



Neutral Citation Number: [2023] EWCA Crim 669

Case No: 202101855 B5

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM Central Criminal Court**  
**His Honour Judge Hillen**  
**20207146**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14 June 2023

**Before :**

**LORD JUSTICE WILLIAM DAVIS**  
**MRS JUSTICE MCGOWAN**  
and  
**HIS HONOUR JUDGE FLEWITT KC**

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**Between :**

**LIELAY AREGUY**  
**- and -**  
**REX**

**Appellant**

**Respondent**

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**Mr Jeremy Dein KC and Ms Kerrie Rowan** (instructed by Reeds Solicitors) for the Appellant  
**Ms Heidi Stonecliffe KC** (instructed by CPS) for the Respondent

Hearing dates: 17 and 18 May 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Lord Justice William Davis:**

### **Introduction**

1. In 2019 Kemar Bassaragh lived in a flat at Kneller Court, Academy Gardens, Northolt. The flat was in a cul-de-sac close to the A40 Western Avenue. On 6 March 2019 shortly after 11.00 p.m. there was a knock at the door of the flat. Bassaragh went to answer the door. As he came into the hallway he was shot by someone putting a shotgun through the letter box and firing it at him. Fortunately he escaped with only minor injuries.
2. At around 11.30 p.m. the same evening two men – Rached Itani and Leon De’Silva – were arrested in Wandsworth Bridge Road in London. They were in a stolen Range Rover. Both men were wearing latex gloves. Itani was wearing camouflage body armour. A Range Rover had been seen by witnesses driving away from the area of Bassaragh’s flat shortly after the shooting. CCTV footage confirmed this evidence. There were knives in the Range Rover but no shotgun. However, there was shotgun residue on the latex gloves being worn by Itani. There was also a Nokia unregistered mobile telephone in the car.
3. The Range Rover had been provided by a man named Yasser Ibrahim. Ibrahim also obtained the shotgun. His father had a significant number of shotguns at his home. The attack on Bassaragh was planned and co-ordinated by two brothers, Omar Mechita and Abraham Espinosa. These men were drug dealers. They had a dispute with Bassaragh in relation to money which they said he owed them for drugs. This was the motive for the shooting.
4. At around 9.00 p.m. on 6 March 2019 Mechita had taken Itani and De’Silva on a reconnaissance trip to Northolt. They set off from the Earls’ Court area of London, joined the A40 near Shepherd’s Bush and drove to Northolt. They then returned to Earl’s Court where Itani and De’Silva collected the Range Rover. The car used for the reconnaissance trip was a Vauxhall Astra owned by Lielay Areguy. Areguy lived in Battersea. On the evening of 6 March he drove his Astra from his home to Earl’s Court from where he collected Mechita, Itani and De’Silva before driving to Northolt. At 9.18 p.m. the Astra was caught on an ANPR camera on Church Road, Northolt. Church Road is a main road through the southern part of Northolt. Academy Gardens is reached via a side turning off Church Road a short distance beyond the ANPR camera. It was a matter of minutes later that the Astra began its return journey to Earl’s Court.
5. During its journey to and from Northolt, Mechita, a passenger in the Astra, made telephone calls to and received calls from Espinosa. There was a flurry of calls when the Astra was in Northolt. Mechita was using the Nokia mobile phone later found in the Range Rover.
6. In the days following 6 March 2019 there was telephone contact between Areguy and Mechita. Mechita was also in contact with Espinosa and Ibrahim. On 12 March 2019 Espinosa flew out of Heathrow to Mexico. Two days later Areguy collected a bag that Espinosa had deposited at a left luggage facility at Heathrow.

### **The consequent proceedings**

7. Ibrahim was arrested on 12 April 2019. Areguy was arrested on 9 July 2019. Espinosa remained out of the jurisdiction. So far as is known that remains the position. Mechita was arrested on 10 July 2019. He was bailed by the police to return on 3 October 2019. He failed to do so. Mechita was thought to have fled the jurisdiction. Whether that was right or not, he was not re-arrested until 3 October 2022.
8. The defendants were sent to the Crown Court at different times. Itani and De'Silva were sent for trial on 9 March 2019. The provisional trial date in their cases was 23 September 2019. That date was vacated due to the sending for trial of Ibrahim on 20 August 2019. Areguy was not sent for trial until 20 May 2020. However, no trial date in relation to the other three had been set, the onset of the pandemic having created overwhelming listing problems. The trial of all four men on a joint indictment originally had been fixed to commence on 4 January 2021. The trial was postponed though the case was listed in court on 4 and 5 January 2021. The trial actually began on 1 March 2021.
9. All four were charged with conspiracy to murder Bassaragh. De'Silva, Itani and Ibrahim were also charged with possession of a firearm with intent to endanger life. The jury convicted each of the defendants of the count or counts which with they were charged. There were other counts on the indictment to which defendants other than Areguy pleaded guilty. We are not concerned with those offences. The sentence in relation to De'Silva, Itani and Ibrahim was 27 years' imprisonment in each case. Areguy was sentenced to 18 years' imprisonment in respect of the count of conspiracy to murder. Mechita appeared at the Central Criminal Court on 17 October 2022. He pleaded guilty to conspiracy to murder. On 13 December 2022 he was sentenced to 20 years' imprisonment. His sentence was reduced due to his early plea of guilty.

### **The applications before the court**

10. Areguy now applies for leave to appeal against his conviction. He was represented at trial by counsel: Abigail Bache and Max Mills. Ms Bache settled grounds of appeal seeking to rely on fresh evidence. Since the application involved fresh evidence, the single judge referred the application for leave to the full Court for consideration. Following the referral of the application to the full Court, new counsel were instructed by Areguy, namely Jeremy Dein KC and Kerrie Ann Rowan. Mr Dein and Ms Rowan apply to rely on a new ground of appeal not considered by the single judge, namely that the representation of Areguy at trial was so ineffective that he did not have a fair trial.

### **The evidential case at trial**

11. The evidence relied on by the prosecution to show participation in the conspiracy was circumstantial. Telephone evidence played a significant part in the case. There was evidence of contact between the defendants and Espinosa and Mechita, in particular at critical times on 6 March 2019. Cell site evidence demonstrated the movement (or lack of movement) of telephones attributed to different defendants. ANPR sightings of vehicles and CCTV evidence also played a role. The scientific evidence relating to shotgun residue was of importance in relation to Itani.

12. The circumstantial evidence was sufficiently compelling to mean that, at the trial, there was only one area where the defendants disputed the narrative we have set out above. It was accepted that around 9.00 p.m. Areguy drove his Astra from the Earl's Court area to Northolt. De'Silva agreed that he was a passenger on that trip. Both men accepted that Mechita was in the car with them. It was agreed that the Astra then returned to the Earl's Court area. De'Silva accepted that later on the evening of 6 March he had driven the Range Rover from Earl's Court to Northolt and had stopped briefly at or near Academy Gardens before driving back to the point at which he was arrested.
13. The dispute in relation to the narrative concerned the identity of those in the Astra and the Range Rover. Itani's case was that he had not been to Northolt at any point whether in the Astra or in the Range Rover. Rather, Ibrahim said that he was the other person in the vehicle on each occasion. Itani's evidence was that he had been picked up in the Range Rover from an address in Holland Park from where he had been driven to Wandsworth Bridge Road. That was the first time that he had been in the Range Rover. His case was that he had not been to Northolt at all on the evening of 6 March. He was wearing body armour because he feared being stabbed. He found the latex gloves he was wearing when he got into the Range Rover and had put them on at that point. He suggested that the shotgun residue had been deposited before he put on the gloves. Ibrahim gave evidence that he was the one who had gone to Bassaragh's flat and discharged the shotgun through the letter box. He said that his intention was to cause injury to Bassaragh, not to kill him. Ibrahim's evidence was at odds with the location and use of his telephones. Telephones attributed to him were in Earl's Court and Fulham throughout the evening of 6 March. Moreover, when Mechita was in the Astra on the first trip to Northolt, there was call traffic between Mechita and Ibrahim.
14. The resolution of the issue concerning the identity of the fourth person in the Astra and of the passenger in the Range Rover was of no consequence so far as Areguy was concerned. His case was that he had been called by Mechita during the afternoon of 6 March. There was no record of such a call in the telephone data retrieved in relation to the telephones of Areguy and Mechita. There was a possibility that the call had been via WhatsApp. In any event, Areguy said that Mechita had suggested that they should go out for a meal later that day with a friend of his. Areguy had gone to the Earl's Court area to pick up Mechita. They then had picked up two other men. Areguy did not know who these other men were. Mechita had directed Areguy to Northolt. When they got there, Mechita had tried to call his friend without success. Therefore, Areguy drove the Astra back to Earl's Court. The two men he did not know were dropped off after which he and Mechita went and got something to eat from a burger restaurant in High Street Kensington.
15. Areguy did not give evidence in the trial. However, he gave a full account of the events of 6 March when interviewed by the police. That account was before the jury. He could not dispute the proposition that the trip to Northolt in the Astra was a reconnaissance for the later attack on Bessaragh. His case was that he did not know of the true purpose of the journey.
16. In his summing up the judge succinctly identified the issue for the jury in relation to Areguy when he said:

“The real issue in Areguy's case, you may conclude is, whether or not that is his car in Academy Gardens, did he know what the reconnaissance, which undoubtedly you may think occurred and everybody seems to agree that it was a reconnaissance, wherever it went – did he know what it was for?”

We shall explain the reference to Areguy's car being in Academy Gardens shortly. What was clear on the agreed evidence was that Areguy had driven people to the general area of the flat which later was to be the scene of the shooting. One of those in the car, Mechita, was an organiser of the proposed attack. He was speaking on the telephone to the other organiser when sitting in the front passenger seat next to Areguy. The jury had to consider whether the driver of the car on the reconnaissance might have been unaware of what was going on.

### **The course of the trial**

17. The served evidence in the case was substantial. By the conclusion of the trial 648 pages of statements had been served together with 7,345 pages of exhibits. Much of the evidence was formal in nature i.e. police witnesses producing exhibits without comment on material such as quantities of raw telephone data. The police gathered a significant amount of CCTV footage. Initially this was served as unused material. When Areguy was interviewed in July 2019 there was a brief exchange about CCTV.

DC O. “We've got CCTV of Academy Gardens.”

AREGUY “A what sorry!”

DC O. “Academy Gardens which is the road that the victim lives in. His block of flats, Kneller Court, is in Academy Gardens alright.”

AREGUY “Okay.”

DC O. “We've got CCTV in there. Now what would you say if there appears to be an Astra doing a drive round through that estate?”

AREGUY “It's wrong”

Nothing further was said on the topic. No evidence to support the interviewing officer's assertion was served at the point at which Areguy was sent for trial and joined with the other defendants.

18. The very detailed opening note provided by the prosecution in anticipation of the trial on 3 January 2021 did not refer to any CCTV showing an Astra car in the estate where Bassaragh lived. It was asserted that the Astra had driven “out to Bassaragh's address....on a recce”. It was not said that this was supported by CCTV evidence. This was in contrast to what was said in relation to the later visit to Bassaragh's address when the shooting took place. The opening stated in terms that the Range Rover could be seen on CCTV outside the address. On 23 December 2020 the evidence of a DC Fortune had been uploaded to the DCS. DC Fortune said that he had created videos from raw footage gathered during the investigation. One of the videos he described as “Compilation of Ealing Borough CCTV at the time of the recce”. One part of the footage showed Academy Gardens for a period of around 35 minutes from 9 p.m. on 6 March 2019. DC Fortune said nothing more about the material. He did not suggest that particular vehicles could be identified on the footage.

19. The prosecution served a further opening note on 25 February 2021 for the purposes of the trial due to commence on 1 March 2021. The further opening note was identical to the previous opening note insofar as the Astra was concerned. At some point the prosecution served video footage from CCTV cameras covering Academy Gardens at about 9.19 p.m. on 6 March 2019 with a particular vehicle picked out with an arrow. It is not clear to us whether this was part of the compilation footage served with the evidence of DC Fortune or whether it came at a later stage. For our purposes it does not matter. DC Fortune gave no evidence as to the identity of the vehicle. It was said to be “a vehicle of interest”.
20. On 9 March 2021 Ms Bache objected to the placing of an arrow over the vehicle in the footage to be played to the jury. At the outset her objection was based on the fact that the arrow gave the “vehicle of interest” an undue prominence. In the course of argument before the judge prosecution counsel said that it was to be asserted that “it is Areguy’s vehicle because it ties in with the ANPR camera”. In response Ms Bache said this:

“...we were told this morning that the Crown would not specifically say that this was Mr Areguy’s car – only that this was a car of interest. Presumably and it’s been made clearer now, they are saying that it is Mr Areguy’s car. We have no statement from any officer explaining why they say it is his car.”

Prosecution counsel did not disagree with the way in which Ms Bache had explained the position. Rather, she said that DC Orr (who was the officer in the case) would make a further statement. From that exchange we infer that Ms Bache hitherto had been unaware that the prosecution case was that Areguy’s Astra could be seen on CCTV footage entering Academy Gardens.

21. DC Orr’s statement was uploaded to the DCS on the morning of 10 March 2019. The relevant parts read as follows:

“Having reviewed the footage, you can see the car go past the camera at 21:20:13 and you get to see some of the body shape of the car, albeit briefly. This appeared to me upon viewing to be that of a Vauxhall Astra, with the lights and body shape being more consistent with the model of Astra Mr Areguy had (he had a saloon model rather than the more common hatchback model). This was also shortly after the ANPR activation on Church Road.... I have then also viewed camera 431.... and this covers vehicles entering onto the White Hart Roundabout travelling southbound from Church Road, and so would capture any vehicles coming out of Parkfield Drive, who have a mandatory left turn towards the roundabout. At 21.23:33 there is a vehicle that can be seen entering the roundabout and which appears to come off at some point....

This vehicle appeared to me to be a Vauxhall Astra of the same shape seen on camera earlier and that of Mr Areguy’s Astra. I have paused the footage at this time (21:23:33) and think that

this vehicle is a Vauxhall Astra saloon of the shape and style that Mr Areguy possessed....

this vehicle was then marked on a compilation video....by use of white arrow to denote it as the vehicle that Police thought was the Vauxhall Astra index LM57AEX on the evening of the 6th March 2019. I would also say that from what I can see of the car indicated, that the colour would also be similar to that of the Astra index LM57AEX, which is silver.

I also think the sighting of this vehicle fits in with the times we know the vehicle was in the area, that is using call data and the sole ANPR activation in Church Road.

However I must state that this is my view from what I have viewed of the CCTV footage taking into account it's quality and lack of colour."

DC Orr gave evidence on the same day in the terms of his witness statement.

22. Ms Bache cross-examined DC Orr in relation to four topics. First, she pressed him on his assertion that the vehicle was a saloon rather than a hatchback. He confirmed that it was a saloon "to me". The significance of this was that Areguy's Astra was a hatchback model rather than a saloon. Second, she showed him footage of the vehicle when the front passenger window was in view. She put to DC Orr that there was no front seat passenger in the car. His response was to say "I couldn't say". Third, she established that DC Orr's evidence about the car on the roundabout was that "it appears to me to be a similar vehicle". Finally, DC Orr agreed that Areguy's telephone appeared to have used a cell site 1.9 miles from the roundabout 33 seconds after the sighting of the "similar vehicle". He further agreed that to travel 1.9 miles in 33 seconds on urban roads was "unfeasible".
23. Whilst DC Orr may not have conceded that the CCTV footage showed that there was no front seat passenger in the car said to have been Areguy's Astra, the prosecution clearly took a contrary view. Further evidence was served from DC Orr in which he suggested that the occupants of the Astra could have alighted in Academy Gardens and gone on foot whilst the Astra drove out of Academy Gardens and picked up those who had left the Astra at a point on Ruislip Road. He and a colleague videoed themselves walking the suggested route. DC Orr also made a statement in which he identified various vehicles which had activated the ANPR camera at about the same time as Areguy's Astra. He then had analysed the vehicles shown on CCTV at a roundabout further down the road. He said that the Astra did not appear at the roundabout at the time one would have expected had it travelled straight on as the other vehicles did.
24. On 29 March 2021 Ms Bache objected to the playing of the video of the officers walking a route out of Academy Gardens on the basis that the proposition that anyone had got out of the Astra and later met up with that car on foot was wholly speculative. The judge did not agree with the submission and permitted the jury to see the video. Following that ruling counsel for De'Silva applied for an adjournment of the trial to allow the instruction of an video analysis expert to consider the CCTV footage from

Academy Gardens and to report on whether occupants could be seen in the Astra. Though it was not made explicit in the course of the application, it was apparent that the likely consequence, were the application to be successful, would be a discharge of the jury with the trial re-starting at some future date. Ms Bache did not support the application. She said that any issues could be covered within the currency of the trial. The judge refused to adjourn the trial.

25. DC Orr, having given further evidence in relation to his additional statements, was cross-examined by Ms Bache. She dealt with three topics. First, she established from photographs of Areguy's Astra that it had a brake light in the middle of the rear windscreen. DC Orr agreed that the car seen in Academy Gardens had braked and that no brake light in the middle of the rear windscreen was apparent. It was put to him that this meant that the car on the CCTV was a different car to that owned by Areguy to which he said "it would yes". Second, Ms Bache investigated what could be gleaned from the CCTV footage at the roundabout beyond the ANPR camera. DC Orr agreed that the order of vehicles at the ANPR would not necessarily be repeated precisely at the roundabout. He accepted that the CCTV at the roundabout was blurry. There was a white van which was distinctive which had passed the ANPR camera just after Areguy's Astra. This van could be identified on the roundabout CCTV. DC Orr agreed that there were two light coloured hatchbacks just behind the van. When it was put to him that one of these vehicles could be an Astra, he said that one of the cars "looks like a Golf to me". In relation to the other vehicle he said that "I didn't think that it was an Astra but I can't say more than that". Finally, Ms Bache put to DC Orr that he was purporting to see things on the CCTV that were not very clear. He said that, if he were just relying on the CCTV, he would probably concede that. He said that he was looking at everything in totality. He accepted that "the quality of the CCTV speaks for itself" i.e. the quality was poor.

### **The judge's directions**

26. The judge reminded the jury of DC Orr's evidence as it had emerged in the course of Ms Bache's cross-examination. He then directed them as to the approach they should take to his evidence:

"...it is for you, the jury, to make your assessment of what can be seen in that CCTV. So, in particular, DC Orr's evidence about the identification of the vehicle in Academy Gardens at about 9.20 pm in which he identifies the Astra, you will no doubt wish to take into account both what he says, any supportive evidence of what he says and what the Defence submits about that. You must look at that image with care and we have just looked at it and reminded you of it and of course you will have the movie CCTV as well. Ask yourselves whether it is of sufficient quality for us, the jury, to make an identification of that vehicle as a Vauxhall Astra saloon. And is the image of sufficient quality for DC Orr to have made the identification? He says that that image was of sufficient quality for making identification of the make and type of the vehicle and you must decide, firstly, whether that is right.



The Defence submit that it is not of sufficient quality to make an identification; the footage is two-dimensional; the footage is in black and white; the footage is at night and in artificial light, shining from a different angle. You must decide if the lighting was poor; whether there were light distortions; whether there were obstructions and at what distance the camera was from the vehicle and, indeed, the angle of the camera of course and overall whether it is poor quality image. If you conclude that that image that we have just been looking at is of such poor quality that even a person viewing the footage repeatedly and over a period of time could not make an identification, then disregard DC Orr's evidence on the issue entirely. If you conclude it is of sufficient quality, then examine DC Orr's evidence on this point. He is entitled to give his opinion from his repeated watching of the footage and from his knowledge of the investigation and the facts which could support his conclusion.

You must, of course, be aware of confirmation bias; that is DC Orr convincing himself that he can see something he was expecting to see. An image which is unclear on first viewing may become clearer to the viewer on repeated viewings or it may not. You must make a judgement about that. You have the images and you judge the facts. In your case you have had the time within the trial process to make the comparison yourselves and that trial process includes the period of your retirement. If you conclude that it is of such poor quality that you as jurors with the time available during the trial process are unable to make a comparison with a known image, then you should not attempt to do so. If you are sure it is of sufficient quality, then you have the photographs of the Astra and may make a comparison yourselves. I repeat; it is for you, the jury, to make assessment of what can be seen on that CCTV.

Of course, confirmation bias can work both ways. The defence for Areguy is that he did not drive his Astra into Academy Gardens and so the Defence assert that you can clearly see the vehicle on the CCTV in Academy Gardens is not his. The question for you is, is that actually so? As I say, you must be the judges of this and you may conclude that you are sure that DC Orr's identification of the car as an Astra by its shape is spot on, supported not least by the obvious point of going on the reconnaissance and the timings he relies on. On the other hand, you may conclude that the suggested differences between the CCTV and suggesting that other vehicles that could be an Astra can be seen on the roundabout at the relevant time and the anomalies shown up by the cell siting evidence leave you less than sure on the issue."

Once DC Orr's evidence in relation to what could be seen on the CCTV had been admitted, no criticism is made of the directions given to the jury. We have already noted the way in which the judge summarised the core issue in Areguy's case. Proof of the presence of Areguy's Astra in Academy Gardens was not determinative of that issue.

### **The first ground of appeal – fresh evidence**

27. This is the context in which it is argued that we should receive fresh evidence. Following his conviction those representing Areguy obtained a report dated 7 September 2021 from Mr Andy Wooller from Acuity Forensics. Mr Wooller is a forensic video analyst with a particular expertise in the identification of vehicles on video footage. Mr Wooller reached three clear conclusions. First, the vehicle identified by DC Orr as Areguy's Astra entering Academy Gardens was not definitively identifiable as a Vauxhall Astra. Second, whichever vehicle entered Academy Gardens did not emerge from the cul-de-sac as suggested by DC Orr. The car which came out of Academy Gardens was a different car to the vehicle which had gone into the cul-de-sac. Third, a vehicle likely to be a Vauxhall Astra had passed the roundabout CCTV at exactly the time that might have been expected had the Astra driven directly from the ANPR camera to the roundabout. Mr Wooller was not called to give evidence before us. We shall proceed on the basis that his report should be accepted as accurate and reliable.
28. Mr Dein argued that, had the jury heard the evidence of Mr Wooller, their verdict may well have been different. At the core of the prosecution case against Areguy was the issue of whether his Astra went into Academy Gardens. In his written submissions Mr Dein went so far as to suggest that, in the light of Mr Wooller's evidence, it was questionable whether the prosecution had a sustainable case.
29. We have no doubt that Mr Wooller's evidence is capable of belief and that it would have been admissible at trial. Whether there was a reasonable explanation for the failure to adduce the evidence at trial is not a straightforward issue. For our purposes we shall assume that there was a reasonable explanation. The critical question is whether the evidence of Mr Wooller would afford a ground for allowing the appeal. We are satisfied that it would not.
30. Of the three conclusions reached by Mr Wooller we consider that two were established in the course of the trial. DC Orr's evidence that he could identify Areguy's Astra as entering Academy Gardens was fatally undermined by two aspects of the evidence. First, he said that the car which entered Academy Gardens was a saloon version of the Astra. If that was right, it was not Areguy's Astra which was a hatchback. DC Orr believed (wrongly) that Areguy owned a saloon rather than a hatchback. He used that incorrect information to confirm his identification of the car. Second, he accepted that the car he identified as Areguy's Astra could be seen on the CCTV to brake and that no brake light in the centre of the rear windscreen was visible. He also accepted that Areguy's Astra had such a brake light. That meant that, on his evidence alone, the car on the CCTV was not Areguy's Astra. DC Orr's evidence about what could be seen on the CCTV at the roundabout was equivocal. In relation to a vehicle seen on the CCTV, he said "I didn't think it was an Astra but I can't say more than that". He accepted that the quality of the CCTV footage was poor. Mr Wooller's evidence is that it is likely that the relevant car was an Astra.

This evidence goes a little further than the concessions made by DC Orr but the distinction is not significant. For a jury's purpose it would make no difference which assessment they accepted. Neither would demonstrate that Areguy's Astra did not proceed directly from the ANPR camera to the roundabout.

31. The evidence that the car which emerged from Academy Gardens was not the same vehicle as the one identified as entering the cul-de-sac was not before the jury. This was not something which Ms Bache was able to establish with DC Orr. She did not have the evidential material to do so. But the fact that DC Orr erred in his evidence about the same car having entered and left Academy Gardens can be of no consequence if the evidence that Areguy's Astra could be seen on the CCTV footage to have entered the cul-de-sac was demonstrably flawed. Ms Bache was able to establish that via DC Orr's concessions in the course of his evidence. Mr Wooller's conclusion about there being two different cars merely underlines the unreliability of DC Orr's evidence. It would not have affected the jury's view about the evidence as to what could be seen on the CCTV footage.
32. Mr Dein argued that DC Orr's evidence purporting to identify cars should not have been admitted at all. He said that DC Orr gave opinion evidence when he was not qualified to do so. We agree that there were serious question marks in relation to DC Orr's expertise. Police officers who have spent a long time watching and re-watching video material are entitled to give their opinion about what can be seen on the material. However, there was little in DC Orr's witness statement which provided a basis for expertise arising from repeated watching of the footage. Moreover, the opinions expressed by DC Orr were of such equivocality that it could have been argued that they were of no value as opinion evidence. Even if these propositions are accepted, the issue is whether the admission of the evidence of DC Orr rendered the trial unfair or led to an unsafe verdict. For all of the reasons we have given in relation to the receipt of the evidence of Mr Wooller, we are satisfied that it did not.
33. The prosecution case against Areguy was that he drove three men from Earl's Court to Northolt and back again. The three other men were party to a conspiracy to murder. One of them, Mechita, was speaking to other conspirators during the journey. The journey was a reconnaissance trip for the later attack on Bassaragh. As the jury found, two of the men in the car were due to carry out the murderous attack. There would have been no reason to risk taking an innocent party on the journey, the risk being that he would tell the police about the reconnaissance and who was involved once his car was identified. There was a clear inference that Mechita's telephone conversations related to the conspiracy. Areguy was sitting feet away from Mechita when those conversations took place. The explanation given by Areguy for the trip was that they were to have a meal with a friend of Mechita. On the fact of it, this explanation was highly unlikely. At the trial Areguy did not give evidence. In all of those circumstances there was a compelling circumstantial case against Areguy irrespective of whether his Astra could be shown to have gone into Academy Gardens. The judge was right to summarise the issue in the case in the way that he did i.e. the case did not depend on whether the Astra demonstrably entered Academy Gardens.
34. It follows that we do not admit the fresh evidence of Mr Wooller. We do not give leave in relation to the ground referred to the full Court by the single judge.

## **The second ground of appeal – inadequate representation**

35. The general principles in relation to leave to put forward a ground not put before the single judge are well established: *James* [2018] EWCA Crim 285. The hurdle for the applicant is a high one. Any new ground must be properly arguable and particularly cogent.
36. The new ground is that Areguy's representation was so incompetent that identifiable errors and irregularities occurred in the course of the trial such as to render the trial unfair and the verdict unsafe. In the first instance the complaint is directed at the solicitors representing Areguy. Once the inadequacies of the solicitors became apparent, Ms Bache should have taken steps to remedy the position. In addition there were aspects of her conduct of the case which fell below the appropriate standards.
37. Areguy's solicitors from an early stage of the proceedings were Archer Maher. The solicitor identified as having conduct of the case was someone named Niraj Keshwala. However, until shortly before the trial Areguy dealt principally with a man named Yazigi. Yazigi held himself out as a solicitor. He was not a solicitor. Moreover, before Areguy was charged and sent to the Crown Court, Yazigi was charged with offences relating to the use of mobile phones in prison by those who were to become Areguy's co-accused. Areguy was not informed of the position.
38. According to the evidence he gave to us, Areguy at no time met Yazigi. All communication was by telephone call or WhatsApp message with documents being sent via Dropbox. This may not have been surprising given that, for much of the relevant period, a lockdown associated with the pandemic was in place. Areguy's evidence to us was that there was little substantive contact between him and Yazigi in relation to the preparation of his case. In particular, he was never aware of the significance of CCTV footage to be relied on by the prosecution. Mr Dein described the position as lamentable.
39. We have no difficulty in agreeing with the proposition that Yazigi should not have been involved in the preparation of Areguy's defence. He was charged with criminal offences involving two of Areguy's co-accused. There was the clearest risk of a conflict of interest. Attendance notes from the file of Archer Maher reveal that Ms Bache became aware of the position on 18 December 2020. She notified Keshwala of her concerns. On 22 December 2020 she stipulated that Yazigi should no longer be involved in Areguy's case. We have a statement from Yazigi in which he asserts that all concerned – Areguy, Ms Bache, Mr Mills – knew about his arrest from an early stage. That cannot be right in respect of Ms Bache. The contemporaneous attendance notes speak for themselves. Insofar as is relevant we do not accept Yazigi's evidence on this issue. However, of itself, the position of Yazigi had no effect on the adequacy of the preparation of the case.
40. The extent to which Yazigi prior to 22 December 2020 engaged in proper preparation of the case was greater than described by Areguy. We reach that conclusion from what is apparent from WhatsApp messages passing between Yazigi and Areguy. Some had attachments which showed that Areguy was being sent the served papers in the case albeit on a sporadic basis. There were also references to documents being sent via Dropbox. A proof of evidence was prepared by Yazigi or someone on his behalf. The proof contained a reasonable amount of detail in relation to Areguy's

defence which can only have come from him. We accept that the quality of the representation was far from exemplary even allowing for the difficulties created by the pandemic. We do not consider that, before consideration of the issue of CCTV, it was so incompetent that the trial was rendered unfair.

41. Once Yazigi withdrew from the case, Keshwala assumed conduct. There is no evidence that he took any active part in the proceedings. He did not attend the trial. Ms Bache said that he was available at the end of a telephone but otherwise gave no assistance in the running of the defence case. She said that this was not a position to which she was unused. As counsel she was accustomed to being left in charge of the case once it was underway. Whatever might be said about this state of affairs, it did not affect the adequacy of Areguy's representation once the trial was underway.
42. Ms Bache was instructed in August 2020. She was brought into the case by her junior, Max Mills. Ms Bache gave evidence to us. She had one conference with Areguy in her chambers in about September 2020. One matter dealt with in the conference was the drafting of the defence statement. The document was drafted by Ms Bache. One of the matters raised in relation to disclosure was the CCTV of Academy Gardens referred to in Areguy's interview. She did not at that point have sight of any CCTV material. As we have explained, none had been served as evidence at this point. Ms Bache did advise that a report should be obtained from a cell site expert. The significance of telephone usage was apparent from the served evidence.
43. Ms Bache explained to us that she went carefully through all of the served material. She also said that Mr Mills had done all that she required of him as junior counsel. She did not go through everything with Areguy because, to a substantial extent, she did not need his instructions on the served material. It was not relevant to his case. In relation to CCTV Ms Bache received the compilation footage on 27 December 2020. Prior to that she had been told by prosecution counsel that there was no footage of Areguy driving into Academy Gardens. Her evidence on this point was not challenged. The statement accompanying the compilation footage did no more than produce it. The opening note served by the prosecution made no reference to any purported sighting of Areguy's Astra on the CCTV footage. Ms Bache told us that she could have put two and two together and realised that, notwithstanding what she had been told by prosecution counsel, there was some significance to the CCTV footage from Academy Gardens. We consider that she did herself an injustice when she said that. There was no reason for her to guess what the prosecution case might be. She was entitled to rely on what she had been told and on the content of the prosecution opening. It is of note that even as late as 17 December 2020 the prosecution were serving CCTV footage of Academy Gardens as unused material.
44. At an early stage of the trial in March 2021 Ms Bache did appreciate that the prosecution did intend to rely on CCTV footage to show that Areguy's Astra had gone into Academy Gardens. We have already set out what she said in court on 9 March 2021. Ms Bache did not consider instructing an expert in relative to CCTV analysis at that point. In her view DC Orr's statement uploaded on 10 March 2021 was problematic for the prosecution. That view was well-founded. She made very substantial progress in her cross-examination of DC Orr.

45. Her evidence was that on 9 or 10 March 2021 she showed Areguy the footage on which the prosecution now intended to rely. She was able to do so because she had downloaded the footage onto her laptop. Areguy's evidence was that Ms Bache was unable to play the footage. All he saw was a still or a screenshot. We do not accept his evidence on this point. Ms Bache by this point understood the significance of the footage. It is inconceivable that she would have proceeded without allowing Areguy to see the relevant footage.
46. When the further evidence from DC Orr and his colleague was served later in March 2021 the issue of an adjournment arose in order to obtain expert evidence. Counsel for De'Silva made an application to the judge which was refused. Ms Bache discussed with Areguy the prospect of supporting the application and whether expert evidence ought to be obtained. Areguy told us that this discussion took place after the judge had ruled against an adjournment. Ms Bache's evidence in chief was that the discussion occurred before the application was made though she was less certain on the matter when she was cross-examined. We are sure that the discussion preceded any application in court. Ms Bache was clearly anxious to consult Areguy throughout the trial. The only rational point at which to discuss an application to adjourn would be before the application being made on behalf of the co-accused, Ms Bache having been put on notice of the application by the co-accused's counsel. Ms Bache's evidence is that she discussed the pros and cons of instructing an expert with Areguy. She explained to him why it would not be a good idea i.e given the progress already made with DC Orr and the further deficiencies in his evidence on which he could be cross-examined. Areguy's evidence was the only discussion occurred after the judge's ruling on an adjournment and that Ms Bache told him that she would not apply for an adjournment because it would irritate the judge. We reject that evidence. We are sure that Ms Bache's evidence on this issue is correct. Had she thought that an application should be made, she would have made it. The irritation of the judge would have been of no relevance.
47. We are satisfied that Ms Bache's reason for proceeding without any expert evidence was well founded. In her further cross-examination she made further inroads into the credibility and reliability of DC Orr in relation to the CCTV evidence. As we have explained in our rejection of the application in respect of the original ground of appeal, expert evidence simply would have been confirmatory of DC Orr's unreliability.
48. Ms Bache was put into a difficult position by the way in which the prosecution late in the day relied on CCTV footage purporting to establish that Areguy's Astra had gone into Academy Gardens. In our judgment she dealt with the situation with considerable skill. There was no reason why she should have been aware of the significance of the CCTV footage earlier than the early stages of the trial in March 2021. Whatever the failings of the solicitors, there is no reason why they should have been so aware.
49. Mr Dein argued that the failure by Ms Bache to commission a report from an expert witness at any stage was a culpable failure on her part. There was ample time to commission a report. Even if the significance of the CCTV footage only became apparent on 9 March 2021, that still left a number of weeks whilst the trial was continuing. We reject this argument. As we have said, Ms Bache took a considered

decision which was wholly reasonable given the way the evidence of DC Orr developed. For the reasons we have given, it did not cause any unfairness to Areguy.

50. Mr Dein also asserted that very little was done by Mr Mills in relation to mastering the background to the evidence. We find no evidence to support that assertion. Ms Bache did not suggest that Mr Mills was not on top of the case. We have the attendance trial note prepared by Mr Mills. It is apparent that it was a rolling document covering each day of the trial. It covers 71 closely typed pages. It includes detailed references to exhibits where appropriate. Whether this note was prepared to assist Ms Bache or the solicitors or both does not matter. It shows that Mr Mills was assiduous in his attention to the trial.
51. We do not consider that the proposed new ground relating the alleged inadequacy of representation is arguable or cogent. We do not give leave to add the new ground of appeal.

### **Conclusion**

52. It follows that the application to appeal against conviction is refused. The fresh evidence adduced on behalf of Areguy would not afford a ground for allowing the appeal. Areguy was represented at his trial with skill and competence. His conviction did not result from any inadequacy of representation.