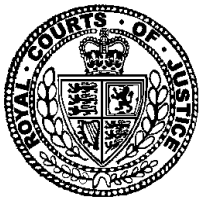

Neutral Citation Number: [2025] EWCA Crim 25

Case No: 202200417 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT
AT CENTRAL LONDON CRIMINAL COURT
His Honour Judge Dennis KC
T20207241

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 January 2025

Before:

LORD JUSTICE STUART-SMITH
MRS JUSTICE THORNTON
and
HIS HONOUR JUDGE DEAN KC

- -

Between:

REX

Respondent

- and -

LEON SMITH

Appellant

- -
- -

Simon Smith and **Pippa Woodrow** (instructed by **Galbraith Branley Solicitors**) for the **Appellant**
Benn Maguire and **Tom Broomfield** (instructed by **CPS)** for the **Crown**

Hearing date: 6 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. The appellant was tried at the Central Criminal Court between 1 November 2021 and 12 January 2022 on an indictment alleging serious criminality. There were 16 counts on the indictment of which 9 counts related to the appellant, broadly alleging four sets of offending;

    i) Count 1 - Between 20 July and 27 October 2019, a conspiracy (with Dario Barnaby) to possess or acquire a prohibited firearm;

    ii) The Garip Conspiracy (Count 6, 7 & 8) - Between 19 September and 13 December 2019, a conspiracy to murder Ercan Garip (Count 6), with a lesser alternative count of conspiracy to cause GBH with intent (Count 7), and conspiracy to possess a firearm with intent to cause fear of violence (Count 8);

    iii) The Ozger Conspiracy (Count 9, 10 & 11) - Between 19 September and 13 December 2019, a conspiracy to murder Sinan Ozger (Count 9) with a lesser alternative count of conspiracy to cause GBH with intent (Count 10), and conspiracy to possess a firearm with intent to cause fear of violence (Count 11);

    iv) The Barrington Court conspiracy (Count 13 & 14) - Between 1 and 12 December 2019, a conspiracy (with Dario Barnaby and others, including Khalifa Benjamin) to possess a firearm with intent to endanger life (Count 13) and to possess ammunition (Count 14).

2. The appellant was convicted of Counts 1, 10, 13 and 14. He now appeals with the leave of the full court, the sole ground of appeal being that his conviction is unsafe on Counts 13 and 14 by reason of the fresh evidence of Mr Khalifa Benjamin, all other proposed grounds of appeal having been refused by the single judge and the full court. It is not submitted that success on the appeal against conviction on Counts 13 and 14 would render the convictions on Counts 1 and 10 unsafe. The appeal is therefore confined to the appellant's convictions on Counts 13 and 14. In the event that the appeal against those convictions were to be successful, the appellant would wish to appeal against the aggregate sentence that was imposed on him in respect of Counts 1, 10, 13 and 14.

3. We heard the appeal on 6 December 2024 and reserved judgment. This is our reserved judgment. For the reasons we set out below, the appeal against conviction is dismissed. The question of an appeal against sentence therefore does not arise.

The factual and procedural background

4. The motivation for the offending was said to stem from gang activity. Kemal Eran was said to be a leading member of a criminal gang known as the Tottenham Boys (also known as the 'Dapper Crew'), who were based in the Tottenham area of London. There was an ongoing violent feud between the Tottenham Boys and a rival gang known as the 'Hackney Turks' or Bombacilars.

5. The prosecution case was that Kemal Eran, who was believed to be living abroad, sought the assistance of the appellant to carry out the contract killing of two men. The first was Mr Garip, who was said to be a member of the rival Hackney Turks gang. The

second was Mr Ozger, who was said to be a member of the Tottenham Boys, the same gang as Mr Eran. It was alleged that the appellant (and his co-accused Mr Burrows) recruited Matthew Watson, Mr Barnaby and others to source firearms and carry out a series of "hits" for Mr Eren, in return for a large quantity of cash and drugs.

6. A complex police investigation took place, including undercover surveillance and placing a listening device into the appellant's home address.

7. Count 1 of the indictment alleged that in the summer of 2019, the appellant and Mr Barnaby had agreed between themselves to obtain a prohibited firearm. The evidence for the offence largely came from WhatsApp messages between the appellant and Mr Barnaby.

8. So far as the Garip and Ozger conspiracies were concerned, the Prosecution primarily relied on:

   i) Recordings of the appellant's conversations obtained via a covert listening device planted in his home in January 2019, which recorded until an un-known date in mid-2020.

   ii) Messages obtained from phone devices seized from various defendants, including an 'Encrochat' device belonging to the appellant.

   iii) Officers' surveillance, and other tracking data in respect of various defendants' movements on days of relevance.

   iv) Expert evidence about cell site evidence.

9. The prosecution case regarding the Barrington Court conspiracy (Counts 13 & 14) was that the appellant and Mr Barnaby were trying to source a firearm for use in the Garip and Ozger conspiracies, and on 11 December 2019 were planning to take possession of a firearm from Khalifa Benjamin and others.

10. Evidence was given concerning a failed or aborted plan to carry out some sort of attack on an individual on 9 December and in the course of conversation between the appellant and Mr Barnaby during the evening of 9 December, this was recorded:

> 'Yeah, I'm good man, I'm stoned bruv, I'm stoned. What, did you sort out everything?' Inaudible, 'It's in the youth's house and I can't get it from Snapchat until Wednesday.'

The "it" was suggested to be the gun the appellant and Mr Barnaby were seeking to acquire: Wednesday would have been 11 December 2019.

11. The evidence in the appellant's trial of the Barrington Court events of 11 December 2019 demonstrated the appellant and Mr Barnaby travelling to Barrington Court together in a white VW Polo and extensive phone and messaging taking place in advance of the meeting in particular between Mr Barnaby and some of Mr Khalifa Benjamin's associates and his co-accused. When they arrived in the vicinity of Barrington Court they waited for approximately 40 minutes before coming into the building. Shortly before they went in one of Mr Khalifa Benjamin's associates (Riaz Miah) arrived with an orange carrier bag. A few minutes later, he left the building

again and approached the VW Polo. Mr Barnaby and the Appellant got out of the Polo and went to the building where, at approximately 10.20 pm, they were admitted to the car park beneath the building by Mr Khalifa Benjamin.

12. A combination of CCTV and police surveillance showed the appellant meeting Mr Barnaby, Mr Miah, Mr Khalifa Benjamin and Mr Hamza Benjamin. It was said by the prosecution that the CCTV showed Mr Khalifa Benjamin initially to have a bulging pocket to his coat, which the prosecution asserted was a gun that was to be transferred. It was also said that Mr Barnaby could be seen to be wearing gloves. CCTV images show various parts of the gathering, but show nothing which demonstrated an exchange of a gun (or of anything else). The group of five men spent about three minutes in the car park and then went out of the car park and out of view of the CCTV for a period of approximately 11 minutes.

13. On their return to the area covered by CCTV the group made their way towards the exit. It was said by the prosecution that Mr Khalifah Benjamin no longer had a bulge in his pocket. Shortly before they parted company, Mr Khalifah Benjamin embraced the appellant and Mr Barnaby in turn. Mr Barnaby then left the building, leaving the other four inside. The appellant then touched knuckles with Mr Khalifah Benjamin, pressed the door release and left Barrington Court.

14. Mr Barnaby left the area of Barrington Court by a pre-ordered taxi that had been waiting outside. The appellant left in the VW Polo. They were driven in opposite directions. The taxi with Mr Barnaby in it headed south towards Mr Barnaby's home; the VW Polo headed north. At 10.50pm officers stopped the taxi. When it was searched they found a loaded pistol with a detachable magazine underneath the rear seats. The pistol was analysed and found to be a Slovakian-made Grand Power self-loading pistol, originally a gas/blank firing model, which had been converted to fire live rounds. Four rounds of live 9 mm short calibre ammunition were in the magazine. Both the pistol and the ammunition were in full working order. The VW Polo in which the appellant was a passenger was stopped at about the same time as was Mr Barnaby's taxi and the appellant was arrested. He denied all the alleged offences and in due course pleaded not guilty to the counts with which he was charged.

15. We will return to the evidence in the appellant's trial as it concerned Counts 13 and 14. For the moment it is only to be noted that the appellant's case, and the evidence he gave in his trial, was that the visit to Barrington Court had been arranged by Mr Barnaby and that Mr Barnaby had told him that a stolen car or car parts which the appellant was interested in would be able to be viewed at Barrington Court. The visit to Barrington Court had nothing at all to do with a gun, or indeed drugs or anything else.

16. The appellant and Mr Barnaby were originally indicted together and with Mr Khalifa Benjamin and the other defendants arrested in relation to the Barrington Court events who were charged as co-conspirators. Subsequently, Mr Smith and Mr Barnaby were severed from the other Barrington Court defendants to stand trial with a separate set of defendants in relation to both the Barrington Court charges and the other counts outlined above. Mr Khalifa Benjamin was identified in the particulars of Counts 13 and 14 of the appellant's extended indictment as one of the persons with whom the appellant and Mr Barnaby had conspired. In Mr Khalifa Benjamin's indictment after severance the appellant and Mr Barnaby were identified in the particulars of the alleged Barrington Court offences as co-conspirators with Mr Khalifa Benjamin and the others.

Thus, after severance, the two indictments mirrored each other in relation to the Barrington Court Conspiracy.

Defence statememts

17. At a time when their cases remained joined, Mr Khalifa Benjamin served a Defence Statement dated 15 May 2020 in which he explained that the Barrington Court events had been concerned with him selling a stolen car to Mr Barnaby. Given the central importance of the Defence Statements for this appeal, we set out the most relevant section of the Defence Statement below:

> "4. The Defendant will state he had been approached by a friend/acquaintance whom had access to a range of stolen vehicles and wanted to sell these on.
>
> 5. The Defendant will state that he wanted to make some fast money and agreed to try and find prospective buyers for the cars.
>
> 6. The Defendant will state that he was speaking with his Brother, Kamal Benjamin (KB) and this came up and his Brother stated that he would ask around to see if anyone new anyone looking to purchase any vehicles.
>
> 7. The Defendant will state that his brother informed him of a prospective buyer and put him in touch with Dario Barnaby (DB).
>
> 8. The Defendant will state that on the 11th December 2020 it had been arranged that DB would come to view the vehicle with a view to purchasing it.
>
> 9. The Defendant will state that the plan was for his acquaintance to bring the vehicle to Barrington Court.
>
> 10. The Defendant will state that he had not met any of the males prior to this date.
>
> 11. The Defendant will state that also on the 11th December 2020 his half-brother Hamza Benjamin (HB) and friend Riaz Miah (RM) had attended his property to play Playstation and smoke.
>
> 12. The Defendant will state that they needed another remote controller for the Playstation so RM went to collect his which was at a friends house in Finsbury. RM did not have a phone at this time and therefore borrowed HB's phone to allow him to call his friend when he arrived.
>
> 13. RM Returned with the Playstation controller and FIFA game in a Sainsburys bag. The defendant put these in his flat and then DB arrived.

14. The Defendant will state that when DB and LS arrived he was waiting for the acquaintance to call him/ provide an update as to their location however there was limited signal in the car park and therefore went onto the stairs where the signal was better.

15. The Defendant will state that he received a message on Snapchat that the acquaintance could not make it but provided him a picture of the vehicle that DB had requested.

16. The Defendant will state that he believed the vehicle to be a Mercedes GLC, however on viewing the vehicle it became apparent that they required a Mercedes GLE.

17. The Defendant will state that after this, he showed the males out of the block. DB left first. LS stated that if they did find anyone with a Mercedes GLE to get in contact again.

18. LS then left.

19. The Defendant will state that at no point did he see any firearm or ammunition.

20. The Defendant will state that at no point did he hand over anything to any of the males.

21. The Defendant will state that he had plastic bag in his pocket which was used for picking up dog poo as he had been looking after his brothers dog the day before and would use the same coat to take it for walks."

18. The appellant provided a Defence Statement which was dated 14 May 2020 (the day before the date of Mr Khalifa Benjamin's) and provided on 16 May 2020 (the day after). Again, because of its potential significance for this appeal, we set out the most significant parts of it:

"1. The nature of the Accused's defence is that;"

A. He did not conspire with any others to possess either the Firearm or ammunition,… .

B. Prior to the 11th December the Accused had spoken to Dario Barnaby (DB) about his Mercedes GLE registration LL16 VDJ, which had been involved in an accident. DB assisted in finding a mechanic to fix and repair the vehicle as he had a background in mechanics. The Accused also asked DB to help him source parts for the car so that it could be repaired.

C. On the 11th December the Accused was at his home address when Jermaal Jackson (JJ) came to pick him up. The Accused attended Mercedes in Colindale and purchased some parts for his vehicle. [Further details were given and

then] he and JJ headed back to the Accused's home address. Whilst on route they stopped off in Edgware Road to eat some food.

D. Whilst in Edgware Road, the Accused received a call from DB informing him that he had some people that had a hot (stolen) car which the Accused could purchase parts from. The Accused agreed to go meet with DB who would take him to these people.

E. The Accused and JJ then drove to DB's home address. They remained there for a short period of time before then going to meet these people. Whilst on route the accused sat as the front seat passenger and DB sat in the rear. The music was playing in the car and the Accused was not aware of what conversations DB was having if any.

F. When they reached the location DB got out the car first and then the Accused got out when they were met by a male that the Accused did not know. They were taken into the car park at Barrington Court and they met 2 further males and again they were not known to the Accused. A discussion then occurs about the car. When the Accused is shown the car on the phone of one of his co-accused he realises that the vehicle they had was in fact a Mercedes GLC. This model was not compatible with the Accused's car and the meeting then came to an end. Upon leaving the building DB exits first and the Accused does not know where he then goes. The Accused speaks briefly to one of the co-accused asking that if he does find a GLE then he should let DB know. At no time was there any discussion or transfer of a Firearm and the Accused was unaware that DB had a firearm on his person.

G. The Accused then goes into JJ's car and whilst on route to his home address he is stopped and arrested."

19. It will immediately be noted that these two Defence Statements matched each other closely. Particular features include that Mr Barnaby was the organiser of the visit to Barrington Court, that Mr Barnaby said he knew people who had a stolen car from which the appellant could purchase parts, and that the appellant agreed to go with Mr Barnaby to meet them: see paragraph D of the appellant's Defence Statement and paragraphs 4, 7, 8, and 9 of Mr Khalifa Benjamin's. They also have in common that there was in fact no car for the appellant to view, that he was shown a picture of a Mercedes but that it was the wrong model, and that the appellant had a brief conversation with Mr Khalifa Benjamin to the effect that if Mr Khalifa Benjamin should find a car that was the right model of Mercedes, he should let Mr Barnaby know: see paragraph F of the appellant's Defence Statement and paragraphs 14, 15, 16 and 17 of Mr Khalifa Benjamin's.

20. On 17 March 2021, the appellant served a new Defence Statement explaining his case in relation to the Counts on the expanded indictment he faced. In relation to the

Barrington Court charges, his new Defence Statement adopted his Defence Statement of 16 May 2020. Thus he maintained his explanation that the Barrington Court events were brokered by Mr Barnaby and were only connected with or motivated by the prospect of a stolen car or car parts.

21. Mr Barnaby's Defence Statement was served on 2 July 2021. He accepted he had been in possession of the gun on 11 December 2019, but he was silent as to how that had come about.

The appellant's trial

22. The appellant gave evidence. We provide a summary of what appear to us to be the most important features of his evidence; but we have read it in full and taken it all into account. His evidence about events on and around 9 December 2019, a few days before the Barrington Court meeting, was that the conversation to which we have referred at [10] above had nothing to do with the events of 11 December. He described his close relationship with Mr Barnaby as being "He's family… . He's my wife's first cousin. … He's like a little brother to me"; and he spoke about his and Mr Barnaby's interest in guns and his, the appellant's, extensive knowledge of guns. He asserted that he was involved in serious criminality, including drug debt enforcement, robbing drug dealers, drug production and supply, and ringing cars; but he denied the matters set out in the indictment.

23. The appellant's evidence was that he did not know any of the individuals he met at Barrington Court. He said that he heard no conversation about a gun and saw no gun supplied to Mr Barnaby. When asked why he went to Barrington Court he told his counsel "I was going to buy a stolen car … [b]ecause I wanted to strip it for parts." He explained that his car, a Mercedes, had been damaged ("totalled") and he was trying to get it repaired. He had been in the Polo when Mr Barnaby rang and said he had somebody who had a car that he [the appellant] had been looking for so that he could fix his car. When he went into Barrington Court he thought he was going to look at a car. Then they went upstairs. He didn't know why they went up the stairs because he cannot walk far anyway so that he was "proper annoyed". There he was shown a picture on a phone but it was the wrong model of Mercedes so the parts would not fit his car. They then went downstairs and, when downstairs, he said to Mr Khalifa Benjamin that if any other cars came up he should "shout [Mr Barnaby]".

24. The appellant's counsel returned to the Barrington Court charges later in the appellant's evidence in chief. The appellant explained in detail that, having been to a Mercedes dealer in Colindale and taken other steps, he still needed "a lot more bits" for his car. He gave more detail about his conversation with Mr Barnaby. Mr Barnaby "said that he's got someone who has got a car", which he understood to mean a car that was compatible with his car (a Mercedes GLE) so that it could be fixed. He therefore went first to Mr Barnaby's home which, he said, was nothing to do with a gun; and from there they went to Barrington Court. When asked what, as far as he was concerned, was going to happen at Barrington Court he replied "I was going to get a car or we was going to strike some kind of deal for a car." When asked why he followed the others into Barrington Court he said "I thought we were going to see a car." He then explained that, having come to see a car, he couldn't see it and he didn't understand the walking up and down. He repeated in greater detail that the whole group had gone upstairs and went onto and stayed on a landing and that someone (clearly Mr Khalifa Benjamin,

though the appellant said he had never met him before) had then showed him a picture of the car which he saw to be a Mercedes GLC, which was not compatible with his GLE. They then went downstairs and left. When asked about embracing Mr Khalifa Benjamin he said that was how he would say goodbye. He didn't have Mr Khalifa's Benjamin's phone number so he said that if anything came up he should "shout [Mr Barnaby]".

25. As we have said, Mr Barnaby had served a Defence Statement which said nothing about how he had acquired the gun he was arrested in possession of a few minutes after leaving Barrington Court. At trial Mr Barnaby did not give evidence, but the appellant was cross-examined by counsel for Mr Barnaby to the effect that the gun had been acquired at Barrington Court and that the gun had been in Mr Barnaby's possession for the appellant. The appellant accepted that Mr Barnaby either had the gun as they went to Barrington Court or he had got it while he was there. But he said Mr Barnaby did not show him a gun on the way there or discuss anything to do with guns with him. In answer to other questions on behalf of Mr Barnaby, he denied that the conversation on 9 December had been about a gun. And he reiterated that he had gone to Barrington Court for a car, not a car part or a gun.

26. Later, when cross-examined by the prosecution, the appellant accepted that he was upset with Mr Barnaby because he had been brought to Barrington Court, on his account, because of Mr Barnaby's actions. Yet again, he reiterated that he had gone there to see and buy a stolen car, which he had expected to see in the garage. He said that, when they had left the garage area and gone to the flat upstairs, he had asked where the car was and was handed a phone. When asked why he had gone upstairs he said he simply followed everyone else. It was put to him that looking at the phone would have taken only a matter of seconds and he was asked what he was doing upstairs for 11 minutes, which he was unable to answer. Finally, when asked why he had embraced Mr Khalifa Benjamin and not the others present, he said that Mr Khalifa Benjamin was the only person to whom he had spoken.

Mr Khalifa Benjamin's trial

27. The appellant's trial having concluded in January 2022 with him being convicted in relation to Counts 1, 10, 13 and 14, Mr Khalifa Benjamin's trial and that of his co-accused in respect of their alleged involvement in the Barrington Court conspiracy took place in June/July 2023. On 15 June 2023, shortly before his trial, Mr Khalifa Benjamin served an "addendum" Defence Statement which set out a different account of the meeting at Barrington Court. Once again we set out the most material parts:

> "The Defendant will maintain the general nature of the defence as outlined in the previous defence case statement. In addition to that the Defendant will say as follows:
>
> 2. That he was in regular contact with his brother (and Co-Defendant) Kamal Benjamin. In December 2019 he was informed by Kamal Benjamin that he had a drug debt that needed to be paid off. Kamal Benjamin asked the Defendant would assist and it was agreed that he would.

> 3. That he was told by Kamal Benjamin that somebody would be meeting with him and giving him drugs to sell on in order to pay off / work off the debt.
>
> 4. The meeting on the 11th December 2019 at Barrington Court was arranged by Kamal Benjamin and the primary purpose of that meeting was in relation to drugs.
>
> 5. That on the 11th December 2019 when Dario Barnaby attended Barrington Court, he supplied the Defendant with a quantity of class A drugs with the intention that the Defendant sell these drugs and provide him with the proceeds of the sale.
>
> 6. That it was agreed that the Defendant would notify Dario Barnaby (through Kamal Benjamin) once he had the money from the drugs to repay the debt.
>
> 7. That he was frightened to say anything about Dario Barnaby and his involvement in drug dealing in his previous defence statement as he was fearful of any repercussions.
>
> 8. That he did not have in his possession a firearm and ammunition and that and did not provide Dario Barnaby with a firearm and ammunition as is being alleged by the police/ prosecution. [The firearm] and [ammunition] recovered from Dario Barnaby must have been in his possession before he arrived at Barrington Court."

28. Nothing was said about cars in the "addendum" defence statement. The meeting was said to be about Mr Barnaby supplying a quantity of Class A drugs to Mr Khalifa Benjamin so that he could repay a drug debt owed by his younger brother.

29. In his evidence at his trial Mr Khalifa Benjamin gave evidence consistent with his newly served "addendum" defence statement. Once again, we have read his evidence in full and in detail. We provide a summary of what appear to us to be the most important features of his evidence; but we have taken all of his evidence into account. He said the meeting at Barrington Court had been solely to do with drugs and there was no gun handed over or spoken about. Class A drugs were to be supplied to him by Mr Barnaby, who he knew of as "Arkid". He did not know that the appellant (who he did not know) would be accompanying Mr Barnaby. He remained frightened (of Mr Barnaby). He said there had been a brief discussion with Mr Smith about cars during "the farewell scene". He said that he had been confused about why the appellant had not left with Mr Barnaby, but he remembered him talking about cars "like, if you get stolen cars and that, [inaudible] car, like he would pay money if [Mr Khalifa Benjamin] could get the car."

30. In giving his evidence in chief Mr Khalifa Benjamin was taken through his first defence statement and asked why he had not mentioned that the meeting on 11 December and leading up to that date was to do with a drugs debt or anything about the quantity of drugs he was looking to receive. His explanation was that he didn't want to say that it was to do with drugs but that he had now "realised the severity of the case and the

charges are serious." He was taken to his second defence statement and asked about his statement in paragraph 4 that "the primary purpose of [the] meeting was in relation to drugs." He confirmed that there was no other purpose than in relation to drugs and that on 11 December Mr Barnaby had supplied him with Class A drugs with the intention that he (Mr Khalifa Benjamin) would sell the drugs and provide Mr Barnaby with the proceeds of sale. He said that nothing had changed and that he was still fearful of repercussions having now mentioned Mr Barnaby's involvement in drug dealing.

31. In cross-examination, Mr Khalifa Benjamin was asked what happened during the 11 minutes that the group were out of CCTV cover. He said that he, Mr Riaz and Mr Barnaby went to between the third and fourth floors of Barrington Court, Mr Hamza Benjamin was asked to wait on the second landing and the appellant was sitting on the step on the third floor (i.e. away from Mr Khalifa Benjamin). He gave an account of discussing the drugs deal with Mr Barnaby; but, despite being pressed on what happened during the 11 minutes, made no mention of any discussion with the appellant about cars or otherwise. His only mention of the appellant was to say that the appellant talked to him about cars at or after the time that Mr Barnaby was leaving Barrington Court. The conversation, according to Mr Benjamin, lasted seconds and then the appellant left.

32. When cross-examined about paragraph 9 of his first defence statement, he said that it was not true that the plan was for his acquaintance to bring the vehicle to Barrington Court. Paragraph 14 was not true in stating that when Mr Barnaby and the appellant arrived he (Mr Khalifa Benjamin) was waiting for his acquaintance to call him/to provide an update.

33. In due course Mr Khalifa Benjamin was acquitted of the counts he faced in relation to Barrington Court. It is his evidence at his trial, his acquittal and the acquittal of his co-accused, that have given rise to this appeal.

The appeal

34. The appellant originally applied for leave to appeal against conviction by an application lodged in early 2022 – the precise date does not matter. Permission was refused by the Single Judge on 8 July 2022. On 27 November 2023 the appellant applied to renew his application and for leave to renew out of time, founding his application on the acquittal of Mr Khalifa Benjamin. That application was supplemented by an application under section 23 of the Criminal Appeals Act 1968 to adduce further evidence, which was made on 11 June 2024. In support of the application, two witness statements were served:

    i) The first was a very short statement by Mr Khalifa Benjamin dated 10 July 2024 in which he stated that he had given evidence at his trial that the transaction on 11 December 2019 had nothing to do with a firearm and that he had not supplied Mr Barnaby with a firearm. "The meeting I had that day was in relation to a drugs transfer as [Mr Barnaby] was supplying drugs on behalf of my brother Kemal in order to settle his drug debt." He confirmed that his evidence at trial was true and accurate and said that he would be willing to attend any re-trial of the appellant to give the Jury his account of events;

ii) The second was a Gogana statement by the appellant's solicitor who explained that he heard of the acquittals on the day that they occurred: 26 July 2023. He explained the steps that he took (including seeking advice from counsel) and how he came to issue the application to renew and, ultimately, made contact with Mr Khalifa Benjamin on or about 7 June 2024.

35. On 12 June 2024 the full court (Stuart-Smith LJ, Hilliard J and HHJ Conrad KC) heard the application for the necessary extension of time and for leave to appeal. Limited leave was given as we indicated above. So it was that the appeal came before the present constitution of the Court on 6 December 2024.

Mr Khalifa Benjamin's evidence on 6 December 2024

36. We reserved judgment not least so that we should have the benefit of a full transcript of Mr Khalifa Benjamin's evidence before us. We have read the transcript in full and in detail. We provide a summary of what appear to us to be the most important parts of his evidence; but we have taken it all into account.

37. Mr Khalifa Benjamin's evidence before us was not always consistent and may be most conveniently addressed by topics:

i) He initially said that he did not know and had never spoken to the appellant. When questioned further in chief about whether he had any discussions directly or indirectly with the appellant, he said he had a brief conversation when the appellant asked him as they were coming down the stairwell if he could source cars, which he understood to mean stolen cars;

ii) He said in chief that the reason for Mr Barnaby coming to Barrington Court was to drop off some drugs (later identified as crack cocaine) to enable him to sell them and to pay off his brother's drugs debt arising from the seizure of drugs in a raid at Mr Benjamin's home in Barrington Court on 20 November 2020. He spoke to Mr Barnaby before he came to Barrington Court. He gave Mr Barnaby his post code and spoke about paying the debt. In cross-examination he accepted that the primary purpose of the meeting on 11 December at Barrington Court was for him to be supplied with drugs; but he maintained that he must have messaged his brother asking if he knew anyone who wanted to buy a car so that he could make a profit. In re-examination he said that there had been no contact with either the appellant or Mr Barnaby about cars or car parts before they got into the Barrington Court garage;

iii) He said in chief that Mr Barnaby gave him drugs. He did not give anything to Mr Barnaby and nor did anyone else in his presence. In cross examination he accepted that he had not mentioned drugs in his first defence statement and said that he had been advised to go no comment when interviewed. He did not include any mention of drugs in his first defence statement as he did not want to incriminate himself with drugs at the time. He later said that he did not mention the drugs or his brother's debt in his first defence statement because he didn't think he would be charged, or come to court or to a trial. When it was pointed out to him that he had already been charged and pleaded not guilty by the time of his first defence statement he said he thought "it might have been thrown out or something like that";

iv) He accepted that, contrary to paragraph 9 of his first statement, there was no plan on 11 December to bring a car to Barrington Court and his statement in paragraph 9 that there was such a plan was a lie;

v) He accepted that paragraph 8 of his first statement, which asserted that it had been arranged that Mr Barnaby would come to view a vehicle was untrue and a lie. Although he subsequently equivocated, his acceptance of this point was fully established;

vi) He said that the main purpose of Mr Miah's going to North London described in paragraph 12 of his first defence statement was to collect a drugs phone and not, as paragraph 12 said, to get a Playstation controller. His explanation was that he did not want to incriminate himself in relation to drugs;

vii) He said in chief that he did not discuss firearms with either Mr Barnaby or Mr Smith. Nor did he participate in or witness the transfer of a firearm or ammunition. He made no arrangements for a firearm to be brought to Barrington Court and had not seen a firearm at any stage when the appellant was at Barrington Court. He accepted in cross-examination that, on his evidence, when he came into Barrington Court with the appellant, Mr Barnaby must have been in possession of the gun and ammunition (as they were not handed over in Barrington Court);

viii) There was no conversation with him while the group were in the garage before going upstairs. When pressed on precisely when there was a conversation about cars he said that the appellant definitely asked him about cars "as he was leaving", confirming that the conversation came up at the point where the CCTV showed Mr Barnaby leaving and then a short while later the appellant leaving. When asked with reference to the evidence he had given at his trial about it being the last topic of conversation just before they left, he confirmed that was right;

ix) Initially in cross-examination he said he could not remember discussing cars on the staircase. He subsequently said that he believed that at some point on the stairwell the appellant would have spoken about it. Similarly, he initially said that he did not remember there being a picture of a car. But on being reminded of paragraph 15 of his first defence statement he said that there was a picture of a Mercedes that he showed the appellant on the stairwell and that it was not the right Mercedes. There then followed an equivocal passage of evidence where he was pressed with what he had said at his trial during which he maintained that there was or may have been conversation on the staircase but "the main topic of cars was when he was leaving" and that he had shown the appellant a picture at some point and the appellant had said that it was not the car he wanted;

x) Finally, it was his evidence that he did not know what had happened to his brother's drugs debt. He said he had got rid of the drugs but would not say how or to whom.

The principles to be applied

38. The approach to be adopted by the Court of Appeal in a case where, as here, fresh evidence has been heard is authoritatively established by the guidance of the House of Lords in *R v Pendleton* [2001] UKHL 66, [2002] 1 WLR 72 and, in particular, by the speech of Lord Bingham of Cornhill, with whom the other members of the House agreed.

39. Where it is submitted that an appeal should be allowed because of the admission of fresh evidence, the Criminal Appeals Act 1968 Act establishes a two stage process. First, for the purposes of an appeal or an application for leave to appeal, Section 23 empowers the Court of Appeal to order any witness to attend for examination and to be examined before the Court (whether or not he was called in the proceedings from which the appeal lies) if they think it necessary or expedient in the interests of justice; and to receive any evidence which was not adduced in the proceedings from which the appeal lies.

40. Second, Lord Bingham emphasised that the role of the Court of Appeal where fresh evidence has been heard is to apply the statutory test laid down by section 2(1) of the 1968 Act:

> "(1) Subject to the provisions of this Act, the Court of Appeal—
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case."

At [11], Lord Bingham made clear that the Court's task is the same whether it has received the fresh evidence or heard it *de bene esse*: it must then decide whether or not to allow the appeal.

41. At [17]-[29] of *Pendleton* Lord Bingham said:

> "17 My Lords, Mr Mansfield is right to emphasise the central role of the jury in a trial on indictment. This is an important and greatly-prized feature of our constitution. Trial by jury does not mean trial by jury in the first instance and trial by judges of the Court of Appeal in the second. The Court of Appeal is entrusted with a power of review to guard against the possibility of injustice but it is a power to be exercised with caution, mindful that the Court of Appeal is not privy to the jury's deliberations and must not intrude into territory which properly belongs to the jury.
>
> 18 Where the Court of Appeal has heard oral evidence under section 23(i)(c) (whether pursuant to its own decision, or by agreement, or *de bene esse*), the evidence will almost always have appeared, on paper, to be capable of belief and to afford a possible ground for allowing the appeal. By the time the court comes to decide whether the appeal should be allowed or dismissed, it will have heard the evidence, including cross-examination, and any submissions made on its effect. It may then conclude, without doubt, that the evidence cannot be accepted or cannot afford a ground for allowing the appeal. … The court

> may, on the other hand, judge the fresh evidence to be clearly conclusive in favour of allowing the appeal. Such might be the case, for example, if a witness who could not be in any way impeached testified, on oath and after all appropriate warnings, that he alone had committed the crime for which the appellant had been convicted. The more difficult cases are of course those which fall between these extreme ends of the spectrum.
>
> 19 It is undesirable that exercise of the important judgment entrusted to the Court of Appeal by section 2(1) of the 1968 Act should be constrained by words not to be found in the statute and that adherence to a particular thought process should be required by judicial decision. Thus the House in *Stafford v Director of Public Prosecutions* [1974] AC 878 were right to reject the submission of counsel that the Court of Appeal had asked the wrong question by taking as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury. It would, as the House pointed out, be anomalous for the court to say that the evidence raised no doubt whatever in their minds but might have raised a reasonable doubt in the minds of the jury. I am not persuaded that the House laid down any incorrect principle in Stafford, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty. But the test advocated by counsel in Stafford and by Mr Mansfield in this appeal does have a dual virtue to which the speeches I have quoted perhaps gave somewhat inadequate recognition. First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

42. It is salutary also to bear in mind the clear statement at [20] where Lord Bingham said:

> "In some of the authorities, the decision to allow an appeal is closely associated with the decision to order a retrial. This is understandable but wrong. If the court thinks a conviction unsafe, its clear statutory duty is to allow the appeal, whether or not there can be a retrial. A conviction cannot be thought unsafe if a retrial can be ordered but safe if it cannot. It is only when an appeal has been or is to be allowed because a conviction is

> thought to be unsafe that any question of a retrial can properly arise."

See also [39] where this last point is emphasised by Lord Hobhouse of Woodborough.

43. We also remind ourselves that the mere fact that Mr Khalifa Benjamin was acquitted of the charge he faced of participation in the Barrington Court Conspiracy does not provide any reason to hold (or to tend to find) that the appellant's conviction is unsafe. It merely means that the jury in Mr Benjamin's trial were not sure that he was guilty on the basis of the evidence and submissions they heard, which was materially different from the evidence and submissions heard by the appellant's jury: see *Andrews Weatherfoil Ltd* [1972] 56 Cr App R 31, 40 and *Burke* [2006] EWCA Crim 3122.

44. We bear these principles and guidance in mind at all times.

The parties' submissions

45. For the appellant, Mr Smith submits that Mr Khalifa Benjamin's fresh evidence is capable of belief and should be accepted. The prosecution's case against the appellant was that he was party to an exchange of a firearm at Barrington Court. That is contradicted by Mr Benjamin's evidence which has steadfastly been that there was no such exchange. He recognises that Mr Benjamin is not of previous good character, as he accepted in evidence, and that his first defence statement did not give the account that he now submits should be accepted as credible. He submits, however, that Mr Benjamin's explanation that he was afraid of repercussions for his brother if he were to say in his first defence statement is credible and plausible. In that context, his second defence statement and his evidence at his trial and to us that the meeting at Barrington Court was concerned with the provision of Class A drugs to him by Mr Barnaby is credible and would be capable of belief at a trial. On that basis, his evidence goes a long way to supporting the appellant's case that the meeting was not about firearms and that he was not concerned with any agreement about firearms. If that is right, Mr Smith submits that it is in the interests of justice for a jury to be permitted to hear that evidence. He submits that we should not be diverted or influenced by the cross-examination of the appellant on behalf of Mr Barnaby as there is no evidence, either from Mr Barnaby or otherwise, to support it. There is nothing strange or suggestive about the fact that Mr Barnaby and the appellant, having arrived together, left separately and went in different directions. That, submits Mr Smith, is explicable by the fact that Mr Barnaby lived South of the River and the appellant lived to the North.

46. For the Crown, Mr Maguire says that Mr Benjamin's evidence is not worthy of belief. Although Mr Benjamin has maintained that the meeting was not about guns, he has also said repeatedly that the purpose of the meeting was also nothing to do with looking at a car or car parts, since his clear evidence is that he did not speak to Mr Barnaby or the appellant about sourcing a car or car parts. Rather, the purpose of the meeting is now said by Mr Benjamin to have been about drugs, which directly contradicts the appellant's case that it was about car parts. If, as he now accepts, Mr Benjamin's account in his first defence statement that the meeting was about viewing a car was untrue, it is stretching credulity beyond belief to imagine that Mr Benjamin's lying account about viewing a car or car parts just happened to be the same as the appellant's account in his contemporaneous defence statement and evidence by coincidence. Furthermore, Mr Maguire submits that Mr Benjamin's new version of events being

based on a drugs deal and his reasons for not giving the drugs deal version are themselves incredible.

Discussion and resolution

47. The question is not whether Mr Khalifa Benjamin's evidence viewed in isolation is capable of belief. Nor is it whether a jury at a retrial presented with evidence including the evidence that Mr Khalifa Benjamin has given in his trial and before us might result in an acquittal. It is whether the appellant's conviction is safe. That involves looking at Mr Khalifa Benjamin's evidence in context, not in isolation.

48. The high point of the appellant's submission to us is that Mr Benjamin gave evidence that (a) there was no talk of or handing over of a firearm at Barrington Court and (b) he had a conversation or conversations with the appellant (summarised above) about a car or the possibility of supplying a stolen car in the future. However, in our judgment, these two features do not begin to scratch the surface of the real issues involved in the appellant's conviction.

49. It is plain beyond argument to the contrary that the appellant needed to explain why he went to Barrington Court with Mr Barnaby if not for the handover of the firearm and ammunition that was found in Mr Barnaby's taxi shortly after he and the appellant had parted company and gone their separate ways. If Mr Barnaby did not take delivery of the firearm and ammunition while at Barrington Court he must have had them with him when in the VW Polo on the way there, as the appellant accepted: see [25] above. The appellant accepted that he and Mr Barnaby were close and shared an interest in guns: see [22] above. It would therefore strain credulity to suggest that Mr Barnaby and the appellant went to Barrington Court with Mr Barnaby in possession the firearm but that they did not discuss or even mention the fact of that possession. So it was essential to provide an explanation for the appellant being on the journey and going into Barrington Court at all.

50. The explanation on which the appellant settled was about viewing a car. It was set out clearly in his defence statement: see [18] above at D and F. That remained his case at trial: see [23], [24] and [25] above. It was fundamental to his defence of the charges against him and was clearly disbelieved by the jury, which resulted in a conviction which, subject to the question of Mr Khalifa Benjamin's evidence, was unimpeachable and safe.

51. Seen in this light, the evidence of Mr Khalifa Benjamin as given at his trial and before us is extremely detrimental to the appellant's argument that his conviction is unsafe. That is because Mr Khalifa Benjamin on multiple occasions, while maintaining to the end that there was a conversation and, possibly, a showing of a photograph, gave evidence which contradicted the fundamental basis of the appellant's defence as we have just summarised it. His first defence statement supported the appellant's explanation about going to view a car: see [17] above. However, his second defence statement represented a complete change in the nature of his defence: see [27] above. No longer was the meeting at Barrington Court anything to do with cars – cars were not even mentioned. Instead, the explanation for the meeting was now said to be a drugs deal with Mr Barnaby delivering crack cocaine to Mr Khalifa Benjamin for him to sell in order to help his brother pay off a drugs debt. It does not matter whether the explanation he gave for changing his story (i.e. that he had been scared of repercussions

if he mentioned Mr Barnaby's involvement in drug dealing) is true. He maintained at his trial that his new version of events was true. Worse for the appellant, he maintained expressly that there was no other purpose for the meeting than in relation to drugs and that paragraphs 9 and 14 of his first defence statement were untrue. There was no plan for an acquaintance of Mr Khalifa Benjamin to bring the vehicle to Barrington Court; and, when the appellant and Mr Barnaby arrived, Mr Khalifa Benjamin was not waiting for an acquaintance to call him or to provide an update: see [30]-[32] above.

52. Before us, he again said that the reason for Mr Barnaby coming to Barrington Court was to drop off drugs, though he subsequently described this as the primary purpose. Despite some equivocation, which we have summarised in [37] above, he was clear in saying in re-examination that there had been no contact with either the appellant or Mr Barnaby about cars or car parts before they got into the Barrington Court garage: see [37 (ii)] above. Once again he accepted expressly that paragraph 9 of his first defence statement was a lie as there was no plan to bring a car to Barrington Court; and he accepted that, contrary to paragraph 8 of his first defence statement, it was untrue and a lie to assert that it had been arranged with Mr Barnaby that he would come to view a vehicle: see [37(iv) and (v)] above.

53. There is thus a virtually complete conflict between the appellant's (necessary) explanation for his going to and being at Barrington Court and Mr Khalifa Benjamin's insistence that the appellant's account of there being an arrangement for him to go Barrington Court to view a car or car parts is untrue. Given the scale of the conflict, the fact that Mr Khalifa Benjamin maintains that there was no arrangement or talk of firearms pales into insignificance when considering whether the appellant's conviction is unsafe. Where it matters, namely the providing of a plausible explanation for the appellant's presence at Barrington Court, the evidence of Mr Khalifa Benjamin does nothing to suggest that the conviction is unsafe. To the contrary, it supports the proposition (evidently accepted by the appellant's jury) that the appellant's explanation is untrue.

54. For these reasons, we are not remotely persuaded that the evidence of Mr Khalifa Benjamin renders the appellant's convictions on Counts 13 and 14 unsafe. We reach this conclusion without adopting a detailed analysis of the other aspects of his evidence, which we regard as relatively peripheral to the appeal. It does not matter whether there was a mention of cars at some point while the appellant and Mr Barnaby were at Barrington Court. What matters is that Mr Khalifa Benjamin's evidence contradicts the central tenet of the appellant's case on why he went there. Though we do not consider this to be a case of particular difficulty (in the sense meant by Lord Bingham in [19] of *Pendleton*) we consider that Mr Khalifa Benjamin's evidence, if given at the appellant's trial, could not reasonably have affected the jury's decision to convict. In our judgment it could only have served to provide further confirmation for their decision.

55. This appeal is therefore dismissed.