Neutral Citation Number: [2024] EWCA Crim 650

Case No: 2022 2541 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HH JUDGE KATZ KC
T202117083

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2024

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION,
LORD JUSTICE HOLROYDE
MR JUSTICE TURNER
and
MR JUSTICE BRYAN

- -

Between:

ISSA SEED **DANIEL MENSAH** **ADEL YUSSUF**	**Applicants**
- and -	
THE KING	**Respondent**

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- -

Michael Magarian KC and John McNally; Bernard Tetlow KC and Ms Emma Akuwudike; Michael Holland KC and Andrew Frymann (all assigned by **the Registrar of Criminal Appeals,** save Andrew Frymann appearing pro bono) for the **applicants**
Oliver Glasgow KC and Ms Kerry Broome (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing date: 15 February 2024

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Approved Judgment

The Vice-President:

1. On 15 August 2022, after a trial in the Central Criminal Court before HH Judge Katz KC and a jury, each of these applicants was convicted of offences of conspiracy to cause grievous bodily harm with intent (count 1); murder (count 2); and possessing a firearm, namely a Baikal self-loading pistol, with intent to endanger life (count 3). They were all acquitted of possessing an imitation firearm, namely a Bruni blank-firing pistol, with intent to cause fear of violence (count 4). On 29 August 2022 each of them was sentenced by the judge as follows: count 1 – life imprisonment with a minimum term of 16 years; count 2 – life imprisonment with a minimum term of 29 years; count 3 – 15 years' imprisonment. They now apply for leave to appeal against their convictions and sentences. Adel Yussuf further applies for an extension of time of 98 days to make his application for leave to appeal against sentence. All the applications have been referred to the full court by the Registrar.

2. The charges arose out of an incident in the early hours of 16 July 2020 in which Billy McCullagh, then aged 27, was shot and killed. It was the prosecution case that this was the latest in a series of violent incidents between two rival groupings of gangs in the Brent area, distinguished by their "colours": the blues, including the Thugs of Stonebridge (based on the Stonebridge Estate) and the South Kilburn gang (based on the South Kilburn Estate); and the reds, including the St Raph's Soldiers (based on the St Raphael's Estate), the Church Road Soldiers (based on the Church Road Estate), and the Harrow Road and Mozart gangs. It was alleged that the applicants, members of the reds, had driven onto the Stonebridge Estate with the intention of causing serious injury to members of the blues.

3. The applicants were aged in their mid to late twenties at the material time. They were charged on indictment with three other men: Leeban Farah, who was charged with doing an act tending and intended to pervert the course of justice (count 5); George Orji, who was charged with possessing the Baikal firearm with intent to endanger life (count 6) and possessing the Bruni imitation firearm with intent to cause fear of violence (count 7); and Anu Adelaja, who was charged with two offences relating to the Baikal pistol: possessing a prohibited firearm (count 8) and possessing a firearm when prohibited (count 9).

4. For convenience, and intending no disrespect, we shall refer to the applicants and their co-defendants by their surnames alone, and to Billy McCullagh as "the deceased".

Summary of the facts:

5. The deceased had for many years been linked to the Harrow Road Boys and Mozart gangs.

6. In the early hours of 15 July 2020 Ahmed Yassin Ali, an associate of Seed, Yussuf and the deceased, was stabbed to death.

7. On the evening of 15 July the applicants and the deceased attended a party at a house on the St Raphael's Estate.

8. At 02.13 on 16 July 2020 a blue BMW driven by Kareem Lashani-Ewing carried the deceased and others from that party to Maida Vale, where a stolen Land Rover bearing false registration plates had been parked. The two cars then returned in convoy to the St Raphael's Estate.

9. At 02.56 the Land Rover drove from St Raphael's Estate to the Stonebridge Estate. It was the prosecution case that the three applicants and the deceased were in the Land Rover; that they were jointly in possession of at least the Baikal pistol loaded with live ammunition; and that they were "riding out" into the territory of the blues intending to cause at least really serious injury to members of the blues.

10. The Land Rover travelled north-west on Mordaunt Road and turned right into Windrush Road. As it did so, 21 Windrush Road was the corner house on its nearside, and 42 Windrush Road was the corner house on its offside. At that junction, there was an exchange of gunfire with unidentified members of the blues in which the deceased was fatally wounded and Seed sustained a bullet wound to his leg. Those in the Land Rover drove away, leaving the deceased dead or dying at the scene.

11. The police who attended the scene in response to 999 calls found the deceased lying in the road outside 42 Windrush Road with gunshot wounds to his chest and back. A number of spent cartridge cases lay nearby. He was pronounced dead at 03.33. A cloned key for a Land Rover was found in his pocket.

12. The Land Rover returned to the Saint Raphael's Estate at 03.05. Yussuf went back to the party: he was seen to be angry and covered in blood, and went immediately to the bathroom to clean himself. At 03.38 Seed was driven to hospital in the BMW by Farah and Lashani-Ewing.

13. Between 02.16 and 03.22 none of the accused used their mobile phones. The first attempted use after that period was by Mensah, who tried to call Orji. At 03.22 Mensah called Farah for over five minutes. He then made further attempts to call Orji. He also had repeated further phone contacts with Orji, including when Orji was at the hospital with Seed and throughout the day.

14. At 05.50 Lashani-Ewing drove in the BMW to a petrol station and filled two cans with petrol. By 06.18 the Land Rover had been set on fire. At about 06.45 Farah and Lashani-Ewing were arrested near the burning car.

15. On 17 July 2020 Orji and his girlfriend Adelaja were arrested at Adelaja's home. The Baikal and Bruni pistols were recovered.

Evidence at trial:

16. Post-mortem examination of the body of the deceased established that he had suffered two gunshot wounds to the left side of his back. One had passed though his lung and heart, causing his death.

17. The jury heard evidence from persons near the scene. One eye witness gave evidence that she heard a shot; saw the Land Rover stop; saw four persons get out of that vehicle; and heard further gun shots as she ran away. Another eye witness gave evidence that he heard a series of shots; saw that the Land Rover was stationary but

with its engine running; saw four men, wearing surgical masks, standing by the doors of the Land Rover; saw that the man by the driver's door was firing a gun, though he could not say whether the gun was pointing at anyone in particular; heard the men saying that they had to leave the person on the ground and that he was dead; and saw them leave. A third witness gave evidence that she heard a series of about eight to ten bangs; saw people running around in the street; and saw a body lying on Windrush Road.

18. Anthony Miller, a forensic scientist specialising in forensic firearm examination, gave evidence about bullets and spent cartridge cases found at the scene and about the recovered pistols. His findings showed that persons at the scene had fired, or attempted to fire, a total of four different guns. He stated that the bullet which killed the deceased was one of eight which had been fired from Gun 1, a 9mm self-loading pistol which has not been recovered. Two .32 calibre cartridge cases bore markings which identified them as having been fired by the Baikal pistol. Four blank cartridge cases which were recovered from the area where the Land Rover was set on fire were identified as having been fired by the Bruni pistol: they would have made a bang and a flash, but did not discharge any projectile.

19. Mr Miller's conclusions may be summarised as follows:

    i) Gun 1 was a pistol which had been used in four previous shootings by members of the blues. On this occasion, it had fired at least eight shots from outside the Mordaunt Road side of 21 Windrush Road. A misfired round which had not been in Gun 1 was recovered from the same area: there may, therefore, have been a second blue side firearm.

    ii) It was not possible to be sure about the sequence of shots, but Mr Miller's thought it probable that shots had been fired at the Land Rover as it was turning into Windrush Road.

    iii) On the opposite corner, outside 42 Windrush Road, three spent cartridge cases were recovered from the area where witnesses had seen the stationary Land Rover. Two had been fired from Gun 3, the Baikal pistol. The third had been fired from Gun 4, a converted 9mm self-loading pistol.

    iv) The deceased had been shot twice when he was outside the Land Rover.

    v) It was not possible for Mr Miller to say whether Seed had been inside or outside the Land Rover when he was shot in the leg.

20. The prosecution also relied on circumstantial evidence including mobile phone call data, cell siting evidence and CCTV footage showing contacts and association between the applicants and others.

21. In the course of the trial, the judge made a number of rulings. They included the following rulings which are challenged by the grounds of appeal.

Ruling re previous convictions:

22. The prosecution applied to adduce evidence of a number of previous convictions of the accused. The judge ruled some of that evidence to be inadmissible but, having

heard submissions and having considered his powers to exclude admissible evidence under section 101(3) of the Criminal Justice Act 2003 and section 78 of the Police and Criminal Evidence Act 1984, he permitted the prosecution to adduce evidence of Yussuf's conviction for an assault committed jointly with Farah in December 2018, and evidence of Mensah's convictions in September 2021 of offences, committed jointly with Orji and Adelaja, of conspiracy to rob and conspiracy to have an imitation firearm with intent to commit an indictable offence. Those previous convictions were not relied upon by the prosecution as showing any relevant propensity, and the judge was satisfied that the evidence would not in fact be "propensity evidence in disguise".

23. In relation to Yussuf, the judge ruled that evidence of the conviction for a joint offence of violence was relevant and admissible because it was capable of providing the jury with an explanation for why Yussuf had left the party and what he had been doing before returning bloodied and upset. He was satisfied that admission of the evidence would not give rise to unfairness. He stated (with emphasis as in the original):

> "On the evidence, the jury could draw the inference that he went to Windrush Road in the Range Rover [sic]. On that basis, the conviction is capable of helping the jury decide the issue central to counts 1 and 2, namely <u>why</u> he did so."

24. In relation to Mensah, the judge ruled that the jury could infer from the evidence that Mensah was at the party and was one of the group including Yussuf and the deceased who left the party. He held that:

> "… the conviction might help the jury decide why he left the party and what he did then – in other words, the conviction may make it more likely that he went with others for a purpose connected to joint violence (with guns) rather than some, as yet unspecified, innocent purpose. In any event, there is clear relevance in his interactions with Orji, vis a vis counts 3 and 4."

25. In Mensah's case, again, the judge was satisfied that admission of the evidence of the previous conviction would not result in unfairness.

26. Following these rulings, the relevant details of the convictions were adduced in the form of agreed facts.

<u>Ruling re music video</u>:

27. There were agreed facts as to seven previous incidents of violence between the rival Brent gangs (the last of which was the stabbing of Yassin Ali) and as to the deceased's involvement in red gangs. As the judge put it in his ruling, it was not in dispute that the deceased was shot and killed after travelling with others in a stolen/plated car from "red" territory into "blue" territory. The prosecution wished in addition to adduce in evidence part of a video recording dedicated to the deceased which included these words:

> "I ain't surprised you died with your gun, over there shooting guys you liked riding for fun."

28. The prosecution did not seek to adduce those words as evidence of what happened at the scene, but rather to put in context a statement by the partner of the deceased, Ms Breach, which the prosecution had agreed to read to the jury. The defence objected on the grounds that the lyric was hearsay insofar as it might be used as evidence that the deceased had gone on an armed "ride out", and that its admission would result in unfair prejudice which could not be prevented by any judicial direction.

29. The judge permitted the prosecution to play to the jury the short extract from the video. He held that the lyric was not hearsay; that it clearly went to the issue of what the "ride out" was about and why the deceased was on it; and that without this evidence, there was a risk that the jury may be misled by the statement of Ms Breach.

Ruling re video on Farah's phone:

30. The police had recovered a mobile phone from Farah. Stored in the phone was a video in which Mensah, Orji and an unknown man could be seen whilst Farah filmed himself saying "We're out here man, gang members out here". On behalf of Mensah, it was submitted that this video was admissible only against Farah: Mensah was facing away from the camera, apparently using his own phone; he neither said nor did anything indicating that he accepted being a member of a gang; and as against him, the words were inadmissible hearsay and/or unfairly prejudicial.

31. The judge rejected those submissions. He held that the video clip was admissible, saying:

> "In my judgment the statement (in Mensah's hearing) is not hearsay. Whilst Mensah seems to be pre-occupied when the statement is made, he shows no trace of surprise or dissent. It is relevant in the round to show the association between Mensah, Orji and Farah."

Ruling re submissions of no case to answer:

32. At the conclusion of the prosecution evidence, all three applicants made submissions of no case to answer on count 2. It was common ground between the prosecution and the defence that, in the light of the decision of the Supreme Court in *R v Gnango* [2011] UKSC 59 ("*Gnango*"), a defendant could only be convicted of count 2 if the jury were sure he was party to an agreement with the unknown blue member who killed the deceased to both shoot and be shot at. Each of the applicants submitted that the evidence was not sufficient for a reasonable jury, properly directed, to be sure of such an agreement. They argued, in summary, that whereas the facts in *Gnango* were truly akin to a duel, the evidence here – in particular Mr Miller's opinion that the blues had fired first, probably as the Land Rover was turning into Windrush Road – was consistent with the blues having ambushed the applicants, and with any shots fired by anyone in the Land Rover being fired in self defence, or in a mere exchange of fire rather than pursuant to an agreement of the necessary kind.

33. Mensah and Yussuf also made submissions of no case to answer on counts 1, 3 and 4, arguing that the prosecution evidence could not make the jury sure that each of those applicants travelled to the scene in the Land Rover.

34. The judge refused the submissions, holding that there was a case to answer against each of the applicants. He gave his reasons in a detailed written ruling in which he referred to the unknown gunman who fired the fatal shot as "A". He recognised the factual distinction that, whereas in *Gnango* the victim was an innocent passer-by, the deceased here was a participant in the shoot out on the red side. He noted that the prosecution did not seek a conviction on any of counts 1 to 4 unless the jury were sure that the defendant in question had travelled to the scene in the stolen Land Rover. Critical factual questions for the jury were, accordingly, whether a particular defendant did so travel, and whether he had individual or joint possession of at least one firearm loaded with live ammunition.

35. The judge ruled that he must decide the case in accordance with the principles stated in *Gnango*, taking into account the subsequent decision of the Supreme Court in *R v Jogee* [2016] UKSC 8 ("*Jogee*"). He was not, therefore, giving a ruling which extended the *Gnango* principle or made new law. He held that a jury could be sure on the evidence that anyone who travelled in the Land Rover must have been in joint possession of at least one loaded firearm, and could therefore be sure that anyone in the vehicle shared the common purpose to fire loaded guns at people. It followed, he said, that anyone proved to be in the vehicle had a case to answer on count 1. Seed accepted that he had travelled in the Land Rover. The judge was satisfied that the circumstantial evidence was sufficient for the jury properly to be sure that both Mensah and Yussuf had been at the party and had also left to travel in the Land Rover to Windrush Road. All three, accordingly, had a case to answer on counts 1, 3 and 4.

36. As to count 2, the judge posed the question whether the jury could draw the inference that a particular defendant who had travelled to the scene in the Land Rover must, before the deceased was killed, have shared with "A" a common purpose to shoot and be shot at. He referred to the agreed facts summarising the history of hostility between blues and reds, and the pattern it showed of swift reaction to incidents of violence. He said that the jury could safely infer that both sides would realise it would be a virtual certainty that any attack by one would result in a swift response by the other. The judge held that the jury could also safely infer that some on the red side would blame the blue side for the murder of Ali (even if they were wrong), and that those on the blue side would anticipate the virtual certainty of an imminent attack from the red side (even if unjustified).

37. The core of the judge's reasoning is contained in the following paragraphs:

> "36. Assuming (A) was loyal to the "blue" side, there are, in my judgment, a number of possibilities. It seems to me reasonable to infer that (A) was either warned the "red" side were coming, or he realised it was a virtual certainty that they would come, or it was an ambush. If any of those were the case then the inference is that he must have realised the virtual certainty that the "red" side would fire at the "blue" side. In my judgment, if the jury were sure about that, then (A) intended (or had a purpose) to shoot and be shot at. If his first 2 shots were the ones which hit and killed the deceased then his continued shooting must have been with knowledge of the virtual certainty that fire would be returned. If the fatal shot came later

> in the sequence then, assuming a mutual exchange of gunfire, the same purpose could reasonably be inferred.
>
> 37 The question then moves to what the evidence shows about the purpose of the "red" side by the time of the murder. If (A) was the first to fire then what was seen by the witnesses Dove and Finch suggests that some (at least) in the vehicle got out after the hostile shooting had started. Indeed, the evidence is at least consistent with the car being shot at before it had stopped. If so, it begs the questions as to why the car stopped, why anyone got out and why anyone fired back. In my judgment the most likely inference to be drawn is that the occupants of the Range Rover realised they were already under enemy fire, got out to return their own fire, knowing that it was a virtual certainty that they would continue to be shot at by whoever was firing from the "blue" side.
>
> 38 In my judgment, the points on behalf of Seed and Yussuf that the firing of Gun 3 (the Baikal) could have been skywards or when the gun was being "waved around" rather than aimed at anyone, are for the jury.
>
> 39 This analysis reveals the strict mutuality or strict reciprocity which Mr Magarian KC correctly said was essential.
>
> 40 Self-defence is not in play for the obvious reason that those who go out to fight cannot complain if they come off worse."

38. On those grounds, the judge held that all three applicants had a case to answer on count 2. The trial continued accordingly.

Defence evidence:

39. Seed gave evidence in his own defence. He denied being a member of a gang, and denied involvement in any plan to injure others. He said that he and the deceased had left the party on the Stonebridge Estate to drive with others to the Windrush Road area in order to buy cannabis. He did not see anyone in the car with a firearm. There was a chaotic scene in Windrush Road, and he heard shots. He did not get out of the car, and was shot whilst in the car. He and others had driven back to the party in fear and panic.

40. Yussuf also gave evidence. He denied being a member of a gang. He said that he had been at the party, but had left to put his son to bed and was at home when the incident occurred. He denied having been in the Land Rover and denied being party to any conspiracy. He said he later returned to the party and found Seed injured.

41. Mensah did not give evidence.

The summing up:

42. The judge gave detailed directions of law, both orally and in writing. Consistently with what he had discussed with counsel when considering the submissions of no case

to answer, his direction as to joint responsibility for a crime – which is not challenged by the applicants – included the following (with emphasis as in the original):

> "Anyone else from the "blue" side who shared with (A) a common purpose to shoot at members of the "red" side, and who intentionally assisted or intentionally encouraged the shooting of Billy McCullagh, would be liable to conviction for his murder if they had the necessary intent to kill or to cause really serious harm."
>
> However, as a matter of law, liability to conviction for the murder of Billy McCullagh is not confined to members of the "blue" side".
>
> THE LEGAL PRINCIPLE: Where there are two opposing sides to a violent conflict, all those who share the same common purpose to use unlawful violence against each other may be criminally liable for injuries caused by the mutual, unlawful violence in which they intentionally participate. Historical examples might include a duel or a prize fight. Similarly, if an individual shares a common purpose with others to engage in the joint activity of shooting at each other, or intentionally assists or intentionally encourages others during a gun battle to fire shots at each other, intending that others in the line of fire (whoever they may be) should die or suffer really serious injury, he or she will be guilty of the murder of those who die. This is irrespective of whether the victim happens to be someone "on the other side", or someone "on his side" or an innocent passer-by. In this case, before you could convict, the Prosecution must make you sure that there was a shared common purpose to shoot and be shot at."

43. All the applicants were convicted and sentenced as we have indicated. We turn to their grounds of appeal.

The grounds of appeal against conviction:

44. All three applicants submit that the judge was wrong to reject their submissions of no case to answer on count 2, and that their convictions of murder are therefore unsafe. That is Seed's sole ground of appeal. Mensah and Yussuf put forward additional grounds. We summarise the grounds under five headings, as follows. All are opposed by the respondent.

Ground A: the submissions of no case to answer on count 2:

45. As we have indicated, the applicants do not challenge the judge's analysis of the law. Rather, they submit that the judge wrongly assessed the sufficiency of the evidence to prove the necessary shared intention both to shoot and to be shot at. The submissions to this court reflect the submissions made to the judge in this regard.

46. The respondent submits that the legal framework was correctly set by the judge, in accordance with *Gnango*¸ *Jogee* and *R v Morgan* [2021] EWCA Crim 895 ("*Morgan*"), and that no legitimate criticism can be made of the judge's assessment of the evidence. The respondent refers to the many aspects of the prosecution evidence which were agreed or unchallenged, the expert evidence of Mr Miller and the eye-witness evidence. It is submitted that if the jury accepted the eye-witness evidence, as they were entitled to do, it showed that shots were fired before four men left the Land Rover; further shots were then fired; and the deceased must have been shot towards the end of the exchange of fire. It is submitted that there was, therefore, evidence on which the jury could properly find that there was a mutual agreement between all those involved to shoot and be shot at.

47. The Respondent summarised the three possible factual scenarios in this way:

i) Given the history between the rival groupings, the red side would not have travelled into blue territory without being prepared for a violent confrontation involving firearms. If the red side fired first, the jury could properly conclude that the red side knew it was a virtual certainty that the blues would shoot back; whilst the blues would know that the reds would not enter their territory unarmed, and would only do so in order to attack them. The common purpose which was to be inferred was, therefore, to kill or seriously injure the other side, ie to shoot and be shot at.

ii) If the blue side fired first, they must have known that the reds would not be unarmed and that it was a virtual certainty that they would shoot back. The same common purpose would therefore be proved.

iii) If the jury could not be sure which side fired the first shot, the common purpose would nonetheless be proved because each side would have known that encroachment into the other side's territory would provoke a violent response, for which both sides were prepared.

Ground B: the submissions of no case to answer on counts 1, 3 and 4:

48. Mensah and Yussuf, relying on the familiar principles stated by Lord Lane CJ in *R v Galbraith* ([1981] 1 WLR 1039 at p1042 ("*Galbraith*"), submit that their convictions on counts 1, 3 and 4 are unsafe because the judge was wrong to reject their submissions of no case to answer on those counts.

49. Mensah submits that there was no sufficient evidence for the jury to be able to be sure that he travelled in the Land Rover: it was not alleged that he had been involved in the earlier trip in the BMW to collect the Land Rover; neither the use made of his phone, nor the gap in usage which the prosecution relied on as a period of "radio silence" at the critical time, was remarkable when compared to his usual patterns of use; and no cell-siting evidence pointed to him being anywhere other than the St Raphael's Estate on the night of the incident.

50. Yussuf similarly submits that the evidence was not capable of making the jury, properly directed, sure that he travelled in the Land Rover. He points out that the prosecution witnesses who gave evidence of his having left the party with others were themselves intoxicated, and gave a time which was inconsistent with the prosecution

case; and that although he was bloodied when he later returned to the party, he was not himself injured.

51. The respondent submits that there was circumstantial evidence which, if accepted by the jury, was capable of proving that each of these applicants travelled in the Land Rover. Reliance is placed against Mensah on his association and communications with his co-accused; his travel to the St Raphael's Estate around 10pm; the period of radio silence; his later communications with Orji and Farah; and the fact that the phone which Mensah was using at the time was not recovered. In relation to Yussuf, reliance is placed on his associations and communications with his co-accused; the evidence that he left the party at the same time as Seed and the deceased, and was not seen again until he returned (at the same time as the injured Seed) bloodstained and angry; the period of radio silence; and his refusal to provide his PIN to enable his phone to be analysed. The respondent points out that neither applicant had answered questions in interview, and there was therefore no explanation for any of the evidence against them.

Ground C: the previous convictions of Mensah and Yussuf:

52. Mensah and Yussuf submit that their convictions are unsafe because the judge wrongly allowed evidence of their previous convictions to go before the jury.

53. Mensah submits that the case against him was weak, and was wrongly bolstered by evidence of previous convictions which was more prejudicial than probative. It was not alleged that the offences concerned were gang-related; and they were committed with persons who were not defendants in this trial and were not gang members.

54. Yussuf submits that there was no suggestion that the previous offence (committed jointly with Farah) was gang related: it was an assault motivated by financial gain (and was initially charged as a robbery). Further, it was not an offence involving an intent to cause really serious injury. It is submitted that the evidence should therefore not have been admitted.

55. Yussuf goes on to submit that the judge's direction about this evidence was inadequate. The direction included the following:

> "Yussuf's previous conviction for an offence of violence does not make it any more likely that he participated in an offence of violence on this occasion. You heard this evidence because it may help you decide the true nature and level of association between Yussuf and Farah. The prosecution rely on the evidence to help undermine Yussuf's case that his leaving the party had nothing to do with any "red" side plan."

56. It is argued that Farah's role in the present offences was to destroy evidence after the event: he was not alleged to have been involved in the "ride out". Yussuf's involvement with Farah in one earlier offence, not said to be gang-related, could not legitimately assist the jury to decide whether Yussuf participated in these offences. Moreover, since there was a wealth of material showing Farah's gang association, but an absence of such material in Yussuf's case, the judge's direction left it open to the jury to draw an unjustified inference that Yussuf must also have been a gang member.

57. The respondent submits that part of the case against Mensah was that he had supplied the Baikal pistol to Orji so that Orji could look after it: Mensah's conviction for serious offending with Orji, involving a firearm, was clearly relevant to the issues to be decided by the jury. The fact that the previous offending was not said to be gang-related was irrelevant.

58. As to Yussuf, the respondent submits that the previous offending with Farah was relevant and admissible because it could assist the jury to determine Yussuf's loyalty to Farah and willingness to commit an offence of violence.

Ground D: the music video:

59. Mensah and Yussuf submit that the judge was wrong to permit the music video to be adduced in evidence. They argue that the lyrics in the video were a hearsay commentary, by someone who was not present, on the facts of the incident. The lyrics had no evidential value and were highly prejudicial. Mensah further argues that the judge gave no direction to the jury as to the issues to which this part of the evidence was relevant.

60. The respondent submits that the video was properly admitted because there was no admission by the defendants as to the deceased's gang membership, and because the statement of Ms Breach – which amongst other things disputed the deceased's gang membership – had been read at the request of the defence. The lyrics in the video were not adduced to prove the truth of what was said, but rather to show the deceased's reputation as an important and violent gang member. The respondent would have been content for the lyrics to be adduced by way of agreed facts, but no agreement could be reached.

61. As to the judge's direction, the respondent notes that no complaint was made in this regard during the trial, and points out that the judge in his summing up referred at length to the evidence about the music video. The judge referred to it as a "dedication video", and directed the jury that they had seen the video:

> "… to help you gauge what this was really about. Was this part of gang activity, bearing in mind that it is an agreed fact that Billy McCullagh was believed to be a longstanding member of the relevant gang?"

Ground E: the video on Farah's phone:

62. Mensah submits that Farah's words were not admissible against Mensah and were highly prejudicial; that the video should not have been admitted in evidence against Mensah; and that the judge wrongly failed to direct the jury that it only went to the association between Mensah and Farah, and was not evidence that Mensah was a gang member.

63. The respondent submits that the video was rightly admitted as evidence of Mensah's willingness to be associated with a red side loyalist. That was relevant because the applicant, whilst admitting association with other defendants, did not admit any loyalty to the red side. The respondent submits that the judge was correct to direct the jury as follows:

> "You received this evidence because it may help you to decide the true nature and level of association between the people present – why they were there ; why they were together; what was the true nature and level of their association – was it to do with gangs or was it not? … The prosecution rely on the material to show the gang-related connection between the individuals present. They argue the clips show that their open behaviour indicates that each individual present was either a red side gang member or would be loyal to and trust each other."

The sentences:

64. In his sentencing remarks, the judge referred to the previous incidents of violence and observed that the chronology of previous shootings revealed a pattern of swift retaliation. The obvious inferences were that those who shared loyalty with one side knew they were effectively at war with the other side and that both sides had access to, and were prepared to use, firearms. The reciprocal violence was therefore highly likely, and often intended, to be fatal. The judge went on to say that those who travelled in the car had agreed that at least one person would be shot and caused at least really serious harm, and had not been deterred by the virtual certainty that their enemies would also be armed and ready to shoot. He accepted that it was likely that the Land Rover was fired on as it turned into Windrush Road, but commented that those in the vehicle could simply have driven off. He found that there was nothing to choose between the applicants in the assessment of culpability and harm.

65. The judge accepted that count 1 did not require an original agreement to shoot to kill, and that he must sentence on the basis that it did not. He observed, however, that since at least one gun was to be fired, the level of intended harm could not have been far below an intention to kill. He considered the relevant sentencing guidelines for counts 1 and 3. He found each of the applicants to be a dangerous offender, stating that he considered the circumstances of counts 1 and 3 to be at the highest level of seriousness. Any willing participant in those offences, which led to one death and risked more, met the statutory definition of dangerousness.

66. Pursuant to schedule 21 to the Sentencing Act 2020, the starting point for the minimum term on count 2 was 30 years. That was increased towards 35 years by the aggravating factors of the background of gang warfare and the fact that the murder was committed in a crowded street in a residential area. The judge said that he struggled to see why the fact that the deceased was a close friend of the applicants provided any mitigation, but was prepared to make some reduction in their favour. He considered matters of personal mitigation but concluded that there were no real differences between the applicants.

67. For those reasons the judge imposed the sentences to which we have referred.

The grounds of appeal against sentence:

68. Each of the applicants draws attention to the minimum term of 16 years specified on count 1, and submits that there is no justification for the much longer minimum term on count 2. They argue that the judge failed to give sufficient weight to the very

unusual mitigating feature that the applicants were convicted of the murder of their friend, and gave too much weight to the applicants' apparent lack of remorse. They further argue that the judge, having recognised that the sentences in this case would be unlikely to deter others, was wrong to sentence on the basis that those who participate in gang warfare on the streets must expect the courts to pass deterrent sentences. Mensah in addition challenges the finding of dangerousness in his case, which he submits was not justified by his antecedents.

69. We are grateful to all counsel for their written and oral submissions. We turn to our analysis and our conclusions. Having set out the arguments in some detail, we can express our views comparatively briefly.

Discussion and analysis: the convictions:

70. As we have indicated, this case does not involve a challenge to the judge's direction as to the law following *Gnango, Jogee* and *Morgan*. It is no longer argued that the judge was improperly extending the principle in *Gnango* to circumstances in which the person killed was on the same side as the accused. That argument is rightly not pursued. In *Morgan*, the court allowed an appeal by the prosecution against a ruling by a trial judge that a defendant had no case to answer on a charge of murder. The narrow issue before the court, in the context of an interlocutory appeal in a trial which had been adjourned to await the decision of this court, was whether the judge could properly find that it was not open to the jury to conclude that the deceased had been killed following an agreement to be involved in a "shootout". At paragraph 22, the court gave this helpful summary of the correct approach:

> "Subject to any further consideration by this court, or by the Supreme Court, in due course on an appeal against conviction, as it seems to us on this interlocutory appeal the combined effect of the decisions in Jogee and Gnango in the present context is *inter alia* to the effect that if an individual agrees with others to engage in the joint activity of shooting (a "shoot out"), or intentionally assists or encourages others during a gun battle to fire shots, intending that others in the line of fire (whoever they may be) should die or suffer really serious injury, he or she will be guilty of the murder of those who die. This is irrespective of whether, for instance, the individual in question, "someone on his side" or an incident passer-by happens to be the victim. Addressing a particular issue raised by Mr Bennathan, as it seems to us it is irrelevant for these purposes whether the defendant is correctly described as a principal or an accessory (see Lord Judge CJ at paragraph 62 of Gnango)."

71. The decision in *Gnango* has been the subject of much academic discussion, and must obviously now be read in the light of the principles as to joint offending which the Supreme Court later set out in *Jogee*. It is unnecessary, and would therefore be inappropriate, for us to enter into that debate in a case where no issue arises, and in which this court is bound by the decisions of the Supreme Court. We accordingly say only this. Respectfully agreeing with the approach taken by this court in *Morgan*, and applying the principles in *Gnango* and *Jogee* to circumstances such as arose in this

case, we take the view that the necessary agreement to shoot and be shot at may properly be inferred where two or more persons engage in, or assist or encourage, shooting at each other, each knowing that it was a virtual certainty that the other(s) would be armed and would either open or return fire, and each intending to kill or to cause really serious injury. It may or may not be helpful to refer to such a situation as a "shoot out": at best, that may be a convenient but imprecise shorthand description of a situation which will have to be analysed with care by a jury before the necessary agreement to shoot and be shot at can be inferred. It may be thought that the term implies the reciprocity which is a feature of the agreement which must be proved. But be that as it may, the whole purpose of each party shooting in such a situation is to kill or to cause serious injury, and it can be no defence for one party to say that the victim of the shooting was a member of his own side. Nor, as the judge rightly said, can there be any question of self defence on the part of someone whose intention in such a situation was to shoot to kill (or to cause serious injury), and to be shot at in return.

72. The judge's direction was in accordance with that approach and is rightly not criticised. We would add that we endorse the judge's focus on the issues of mutual loyalty and trust underlying gang association, rather than on the specific (and, it may be, elusive) question of whether a defendant was a "member" of a particular gang.

73. The challenge made by the applicants is a *Galbraith* challenge to the sufficiency of the evidence. The judge had heard all the prosecution evidence and it is apparent that he had made a most careful assessment of it. In our judgement, there was no arguable error in either his approach or his conclusions. He correctly identified the crucial factual questions which the jury would have to consider, and correctly concluded that the evidence was sufficient to be capable of satisfying the jury that each of the applicants was a willing member of the group which travelled in the Land Rover, that each was in individual or joint possession of at least one loaded firearm, and that each was party to an agreement to shoot at any blues they encountered and to be shot at by their intended victims.

74. We would add that we see no force in the submission on behalf of the applicants that the exchange of gunfire was "a very one-sided affair". Even if that is so, it is but one consideration for the jury in deciding whether the necessary agreement to shoot and be shot at had been proved against a particular defendant. If, hypothetically, a witness or a recording device in the Land Rover provided evidence of an express agreement by all the applicants to shoot and be shot at, the subsequent exchange of fire might still be said to be one-sided; but the necessary agreement would clearly have been proved by direct evidence.

75. Nor do we see any force in the submission that, without knowing who fired the first shot, it was impossible for the jury to exclude self defence. That approach begs the question of why the applicants went into enemy territory armed with at least one loaded gun. It also begs the question of why (if the jury accepted Mr Miller's evidence as to the likely sequence of shots, as the defence invited them to do) those in the Land Rover did not simply drive away when they came under fire, instead of stopping, getting out of the vehicle, and shooting at their enemies.

76. Ground A is therefore not arguable.

77. Nor is Ground B. For the reasons given by the judge, he was clearly entitled to conclude that the evidence was capable of satisfying the jury that Mensah and Yussuf were each members of the group in the Land Rover.

78. Turning to the previous convictions of the applicants, we have noted above that the judge refused some aspects of the prosecution's applications. For the reasons he gave, the specific convictions of Mensah and Yussuf which he permitted to be adduced in evidence were relevant and admissible; and he was entitled to conclude that the admission of the evidence would not result in unfairness to either man. The applicants did of course have the opportunity (which Yussuf took, but Mensah did not) to give evidence if they wished, and to say anything they wished to say about their previous convictions; and their counsel were able to address the jury about reasons why the previous convictions should not be given any weight. Ground C is in those circumstances not arguable.

79. The music video which is the subject of Ground D formed only a very small part of the prosecution evidence. It was relevant to the issue, which the applicants and their co-accused made a live issue, as to whether the deceased was an active and violent member of the reds. Its relevance was increased by the defence request that the prosecution read the statement of Ms Breach. There can in our judgement be no valid criticism of the judge's decision as to admissibility. In any event, it is impossible to say that this evidence – even if it had been incorrectly admitted – could render the convictions of either applicant unsafe. Ground D is therefore not arguable.

80. Ground E similarly relates to a very small part of the evidence. With respect to the prosecution, we doubt that it was evidence which really needed to be included; and with respect to the judge, we see some force in the complaint that he did not deal with this part of the case as well as he might have done when summing up. The decision to admit the evidence cannot, however, be criticised; and any deficiency in the summing up cannot be said to render Mensah's convictions unsafe. Ground E is therefore not arguable.

81. We turn to the applications in relation to sentence.

Discussion and analysis: the sentences:

82. We can deal with these applications briefly, because in our view the grounds of appeal are wholly without merit.

83. Mensah's challenge to the finding of dangerousness is hopeless: whatever his record of previous convictions, the judge was undoubtedly entitled, and indeed correct, to find him dangerous on the facts of these offences alone.

84. The judge was unquestionably correct to take the statutory starting point of minimum terms of 30 years on count 2, and to adjust that starting point upwards to reflect the serious aggravating features. He then made a generous reduction to reflect the ages of the applicants and the fact that the murder involved the shooting by an unknown person of the applicants' friend. The fact that a crime has resulted in the death of a loved one or a close friend may be significant in some circumstances, for example in some cases of causing death by dangerous or careless driving. But, like the judge, we struggle to see why it provides much – or, indeed, any – mitigation in circumstances

such as these, where a group of armed men set out on a mission to shoot at, and at least seriously to injure, enemies who could confidently be expected to shoot back. On the jury's verdicts, each of the applicants shared an intention to shoot and to be shot at, and there was an obvious and high risk that members of their own side would be killed or seriously injured.

85. The judge having made that generous reduction, it is not arguable that he should have reduced the minimum term on count 2 further, simply because it was significantly longer than the minimum term on count 1. Count 1 was the less serious of the two offences, to be sentenced by following the relevant guideline; count 2 was the more serious offence, to be sentenced in accordance with the framework established by Parliament.

86. It is unnecessary for us to consider the merits of Yussuf's explanation for not having lodged his notice of appeal against sentence sooner than he did. For the reasons we have briefly given, none of the grounds of appeal against sentence is arguable. Whatever the merits of the application for an extension of time, therefore, nothing would be achieved by granting it.

The time spent by Seed in custody whilst awaiting trial:

87. Although it was not the subject of a ground of appeal, a point arises in Seed's case which this court must address. He was remanded in custody before trial for a total of 745 days. The judge when passing sentence said nothing about the treatment of that period in custody, and no counsel invited him to do so. It seems clear that the judge intended the whole period to count against the minimum term of 29 years imposed on count 2; and it appears that a court official purported to reflect that intention when drawing up the order. But as recent case law has made clear, the calculation of the minimum term when imposing a life sentence is part of the sentence of the court, and it is therefore necessary for the judge to pronounce the minimum term after deduction of any relevant period of remand: see *R v Cookson and Eaton* [2023] EWCA Crim 10; *R v Kamarra-Jarra* [2024] EWCA Crim 198; and *R v Sesay (Yousif)* [2024] EWCA Crim 483.

88. This court must, in fairness to Seed, correct that omission. We will grant him leave to appeal against sentence, and allow the appeal to the appropriate extent, solely for that reason.

89. No similar point arises in relation to Mensah or Yussuf: whilst awaiting trial on this indictment, each of them was also in custody on other matters, and none of that period can count towards the minimum term in their cases.

Conclusion:

90. We accordingly refuse all the applications for leave to appeal against conviction. We refuse the application by Mensah for leave to appeal against sentence. We refuse Yussuf's application for an extension of time, and his application for leave to appeal against sentence is accordingly refused.

91. In Seed's case, for the reason we have indicated, we grant leave to appeal against sentence solely to correct the error as to the treatment of his time in custody. We

allow his appeal against sentence to this extent: we quash the minimum term of 29 years, and substitute for it a minimum term of 26 years 350 days.

92. Although we have for the most part refused leave to appeal, we do so having had the benefit of full submissions on both sides, and we give leave for this judgment to be cited.