

22. He testified that the deceased and TC, on the opposite platform, had started the incident by "*screw-facing*". This is a contorted facial expression, usually made out of anger or frustration. They had gestured for him to come over. As he crossed between the platforms, he was joined by JC. He denied having shown aggression and he maintained it was TC who was verbally abusive. He said TC started the violence by pushing JC. The deceased and TC attacked JC, and as a result AL decided to take out the knife he was carrying to scare them away. He said the deceased punched him while he was waiving the knife.

23. As AL took the deceased in a bear hug while holding the knife in his right hand, the deceased spun him, and they fell to the floor. It was at this stage that the deceased turned himself onto the knife. He had no intention to stab him. The sheath had fallen off the knife at some stage by accident. He had taken it from a film set where he had been working.

24. JC said he knew the first appellant AL, but not well. On 24 September 2019 they had agreed to meet at Hillingdon Underground Station to travel together to a friend's house. AL told him at the station that two boys had been abusive to him and he was going to have a chat with them.

25. He denied that he took part in an unlawful assault. He said TC had started to swear and was aggressive, and as a consequence JC tried to calm the situation down. He said he had acted, therefore, as a peacemaker and he only became involved in the violence when he acted in self-defence after being pushed by TC. He knew nothing of the fatal fight between AL and the deceased. He was unaware that AL had a knife and he did not see it being used. He said he did not speak to the deceased; he did not punch him or receive any punches from him. His attention was solely on TC who was punching him. When he heard AL say, "*let's go*", he managed to get away from TC, returning briefly to pick up his telephone which had fallen from his pocket.

26. He said he did not see the first appellant hide the knife, and he did not know a person had died until the following day.

The issue for the jury

27. The jury needed to decide whether they were sure that AL deliberately stabbed the deceased, intending by his actions to kill him or to cause him really serious harm. As regards JC, on count 1 they needed to decide whether they were sure that JC had intentionally assisted or encouraged AL in an assault upon the deceased and TC, and that he had done so with the intention to kill or do really serious harm to another. If they were not sure on count 1, alternatively on count 2, were they sure JC had intentionally assisted or encouraged the first appellant AL in an assault upon the deceased and TC, and that he had done so with the intention to cause some physical harm to another.

Lanning and Bad Character

28. The prosecution applied to introduce evidence of bad character concerning AL. He had previous convictions arising out of his guilty pleas at Lewes Crown Court on 15 July 2016 on an indictment containing two counts of possession of class A drugs with intent to supply, and a count of unlawful wounding contrary to section 20 Offences Against the Person Act 1861.

29. The prosecution originally served a bad character notice dated 3 March 2020 in which it was submitted the wounding conviction was admissible under section 101(1)(d) Criminal Justice Act 2003 (*viz.* the convictions were relevant to an important matter in issue between AL and the prosecution, namely whether AL had deliberately stabbed AL to the chest, and it was suggested that the conviction demonstrated a tendency to commit offences of this kind). The facts were analysed as follows for the purposes of the application:

> "a. (AL) was in Brighton acting as a runner supplying drugs for a dealer based in Kent;
>
> b. On the night in question, (AL) met a man named William Goodfield with a view to selling him some drugs. However, there came a time when (AL) realised that Goodfield did not have the money to pay for the drugs;
>
> c. A fight ensued between (AL) and Goodfield. (AL) believed that Goodfield was trying to steal his drugs;
>
> d. In the course of the fight, Goodfield produced a knife. The knife fell to the floor during the struggle. (AL) grabbed the knife and deliberately stabbed Goodfield several times in an effort to break free;

> e. Goodfield was subsequently taken to hospital. It was noted he had suffered multiple stab wounds, including seven stab wounds to his chest; a stab wound to the back of his head; a stab wound to his hand; and a stab wound to his groin. He was noted to have a left pneumothorax and an associated collapsed lung.
>
> In essence, (AL) pleaded on the basis that this was a case of excessive self-defence and he did not intend either to kill Goodfield or cause him really serious bodily harm."

30. AL's basis of plea in relation to the wounding offence had been that:

> "1. The accused will plead guilty to unlawful wounding contrary to section 20 O.A.P.A 1861 on the basis that he used excessive force having initially reacted in self defence when attacked by William Goodfield.
>
> 2. The accused had met Goodfield to sell him drugs. It became clear that Goodfield did not have the money to pay for the drugs and he intended to rob the accused. Goodfield attacked the accused first.
>
> 3. A knife was produced which ended up in the accused's hands and which he used to defend himself from Goodfield's attack. The accused accepts that having caused 11 wounds he went beyond lawful self defence."

31. The argument was expanded in a skeleton argument dated 22 July 2020, in that following the cross-examination of TC it was additionally submitted that the wounding conviction was admissible on the basis of an unlikelihood of coincidence and propensity. Furthermore, it was submitted that all three previous convictions were admissible under section 101(1)(g) Criminal Justice Act 2003 (*viz.* an attack had been made by AL on another person's character). AL resisted this application.

32. As regards the wounding conviction, the prosecution argued the matter in writing as follows:

> "15. The facts relating to the previous conviction for unlawful wounding show that during a violent confrontation in a public place, (AL) intentionally used a knife to stab the unarmed victim when he felt threatened. It is submitted that this is relevant to the issue of whether (AL) took the knife out of the sheath and intentionally stabbed (TD) as (TD) was forcing him back along the platform.

16. Put another way, on hearing evidence about the previous conviction, the jury would be entitled to reject the defendant's claim that he did not intend to stab (TD) and conclude that he is a man who is prepared unlawfully to use a knife to stab when involved in a fight."

33. The judge set out his conclusions as follows:

"7.1. In my view the bad character evidence in relation to the unlawful wounding conviction, as outlined by the prosecution, is relevant to an important matter in issue between the prosecution and (AL) namely whether the jury can be sure that the fatal wound was inflicted as a result of a deliberate stabbing by (AL) and in turn whether in doing so he had intended to cause at least really serious harm. The question whether the stab wound was inflicted deliberately or unintentionally is the core issue underpinning the allegation in Count 1. The jury would be entitled to consider whether it was too much of a coincidence that on a previous occasion (AL) had taken hold of a knife during a fight with another male and then unlawfully and intentionally used the knife to inflict wounds (including to his chest) in order to overcome the person with whom he was fighting. The jury would be entitled to conclude (subject to due consideration of all the other evidence in the case) that that was too much of a coincidence for (AL's) account in evidence to be a truthful one.

7.2 Furthermore in my view the fact that (AL) has previous convictions for both unlawful wounding and drug dealing offences is relevant in the light the attack made by him upon the character of the deceased and (TC). (AL) has asserted that he had not initiated any violent confrontation nor had he acted in any reprehensible way towards the deceased or (TC). In order to explain the violent incident that occurred (AL) has accused them of discreditable conduct including swearing and abusive language, challenging and confrontational actions, striking both himself and (JC) without any provocation or justification and initiating the dreadful display of violence that followed. Such conduct by the deceased and (TC), if true, would reflect adversely on the character of both young men. Given that conflict of evidence it is only fair that if such an attack is made on the character of someone involved in the incident then the jury should know about the character of the person who makes such assertions. The jury would be entitled to consider such evidence together with all the other evidence in the case when deciding whether (AL's) assertions are or may be true.

7.3 I have no reason to conclude that the admission of the bad character evidence sought by the prosecution would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. The evidence is very relevant to the issues in the case. The offending conduct took place when (AL) was already over 18 years of age and it did not take place so long ago that its value has been significantly reduced by the passage of time and (AL's) subsequent development and/or maturing."

34. The judge summed up AL's bad character to the jury as follows:

"Another matter of law; you have heard that the defendant, (AL), has previously been convicted of the following offences - an offence of unlawfully wounding a person on 5 March 2016; two offences of possessing, on 11 March 2016, a controlled drug of Class A with intent to supply to another. I said I would come back and give you directions about how you should and should not regard that evidence. I do so now. Both convictions relate to offences committed when he was 19. He is now aged 22. These previous convictions do represent a bad side to his character; however, please treat the fact of these previous convictions with great care and caution. The fact that a defendant has committed such offences does not and cannot in itself prove that he has committed the offence with which he is now indicted and in your charge. You must not think that it does, nor allow any of your number to use such evidence in that way. As is obvious and as you would appreciate is only common sense, you must not convict the defendant because he has this element of bad character in his past, nor must you allow yourself to be prejudiced against him because of his past misconduct. You have been told about these previous convictions for two reasons; (1) because of the nature of the issue between the prosecution and (AL) in this trial; and (2) because of the attack that (AL) has made on the character of (TC) and (TD).

I will deal with the first basis. The first conviction, unlawful wounding, is relevant for your consideration of the principal issue between the prosecution and (AL), namely whether you are sure that (AL) deliberately stabbed the deceased in the chest and that he did so with the intention of causing him really serious harm. (AL) contends that the death was caused in an unintentional stabbing when he was wielding his knife in order to scare the deceased and that the fatal stabbing occurred when he was holding the deceased in a bear hug from behind and the deceased turned on the blade during their struggling. The prosecution allege that this was a deliberate stabbing an offensive manner and was intended to cause, at the very least, really serious harm. It is contended by the prosecution that for (AL's) account in this case to be true it is too much of a coincidence

that some three years or so earlier he had taken hold of a knife during a fight with another and then unlawfully and deliberately used the knife to inflict wounds in order to overcome his opponent on that occasion, including a stab wound to the torso (to the upper body). The prosecution contend that it is too much of a coincidence and contend that the nature and manner of the previous conduct (as set out in No 57) is a further piece of circumstantial evidence which helps put a lie to his account of how the fatal stabbing of (TD) occurred.

It is contended by contrast on behalf of (AL) that the facts and circumstances of that previous incident are entirely different to this case and that a conviction for unlawful wounding without an intent to cause really serious harm cannot assist with the jury's consideration of the issue that arises on count 1, namely whether the prosecution have proved that the fatal stab wound was inflicted by the first defendant with the intention to cause death or really serious harm.

Again, you must consider these competing submissions and make a fair and unemotional assessment of this evidence of past conduct and determine whether in all the circumstances of this case such evidence does support the prosecution in relation to this principal issue.

The second basis for you hearing about this evidence; both convictions, unlawful wounding and the two drugs' offences, are relevant to your consideration for the following separate reason, namely owing to the attack that (AL) has made on the character of, in particular, (TC), but also the character of the deceased. The prosecution allege that (AL) was the troublemaker in this event and that he had picked a fight with the deceased and (TC) as they were innocently standing on the opposite platform waiting for their train, minding their own business, and that he had acted without any justification in an aggressive and bullish manner form the outset.

The first defendant, (AL), has denied that he behaved in any reprehensible way and he maintains that between them (TC) and the deceased were the troublemakers and that they were acting in an offensive and aggressive way. He has alleged that (TC) started the trouble by shouting [inaudible] abuse at (AL) across the tracks and beckoning him in a challenging and aggressive way to come over to their platform and in continuing to abuse and swear at him when he approached them together with (JC). And then without provocation (TC) started the violence by pushing (JC) and then, together with the deceased, hitting out offensively at both him and (JC) in the fighting that ensued. Such discreditable conduct by (TC) and deceased if true of course would reflect badly on the character of both males.

So having set out the competing contentions about this aspect it is a matter for you to consider fairly and in an unemotional way those competing positions, having considered all the evidence in the case. Obviously just because a defendant has such previous convictions does not mean he must be telling lies in his account in this case. However, it is only fair that if such an attack is made on the character of another person or other persons, then you should know about the character of the person who makes such allegations when you are deciding whether or not what he is saying is true. It is important to bear in mind at all times that the previous convictions are just part of the evidence in this case. You must step back and consider all the evidence before coming to any final conclusions on this.

The Defence contend that this evidence cannot assist the jury in their deliberation of the issues in this case and caution that such evidence may risk unfairly prejudicing (AL). Remember at all times it will wrong simply to convict someone of an offence wholly or mainly because of his bad character (previous convictions). Such matters can never be more than support for the prosecution case. This is evidence, please, which you are entitled to consider in relation to (AL) and the issues that arise in his case; it is not evidence which you are entitled to hold against the second defendant or otherwise use to the direct detriment of (JC)."

35. The following agreed facts were given to the jury in writing:

"56. On 15 July 2016 at Lewes Crown Court, (AL) pleaded guilty to the following offences:

- Two offences of possessing a controlled drug of class A drugs with intent relating to 11th March 2016;

- An offence of unlawful wounding.

57. The facts of the unlawful wounding related to an incident in the early hours of 5th March 2016 in Regency Square, Brighton when the defendant stabbed William Goodfield with a knife. (AL) pleaded guilty on the following basis:

a. (AL) had met Mr Goodfield to sell him class A drugs;
b. Mr Goodfield did not have the money to pay for the drugs and he attempted to rob (AL);
c. Mr Goodfield attacked (AL) first;
d. A knife was produced by Mr Goodfield which ended up in (AL's) hands;

> e. In the course of the violence (AL) deliberately stabbed Mr Goodfield, including to the torso;
> f. (AL) initially acted in self-defence but subsequently his actions went beyond lawful self-defence."

Camille and an Overwhelming Supervening Act

36. Mr Aina on behalf of JC submitted that the actions of AL in killing the deceased amounted to an overwhelming supervening act ("*OSA*"), and that the judge should give directions to the jury on the issue. It was argued, first, that JC joined the incident after it had begun, and he had not seen or heard the events that initially led to the confrontation. Second, it was submitted that there was no evidence that JC knew AL had a knife or that it had been used during his fight with the deceased, which events took place out of his sight. JC was unarmed. The prosecution submitted that the use of the knife by AL in the fatal assault did not constitute an OSA.

37. The judge concluded that the relevant jurisprudence from the Court of Appeal indicates that if, during a joint enterprise attack, one or more of the perpetrators are unaware that one of their number has produced and then used a knife, that would not constitute an OSA. Instead, as the judge put the matter:

> "[…] once you have agreed to take part in an unlawful assault, it is an escalation of the violence to which you have signed up to and that is one of the perils of signing up. […] at the end of the day, a defendant, a secondary party is guilty of murder, or manslaughter, will depend upon, of course, the intention held by that secondary party, and one of the factors to be considered by the jury is the knowledge, or ignorance, of the knife used by the principal, but that is for the jury to consider, but within the concept of the joint enterprise and issues of intent and self-defence, to the extent that they arise in any given case. It is not just simply having a production of a knife, in what starts as a verbal dispute, but not the overwhelming supervening act, that is not what is in position in *Jogee* ([2016]] 1 Cr App R 31 and thereafter considered further in the two cases that I have mentioned."

Camille and a Count of Affray or Assault Occasioning Actual Bodily Harm

38. On 30 July 2020 the judge invited the prosecution to review the indictment and to consider adding a count either of affray or assault occasioning actual bodily harm as regards JC. The judge made the suggestion in anticipation of the possibility that the jury might not be sure that JC was guilty of murder or

manslaughter but nonetheless concluded he had not acted in lawful self-defence. In those circumstances it would have been open to them to convict of a lesser offence. The Crown elected to focus on the principal contention in the case, which concerned the death of TD. The prosecution, therefore, declined to amend the indictment.

The Grounds of Appeal

Bad Character: Lanning

Submissions

39. It is submitted Mr Femi-Ola Q.C. and Mr Stradling on behalf of AL that the judge wrongly admitted the evidence of his previous convictions under gateways 101(1)(d) and 101(1)(g) of the Criminal Justice Act 2003. Alternatively, it is submitted the judge erred in not excluding this evidence under section 101(3) of the Criminal Justice Act 2003. It is suggested that "*the core and central*" issue in AL's case was whether he intended to kill or to cause really serious harm. It is contended "*there was little of assistance that was brought to the case by consideration of whether or not there was a deliberate stab*". Mr Femi-Ola submitted that the introduction of this material ran the risk of the jury being misled in their consideration of whether AL had the *mens rea* for murder by focussing on whether the blow was deliberate. Therefore, it is contended that the wounding conviction – the stabbing on that occasion had been deliberate but was not accompanied by an intention to kill or to cause really serious harm – was of no relevance to the main issue in AL's case. Mr Femi-Ola argues that there was too great a risk that the jury would simply have concluded that he had in the past done something similar to that which was alleged on this occasion. Put otherwise, AL was at risk that the jury would have viewed the wounding conviction as proving he had a propensity to commit this kind of offence. Finally, it is said that it was wrong to introduce the three convictions because of the attack on the character of the deceased and TC. Most particularly, introducing the wounding conviction on this sole basis would have involved prejudice as regards count 1 that was potentially very great; indeed, there was a real risk it would have been determinative of the jury's verdict.

40. Mr Aina Q.C. and Ms Bukhari on behalf of JC supports this ground of appeal. He contends that the judge was wrong to admit the previous convictions of AL. He argues that once the convictions were admitted it was inevitable that AL would be convicted of murder, and as the main thrust of the prosecution case against JC was his association with AL after the killing, the admission of the previous convictions had an irretrievably negative effect on the jury's consideration of JC's defence at trial. He highlights that there were differences between the two cases, and that the wounding offence only occurred when AL had been attacked,

and he responded by picking up the knife that had been carried by the other man.

Discussion

41. The relevant statutory provision is section 101 Criminal Justice Act 2003 which provides, as relevant:

> **"Defendant's bad character**
> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> […]
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> (g) the defendant has made an attack on another person's character.
>
> […]
>
> (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.
> (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."

42. As Mr Oliver Glasgow Q.C. and Mr Martin for the respondent have highlighted, the prosecution's case and AL's case were markedly at variance. It was the prosecution's allegation that AL deliberately unsheathed the knife and then deliberately stabbed TD in the chest with it, intending to do him at least really serious bodily harm. Conversely, AL claimed that the knife came out of the sheath accidentally during the incident, and that the wound was inflicted unintentionally; it resulted simply from AL and TD coming together during the struggle. In essence, AL claimed that TD turned onto the knife during a dynamic episode as he gripped him from behind.

43. Therefore, the two important matters in issue between the prosecution and AL included whether AL deliberately stabbed TD and whether at the time of the stabbing, AL intended to do TD at least really serious bodily harm. We agree with Mr Glasgow that although these issues were plainly linked, they were nonetheless significantly distinct. A conclusion that this was a deliberate stabbing would not necessarily lead to a conclusion that it was done with the requisite intent for murder, although it had a significant bearing on it. On the other hand, a conclusion that this was not a deliberate stabbing would go hand in hand with a conclusion that there was no intent to cause really serious bodily harm.

44. The importance whether the blow was deliberate was the focus of AL's two defence statements. In the original statement dated 23 December 2019 it was contended:

> "The defendant and (TD) got into a bear hug. Blows were thrown by (TD) and the defendant became disorientated and lost his balance. In a split second and in the confusion the defendant accepts that the knife entered (TD). This happened as the defendant lost his balance. There was no intention for this to happen.
>
> The defendant did not realise what had occurred until after the knife had come out of (TD). Thereafter the defendant panicked and his subsequent actions were as a result of that panic."

45. In the second defence statement, served on 15 July 2020 (the third day of trial) it was set out that:

> "4. During the course of the altercation the sheath came off the knife. This was not done deliberately."

46. These contentions were reflected in AL's evidence at trial.

47. As Mr Glasgow submits, the Crown sought to adduce the bad character evidence as being relevant to the issue of whether this was a deliberate stabbing as opposed to whether AL had the requisite intent for murder. Accordingly, the prosecution did not apply to adduce evidence of the number of stab wounds inflicted by AL on William Goodfield or the extent of his injuries (see the admissions above at [35]). The prosecution, furthermore, did not in the event seek to establish via this material that AL had a propensity to commit offences of the kind with which he was charged (section 103(1)(a) Criminal Justice Act 2003). Instead, the previous conviction for the offence of unlawful wounding was

argued to have been plainly relevant to the jury's consideration of whether AL deliberately stabbed TD.

48. In our view the credibility of AL's explanation that TD had turned onto the blade which had accidentally come out of the sheath – therefore, that this fatality was in essence simply a terrible accident – was potentially significantly reduced when it was known that he had in the relatively recent past (*viz.* three years or so earlier) taken hold of a knife during a fight with another man and then unlawfully and deliberately used it to inflict wounds in order to overcome his opponent. This included delivering a stab wound to the torso/upper body.

49. Notwithstanding Mr Aina's submission that there were certain differences between the instant case and the wounding, the short summary of the Lewes Crown Court matter set out above reveals why the wounding conviction was relevant on its facts to the defence advanced by AL in the present trial. The judge explained its relevance to the jury (see [34] above) on the basis that for AL's account to be true it was arguably too much of a coincidence that some three years or so earlier he had taken hold of a knife during a fight with another and then unlawfully and deliberately used the knife to inflict wounds in order to overcome his opponent on that occasion, including delivering a stab wound to the torso.

50. In this context we have found assistance in the decision of this court in *R v Hay* 2017 EWCA Crim 1851. At paragraph 21 of the judgment, Simon LJ set out that:

> "[…] A "matter in issue" can arise when a defendant seeks to explain potentially incriminating evidence of association with someone involved in a crime as "innocent association" or to rebut coincidence. Whether or not an association is innocent or coincidental may be an important matter in issue between the defendant and the prosecution within the meaning of section 101(1)(d)."

51. In our view the contention that a stabbing was not deliberate and instead the deceased turned onto the knife can equally be an important "*matter in issue*", and that relevant and probative evidence can potentially be called to rebut the suggestion that the fatality was an accident.

52. It might have been more straightforward simply to direct the jury that when they were evaluating whether it was possible that TD turned onto the knife, it was relevant for them to consider the way in which previously the appellant had deliberately used a knife when fighting with an adversary. Whatever the precise wording used, however, we have no doubt that the jury would have understood that the prosecution's contention was that the earlier wounding conviction made

it less likely than otherwise might have been the case that the present fatality was accidental, in the circumstances of someone wielding a knife during an altercation. They would have appreciated that this was an argument that they needed to consider.

53. We stress, therefore, that the effect of the judge's direction to the jury was that the circumstances of the wounding conviction potentially threw light on the truthfulness of AL's account as to how TD's fatal injury was inflicted, and whether he had accidentally turned himself onto the blade. Put otherwise, the judge made it clear to the jury that the previous conviction for wounding was relevant as to how the injury came to be inflicted, namely whether this was a deliberate stabbing. Indeed, as set out above, the judge directed the jury that this evidence, on the prosecution's submission, "*helps put a lie to his account of how the fatal stabbing of Tashan Daniel occurred*" and it tended to rebut the suggestion of accident.

54. It is not suggested on AL's behalf that the evidence of his convictions for the offence of unlawful wounding and the drugs offences were not *prima facie* admissible through the gateway established by section 106(1)(g) Criminal Justice Act 2003, which permits the prosecution to adduce evidence of bad character to counter an attack on another person. The submission made is that the judge should have excluded the evidence under section 101(3) Criminal Justice Act 2003 or section 78 Police and Criminal Evidence 1984.

55. In our view, the judge was correct to rule that this evidence ought not to have been excluded under section 101(3) Criminal Justice Act 2003 and he was justified in concluding that the admission of the evidence would not have such an adverse effect on the fairness of proceedings that the court ought not to admit it. As submitted by Mr Glasgow, the judge evaluated the relevant factors, including the nature of the previous convictions and their age, and he was entitled to reach the conclusion he did. The circumstances of the unlawful wounding and the two drug offences were not in dispute, they did not lead to any satellite litigation and this was not a case where evidence of bad character was being adduced to support a weak case. Furthermore, any potential prejudicial effect of the admission of the bad character evidence was appropriately addressed by the judge's directions during summing-up. He instructed the jury to treat the evidence of bad character "*with great caution*" and "*that the convictions could not in themselves prove AL's guilt*"; he set out the reasons why the evidence had been introduced, the purpose for which they could be

used and the rival submissions from the prosecution and defence. In the circumstances of this case, the evidence countering the character attack had clear probative value in correcting what was said to be a false impression and it would have provided the jury with information relevant to whether AL's assertions against the character of the deceased and TC were worthy of belief (see *Clarke* [2011] EWCA Crim 939, particularly at [45] and [46]).

56. We were taken to two particular authorities. First, in *R v Bullen* [2008] EWCA Crim 4; [2008] 2 Cr App R 25 seven previous convictions were introduced to establish a propensity on the part of the accused to be violent. Second, *R v Fyle* [2011] EWCA Crim 1213, was a case in which a burglary and a wounding conviction were introduced to establish a propensity to attack and take property from men with whom the defendant had had sexual relations. Given both of these cases involved the question of whether the appellant's bad character was properly admitted to establish propensity, we have not found them of assistance in resolving the different issue that falls for consideration in the instant appeal under section 101(1)(d).

57. Turning to Mr Aina's submissions on this ground of appeal, this evidence was admissible against AL only, as the judge explained to the jury. He expressly directed them that they should not use this material against JC (see [34] above). Once the judge concluded that the evidence was admissible against the accused to whom it related, he was not under any obligation then to exclude it because it was submitted that it might have an adverse effect on the case of a defendant against whom the evidence was inadmissible. Juries are properly trusted to apply clear and accurate directions which are given to them. It is perhaps significant that at the time the bad character application was made in respect of AL, no submissions were made on JC's behalf objecting to the admission of the evidence.

58. It follows that we are unpersuaded by this ground of appeal as advanced by both appellants and the appeal against conviction as regards Alex Lanning is dismissed.

An Overwhelming Supervening Act: Camille

Submissions and Discussion

59. It is submitted by Mr Aina that the judge erred in not directing the jury that they could acquit JC of manslaughter if the actions of AL in killing the deceased

amounted to an OSA. Mr Aina has provided a detailed breakdown of the evolution of the incident, first with all four men involved together and thereafter splitting into two groups. It is suggested that after the first few seconds of the incident, any aggression by JC was directed solely at TC. This was after he had been attacked from behind by TD. The moment was reached when he left with AL. Mr Aina relies significantly on the contention that the use of knife was out of the sight and knowledge of JC. It is asserted that JC was convicted on the basis of his actions after the incident. This contention is based on a jury note during retirement, "*Does encouraging and assisting cover the post incident actions taken. Clarification over the level of encouragement and assistance meant*".

60. With great respect to Mr Aina, we consider this latter submission to be without foundation. It would be wrong in principle to attempt to speculate on the reasons why the jurors were persuaded that they were sure of a defendant's guilt based simply on the content and timing of a note they sent to the judge. This provides a wholly inadequate basis for reaching any conclusions as to the course of their deliberations.

61. In his oral submissions, Mr Aina suggested that the decision of the Supreme Cout in *R v Jogee* [2016] UKSC 8 (see [63] below) does not have the effect of excluding the possibility of the judge leaving OSA to the jury in all cases in which a knife is used during an escalation of violence during a fight. He argues that the present spontaneous violence, which occurred when JC was unaware that AL had a knife, is an example of the kind of situation in which OSA should be left to the jury, at the judge's discretion, particularly bearing in mind the absence of any evidence that JC had been involved in gang violence or that he had previously used a knife. In this context, Mr Aina submitted that a distinction should be drawn between defendants depending, *inter alia*, on a number of factors, including their past and whether they had deliberately placed themselves in a position in which reliance on OSA would not arise, for instance by joining a violent street gang or participating in a venture when it was sufficiently clear weapons may be used.

62. Notwithstanding those persuasively advanced submissions, in our judgment, Mr Glasgow is correct to argue that the judge appropriately ruled that there was insufficient evidence to leave the question for the jury to decide as to whether the production and use of a knife by AL on TD constituted an OSA. This conclusion is based on the development of the law in *Jogee* and developed in other authorities, some of which we consider hereafter

63. The principles of secondary participation in cases of homicide, including the application of the principle of OSA, were restated in *Jogee*. The Supreme Court observed, *inter alia*:

> "97. The qualification [...] is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> 98. This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from English. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in Chan Wing-Siu to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

64. Additionally, Mr Glasgow and Mr Aina have helpfully taken the court to *R v Tas* [2018] EWCA Crim 2603, a case in which the concept of an OSA was further elaborated. Tas appealed against his conviction for manslaughter. He argued that a co- defendant's use of the knife to kill was an OSA and the trial judge should have left this issue to the jury. The judge refused, holding there was insufficient evidence to adopt this course. The Court of Appeal in upholding the conviction, observed:

> "37. Thus, in underlining the requirement for proof of intention, one of the effects of Jogee is to reduce the significance of knowledge of the

weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of Jogee), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.

38. The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in [96] of Jogee, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based on principle and the correct application of Church (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self-defence.

39. On the facts which must have been found by the jury in this case, Tas took the risk that the others involved in the joint enterprise with him would go further than to inflict 'some harm'. Consistent with the principles identified in the authorities and the modern approach to knowledge of a specific weapon, there is no reason to distinguish the case where the victim is kicked to death or killed with a weapon either that is picked up off the ground or brought by the principal to the scene.

40. What then is left of overwhelming supervening act? It is important not to abbreviate the test which postulates an act that "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". In the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.

41. We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre- requisite for manslaughter. In our judgment,

> whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency."

65. Mr Aina seeks to distinguish the decision in *Tas* from the present case on the basis that the joint venture in *Tas* involved a plan by a group to confront the victim. When he was located, force including by means of a weapon was used and the case, it is submitted, is to be differentiated on the basis that it did not involve a fist fight "*occurring out of the blue*". We are unable to accept that the distinction between a planned attack and an event which occurs more spontaneously is in any sense determinative of whether the judge should direct the jury as regards an OSA. It will be one of the factors to be borne in mind when considering the defendant's intention, but it does not, as a matter of course, lead to the conclusion that the production of a knife is an OSA.

66. The last of the authorities referred in argument by Mr Glasgow and Mr Aina is *R v Harper* [2019] EWCA Crim 343. Harper appealed against her conviction for murder. Her co-defendant had used a knife to stab the victim, in the context of a spontaneous fight. She had pleaded guilty to affray having been involved in the general fight. She argued that the (unseen) stabbing of the victim by her co-defendant, using a knife of which she was unaware, constituted an OSA. In dismissing the appeal, the Court of Appeal held:

> 30. That brings us to the concept of overwhelming supervening event. Although Mr Lumley argues that the presence of a knife constitutes such a feature, in our judgment, it is clear that it does not: if it were the case that it did, the observations in Jogee is no more than evidence from which the jury could reach conclusions about intention would be wrong.

67. Those conclusions are particularly apposite in the context of the present ground of appeal.

68. Mr Aina relied on four scenarios which he suggests demonstrate the range of situations in which an OSA should be left to the jury, particularly when spontaneous moderate violence occurs. Although we are grateful to Mr Aina for

his industry and ingenuity, decisions in trials are rooted in the detailed facts of real cases, rather than on thumbnail sketches of imaginary situations. We readily appreciate that the scenarios form only a part of Mr Aina's overall submission that the escalation of violence resulted in the use of a knife in circumstances which were wholly unforeseeable by JC. This, Mr Aina contends, arguably relegated his actions on the station platform (*viz.* play fighting, escalating into a fist fight) into history.

69. The fatal stabbing occurred in a public place, during an incident of violence involving four young men. The CCTV footage significantly supports the contention that this was a joint attack by AL and JC on the two victims. It would have been clear that AL was seeking an unnecessary confrontation with TD and TC, who had upset or angered him. AL and JC joined up and walked to the platform where the victims were standing. As the Crown suggest, "*in today's social climate*", or, as we would put it, bearing in mind that knives are produced in situations of this kind with a high degree of frequency leading to serious injury or death, the judge was entitled to conclude that there was an insufficient factual basis for a jury to conclude (adopting the language from *Jogee* at [97]), that "*nobody in the defendant's shoes could have contemplated*" that the production and use of a knife in the joint attack might happen. It was open to the judge to determine that the production of the knife was not an event of such a character as to relegate JC's acts of encouraging AL to assault the two victims to history (again, see *Jogee* at [97] quoted above).

70. We stress that we consider it is essentially irrelevant in this regard that JC was unaware of the presence of the knife when he set out with AL to confront TD and TC, or that he did not have a history of carrying knives and he had not been associated with street gangs, given factors of that kind are not the central question. What matters instead is whether JC intended to assist AL in a crime where some physical harm would be caused to the victims. As the judge set out for the jury with commendable clarity in the written directions:

> "Count 2: *Second Defendant*
> It is contended in the alternative by the Prosecution that if the jury is not sure that the *Second Defendant* shared an intention at the very least to cause *Tashan Daniel* or *Treyone Campbell* really serious harm but the jury is sure that the *Second Defendant* intended that some physical harm would be caused to the two males then the *Second Defendant* is guilty of the offence of *Manslaughter.*
>
> […]

Second Defendant's contention

The *Second Defendant* denies that he has committed either the offence of *Murder* or the offence of *Manslaughter.*

The *Second Defendant* accepts that he was involved in a violent incident on the station platform however he maintains that he took no part in the stabbing of the *Deceased* and that he neither assisted nor encouraged the *First Defendant* to assault the *Deceased* nor had he acted at any stage with the intention of assisting or encouraging the *First Defendant* to do so.

The *Second Defendant* denies that he was a party to any unlawful assault upon *Tashan Daniel & Treyone Campbell.* He maintains that he had initially acted as a peace-maker in order to calm down an altercation that was taking place between the *First Defendant* and *Treyone Campbell.* He accepts that he had then become involved in a fight with *Treyone Campbell* but he maintains that he was acting in lawful self-defence and he contends that this fighting was quite separate and unconnected to what was happening out of sight between the *First Defendant* and *Tashan Daniel.*

The *Second Defendant* maintains that he had not known that the *First Defendant* had been carrying a knife or any other weapon that day nor did he see him wielding or using a knife during this incident.

[…]

Count 2

The issue for you to determine in respect of the *Second Defendant* is whether the Prosecution have made you sure that:

- He intentionally assisted or encouraged the *First Defendant* in an assault upon the *Deceased* and *Treyone Campbell;*
  AND
- He had done so with the intention to cause some physical harm to another albeit not death or really serious harm."

71. The jury would have understood the issues of which they needed to be sure, and in particular whether JC assisted or encouraged AL in the assault and intended that some physical harm should be caused. Given that the effect of *Jogee* is that in cases of this kind knowledge of a weapon has been relegated to proof of intent, we do not consider that in the present context its production meant that an OSA should have been left to the jury. Indeed, the harm by AL could have been caused by forcing the victim to the ground or onto the railway tracks, so that he fatally hit his head. This wholly unnecessary fatality was a paradigm of rapidly escalating violence which was part of a joint enterprise attack. In the circumstances we are unpersuaded by this ground of appeal.

A Count of Affray or Assault Occasioning Actual Bodily Harm: Camille

Submissions and Discussion

72. As something of a makeweight ground of appeal, Mr Aina submits that once the prosecution had declined to add additional counts to the indictment at the judge's suggestion, he should have amended what he argues was a defective indictment.

73. The purpose of adding a count of affray would have been to cater for the situation where the jury were uncertain that JC bore no criminal responsibility for the death of TD but they were sure that he had engaged in unlawful violence towards TC. Adding a count of affray or assault would have ensured that his alleged criminality, outwith the homicide, would have been reflected in the jury's verdicts.

74. The indictment before the jury was not, however, defective for want of an affray or an assault charge. We accept Mr Glasgow's submission that the prosecution were entitled to draft the indictment in a way that ensured the jury focussed on JC's alleged involvement in the homicide, rather than adding a count for the relatively less serious criminality, despite the evidential justification for adopting this course. An indictment is not necessarily defective merely because it does not include every potential offence that may be revealed by the evidence.

75. The judge was under no obligation to exercise his discretion to amend the indictment under section 5 Indictments Act 1915, a course which he chose not to take. This point was not raised during the trial and it was not suggested to the judge that the indictment was defective.

76. The judge ensured that the jury approached the indictment correctly, and that they did not impermissibly convict the appellant of manslaughter because no lesser charge was available. As he directed the jury:

> "May I just alert you to this situation should it arise in your deliberations and it is really, as I say, words of caution to alert you to this so you do not fall into any trap subsequently. If you were satisfied that in fighting with (TC), the alleged victim, that the second defendant was not acting in lawful self-defence but was unlawfully assaulting (TC), but you were not sure that he was acting as a secondary party to the unlawful killing as alleged on Counts 1 and 2, then your verdict must be one of acquittal in his case because there is no count for you to consider that would reflect that unlawful assault upon (TC) if you so found. The prosecution have chosen in this case to focus upon the homicide allegation and recognise and obviously accept this situation. So I hope you see the line I am trying to draw.
>
> If you wish me to repeat that I will, but otherwise I think it obviously stands to reason given all that I have said so far by way of directions and everything that is written down for you already, but I thought it good and sensible to flag it up because one never knows how discussions go when a jury retire and I just want to flag up that little pitfall to make sure no one falls into it."

77. It follows that there is no basis for the submission that the absence of a count of affray or assault occasioning actual bodily harm on the indictment had a bearing on the jury's decision to convict of manslaughter. The only sustainable conclusion is that the jury convicted because they were satisfied that the offence had been proved. The verdict is not rendered unsafe because of this suggested defective indictment.

78. The appeal against conviction as regards Jonathan Camille is dismissed.