Neutral Citation Number: [2022] EWCA Crim 1488

Case No: 202101486 B2
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
HIS HONOUR JUDGE DENNIS WATSON KC
T20207308 / T20207325 /
T20207305 / T20207356

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2022

Before :

LADY JUSTICE MACUR

MR JUSTICE HOLGATE
and
HER HONOUR JUDGE KARU RECORDER OF SOUTHWARK

- -

Between :

Rex	**Respondent**
- v -	
Peter Walker	**Appellant 1**
- and -	
Melissa Stubbs	**Appellant 2**
- and -	
Aaron Stubbs	**Appellant 3**
- and -	
Stephen Strutt	**Appellant 4**

- -
- -

Tania Griffiths KC and **Robert Dudley** (instructed by **the Crown Prosecution Service**) for the **Respondent**
Nina Grahame KC (instructed by **Robert Lizar Solicitors)** for the **Appellants** and **Michael O'Brien (**instructed by **Robert Lizar Solicitors) for Appellant 1, Mark Trafford KC (instructed by Cobleys Solicitors) appeared *pro bono* and Ian Whitehurst** (instructed by **Robert Lizar Solicitors**) for **Appellant 2, Adam Brown (**instructed by **Robert Lizar**

Solicitors) for **Appellant 3** and **Mark Friend (**instructed by **Robert Lizar Solicitors)** for **Appellant 4**

Hearing date : Friday 28 October 2022

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Approved Judgment

This judgment was handed down in court 7 by Lady Justice Carr on behalf of Lady Justice Macur at 10.00am on 11 November 2022 and by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Macur:

1. This is the appeal of Peter WALKER (PW), Melissa STUBBS (MS), Aaron STUBBS (AS) and Stephen STRUTT (SS) against their convictions on 23 April 2021 for the murder of Warren Glover on 13 June 2020. We mean no disrespect for the deceased in referring to him throughout this judgment as WG.

2. The one common ground of appeal, for which leave has been granted by the single judge, relates to a prosecution witness, Andrew Carney (AC), in circumstances described below.

3. MS and AS also renew their application for leave to appeal against conviction on the ground that the judge refused an application to adduce details of all aspects of WG's 'bad character'. In addition, AS renews his application for permission to appeal against conviction on the ground that the judge refused to exclude evidence of text messages between his mother and MS referring to AS's apparent state of mind and intent to kill WG on the night in question.

4. MS alone renews her application for leave to appeal against sentence.

The facts in brief:

5. On 13th June 2020 WG was attacked in St Helens and fatally injured. Prior to the attack, WG had sent offensive text and voice messages to his former partner MS and her parents, Gail Duff (GD) and Frank Stubbs (FS). The prosecution case was that MS and AS intended to avenge the abuse and threatening messages. AS recruited his friends, SS and PW to 'teach [WG] a lesson'.

6. The four appellants agreed that they drove, in MS's car, from Manchester to St Helens. They maintained that their intention was to collect MS's property from WG's grandmother's house. In fact, it appears that in a telephone call whilst en route from Manchester to St Helens, AS and MS told WG that they were coming to "smack his head in".

7. Following the exchange of a number of texts with AS, MS and their parents, WG phoned the police at approximately 21.15 hours describing the threats made and the imminent arrival of AS and MS. WG gave details of the car in which they would likely be travelling and the route they would take. The telephone call was recorded.

8. Shortly thereafter AS sent a message to WG: "We're here, come on big man, I'll go to your Nan's and find out where you are … you're a pussy". The appellants attended at WG's grandmother's house. MS asked the grandmother where WG was. She said she did not know.

9. Around about this time, according to AS, there was an argument over the phone between MS and WG. AS, took the phone from MS and asked where WG was. WG provided the appellants with his location by way of a postcode.

10. WG had gone to the home address of his new partner, Jemma Cragg (JC), and armed himself with a hammer and a crowbar. JC removed the crowbar from him and told him that she was going to phone the police. He replied, "Do it".

11. JC telephoned 999 asking for the police to attend urgently since her partner had been threatened by individuals who were coming to fight with him and that WG and was on his way to meet 'them' with a lump hammer.

12. The appellant's drove to WG's stated location. WG attacked the vehicle with a lump hammer. Two men were seen to emerge from the car to swing /exchange blows with WG and to chase after him. These were AS and PW. Both were described by AC as already armed when leaving the vehicle with what appeared to be a metal pole and a wooden bat respectively. AS inflicted the fatal blow by hitting WG to the back of the head with the metal pole. WG was knocked unconscious by the blow; he sustained a depressed skull fracture and irredeemable brain injury. He did not recover consciousness and on 7th July 2020 died as a result of the injuries sustained in the attack. The expert evidence was that the fatal injury would have required severe force.

13. All defendants left the scene in MS's car. There were a number of text messages following the attack. MS messaged a friend on 13 June 2020 to say "He [WG] didn't show". Texts between MS and FS on the 14 June, refer to the car and to a potential false alibi. On the same day MS called the police and made a complaint that WG had caused criminal damage to her car.

14. MS was first arrested on 14 June and bailed on 15 June. She was arrested on 21 July and remanded in custody. AS was arrested on 13 July and remanded in custody. PW was arrested on 11 July and remanded in custody. He was bailed in December 2020. SS was arrested on 4 August and on 6 August remanded in custody.

15. The appellants all denied taking any weapon with them to the scene.

16. AS said, he acted in lawful self-defence. WG had thrust a table leg through the window towards his face after using the hammer. There was a short tussle and AS wrestled the leg from WG and got out of the car. WG was "out of control" and AS swung back. He had not aimed at WG's head. PW grabbed him and the wood and "was trying to get me out of the way…."

17. MS, PW and AS said they got out of the car "instinctively and defensively" without any hostile intent. MS and SS said they did not participate in, assist or encourage any unlawful violence, PW said he did not chase WG. He took the table leg off AS and put it into the car before driving back to Manchester. The wooden table leg was ejected during the journey.

18. The appellants all gave evidence.

Andrew Carney

19. AC was a reluctant witness for the prosecution. However, ultimately, he gave critical evidence against the appellants regarding the attack in accordance with the description

above. Ms Grahame KC, who appeared on behalf of AS in the court below but has led the appeal on behalf of all the appellants on this ground, rightly describes AC as a "crucial" witness in a most serious case. He was the only witness to give evidence which went to the issue of whether and what weapons had been taken to the scene and then used by AS and PW.

20. As we will indicate below, the manner in which AC came to give his evidence was unusual and resulted in several defence applications challenging the procedure adopted to accommodate AC's fickle attitude to giving evidence during the police investigation and thereafter at trial. There is, however, no criticism of the way in which the trial judge, HHJ Dennis Watson KC, summed up AC's evidence to the jury. What is more, the judge reminded the jury of AC's attendance at court under compulsion, his refusal at first to answer questions, his change of stance and that they should not form any adverse conclusions that the (then) defendants, or anyone associated with them, were responsible for his initial reluctance.

Court process

21. We are grateful to all counsel for their collaborative efforts in producing an agreed overriding chronology, with all necessary hyperlinks, to assist us in the determination of this appeal. The relevant material is copious. We have read it all.

22. As the single judge reasonably observed: "The circumstances surrounding the calling of Mr Carney were undoubtedly messy. He was the main eyewitness to the incident and the only eyewitness to the defendants getting out of their car with weapons after the deceased, Warren Glover, had hit their windscreen with a lump hammer. There had been difficulties with Mr Carney: including his initial refusal to sign his witness statement and reluctance to be a witness; the failure of the prosecution to obtain a signed or verified statement from him thereafter before trial; his refusal to attend court; his refusal to answer any questions under oath after he had been witness summonsed; his arrest and incarceration after his failure to return to court; and his refusal to say anything without first having legal representation, much of which occurred in the presence of the jury. It was unsatisfactory that no statement was taken from Mr Carney before he was sworn in. Furthermore, after the prosecution was granted permission to obtain a witness statement from him whilst he was under oath on 22 March 2022, it appears that no detailed note or record of the police officers' discussions that resulted in his statement, was kept.…"

23. Unfortunately, we are not able to confine the length of this judgment by reference to that accurate and succinct summary in addressing the submissions so ably made by Ms Grahame KC. However, we attempt to marshal the facts as concisely as possible under two main subheadings which accord with the criticisms made of the prosecution approach in securing AC's attendance at court, and thereafter in the manner in which AC's witness statement was produced.

Application and issue of a witness summons for AC

24. At 22.16 on 13 June 2020, a man who transpired to be AC, made a 999-call asking for an ambulance to be sent for a man who was unconscious and who had been struck to the head with a metal bar. The telephone call was recorded.

25. On 16 June 2020 AC attended at St Helens Police station saying he wished to speak to officers to describe an incident that he witnessed on the 13 June. He gave a verbal account to DC Thompson and DC Hatton but declined to make a formal statement. DC Thompson took contemporaneous notes of the account. This note was included on the unused material schedule (MG6C) served on the defence and dated 1st December 2020. AC's name appeared on a prosecution witness list served later the same month.

26. DC Thompson also made a witness statement on the same day which described taking contemporaneous notes of AC's account; that he refused to provide a statement "due to fearing consequences or any repercussions"; and, that she made notes of the account "and this will act as a hearsay statement, in order to provide his witness account as evidence." Amongst other things, AC's account referred to a male who got out of the rear driver's side carrying "a long sort of bar, like an iron type with something at the end of it, it was a weird shape but not sharp looking". The second man had a baseball bat as he emerged from the car. The man with the hammer (WG) was pursued by both men. Two other passengers emerged from the car, and AC thought he heard the female shout something. The male with the iron bar, who had chased after the man with the hammer, "hit the male to the back of the head "BAM" from behind and he went down". Both males who had chased after the man "seemed to realise that something serious had happened". The statement of DC Thompson was disclosed on 1st December 2020, but her contemporaneous notes were not disclosed until March 2021.

27. Thereafter, several visits were made to AC's last known addresses, and notes were left requesting him to contact the police, but he was not seen until 22 September 2020 when he spoke to officers. He still declined to provide a written statement or become involved in the criminal justice process. DC Cunningham had prepared a note in his daybook, written in the first person on behalf of AC which confirmed that the information he had previously provided to police officers was accurate and true, but that he did not wish to give a written statement or to attend Court despite being made aware that the victim had died. However, AC refused to sign the entry. DC Cunningham's statement referring to this meeting was made on 9 March 2021. It was said that initially AC had appeared willing to sign the entry but had then changed his mind.

28. Thereafter, it appears that a decision was made by the police in agreement with the CPS, to make no further direct approaches to AC, but to continue to keep tracks upon him, until the anticipated issue of a witness summons, to be sought at a later date; the prosecution team were concerned that further attempts to seek a witness statement or secure his attendance at trial may cause him to "go to ground".

29. The first trial date was fixed for January 2021 but was vacated and re-fixed for 1 March 2021.

30. The prosecution made an ex parte application for a witness summons on 3 March 2021. The application referred to the matters reported in [24] to [28] inclusive above. It explained "[t]he prosecution now consider that, as the trial is underway, the time is right to secure his attendance by way of witness summons. If granted, the plan would

be to continue to seek his voluntary attendance but with the sanction of a witness summons if required. He will again be invited to make a witness statement which will be served without delay. If he refuses, he will be brought to court and again invited to make a witness statement, if necessary, with intervention from the court".

31. A witness summons was issued returnable on 8 March 2021 "and on subsequent days until the Court releases you". The defence were notified.

32. Defence counsel made application to set the witness summons aside arguing that the application was in fact to secure a witness summons to require AC to provide a witness statement, rather than to call him to give evidence. It was submitted that the CPS should instead have made an application pursuant to Schedule 3 paragraph 4 of the Crime and Disorder Act 1988 for AC's evidence to be taken by deposition. AC was not a witness in that he had not made a statement. AC would be brought to court against his will under sanction. It was not in the interests of justice to compel Andrew Carney to either make a statement or to give evidence "blind". The failure to do so was a deliberate tactical decision and contrary to CPR 17.3. To issue a witness summons 'endorsed' the CPS tactic to ignore legislation that would have allowed a statement to be taken before trial.

33. The judge refused to set aside the witness summons. He did not regard the procedures pursuant to section 2 Criminal Procedure (Attendance of Witnesses) Act 1965 and Schedule 3 paragraph 4 of the 1988 Act to be "mutually exclusive". AC had made an oral statement relevant to the proceedings and was a witness to relevant events. The witness's account had been disclosed. The prosecution had been entitled to take "an overview of the correct timing".

Events following AC's attendance at court in answer to witness summons and subsequent warrant

34. The witness summons was served on 5 March 2021. According to DC Cunningham: "AC appeared happy in attending Court… He informed me that he remembered the incident clearly and stated that he thought that attending Court and giving evidence was 'the right thing to do'." Later on, that day, AC asked for special measures to be provided. He agreed he would attend Court as per the summons and special measures could be discussed further then, he asked for anonymity.

35. On 8 March 2021 AC attended Court but left after discussion with police officers and before providing a witness statement. One of the officers, DC Bott made a witness statement regarding what AC had raised in conversation when alone with her. Namely, "that it was a terrible incident, and he can still remember everything that happened". He is said to have recounted the attack on 13 June he witnessed afresh, and without reference to "the hearsay statement of DC Thompson".

36. Subsequently, DC Cunningham received a telephone call from AC saying he was not happy about his name being known, making reference to his previous drugs use and psychosis and stated he wanted nothing else to do with the case.

37. A witness summons was re-issued requiring AC's attendance on Friday 12 March 2021. When an officer attended at AC's address to serve the re-issued witness

summons, there was no reply, but AC sent a text message to DC Cunningham: "I've had legal advice. I take it you need to serve me with another warrant which is fine I can come and collect it from the police station today. I will attend court, but I won't give evidence".

38. AC did attend at St Helens Police station, took possession of the summons and departed.

39. On 10 March 2021 the prosecution served the defence with an AC "disclosure pack" consisting of statements and the available information AC had already provided, dates of contact and his reluctance and refusal to give evidence. This included a transcript and audio recording of his 999 call to the ambulance service.

40. On 15 March 2021 the prosecution made an application inviting the Court to receive the evidence of AC, saying that: "It is not clear yet what evidence (if any) the witness will be prepared to give. However, the prosecution submit that his evidence is receivable in a number of ways: (a) By his giving evidence in the ordinary way (either in reliance on a witness statement to be made or in reliance on notes of discussions about the incident made by police officers). (b) If he refuses to give evidence, by way of hearsay evidence pursuant to s116 (2) (e) CJA 2003. (c) Pursuant to s119 CJA 2003, namely, by putting to him previous inconsistent statements made to DC Thompson and DC Bott. (d) Pursuant to s114 (1)(d) CJA 2003 based on public interest.

41. The defence objected to AC being called without provision of a witness statement.

42. The judge heard legal argument on 17 March 2021. He granted the prosecution application finding that the recording of AC's call to the emergency services on 13th June 2020 and his recorded account given when voluntarily attending at St. Helens police station on 16th June 2020 which he was recorded to confirm to another officer on 22 September 2020 meant "this is not a witness who is being called blind. … It is known what the witness can say and there has been disclosure of the contacts between him and the police and what was said. That has been done in an entirely proper manner". Notes of what he had said at court on 8 March 2021 had been disclosed. The situation was different to that of a witness known to be present but who had never given an account to anyone at all and was to be asked for the very first time for an account at the Crown Court. Assuming AC did give evidence, the defence were in a position to cross-examine on the known facts and on the difference between his account and any other eyewitnesses present. "The central thread of his account is one which he gave on the night and two and a half days later which is known. So, in my judgment there is no sufficient or real prejudice to the defence by calling Andrew Carney."

43. AC apparently sought and received legal advice upon receipt of the second summons. See [37] above. Consequently, he indicated that he would attend Court as stipulated to inform the prosecution he has no evidence to give. He did attend Court but left the building before he was called to give evidence. He was telephoned, told to re-attend and did so but stated that he could only stay for a short period of time, and he left again without being called to give evidence.

44. Consequently, the prosecution successfully applied for a warrant for his arrest.

45. AC was arrested at 2am on 19 March 2021 and detained. He was called to give evidence before the jury later that day. He took an oath. The recording of the 999 call was played and he was asked if he had made the call. AC said that he had nothing to say and repeatedly asked to speak to his legal adviser. When told that refusing to answer questions may render him in contempt of court, AC said: "I understand that your honour. To save everyone else's time I'm going to refuse every question….."

46. The jury were sent out. It was reported to the judge that at least one juror was overheard, to use the word "disgusting" and "he ought to be ashamed of himself". As the judge was subsequently to record in his ruling, he had not heard the comment and it was not known to whom the comment was directed. That is, whether it expressed disapproval of the witness, or the judge's treatment of AC.

47. AC explained in the jury's absence that he felt "like a suspect. I am absolutely on edge like. I've got nothing to say in the court case and unfortunately if you want to arrest me for contempt then arrest me or let me go… I've been arrested like a criminal…" He was remanded in custody. Legal representation was arranged. Later that afternoon, AC was bailed to allow "a period of reflection over the weekend".

48. AC re-attended court on Monday and indicated his willingness to give evidence and answer questions. Junior counsel for the prosecution indicated that it was intended, subject to leave, to seek to take a witness statement and to record the method by which the statement was taken. It was envisaged that AC would have recourse to the contemporaneous notes of his accounts as provided to others. Defence counsel objected. In short AC had not signed the notes, nor were they read back to him for him to confirm their accuracy. AC should be required to give his statement by free recall of the event.

49. The judge indicated that it was preferable that the defence were on notice of what precisely AC could/would say, gave leave to the prosecution to speak to AC with a view to providing a witness statement from him and said that the manner in which they did so and how they went about it was entirely a matter for them. "The consequences of taking a statement as to further applications at whatever stage will just have to be accommodated in the trial process with whatever outcome that is."

50. Counsel who advised AC on the consequences of his refusing to give evidence declined to be present at the taking of the statement. DC Thompson made a statement confirming the procedure adopted.

51. The witness statement made by AC said he had been given the opportunity to provide a free recall account regarding what he witnessed but did not wish to do so. "I can remember what happened and my account will not have changed from what I told the Police." AC confirmed that he made a 999 call to the ambulance service immediately after the incident. He recognized his voice in the recording of the 999 call, played in court in his presence. He recalled going to St Helens Police Station shortly after and provided an account of what he had seen. He had been shown a copy of DC Thompson's handwritten notes made that day but had been unable to read the

handwriting, so was provided a typed version of the notes. He read them for the first time that day before making his statement. He confirmed that they were an accurate representation of the witness account he had provided, save to clarify that rather than "two ran over to have a go but seemed to realise it was serious so panicked and ran back to the car …" that "the guy with the bar ran towards him and hit him, the guy with the bat was moving towards him. Both of the people who were sat in the front of the car, got out of the car halfway through, but stayed next to the doors of the vehicle".

52. He also read, for the first time, DC Thompson's witness statement and confirmed it to be "accurate and spot on as to how I remember the incident" although his memory of the descriptions of the people involved had declined. He read the witness statement made by DC Bott, on 8 March 2021 and confirmed that it was an accurate reflection of what was discussed.

53. He said he would like to provide his evidence via video link since he suffered from anxiety and the process of giving evidence in a room full of people would be very difficult for him to provide a full account as to what happened.

54. The statement was served on the defence. On 23 March 2022 the judge ruled upon the defence application to exclude AC's evidence, pursuant to section 78 of the Police and Criminal Evidence Act 1984. It was submitted that the evidence had been garnered by an "irrevocably and overwhelmingly prejudicial" procedure. AC would not have been able to refresh his memory from the documents identified above, since section 139 (1) of the Criminal Justice Act 2003 specifically referred to documents made or verified by the witness at the time that the note was made. The methods used in obtaining AC's witness statement completely subverted the safeguards which section 139 provided.

55. The judge accepted that for AC to verify the notes of what he said on previous occasions was clearly not envisaged by section 139 in terms of refreshing memory when giving evidence in court. However, the admission of his evidence did not offend against fairness by reason of his previously recorded accounts given so soon after the event and confirmed subsequently. Whilst it would have been better if the witness had verified the accounts at the time, the jury were capable of assessing the reliability of the evidence having been reminded that the records were made by others who had an interest in what it is he had to say. The judge drew parallels of the situation which arose in *Ascough*, [2014] EWCA Crim 1148 where a witness who signed a written witness statement transpired to be illiterate. The prosecution was permitted to go through the witness statement line by line with the witness in the witness box pursuant to section 139 when in reality his illiteracy meant he could not have read through the statement and verified it at the time. It was a matter for the defence to decide how they chose to cross-examine AC and the police officers to whose statements and notes he had referred.

56. Acknowledging that the defence feared that the granting of special measures to AC, his change of mind and decision to answer questions, and that his evidence will be seen to have been dragged out of him or that it may appear that way and that notwithstanding his direction to the jury on Friday afternoon, that his refusal to answer questions originally may be the fault of the defendants, the judge considered

Mr Trafford QC's [as he then was] submissions that AC may equally have presented as a man "with some steel who demonstrated by his refusal to answer questions that he was someone who would do his own thing and was not someone who could be canned". He considered in all the circumstances that it was appropriate to grant a live link and would remind the jury that any thought or suspicion that the stance adopted by AC previously was the result of any action by or on behalf of the defendant was completely groundless.

57. AC was recalled and gave evidence which significantly accorded with the previous accounts he was recorded to have given. In addition, he spontaneously demonstrated the blow to WG's head was made "like he was swinging an axe to chop wood". He volunteered that he "had a good few drinks". His memory varied from last year regarding the position of the car. He saw two weapons come out of the car. A bat and a metal bar. The men with the weapons got out at different times. "As soon as he got hit with the bar, I ran to help him. He was lying on the floor. ...I knew it was serious and I went to help. … a woman got out of the driver's side, and I think a guy got out of the passenger side. I couldn't tell you what they looked like. He didn't move away from the car he didn't get involved in it.

Submissions on the appeal

58. Ms Grahame KC identifies the common ground of appeal to comprise different strands representing the asserted errors of the prosecution in witness engagement and the consequent applications they were forced to make to secure AC's attendance to give evidence before the court. She adopts the single judge's expressed view that "[w]hilst each of the separate strands of this ground of appeal individually may not have been sufficient to show an arguable case, collectively they may". Understandably, she repeats many of the defence submissions we have identified to have been made in the court below in response to the several prosecution applications regarding AC. The overriding submission is that the appellants were irrevocably prejudiced by what amounted to a deliberate tactical decision made by the prosecution not to seek to obtain a witness statement from AC before seeking a witness summons.

59. In summary the prosecution had an obligation to take a more pro-active stance to overcoming AC's reluctance to give evidence; there could have been no doubt from June 2020 that he was an important witness. Consequently, AC was notably distressed when compelled to appear to give evidence and was called "blind". He was initially truculent before the jury in refusing to give evidence, but after remand into custody then appeared compliant. In the meantime, he was permitted to refresh his memory for the purpose of preparing a witness statement from documents that he had not made or verified at the time of making. The implicit danger was that identified by the Court in *R v Khan, Dad & Afsar [2002] EWCA Crim 945, paragraph [34]* that ". . . the jury will see a witness apparently giving evidence in one frame of mind and then will come back to that witness after events have occurred in their absence which may have brought about a complete turnabout in the evidence that he gives. For such a jury to assess fairly what reliance they can place upon the evidence of a witness will be nigh-on impossible…". His evidence in the witness box differed from the notes made which supported an inference that the witness' recollection was flawed.

Discussion

60. There is no question but that it would have been far better if AC had been persuaded to co-operate and to make a witness statement on 16 June 2020. We see absolutely no advantage to the prosecution in him failing to do so. Regrettably, the reality is that there are communities in which many potential witnesses are reluctant to make themselves known or to disclose information to the police. In this case AC did make himself known to the police three days after the fatal event and provided a full account, albeit he refused to verify the same indicating that he would not participate further. Police officers recognised the import of the information and prepared witness statements of their interaction with AC. A judgment was made in September 2020 to desist from further attempts from seeking to persuade AC to engage or otherwise to alert him to the possibility of a prospective application for a witness summons for fear that this would drive him 'underground'. This is criticised by the defence, but whilst the relevant police officers may have misjudged AC's likely response, we are not persuaded that the decision was irrational or unreasonable or indicative of bad faith to establish an abuse of process.

61. Following the abolition of committal proceedings, the Crime and Disorder Act 1998 Sched 3 paragraphs 4 and 5, provided a residual power allowing the justices to take the depositions of persons able to give evidence for the prosecution but who were unwilling to do so. The deposition could then be used as evidence in the Crown Court trial unless that court ordered otherwise, or a party at the trial objects. It is entirely unrealistic to suggest that the defendants in this case would not wish to cross examine AC, assuming him to have given the same account during any deposition. If AC expressed unwillingness to attend to give evidence, then it would be necessary to make application for a witness summons pursuant to section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 requiring him to do so.

62. Section 2(3) provides that the Crown Court may refuse to issue the summons if any requirement relating to the application is not fulfilled. The application is subject to Criminal Procedure Rule (CPR) 17.3 which requires that a party must apply for the summons as soon as practicable after becoming aware of the grounds for doing so. CPR 17.7 (1)(b)(i) affords the witness concerned with the opportunity to challenge the issue of the summons on the basis that he was not aware of the application, and he cannot give evidence that is likely to be material. A person, including a defendant, against whom the proposed evidence relates may apply to the Crown Court to withdraw the summons on the grounds that he was not aware of the application for it and that the evidence is unlikely to be material evidence.

63. The application for a witness summons is not dependent upon an earlier application pursuant to Schedule 3 paragraph 4 of the Crime and Disorder Act 1998. We have not received any satisfactory explanation from Ms Griffiths KC as to why the application needed to be made ex-parte or without advance notice to the defence. The late service in March 2021 of DC Thompson's contemporaneous notes of 16 June 2020 is remarkable. It would have been good practice to cross refer AC's name on the witness list to the notes made by DC Thompson on 16 June 2020. However, we consider it is an overstatement to refer to these omissions as a prosecution ambush.

64. Despite the breach of the CPR 17.3 in terms of timing the application the judge was entitled in the exercise of his discretion to issue a witness summons. There was evidence that AC was a witness, whether or not he had made a written witness statement. The judge was satisfied that the prosecution had established good reason to delay the application and was entitled to take at face value the indication that the prosecution would continue to seek AC's co-operation in the court process, which included the preparation of a witness statement. There is no basis upon which to regard his determination to be unreasonable or irrational or the procedure to prejudice the appellants. There was no good basis for him to withdraw the witness summons.

65. The judge was undoubtedly correct to distinguish AC's position from that of a witness who had been identified as present at the scene but had never provided an account. Whilst the contemporaneous notes and police officers' witness statements were second best, they provided the defence with some idea of what AC was likely to say if he gave evidence. In these circumstances, we do not accept that he would be called to give evidence "blind".

66. We were not persuaded that the defence found themselves in any worse position than counsel who encounter a witness giving evidence that is not contained within his/her statement. There may well be nuanced differences, corrections or amplification. It is commonplace. In this case, although the defence did not have the "security" of a witness statement from AC, they had three separate police officers' statements and two sets of contemporaneous notes of what he had said, and which prior inconsistency, if that was revealed, they might expect prosecution counsel to concede. Counsel, whether prosecution or defence, must take decisions on how to react in these circumstances, whether by challenge and/or to seek an adjournment to take instructions, and/or in extreme cases to seek to discharge the jury. We see no error in the judge's approach in determining that AC could be called to give evidence and that any difficulties, for example, his refusal to give evidence would be accommodated in the trial process.

67. AC's attendance at Court under compulsion and his first appearance before the jury was less than constructive. Ms Grahame asserts that it was difficult to "articulate" the atmosphere in the court as this sorry tale unfolded before the jury. She said that AC's reaction to hearing the recording of 999 call was of obvious upset; he had not been forewarned that it would be played. She argued that the inference to be drawn from the jury person's comments indicated in [46] above is that the jury sympathised with the witness' predicament.

68. We have read the transcript of the relevant part of the proceedings, and do not discern that AC was in distress at hearing the 999 call, nor that he was visibly agitated. He responded articulately and politely to the judge's direction to him to answer the question and 'held his own'. The interactions between the judge and AC, both in the presence and then the absence of the jury, were civil and polite. We do not see that the comment of one member of the jury is a view necessarily shared by others. In any event, if the comment was disapproving of the witness, this benefitted the defendants. If it was disapproving of the judge, we do not understand how this prejudiced the defendants. In any event, his subsequent direction to the jury on their return to Court, "at the request of counsel", was timely and explicit. He warned the jury "not to reach

any conclusion about the witness or the reasons for the stance that he had taken…witnesses are sometimes reluctant to give evidence for reasons which can be many and various, and it would be wrong to assume that any reluctance was the result of something said or done by any defendant. Or anyone on behalf of a defendant. That any such assumption would be groundless and if the jury had any such thought they must put it out of their mind and disregard it". This type of direction is commonly given when required and unexceptional in cases of a witness giving evidence with special measures. We have no reason to assume other than the jury would follow the judge's direction, as with any other direction of law, faithfully.

69. AC, whilst on bail, did reflect upon his position over the weekend and decided to give evidence which led the prosecution to seek permission from the judge to talk to him although he had commenced to give his evidence, at least to the extent of refusing to answer questions, in order to prepare a witness statement. It was no doubt regarded to be politic to do so on all fronts. Permission was granted, and despite the defence objections made as to the manner in which the statement should be obtained, the judge declined to direct how the prosecution should proceed. As the judge remarked, "until now the complaint has been that AC should not be called blind and that the prosecution were in reality propelling AC into the witness box in effect to see what he could say".

70. We consider the judge was entirely right not to enter into the debate as to the manner in which AC would give his statement. The judge had been informed of the likelihood of an application to exclude the evidence pursuant to section 78 of the Police and Criminal Evidence Act 1984. He would be ill advised to predetermine the application by his approval of a modus operandi.

71. The failure of the prosecution to record the interview of AC is again remarkable. It would have been obvious that his 'change of heart' would be subject of exploration and insinuation of adverse inference. Nevertheless, this error of judgment aside, the defence would have been able to cross examine both AC and the officers who took the statement as to methodology and undue influence.

72. We do not accept that because the jury saw AC in one frame of mind prior to his remand in custody and then in another in which he made a complete turnabout is analogous to the problem identified by Kay LJ in *Khan and others*. (See [59] above) The defence were able to cross examine AC on the fact that he attended under duress. His evidence, as such had not changed, for he had previously refused to give any. The jury would be able to assess fairly what reliance they could place upon the evidence he gave. The grant of special measures was warranted on the basis of AC's request and reasons to do so. Any argument to the contrary has not been pursued with any vigour.

73. What did transpire involved AC referring to notes and statements that he had not previously seen, and which he had not verified at the time. He adopted the majority of the contents as 'spot on' although questioned the accuracy of some detail. We agree with Ms Grahame KC that AC would not be permitted to refer to these statements in the witness box pursuant to section 139. However, this was to the disadvantage of the prosecution. His evidence before the Court appeared to be free recall, although he referred to the accounts he had previously given and accepted that

he could not now be sure of certain detail. AC's statement clearly detailed the sequence of events. The defence were at liberty to cross examine him as to the extent of his independent recall, and the officer as to the taking of AC's statement.

74. The fact that the appellants were prejudiced by the substance of the statement obviously does not mean that it must be excluded. We find no error in the judge's conclusion that the jury were capable of assessing the reliability of the evidence having been reminded of what records he had accessed and that "any potential prejudice to any defendant can be explored, and the jury will be able to assess the witness's accuracy and scope for error ..."

75. We reject this ground of appeal.

Renewed application for permission to appeal against conviction regarding the application to admit evidence of WG's bad character

76. Mr Trafford KC, led on this renewed application on behalf of MS and AS. There was a schedule of agreed facts laid before the jury concerning WG's emotional volatility and 'anger' issues in the context of his psychiatric medical history and resultant episodes of actual violence and threats of violence towards his ex-partners, including MS. Mr Trafford KC argued that the judge was wrong to refuse to admit evidence of two other aspects of WG's behaviour, namely cruelty to a domestic pet and aggression exhibited towards WG's grandmother. When probed, Mr Trafford KC's submission was that the omitted material would have taken the deceased's bad character to a "higher level" and that these incidents, would tend to show that WG would be quick to arm himself and to carry through the threats of violence that he had exchanged with AS.

77. We are bemused by this submission. As the judge correctly identified, the issue in the case was "whether Aaron Stubbs (and others) travelled from Manchester to St. Helens to attack Warren Glover, found him and attacked him as he ran away from him having just smashed the car window or whether Warren Glover attacked Aaron Stubbs and the car in which he and others had travelled so that Aaron Stubbs had to defend himself. It is the fact that Warren Glover had no convictions for offences of violence but the jury will know of the matters I have set out including his involvement with a mental health nurse, whether or not he is suffering from an unstable personality disorder, his anger and problems and that they were made worse by drink, they will know Gemma Cragg's 999 call where she says Warren Glover had been drinking, they will know how aggressive and/or offensive and abusive Warren Glover was to Melissa Stubbs, Frank Stubbs and Gail Duff and they will know from the 999 call made by Gemma Cragg that Warren Glover went out to engage with Aaron Stubbs armed with some sort of hammer which he in fact used to damage the windscreen. …"

78. There was no further ammunition needed for the defence proposition that WG "was the sort of person who would go out with weapons to attack a group with whom he is in dispute". Nevertheless, the judge conscientiously ruled upon the application with regard to section 100 of the Criminal Justice Act 2003 and applied the principles stated in *Braithwaite (Stephen) v R [2010] EWCA Crim 1082*.

79. There is no criticism of the manner in which the judge directed the jury about WG's character in his summing up, drawing their attention to the relevant agreed facts.

80. There is no merit in this renewed application. The suggestion that this ground adds weight to the criticisms made in relation to the first ground of appeal, for which permission was granted, is unrealistic. The renewed application for permission to appeal on this ground is refused.

Renewed application for permission to appeal against conviction made in relation to the judge's refusal to exclude evidence relating to WhatsApp messages passing between MS and her mother regarding AS's perceived state of mind and intent

81. The two WhatsApp messages concerned were those sent by GD to her daughter, MS, at 20.57 hours which stated: "Aaron's fuming Melissa" and "Aaron's gonna go down and kill him Melissa".

82. Ms Grahame KC acknowledges that the evidence is admissible, against MS, but asserts that there was "a wealth of other evidence" that demonstrated MS's state of knowledge of other defendants' intent, and that the prejudicial effect of the evidence against AS, outweighed the probative value of the evidence against MS.

83. The judge determined that the relevant WhatsApp messages were not hearsay evidence going to AS's intent, since the prosecution did not rely upon them for the truth of the matter stated. However, even if he was incorrect in that assessment, that he would admit the messages pursuant to section 114 (1) (d) of the Criminal Justice Act 2003, since he was satisfied that it was in the interests of justice to do so having had regard to those factors set out in section 114 (2) of the Act. Specifically, he determined that to "have one side of the messages without the other, as would be the result if the defence submissions were correct, would not give a fair picture and would not be in the interests of justice". The judge regarded the suggestion that the prosecution call FS and GD in the trial of their son and daughter to be unrealistic but noted that if FS and GD needed to explain the context of what they said or why they said it, the defence were at liberty to call them.

84. We see no reason to question the exercise of the judge's discretion on the alternative routes of admissibility which he contemplated. That he appears to have misunderstood Ms Grahame KC's acknowledgment that the texts between FS, GD and MS were admissible as an indication that she withdrew her application to exclude them does not detract from our conclusion on this point.

85. In his summing up the judge correctly directed the jury that they must not treat the content of the messages as establishing the truth of what was said in the message; rather, they had been placed before the jury to give context to the messages which followed from WG and MS. Specifically, and apparently in the defendants' favour, "what is clear is that there was a heated dispute going on here and so this raises the prospect …that what was said may well have been what I would describe as hot air, not based in truth or fact. It is just a trading of insults and statements without actually any of them being accurate or intended to be carried out or anything like that."

86. Ms Grahame KC does not criticise the part of the summing up dealing with the text messages as incorrect but maintains that, since two of the messages referred to the specific intention of AS, and may be relied upon by the jury, "specific and clear directions should have distinguished these two messages and recognised and addressed the fact that they had a greater potential for prejudicial misuse than the other messages in the case".

87. We do not accept this submission. It appears to us that the judge was right to give a direction that covered all, potential, hearsay evidence relating to the messages sent between MS and her parents, and her parents and WG. This provided a balanced context in which the messages which MS sent to others should be placed. We consider that to highlight two of the messages would draw adverse attention to them, rather than serve the purpose of demonstrating the effect of the directions. In any event, the direction to the jury was sufficient. It does not appear that Miss Grahame KC requested the judge to supplement the summing up in this regard.

88. The renewed application for permission to appeal on this ground is refused.

89. It follows from the above that we are not persuaded that the convictions of these defendants, or any of them, are unsafe. We dismiss the appeals against conviction.

Renewed application for permission to appeal against sentence

90. This application is made in respect of MS only. We note that no criticism is made of the judge's summing up, whether in relation to the evidence in the trial, or the directions in law on joint enterprise and intent. Nevertheless, it is asserted that the judge fell into error in that he failed to give sufficient weight to: (i) the context to this applicant driving to the scene with a weapon (a statutory aggravating feature) and which "reduced the role of the applicant to a secondary one in nature" ; (ii) statutory mitigating factors, namely the intention to cause grievous bodily harm rather than kill and provocation; and (iii) personal mitigation, namely previous good character, public service as a nurse, her experience of previous domestic abuse at the hands of Mr Glover; the applicant's poor physical and mental health and her caring responsibilities for her 4 year old child. Further, it is submitted that the judge wrongly failed to mark the disparity between the role of MS and the two actual assailants AS and PW.

91. We find these submissions to have no merit whatsoever. MS's case at trial, that she had travelled to St Helens to collect her belongings not expecting to see WG, that she was surprised that PW and SS accompanied her and AS on the journey, that she did not expect violence to erupt even though they travelled to confront WG once he provided his location, that she had not witnessed the attack, that she had not shouted encouragement to AS, were obviously rejected by the jury's verdict.

92. The trial judge found that AS and MS recruited PW and SS to join them in what they intended to be a significant physical assault upon WG in retribution for his offensive text messages to MS, and her parents. The four travelled 30 miles from Manchester to St. Helens to do so. They carried weapons to the scene. MS did not actually inflict injury, but it was her reaction which "fuelled [the] attack from first to last… Even though you were a secondary party, you gave full and vocal encouragement". It is not

suggested that the judge was not in a position to make these findings to the criminal standard on the basis of the evidence led at trial.

93. There is, rightly, no attempt to argue that the judge was wrong to identify Schedule 21, paragraph 4(2) as providing the appropriate starting point for the minimum term tariff as being 25 years. No criticism is made of the judge's identification of an additional statutory aggravating features, namely an attack planned beyond the carrying of weapons to the scene, the recruitment of others and the attempt to cover tracks. Nevertheless, the judge explicitly discounted the starting point taking into account that there was, as he found, no intention to kill and only a limited period of premeditation. He did consider the issue of provocation but discounted it because of what he described as a "gross over reaction" to the texts, persisting for two hours before finding WG and more demonstrative of vengeance than an instant reaction to the slight. The judge was correct to observe that personal mitigation, has "limited impact in a case of this gravity".

94. AS was sentenced as the defendant who inflicted the fatal blow. He did receive a higher minimum tariff, albeit only one year more than that of MS. Bearing in mind the judge's findings of fact made as to the culpability of each defendant, we see no error in the exercise of his discretion to limit the differential between AS and the others by comparatively minor amount. We dismiss the renewed application for permission to appeal against sentence.