Neutral Citation Number: [2022] EWCA Crim 1010

Case No: 202101973 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT STAFFORD
HHJ MONTGOMERY QC
T202117063

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 July 2022

Before :

LADY JUSTICE WHIPPLE
MRS JUSTICE CUTTS
and
HHJ CHAMBERS QC, THE RECORDER OF WOLVERHAMPTON

- -

Between :

Muhammad Khan	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Mr Tom Kark QC and Ms Cathlyn Orchard instructed on behalf of the **Respondent**
Mr Timothy Raggatt QC and Mr Makhan Singh instructed on behalf of the **Appellant**

Hearing date : 8 July 2022

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Whipple LJ:

Introduction

1. On 28 May 2021, the Appellant, who was then 20 years old, was convicted of manslaughter at Stafford Crown Court following a trial before HHJ Kristina Montgomery QC. He was acquitted of count 1, murder and count 3, robbery. The co-accused, Caesar Bello, faced the same three counts and was acquitted by the jury on all three counts. The appellant appeals against his conviction with the leave of the Full Court.

Overview of Facts

2. On 21 July 2020, Panashe Bako ('the deceased') was killed by a single stab wound to the chest which dissected a coronary artery and penetrated his heart. The deceased had been at the Crowne Plaza hotel in Birmingham City Centre spending time with a woman named Jaima Chowdhury with whom the appellant had been in an on-off relationship for around 18 months.

3. CCTV footage showed the appellant arriving alone at the hotel at around 6.25pm. The appellant's friend, Bello, arrived and entered the hotel around 20 minutes later. Shortly after entering the hotel, the appellant and Bello made their way to the room occupied by the deceased and Ms Chowdhury.

4. What happened next was disputed. But it was clear that there was an argument leading to a fight with fists and, as it turned out, a knife. The deceased was stabbed once. The appellant and Bello then left the hotel.

Trial

The Prosecution and Defence Cases

5. The prosecution case at trial was that this was a joint enterprise murder, that Bello had stabbed the deceased and had been encouraged to do so by the appellant. Manslaughter was added to the indictment at the close of evidence at the instigation of the trial judge, as an alternative verdict which was available on the evidence, applying *R v Coutts* [2006] UKHL 39; [2007] 1 Cr App R 6. The prosecution relied on a variety of evidence to support its case. That evidence included evidence from Ms Chowdhury and her mother which we shall examine in more detail shortly. There was forensic evidence, namely DNA from the appellant, Bello and the deceased which was found on the knife and its sheath. The deceased's blood was found on the appellant's top and tracksuit bottoms. No blood was found on bottoms said to have been worn by Bello (although it was disputed that these were the bottoms he had been wearing at the time as he was only arrested some months after the stabbing). The prosecution also relied on Bello's silence in interview, and his failure to mention certain facts that he advanced as part of his evidence at trial and on his previous

conviction for possessing knives and a video of him with a large hunting knife, both of which, on the Crown's case, demonstrated his propensity to carry knives.

6. The appellant's case was that Bello had stabbed the deceased but without encouragement from or participation of the appellant. The appellant denied any knowledge of the knife and denied any joint enterprise for violence against the deceased. The appellant gave this explanation in his police interviews. The appellant gave evidence at trial in his own defence.

7. Bello's case was that the appellant had fatally stabbed the deceased but without encouragement from or participation by him. Bello said that he was unaware that there was a knife. He too denied any joint enterprise. He had given no comment to the police in interview. He gave evidence in his own defence at trial.

8. Thus, the appellant and Bello each ran a cut-throat defence naming the other as the stabber and the person solely responsible for the deceased's death. At trial, both Bello and the appellant were cross-examined by the prosecution and by the co-defendant. Bello's counsel put to the appellant that it was the appellant, and not Bello, who had stabbed the deceased, and the appellant's counsel (as well as prosecuting counsel) put to Bello that it was him, not the appellant, who had stabbed the deceased. Thus, the cut-throat defence which was advanced by each defendant was challenged by the other defendant and that challenge formed part of the evidence in the case.

Ms Chowdhury's evidence

9. Ms Chowdhury was an important witness in the case. Her first account was recorded on police body worn video (BWV) at the hotel, where the police spoke to her when they arrived shortly after the stabbing took place on 21 July 2020. As part of a longer passage recorded on the BWV she refers to her ex-boyfriend, meaning the appellant, as the "guy who stabbed him". Then she said she thought it was Bello who had the knife, and they were both saying something like "whoa what have we done" and that she did not want to feel "like a snitch" in speaking to the police in this way. She told the officer that the appellant had said to Bello "oh you've gotta do it. You know you've gotta do…" and "come on do your thing", and that it was Bello who stabbed the deceased.

10. She gave her first ABE interview the following day, on 22 July 2020. On this occasion, she said that while the appellant was fighting with the deceased, she saw Bello move towards the deceased, she thought he had thrown a punch. Immediately after contact had been made, Bello and the appellant ran from the scene. She saw the deceased holding his chest with blood dripping down and realised he had been stabbed. She heard the appellant ask Bello "where are you gonna dash it?" which she understood to mean the appellant asking Bello where he was going to get rid of the knife.

11. The appellant was arrested and taken into custody. While in custody, a series of telephone calls took place between Ms Chowdhury and the appellant which, unknown to the appellant or Ms Chowdhury at the time, were recorded. In these telephone calls, the appellant and Ms Chowdhury discussed the account that Ms Chowdhury would give to the police and at trial.

12. She gave a second ABE interview on 2 February 2021, after these telephone calls had taken place. In this second interview, she distanced herself from her earlier account captured on BWV and contained in her first ABE, saying that she had been confused at that time. She stated that she now remembered the deceased had threatened to stab the appellant during the course of their fighting. She confirmed it was Bello who had contact with the deceased when he was stabbed. At the point the deceased was stabbed and fell to the ground, she said she had a full view of the appellant and was absolutely certain that he did not have a knife and did not stab the deceased. She agreed that in her first ABE interview she said the appellant had told Bello to "do what he had to do" but now asserted that was not true and the appellant had not said that to Bello.

13. The prosecution elected to run its case in line with Ms Chowdhury's first ABE: to the effect that Bello had wielded the knife and was encouraged to use it by the appellant. The prosecution played the BWV and the first ABE as part of its case at trial. It did not adduce the recordings of the discussions between the appellant and Ms Chowdhury, nor the second ABE, as part of its case.

14. The second ABE was in the event played as part of the appellant's defence and Ms Chowdhury was cross-examined on it. In answer to questions put on behalf of the appellant, she stated that the second ABE was the truth and to the extent that there were inconsistencies between the first and second ABEs, the truth lay in the answers given in the second ABE.

15. Ms Chowdhury was then extensively cross-examined by counsel for Bello, who introduced the recordings of the telephone calls from prison, as part of his case that the appellant controlled Ms Chowdhury and had sought to influence the account that she gave in her second ABE.

16. Ms Chowdhury was re-examined by the prosecution as a hostile witness, and she was questioned about her changed evidence.

17. Ms Chowdhury's mother was also called to give evidence at trial. She said that her daughter had spoken to her on the telephone on 21 July 2020, very shortly after the incident had occurred, and had told her that "Sully killed someone". Sully is a nickname for the appellant. Her mother said that the next day Ms Chowdhury told her mother that Sully did not do it, but that it was the other person, Bello, who did it.

Trial Judge's Directions

18. In the usual way, at the conclusion of the evidence, the judge circulated draft directions to the jury including directions on the ingredients of murder, manslaughter and joint enterprise. Those draft directions left open to the jury the issue of which defendant had stabbed the deceased and whether the stabbing was part of a joint enterprise or not.

19. The prosecution took issue with the judge's proposed approach. In a document submitted by Mr Kark QC (trial counsel for the prosecution, and counsel for the respondent on this appeal) the prosecution stated that its case had always been that the BWV and the first ABE by Ms Chowdhury were true, that Bello was the stabber, and that the prosecution could not now shift its case to suggest that it could have been either defendant who was the stabber,

noting that the prosecution had never put to the appellant that he was the stabber. Instead, the prosecution argued that:

> "6. Much simpler, safer and fairer to stick to the prosecution case as presented. If the jury are not sure that Bello is the stabber they could not be sure on the evidence that [the appellant] was and both would have to be acquitted."

20. That led to discussion in Court on Monday 24 May 2021. The hearing commenced with this exchange:

> "JUDGE MONTGOMERY: Right, the Crown's position, such that everybody understands what we are talking about, is that they have put a positive case, and their positive case is that Mr Bello wielded the knife at Mr Khan's encouragement.
>
> MR KARK: Yes.
>
> JUDGE MONTGOMERY: And that they invite convictions on that basis, but no other basis.
>
> MR KARK: Yes …"

21. Mr Kark submitted to the judge that:

> "… the reason for that is that, first of all, that is how the Crown opened its case, and that is based, of course, upon the first ABE. Any alternative basis that Mr Khan [the appellant] was the stabber could only come from Mr Bello's evidence, about which you would inevitably -- because they are co-defendants -- have to give the jury a warning, and I've just spent the last hour or so cross-examining Mr Bello on the basis that he's a liar which we say that he is."

22. Mr Raggatt QC, counsel for the appellant here and below, agreed with Mr Kark's position, which reflected the only way the Crown had put its case throughout the trial and was in his submission the only way any conviction could be safe; directing the jury in this way could not, he argued, cause any possible prejudice to Bello.

23. Mr Ivers QC, trial counsel for Bello, disagreed. He argued that the facts were for the jury and that it was open to the jury, on the basis of the evidence they had heard, to conclude that the appellant was the stabber. The defendants were running cut-throat defences and it was for the jury to decide which version of the facts was true. The jury should not be confined in their deliberations to considering the way the Crown put its case. Moreover, there was prejudice to Bello if the court were to accede to the position adopted by the prosecution and the appellant, because the court would, in effect, be inviting the jury to disregard Bello's evidence as false, and further the jury would be being directed that the only way they could convict was on the basis that Bello was the stabber, failing which both men should be acquitted, and that risked a false conviction of Bello if the jury were to conclude on the

evidence that the appellant was the stabber, but on the judge's direction they could only convict the him if they convicted Bello with him. This was, he said, like a "gun being held to the jury's head".

24. In her ruling, the judge concluded that Mr Ivers' view was correct in law. She said this:

> "This case throws up a number of possible permutations on the evidence and the jury should be entitled, treating all evidence as equal at first consideration, to decide the issue for themselves without being presented with a version of events that they either accept or they reject…Whilst each of the parties will in their closing present a very clear case on their respective behalfs as to what actually happened, ultimately the only people who can decide what happened are those seated in the jury box and it is not for us to presuppose on their part that that they find favour with a particular witness or a particular part of a witness' evidence or for that matter a defendant or a particular part of his evidence. The important consideration as far as I am concerned is to allow them to consider the evidence in its entirety with directions that ensure that they consider the issues as arise against each aspect of that evidence without being fettered by a particular party's version of the truth. The directions that I have drafted allow them to do that."

25. The judge then provided legal directions to the jury in writing. She directed the jury to consider each count separately in relation to each defendant, she set out the ingredients of murder and manslaughter, and then gave a direction on joint enterprise. She summarised the rival cases in this way:

> "The prosecution case is that both defendants took part in an unlawful assault on Panashe Bako intending thereby to cause him really serious injury or death. They say that even though the assault only involved one knife it was carried out jointly by these defendants acting together: one using the knife the other encouraging the use of it. Each defendant accepts that Panashe Bako was stabbed and killed but says that, though present at the scene, he neither stabbed Panashe Bako nor encouraged his co-defendant to stab him. "

26. She then gave the direction on joint enterprise in these terms, which reflected her earlier draft circulated to the parties:

> "There are two ways in which a defendant could be guilty of murder or manslaughter. Firstly, a defendant would be guilty if he unlawfully stabbed and injured Panashe Bako. Secondly, a defendant would be guilty if he deliberately encouraged the other defendant to unlawfully assault Panashe Bako. If you are sure that one of those two roles applies to the defendant who you are considering, then he would be guilty of an offence in relation to the killing of Panashe Bako and you

> would need to go on to consider the harm that he intended to be caused. If you decide that a defendant was not or may not have been the man who stabbed Panashe Bako, or did not or may not have offered encouragement to the person who did, then you must find him not guilty"

27. She provided the jury with a route to verdict which asked the relevant questions in relation to each defendant.

28. Later, in a separate document which she gave to the jury, she directed them on how they should approach the evidence of a co-defendant. It was in these terms:

> "…However, evidence that a defendant gives in a trial is for you to consider just as you would with any other witness. That means you can accept or reject all or any of it including what he may say about another defendant. In judging a defendant's evidence about the other defendant you should bear these points in mind: First, as I have already explained to you, you must consider the case against and for each defendant separately. Secondly, you should decide the case in relation to each defendant on all of the evidence, which includes the evidence given by each of the defendants. Thirdly, you should assess the evidence given by each of the defendants in the same way as you assess the evidence of any other witness in the case. Finally, when the evidence of one defendant bears upon the case of the other, you should have in mind that the defendant whose evidence you are considering may have an interest of his own to serve and may have tailored and contrived their evidence to blame their co-defendant. Whether any defendant has in fact done this is entirely for you to decide."

The Appeal

Grounds of Appeal

29. Mr Raggatt QC advances the following grounds, supported by a skeleton argument. The Full Court granted leave for all grounds:

i) By her directions of law and route to verdict document, the Judge caused the jury to return a verdict of guilty of manslaughter that was not open to them on the case advanced by the Prosecution.

ii) The Prosecution conceded that if the jury rejected the Crown's case that Bello had stabbed the deceased and acquitted Bello, they should have been directed that they could not then convict the appellant of either murder or manslaughter.

iii) The direction given by the Judge as to how the jury were to approach the conflicting evidence of the appellant and Bello was insufficient.

iv) The acquittal of Bello of both murder and manslaughter renders the appellant's conviction of manslaughter unsafe and perverse.

30. The prosecution resist this appeal. By their Respondent's Notice, response to the appellant's perfected grounds and skeleton argument, they say that the judge was entitled to leave the case to the jury in a way not posited by the prosecution; the jury had been properly directed as to the elements of murder and manslaughter; the jury had also been reminded of the relevant (and at times contradictory) evidence; the jury was entitled to act upon the evidence as they saw it. Bello gave direct evidence that the appellant was the stabber and the jury were entitled to accept that evidence. The judge's direction on how the jury should treat a co-accused's evidence was appropriate and sufficient. Further, the conviction of the appellant for manslaughter is safe: there was an abundance of evidence to support the conclusion that he stabbed the deceased. That verdict was not perverse, because the jury were required to come to separate verdicts for each defendant on each count and they were self-evidently not sure of Bello's guilt and acquitted him, at the same time as being sure of the appellant's guilt, so that he was convicted.

Submissions

31. For the appellant, Mr Raggatt, assisted by Mr Singh, argued that the judge's approach was wrong as a matter of principle. The only case a defendant at trial has to answer is that advanced by the Crown, on whom the burden of proof is placed. A defendant does not have to answer allegations advanced by co-accused or other witnesses. That is a reflection of the adversarial system of justice where the prosecution is brought by the Crown and not by other defendants. Further, the protections which exist to ensure fairness for a defendant facing a case brought by the Crown do not apply where accusations are made by others, so, for example, there is no right of disclosure against a co-defendant (contrast the Crown's obligation of disclosure). The jury should not have been permitted to embark on a "frolic of its own" by considering factual scenarios which were different from the Crown's case.

32. Mr Raggatt submitted that there was no case, so far as he was aware, in which the Court of Appeal had sanctioned a trial judge leaving to the jury a case which was different from that advanced by the Crown. He submitted that the approach adopted by the trial judge in this case was extraordinary and departed from established norms. He distinguished *Coutts* as a case about leaving alternative and lesser offences to the jury, which was to be contrasted with this appeal which involved the judge leaving an alternative positive case for conviction to the jury in circumstances where that alternative case had been expressly disavowed by the Crown. Similarly, he contended that the recent case of *R v Kinse Adid* [2021] EWCA Crim 581 was on different facts (about whether a direction regarding intoxication should be given) and not of assistance.

33. He said that there was significant unfairness to the appellant in the way the jury was directed. It had not occurred to the appellant's legal team that the judge would direct the case in that way and in effect leave Bello's case to the jury as an alternative. The appellant's

defence had been prejudiced because the appellant had only addressed the Crown's case in evidence, not realising that Bello's case on the facts was also going to be left to the jury. Further, the appellant had relied on parts of the prosecution case in his speech to the jury, considering that to be the only case which was properly before the jury.

34. In the alternative, Mr Raggatt argued that if the judge was minded to leave the alternative factual case to the jury, she should at the very least have directed the jury in the plainest terms that Bello's version of events was disavowed by the prosecution as false and unreliable and that it was unsafe for the jury to rely on it. Although this might have appeared unfair to Bello, it was unfair to the appellant not to give such a direction and the judge had to achieve a balance in her directions. Mr Raggatt came back to his earlier submission, that the direction sought by Mr Kark at trial represented the only proper balance, because it would have protected the appellant whilst not prejudicing Bello. The direction that the judge in fact gave relating to evidence of co-defendants did not address the fundamental unfairness to the appellant of permitting the jury to consider Bello's case as a basis for conviction of his co-accused and was insufficient. Further, by summing up Bello's evidence as she did, and leaving his case to the jury without any strong direction urging caution about it, the judge in effect gave the jury "a hint" that Bello's evidence should be believed, and this was unfair.

35. Asked by Cutts J how he suggested a judge was to manage this sort of situation, which is not unusual given that cut-throat defences are commonplace, sometimes even emerging during the course of the trial without any warning, Mr Raggett suggested that a direction of the sort suggested was required in this case and might be required in other cases, where the prosecution advanced a positive and narrow case which was inconsistent with a case advanced by one of the defendants. Where that could not be done for some reason, then the trial judge would have to consider other measures to safeguard fairness, including in some cases possibly discharging the jury and directing separate trials against the defendants.

36. On this appeal, Mr Kark appeared for the Crown assisted by Ms Orchard. It is an unusual feature of this appeal that we find Mr Kark distancing himself from his own submissions to the trial judge and attaching himself instead to the submissions to the judge made by Mr Ivers, trial counsel for Bello (who is not present or represented on this appeal), while Mr Raggatt for the appellant adopts Mr Kark's submissions for the prosecution below, arguing that Mr Kark has taken a wrong turn in now abandoning them.

37. In this appeal, Mr Kark says there is a point of principle to determine, which was whether the judge is bound by the prosecution's case hypothesis. The answer to that hypothetical question was given by *Coutts*, which could not be confined to its facts as Mr Raggatt suggested. In *Coutts*, the judge had decided not to leave manslaughter to the jury, having invited submissions on the matter and having established that neither the prosecution nor the defence wished manslaughter to be left to the jury; in the event, the defendant was convicted of murder. On appeal, the House of Lords held that manslaughter should have been left to the jury because that lesser alternative was obviously raised by the evidence and it was in the wider interests of justice that a defendant should be convicted of the offences which they had been proved to have committed, irrespective of the wishes of trial counsel. Mr Kark says

that the judge is not bound by the prosecution's case but is instead required to sum up all the evidence and leave to the jury any reasonable hypothesis arising on the evidence.

38. He argues that the jury in this case were properly directed. The direction about evidence from a co-defendant was sufficient and satisfactory. It is clear from *R v Makanjuola* [1995] 1 WLR 1348 and *R v Stone* [2005] EWCA Crim 105 that a trial judge has a wide discretion when it comes to a direction of this sort. There was no warrant for a 'corroboration' warning of the sort required before that requirement was abolished by statute. There was no warrant for a warning in the terms suggested by Mr Raggatt, which anyway would have been extremely prejudicial to Bello.

39. There was no unfairness in the jury being directed in this way. The jury had heard the evidence of Ms Chowdhury, Bello and the appellant. The jury was able and required to reach their own conclusions about which parts of that evidence they believed. The appellant had been able to cross-examine Ms Chowdhury and Bello; Mr Raggatt had put the appellant's account to each of them. And Mr Ivers for Bello had put his case to Ms Chowdhury and the appellant so the jury had the benefit of hearing those witnesses' answers to Bello's case. It was fanciful to suggest that Mr Raggatt would or could have done anything differently, even if he had appreciated earlier that there was going to be a cut-throat defence.

40. All that evidence, once given, needed to be taken into account by the jury, there was no basis for limiting their review of it. Although the burden of proof was on the prosecution, that did not mean that the case could only be proved if the jury accepted the prosecution's case theory in its entirety; instead it meant that the jury had to be satisfied, so it was sure, that all the necessary ingredients were made out on the evidence adduced at trial, and that included evidence adduced by the defendants in their own defence, which could be considered by the jury subject, of course, to the necessary directions being given. In this case, there was plenty of evidence to support the case put forward by Bello, even though the prosecution had not accepted his case at trial and had offered a different case theory to the jury. This Court can be satisfied that it is a safe conviction.

Discussion

41. There are three key issues in this appeal: first, whether the judge was at liberty to depart from the prosecution case when directing the jury on the facts; secondly, whether by doing so the trial judge prejudiced the appellant; and third, related to the second, whether any further or different directions were required in the circumstances. The overarching question is whether the conviction is safe, and we take that as a separate, fourth issue.

First Issue: Judge departing from prosecution case in her directions

42. The appellant's arguments raise a question of some magnitude, as to whether a trial judge can or even, in some circumstances, must depart from the prosecution case when directing the jury about what conclusions are open to them on the evidence. In our judgment, *Coutts* provides the affirmative answer to that question. Mr Raggatt is of course correct to say that the facts of *Coutts* involved a different issue, whether a lesser offence of manslaughter

should have been left to the jury in a murder trial. But in our judgment, *Coutts* stands for a principle of much wider application, namely that the judge and jury are not bound by the way the case is put at trial by the prosecution or any other party.

43. In his speech in *Coutts*, Lord Bingham of Cornhill cited a passage from *Von Starck v R*. [2000] 1 W.L.R. 1270 , 1275 at [14], per Lord Clyde at p 1275:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside. The threshold of credibility in this context is, as was recognised in *Xavier v The State* (unreported), December 17, 1998; Appeal No. 59 of 1997 a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance. But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them."

44. At [21], Lord Bingham Court cited the Australian case of *Pemble v R* (1971) 124 CLR 107, per Barwick CJ at 117-118 to similar effect:

> "Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client,

> the trial judge must be astute to secure for the accused a fair trial according to law.
>
> This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part …
>
> Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused."

45. The Court was unanimous in its conclusion. Lord Hutton said this at [44]:

> "I consider that the leaving of relevant issues to the jury which may result in the jury coming to the conclusion which is the most just one on the evidence cannot depend on the way in which the prosecution chooses to present its case but must depend on all the evidence; as Lord Clyde stated in Von Starck at p.1276, "the issues in a criminal trial fall to be identified in light of the whole evidence led before the jury".

46. Lord Rodger said that

> "the stance of prosecuting counsel cannot be determinative of the range of verdicts fairly open to the jury on the evidence" (see [81])

and that the jury should be directed on the way the law applies on any reasonable view of the facts disclosed by the evidence, and that counsel have to adjust their speeches to the jury to take account of any direction which the judge is going to make (see [82]).

47. Lord Mance said this, at [95]:

> "An important public interest is served by the conviction of offenders of offences which they have committed, and the judge is not bound by the way in which either side has presented its case, if an alternative offence can without injustice be left to the jury."

48. Lord Nicholls agreed with the other members of the constitution: see [28].

49. In *R v Kinse Adid* [2021] EWCA Crim 581, a further authority cited to us by Mr Kark, the issue was whether the judge should have given a specific direction on drunken intent. This Court (Fulford LJ as Vice-President giving the leading judgment) held at [88]:

> "Juries in criminal cases are not limited in their consideration of the evidence to the arguments advanced by the prosecution and the defence. They are the finders of fact and it is open to them to reach conclusions that do not match the particular contentions advanced by the parties. They are free, for instance, to reject an accused's account but nonetheless to acquit him or her (or convict of a lesser charge) because they conclude that they are unsure that one or more of the ingredients of the offence of specific intent have been made out".

50. These authorities illustrate a general principle that the judge and jury are not bound by the way the case is put at trial by the prosecution or any other party, and they provide emphatic support for the approach taken by the judge in this appeal. In light of them, we are unable to accept Mr Raggatt's proposition that a trial judge *must* direct the jury in accordance with the prosecution's case theory, and on no other basis; as Mr Kark submits, we consider that submission to be unsupported by authority and wrong in law.

Second Issue: Prejudice

51. There may of course be instances where prejudice might be caused by the judge departing from the prosecution case in the way the case is left to the jury (whether by adding a lesser offence to the indictment, leaving a particular defence which is not relied on in terms by a defendant, or leaving a co-defendant's case to the jury, to name the obvious examples). This was discussed in *R v McCormack* (1969) 53 Cr App R 514; [1969] 2 QB 442 (a case cited in *Coutts* at [45]), where the judge left a lesser offence of indecent assault to the jury, in a case where unlawful sexual intercourse with a girl under 16 was charged on the indictment. The appeal against conviction was dismissed because there was no prejudice to the appellant in leaving the lesser offence. At 446B the Court said:

> "Cases vary so infinitely that one can well envisage a case where the possibility of conviction of some lesser offence has been completely ignored by both prosecution and defence — it may be that the accused has never had occasion to deal with the matter, has lost a chance of giving some evidence himself about it or calling some evidence to cover or guard against the possibility of conviction of that lesser offence — and in such a case, where there might well be prejudice to an accused, it seems to this court there must be a discretion in the trial judge whether or not to leave the lesser offence to the jury."

52. Where there is prejudice, the trial judge will have to consider how to safeguard the fairness of the trial: whether to narrow the options for the jury, whether a particular direction should be given, whether more time is needed, whether (in an extreme case) the jury must be discharged with a view to a new trial on the different footing which is now known and understood. The answers must be specific to the particular case and fall within the remit of the trial judge.

53. An example of the judge successfully managing such a situation is given by *R v Mason* [2012] EWCA Crim 2635, where a jury question during retirement posited a scenario on

joint enterprise which had not been suggested as part of the prosecution case. Having discussed the matter with counsel, the judge told the jury that they could convict on the basis of that scenario, but he went on to remind the jury of the prosecution case and of the difficulties with that alternative scenario. The Court of Appeal (per Pitchford LJ) said:

> "32. We recognise that if during the jury's retirement an issue of law or fact is raised for the first time, with which neither party has had the opportunity to deal in evidence or argument, it may well be necessary to direct the jury to exclude that issue from their consideration of the case in order to preserve the fairness of the proceedings. The question for us is whether in the circumstances of the present case any unfairness arose which might have affected the safety of the verdict.
>
> 38. … it is our view that the jury could properly have convicted on either basis. We conclude that the judge having given the jury the strong direction he did, no unfairness took place. [Defence counsel] could have done no more than to invite the jury to exercise the same extreme caution which the judge expressly directed the jury they must do. For these reasons, we see no grounds for doubting the safety of the verdict and the appeal against conviction must be dismissed."

54. There are cases which go the other way, in which a late development in the case caused prejudice to the defendant which was not sufficiently dealt with by the trial judge and resulted in a successful appeal against conviction. In *R v Ali* [2014] EWCA Crim 948, the judge permitted the jury to consider a version of the case which had not been aired at trial, following a question by the jury in retirement. The Court of Appeal held that the judge should not have left that alternative scenario to the jury, and that unfairness resulted: see [21] - [23]. In *R v Acheampong* [2017] EWCA Crim 1289, the trial judge allowed the jury to consider a version of the case raised by the prosecution only in its closing address, which version had not been appreciated by defence counsel, and had not been the subject of evidence by the defence at trial. The Court of Appeal held that the judge's directions to the jury (that they should take care over this alternative case) were inadequate; that a stronger direction was needed, alternatively the judge should have excluded this version from the jury's consideration altogether (see [31]- [32]). In these cases, the convictions were quashed.

55. Mr Raggatt complains that his client was unfairly prejudiced in this case by the judge leaving the case to the jury on a wider basis than the prosecution contended for, namely by permitting the jury to consider Bello's case on the facts. Prejudice is a strong word. It denotes unfairness beyond the mere disadvantage of a party having to answer particular evidence or a particular case which had not been anticipated. The question for this Court is whether the appellant was prejudiced by the way Bello's cut-throat defence emerged. We think not. The three people who were present when the deceased was killed all gave evidence at trial. We have been unable to identify any different evidence which might have been called, or any different line of questioning which might have been pursued, if the

appellant had known earlier of Bello's cut-throat defence. Certainly, Mr Raggatt could not point to any such when he was asked about it.

56. Mr Raggatt did, however, suggest two matters which he said amounted to prejudice against the appellant in consequence of Bello's late-revealed defence. The first was that the appellant could not obtain disclosure from Bello, as a co-defendant, which Mr Raggett said disadvantaged his client when it came to probing the evidence of Bello. This seems to us to be a highly speculative point, given that the issue in this case turned on disputed versions of what occurred in the hotel room, which versions could be (and were) fully explored with the witnesses. Mr Raggett did not identify any particular information likely to have been in Bello's possession which would have been material to his case; if he had been able to, doubtless he would have raised it with the trial judge who would have ruled as appropriate. In the circumstances of this case we do not accept that there was any prejudice in this regard. It is important to note, even if just in the margin, that the prosecution remained under an ongoing duty of disclosure in light of the defences as they developed, and the prosecution had disclosed to the appellant everything in their possession which might have been relevant in light of Bello's defence. The second was that the appellant was not in a position to address the jury on the alternative case. We doubt the factual basis of this submission. By the time Mr Raggett was making his speech to the jury, the judge had already ruled and had given her legal directions to the jury, so he knew that the judge had left Bello's account to the jury. Although in his speech to the jury Mr Raggett may have dwelt on the prosecution case, which in parts helped his client and in parts hindered his client, we are sure that he invited the jury to believe the appellant's account and to disbelieve Bello's account, given the central prominence of that dispute in the case as a whole. We are not persuaded that either point caused any material prejudice to the appellant or his legal team.

57. Finally, we note the timing of the emergence of Bello's cut-throat defence. The appellant's legal team first saw Bello's defence statement on the first day of trial, having requested sight of it earlier than that. It is regrettable that they did not receive it earlier than that, but we have been unable to establish the sequence of events leading to its late emergence; there may be a good reason for it. The appellant's team did not request further time from the judge on receipt of the defence statement, nor did they alert the judge to any difficulty for the appellant's defence at trial at that stage. It is important to note, however, that Bello's cut-throat defence did not come out of the blue. The appellant was aware from an expert report disclosed by the prosecution in April 2021 as part of the unused material that Bello was seeking to blame the appellant. Further, Ms Chowdhury's evidence was contradictory, in that she had herself named the appellant as the stabber in some passages of her evidence, and it must have been anticipated that Bello might seek to exploit those parts of her evidence and cast doubt on other parts.

58. We accept the general proposition that if late disclosure causes prejudice to the appellant, then that must be managed as fairly as possible by the trial judge. That might result in a particular direction to the jury or some other measure to ensure fairness. But we are not persuaded that the appellant was prejudiced in this case by the late disclosure of Bello's defence statement.

Third Issue: were the directions adequate?

59. Mr Raggatt's primary submission is that the judge should have directed the jury to acquit both defendants if they were unsure about whether Bello was the stabber. We have already addressed the lack of legal foundation for that submission and the lack of any prejudice to the appellant which might have justified such a course. Mr Raggett says that such a direction would have maintained the balance of fairness between the parties. We are unable to agree with that. To direct the jury that way would have been profoundly prejudicial to Bello: not only would it have been an effective withdrawal of Bello's case from the jury, but it would also have obviously put pressure on the jury who could only convict the appellant if they convicted Bello as well, alternatively they had to acquit both.

60. Mr Raggatt's alternative case was that, if the judge was going to allow Bello's case to go to the jury, she should have directed the jury to exercise particular caution when it came to assessing Bello's evidence. Mr Raggatt was pressed in the course of submissions to formulate a suitable direction to this end. He was reluctant to do so, considering that to be the job of the trial judge, but in general terms he suggested something along the lines of a direction requiring corroboration (as used to be given in relation to the evidence of a complainant of a sexual offence until that requirement was abolished by section 32 of the Criminal Justice and Public Order Act 1994), alternatively he suggested a direction by which the judge reminded the jury that the Crown disavowed Bello's evidence as false and unreliable and directed the jury that they should not rely on it either.

61. In his written submissions he relied on *Makanjuola* and *R v Stone* [2005] EWCA Crim 105. The discussion in those cases related to a direction to the jury to take special care in relation to particular evidence where there was reason to suspect it might be unreliable. The relevant passage from *Makanjuola* is at p 1351H:

> "(2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence. (3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel. (4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches. (5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a

> set-piece legal direction. (6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules. (7) It follows that we emphatically disagree with the tentative submission made by the editors of Archbold, Criminal Pleading, Evidence & Practice, vol. 1 in the passage at paragraph 16.36 quoted above. Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated. (8) Finally, this court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the *Wednesbury* sense: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223]"

62. *Makanjuola* therefore emphasises the wide scope of the judge's discretion relating to the directions to be given. In that case, the Court deprecated any suggestion that the old corroboration warning should be given in any case where it had been customary to do so before the law changed, and emphasised that the scope and tenor of any warning was for the trial judge to determine. *Stone* is a case far distant on its facts from this case, where the Court emphasised that there is no hard and fast rule about the directions to be given where there is reason to doubt the veracity of particular evidence, and in many cases no direction is required: see [84].

63. Turning to this case, we note that in the discussion about the legal directions, Mr Raggatt did not invite the trial judge to give a specific direction along the lines that he now suggests. That is not necessarily fatal to the appeal, but it does expose this part of Mr Raggatt's case as a possible afterthought.

64. Be that as it may, we are unable to discern any proper basis for seeking such a direction in this case. There was no special reason for the jury to be warned that Bello was lying; further, it would have been grossly unfair to Bello for the judge to give such a warning in relation only to his evidence – a point we have already discussed in the context of the direction the trial judge was invited to give to the jury. If the prosecution and the appellant wished to suggest to the jury that Bello was lying, that was of course a matter for them to address in their speeches.

65. Mr Raggatt's suggestion that by leaving Bello's case to the jury, without such a direction, the judge was in effect hinting to the jury that they should accept that evidence, is untenable. The judge summed up Bello's evidence with the same neutrality as she applied to all the evidence in the case. By doing so she gave no hint as to which evidence should or should not be accepted.

66. The judge gave a direction on evidence from co-defendants in terms we have noted above. This was a perfectly satisfactory and fair way to alert the jury to the particular difficulties which can arise when one defendant gives evidence against another. It applied both ways, to the appellant and to Bello. This direction, together with the other directions of law, provided the jury with a straightforward and clear understanding of the law which applied and the approach they should take to the evidence. What they determined on the evidence was for

them. This was in our judgment an exemplary summing up and no further or different direction was required to deal with Bello's evidence.

Fourth Issue: Safety of conviction

67. We have found no fault with the trial judge's directions. We turn to the overarching issue of whether the conviction is safe, which, given our previous conclusions, we take briefly. Standing back, we note that there was evidence, quite apart from Bello's evidence, which supported the appellant's conviction. First, there was Ms Chowdhury's evidence that the appellant was the stabber: swiftly recanted, but still recorded on the day of the killing both to the police and to her mother. Second, there was the appellant's evidence, which, if disbelieved, axiomatically meant that the appellant must have wielded the knife. Third, the appellant claimed when speaking to Ms Chowdhury on the intercepted prison telephone conversations that Ms Chowdhury had "snitched" on him, which might indicate that she was telling the truth in giving that account. Fourth, the appellant had a reason to dislike the deceased, given the appellant's existing relationship with Ms Chowdhury, which relationship was controlling, possessive and toxic, and his discovery that she was staying at a hotel with the deceased. Fifth, Bello had no grievance with the deceased. Sixth, the appellant had the deceased's blood on his top and on his trousers, consistent with proximity to the deceased at the time he was stabbed. Seventh, in the phone calls from prison, the appellant had discussed with Ms Chowdhury the account of events that she would give; the inference could readily be drawn that this led to her second ABE and was a demonstration of the control the appellant had over Ms Chowdhury, and his willingness to lie to cover up his own actions.

68. The jury's conviction of the appellant was not perverse. Clearly, the jury were not impressed by the appellant's evidence and they rejected it. They listened to him giving evidence and will have formed a view about his credibility as they were entitled to do. The jury must have considered that Bello was or *might be* telling the truth: that was sufficient to acquit him. The jury must have rejected parts of Ms Chowdhury's evidence, specifically those parts where she sought to exonerate the appellant in her second ABE. There is no "logical inconsistency" in the verdicts reached in this case (see *R v Dhillon*]2010] EWCA Crim 1577; [2011] 2 Cr App R 10 at [35]-[37]). Indeed, the verdicts lay within the parameters of the legal directions given to the jury as the case had been left to them by the judge. It was open to the jury to find, if they were sure, that it was the appellant who had killed the deceased.

69. The conviction is safe.

Conclusion

70. We find no merit in any of the grounds. We dismiss this appeal.

71. We wish to record our thanks to all counsel and their legal teams for the expert assistance they have given to this Court.