Neutral Citation Number: [2025] EWCA Crim 9

Case Nos: 202302976 B5
202400853 B5
202302993 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
Her Honour Judge Rafferty KC
T20227366

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2025

Before:

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

- -

Between:

REX

Respondent

- and -

(1) KAVIAN VAUGHANS
(2) ABDUL YARO

Appellants

- -
- -

Michael Holland KC (instructed by **SVS Solicitors**) for the **First Appellant**
Dhaneshwar Ram Sharma (instructed by **Sharma Law Solicitors**) for the **Second Appellant**
Nicholas Corsellis KC and **Polly Dyer** (instructed by **CPS)** for the **Crown**

Hearing date: 5 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 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:

1. On 2nd August 2023, in the Central Criminal Court before Her Honour Judge Rafferty KC the appellant Mr Vaughans, who was then aged 18, and the applicant Mr Yaro, who was then aged 19, were convicted of the murder of Mr Shea Gordon. On 5th February 2024, HHJ Rafferty sentenced both Mr Vaughans and Mr Yaro to Detention at His Majesty's Pleasure, with a minimum term of 21 years less 472 days spent on remand.

2. Mr Vaughans and Mr Yaro stood trial with two co-accused. Mr Witter Cameron and Mr Addae-Johnson were each acquitted of murder but convicted of manslaughter and sentenced to detention in a YOI for 8 years.

3. Mr Vaughans and Mr Yaro renew their applications for leave to appeal their convictions, leave having been refused by the single judge. In addition, Mr Vaughans appeals with the leave of the Single Judge against the sentence imposed on him. For simplicity, we shall refer to them throughout our judgment on conviction as the applicants unless it is necessary to identify which we are referring to at a particular moment.

4. At the end of the hearing on 5 December 2024 we reserved our judgment on both conviction and, as necessary, on sentence. This is the reserved judgment of the court, to which all members have contributed.

The facts

5. On 4th September 2022, having attended a birthday party held at the Epainos Church in Lichfield Road, London E3, the deceased, Shea Gordon, was fatally stabbed in the street outside. He was rushed to hospital but died from his injuries.

6. The Prosecution case was that Mr Witter Cameron had been invited to the party. He informed the other three co-accused via messages where the location of the party was and that the deceased was present. As a result, the applicants and Mr Addae-Johnson took a taxi to the location. They were all wearing face coverings and they were armed. The applicants attacked Mr Gordon in the street outside the party. He was fatally stabbed in the chest but managed to run a short distance into Morgan Road. He was chased by the group and stabbed again in the leg and collapsed.

7. To prove the case, the Prosecution relied on:

   i) Telephone calls between Mr Yaro and a male in prison, before the stabbing discussing a plan to attack someone and, after it, stating that both he and Mr Vaughans had been involved in the killing of Mr Gordon;

   ii) CCTV evidence of the build-up and aftermath (but not the stabbing itself), produced before the jury by DC Baxter, who opined that the applicants could be seen brandishing knives or items consistent with knives;

   iii) The arrival of the applicants and Mr Addae-Johnson at the location of the party, together in a taxi, wearing balaclavas;

   iv) Undisputed evidence of eyewitnesses in the area, a number of whom called the police due to fear, having seen the large group of young people outside the party,

people running, possible weapons being carried and black males wearing face coverings;

v) Evidence of a Ms Turner, who saw three males in masks and hoods, holding knives, walking purposefully past her house. She called the police;

vi) Ring doorbell footage and audio of the applicants leaving the scene and a brief discussion of the incident, and the contradiction between Mr Vaughan's evidence and his Defence Statement as to what was said.

8. The Defence case for Mr Vaughans was that he did not participate in or encourage any violence against the deceased. He did not have a knife. He saw an exchange of blows between the deceased and Mr Yaro outside the party, which must have been when the deceased received the fatal wound.

9. Mr Vaughans was the only one of the four defendants who gave evidence at trial. His evidence was that he was with his friends innocently at the location of the party when he saw Mr Gordon confront Mr Yaro. Mr Gordon threw a punch at Mr Yaro's chest. When he threw another punch, Mr Yaro blocked it and punched him back. Mr Gordon then ran off and everyone began to run. Mr Vaughans ran too. He did not have a knife in his hand, it was a phone, and he was not chasing Mr Gordon. He and his friends were not disguised; the balaclavas were a fashion accessory. He was not aware of any plan to confront anyone, nor was he aware that anyone had a knife initially. As everyone ran, he did then see Mr Gordon with a knife and another group of males with knives but he did not know who had stabbed Mr Gordon. He saw that Mr Addae-Johnson had been injured but others were helping him. He left the scene in a taxi with Mr Yaro who was injured, because he feared for his safety; but he did not speak to Mr Yaro about what happened. He found out that Mr Gordon had died through social media over the next few days. He got rid of his phone as people were pointing the finger at his group and he was stressed by the accusations. Following his interview by police, Mr Yaro had told him that he had stabbed Mr Gordon in self-defence.

10. Mr Vaughans also relied on the evidence of an anonymous witness who knew both Mr Gordon and the girl who organised the party. She described a 'one on one' confrontation between Mr Gordon and another male outside the party. She saw the other male stab Mr Gordon once and then everyone ran off in panic. She did not see Mr Gordon with a knife but did see the other male with a black handled knife. She did not know the other male.

11. The Defence case for Mr Yaro, who did not give evidence, was that he did not have any intention to attack anyone. He was confronted unexpectedly by Mr Gordon, who he did not know, and was stabbed in the chest by him. During the ensuing struggle, he picked up the knife that had fallen to the ground and instinctively struck out at Mr Gordon with the knife. He used the knife in lawful self-defence.

12. The other co-accuseds, Mr Witter Cameron and Mr Addae-Johnson, denied being involved in a plan to use violence against anyone or attacking anyone. Their case was that they were not armed and did not encourage anyone else to attack anyone. Neither gave evidence.

13. The issue for the jury was whether each of the co-accused unlawfully stabbed Mr Gordon intending really serious harm or intentionally assisted or encouraged others to stab him intending him to be caused really serious harm.

Mr Vaughan's renewed application for leave to appeal against his conviction

14. Ground 1 is that:

> "The judge erred in directing the jury that the evidence of recorded prison telephone calls between Mr Yaro and a third party were admissible against Mr Vaughans (as hearsay or otherwise) to demonstrate his role in the events leading to Shae Gordon's death."

15. In prison telephone recordings dated 4th and 5th September 2022, Mr Yaro admitted to a third party, a Mr Dahi, that he had stabbed Mr Gordon. He said he acted in self-defence as Mr Gordon stabbed him first to the chest. In the recording on 4th September 22, Mr Yaro said to Mr Dahi when discussing the stabbing: "I think KB done him up the worst still." Mr Dahi asked how and Mr Yaro replied: "Me drew the one ting. One ting…. He done man first in man's chest… boom…. He backed his ting (knife) first at my ting boom…."

16. It was the Prosecution's interpretation that the reference to KB should be to KV and that "he" was referring to Mr Vaughans. On this basis, Mr Yaro was describing Mr Vaughans inflicting the fatal wound. This was despite the fact that, at trial, Mr Yaro was accepting that he inflicted the fatal stab wound and contending that he did so in lawful self defence.

17. This evidence was clearly admissible against Mr Yaro; but Mr Vaughans applied to exclude it. The initial application was that the letters KB (or KV) should be replaced by "X". The application was opposed by the Prosecution who submitted, first, that the statements were not hearsay – relying on *R v Twist* [2011] EWCA Crim 1143; and, secondly, that if they were, they were admissible under s. 118(1) or 114(d). Mr Yaro remained neutral on the application. The judge recognised that the interpretation of what had been said by Mr Yaro was contested.

18. The judge ruled that the evidence should not be excluded. She was not sure that the evidence was hearsay against Mr Vaughans but she ruled on the assumed basis that it *was* hearsay to afford him the protections of the Criminal Justice Act 2003 ("CJA 2003") to ensure fairness. The judge considered the evidence to be admissible hearsay under s114(1)(d) CJA 2003. She paid close attention to the factors listed in s 114(2). The calls had high probative value in relation to important issues in the case. The jury could listen to the recordings and hear evidence as to the meaning of the words. The Defence would be able to challenge the evidence and put alternative interpretations before the jury. The prejudice was not such that the evidence should be excluded. The judge did not make any findings on s124 CJA 2003 at that stage.

19. Both in her written directions and in her oral summing up, the judge gave clear directions about how the Jury should approach the evidence of the prison calls. The written directions dealt with the issue at paragraphs 93-104, which are also relevant to Ground 2. They included:

> "93. You have heard evidence of prison calls between Mr Yaro and a third party. You have also heard evidence of Mr Yaro's defence statement. Thirdly Mr Holland KC has read to you an account from a witness read as part of his client's case.
>
> 94. It is argued by the prosecution that AY makes admissions about stabbing SG in the prison calls and incriminating remarks about the planning of the confrontation and what took place on the night. He also, the Prosecution argues, speaks about KV being involved in stabbing. …
>
> 95. The defence for Mr Yaro argues that he raises self defence in the calls. … ."

20. After directing the Jury that they must consider everything that Mr Yaro said in these calls, and that they must decide where the truth lies taking into consideration the whole of the contents of these calls when deciding the case in relation to Mr Yaro, the judge turned to the position of Mr Vaughans as follows:

> "97. In relation to the prison calls Mr Vaughans was not present. He disputes what Adbul Yaro says about him in these calls and he does not accept that he attacked SG at any time, or that AY is describing this in the calls. The interpretation put on the calls by the Crown is disputed by KV.
>
> 98. You must consider when you are analysing this evidence in relation to KV that it comes from AY who did not give evidence to you. You have not heard evidence from the other speaker on the calls.
>
> 99. You must consider what purpose AY may have had in making the statements in the calls to another. The prosecution argues that he was speaking to an associate and therefore had no reason to make things up about KV. KV says that the Crown has misinterpreted the calls and that AY is not describing KV getting involved and not incriminating him.
>
> 100. Mr Holland for KV has had no opportunity to challenge this evidence in cross examination and test it for accuracy, truthfulness, ambiguity, or misperception. You have not seen how any of the speakers on the calls would have responded to questioning. The evidence was not given on oath. You have not seen the manner (or demeanour) of the person giving the evidence.
>
> 101. You must consider whether what AY said was reliable in relation to KV given the other material you have which is said to be inconsistent.
>
> 102. You will consider his defence statement and what was said in the account by the absent witness."

21. The judge then explained the legal requirement for Defendants facing contested charges to file defence statements setting out the nature of their case and what they do and do not dispute. She continued:

> "103. AY's defence statement did not implicate KV. The absent witness sees only one attacker in her account. You will consider what effect this has on your view of the reliability of AY's account in the prison calls about KV.
>
> 104. You have heard a summary of statements made in Abdul Yaro's defence statement in evidence. This is relied on by KV to demonstrate an inconsistency with the prison calls. What Mr Yaro says in his defence statement is argued to be inconsistent with the content of the prison calls as interpreted by the Prosecution. I will remind you of the evidence due course."

These directions were repeated in part 1 of the oral summing up.

22. Before us, Mr Holland KC submits that these directions did not provide a sufficient safeguard against the potentially prejudicial effects of an interpretation adverse to Mr Vaughans.

23. The Prosecution responds that the judge adopted the more precautionary approach by treating the evidence as hearsay and that *R v Thakrar* [2010] EWCA Crim 1505 is directly analogous to and supportive of the approach adopted by the judge.

24. Refusing leave, the Single Judge said:

> "It is not arguable that the trial judge was wrong to admit the Yaro-Dahi telephone evidence as hearsay evidence of what happened, including as to who was involved, who did what during the confrontation, who was armed with knives, who was proximate to whom when the deceased was stabbed. Yaro's comment, "I think KV's done him up the worst though", was evidence against you that came in an apparently spontaneous and candid conversation between friends so as to be capable of being considered credible by the jury. It is not contradicted by Yaro's next comment ("Even me doing one ting, one ting … he's done man first in man's, in man's chest, boom, but he backed his ting first at my ting, boom") even if, as is submitted on your behalf, "he's done man first in … man's chest" means Shea Gordon ("he") attacked Yaro ("man") and what Yaro did (the "one ting, one ting") was a (possibly defensive) response. The learned judge gave proper consideration to the factors required by s.114(1)(d) of the Criminal Justice Act 2003. The jury were able fairly to evaluate Yaro's comments, alongside the evidence you gave in your own defence, and Yaro's decision not to give evidence. There was no unfairness in the trial in the admission of this evidence."

25. We note in passing that the single judge's reference here to s. 114(1)(d) should, in context, have been a reference to s. 114(2). Subject to that, in our judgment, the Single Judge was right to refuse leave on Ground 1 for the reasons he gave. Nothing in the submissions of Mr Holland today persuades us that the judge's approach, treating the evidence as hearsay and paying close regard to the matters listed in s. 114(2) was wrong in principle. Nor do we consider it arguable that her exercise of her discretion to admit the evidence, having applied the correct approach, was not one that she was fully entitled to reach, for the reasons she gave. Her directions to the Jury, which we have set out extensively above, were clear and correct and, in our judgment, amply sufficient to guide the Jury as they considered the significance of the prison calls. They were also conspicuously even-handed in relation to Mr Yaro and Mr Vaughans, reminding the jury of the potential weaknesses of the evidence and the inconsistency between the evidence and Mr Yaro's Defence Statement. We are unable to accept that there was even arguably any error of principle in the judge's approach to the exercise of her discretion; and her directions to the Jury were sufficient to ensure that no unfairness ensued.

26. Ground 1 is unarguable.

27. Ground 2 is that;

> "Having ruled that the extracts were admissible, the judge erred in ruling that the appellant could not adduce Mr YARO's Defence Statement in full to undermine or contradict the statement upon which the prosecution relied. This document was argued to be admissible under s.124 Criminal Justice Act 2003 or as a confession by YARO against his interest (ie that he was responsible for the fatal injury). Applications to adduce the Defence Statement were made when the prison calls were read to the Jury as part of the prosecution case; as part of the appellant's own defence case; and after YARO finally indicated he would not give evidence. It is submitted that the judge wrongly permitted only an extract be adduced and limited the terms of the extract;"

28. Mr Yaro's Defence Statement included the following:

> "12. Whilst walking around for the party venue and "girls" the Defendant heard someone say, "Yo", this was Shae Gordon, "SG".
>
> 13. The Defendant turned to his left and saw someone he had never met before, this person he now knows to be, "SG".
>
> 14. When the Defendant turned left; he saw, "SG'S" eyes "locked" onto him, who was some two and half feet away from him.
>
> 15. SG asked the Defendant, "Where are you from?"

> 16. As the Defendant told SG, "Tottenham"; SG got closer and without the Defendant realising (as it happened so fast) he felt a punch in his chest.
>
> 17. As SG brought his hand back down, the Defendant saw a flick knife, in his hand and at this point the Defendant realised he had been stabbed.
>
> 18. The Defendant then saw Shae Gordon moving towards him again, he was still holding the knife, and tried to stab the Defendant again.
>
> 19. The Defendant took hold of his wrist, at this point they struggled, and another knife fell from SG's pocket.
>
> 20. The Defendant picked up the knife and as SG came towards him to stab him again, the Defendant stabbed him once.
>
> 21. The Defendant will say, this is when Shea Gordon ran off.
>
> 22. During the incident with SG, the Defendant will say, KV and GAJ were to his left.
>
> 23. The Defendant will say, without him instructing or encouraging anyone, others began to run after, SG."

29. In the light of the judge's admission of the evidence about the prison calls, Mr Vaughans submitted in writing and orally on 18 July 2023, after the conclusion of witness evidence, that Mr Yaro's Defence Statement should be admitted pursuant to the provisions of s. 124(2)(b) CJA 2003. Mr Vaughans submitted that the Defence Case was inconsistent with the prosecution's interpretation of the evidence of the prison calls because (a) it averred that it was Mr Yaro who had stabbed Mr Gordon, (b) there was a single (serious) stab wound; and (c) At the time Mr Yaro stabbed Mr Gordon, Mr Vaughans was to Mr Yaro's left with no suggestion that Mr Yaro saw Mr Vaughans stab Mr Gordon or join Mr Yaro in stabbing Mr Gordon. On that basis the Defence Statement was evidence which (if Mr Yaro had given evidence about the prison calls) would have been admissible as relevant to his credibility as a witness.

30. It appears from Mr Holland's skeleton argument in support of the submission that the prosecution was submitting that what "should not take place is for the Court to allow for [Mr] Yaro's Defence Statement asserting self defence to be set out before the jury given that he has exercised his right to silence".

31. While retaining an ostensibly neutral stance, Mr Yaro supported Mr Vaughan's central submission that the terms of the Defence Statement were plainly inconsistent with the Crown's suggested interpretation of the prison calls and that no one could have objected if, had Mr Yaro given evidence about the prison calls, he had been cross-examined on the basis of the Defence Statement. That said, Mr Yaro submitted that if the Court acceded to Mr Vaughan's explanation, the evidence to be admitted must include paragraphs 12 to 23 of the Defence Statement, which we have set out above, because "by so doing, the absence of any suggestion by [Mr Yaro] of any violence on the part

of [Mr Vaughans] is set in its proper context as part of his narrative of events." Mr Yaro's written submissions are dated 19 July 2023 and state that they were prepared at the invitation of the court.

32. The exact sequence of events is not entirely clear. However, we have a transcript dated 18 July 2023 where the judge considered the admission of the defence statement. It appears from the transcript that the application being considered at that point was primarily an application to admit the evidence of another (unnamed) witness, to which we will return later. The judge decided to admit the evidence of that witness and then said:

> "I should also say at this stage that I am not going to accede to Mr Holland's application at this time to adduce your client's defence statement under section 124. I am of the view that should your client not give evidence and not be questioned, then there may or could be or might be or possibly is a very strong application under the provisions of the Criminal Justice Act (2003) for parts of that statement to be admitted. However, at this present, I do not adjudicate on that issue finally as potentially available evidence is still ongoing."

33. What is clear is that the judge subsequently revised her approach to Mr Vaughans' section 124 application. We have referred already to the fact that the written submissions on behalf of Mr Yaro were dated 19 July 2023. On the same day, Mr Holland submitted a further skeleton entitled "Consequence of Indicative Ruling Regarding Yaro Defence Statement" which said:

> "1. It is understood the Court has ruled that the defence statement of Abdul Yaro is capable of being adduced in some form under s124 CJA (reasons not set out here.
>
> 2. The purpose of s124 is to allow inconsistency to be adduced.
>
> 3. A summary which sets out what Mr Yaro did not say does not In our submission provide evidence of inconsistency: rather it goes no further than a failure to repeat what the prosecution rely upon.
>
> 4. The defence propose that the following summary identifies inconsistency in a way which is in accordance with the Court's concern that AY's defence of self defence should not be advanced through Vaughans response under s124.:
>
> *It is agreed that Abdul Yaro served a defence statement which gave an account of events outside the church hall. The details of that account are not admissible before the Jury in the circumstances where Abul Yaro has not given evidence.*
>
> *It is agreed that the account he gave is inconsistent with the interpretation the prosecution give to Abdul Yaro's words*

> *adduced from recorded calls in which he spoke to people in custody.*
>
> *In particular Abdul Yaro accepted that he and Shea Gordon were the ones who were involved in stabbing each other outside the Church Hall. He did not suggest that Kavain Vaughans was involved in any violence with Shea Gordon at any time when he (Yaro) was present.*
>
> 5. Should the Court rule that this summary is not to go before the Jury then the only summary which may go before the Jury it that proposed by the prosecution. Should the Court rule that is the limit of what may go to the Jury the defence for Kavian Vaughans will seek to adduce that summary by whatever evidential means is open to the defence for KV An agreed fact that the account of Mr Yaro was inconsistent with the prosecution interpretation given of Mr Yaro's prison calls is still sought."

34. The reference to a summary proposed by the prosecution was in the following terms (in a document we shall refer to as Q214):

> "In his defence statement submitted to the Court AY did not address the calls of the 4.9.22. He set out that "During the incident with SG, KV was to his left." He did not suggest that KV was involved in the violence."

35. We have not been able to identify an equivalent statement in any document conventionally entitled "Agreed Facts" or similar. When pressed on whether this was an agreed fact, Mr Hollands tended to equivocate saying that it was "the best he could get". We can readily accept that there would have been a process of negotiation between the parties as to what should or should not be included; and we take Mr Holland's answer as confirmation that Q214 was the summary or statement to which the judge was referring at paragraph 104 of the written legal directions.

36. Ultimately the issue was dealt with by the judge at paragraphs 103 and 104 of the written legal directions, which we have set out above. In her oral summing up of this area of the case the judge said (at 18G of the transcript) that the jury had "heard recently in an agreed fact details of Mr Yaro's defence statement." This went slightly further than what was said in paragraph 93 of the written directions which said that the jury had "heard evidence of Mr Yaro's defence statement." Shortly thereafter, the judge in her oral summing up repeated what was in paragraph 104 of the written directions in saying to the jury "you have heard a summary of the statements made in Abdul Yaro's defence statement in evidence."

37. For completeness, we set out section 124 in full. It provides

> "(1) This section applies if in criminal proceedings—
>
> (a) a statement not made in oral evidence in the proceedings is admitted as evidence of a matter stated, and

> (b) the maker of the statement does not give oral evidence in connection with the subject matter of the statement.
>
> (2) In such a case—
>
> (a) any evidence which (if he had given such evidence) would have been admissible as relevant to his credibility as a witness is so admissible in the proceedings;
>
> (b) evidence may with the court's leave be given of any matter which (if he had given such evidence) could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party;"
>
> (c) evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself.

38. Section 124 was recently considered by a different constitution of this court in *R v BOB and others* [2024] EWCA Crim 1494. At [7] the Court said:

> "The purpose of section 124(2) is to enable evidence which tends to undermine the reliability of the hearsay statement to be adduced before the jury to enable them to assess its reliability. This encompasses any evidence relevant to credibility (abrogating the common law rule as to the finality of answers in cross-examination on issues of credit only) and any other statement made by the maker of the statement which is inconsistent with it. If the existence of material undermining the credibility of the maker of the statement or a previous inconsistent statement by that person were invariably a reason for excluding the statement section 124 would not be necessary."

39. Before us, Mr Holland says that, once the prosecution had been held entitled to rely upon Mr Yaro's statements that are the subject of Ground 1, Mr Yaro's Defence Statement was or became relevant and admissible pursuant to s. 124 CJA 2003 and that there was no discretion in the judge to refuse to admit it.

40. The Crown's response is that the judge was right not to allow the Appellant to deploy Mr Yaro's defence statement under section 124 of the CJA. If the application was allowed it would have created an inappropriate pathway where a defendant not giving evidence could have an unsworn and self-serving statement to be placed before a jury. In any event, Mr Yaro's defence statement was in fact silent on the actions of Mr Vaughans save to say that he was to Mr Yaro's left, which was included in the summary at Q214. It was also made clear in front of the jury on Mr Yaro's behalf that his case was that he had stabbed the deceased to the chest (not Mr Vaughans)

41. Refusing leave on Ground 2, the Single Judge said:

> "There was no error or unfairness in the trial judge's refusal to allow counsel on your behalf to put Yaro's Defence Statement in evidence. The possible purpose in adducing that Defence Statement would have been to contrast it with the "KV's done him up worst though" comment (above), because it (the Defence Statement) did not make an allegation that you inflicted violence upon Shea Gordon. But the jury were made well aware that Yaro's position in the criminal proceedings was that (a) he inflicted the fatal stab wound to Shae Gordon's chest, and you did not, but (b) he (Yaro) was acting in self-defence in doing so. It would have added nothing for the jury to know that that was indeed Yaro's position in the criminal proceedings because he had said as much in a written court document."

42. Three questions arise. The first is whether s. 124 made Mr Yaro's defence statement admissible on the basis that it undermines the credibility of Mr Yaro in relation to what he said about "KB done him up worst" i.e. the suggestion (according to the prosecution) that he was referring to Mr Vaughans when he said what he did in the conversation that is the subject of Ground 1. If that first question is answered in the affirmative, the second question is whether all or only part of Mr Yaro's defence statement was rendered admissible. The third question is then whether the Jury were given what they should have been given pursuant to section 124 and, if not, whether that matters.

43. We are satisfied that Mr Yaro's defence statement was at least potentially admissible pursuant to section 124(2)(b). The main thrust of the defence statement (including, in particular, paragraphs 12-23) was inconsistent with the interpretation being placed by the prosecution on the prison calls because the defence statement said nothing to implicate Mr Vaughans as being involved with the stabbing of Mr Gordon and accepted that it was Mr Yaro who had stabbed Mr Gordon in the chest. To the extent that it was inconsistent with the prosecution's interpretation, therefore, it was relevant to the credibility of Mr Yaro in having said or meant (if he did) that Mr Vaughans inflicted the fatal wound.

44. That said, we reject that submission that section 124 deprived the judge of any discretion about whether and, if so, how the purpose of section 124 should be implemented. On the face of section 124(2)(b) it is plain beyond argument that the Court has a discretion because evidence falling within the subsection may only be admitted "with the Court's leave". Those words would be irrelevant and unnecessary if the Court had no discretion about whether to give leave or not. What mattered was that the jury should have the substance of the evidence which tended to undermine the reliability of the hearsay statement to be adduced before the jury so as to enable them to assess its reliability. The answer to the second question we have posed above is therefore that section 124 rendered admissible evidence from the defence statement which tended to undermine the reliability of (the prosecution's interpretation of) what Mr Yaro said in the prison calls. However, the Court retained a discretion about how that evidence should be presented to the jury.

45. It appears from Mr Holland's further skeleton that the judge was concerned that Mr Yaro should not have a "free run" by the putting in of his account of acting in self-defence in circumstances where the prosecution would not be able to challenge his account because he did not give evidence. We consider that she was right to have that

concern and therefore right in her discretion to look to the essential elements of the inconsistency between the prison calls and the defence statement and to ensure that those essential elements were placed before the jury in a way that did not give Mr Yaro his "free run".

46. In our judgment the essential elements of the inconsistency between the two statements were, first, that the defence statement did not implicate Mr Vaughans in the violence and, second and more tenuously, that he was standing to Mr Yaro's left. We consider this second aspect to be more tenuous because the defence statement did not say how far to his left Mr Vaughans was during the incident. We accept, however, that it was properly left to the Jury as it could support the inference that Mr Vaughans was at some remove from where the fatal stabbing took place. Once it is accepted that the judge had a discretion under section 124(2)(b) and that these were the essential elements of the inconsistency, ground 2 is immediately seen to be unarguable. Both Q214 and paragraphs 103 and 104 of the written directions (and the oral summing up) placed the essential inconsistency clearly before the Jury for their consideration. That was a justifiable (and, in our view, plainly correct) exercise of the judge's discretion because it steered the correct path between the dangers of giving Mr Yaro a "free run" on the one hand and failing to protect Mr Vaughans by not drawing the jury's attention to the inconsistency between the prosecution's interpretation of the prison calls and the defence statement on the other.

47. It is instructive to consider whether the actual treatment of the issue differed materially from that suggested by Mr Holland in his further skeleton, which we have set out above. It is not arguable that the jury did not know and fully appreciate the significance of defence statements or that the defence statement gave an account of what had happened outside the church hall or that they were entitled to rely upon what they knew of Mr Yaro's defence statement to demonstrate and inconsistency with the prison calls, as those were all covered at pages 18-20 of the summing up. The first paragraph suggested by Mr Holland would add nothing material.

48. Turning to the second paragraph suggested by Mr Holland, the judge's directions to the jury did not state that it was agreed that the account given by Mr Yaro in the defence statement was inconsistent with the prosecution's interpretation of the prison calls. The question of inconsistency (and what weight to attribute to any inconsistency they found) was a matter for the jury to decide. Paragraph 104 of the written legal directions identified the issue clearly for the Jury. It is not arguable that the failure to refer to the fact of the inconsistency being agreed could have misled the Jury or that it is capable of rendering (either on its own or in aggregate with any other point) the conviction unsafe.

49. Turning to the third paragraph, the Single Judge was right to identify that the Jury were made aware that Mr Yaro's case was that (a) he inflicted the fatal wound and Mr Vaughans did not, and (b) he was acting in self defence when he did so. The Jury therefore knew and could not have been in any doubt that Mr Yaro accepted that he and Mr Gordon were the ones who were involved in stabbing each other. The first sentence of the third paragraph therefore adds nothing. That leaves the second sentence which was covered by the first sentence of paragraph 103 of the legal directions and the terms of Q214.

50. While not determinative, this comparison reinforces our view that the judge presented the essential elements of the argued inconsistency fully and fairly while avoiding giving Mr Yaro his "free ride".

51. For these reasons, which include the substance of the reasons given by the Single Judge, Ground 2 is not arguable.

52. Ground 3 is that:

> "The judge erred in refusing to allow the appellant to call an expert witness in relation to the interpretation of street slang to give an alternative translation of the hearsay statements in the prison calls to that relied upon by the prosecution expert (*PGs, 58-60*)".

53. The Defence expert had produced a report (M55) and an addendum report (M187). We have read them both. The Crown accepts that the defence expert was qualified to help with specific street slang words. An agreed lexicon was provided to the jury. The Crown submits that the defence expert was not qualified to explain what he thought the people on the telephone call meant by their words. That was not expert evidence but a matter for the jury to interpret words in English and how they had been used.

54. The main report went far beyond the remit of an expert expressing an opinion on the meaning of slang words and went into wholesale expression of his opinion about how the incident came about, who was culpable and who was not. As a whole it was clearly inadmissible. The addendum report (M187) specifically addressed the conversation that is the subject of ground 1. In it, the expert again went far beyond indicating the meaning of particular words and gave his opinion about what Mr Yaro was talking about and what he meant during the recorded exchange.

55. There is no transcript of the judge's ruling, but the nub of it appears from Counsel's note. Referring to the conversation that is the subject of Ground 1, she said that "the dispute is over whether "he" means Mr Vaughans or Mr Yaro. This is a matter for the jury not an expert. The words are clear but interpretation may not be. There are two interpretations for the jury to decide on."

56. Refusing leave, the Single Judge said:

> "The interpretation of Yaro's comments was a matter for the jury, informed (where necessary) by expert evidence of street slang / dialect meanings of words where they were considered outside the ordinary common knowledge of jurors."

57. The judge and the Single Judge were right to draw the distinction between (a) the provision of a lexicon of words that might not otherwise be understood by the jury; and (b) giving the expert's interpretation of what Mr Yaro meant when using those words in the context he did. The former would be and was admissible evidence; the latter was not.

58. Ground 3 is not arguable.

59. Ground 4 is that:

> "The cumulative effect of Grounds 1 to 3: It is submitted that the prejudice to the appellant was cumulative, in that the appellant was deprived of expert support for the proposition that [Mr] Yaro was describing himself acting in self-defence, as well as being denied the ability to marshal [Mr] Yaro's Defence Statement to the same effect."

60. The Respondent submits that Mr Vaughans was able to comment on the "allegation" made by the prosecution against him on the basis of the prison calls. Firstly, he said in his evidence in chief that Mr Yaro was not talking about him and that Mr Yaro had told him in custody that he was referring to himself (Mr Yaro) acting in self defence. Secondly, he denied that Mr Yaro was referring to him, saying that he was referring to a person called KB.

61. Refusing leave, the Single Judge said that because there was no arguable merit in any of grounds 1-3 there is no arguable merit in Ground 4. We agree that Ground 4 adds nothing. Mr Vaughans was not "deprived" of expert support: there was no admissible expert support to be deprived of. Marshalling Mr Yaro's defence case statement would, for the reasons we have given, have added nothing.

62. Ground 4 is unarguable.

63. <u>Ground 5 is that:</u>

> "The Judge ruled that the CCTV officer should be limited to identifying sequences of footage which were consistent with the appellant holding a knife. In evidence before the jury the officer repeatedly expressed her opinion that she believed the appellant could be seen holding a knife. The officer failed to disclose at the time of the admissibility argument and giving of the evidence that she had received an e-mail (which had not been placed in the material to be considered for disclosure) in the terms subsequently agreed to indicate the footage was of insufficient quality to reliably identify objects in hands;

64. CCTV showed around eight youths running ahead of Mr Gordon into Alloway Road. After Mr Gordon came Mr Witter-Cameron closely followed by Mr Vaughans. They then ran down that road and turned into Morgan Street. As well as Mr Gordon, Mr Yaro and Mr Addae-Johnson suffered stab injuries.

65. There was limited witness evidence about the presence or use of knives. DC Baxter was the CCTV officer. She was permitted, after legal argument to exclude her opinion, to give evidence that she could see an item consistent with a knife in the hands of both Kavian Vaughans and Abdul Yaro on the CCTV enhanced footage. Having given her ruling the judge outlined the direction that she intended to give (and in due course gave) to the jury about the limitations of DC Baxter's evidence and how they should approach it.

66. In fact, in evidence DC Baxter said that she could see a knife in Mr Vaughans' hand. DC Baxter's evidence that she could see a knife (rather than limiting herself to saying

that she could see and item consistent with a knife) was a breach of the judge's ruling. She was extensively cross-examined.

67. An email from the laboratory was disclosed after DC Baxter had given her evidence which said that the laboratory "cannot comment on an object a subject might (or might not) be holding". It was not within their remit of expertise. The email stated that the "quality of the imagery provides limitations for reliable comment". There was no request for DC Baxter to be recalled in the light of the late-disclosed email. The terms of the email were included as agreed facts.

68. The judge provided a detailed written direction on how the Jury should approach DC Baxter's evidence. In the course of that direction she said:

> "28. The officer's viewing of the CCTV evidence is not an expert view – they are simply her observations on the footage that we all have seen. You are as capable of watching it and drawing your own conclusions and this is what you must do. The witness was, you may think, of great assistance in directing you to relevant parts and features of the footage. You can and should take account of the officer's evidence, but it should be your views of it and all the other evidence in the case that you ultimately rely on.
>
> …
>
> 30. There are however some areas of dispute. The first relates to the question of whether KV and AY had knives. It is not accepted that the CCTV shows that they did."

69. In addition she gave clear directions about particular aspects of the CCTV evidence: fast movement can cause blur; CCTV footage is 2-dimensional; she specifically reminded the jury that they should take into account the agreed facts about what DC Baxter was told by the laboratory when they were assessing the question of knives. The judge went on to direct them that:

> "When you are viewing the CCTV you must take into account the following factors:
>
> …
>
> (4) Regarding the question of knives, you must decide whether the quality of the footage is or is not good enough for a fair comparison to be made. If you decide it is not then you must ignore DC Baxter's evidence and not make any comparison of your own.
>
> (5) However, if you are satisfied that the quality of the footage is good enough for a fair comparison to be made then you must decide whether, taking account of Ms Baxter's evidence and your own observations of the CCTV, whether there is an object in either KV or AYs hand and whether that it is a knife."

70. The judge repeated these directions orally in the first part of her summing up at pages 8-9, reminding them at the end of that section of her written directions that it was a matter for them to decide.

71. In due course, when summing up DC Baxter's evidence at pp 57-58, the judge reminded the jury three times to remember and apply the legal direction she had given them. She repeatedly referred to DC Baxter's evidence being that she had seen things on the CCTV that she regarded as "consistent with" Mr Vaughans holding a knife and to having been challenged by Mr Hollands when she said she had seen knives. At the conclusion of the section of her summing up DC Baxter's evidence she reminded them once again of the need to comply with her directions, the substance of which we have set out above.

72. The prosecution submit that, in circumstances where Mr Vaughans accepted that he had an object in his hand that projected light, the jury could safely be left to decide for themselves whether it was a phone or a knife.

73. In refusing leave, the Single Judge said:

> "It would have been better for counsel and (if necessary) the trial judge to have given the CCTV officer more help, during her examination, to avoid expressing answers in a way that may have included her own opinion on whether what could be seen in any given footage, or still image, was a knife. But I do not consider it arguable that the jury could have failed to understand that it was for them and them alone to assess how much could or could not really be ascertained from the CCTV footage, particularly after the admission as agreed evidence of the forensic laboratory's scientific opinion as to the quality of the images. The fact that that laboratory opinion came to light and was admitted into evidence only after the CCTV officer had given evidence does not arguably create any unfairness."

74. We agree. The email from the laboratory did not undermine DC Baxter's evidence completely: it merely referred to "limitations" for reliable comment. It was therefore for the Jury to decide whether, despite those limitations, DC Baxter's comments were useful for them as an aid to their deliberations. While it would have been better if DC Baxter had not at any stage slipped from merely saying "consistent with", the Jury can have been left in no doubt that it was for them to form their own view about what the CCTV showed and that they should only have regard to DC Baxter's evidence to the extent that they agreed that her observation or observations were sound. The combined effect of the written directions and the judge's repeated reference back to those directions removed any potential for unfairness based on misunderstanding of the status and limitations of DC Baxter's evidence.

75. Ground 5 is unarguable.

76. <u>Ground 6 is that</u>:

> "The judge erred in permitting the prosecution to adduce, in cross-examination of the appellant, a "Ringo" doorbell audio

> recording and to leave this recording with the jury during their deliberations when the learned judge had previously excluded the same recording in the prosecution case, following a voir-dire, on the basis that expert evidence commissioned by the prosecution found that the audio quality of the recording was insufficient to allow safe interpretation (*PGs, 39-46, 64*).

77. CCTV showed Mr Vaughans and Mr Yaro leaving Morgan Street shortly after midnight. As they passed a "Ringo" doorbell, some audio footage was recorded. It is accepted on all sides that the quality of the audio reproduction was poor, with the result that a number of different assertions were made about what could or could not be heard to be said as they passed by. The poor quality of the audio was the subject of expert evidence from Dr Earnshaw, the expert instructed by the prosecution. It was an agreed fact that her opinion was that the quality of the audio recording was low and that, even in the enhanced version, it was not suitable for voice interpretation.

78. In his Defence Statement, which was prepared and served before Dr Earnshaw's report and all other purported interpretations of the audio were available to him, Mr Vaughans said that Mr Yaro had said to him words to the effect "did I kill him" and that he had said "let's go man come". It was common ground that shortly after passing the Ringo site, Mr Vaughans and Mr Yaro left the area in a taxi.

79. In a ruling on 7 July 2023 (Y13) the judge ruled that, because of problems attributable to the quality of the recording, the audio recording should not be played to the jury as part of the Crown's case. Her reasoning, which is not criticised, was that to play the audio at that stage would be to invite the jury to speculate about what was being said because they could not hear it clearly.

80. As explained in Mr Vaughans' grounds, when Mr Vaughans gave evidence he said that he did not recall saying anything when leaving the scene. The prosecution cross-examined him about the content of his Defence Statement (which, as we have said, was served before Dr Earnshaw's report and transcript had been disclosed) and whether, as they passed the doorbell, Mr Yaro had asked if he had killed him and Mr Vaughans had said "Let's go man come." Mr Vaughans accepted that he had put this in his Defence Statement but said that he had no recollection of the words spoken and was explaining what others had said could be heard: summing up pages 60H-61F. This was characterised by the prosecution as a deliberate lie to the Jury.

81. Following Mr Vaughans' evidence in chief the judge permitted the prosecution to play the 'indecipherable' audio to the jury several times, with the Jury using headphones provided to them. Mr Vaughans relies upon the fact that, having done this, they were directed by the judge [summing up page 60E],

> "You know that Dr Earnshaw deals with the legibility of the audio recording in her agreed facts and this is a legal direction, members of the jury, what you must not do is go on an amateur deciphering exercise of your own on the audio part of the footage. It would not be right for you to replace what you have heard in evidence with your own opinion as to what you think that you can hear. That would not be fair and not a proper approach to this evidence."

82. Mr Vaughans now submits that playing the Ringo audio to the Jury was unfair for the reasons that had previously led the judge to exclude it as part of the prosecution case.

83. The prosecution submits that the evidence was properly admitted because of evidence given by Mr Vaughans in chief. In examination in chief, Mr Vaughans said there was no conversation between him and Mr Yaro as they left the scene. The footage showed that there was. However, the Appellant was given a chance to amend that position in cross-examination without any point to be taken, given his age and the pressure of the trial. He maintained his position. He had accepted in his defence statement that he and Mr Yaro had discussed the killing when they had passed the Ringo doorbell. He was therefore shown his defence statement (not read out) to refresh his memory. He maintained that he could not remember if anything was said. The real evidence then became admissible to remind him of what had happened. When it was played to the Appellant - without a suggestion as to what words could be heard - he said that it was Mr Yaro asking him if he had killed someone and that the Appellant said "Let's go". In other words, having had his memory refreshed, he reverted to what he had said in his Defence Statement.

84. The prosecution submission is supported by the passages of the summing up immediately before and after the passage cited by Mr Vaughans as set out above. His acceptance that Mr Yaro was asking him if he had killed someone led to further cross-examination to the effect that there was a discussion between them about what had happened and his final acceptance that there had been such a discussion along the lines set out in his Defence Statement.

85. Refusing leave on this ground, the Single Judge said:

> "The learned judge's ruling that the Ring doorbell audio was not to be admitted as part of the prosecution case was logical and correct. It could only have been a proper part of the prosecution case, prior to some other relevance emerging (if it did) from any evidence that you (or Yaro) might give, if the content could satisfactorily be made out and was relevant. However, your denial in evidence that there was any conversation between you and Yaro as you left the scene of the incident rendered that audio relevant as evidence that the two of you did speak, and spoke about what had happened (even if precisely what you were saying could not be made out); furthermore, as the learned judge said in her ruling, a poor quality recording that might be unintelligible to someone who was not one of the persons speaking might aid the recollection of or be intelligible to those persons. The prosecution's inability, as part of its case, to put before the jury without your (or Yaro's) assistance an arguably reliable account of what was said between you in the Ring doorbell audio therefore did not make it improper for them to play the audio to you as part of exploring and testing your evidence; and having in that way introduced the audio properly into the trial, I do not consider it arguable that the jury should not have been allowed to listen to it again when deliberating, when they would be evaluating amongst other things what you said in answer to questions about it.

86. We agree with the single judge for the reasons he gave. In our judgment it was not unfair to cross-examine Mr Vaughans about whether there was a conversation between him and Mr Yaro in the vicinity of the Ringo equipment and, if so, what that conversation was. That became relevant because he had departed relevantly from the terms of his Defence Statement. The judge's warning to the Jury was clear and sufficient to remove any residual risk of speculation. In our judgment it is not reasonably arguable that the judge's decision to permit the use of the audio in this way rendered Mr Vaughan's conviction unfair.

87. Ground 6 is unarguable.

88. We have not simply looked at the individual grounds of appeal. We have attempted to stand back and consider them both singly and cumulatively in context. For that purpose we have re-read all of the materials placed before us, including the impeccable legal directions and full and fair summing up by the trial judge. The broad context is that one of the four co-accused called the other three (including Mr Vaughans and Mr Yaro) to the party and informed them that Mr Gordon was there. They came together in clothing that disguised their identity. Mr Yaro always maintained that he was the one who had inflicted the chest wound that killed Mr Gordon, but said he had acted in self-defence. There was a wealth of evidence for the jury to consider and form their views about.

89. Mr Vaughans gave evidence denying that there was any plan to inflict any sort of violence and asserting that he was an innocent bystander holding his telephone, as opposed to a knife, in his hand. He denied that Mr Yaro was talking about him in the prison calls saying that he (Mr Yaro) was referring to a person called KB. He advanced Mr Yaro's defence for him that he had acted in self defence, denying that he was involved. He accepted that Mr Yaro had asked him if he had killed a person in the Ringo bell evidence but said it was a question from Mr Yaro to which he did not reply. The jury obviously rejected his account despite having, as we have said, impeccable legal directions and a full and fair summing up.

90. Standing back, we are not close to being persuaded that any of Mr Vaughans' criticisms have substance or could reasonably be found to render his conviction unsafe. For these reasons, which are substantially the same as given by the Single Judge in refusing leave, we consider that Mr Vaughans' intended appeal is unarguable and would be bound to fail. We therefore refuse Mr Vaughans' renewed application.

Mr Yaro's renewed application for leave to appeal against his conviction

91. There is one ground of appeal, for which leave was refused by the Single Judge and which is now renewed before us. The ground as fully set out in Mr Yaro's perfected Grounds is:

> "The learned Judge erred in allowing the Applicant's co-defendant to adduce hearsay evidence from an eyewitness that fundamentally undermined the Applicant's defence of self-defence in significant respects. It was unnecessary to include those aspects of the witness' statement that contradicted the Applicant's case. If the statement was to be admitted, then only that part of her statement that was relevant to the discrete issue

> between the prosecution and the co-defendant should have been placed before the jury in order not to prejudice the case of the Applicant. The legal directions to the jury seeking to mitigate the collateral harm caused to the Applicant's defence provided an inadequate substitute for the opportunity to cross examine the eyewitness on the contested aspects of her account so as to challenge her credibility and reliability."

92. On 9 July 2023 an application was made by Mr Vaughans to admit the statement of an unnamed witness who was accepted to be absent due to fear and outside the jurisdiction in circumstances where it was not reasonably practicable to secure her attendance. Taken at face value, the evidence of the witness was important evidence in the case as she was the only person who said that they had seen the stabbing of Mr Gordon by Mr Yaro. Mr Vaughans wanted the evidence to be admitted because the witness said that she had seen Mr Gordon and another boy "squaring up to one another. It was one on one and not groups involved." That would provide support for Mr Vaughans' case that he was not involved in the fatal stabbing. The witness also said that she did not see Mr Gordon with any weapons but that she had seen that the person who stabbed him had a knife. She did not know who it was who stabbed Mr Gordon. She also said that "when I saw them squaring up to each other, there were no punches, just one stab".

93. Mr Yaro opposed the admission of the evidence on the basis the witness fundamentally contradicted his account and that his inability to cross-examine the witness would result in unfairness to him (relying on s. 116(4)(b)). In particular, he objected to the admission of the following statements:

    i) "Shea and another boy were squaring up to one another";

    ii) "I didn't see Shea with any weapons";

    iii) "I saw the person that stabbed him had a knife";

    iv) "When I saw them squaring up to each other, there were no punches, just one stab".

94. It was assumed that what she was describing was the stabbing of Mr Gordon by Mr Yaro. Her account was obviously adverse to Mr Yaro's case that he acted in lawful self-defence.

95. Subject to minor editing, which does not affect the present issue, the judge ruled that the evidence of the witness should be admitted.

96. In a detailed ruling, the judge accepted that the witness was in fear; but she also accepted that the witness was overseas so that the evidence was admissible on that basis, to which section 116(4)(b) did not apply. She had regard to, and accepted the substance of the various factors relied upon by Mr Vaughans, which she summarised at 4B-E of her ruling:

> "The witness is a known witness to the police and her identity will be reported to the court privately. She is independent. She appears to be reliable on all available evidence and the police

> have taken considerable efforts to secure her attendance with no success.
>
> Her account was given close in time to the incident. It was given to a teacher but there were others present safeguarding her and a police officer. She is, I am told, a good student and I am satisfied that the police have investigated her thoroughly and her account. She has no convictions or cautions. She does not see Kavian Vaughans attack Shea Gordon. Therefore, her evidence is contrary to the case put by the Crown in cross-examination and therefore, is potentially important and relevant to Mr Vaughans' case."

97. Turning to Mr Yaro's concerns about fairness, which she described as "relevant and important", the judge said:

> "They can, in my judgment, be addressed with firm directions to the jury dealing with the limitations and the parameters of this evidence. The jury will be reminded that the defence for Mr Yaro would have wanted to challenge this witness and ask her questions but are unable to. I will remind the jury that Mr Yaro has had no opportunity to challenge the evidence, that it was not called by the prosecution and was read as part of Mr Vaughans' case.
>
> If there any undermining material, I will remind the jury of it. I will hear submissions in due course on the precise content and scope of these directions. I am satisfied that Mr Yaro's case will not be unfairly prejudiced by the inclusion of this evidence in Vaughans' case and that the interests lie in permitting Mr Holland to read what could be important evidence for his client."

and

> "Further, in relation to, Mr Sidhu, this hearsay if it is admitted, you would be entitled to, for example, tell me what questions you would have wished to ask this witness and you are entitled to all the protections that can be offered in a balancing and fair by the court in summing the matter up to the jury so I will require your assistance in due course in relation to that and as to when the jury should be informed of the legal status of that piece of evidence and what should be said."

98. In due course, the judge gave the jury written directions on how to approach the evidence of this witness.

> "**Absent witness in relation to [Mr Yaro]**
>
> 106. You heard an account read from this witness as she was unavailable. It was read as part of [Mr Vaughans'] case. It was read to you because as I have directed you it is said to be

> inconsistent with the Prosecution's interpretation of what Mr Yaro said in the prison calls about [Mr Vaughans].
>
> 107. The evidence of this witness is disputed by Abdul Yaro insofar as it suggests he was an aggressor. The fact that she saw a one-on-one confrontation is not disputed by Mr Yaro but the detailed circumstances of it are in dispute.
>
> 108. When considering this witness account remember that Mr Sidhu has not been able to explore, challenge or question this witness on her account for accuracy, truthfulness, ambiguity or misperception in relation to Mr Yaro. He has not been able to put to her any questions about who was the aggressor or explore her position, or what she did or didn't see or explore any other aspect of her account with her. The account was not given on oath and subject to the analysis of witness accounts that you have seen taking place in the courtroom. You have not seen how the witness would have responded to questioning or her manner in giving evidence.
>
> 109. You must consider whether what she said was reliable in relation to Mr Yaro given the all the other evidence in the case. You must be very cautious in relation to this statement and recognise its limitations when you are considering the evidence in relation to Abdul Yaro."

99. The judge gave that direction orally at pages 20-21 of the first part of her summing up. When she summed up the absent witness's evidence in the second part, she prefaced her reading of the edited statement by saying:

> "And then you had a statement read to you from an absent witness and when you are considering this statement you must apply the direction that I have given you, please. This witness did not give evidence to you in Court or on oath and all of the things that are set out in that direction must be considered before you consider this statement. It is different in status to those that I have already read to you."

100. After reading the statement she again reminded the Jury of their need for care, as follows:

> "So bear in mind everything that has been said to you about what questions would have been asked of the witness and the direction, please, when you are considering that evidence."

101. As we have set out above, Mr Yaro submits that the parts of the statement that are adverse to his case should have been edited out and that the directions that the judge gave to the jury are an inadequate substitute for an opportunity to cross-examine the witness. His primary submission is that the judge erred in her application of the interests of justice test under s. 116(4).

102. The prosecution submits that it would have been artificial and misleading for the jury to have been read a truncated version of the witness' evidence that excluded the bits to which Mr Yaro takes exception. The evidence as a whole was important for Mr Vaughans' alternative case that, if there was an unlawful homicide, it was entirely Mr Yaro's responsibility. The judge's reasons for exercising her discretion as she did were justified and her directions and summing up ensured a fair trial.

103. Refusing leave, the Single Judge said:

> "The testimony of the eye witness as noted by the police was properly admitted as hearsay evidence on the application of your co-defendant Kavian Vaughans ('KV'). It would not have been realistic, sensible or fairly possible to edit that testimony if justice was to be done to KV's legitimate interest in having that eye witness account, as thus relayed by the police, available to the jury as possible support for his case, and his evidence, that he had no involvement in the fatal stabbing. It would have been artificial and misleading to ask the jury to evaluate the eye witness account, provided in hearsay form from the police notes of what she had said, by reference only to extracts of what she said about the key confrontation.
>
> The fact that the prosecution did not seek to adduce the hearsay evidence as part of its case against you did not make it inadmissible against you after it had been introduced pursuant to KV's application. The careful, clear directions about that evidence that the trial judge gave to the jury ensured that the trial against you remained fair. An appeal challenging the trial judge's failure to limit the hearsay evidence of the eye witness to extracts as you propose should have been done would not have a realistic prospect of success."

104. We agree entirely. The judge had regard to and weighed all material factors before exercising her discretion. Mr Yaro is unable to point to any material feature that she omitted or any immaterial feature that she included in her detailed consideration. There is no basis upon which this court could properly interfere with her exercise of her discretion which, in our judgment, was not merely justifiable but plainly correct. We merely add that, since the application was made pursuant not only to s. 116(2)(e) but also to section 116(2)(c) and (d) the evidence was admissible and not subject to section 116(4). While we do not doubt that the judge could have required editing or excising had she formed the view that the inclusion of the passages to which Mr Yaro objected would render the trial unfair, we are satisfied that there was no call for such editing or excising.

105. Mr Yaro's renewed application must therefore be refused.

Mr Vaughan's appeal against sentence

The sentencing remarks

106. The judge commenced her sentencing remarks by referring to the age of all the defendants in front of her (17 at the time of the killing and 18 at the time of the sentence). She observed that the killing occurred for trivial reasons – teenage rival arguments that are all too common in this city. Mr Gordon's life had been lost for nothing and all of the lives affected, including those of the defendants, were ruined. Knives escalated what could have just been a fight into murder.

107. She observed that "on the night in question you were all acting as a group and I am quite satisfied that a confrontation with this other armed group was planned".

108. She was satisfied that Mr Yaro was the initial stabber and his defence of self defence was rejected by the jury. She said that she had looked at the footage again and because he caused that fatal wound she would treat him as the principal offender.

109. Turning to the Appellant, Mr Vaughans, she said as follows:

> "You, Kavian Vaughans, were standing close to if not beside Abdul Yaro at the time of this and you told the jury and I watched you give evidence that you saw only punches, no knives. It was clear from even your evidence that you were very closely involved in this planned attack. You chase Shea Gordon down the street and again I have watched the CCTV today. The prosecution say were brandishing a knife and you must have been close by him when he was stabbed again."

110. The judge went on to say the following of relevance to the ground of appeal advanced before the Court:

> "In deciding whether you both had knives on you and brought them to the scene that night, I rely on witnesses, the CCTV, your evidence, Kavian Vaughans, and all of the interferences that can be drawn when deciding what I can be sure of. Not what Abdul Yaro says in telephone calls afterwards in relation to Kavian Vaughans. And it is clear to me and can be seen in the CCTV and putting together all the evidence, that you had knives.
>
> Kavian Vaughans, your evidence was singularly unconvincing in denying this. But it does not follow from the verdicts of the jury that the jury were necessarily sure that you Kavian Vaughans were the principal offender. I cannot be sure that you were the actual stabber and I will sentence you on the basis that you acted as a secondary party. However, regardless of this, your conduct in encouraging and assisting Abdul Yaro from the start to the end of the incident was such that there is, in my judgment, no proper distinction to be drawn between the two of you for the purposes of sentence. You each played your part in what was a joint defence."

111. The judge was satisfied, so as to be sure, that knives were brought to the scene for a planned confrontation with another group who were thought to be armed. Accordingly, because the Appellant and Mr Yaro were 17 at the time of the offence, the starting point

was 23 years. Aggravating features were: planning, the acting in a group, more than one knife in the street, disguises being worn, discarding evidence afterwards and a terrifying scene, witnessed by numerous members of the public. The aggravating features increased the notional sentence to 24 years.

112. She identified mitigating features in relation to the Appellant as; an exemplary school record, positive good character, a difficult time in prison, impulsivity and immaturity. She concluded her sentencing remarks by saying as follows:

> "The minimum term before I take into account all these things about you, would have been in my judgment, 24 years. I cannot be sure what was in your minds at the time. I cannot be sure that you intended to kill Shea as opposed to seriously harm him. I set out those factors that make this less serious. But you will be detained at His Majesty's pleasure for life, with a minimum term in each of your cases, of 21 years, minus 472 days and if this is an administrative error it will be corrected."

Grounds of appeal

113. The grounds to the appeal originally advanced on Mr Vaughans' behalf were that:

    i) the judge erred in her assessment of the balance between the aggravating and mitigating features; and

    ii) the judge fell in error by not mitigating the sentence of Mr Vaughans given she identified him as a secondary party compared with the role she identified for Mr Yaro.

114. Leave to appeal was refused on ground (i) and has not been renewed before us. The Single Judge explained his reasons for refusal as follows:

> "It is not realistically arguable that HHJ Rafferty erred in principle, or imposed a manifestly excessive minimum term, by reducing the statutory starting point of 23 years to 21 years to reflect the degree to which, in her judgment, mitigating factors outweighed aggravating factors. The first ground of appeal therefore does not give you any realistic prospect of success on appeal. For that reason, leave to appeal on that ground is refused."

115. Leave to appeal was granted on ground (ii).

Discussion and Resolution

116. The sentencing judge set the minimum term for Mr Vaughans at 21 years. In doing so she was following the framework laid down by Parliament in the Sentencing Act 2020 for determining the minimum term in relation to a mandatory life sentence for murder.

117. The judge's finding that Mr Vaughans took a knife to the scene is not challenged. Parliament has determined that the starting point in such a case is for an offender who

was 17 years old when the offence was committed is 23 years. No challenge is made to this starting point.

118. Nor is there any criticism of the judge's decision to adjust the starting point upwards to 24 years to reflect the aggravating features of the offending which were: planning; acting in a group; there being more than one knife; the use of disguises and evidence being discarded afterwards; and terrifying scenes witnessed by numerous members of the public.

119. We are not persuaded that the judge erred by not mitigating the sentence of Mr Vaughans to reflect the fact she had identified him as a secondary party compared with the primary role played by his co-defendant Abul Yaro. This is because the judge explained her reasoning as follows:

> "I will sentence you on the basis that you acted as a secondary party. However, regardless of this, your conduct in encouraging and assisting Abdul Yaro from the start to the end of the incident was such that there is in my judgment, no proper distinction to be drawn between the two of you for the purposes of sentence. You each played your part in what was a joint offence."

120. This assessment was made by the trial judge who presided over a trial of 38 days in which she had a full opportunity to assess the roles and conduct of the co-defendants in the offending. Even on the stated assumption that Mr Yaro inflicted the fatal wound and Mr Vaughans did not, it does not follow that their culpability was different in the context of what was clearly a joint enterprise in which, as the judge found, Mr Vaughans was an integral participant in encouraging and assisting Mr Yaro from the start to the end of the incident.

121. On the evidence cited by the judge, she was entitled to come to treat Mr Vaughans and Mr Yaro with parity for the purposes of sentencing. The judge referred to the following evidence:

i) Mr Vaughans was standing close to, if not beside, Mr Yaro at the time of the stabbing by Mr Yaro;

ii) Even on Mr Vaughan's own evidence he was closely involved in the planned attack;

iii) He chased Mr Gordon down the street;

iv) He was in possession of a knife. In this regard we reject Mr Holland's oral submission before us that there was no finding by the judge that Mr Vaughans was carrying a knife at the time of the incident. The judge made a clear finding that Mr Vaughans brought a knife to the scene: see the extract from the sentencing remarks set out at [110] above;

v) He was close by when Mr Gordon was stabbed again;

vi) In addition, in oral submissions Prosecution Counsel referred us to the Ringo doorbell evidence showing Mr Yaro and Mr Vaughans leaving the scene together.

122. In the absence of any error of material fact or principal, it is not realistically open to this court, which does not have the same insight into the facts of the offending, to go behind this reasoned assessment by an experienced trial judge who had the advantage of having presided over the trial. We are unable to detect any error of principle or failure by the judge in making her assessment; and we are not persuaded that the minimum term of 21 years was manifestly excessive or wrong in principle.

123. Finally, we record the following. The court has recently confirmed and explained the proper articulation of the minimum term in cases of life sentences where time spent on remand is being taken into account (*R v Sesay (Yousif)* [2024] EWCA Crim 483). The judge said that the minimum term was "21 years, minus 472 days and if this is an administrative error it will be corrected". That was reflected in the Custodial Order drawn up by the Crown Court. In accordance with *Sesay*, and, on the basis that Counsel has confirmed our arithmetic to be correct, the judge should have concluded that the minimum term was "19 years and 258 days", which should then have been reflected in the Order drawn up after sentencing.

124. For these reasons, the appeal against sentence by Mr Vaughans is dismissed, save to the limited extent of a technical amendment to record that the minimum term to be served is 19 years and 258 days.