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Case No: 202001319 B4
Case No: 202001321 B4
Case No: 202001323 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CENTRAL CRIMINAL COURT
Her Honour Judge Dhir QC
T20197225

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2022

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION

MR JUSTICE HOLGATE
and
MR JUSTICE GARNHAM

- -

Between :

REGINA	**Respondent**
- and -	
TAALIB ROWE , KARLOS GRACIA, ALHASSAN JALLOH	**Appellants/ Applicant**

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Mr A Bajwa QC & Mr R James (instructed by **PSP Law**) for the **Appellant Rowe**
Mr J Wood QC (instructed by **Banks & partners**) for the **Appellant Gracia**
Mr J Bennathan QC & Mr T Okewale (instructed by **Tuckers Solicitors**) for the **Applicant Jalloh**

Mrs A Morgan QC & Mr P Ratliff (instructed by **CPS London North**) for the **Respondent**

Hearing date: 28th October 2021

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Judgment Approved

Dame Victoria Sharp, P. :

Introduction

1. On 23 March 2020, at the Central Criminal Court, before Her Honour Judge Dhir QC and a jury, Rene Montaque, Alhassan Jalloh and Karlos Gracia were convicted of murder and their co-accused, Taalib Rowe was acquitted of murder but convicted of manslaughter. On 13 November 2020, Rene Montaque was sentenced to imprisonment for life, with a minimum term of 30 years; Karlos Gracia was sentenced to imprisonment for life, with a minimum term of 26 years; Alhassan Jalloh was sentenced to imprisonment for life, with a minimum term of 25 years 6 months and Taalib Rowe was sentenced to 17 years' imprisonment.

The Grounds of Appeal

2. It is convenient if we number the grounds we have to consider sequentially. These relate solely to the safety of the convictions of Rowe, Gracia and Jalloh.

3. Rowe appeals against his conviction for manslaughter by limited leave of the single judge (Ground 1). He renews his application for leave to appeal against his conviction in respect of two refused grounds (Grounds 2 and 3). Gracia appeals against his conviction for murder by limited leave of the single judge (Grounds 4 and 5). He renews his application for leave to appeal against conviction in respect of three refused grounds (Grounds 6 to 8). Jalloh renews his application for leave to appeal against his conviction for murder on the grounds placed before the single judge. Two of those grounds (Grounds 9 and 10) relate to rulings made in relation to him. In his other grounds, Jalloh seeks to adopt, almost in their entirety, the grounds advanced by Gracia (Ground 11) and by Rowe and Gracia relating to the management of the jury in retirement (Ground 12). He also seeks leave to amend his notice of appeal to advance a new ground not put before the single judge (Ground 13). Rowe and Gracia seek to adopt this further new ground.

4. The issues raised in the grounds for which leave has been given are these. The judge misdirected the jury so that there was no proper basis for a verdict of manslaughter (Rowe). The judge was wrong to allow the prosecution to adduce telephone handset evidence and evidence of call records which it had not led as part of its case, as this gave rise to unfairness (Gracia). The judge was wrong to permit the prosecution to adduce bad character evidence concerning two individuals, Massiah Tillock and Kevin Gracia (Gracia).

5. The renewed applications can be summarised as follows. Jalloh renews on the grounds advanced by Gracia referred to above. The judge erred in refusing to allow bad character evidence to be adduced in respect of Montaque, and his associates Small, Carlene Wilson, and Kyle Barratt (Jalloh and Gracia). The judge was wrong to allow evidence of Jalloh's bad character and involvement in gang violence to be adduced in his cross-examination of him without application and in the face of objection; and was also wrong to admit Jalloh's conviction for the supply of class 'A' drugs when he was 17 to correct a false impression (Jalloh). The judge's directions to the jury in the case of Gracia were flawed (Gracia and Jalloh). The summing up was unfair to Rowe's case (Rowe). The judge's management of jury in retirement was deficient (Gracia, Jalloh and Rowe).

6. The new ground in respect of which leave is sought by Jalloh to amend his notice of appeal, adopted by Rowe and Gracia, is that the judge was wrong not to direct the jury that encouragement or assistance by an accessory must have had some effect on the relevant events to establish criminal liability as an accessory.

Overview

7. In the early evening of 7 July 2019, an innocent member of the public, Kwasi Mensah-Ababio, who was then 26 years old, was sitting in a park in Wembley, known as Monks Park, enjoying a soft drink after his day's work at Sainsbury's. Within minutes of sitting down, he was confronted by a group of three men, one of whom produced a gun and shot him once in the face. He died at the scene.

8. The prosecution case was that the murder of Mr Mensah-Ababio arose from the rivalry between two local gangs, the St Raphs Soldiers and the Thugs of Stonebridge. On 5 July 2019 a man called (Michael) Craig Smalls who was a leading member of the Thugs of Stonebridge, had been shot and killed on the Harrow Road, some 150 metres from Monks Park. The St Raphs Soldiers were believed to be responsible for his death. The prosecution alleged that the defendants were associates of Smalls and were involved in "guarding" an informal shrine (of photographs and flowers round a tree) that had been created for him on the Harrow Road. CCTV footage showed the defendants attending the shrine and associating with others who were mourning Smalls' death.

9. Before Mr Mensah-Ababio had gone into Monks Park, he alighted from a bus on the Harrow Road, bought himself a soft drink at Costcutter and walked past the shrine to Smalls. He was spotted, so the prosecution said, by the defendants, mistaken for a member of St Raphs Soldiers called Darren Buchanan (aka Pacman) to whom he bore a striking resemblance, followed into Monks Park by the four men and shot. The prosecution case in summary was that the defendants were each party to the planned shooting of Mr Mensah-Ababio which was a revenge killing gone wrong. Its case at trial was that Montaque was the shooter.

10. Most of the material events (save for the shooting itself which was witnessed by a member of the public) were captured on CCTV footage, including the defendants' movements in and around the shrine, the following of Mr Mensah-Ababio into Monks Park, their running away from Monks Park after he had been shot and their movements thereafter.

Gang related evidence/issues pre-trial

11. On 6 September 2019, and prior to the PTPH, the prosecution served a witness statement from Detective Constable Palmer, an experienced gangs officer. He dealt with the defendants' links with the Thugs of Stonebridge, hostilities between the Thugs of Stonebridge and St Raphs Soldiers (which were based on their geographical proximity and drug dealing in the area), membership of the respective gangs and the fact that there had been many instances of serious violence between them.

12. Detective Constable Palmer said the defendants were all either members of, or were directly associated with, the Thugs of Stonebridge. Membership of that gang included Craig Smalls, Lamar Charles, Kyle Scott, Kevin Georgiou, Nathan Franklin and

Massiah Tillock (aka "M1"). Each defendant was an associate of Craig Smalls. Karlos Gracia was a senior active member of the Thugs of Stonebridge. Details were given of his association and links to other gang members, including Massiah Tillock and Nathan Franklin and of a relevant conviction that he had for dealing in cannabis. Jalloh was a mid-ranking member of the Thugs of Stonebridge. His telephone number was stored on a handset recovered from Nathan Franklin. Details were given of his conviction for the supply of crack cocaine and heroin, his use of a street name associated with the Thugs of Stonebridge and his connection to other Thugs of Stonebridge members. Reference was also made to an incident on 30 September 2018 when Jalloh was stabbed in the thigh and shoulder blade and of an incident a month later when his home and the home of another member of Thugs of Stonebridge was shot at by someone using a shotgun.

13. Detective Constable Palmer's evidence was summarised in the prosecution's "Case Summary and Note for the PTPH on 18 October 2019". Following the PTPH, the defendants served their respective Defence Statements. Each defendant denied being a member of the Thugs of Stonebridge but accepted knowing Smalls and other members and associates of that gang.

14. For present purposes it is sufficient to set out what was said by Jalloh and Gracia. On 13 November 2019, Jalloh served his Defence Statement in which he denied being a member of the Thugs of Stonebridge, but said he knew some of the persons said to be members of the Thugs of Stonebridge as a result of growing up in the area, including Craig Smalls who he had known from childhood. He said he visited the shrine and attended Smalls' family home on 7 July 2019 to pay his respects. In his Defence Statement dated 2 December 2019, Gracia said that he was not a member of either the Thugs of Stonebridge or the St. Raphs Soldiers, but he did know members and associates of each gang. He also knew and was friendly with Craig Smalls and they both knew each other's family. But he had not participated in any gang activity with Smalls. In his Defence Statement Gracia said that Montaque was the gunman who had shot Mr Mensah-Ababio.

15. On 12 December 2019, before the trial began, the prosecution filed a further note (the Note). The Note said that the prosecution did not propose to lead evidence showing the association of Montaque, Gracia and Jalloh with the Thugs of Stonebridge. It said the prosecution had reviewed a large body of bad character material which had been disclosed to the defence. At present, it did not intend to serve a bad character application and did not seek to establish "gang" evidence to demonstrate propensity or for any other reason. However, the Note also said that for the avoidance of doubt, the prosecution considered the following to be matters to do with the facts alleged, and not bad character evidence, for the purposes of section 98 of the Criminal Justice Act 2003 (the CJA 2003): the murder of Smalls on 5 July 2019; the defendants' connections to him culminating in their presence in the vicinity of the memorial in the Harrow Road, and the striking resemblance of Mr Mensah-Ababio to a member of the gang thought to be responsible for that murder. These three matters were thereafter put before the jury as agreed facts.

An overview of the trial

16. The trial commenced on 6 January 2020 and was much interrupted for Covid and other reasons. There was no dispute that the defendants were in the area at the time of the killing.

17. CCTV footage during the course of the afternoon of 7 July 2019 showed that Rowe parked his car near to the entrance of Monks Park at 17.12hrs, at a time when Montaque was on Harrow Road, near to the shrine.

18. Gracia and Jalloh arrived in the area of Monks Park with a third man, Lacquim Anderson, at about 17.45hrs. They all went to the home address of Smalls in MacArthur Close to pay their respects, along with a number of others, who were moving between the shrine on Harrow Road and MacArthur Close, which is a road next to Monks Park. The defendants then left to walk back to Harrow Road. The prosecution case was that they were heading back to guard the shrine, expecting that there might be further incidents of violence. On the way towards the Harrow Road, CCTV captured a prolonged exchange between Montaque and Rowe. The two engaged in conversation and their hands appeared to touch at points during the conversation. They then walked together up the Harrow Road.

19. There was footage of each of them at the shrine, then apparently following Mr Mensah-Ababio, entering Monks Park after him and leaving after he had been shot (an event that could be timed at 18.47.07 by the sudden flight of birds that occurred when the gun was discharged). The footage from the shrine showed the distinctive clothing that each man wore, and that both Montaque and Gracia carried a man bag (Montaque's man bag was black, Gracia's man bag was dark in colour).

20. The prosecution alleged that the sequence in which the defendants followed behind Mr Mensah-Ababio was significant. Its case that Montaque was the gunman was based in part on the way he appeared to be holding the man bag against his side as he ran into Monks Park. Further, as the defendants moved towards the entrance to Monks Park, Gracia and Jalloh were ahead; Jalloh made two gestures consistent with encouraging Montaque and Rowe to hurry and he and Gracia then waited to be joined by Montaque and Rowe, because the prosecution said they knew Montaque was in possession of the firearm.

21. The shooting was seen at close quarters by Mr Bogdan Pirvu, a member of the public who was seated on an opposite bench. Mr Pirvu's statement (not all of which was agreed) was read to the jury by agreement. His evidence was provided to the jury as hearsay in this form because there were difficulties in him leaving Romania where he was by the time of the trial, and with video link technology. His evidence was that a group of three men approached the victim who was shot within a matter of seconds by one of them, who produced a gun out of a black man bag.

22. Mr Pirvu's statement said in part:

> "… a group of three (3) people then came right up to the bench where the man was sitting on his own. They came round the benches. They started to talk to the man sat on the bench and it was noisy. I could not hear the person I was on the phone with

> anymore. I stood up to leave as I was trying to speak on the phone and one of the persons in the group raised his voice and started to shout at me "Stay here, stay here". I replied "It's ok, I am leaving, do not worry". The person who raised his voice had a man bag on his left-hand side, I think it was black in colour; it had a zip close to his waist. I think it was attached to his shoulder with a strap. He put his hand in his man bag and a pistol was slightly visible. Only the handle could be seen. That was the moment when he said to me "Stay here, stay here". There was a distance of about three (3) to four (4) metres between me and him, there were no obstacles between us and this exchange lasted for a few seconds. I panicked when I saw the pistol and I retreated from the group, up the hill. I headed towards another bench, closer to the other path, at approximately 20 metres away. When I was nearly there I heard a loud bang and I was shocked. I turned around in the direction of the noise and I saw a man falling to the ground. I turned my head for a split second, after I heard the noise of the shooting that was the moment I saw the person in the movement of falling to the ground. I think it may have been the man who was sitting on the bench next to me. I only looked for one second. After that I never looked back again and I ran in the direction of my house, towards Harrow Road, but I tripped in the park and dropped my wallet on the ground. I then dropped my phone in the street, I picked it up and I went inside my house".

23. After the shot was fired (timed as we have said, at 18.47.07hrs) CCTV footage from the entrance to Monks Park showed Gracia, Jalloh and Rowe running away from the area of the benches and towards the exit of Monks Park, leaving at 18.47.52hrs. The prosecution alleged that Rowe remained near to the entrance, waiting for Montaque to come out of Monks Park. At 18.48.23hrs Montaque could be seen leaving the Park. All the defendants then moved in the same direction along Monks Park Road. Gracia and Jalloh left the area in the car that they had used to arrive earlier. Rowe did not go back to his car, which he had parked nearby. Instead, he took a lift with the others before arriving back at the Harrow Road as emergency services arrived at the scene. Rowe went back to his parents' address before leaving at 20.21hrs having changed his clothing and carrying a sports bag. Gracia was also seen to have changed his clothes and removed a bag from his home address. Jalloh changed his clothes and took them to his aunt's house. It was suggested that they had each changed and removed their clothes to avoid detection.

24. Montaque did not give evidence, and for much of the defence case declined to attend the trial. His case, put forcibly to Gracia and Jalloh in cross-examination, was that Gracia, assisted by Jalloh, was the shooter. The other defendants gave evidence in their own defence. In his evidence, Gracia said he did not know Rowe; Jalloh said he recognised him because they had been at the same school. Gracia and Jalloh said they had followed the victim into the park because he had looked at them in a suspicious

way. They ran to see who he was and why he was behaving that way. They admitted they were present when the gun was fired but said they had no idea that Montaque had a gun or intended to use it or to kill the victim. Gracia said he caught up with Mr Mensah-Ababio a little distance from the picnic benches, spoke to him, satisfied himself he meant no harm and walked away. Montaque suddenly arrived and began a heated conversation with the deceased. Gracia went towards them to try and defuse the situation but Montaque then pulled out a gun and shot the deceased. Jalloh's account was similar, save that he said he did not see the shooting but formed the view that Montaque must have done the shooting.

25. In view of the grounds of appeal advanced it is necessary to give some more specifics about the evidence that Gracia and Jalloh gave.

26. Gracia and Jalloh each sought to put forward evidence (and to invite the prosecution's agreement of certain facts) emphasising the close connection between Montaque and Smalls and other associates/members of the Thugs of Stonebridge, including telephone evidence of the association of Montaque with others; and to explore additional CCTV footage implicating Montaque by suggesting that his man bag had been passed around with others on the afternoon of 7 July before the murder, including to someone called Bryant, who had an association with firearms. Their implication of Montaque in this connection inevitably served to emphasise the distinction between his position and their own.

27. Gracia's evidence in chief was given on 5 and 11 February 2020. He was cross-examined for Montaque between 11 and 12 February and for Jalloh on 12 February. The prosecution's cross-examination of Gracia began on 12 February and there was then a period when the court did not sit before that cross-examination continued on 24 to 25 February. Re-examination took place on 25 February.

28. During the course of his evidence, Gracia sought to establish that he was not the gunman, Montaque was; he was terrified of repercussions from Montaque and others as a result of naming Montaque and Montaque had been one of Smalls' "bodyguards". Further, and contrary to what Gracia had said in his Defence Statement, he said he did not know who was a member of the Thugs of Stonebridge, or whether Smalls was a member of that gang, and he knew nothing of firearms – saying he had never held one or seen one.

29. Gracia and Jalloh were extensively cross-examined by counsel for Montaque. The purpose of the cross-examination was, somewhat inevitably, to establish amongst other things, their links to Smalls, and to members of the Thugs of Stonebridge. It was put to them in terms that Gracia was the shooter, and Jalloh his accomplice, and they were lying about the extent of their association with Smalls and those known to be members of the Thugs of Stonebridge, allegations which they denied.

30. In the course of cross-examination Gracia agreed that he knew St Raphs Soldiers was a gang, as was the Thugs of Stonebridge. He maintained he did not know the member of any "group" and denied knowing that Smalls was a member of the Thugs of Stonebridge. Gracia was asked whether he hung around with people he knew were in those gangs, and said he was not going to hang around them or anyone suspected of being in one of those gangs. He was pressed on this and eventually identified one person called Nolan who he thought might have been a gang member.

31. After this evidence was given, but before the commencement of the prosecution's cross-examination of Gracia, the prosecution served (on 11 February 2020) by notice of additional evidence, parts of a telephone download previously provided as unused material, showing the extent of Gracia's contact with certain members of the Thugs of Stonebridge whose identities and background had been set out in the statement of Detective Constable Palmer.

32. On 17 February 2020, Massiah Tillock, said by Detective Constable Palmer in his witness statement to be a member of the Thugs of Stonebridge, was convicted in Harrow Crown Court of possession of a firearm with intent to endanger life. The offence had been committed on 9 July 2019. Tillock was stopped by police on the Harrow Road and was found to be in possession of the gun which had been used on 6 July 2019 in another shooting, together with some live ammunition. That gun had not been used on 7 July to kill Mr Mensah-Ababio. Tillock's street name of "M1" was stored on Gracia's mobile phone with a number belonging to Massiah Tillock.

33. On 23 February 2020, Gracia's legal team served a skeleton argument objecting to the use of the download from Gracia's phone. In an email sent at 17.00hrs on the same day, the prosecution said as follows: "The prosecution intends to use the material referred to in the skeleton in direct response to assertions made by… Gracia in his evidence. It was provided to the Gracia team many weeks ago. It was formally served in evidence at the end of examination in chief as a result of evidence given by [Gracia]. The Gracia team were aware I intended to use it before I began my cross examination. The prosecution will object to any attempt to rehearse the detail of this in open court through argument before questions are asked. This gives an obvious, and we would submit unfair, advantage to the defendant. The relevance will be made clear from the questions asked. If the relevance is not well-established then the Defence can object at that point."

34. When the cross-examination of Gracia resumed on 24 February 2020, the prosecution asked him questions about firearms. He said that he was not familiar with guns and did not know anyone who carried a firearm. He was asked about Massiah Tillock and Tillock's brother, Kyle. Mr Wood QC objected on behalf of Gracia that the prosecution was attempting to elicit third party bad character evidence without making a proper application to do so. That matter was put to one side, while the judge allowed other questions to be put to the witness.

35. Ms Morgan QC asked Gracia about a section of CCTV footage which had been shown to the jury during his cross-examination by Montaque's counsel. This showed that he had been on his telephone at about 18.42hrs when Mr. Mensah-Ababio was in Costcutter. Gracia was asked to whom he had been speaking and whether it could have been Massiah Tillock. Gracia said that there had been no reason for him to call Tillock.

36. Ms Morgan QC then sought to ask about the download from Gracia's telephone. Mr Wood QC objected. He said because of the timing of the service of this telephone material there had been no opportunity to take instructions from his client and, in any event, the relevance of the download material was contingent upon a third-party bad character application which had yet to be made. Ms Morgan QC responded that the telephone material she wished to rely upon arose from the way in which Gracia's evidence had departed from his defence statement. She accepted that the full

relevance of this material was linked to a bad character application yet to be made but she said that it had contextual relevance in any event. The judge allowed this aspect of the questioning to continue.

37. Gracia was then asked about calls from his telephone to Massiah Tillock's telephone at 18.35hrs and 18.42hrs on 7 July 2019. Gracia said that Massiah Tillock's telephone was also used by his brother Kyle and the call would have concerned a purchase of cannabis for Kyle's girlfriend. Massiah Tillock was listed in Gracia's contacts, along with Gracia's brother Kevin, who had called him at 18.46hrs just before the shooting. Gracia was then asked why he had deleted a number of texts sent on the day of the shooting before his arrest (on 11 July 2019 at 2 am). Gracia said his telephone was old and had only limited storage space so that he had to delete texts in order to be able to receive more.

38. Towards the end of that day, the prosecution filed an application to adduce bad character evidence and to call rebuttal evidence. They applied for leave to call evidence of Gracia's connection with Massiah Tillock and with Kevin Gracia under s.101(1)(f) of CJA 2003 to correct a false impression given by Gracia that he did not know any members or associates of either the Thugs of Stonebridge or the St Raphs gang or anyone connected to firearms. The prosecution also applied to adduce bad character evidence of Massiah Tillock and Kevin Gracia under s.100(1)(b) of CJA 2003 concerning the same matters, on the ground they were issues of substantial importance in the case. That application was resisted on behalf of Gracia. In summary, it was submitted that Gracia had not given a false impression that he did not know any gang members, or anyone connected to firearms. In relation to s.100(1)(b) it was submitted that these were not matters of substantial importance in the case, nor was the evidence of substantial probative value, for example, to show membership of, or association with, gangs.

39. Legal argument took place on 25 February 2020. The judge gave *ex tempore* rulings acceding in substance to the applications made by the prosecution. The prosecution indicated that during their further cross-examination of Gracia they would only ask about his knowledge of the arrest of Massiah Tillock for his possession of a firearm on 9 July 2019 and of his knowledge of his brother's involvement with gangs. On 6 March 2020 the judge gave more detailed written reasons for her decision.

40. After Gracia had completed his evidence, the parties agreed additional admissions as a result of the judge's ruling. In summary, the matters agreed included the following: a police expert had concluded that Massiah Tillock and Kevin Gracia were members of the Thugs of Stonebridge; the details of the offence for which Massiah Tillock had been convicted on 17 February 2020; and it had been shown that the number stored as "M1" on Gracia's telephone belonged to Massiah Tillock.

41. In the course of his evidence in chief, Jalloh maintained that Smalls was someone he would just say "Hi" to. He said he was aware of a group known as the Thugs of Stonebridge but could not say who was or was not involved; he was asked whether he had attended the gatherings at McArthur Close (where Smalls had lived) on 5 or 6 July 2019, and he said he had not. He was asked why, and he said: "Because me and Craig aren't close friends. I don't know really know his family like that, so". He was asked where he had met Gracia and Anderson on the afternoon of 7 July 2019 and said he had met them outside Anderson's house. He said he had no plan for that

afternoon, but when he met his friends, Anderson made him aware that they were going to Monks Park to pay their respects to Smalls and see the shrine and he did not object.

42. The CCTV footage of the shrine at the material time and shown to the jury showed that Jalloh had remained in the area of the shrine for about 20 minutes. In his evidence in chief, Jalloh maintained that while in McArthur Close at Smalls' address, he had spoken to a number of people, including his cousin Brina Bengali, and by telephone to his friend Benji, who wanted to know if he was in the area so they could smoke cannabis. It was suggested therefore that this was the reason he remained in the area of the shrine. Further, with regard to his presence at or near the shrine as could be seen on the CCTV footage, he said he had been speaking to his cousin Brina, and when asked what they had been talking about, said "…he was happy that I'd just finished uni." When asked why he had moved away from the shrine (which the prosecution suggested was to follow Mr Mensah-Ababio) Jalloh said he and Gracia had left at that point because "Karlos had said that he didn't really feel comfortable because it was too open… there were lots of people that he didn't know and cars going past and being the reason I was there, standing out there wouldn't be the smartest thing to do…"

43. When cross-examined on behalf of Montaque about his knowledge of members of the Thugs of Stonebridge, Jalloh said that the only people he would speak to who he thought might be members were a rapper called "Skeng" and "some guy called Lightening". In respect of Smalls, he was asked whether he was anything to him before 5 July, and he said Smalls was just someone he knew to say "Hi" to. He was asked whether he really wanted the jury to accept that Smalls and his family meant nothing to him, and he said yes, because Smalls' and his family meant nothing to him, and he didn't know Smalls' family. Jalloh was asked whether he was worried there might be more shootings in the area and said that things happen all the time, he knew there was a danger that anyone could get shot because someone had just been shot and he confirmed he had left the Harrow Road (not to follow Mr Mensah-Ababio) but because Gracia had said it was not a good idea to be in the open and they were standing where someone had just been shot.

44. As for Rowe, the CCTV footage showed he entered Monks Park seconds after the other three defendants. His case was that he was not present when the victim was shot, and he had no idea that Montaque had a gun or that he intended to use it. He said he had walked along the path in Monks Park because he was curious as to why two men and Montaque had run into Monks Park. He did not reach the picnic tables where the shooting took place, and because of the presence of foliage between him and the picnic table, he did not see the shooting. He heard the sound of it and froze in shock. He felt spurred into running away from the area where the sound of the shot came from after Gracia and Jalloh ran past him, so he ran behind them and out of Monks Park.

45. The issues and rulings to which this evidence gave rise are dealt with further below.

46. The offence of manslaughter did not appear on the indictment. Section 6(2) of the Criminal Law Act 1967 provides however that it is available as an alternative verdict on an indictment for murder (on "an indictment for murder a person found not guilty of murder may be found guilty (a) of manslaughter…").

47. The judge's draft legal directions and routes to verdict were circulated on the evening of 3 March 2020, with a request that responses be submitted by 20.00hrs. It was understood that there was to be a split summing up, and that Parts 1 and 2 of the draft directions of law (Preliminary Matters and Murder (or Manslaughter)) would be provided prior to closing speeches. The judge had yet to determine how she would describe the joint enterprise: specifically, whether she would direct the jury that secondary party liability in this case involved the intentional assistance or encouragement of "an unlawful attack" (a position for which the prosecution contended) or "the unlawful shooting" of the deceased.

48. The suggested amendments sent to the judge on behalf of Rowe overnight were confined to the correct description of the event, and set out his position, namely that liability for any offence for a defendant other than the gunman would depend upon giving and intending to give assistance or encouragement to another defendant to shoot the victim (rather than merely attack). Nothing was said about whether manslaughter could properly be left to the jury. The response for Jalloh endorsed the approach "adopted by the court generally in the document, namely, to tether the directions on murder and manslaughter to the case as put, is by far the better approach…". Having received those responses, the judge indicated that any further submissions would be heard the next day with 5 minutes allotted to each defence team, and 6 minutes allotted to the prosecution.

49. The next morning, the submission made on behalf of Jalloh by Ms Trowler QC (apparently assented to by the other defendants) was that the jury should be directed that liability for a defendant who was not the shooter depended on an intention that the victim be shot rather than attacked. Ms Trowler's submission was this kept it simple, and did not overcomplicate matters, including for the purposes of sentence for any defendant who was convicted. The implications of this characterisation of the event for the correct approach to a route to a conviction for manslaughter for secondary parties were not adverted to on behalf of any of the defendants, save briefly by Mr Wood for Gracia. He submitted it was open to the jury to return a verdict of manslaughter (on the basis of an intention to cause some injury falling short of serious harm) even if those participating in the attack knew the planned attack was a shooting. In the face of a query from the judge as to whether that could be appropriate in this case he then said he did not press this submission.

50. For her part, Mrs Morgan for the prosecution maintained the prosecution position that the case on joint enterprise should be left to the jury as one of assistance or encouragement in an unlawful attack. She submitted that though the prosecution had put their case as one of a planned shooting, it was open to the jury to accept or reject parts of the prosecution case; and therefore (for the purposes of joint enterprise) the jury should be directed that if a defendant assisted or encouraged an unlawful attack on the victim, intending that he should be caused really serious harm he could be found guilty of murder (subject to an issue as to whether the use of the gun was a supervening event). Otherwise it was difficult to see how manslaughter could be left to the jury ("if manslaughter is to be left it cannot sensibly set aside a framework for murder that requires the prosecution prove the shared intention as to the use of a gun.").

51. The judge however did not seem to agree. She indicated that this case had been put in a particular way (a planned shooting in revenge for the murder of Smalls) and it

would be artificial to leave the case to the jury on any other basis. She then said: "but I am going to leave manslaughter."

52. Mrs Morgan QC made clear her concerns if this were to be done, as can be seen from the following exchanges that then took place with the judge:

> "Mrs Morgan: I am very concerned as to the basis upon which a case might be advanced that manslaughter was available on the basis that someone shoots somebody but not intend at least really serious harm."
>
> Judge: "Well that is something as you know I have struggled with because I have asked Mr Wood for that."
>
> Mrs Morgan: Yes.
>
> Judge: But I think just and just …it gets left because on the facts I know that it is a remarkable – it is a shot to the head from [inaudible] and effectively an attempted shot to the head for quite a [inaudible] but it could have been shot somewhere else but what is key in this case is the gun.
>
> Mrs Morgan: May I leave it this way Your Ladyship? I understand how it can be left in the framework that Your Ladyship sets out and we submit that it may lead to very confusing and problematic territory. However, may we see how my learned friends, if any of them do, touch upon that issue in their speeches?"
>
> Judge: Well that is why this discussion…
>
> Mrs Morgan: …to see whether or not Your Ladyship needs to give any further direction on the evidential foundation for a verdict of manslaughter in certain circumstances. I am not going to be addressing it in my speech. I know not what my learned friends will be saying about it but may I effectively reserve the position as to whether or not anything further should be said by Your Ladyship… about manslaughter until after that point… when we have heard how the case is advanced.. because I submit that there is no sensible route and particularly in light of the way in which effectively I am – and I understand why.
>
> Judge: It may be that I say to the jury it is not going to be put on the basis of manslaughter but in law you can bring back – I can say something of that type to them but I would – there are [inaudible]…And – but that was the last case, which I did not leave was about nine shots to a person sitting in a station so…"
>
> Mrs Morgan: Your Ladyship is right.

> Judge: "But this is slightly different so I think on this – in this particular case it is finely balanced, I will leave it. But when I sum up the facts [inaudible]"
>
> Mrs Morgan: Yes, and as I say…
>
> Judge: …That will be tomorrow."
>
> Mrs Morgan: I will reserve the position until we have heard how anybody seeks to advance…"

53. The judge delivered Part 1 of her summing up later that morning (4 March) and copies of it were handed to the jury. The judge told the jury that each defendant was charged with murder, but they also had the alternative of returning a verdict of not guilty to murder but guilty of manslaughter. Having described in summary the prosecution case (that this was a planned shooting in revenge for the murder of Smalls) and the case for each of the defendants, the judge set out the two questions (Questions 1 and 2) the jury had to answer for the charge of murder in the form that those questions later appeared on the route to verdict document: see para 56 below. The judge did not however specify the questions that would have to be answered for manslaughter. All she said at this stage about manslaughter was this.

> "Manslaughter – a person who does not intend to cause really serious bodily harm is guilty of manslaughter if he is party to an unlawful attack or gives intentional assistance or encouragement to an unlawful attack which causes the death of the victim. So in this case you should find a defendant not guilty of murder but guilty of manslaughter if in relation to that defendant your answer to Question 1 is 'yes', but your answer to Question 2 is 'no'…"

The judge went on to say that at the end of her summing-up she would give the jury the route to verdict document that would summarise the questions the jury should ask themselves in relation to each defendant and the verdicts that would follow from the answers to those questions.

54. The prosecution then began its closing submissions; and that afternoon the judge circulated to counsel an amended version of the route to verdict in the form in which it eventually went to the jury. Following further delays in the trial timetable, and the completion of all closing submissions, on 10 March 2020 the judge heard further submissions in respect of the second part of the written directions of law, which included the route to verdict document. Though detailed submissions were received by the judge before the directions of law were put into final form, the judge did not return to the subject of manslaughter again, nor in their speeches did any counsel. No-one touched on the issue of manslaughter or advanced an argument that there was in this case possibly a lesser intention than to cause serious harm.

55. The one-page route to verdict was provided to the jury during the second part of the judge's summing up which was delivered on 16 March 2020.

56. The route to verdict applied to all of the defendants without distinction. It contained three questions:

> "**Question 1**
>
> 1. Are we sure that the defendant we are considering either:
>
> (a) shot Kwasi Mensah-Ababio; or
>
> (b) intended to and gave assistance or encouragement to another person to shoot Kwasi Mensah-Ababio?
>
> If NO, return a 'Not Guilty' verdict.
>
> If YES, go to Question 2.
>
> **Question 2**
>
> 2. Are we sure that, when he shot Kwasi Mensah-Ababio or gave assistance or encouragement to another person or persons to shoot Kwasi Mensah-Ababio, the Defendant intended that Kwasi Mensah-Ababio would be caused at least really serious bodily harm?
>
> If YES, return a 'Guilty' verdict.
>
> If NO, go to question 3
>
> **Question 3**
>
> 3. Are we sure that when he shot Kwasi Mensah-Ababio or gave assistance or encouragement to another person to shoot Kwasi Mensah-Ababio, the Defendant intended that Kwasi Mensah-Ababio would be caused some harm?
>
> If YES, return a verdict of 'Not Guilty of Murder but Guilty of Manslaughter'.
>
> If NO, return a verdict of 'Not Guilty'"

Ground 1: conviction appeal of Rowe

57. The principal submission now made on behalf of Rowe in this appeal, is that there was no proper basis in this case for a verdict of manslaughter. This submission

resolves itself into one simple point. In circumstances where the joint plan was described as a shooting rather than an attack, it is impossible to conceive of circumstances in which an accessory could be not guilty of murder, but guilty of manslaughter. It is submitted that it would not be logically possible for someone to intend to shoot someone (at close range, and not merely to shoot at them) and, at the same time, intend to cause anything less than serious bodily harm. Indeed, as the prosecution foresaw in the exchanges with the judge before speeches, once the incident was characterised as a 'plan to shoot', there was no possibility of a safe verdict of manslaughter being returned.

58. Mrs Morgan QC submits to contrary. As to the law, she submits as follows. Manslaughter is an alternative verdict to murder (s.6(2) Criminal Law Act 1967). In deciding whether to leave a verdict the focus should be on whether the evidence is such that a defendant ought at least to be convicted of the lesser offence (*R v Fairbanks* [1986] 1 WLR 1202 at 1206D). The duty of the judge is to place before the jury all possible conclusions which may be open to them on the evidence (*Von Stark v The Queen* [2000] 1 WLR 1270). The threshold in this regard is low (*Xavier v The State* (unreported) 17 December 1998). The court's objective should be to ensure that defendants "are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged" (*R v Coutts* [2006] UKHL 39, 1 WLR 2154 at para 12). It is not unfair to deprive a defendant, timeously alerted to the possibility, of what may be an adventitious acquittal" (ibid [23-24]). The "decisions which verdicts are left to the jury is a matter for the judge" (*R v Matthews* [2010] EWCA Crim 1859). None of that is disputed and we agree with it.

59. Mrs Morgan QC submits there was a tenable factual distinction to be made between Rowe and the other defendants based on timings. Rowe arrived at the area of the shooting some time after the other defendants had run up the path and although he must have been present at the time of the shooting, it could not have been for more than 10-15 seconds (as was emphasised on his behalf throughout the case). She submits that there was here "evidence which was capable of establishing the offence of manslaughter against Rowe on the basis that he assisted or encouraged the gunmen to shoot the victim" and "it was a possible conclusion that he might have had an intention falling short of one that the victim would be caused really serious harm". The judge was well-placed to reach the view that it was open to the jury to conclude that although a defendant had been party to an enterprise to commit a shooting it did not inevitably follow that there was a shared intention to cause at least really serious harm. Leaving the alternative verdict avoided presenting the jury with the stark choice of convicting for the more serious offence or acquitting altogether. There was no unfairness to Rowe in the course that was taken. Further those representing him made a clear decision not to object to the jury being directed on the availability of manslaughter as an alternative verdict prior to the first part of the legal directions being given on 4 March 2019, or then to object between 4 and 16 March 2019, when the jury were provided with the route to verdict document.

Discussion

60. In *R v Coutts* at paras 23 to 24, Lord Bingham said:

> "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. … I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge …
>
> Application of this rule may in some cases benefit the defendant, protecting him against an excessive conviction. In other cases it may benefit the public, by providing for the conviction of a lawbreaker who deserves punishment. A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.
>
> It is of course fundamental that the duty to leave lesser verdicts to the jury should not be exercised so as to infringe a defendant's right to a fair trial. This might be so if it were shown that decisions were made at trial which would not have been made had the possibility of such a verdict been envisaged. But no such infringement has ordinarily been found where there is evidence of provocation not relied on by the defence, nor will it ordinarily be unfair to leave an alternative where a defendant, who, resisting conviction of a more serious offence, succeeds in throwing doubt on an ingredient of that offence and is as a result convicted of a lesser offence lacking that ingredient. There may be unfairness if the jury first learn of the alternative from the judge's summing-up, when counsel have not had the opportunity to address it in their closing speeches. But that risk is met if the proposed direction is indicated to counsel at some stage before they make their closing speeches…It is not unfair to deprive a defendant, timeously alerted to the possibility, of what may be an adventitious acquittal. "

61. In *R v Barre* [2016] EWCA Crim 216, Gross LJ, giving the judgment of the court, summarised the relevant principles of law at [22] in this way:

> "The law in this area has been considered in a number of authorities, most recently *R v Coutts* … and *R v Foster* [2007] EWCA Crim 2869, [2008] 1 WLR 1615, a decision in four conjoined appeals heard by a five-member Court of Appeal.

> For present purposes the following summary may be distilled based on these decisions and others there referred to together with the discussion in *Archbold* at paragraphs 4-532 and following:
>
> The public interest in the administration of justice will be best served by a judge leaving to the jury any obvious alternative offence to the offence charged. The actual wishes of trial counsel on either side are immaterial. As observed by Lord Bingham in *Coutts*:
>
> 'A defendant may, quite reasonably from his point of view, choose to roll the dice. But the interests of society should not depend on such a contingency.'
>
> Not every alternative verdict must be left to the jury. Plainly there is no such requirement if it would be unfair to the defendant to do so. Likewise, there is a 'proportionality consideration': *Foster* at [61]. The alternative need not be left where it would be trivial, insubstantial or where any possible compromise verdict could not reflect the real issues in the case (ibid). The requirements to leave an alternative verdict arises where it is 'obviously' raised by the evidence. It is one to which 'a jury could reasonably come' or, put another way, 'where it arises as a viable issue on a reasonable view of the evidence': *Foster* at [54]; *Coutts* at [85].
>
> Subject to the above framework, whether in any individual case an alternative verdict must be left to the jury is necessarily fact specific. In this context, the trial judge will have 'the feel of the case' which this court lacks: *Foster* at [61].
>
> Where an alternative verdict is erroneously not left to the jury, on an appeal to the court the question remains as to whether the safety of the conviction is undermined: *Foster* (loc cit)."

62. In that case, fatal injuries were caused by a knife wound during a fight, and the contention for the appellant was that the judge ought to have left manslaughter to the jury as an alternative to murder. The court held that he was not obliged to do so. The principal reason for so holding was that the use of a knife with "moderate force" in the chest area penetrating the deceased's body to the hilt of the weapon was itself indicative of an intention to cause at least really serious harm. In those circumstances the court concluded at [32]:

> "The upshot, in our judgment, is that an alternative verdict of manslaughter was not obviously raised on the evidence. It did not arise as a viable issue on a reasonable view of the evidence. In the circumstances, the judge did not err in declining to leave the alternative verdict to the jury. The most that can be said is

> that some judges might have left it but that falls short of establishing error on the part of this judge in this case."

63. There are a number of features of the case we are considering which need to be highlighted. First, the complaint is not that the judge refused to leave an alternative offence to the jury, but that the judge decided to do so when there was no sensible evidential route to that alternative offence. Secondly, it is clear from the chronology of the discussions with the judge that defence counsel were keen that this case should be left to the jury on an "all or nothing basis", namely as a planned shooting to which each of the defendants was a party, rather than as an unlawful attack. Thirdly, no defence counsel (except briefly as we have indicated, counsel for Gracia) addressed the judge on the implications this might have for a verdict of manslaughter. Fourthly, the prosecution had made plain its view of the difficulties that were inherent in the course the judge was considering. No objection was taken by defence counsel however to manslaughter being left to the jury or, at any stage, to the wording of the route to verdict which is now objected to.

64. The explanation proffered by Mr Bajwa QC who appeared for Rowe below and before us, is that this was because the view was taken (by those representing Rowe) that all depended on how the joint enterprise was described: if it was an unlawful attack, manslaughter remained a realistic alternative verdict for murder; if the latter (a planned shooting) manslaughter did not arise. We do not consider this explanation to be a satisfactory one. Once it was clear that the judge was actively considering manslaughter as an alternative verdict to murder and certainly after she had identified the relevant event as a planned shooting, counsel should have raised any concerns they had about the wording of the route to verdict to manslaughter with the judge.

65. We note that the parties' submissions on the topic arrived piecemeal by email overnight. It further appears that the hearing on 4 March was somewhat disjointed and conducted under apparent pressure of time. We understand of course that there were difficulties caused by the pandemic while this trial was taking place. Saying that however, it was obvious that the phrasing of the route to verdict required careful consideration; and there was ample time to consider the implications of the wording the judge had arrived at before the route to verdict went to the jury on 16 March 2020.

66. In the event, in our opinion the way in which the questions were ultimately framed provided neither a sensible nor a secure route to a manslaughter verdict on the facts; and though we deprecate the fact that the arguments now raised before us on behalf of Rowe were not raised with the judge at any time, we are driven to the conclusion that Rowe's conviction for manslaughter cannot be regarded as safe and must be quashed.

67. In order to reach the verdict that Rowe was not guilty of murder but guilty of manslaughter, the jury had to answer "yes" to question 1, "no", to question 2 and "yes" to question 3. It follows that they convicted Rowe of manslaughter on the basis that he intended to and gave assistance or encouragement to another person to shoot Mr Mensah-Ababio; they were not sure that he intended that Mr Mensah-Ababio should suffer at least really serious harm, but they were sure he intended Mr Mensah-Ababio some harm.

68. Once the planned act which the secondary party encourages or assists is a shooting however, it is difficult to see that there could be circumstances in which a secondary party could say that the harm intended was some harm, but not really serious harm. Certainly no such circumstances emerged from the evidence here.

69. As Mr Bajwa QC submits, the prosecution case was that this was a planned and precisely executed joint shooting with nothing less than a joint intention to carry out a revenge murder for the shooting two days earlier of Smalls. As Mr Bajwa QC also points out, in its sentencing note for the three defendants convicted of murder, the prosecution said that; "The mitigating feature of an intention to cause serious bodily harm, rather than kill, does not arise in this case."

70. The evidence of Rowe's involvement in the killing fell within a relatively narrow compass. Prior to the shooting, Rowe had been at the shrine for about 20 minutes, having earlier attended at Smalls' home address. Shortly before the shooting took place, Rowe followed Montaque, Gracia and Jalloh along Monks Park Road and into the park. There was no evidence that more than three men approached the deceased, or that Rowe was one of them or that he was in the immediate vicinity of the shooting. The prosecution said the men who approached Mr Mensah-Ababio were Gracia, Jalloh and Montaque. Rowe's case was that no assistance or encouragement was given to the shooter. No one suggested that the Rowe was the shooter.

71. There may be cases in which a party to a joint enterprise knows that one of their number has a gun and plans to use it in an attack - to frighten or threaten someone for example, or to hit someone over the head. In those sorts of cases it might be open to a jury safely to conclude that the relevant intention of the secondary party fell short of that required for murder but was sufficient for manslaughter. But as we have indicated there was no evidence of this nature put before the jury, nor was this how the case was left to the jury to consider.

72. The judge did of course direct the jury in Part 1 of her summing up in general terms that a person who does not intend to cause really serious bodily harm is guilty of manslaughter if he is party to an unlawful attack or gives intentional assistance or encouragement to an unlawful attack which causes the death of the victim. Albeit the case might have been left to the jury on the basis that at least some of the defendants were party to an unlawful attack (as Mr Bajwa QC appears to concede) and there may have been reasons to distinguish Rowe from the other defendants in this connection, whether Rowe was a knowing party to an unlawful attack as opposed to a planned shooting, was not the question that the jury were required to consider or answer in arriving at their verdict that he was guilty of manslaughter.

73. There is no doubt that routes to verdict (and written directions of law) have proved to be invaluable in assisting jurors to arrive at a true verdict according to the evidence. There is no doubt either that the questions that are formulated should be phrased in as straightforward language as possible and put in a way that is straightforward for the jury to understand. But there is a risk, and in our view this case is illustrative of it, of oversimplifying the questions to such an extent that they distort the issues the jury has to consider.

74. The first question that must be asked in a case such as this one, is whether or not an alternative offence should be left to a jury. This is an issue that should be determined

in accordance with the principles of law identified above. The fact that leaving an alternative offence may make the case more complicated for the jury to determine – or the route to verdict more difficult to craft for that matter – is not a good reason on its own for failing to do so. The analysis that must then be undertaken in order to arrive at the essential questions the jury have to answer provides the judge and counsel with the opportunity to identify any complications which may not have been apparent at first sight.

75. It may be helpful and no doubt it normally is helpful, to provide the judge with submissions on the topic in writing, but for the purposes of transparency and clarity, the final arguments if there are any and the resolution of any matters in dispute should be addressed by all parties and the judge in open court so there is no room for later doubt about what stance was taken on any matters in contention. Moreover, such a discussion should take place as early as possible, since a well-crafted route to verdict will assist the judge in structuring the summing up and the advocates in focussing their closing submissions on the questions the jury will be required to answer.

76. One matter that should be considered where there is more than one defendant, is whether the same series of questions is appropriate for each defendant. In some cases they will be, in other cases, not. It is certainly not a given that one series of questions should be framed for all defendants. And care should be taken to ensure that the natural desire to pose a series of simple questions does not override the imperative that the questions should where necessary, be tailored to the individual circumstances of each defendant. In this case for example, there was no evidence whatever that Rowe was the shooter, yet the jury were invited to consider whether he was. Had a route to verdict been specifically tailored to the case against him, we venture to suggest that the difficulties with the route to verdict that have led us to conclude that his conviction for manslaughter must be quashed, would not have arisen.

Renewed applications: Rowe

77. In the circumstances, it is not strictly necessary for us to address Rowe's renewed grounds of appeal against conviction (Grounds 2 and 3). For the sake of completeness however, we do so. Ground 2 concerns the fairness of the judge's summing up to his case. In our view, the summing up was fair and balanced in relation to each defendant and save as to the route to verdict, contained no error and can give rise to no legitimate complaint. We agree with the reasons the single judge gave for refusing leave on this ground, in which he observed that this was a long and complex case involving four defendants, three of whom gave evidence, and continued:

> "In such cases it is wholly understandable, indeed it can be necessary, for a judge to bring to the attention of the jury those parts of a defendant's case which might bear particular consideration and to put what one defendant says in the context of the evidence of another witness, whether that witness be a co-defendant or prosecution witness. While the content of a question by counsel is not evidence unless accept by the witness, the proposition underlying the question often reflects the prosecution case and is a conclusion which the jury can draw from the evidence. There is nothing objectionable in a judge reminding the jury of such questions and the answer or

> lack of answer to them. The judge reminded the jury at length of your evidence (S/U p80D-81H, p83H-97D and p99A-109G). The summary contains no improper comment; it is a fair and balanced summary of your case about which you can have no complaint. Leave refused."

78. We can also dispose briefly of the further renewed ground (Ground 3) which concerns complaints made by Rowe (and by Gracia and Jalloh who renew on this ground too (Grounds 8 and 12)) about the way in which the judge dealt with the jury in retirement. In this connection is said that: "The learned trial judge's directions upon the management of the jury in retirement, and when they ceased deliberation overnight, together with the extraordinary circumstances in which the jury were required to deliberate (as their number progressively diminished as a result of the onset of the coronavirus pandemic) combined to render the verdict of guilty against this applicant unsafe."

79. Leave to appeal was refused in respect of this ground by the single judge who gave the following reasons, with which we agree.

> "Ground 3: Jury Management
>
> I have read the transcript of events relating to the retirement of the jury, the directions given to the jury about deliberating, the discharge of jurors and jury notes. I have also read the prosecution's chronology of events based on the transcript. Having done so, I am satisfied that the jury could not have been under any misunderstanding about the direction that they were not to deliberate until all were present; that the discharge of jurors was undertaken properly, in accordance with the correct procedure taking into account the Covid situation; counsel were kept informed of the contents of notes from the jury and the decisions made as a result of them and that no time did any counsel raise any objection to the course adopted by the judge. No concerns were raised and no application made to discharge the jury. The suggestion that the jury felt under pressure to reach verdicts is wholly conjectural. Leave refused."

Conviction appeal: Gracia

80. Gracia was given leave to appeal on two grounds which are linked. The first, Ground 4, challenges the judge's decision to allow the admission of telephone download evidence and call data. The second ground, Ground 5, challenges the judge's decision to allow the admission of bad character evidence concerning Massiah Tillock, Kevin Gracia and Kyle Scott.

81. We have set out the background to the admission of this evidence at [28] to [37] above. On behalf of Gracia in respect of Ground 4, it is submitted that the

prosecution's reliance upon the download material from Gracia's telephone in cross-examination was an impermissible ambush and that the judge should have exercised her discretion under section 78 of PACE 1984 to exclude it.

82. We consider there is no merit in this ground of appeal. In short, as the prosecution submit, relevant and admissible evidence was placed before the jury in cross-examination which had to do with the facts alleged and demonstrated the untruthful nature of Gracia's evidence. It was relied on in cross-examination because Gracia had given a misleading impression in his evidence which departed from the position he had adopted in his Defence Statement. It was not bad character evidence, but evidence deployed to address the lies that had to do with the facts alleged.

83. We have referred to the material parts of the evidence given by Gracia, including in cross-examination on behalf of Montaque. It is quite clear that the case for Gracia (and Jalloh) had evolved during the course of the trial. They had initially obtained the inclusion of agreed admissions designed to show that, in contrast to their own position, Montaque was closely connected to Smalls and other members of the Thugs of Stonebridge. Gracia had also relied upon CCTV footage of Smalls' girlfriend removing his telephone from his body just after he was shot and using it a minute or so later to call Montaque's telephone.

84. The course followed by the prosecution did not therefore involve any "ambush" at all. It was a permissible response to Gracia's change of case. Gracia would have been well aware that the police were in possession of his telephone. In giving his evidence, he simply "opened the door" to legitimate questions about his contacts and the calls he made or received on the day of the killing of Mr Mensah-Ababio, including calls from his brother, Kevin.

85. It is asserted that because of the way the matter was dealt with, Gracia's defence team were unfairly denied an opportunity to have the handset analysed (something it is said they would have wished to do given the case put to Gracia that he had deliberately deleted texts from his telephone). There is nothing in this complaint, in our view. Gracia gave an explanation to the jury as to why it had been necessary for him to clear messages from his telephone regularly; and the defence then obtained an expert report dated 26 February 2020 to support this explanation which found reflection in the Agreed Facts that went to the jury. Further there has been no indication before us as to what more could reasonably have been said about the handset than was said at the trial.

86. It is further asserted that there was no opportunity for the defence to investigate the call from Gracia's telephone to Tillock's number at 18.35hrs on 7 July 2019. This matters, Mr Wood QC says, because when he was preparing his closing speech on 11 March 2020, he checked the CCTV footage and it showed that Gracia was not using a telephone at the time of this call lasting 1 minute 16 seconds, but another male was; but he was then unable to rely upon the CCTV footage because the relevant clip had not been produced in evidence before the jury.

87. There is nothing in this complaint either. The call data placed before the jury showed that the M1 number had attempted to call Gracia at 03.16.02hrs on 7 July 2010; and, as we have said, there was a call from Gracia's number to M1 at 18.35.40hrs on 7 July 2019, which lasted for 1 minute and 16 seconds. The evidence showed that at

18.40.58 Mr Mensah-Ababio appeared in the vicinity of the shrine where he went into Costcutter. At that point, the footage showed Gracia looking in his direction. Gracia's number then called Massiah Tillock at 18.42.58hrs while Mr Mensah-Ababio was in Costcutter, moments before Gracia, Jalloh and Anderson followed him from the Harrow Road and into Monks Park. This was a call that Gracia could be seen on the footage to be making: he placed the phone to his ear at 18.42.33hrs and put it down at 18.43.46hrs before hanging up, something he agreed was the case, when giving evidence (his account was the calls had to do with the sale of cannabis). Further, the M1 number attempted to call Gracia twice later that evening after the shooting, and, minutes later, Gracia attempted to call the M1 number. Having regard to these features of the evidence, the complaint about what the defence could or might have made of the footage of the call at 18.35hrs is of no significance whatever.

88. We note further that no application was made to the judge after Mr Wood QC had checked the CCTV footage. Nor has any explanation been proffered to us as to why the defence did not investigate this potentially relevant footage earlier, certainly before closing submissions or while Gracia was giving his evidence. This was in circumstances where Gracia was cross-examined on the footage by the prosecution on 24 February and re-examined on it the following day; the CCTV footage was available to Gracia and his team before he gave his evidence and the prosecution had made it plain at an earlier stage that it would seek to rely upon the telephone download material.

89. We turn next to the complaint about the judge's decision to permit the prosecution to adduce bad character evidence concerning Massiah Tillock and his associates, Kevin Gracia (Gracia's brother) and Kyle Scott (Tillock's brother): (Ground 5).

90. In her written reasons of 6 March 2020 for allowing this application, the judge said that the mere fact that calls between the telephones of Gracia, his brother and Tillock had been made was not bad character evidence within section 98 of the CJA 2003; but she treated evidence that Gracia was communicating with these two individuals (who were members of the Thugs of Stonebridge and/or had criminal convictions) as potentially bad character evidence against Gracia. On one view, this was unduly favourable to Gracia as this material might otherwise have been regarded as having to do with the alleged facts of the offence.

91. As it was, the judge held that this evidence was admissible under s.101(1)(f) of the CJA 2003 to correct a false impression given by Gracia that he did not know any members of the two rival gangs and did not know about firearms. The judge applied section 105(6) to ensure that the evidence admitted went no further than to correct that false impression. It was limited to evidence that Tillock and Kevin Gracia were members of the Thugs of Stonebridge and Tillock's near contemporaneous offence of possessing a firearm in the Harrow Road which had been used in a shooting on 6 July 2019. The judge decided that the context of the telephone communications and the fact that Kevin Gracia was Gracia's brother meant that the jury could infer that Gracia knew about their gang membership and firearms, contrary to what he had said or the impression he had given in his evidence.

92. These conclusions were linked to the judge's decision to admit evidence of those aspects of the bad character of Tillock and Kevin Gracia under s.100(1)(b) of CJA 2003. She decided that the evidence had "substantial probative value" as to whether

Gracia had given a false impression that he did not know any gang members or about firearms, which was a matter in issue in the proceedings and of "substantial importance in the context of the case as a whole", going also to the credibility of Gracia's evidence.

93. In relation to section 78 of PACE 1984, the judge decided that the admission of the evidence sought to be relied upon by the prosecution, would not have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. On the contrary, the judge considered that it would be unfair to prevent the prosecution from seeking to show that Gracia had given a materially misleading impression about himself.

94. In *R v Renda* [2006] 1 Cr App. R. 24 this court explained at [3] that the application of the principles in the CJA 2003 typically involves the exercise by the trial judge of a fact-specific judgment. Where a judge has not misdirected himself on the law, this court may only intervene if that judgment was "plainly wrong" or Wednesbury unreasonable (*R v Hanson* [2005] 1 WLR 3169 at [15]). In such circumstances the "feel" of the trial judge for the case is often the critical ingredient which an appellate court lacks. But even when a trial judge has erred on a matter of legal principle, or has reached a judgment which was irrational, the question remains whether the conviction was thereby rendered unsafe.

95. Mr Wood QC submits that the judge erred in concluding that Gracia had given a false impression in his evidence. We do not agree. We are in no doubt that the judge was right to accede to the applications to admit this evidence for the reasons she gave and that she correctly applied the relevant provisions of section 105 and section 100 of the CJA 2003.

96. Mr Wood QC criticises the judge for the way in which she linked the applications under section 101(1)(f) and section 100, but that connection was one which he himself pointed to when he raised objections to the course being taken by the prosecution. The connection between the applications is plain. Likewise we agree with the judge that all these matters fell to considered together when section 78 PACE was applied.

97. Lastly, Mr Wood QC criticised the judge for what he describes as her mischaracterisation of some of the material she was asked to rule on, for example, by referring to Tillock and Kevin Gracia as "leading" rather than "senior" members of the gang. Such points do not begin to amount to an argument that the judge's decision was flawed, let alone provide a basis for treating the conviction as unsafe.

Renewed applications by Gracia: bad character of Montaque and associates

98. The submission made here (Ground 6) is that the judge erred when she declined to admit "absolutely essential" bad character evidence concerning Montaque, and third-party bad character evidence concerning certain of his associates.

99. On 25 February 2020, Gracia made a written application to adduce bad character evidence under s.101(1)(f) of CJA 2003 concerning Montaque which was said to have substantial probative value in relation to an important matter in issue between the two accused, namely whether it was Gracia rather than Montaque who shot Mr Mensah-Ababio. This concerned (i) a police search in 2008 carried out at an address in

Wembley which found a bandana with Montaque's DNA wrapped around a gun; an incident that resulted in Montaque's acquittal for possession of a firearm; (ii) his convictions in 2009 for possession of crack cocaine and heroin and (iii) certain WhatsApp messages exchanged with Montaque on 1 July 2019 (which showed that one of Montaque's associates was aware that someone they both knew had been arrested for possession of a firearm) and on 8 July (where another associate said only that he had "just heard" but did not specify what he had heard). Gracia also applied to adduce under section 100(1)(a) and (b) of CJA 2003 the convictions of Ricky Bryant, Smalls, Carlene Wilson (Small's girlfriend), and Kyle Barratt. This was said to be important explanatory evidence as to their criminal association with the Monks Park area and to have substantial probative evidence on Montaque's motive for the murder of Mr Mensah-Ababio, in revenge for the killing of Smalls and/or to deter others from encroaching on their drug dealing area. The applications were opposed by Montaque. The prosecution adopted a neutral stance.

100. In relation to the non-defendant application the judge allowed evidence to be given of the convictions of Ricky Bryant. In relation to the remainder of the evidence, the judge refused to allow it because she did not consider any of it to have substantial probative value in relation to the issue identified, namely whether Montaque or Gracia was the shooter.

101. In agreement with the single judge we consider this ground to be unarguable and we agree with the reasons given for refusing leave:

> "The bad character evidence you wished to adduce in respect of Montaque simply did not pass the statutory threshold for the reasons given by the judge in her ruling. Your application to adduce third party bad character evidence was partly successful in that the judge permitted you to adduce evidence of the connection between Bryant and firearms. This was important as you said that Bryant could be seen on CCTV footage handling the man-bag carried by Montaque and allowed you to say that Bryant supplied the gun which Montaque used to kill Ababio. There was ample evidence of the drugs background to the killing before the jury and you had adduced evidence of Wilson removing a mobile phone from the body of Smalls after he had been shot and using it to try to contact Montaque. The other third-party evidence you wished to adduce added nothing to the evidence already available and, again for the reasons given by the judge, did not pass the statutory threshold."

Renewed application by Gracia: criticisms of the summing up

102. Gracia renews his application for leave in respect of criticisms of the judge's summing up in his case. This ground (Ground 7) as now refined for the purposes of this application, relates to three areas. First, it is said that the judge failed to give specific directions on certain aspects of the bad character evidence she had admitted for the purposes of correcting false impressions given by Gracia. Such matters could only have been relevant if the jury were to be satisfied that Gracia knew about them.

103. There is no basis for this criticism. At para 60 of her written directions to the jury, the judge restricted the relevance of what the jury had been told about Tillock and Kevin Gracia to two matters: (i) Tillock's and Kevin Gracia's membership of the Thugs of Stonebridge was relevant to assessing Gracia's evidence that the only gang member he could think of was "Nolan", provided that they were sure that Gracia knew that they were members; and (ii) the telephone conversations at 18.35hrs, 18.42hrs and 18.46hrs on 7 July 2019 with Tillock and Kevin Gracia which were consistent with the prosecution case that Gracia was in contact with members of the gang, one of whom had a conviction for possession of a firearm.

104. The judge made it clear that these were the only two matters to which the bad character evidence was relevant and that "apart from these matters you should ignore the evidence". Thus, she made it plain that the jury could not infer that Gracia was aware of Tillock's possession of a firearm on 9 July 2019. By the time the evidence had been concluded the judge had decided to limit the ambit of point (ii) in a manner which, if anything, was favourable to Gracia, and certainly cannot be criticised.

105. The second part of the summing up about which complaint is made is the Lucas direction, contained in paras 76 to 78 of the judge's written directions. Gracia contends that this was not a situation in which a Lucas direction should have been given. It does not appear however that any submissions to that effect were made to the judge by any of the defendants.

106. In *R v Burge* (1996) 1 Cr. App. R 163 this court identified four circumstances in which a Lucas direction would normally be required. The fourth arises where, although the prosecution has not sought to rely upon a lie told by a defendant in or out of court as evidence of guilt, there is a real danger that the jury may do so.

107. Both the prosecution and Montaque contended that Gracia had lied extensively. In agreement with the single judge, we understand why the trial judge thought that this case might fall within the fourth category identified in *Burge*. The direction she gave warned the jury that they would need to be sure that an answer given by a defendant was both untrue and deliberately so, and only if they were also sure that a lie had not been told for an innocent reason, could they use those conclusions as providing some support for the prosecution's case against that defendant. Even so, the jury could not convict that defendant wholly or mainly on the strength of such a lie.

108. The judge also made it clear that this line of reasoning could only be applied to those matters which had been identified as a lie in the prosecution's closing speech. There was no suggestion that if the jury were to reach adverse findings merely on the credibility of a defendant, that could be treated as evidence of guilt. We understand why Gracia says the direction should have been tailored more specifically than it was, but we are not persuaded that the direction given leads, even arguably, to a conclusion that Gracia's conviction was unsafe.

109. Like the single judge, we are unimpressed by the third complaint which is that the judge failed to summarise significant parts of Gracia's case, based, for example, on the agreed facts. The judge gave a detailed account of Gracia's evidence. Specific points on matters of detail in the summing up were raised by counsel with the judge. But we have not been shown any passage in the transcript where any concern was raised about a failure to summarise any other part of Garcia's case, particularly in

relation to the agreed admissions. The judge made it clear in several places that Gracia's case was that Montaque was the only person involved in the shooting. It is not arguable that the conviction is unsafe because the judge did not rehearse in her summing up the various inferences which Gracia asked the jury to draw from the agreed admissions. She specifically referred the jury to the relevant section of those admissions and said that Gracia's case was that Montaque's contacts with the people set out there were "highly relevant". The jury would have understood very well the contentions to which the judge was referring.

110. We agree therefore with the reasons given by the single judge for refusing leave:

> "A number of complaints are contained in this ground including the nature of discussions between the judge and counsel about directions which can have no impact on the safety of your conviction. Although this ground complains that the judge "erred in her directions to the jury upon all the issues relating to bad character" your complaint seems to centre on p11A-D of the summing-up and the way she dealt with the issue of gangs. This extract has to be looked at as part of the passage which began at p9G in which she gave appropriate directions on how the jury should consider the evidence of your knowledge of and contact with gang members (See in particular p10F-H). There were allegations made by the prosecution and co-defendants that defendants had lied. There was a danger that the jury would accept such an allegation and hold it against a defendant in a way which was improper. A protective Lucas direction was, therefore, necessary. Contrary to your submission, your case and your case against Montaque was fairly left before the jury by the judge. The judge reminded the jury of your evidence in detail (p114C-131F). Leave refused".

Renewed application by Jalloh: evidence of his bad character and involvement in gang violence

111. Jalloh renews his application for leave to appeal on the ground (Ground 9) that during his cross-examination, junior counsel for the prosecution adduced evidence of his bad character, namely his involvement in gang violence, without application and in circumstances where it was known to the prosecution that there was an objection to the admission of the evidence.

112. Refusing permission, the single judge said that:

> "…the questions complained of elicited the fact that you had been a victim of crime and were intended to show that you would have been aware of the potential danger of standing around the shrine of Small. This was not bad character evidence and had it been thought that this evidence would lead to an unsafe conviction, application to discharge the jury should have been made at the time. Any possible prejudice caused by

> these questions and the answers given to them was dealt with by the directions given by the judge, both general (S/U p9G-10C) and specific (p12E-G). Leave refused."

113. We agree. As the single judge observed, if there was the potential for prejudice as a result of this evidence, those acting for Jalloh should have made an application to discharge the jury. As it was, any such potential prejudice was dealt with properly by the judge's direction to the jury.

Renewed application, Jalloh: admission of his conviction for supply of class A drugs

114. Jalloh also seeks leave to appeal on the ground (Ground 10) that the judge was wrong to rule (during the course of his examination in chief) that details of his previous conviction for possession of class 'A' drugs with intent to supply (an offence committed in 2016 when he was 17 years old) were admissible to correct a false impression given by him in his evidence.

115. Refusing permission, the single judge said:

> "Your answer gave a false impression within the meaning of the Act and there was a risk of misleading the jury as to your character. The judge was uniquely well placed to judge the impact of your answer on the trial; she had the terms of the Act and her exclusionary powers under PACE well in mind and her decision cannot be criticised. The manner in which the matter was dealt with gave you the advantage of dealing with the admitted conviction during your evidence in chief. Leave refused."

116. We agree. Jalloh had pleaded guilty in October 2018 to two offences of the supply of class 'A' drugs, for which a suspended sentence order was imposed (in November 2019). We have referred to the relevant parts of Jalloh's evidence at [42] above. At the material time Jalloh had just finished a foundation year in business finance and accounting at the University of Bedfordshire. The judge was very well placed to consider the impact of the relevant answer given by Jalloh (that his cousin Brina Bengali had indicated he was "happy I had finished Uni") in the context and against the background of the other evidence given, and to gauge therefore the false and misleading impression it gave to the jury as to his good character:

> "Can I just say before you go on that I was surprised when I heard that comment and I then looked at the antecedents…There was an impression that he was of a very different character".

117. In the circumstances, the judge was unarguably entitled to accede to the prosecution's application.

Renewed application: Jalloh's adoption of Gracia's grounds of appeal

118. By this ground (Ground 11) Jalloh seeks to adopt Gracia's grounds of appeal. It is sufficient to set out what the single judge said when refusing leave for reasons with which we agree:

> "This ground adopts, almost in their entirety, the grounds of appeal advanced by your co-defendant Gracia and seeks to apply them to your case. However, apart from pointing out that you and Gracia were in each other's company and your explanations for entering the park and descriptions of what happened in the park were the same, no detail is given of how the matters referred to in Gracia's grounds "impacted significantly" on the safety of your conviction. I deal with these grounds under the lettered/numbered paragraphs set out in your ground:
>
> [Grounds 4 and 5] …I have given leave to Gracia to develop these matters before the full court. However, the issues do not affect the safety of your conviction.
>
> [Ground 6] …The bad character evidence that Gracia wished to adduce in respect of Montaque simply did not pass the statutory threshold for the reasons given by the judge in her ruling. His application to adduce third party bad character evidence was partly successful in that the judge permitted him to adduce evidence of the connection between Bryant and firearms. This was important as Gracia said that Bryant could be seen on CCTV footage handling the man-bag carried by Montaque and allowed him to say that Bryant supplied the gun which Montaque used to kill Ababio. There was ample evidence of the drugs background to the killing before the jury and Gracia had adduced evidence of Wilson removing a mobile phone from the body of Smalls after he had been shot and using it to try to contact Montaque. The other third party evidence Gracia wished to adduce added nothing to the evidence already available and, again for the reasons given by the judge, did not pass the statutory threshold.
>
> [Ground 7]… Although this ground complains that the judge "erred in her directions to the jury upon all the issues relating to bad character" Gracia's complaint seems to centre on p11A-D of the summing-up and the way she dealt with the issue of gangs. This extract has to be looked at as part of the passage which began at p9G in which the judge gave appropriate directions on how the jury should consider the evidence of Gracia's knowledge of and contact with gang members (See in particular p10F-H).
>
> …Contrary to Gracia's submission, his case and his case against Montaque was fairly left before the jury by the judge.

> The judge reminded the jury of his evidence in detail (p114C-131F) including the evidence he gave when cross-examined on your behalf (p126B-F). Leave refused."

Causative effect: new ground, Jalloh (adopted by Rowe and Gracia)

119. In his renewed application for leave, Jalloh seeks to raise a further ground of appeal (Ground 13). It is submitted that although the act of an accessory in encouraging a principal need not have caused the offence, in the sense of satisfying a "but for" test, the accessory must have had some effect on the events. They cannot be held criminally responsible for a homicide to which they have not contributed at all. In effect, the argument is that there must have been at least some causal link between the accessory's encouragement and the principal's offence, albeit not a *sine qua non.*

120. We have previously referred to the three questions which the judge posed to the jury in her route to verdict (see [56] above). In para 25 of her written directions the judge said:

> "Whatever the nature of the Defendant's act(s) of assistance or encouragement, you must be sure that any act of assistance or encouragement came to the attention of the person who shot Kwasi Mensah-Ababio, and did so before the fatal wound was inflicted. On the other hand, the Crown do not have to prove that the Defendant's act(s) had a positive effect on that person's conduct or affected the outcome of the shooting of Kwasi Mensah-Ababio."

121. Mr. Bennathan QC accepts that the last sentence of that paragraph accurately reflects the law as stated in *R v Jogee* [2017] AC 387 in the first sentence of [12]. However, he submits that the law requires an accessory's encouragement or assistance to have made some contribution to the principal's offence and says that the judge's legal directions did not address that point.

122. The general principles for dealing with a new ground of appeal which was not raised before the single judge are set out in *R v James* [2018] 1 WLR 2749, in particular at [38]. The requirement to obtain leave is an important "filter mechanism" which should not be bypassed because new counsel have been instructed. "Fresh grounds advanced by fresh counsel must be particularly cogent." An application for leave to vary the notice of appeal is required. The hurdle for an applicant is a high one. Relevant factors to be considered include the extent of the delay in taking a new point and the reasons for that delay, as well as the overriding objective (Crim.PR r.1.1).

123. Here, the single judge's decision was given on 15 March 2020 and the new point was not raised until the submissions filed on 21 September 2021. No adequate reason has been given for that delay.

124. It is also important to consider the significance of the new point Jalloh now seeks to raise to the way in which both he and Gracia put their respective cases to the jury. Jalloh said that both he and Gracia had followed the victim into Monks Park because Mr Mensah-Ababio had been looking at them and acting in a suspicious manner. So they had simply wanted to know who he was and why he was acting in that way. After a brief discussion both of them were walking away from the victim when Montaque ran past them, began a confrontation with the victim and shot him. Neither Jalloh not Gracia were party to any plan to attack the victim. Montaque acted on his own. Neither Jalloh nor Gracia assisted him to attack the victim.

125. In short, the case for both Jalloh and Gracia was that they did not participate in the shooting in any way at all. They did not encourage or assist Montaque. Neither of them suggested that if they had given any encouragement or assistance to Montaque, that had made no contribution at all to his lethal conduct. The legal issue which Jalloh and Gracia now seek to raise is therefore entirely hypothetical so far as their cases are concerned. Accordingly, we are not satisfied that there is any good reason for the court to grant leave for the notice of appeal to be amended.

126. Nevertheless, we have considered the submissions made by Mr. Bennathan QC on the contention he now seeks to raise and will briefly explain why we do not consider it to be arguable.

127. The leading judgment in *Jogee* was given by Lord Hughes and Lord Toulson JJSC, with all the other members of the court agreeing. At [12] they stated:

> "Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately, it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it."

128. Thus, the Supreme Court unequivocally stated that the prosecution does not have to prove that any encouragement or assistance by an accessory had a positive effect on the principal's conduct. It matters not that encouragement was given but ignored, if the counselled offence was committed.

129. Mr Bennathan QC submits however, that there is a tension between the first part of [12] and the last two sentences of that paragraph. He suggests that the court's explanation of overwhelming supervening act or event is concerned with a break in the chain of causation. Accordingly, he says that it follows that it is essential for the prosecution to show that the encouragement or assistance had some effect upon the course of events relating to the principal offence. He relies upon the discussion of the subject in the Report of the Law Commission: "Participating in Crime" (Cm 7084: May 2007) and the authorities there cited.

130. We do not consider that there is any tension within [12] of *Jogee*. The first part of [12], read together with [8] and [11], deals with the conduct element of an accessory's liability for assistance or encouragement. But the last part of [12] deals with an exclusion from that aspect of liability, namely an overwhelming supervening act. There is no logical reason why the legal test for such an exclusion must be treated as being relevant to the tests for establishing the conduct element of criminal liability as an accessory, as Mr Bennathan's argument assumes. An overwhelming supervening act is no more than an exclusion.

131. In any event, in our view Mr Bennathan's argument involves a misreading of the case law. In dealing with the conduct element, the first part of [12] plainly states that the focus is on proving that encouragement or assistance has been given to the principal. Once that is done there is no additional requirement to prove that that encouragement or assistance had a "positive effect" on the principal's conduct or the outcome. It may have made no difference.

132. These principles are based upon the line of authority which includes *R v Calhaem* [1985] QB 808. There the Court of Appeal held at p.813 E-G, that the word "counselling" does not imply any causal connection between the counselling and the offence. True enough, the actual offence must have been committed by the person counselled. To that extent there must be contact between the parties and, in that sense, a connection between the counselling and the offence.

133. Likewise, in *R v Stringer* [2012] QB 160, Toulson LJ (as he then was) discussed the report of the Law Commission and explained that the accessory's conduct must be "relevant" to the offence of the principal and, in that sense, there must be a "connecting link" ([48]). So encouragement should have the capacity to act on the principal's mind ([49]). Then at [50] he stated:

> "If D provides assistance or encouragement to P, and P does that which he has been encouraged or assisted to do, there is good policy reason for treating D's conduct as materially contributing to the commission of the offence, and therefore justifying D's punishment as a person responsible for the commission of the offence, whether or not P would have acted in the same way without such encouragement or assistance." (emphasis added)

134. There is no additional requirement for the prosecution to prove that the encouragement or assistance did contribute to the commission of the offence.

135. As we have said, the second part of [12] in *Jogee* deals with an exclusion from accessory liability. The Supreme Court returned to the subject of an overwhelming supervening act at [97] having fully analysed the decision of the Court of Appeal in *R v Anderson*; *R v Morris* [1966] 2 QB 110, cases upon which Mr. Bennathan QC placed some reliance in oral argument:

> "The qualification to this (recognised in *R v Smith (Wesley)*, *R v Anderson; R v Morris* and R v Reid) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death."

136. In *R v Tas* [2019] 4 WLR 14 this Court stated at [40] that it is important not to abbreviate that test for an overwhelming supervening act. The focus initially is on whether nobody (not simply the defendant) standing in the defendant's shoes could have contemplated that the act in question might happen. That part of the test does not ask whether there is a causal link between the defendant's conduct and the principal's act. The second part of the test is whether the accessory's assistance or encouragement has "faded to the point of mere background" or has become "spent of all possible force" by an overwhelming supervening act (see *Jogee* at [12]). That language describes conduct on the part of an accessory which has become irrelevant (see Stringer) or has become incapable of encouraging or assisting the commission of the offence by the principal. In such circumstances an accessory's encouragement of or assistance to the principal has ceased. This does not make causation a test for satisfying the conduct element in the first place.

137. This point was illustrated in *Jogee* at [13] and *Stringer* at [52] by the early example in the days of highwaymen of *R v Hyde* (1672), described in Hale's Pleas of the Crown (1682), Vol.1, p.537, and also in Foster's Crown Law (1762), p.354:

> "A, B and C ride out together with intention to rob on the highway. C taketh an opportunity to quit the company, turneth into another road, and never joineth A and B afterwards. They upon the same day commit a robbery. C will not be considered an accomplice in this fact. Possibly he repented of the engagement, at least he did not pursue it. Nor was there at the time the fact was committed any engagement or reasonable expectation of mutual defence and support, so far as to affect him."

138. Any original encouragement by C was regarded as having become spent by the time A and B committed their robbery. Likewise, the issue of whether participation is continuing underlies much of the discussion of withdrawal by an accessory in cases of spontaneous violence (see e.g. Blackstone's Criminal Practice (14th edition) paras. A4.23 to A4.24).

139. Accordingly, we see no arguable basis for criticising the reasoning of this court in *R v Grant* [2021] EWCA Crim 1243 which rejected the submission that an overwhelming supervening act is to be viewed through the lens of causation (see [31-34]).

140. The views expressed in the Law Commission's report and in the textbooks referred to, read as a whole and in the light of the case law cited, do not therefore lend any support to Mr. Bennathan's argument.

141. For these reasons, the proposed ground of appeal is unarguable, and we refuse the applications by Jalloh, Gracia and Rowe to amend their respective notices of appeal to pursue this point.

Conclusion

142. For the reasons given above, Taalib Rowe's appeal against conviction is allowed and his conviction for manslaughter is quashed. The appeal of Karlos Gracia is dismissed. All renewed applications for leave to appeal and the remaining applications for leave to amend, are refused.