



Neutral Citation Number: [2017] EWCA Crim 1304

Case No: 201601371 C5

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CENTRAL CRIMINAL COURT**  
**HHJ Nicholas Hilliard QC**  
**T20127436, T20137209**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/09/2017

Before :

**LADY JUSTICE SHARP**  
**MR JUSTICE SWEENEY**  
and  
**SIR RICHARD HENRIQUES**  
**(Sitting as a judge of the Court of Appeal Criminal Division)**

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Between :

<b>REGINA</b>	<b><u>Respondent</u></b>
- and -	
<b>JASON RONALD WILLIAM MOORE</b>	<b><u>Applicant</u></b>

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**James Scobie QC and Robert Tolhurst (instructed by Shearman Bowen & Co)**  
for the **Applicant**  
**Simon Denison QC and Jacob Hallam QC (instructed by Crown Prosecution Service)**  
for the **Respondent**

Hearing dates: 21-22 March 2017

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**Approved Judgment**

**Lady Justice Sharp:**

1. This is the judgment of the Court, to which all members of the court have contributed.

*Introduction*

2. On 18 December 2013, at the conclusion of a trial before the then Common Serjeant, HHJ Hilliard QC in the Central Criminal Court, the Applicant, Jason Moore, who is now aged 47, was convicted of the murder of Robert Darby on 25 August 2005. Jason Moore's co-accused Martin Power, who is now aged 51, was acquitted of the murder. On 23 December 2013 the Applicant was sentenced to life imprisonment with a minimum term of 18 years. He now applies, some three years and three months out of time, for an extension of time, for permission to appeal against conviction, and to rely upon fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968. His applications were referred to this Court by the single Judge.
3. The Applicant seeks permission to appeal on two Grounds. These are that:
  - (1) The conviction is unsafe in the light of the unreliability of the principal prosecution witness, Abdul Ahmed, as demonstrated by fresh expert evidence;
  - (2) Other fresh evidence from a number of witnesses shows that Power alone committed the crime.

*The respective cases at trial*

4. Mr Darby, then aged 42, was stabbed at around 11.55am on 24 August 2005 and died of his injuries in hospital the following day. The delay between then and the trial in 2013 was wholly attributable to the flight abroad of both the Applicant and Power very shortly after the stabbing.
5. The Prosecution case was that the Applicant stabbed the deceased with a knife brought to the scene outside the Valentine Public House ("the Valentine") in Perth Road in Gants Hill, and that the co-accused Power had lent support by driving the Applicant to and from the scene in his silver BMW and by providing backup, and was thus guilty of murder by way of joint enterprise. The motive asserted for the attack was that the deceased had taken exception to the Applicant having formed a relationship with a former partner of his, Adele Rayner. It was said he had become enraged by that relationship and had threatened both the Applicant and Miss Rayner. It was that which had brought the deceased, driving his black BMW, to the scene.
6. The Applicant's case however was that he had merely been present at the incident. He had taken no part in any violence. Power had stabbed Robert Darby. Immediately before the stabbing, and at the moment of stabbing, the confrontation had been between the deceased and Power. The Applicant had observed this whilst sitting in the front passenger seat of Power's silver BMW car. He had only left the car after Power and Darby had clashed and Power had screamed for help.
7. Power's defence was that he approached Darby on his own, and that Darby then struck him on the top of his head (with what turned out to be the butt end of a Stanley

knife) knocking him unconscious. Power said he had not had a knife. When he had regained consciousness, the Applicant had told him to drive off and he had done so.

8. The respective cases of the co-accused were carefully confined to this extent. Neither Power nor the Applicant asserted the other was to his knowledge in possession of a knife or that he saw the other stab the deceased: it was, as we have said, Power's case that he was on the ground and unconscious when the deceased sustained his fatal wound, whilst the Applicant asserted that he was in the front passenger seat of Power's silver BMW car and that both of the others were on the ground.

*Relevant aspects of the investigation and of the evidence at trial*

9. Adele Raynor said in evidence that she had been in a long and volatile relationship with the deceased until 2004. In the spring of 2005, after Darby returned from a long visit to Australia, he learned that she had been out with the Applicant for dinner on a couple of occasions, and he started to issue threats to her and her family. On Sunday 21 August 2005, she visited the deceased at his flat, and he accused her of being in a relationship with the Applicant. He grabbed her by the throat and she called the police. The deceased had threatened to go to the Applicant's address and to hurt him. On Monday 22 August 2005, the deceased went to her place of work, and said that he had spoken to the Applicant (who had told her that, in the days leading up to 24 August, the deceased had threatened him). Also on 22 August, the deceased met Martin Power, who had been asked by the Applicant to act as a mediator. She understood that the meeting had gone smoothly, albeit that the deceased and Power did not care for each other. On Tuesday 23 August 2005, the deceased had gone to her place of work again, and had been erratic and ill-behaved. On Wednesday 24 August 2005, she had woken to find milk and tomato sauce all over her car. The deceased had followed her when she drove to work; he had deliberately driven his vehicle into hers, and tried to smash her windows. She said that he was ranting and raving, and was very erratic, irrational, manic and dangerous.
10. Telephone evidence for the period from 22 to 24 August 2005 was consistent with the deceased harassing the Applicant, and with Power acting as an intermediary on the Applicant's behalf.
11. The evidence of Derek Coverly, a friend of the deceased, was read as contested hearsay. He said that on the morning of 24 August 2005, the deceased had called him and had told him that he was being "messed about" by someone who owed him money, and that he was going to "a meet" that day.
12. Telephone evidence showed that Power received a telephone call from his girlfriend Terri Beales at 11.47 that morning, and that three minutes later Power had called the deceased from a call box in Cranbrook Road, not far from the scene of the murder in Perth Road. CCTV footage from Bramley Crescent (which runs into Perth Road) showed the arrival in the vicinity of first, the deceased's black BMW, and then Power's silver BMW.
13. The Prosecution called two independent eye-witnesses to the murder. These were Abdul Ahmed who had been on foot, and Sally Palmer who was driving past the incident when it happened. Their evidence was substantially at odds with the Applicant's case and was, the Prosecution asserted, mutually supportive.

14. From early in the investigation Mr Ahmed was classified as a significant witness, and the principal interviews with him were tape-recorded. The Applicant invited us to consider those interviews. Mr Ahmed was first interviewed in detail within a few hours of the stabbing on 24 August 2005, and he was interviewed again on 19 September 2005. Mr Ahmed also took part in an identification procedure in September 2005, when both the Applicant and Power were overseas, which involved viewing two videos. The first video included a photograph of the Applicant, which the police had found amongst his possessions, and which had been digitally altered for use in the procedure. As to that video, Mr Ahmed picked out a volunteer – saying that he was confident that that person was the stabber. Mr Ahmed did not identify anyone in the second video, which included a photograph of Power. In October 2012, after the Applicant had returned to this country and had been photographed, Mr Ahmed identified him as the stabber. Mr Ahmed made witness statements, in particular, on 24 August 2005, 19 September 2005 and 20 October 2005.
15. There were some inconsistencies in Mr Ahmed’s account which were explored at trial, but the central thrust of what he told the police during his interviews was as follows. On 24 August 2005 he had gone by tube to Gants Hill for a meeting at premises in Perth Road. It was raining heavily. He had walked down the pavement in Perth Road, with the roadway to his left, and had passed the Valentine, which was to his right, but had not been able to find the premises that he was looking for. Not long after passing the Valentine, he had therefore turned around and started to walk back along the pavement.
16. Before he got (back) to the Valentine, he was aware of a black BMW which stopped, slightly ahead of him and to his right, in the middle of the road, and then of a silver car which stopped very close behind the black BMW. Two men got out of the silver car. As the passenger of the silver car (who was closest to him, was wearing a dark blue jacket, and was taller than the driver from the silver car) got out, Mr Ahmed saw that he was carrying a knife. There was then a confrontation between the two men from the silver car and the driver of the black BMW, who had got out from his car. All three men were white. All three were shouting – including use of the “F word”. The only thing that obstructed his view was the black BMW, but he could see the whole of the top half of the driver of that car. The passenger from the silver car then stabbed the driver of the black BMW in the left chest. It had happened very quickly after the two men had got out of the silver car. He then saw the man who had been stabbed walk across into the entrance of the Valentine car park, and collapse. He saw blood on the man’s shirt, where he had been stabbed. He did not know where the two men from the silver car had gone to. He saw a lady in a car in Perth Road who, as far as he could tell, had also witnessed the incident.
17. During his interviews on 24 August 2005 Mr Ahmed drew a rudimentary sketch of the scene (ASA/1) which nevertheless clearly indicated, consistent with the core thrust of his account to the police, that at the time of the stabbing, he had been on the pavement “near opposite to them, very close”.
18. During his interview on 19 September 2005 the police provided Mr Ahmed with a more formal plan of the scene (ASA/5) on which they asked him to mark the position of the black BMW, the silver car, the movements of the men from the silver car, the place where the confrontation between the three men had taken place, the location of the lady’s car, and his own location.

19. We observe that there were obvious deficiencies in the creation of ASA/5. The base plan itself was confusing – in particular, as to what was intended to represent the main pavement adjacent to Perth Road, what was intended to represent the driveway of the Valentine (which separated the Valentine from the main pavement), and what was intended to represent the parallel pavement immediately outside the Valentine itself (on the far side of the driveway from the main pavement). There were no scale markings on the plan. In addition, the black BMW and the silver car were drawn as being on the right-hand side of Perth Road whereas Mr Ahmed had clearly stated that they were in the centre of the road, Mr Ahmed was marked as being on the parallel pavement although he had clearly described having been on the main pavement. It was also not clear as to the moment in the sequence of events when he was saying he was in the marked position. If the police had wished to add to the evidence in ASA/1, Mr Ahmed should have been taken to the scene and given the opportunity to point out the various locations of what he had seen as the events unfolded, and from where, which should then have been accurately recorded on a clear and accurate plan.
20. In the event, when Mr Ahmed came to give evidence at trial, he adhered in substance to what he had said in his original witness statements, as further illustrated by ASA/1. He said in that on 24 August 2005 he had gone to the Gant's Hill area by tube to attend a business meeting in Perth Road. It was raining heavily. He said that after leaving the tube station, he was walking along the pavement on the Valentine side of the road. He had walked past the Valentine, which was then on his right, looking for the location of his business meeting, and had then turned around and walked back again, now with the Valentine ahead of him to his left, and walking in the same direction as traffic in Perth Road (which was a one-way street at that point). As he was walking back, he had seen a black BMW and a silver car (which he described throughout as being like a Ford Fiesta) behind it. They had both stopped, very close together, in the middle of the road. Mr Ahmed was on the pavement and the two cars were in front of him to his right, each with the passenger side of the car closest to him. He could see them clearly. He saw a white man alight from the driver's side of the black BMW - plainly the deceased Robert Darby. Darby was on the far side of the car from Mr Ahmed.
21. Mr Ahmed then saw two men come out of the silver car. The driver got out first and went towards the driver of the black BMW. The passenger was about 10 seconds after the driver. The passenger quickly went around the back of the silver car also to confront the driver of the black BMW. The passenger had a knife. Mr Ahmed saw that when the passenger got out of the car the knife was wrapped in a white cloth. The passenger held the knife in his right hand. Mr Ahmed could see the blade. It was about six inches long. It appeared to be a kitchen knife.
22. Mr Ahmed said that there was then a confrontation on the driver's side of the black BMW. The three men were shouting at each other using the "F word". The two drivers possibly touched, but the driver of the silver car did not hit the driver of the black car in any way. The passenger from the silver car, who had the knife, was big. He took the knife from the white cloth and stabbed the man from the black BMW in the left side of the chest. Mr Ahmed then demonstrated in the witness box a motion upward and across him and said:

*"This is what I saw. He stabbed him into the left side of the chest. All three men had come together at the same time. After*

*the stabbing, the man who had been stabbed walked through to the pub and collapsed in the car park.”*

23. Mr Ahmed re-iterated that he did not see the shorter man, the driver of the silver car, hit or touch the man who was stabbed. He said the passenger from the silver car was wearing a dark blue jacket. Mr Ahmed described the passenger as bulky, fit and tall. He said the person with the knife was the bigger of the two men from the silver car: He described the stabber, the passenger, as having black hair and that it was the driver who had thick brown hair, not long, a couple of inches in thickness from his head. The driver of the silver car was a short man.
24. Albeit that there was an issue about his having transposed his description of the hair of the two men from the silver car, Mr Ahmed was clearly correct in describing the passenger from the silver car as the taller and bulkier of the two, and wearing a blue jacket. Indeed, it was not disputed during the trial that the Applicant was the passenger in the silver car, nor that Power was the driver, nor that the Applicant was six inches taller than Power and stockier, nor that the Applicant was wearing dark blue upper clothing, nor that Mr Ahmed had seen the Applicant (although it was of course suggested on the Applicant's behalf that he was wrong about the Applicant's role in the incident).
25. Mr Ahmed went on to say that the man who had been stabbed then walked across to the car park of the Valentine, where he collapsed. It was after that that Mr Ahmed had seen blood on his shirt where he had been stabbed. He did not see where the men from the silver car went. He had seen a lady, sitting in her car, who had seen what had happened. We interpolate that there can be no doubt that this was the witness, Sally Palmer.
26. When asked about the plan, ASA/1, Mr Ahmed agreed that he had illustrated himself as being on the main pavement “just next to the pub”. As to the other plan, ASA/5, he agreed with the Prosecution suggestion that he had been asked to mark the position of himself and the vehicles “*when this happened*” – but precisely what “*this*” was, was not clarified.
27. In cross-examination by the late Mr David Howker QC, then appearing on behalf of the Applicant, Mr Ahmed said that the lady he had referred to was present when the black BMW had arrived – although he had first noticed her after the incident. He could not remember the colour of her car, and had never spoken to her. He said that there probably were cars parked in the road. He gave varying descriptions of his position relative to the black BMW. He said that he had passed the Valentine and had turned back at the start of the houses that were adjacent to it. He had just turned around, and it was before he reached the Valentine, when the black car had driven past him and stopped about 20 – 30 feet ahead in the middle of the road. There had been one person in the black car. He gave different accounts as to whether he could actually see that the passenger side was empty. There were no other pedestrians about.
28. The fact that the two cars arrived together and had stopped (with the silver car immediately behind the black BMW) had caused him to stop and to stand still on the pavement. When it was put to him that he had told the police in one of his witness interviews that he had not stopped out of fear for his own safety, and had walked past

the cars before turning back to look, he agreed and adopted this as his evidence – saying that he had kept on walking but had not passed the Valentine. When he had first seen the silver car, it was probably behind him, and he had had to turn to see it. The driver of the black car had got out. He had what Mr Ahmed thought was a yellow scraper (rather than a Stanley knife) in his hand.

29. As to his view of the stabbing Mr Ahmed said that it had happened on the driver's side of the black BMW. The roof of the black BMW obscured his view of the deceased, who was on the opposite side of the car, such that he could only see the top of his body from the trunk upwards. He said however that neither driver disappeared from his view at any point. He said that the driver of the silver car had got out as he, Mr Ahmed, was walking past. The driver had left the car door open which had blocked his view of the driver's hands. He could however see the passenger clearly, as he exited on the nearside (which was closest to him). His view had not been encumbered by the passenger door. He rejected the suggestion that the passenger had been carrying a rolled-up newspaper.
30. Certain passages from his police interviews were put to Mr Ahmed. He had been asked "You have got two guys coming out, getting out of that silver car, what has happened then?" He had replied "I do not know who stabbed him but something I saw. It was quick. They stabbed him quickly." He had also said "I did have a doubt about who did the stabbing and how it was done. It all happened in a flurry." He maintained, however, that he had seen the passenger of the silver car leave the car, knife in hand, and that the passenger had stabbed the driver of the black BMW in the left chest. He was on the pavement of Perth Road at the time of the observation and had a clear line of vision allowing him to observe the stabbing. His evidence throughout, like his account to the police, was that he was on the pavement adjacent to the road and not the parallel pavement immediately outside the Valentine. He had carried on walking as he saw the black BMW driver go to the car park. He had been standing by the Valentine when (at the end) he had seen the lady in her car.
31. Cross-examined on behalf of Power, he said that his first language was Somali, not English, and that when interviewed by the police he not had an interpreter to assist him, but had not found the questions difficult. He repeated that, as he had told the police, it was the passenger who had had the knife, that the passenger had made the upward stabbing motion and that he had told the police that. The black BMW had stopped opposite him, straight to his right. He had had to turn his head to see the silver car. The first person out of any car was the driver of the black BMW. He was shouting and Mr Ahmed heard the "F word". He had something yellow in his right hand. The next out was the driver of the silver car. He was not carrying a knife. He went towards the black BMW driver. Mr Ahmed then agreed that:

*"Ten seconds later the passenger gets out of the silver car and my eyes go to him. He had a knife wrapped up in a white cloth.....The silver car passenger made a stabbing motion to the black BMW driver's left chest. He came from behind the silver car driver. All my concentration was on the man with the knife."*

The passenger had the knife in his right hand and had made an upward stabbing motion into the left side of the black BMW driver's chest, where blood had come out

- quickly onto his white shirt. The black BMW driver had walked away, staggered, and then collapsed in the public house car park. He, Mr Ahmed, was still opposite the black BMW, and had then moved up to about half way to where the driver of the black BMW had collapsed, and was concentrating on watching him.
32. He said that he had not seen the driver of the black car hit the driver of the silver car on the top of the head. He agreed, however, that his witness statement was correct when it recorded that he did not see the shorter man (i.e. the driver of the silver car) hit or touch the other driver in any way.
33. In re-examination Mr Ahmed repeated that the black BMW had been more or less opposite him to his right when it had stopped; that the silver car had also stopped; that he had seen cloth around the knife (when the passenger of the silver car had got out) which had been removed by the time of the stabbing; that the stabber was the passenger; that there was no physical contact between the two drivers; that the driver of the black car did not hit the driver of the silver car; but that the driver of the silver car was next to the stabber when he stabbed the driver of the black BMW.
34. Sally Palmer gave evidence that on 24 August 2005 she was driving a car on Perth Road when she saw a black BMW car parked in the middle of the road in front of her facing in her direction of travel. There were three men engaged in a stand-up argument in front of the bonnet. Two of the men were facing away from her, one towards her. The man facing towards her (clearly Darby) was wearing a white shirt, and grey flannel trousers. She referred to him as Man 1. He was white, aged around 30, 5 feet 10 inches tall and of slim build, with mid brown hair, and was mouthing at the other two. The male facing away from her on the right (Man 2 – who was said to be the Applicant) was aged 35 to 40, stockier in build, a similar height to Man 1 but a bigger build. Man 2 was wearing a blue sporty jacket and dark leg wear. Man 3 (who was said to be Power) was also facing Man 1, was also white, aged 35 to 40, shorter in height than Man 2, of medium build and with brown hair. He was wearing a lighter jacket.
35. As Sally Palmer prepared to overtake, she formed the impression that the male on the right, Man 2, had pushed the man in the white shirt, Man 1, causing him to turn and run towards the pub. Man 3 had not done any pushing, shoving or striking. As she travelled up the road towards the pub, she saw that Man 1 had fallen to the ground in the car park and was covered in blood. She remained in her car and called the emergency services. Men 2 and 3 ran in the opposite direction. She did not see a knife at any stage.
36. She said she had no recollection of a second car behind the black BMW. She confirmed that she had attended an identification procedure in 2005 and had been unable to identify anybody. She did not see how the incident started, nor where the men came from. She did not see Man 1 holding a knife. She did not see Man 1 hit Man 2 or Man 3. She saw a push by Man 2. She was six to twelve feet away at the time. She said *“I felt Man 2 push Man 1 and would have changed his angle at that point”* In her interview with the police she had said *“I saw the pushing out of my front windscreen, so I was driving towards them.”* She said in evidence *“As I was pulling out to overtake, when I was level, the man turned to run away.”* In her interview, she had said *“The push could have been a stab, because I know he was stabbed.”* She had also said *“It could only be an impression, but I just felt it was the man in the blue who*



came across as the more dominant character to me. I cannot say definitely it was him.” She also said in interview Males 2 and 3 “were almost like crowding”. She had made a 999 call, which was timed at 11.55am.

37. Plainly, Sally Palmer’s evidence was capable of confirming Mr Ahmed’s evidence in a number of material particulars. She spoke of two men facing one and of those three men being engaged in a stand-up argument, a kind of road rage. She spoke of the male facing the same way as Man 2 namely Man 3 being shorter in height than his companion, as indeed he was - the Applicant being 6ft 4ins and Power measuring 5ft 10ins. She spoke of Man 2 wearing a blue jacket, as was the Applicant, and she spoke of Man 2 pushing Man 1 and said that the push could have been a stab. The man on the right (Man 2) was the more active of the two men facing Man 1. There were three people obviously in close proximity. “I saw that he [Man 1] was pushed and it caused him to turn and run... I saw out of the corner of my eye that he had fallen to the ground”. She had then phoned the police. She did not at any stage see a knife. She also did not see Man 1 strike either of the two males facing him, nor did she see Male 3 knocked to the ground unconscious.
38. Paul Hunt, a friend of the deceased, gave evidence. He was with the deceased on the 24 August 2005 having travelled as front seat passenger in the deceased’s black BMW to the locality. According to Hunt, they had been going, as he understood it, to get something to eat when the deceased had told him that he wanted “to see if some car is somewhere” and drove towards Gants Hill. When they reached the Valentine, the deceased had stopped the car, got out and walked off. Paul Hunt said that he had then put the passenger seat back and fallen asleep. When he woke up he could not see the deceased and so he drove the car into the Valentine car park, where he saw the deceased lying on the ground. He walked over to the deceased, saw he was covered in blood and had a Stanley knife in his right hand. Paul Hunt had removed the knife and had put it behind a fence in panic. He did not tell the police about the Stanley knife. He agreed that he had rung his girlfriend Emma Ross at one minute past midday but denied the assertion that he had said: “He’s done him”. He insisted that he had said: “Rob’s been stabbed. Someone has stabbed him”. Paul Hunt said that when the deceased had walked off, having got out of the car, he was calm, and had strolled off. He had thought that he was going to go into the Valentine. He never heard any shouting and never saw anything and was unaware of another car nearby. When the car had stopped, the deceased had opened the car door and had said that he wouldn’t be a minute.
39. Dean Sloane a barman at the Valentine said that he saw the deceased collapsed on the ground in the car park and administered first aid. He heard a male with the deceased on a telephone saying: “He’s done him”.
40. There was evidence that the police cordoned off the scene at about 12.15pm. It was an Agreed Fact that the scene, including the vehicles that were then parked in Perth Road in the vicinity of the Valentine, was photographed at around 2.15 – 2.55pm on 24 August (i.e. starting around two-and-a-quarter hours after the murder). The deceased’s black BMW was recovered at the scene. It was an Agreed Fact that two knives were found in the boot.
41. Dr Poole, a pathologist, gave evidence that the entry point of the fatal wound was on the front of the chest to the left side. It was slightly slanted and measured 2.3cms

long. A severe degree of force would have been required to cause the injury. The bone of the left fifth rib was divided and the knife had entered the heart. A blade with a minimum length of 30mm and a width of 23mm would be required to inflict this injury. He was asked whether the Stanley knife could have caused the injury and said that was extremely unlikely, not least because when the knife blade was fully extended it measured 23mm which was significantly less than the estimated minimum distance of 30mm between the skin and the heart. Whilst it was impractical to estimate the length and width of the blade actually used, he thought it highly unlikely that the Stanley knife could have caused the fatal injury. It was an Agreed Fact, consequent upon analysis of the deceased's blood, that he had probably been under the influence of heroin and diazepam at the time of the fatal events in Perth Road.

42. A motor trader gave evidence that between 6.00pm and 6.30pm on 24 August 2005 Power had deposited his silver BMW with him saying that he was going to Spain for a few days. Power had had no visible injuries at the time. It was an Agreed Fact that Power's car was recovered by the police on 27 August 2005 and that no blood was found inside it.
43. In August 2005, the Police received credible intelligence of threats to the Applicant and Power by associates of the deceased. Police evidence was adduced establishing that in October 2011 the Applicant was in Dubai having travelled there on a false Irish passport. At that time, Power (who also had the use of a false passport) was in Spain, and both men were wanted. The Applicant, through his solicitors, requested that the police facilitate his return to the United Kingdom, following his arrest in Dubai for unrelated matters.
44. In April 2012, via his solicitor, the Applicant provided a witness statement to the police. In the statement the Applicant set out the history of threats and intimidation by the deceased because of the Applicant's friendship with Adele Rayner, and how he had involved Power (who knew the deceased) to try to reason with him. On the morning of the fatal events he had happened to be with Power as they were going to play racket ball. They were in Power's car, which Power was driving. Power had received a call saying that the deceased had threatened his girlfriend. Power had become agitated, and had stopped and used a phone box, after which he had said that he was going to meet with the deceased. They had parked up next to a public house.
45. A few minutes later another car had pulled up in front of them. The deceased got out of that car and Power got out of his car. The Applicant stayed in Power's car. He saw that the deceased had a knife and had lunged at Power with it – after which they had both fallen out of his sight. Thinking that the deceased had stabbed Power, the Applicant got out of Power's car. The deceased ran away, and the Applicant chased him, but to the Applicant's surprise, the deceased had then fallen over and he had seen that the deceased was bleeding. He saw Power talking to the other man in the deceased's car, and then go back to his own car. The Applicant re-joined Power, who then drove them both away. Power's ear was half hanging off and he was bleeding. He did not know how Power had come to injure the deceased and at that time, he did not realise that the deceased was badly injured. He left the country later that day because he feared that he would be blamed and that friends of the deceased would find him and harm him.

46. On 4 October 2012, by arrangement, the Applicant attended Ilford police station where he was arrested and interviewed – during which he gave more detail as to what he said had happened.
47. Power was extradited from Spain on 21 May 2013. As he had been extradited, he was not interviewed. His ears and face were examined for scarring and none was found.
48. The Applicant gave evidence at trial. By then he was 43 years old. He said that he was a professional gambler specialising in betting on cricket. He had no convictions for violence but had various convictions for dishonesty. He had had an on-off relationship with Adele Rayner, but before 2005 he did not know the deceased. In 2005, however, he had seen the deceased in the local area and had been the recipient of abuse and thereafter of threats of violence. On one occasion the deceased had visited the Applicant's flat armed with a machete. As a result, the Applicant had asked Power to speak to the deceased to resolve the situation. He had known Power since he was 20. Power had spoken to the deceased a few days before the deceased's death, and the Applicant had understood that Power had offered the deceased money to go away on holiday, in the hope that that might cool tensions. In the days following, the deceased had made demands by phone for money.
49. On the morning of 24 August 2005, the Applicant and Power had been travelling in Power's car to a sports centre, when Power received a phone call, and told the Applicant that his girlfriend was being terrorised by the deceased. Power had stopped at a payphone and telephoned the deceased, as demonstrated by the telephone evidence. Power had then driven the car to Perth Road and stopped in the middle of the road outside the Valentine. The Applicant had not known what was afoot. The deceased pulled up in his car moments later and got out. Power in turn got out of his car, whilst the Applicant remained in Power's car reading a newspaper. He could see that the deceased was holding a yellow knife in his right hand. Power was not holding anything. They were shouting at each other, and as Power approached the deceased, the deceased slashed at Power. Both men fell to the ground. Power screamed for help, and the Applicant got out of the car, newspaper in hand, and chased the deceased for ten to fifteen yards until the deceased collapsed, at which point the Applicant saw that he was injured. The Applicant returned to the car to find Power in conversation with Paul Hunt, who was saying "*Yes, Mart. Yes, Mart.*"
50. The Applicant and Power then returned to Power's car and drove away. The Applicant saw that Power was holding his ear. The Applicant said that in his statement and in interview, he had exaggerated Power's injuries in an attempt to help Power. The Applicant said that he had been scared that the deceased would exact revenge, and he and Power therefore resolved to leave the jurisdiction for a few days. A few days later, while in France, the Applicant learned of the death of the deceased. He assumed that Paul Hunt would tell the police what had taken place, and having been informed that his parents had received an '*Osman* warning', he remained out of the country for several years, in Spain and Dubai. In Spain, not long after 24 August, he overheard a conversation between Power and Sandra Dumont (the Applicant's former girlfriend), in which Power had said, "*He is a lunatic, I had no choice, the man came at me.*"
51. The Applicant said that he had not seen Power thereafter, but had feared that Power might 'get rid' of him as he was a witness. On several occasions, he said, he had been

seriously assaulted. He was concerned that Hunt might give an account supportive of Power. He returned to the United Kingdom voluntarily in 2012, in consultation with the Police, after having been assaulted and accused of offences in Dubai. He thought that if he gave his account to the police, it would reduce the chances of Power wanting to harm him.

52. In cross-examination, the Applicant said he had returned to the UK in order to clear his name. He admitted however travelling to the UK several times, at least ten times he conceded, between 2005 and 2012, using a false passport. He denied any plan to meet the deceased on 24 August 2005, and maintained that the phone calls between the parties in the days before the incident related to the meeting between Power and the deceased, and the deceased's subsequent demands for the money. The Applicant asserted that neither he nor Power had had a knife in the car on the fatal day, and he denied any joint plan to attack the deceased. The Applicant was shown a picture of a dark blue zip-up top, and agreed that this was what he had been wearing at the time. There had been no plan for money to be handed over that day. The Applicant said that the deceased had a reputation as a violent and dangerous individual, and that it was for that reason that he had enlisted Power, rather than the police, to calm the situation. Power, he said, had a massive ego and a very short temper. He had a reputation as a hard man who could handle himself. He maintained that Power had not got out of the car armed with a knife. Power and the deceased had been rolling on the floor for about 15 seconds before the Applicant had got out and chased the deceased away. He had not a clue how the deceased died. The deceased had just tried to kill Power with a Stanley knife.
53. He said that immediately after the incident he contacted his sister, Ronda Moore, who had helped him gather his belongings and passport. The Applicant and Power were in the back of her car on 24 August when Power said to the Applicant "*I had no choice but to defend myself.*" He thought that Power had meant that in defending himself, he had killed the deceased. He accepted he did not mention Power's words in his Defence Statement (in 2013) and claimed this was because he did not wish to bring Ronda into it. He also accepted he had made no mention to the police or in his Defence Statement of Power telling Sandra Dumont "*I had no choice, I had to do it*". According to the Applicant, this was because he felt responsible for having involved Power in the dispute with the deceased.
54. Sandra Dumont gave evidence that she had known the Applicant for some 20 years and had previously been in a relationship with him. In 2005 she was his landlord. She described him as kind and gentle and said that she had never known him to be violent. On the morning of 24 August, she had been shopping with the Applicant's sister Ronda and they had met the Applicant for lunch. He had appeared subdued and had said they may have to relocate. That evening Ronda had told her that there had been an incident with Robert Darby and that they were leaving the country. Whilst the Applicant was in Spain Sandra Dumont had spoken to him on the phone from time to time. He had told her that there had been an altercation resulting in death, but had not disclosed details. Sometime afterwards, when she was with the Applicant, he had put Power on the phone to her and Power had said, "*Rob came at me like a madman...it was himself [sic] or me.*" She had never spoken to Power again. She had kept in touch with the Applicant - sending him money and visiting him on occasion. She said that she had helped him because she believed him to be an innocent witness.

55. When cross-examined she accepted she had made no mention of Power's confession when she gave her first statement to the police on 2 October 2005. She said that she had mentioned it to the Applicant's solicitor sometime in 2013. Asked whether the confession was within two weeks of the Applicant arriving in Spain, she said that she did not know. She said that she had told no one at the time because she did not want to get anybody into trouble. She agreed that she had not told the police in 2005 that the applicant was in Spain, and when asked whether she had helped the Applicant to book travel tickets in a false name, she declined to answer. She accepted that the Applicant had seven mobile phones and that they were registered to her. She also agreed that she had falsely told the police that the Applicant never used mobile phones. She said that she had not mentioned the events of 24 August to the police in her first statement because she was simply answering their questions. It was the Applicant's evidence that he had travelled several times with Sandra Dumont between his flight abroad and his arrest.
56. Ronda Moore, the Applicant's sister, gave evidence over a video link from America. She confirmed that both she and the Applicant had been threatened by the deceased over the telephone in the summer of 2005. It related to money for a holiday. On 24 August 2005, she had been with Sandra Dumont when she had received a phone call from the Applicant asking her to meet him. She had driven to an unknown street where the Applicant and Power had got into the back of the car. She heard Power say to the Applicant "*He came at me from nowhere, he's a fucking lunatic. I had no choice but to defend myself.*" Power told the Applicant that they should both go away for a few days. The Applicant asked her to go to his flat to pack a bag for him, which she did. Later that day the Applicant told her that she was in danger and that she should leave with him, which she did. They took a ferry to France and then drove to Spain. En route, the Applicant told her that the deceased had attacked Power with a knife and had been stabbed in the ensuing struggle. She returned to the UK after two or three days, and had been warned by the police that she was at risk of retaliation from associates of the deceased. She moved to America the next day and continued to reside there.
57. Cross-examined, she agreed that she had not told the police about what she had heard Power say in 2005, but denied this was a false account given on her brother's instructions to assist his defence. She was shown her witness statement of 9 May 2013 and was asked why she had not mentioned Power's confession then. She said she had not appreciated the significance of it at the time.
58. Martin Power gave evidence. He had convictions for dishonesty and a conviction for common assault. He said that in 2005 he had been a property dealer. In August 2005, the Applicant repeatedly asked him to intervene in a dispute that the Applicant had been involved in with the deceased. Power always called the deceased from a public phone box to avoid giving the deceased his phone number. He met the deceased and offered to pay for him to go away on holiday to "get his life back on track", and the deceased had accepted. He told the deceased that the Applicant had agreed to pay for the cost of the holiday. That was his first meeting with the deceased.
59. On 24 August, the Applicant rang him to arrange the handing over of the money. He picked the Applicant up in his car and they drove to a café for lunch. He received a phone call from his partner, Terri Beales, who had told him that the deceased had asked for Power's phone number. He stopped his car at a phone box and telephoned

the deceased - telling him to meet at the café so that Power could give him the money for his holiday.

60. He parked his car on the left-hand side of Perth Road near to the Valentine. The deceased pulled up in his car ahead of Power's car in the middle of the road. The deceased left his vehicle and immediately and angrily demanded to know why the Applicant was in the passenger seat of Power's car, and why he was accompanying Power. Power left his vehicle and walked over towards the deceased and told him to calm down. The deceased then struck him to the head knocking him unconscious. His next recollection was of the Applicant taking him back to his car and telling him to drive.
61. From the conversation after they had left the scene he had inferred that the Applicant had hit the deceased, but at no time had he (Power) seen any confrontation with a knife. He had then phoned Terri Beales and had asked her to send someone to check on the deceased. He himself had no injuries. He dropped the Applicant in Epping, where the Applicant was meeting his sister Ronda.
62. He subsequently learned that the deceased was seriously injured and became worried. He learned that the Applicant had left the country on the evening of 24 August and that the deceased had died the following day. Having received threats from associates of the deceased on 26 August, he also left the country. He arranged to meet the Applicant in Marbella one month later, when he told the Applicant to tell the police the truth, but the Applicant had become angry. The Applicant agreed to give him money for his daughter's education. Power then began a new life in Spain until his arrest on suspicion of fraud in 2013, which had led to his extradition to the UK in respect of the murder.
63. When cross-examined, Power said that because his car was present at the scene of the stabbing he had been afraid that he would be implicated. He denied seeing Paul Hunt in the deceased's car. He said that the Applicant had refused to tell him what had happened. He agreed that his Defence Statement asserted that he had seen the Applicant follow the deceased to the pub, but said that he could not remember that. He agreed there was a further discrepancy in relation to whether he had agreed to give the deceased cash or to go to a travel agent with him to book a holiday (his evidence at trial). It had been the Applicant's decision that they should leave the scene. The Applicant had said: "*come on let's go*". Power had not seen the deceased flat on the ground, but said if he had, he would not have been bothered. He would have thought that he had hit his head. He asked the Applicant to pay him some money as he took the view that he wouldn't have been involved in any of this but for the Applicant. At the scene, he had never seen the Applicant standing beside him. If the Applicant had a knife, he had never seen it.

#### *Ground 1 – Mr Ahmed's reliability*

##### *(1) The evidence*

64. We heard evidence *de bene esse*, from Mr David Marcel, an expert in 3D Geomatics and Virtual Reconstruction and the Chief Technical Officer of Advanced Laser Imaging Ltd. Working with his colleague Mr De Giovanni, also an expert, he had used various items of information to produce four graphic 3D reconstructions to

reproduce the scene demonstrating Mr Ahmed's line of sight in four scenarios identified below. The principal information used was plan ASA/5 (treating the marking made by Mr Ahmed as an accurate marking of precisely where he was at the time of the stabbing). In addition, he used other aspects of Mr Ahmed's account, the photographs of the scene taken on 24 August 2005 (showing the vehicles then parked in Perth Road adjacent to the Valentine), 3D survey data captured from the scene on 1 October 2015, and 3D survey data from an identical black BMW.

65. The four scenarios were as follows:

- (1) The black BMW in the precise position marked by Mr Ahmed on ASA/5, with the driver's door closed;
- (2) The black BMW in the precise position marked by Mr Ahmed on ASA/5, with the driver's door open;
- (3) The black BMW two metres closer to the pavement on the Valentine side of the road (thereby allowing enough room for Sally Palmer to drive her car past it) with the driver's door closed;
- (4) The black BMW two metres closer to the pavement on the Valentine side of the road, with the driver's door open.

66. Mr Marcel said in his opinion in the first and second scenarios, Mr Ahmed could not have seen either the Applicant's right arm or the deceased's chest; and in the third and fourth scenarios, the Applicant's right arm would not have been visible. In the result, he concluded that in none of the scenarios was there a feasible way for Mr Ahmed to have seen the hand causing the injury, or the location of the injury.

67. In cross-examination by Mr Hallam QC on behalf of the Respondent, Mr Marcel conceded that there were a large number of variables that could have resulted in a different outcome of the exercise that he had undertaken; that the position that Mr Ahmed had marked himself as being in on ASA/5 was significantly different to that which Mr Ahmed had depicted in ASA/1, and in his evidence; and it would have been better if Mr Ahmed had been taken to the scene and had there indicated where the two cars had stopped and where he was at the time of the stabbing.

(2) *Submissions: Ground 1*

68. Mr Scobie QC for the Applicant argued that Mr Ahmed's account was so variable, a matter only capable of assessment once all the evidence had been given, that it raised questions about the safety of the conviction. Whilst ASA/5 had been available before the trial, exceptionally, it was appropriate for the 3D reconstruction, based on Mr Ahmed's explanation of ASA/5 in examination in chief, to have been done, and albeit that there were other variants in what he had said as to where he was at the time of the stabbing, the exercise was not "worthless".

69. Mr Denison however submitted that the inconsistencies in Mr Ahmed's account (such as they were) had been brought out at trial. The reconstruction was of no value unless ASA/5 was of pinpoint accuracy as to where for example Mr Ahmed was at the time of the stabbing, where the black BMW was, and where the parked vehicles were at the

time. It was however clear that the plan was confusing. Further, the position in which Mr Ahmed had marked himself on it was different to all his verbal descriptions and to the sketch ASA/1. As it was, the reconstruction did not undermine Mr Ahmed's evidence about his sight of the knife as the passenger got out of the silver car, nor his evidence that the passenger was the taller of the two men from the silver car and was wearing a navy-blue jacket, nor that it was the passenger who had stabbed the deceased in the manner described. Nor did it undermine the evidence of Sally Palmer, which was consistent with what Mr Ahmed saw, and consistent with the pathological evidence. In contrast, the Applicant's evidence (that there was no confrontation involving the three men, that two men had fallen to the ground, and that the Applicant had chased the deceased) was inconsistent with the accounts of Mr Ahmed and Sally Palmer. The reconstruction was worthless.

(3) *The merits*

70. There might be cases where 3D reconstruction evidence of the type presented to us on this appeal can be of assistance in the fair resolution of matters in issue in a criminal trial; and this can only be decided on a case by case basis having regard to the common law and the Criminal Procedure Rules (now contained in Part 19) which govern the admission of expert evidence. Having said that however, there are obvious difficulties in allowing such evidence to go before the jury, in the absence of sufficiently reliable and precise factual foundations (such as an indelible record of events in video and/or audio for example) without which what is described as a reconstruction cannot properly be regarded as such.
71. In this case, the 3D reconstruction evidence could only have been of any conceivable assistance if a large number of variables had been pinpointed to the exclusion of all other possibilities. However in a case with as many "moving parts" as this one, the necessary precision was and is simply impossible to achieve. It followed that the reconstruction evidence was of no probative value whatever; and its preparation and presentation for the purposes of this application was, regrettably, a complete waste of time and money. Indeed had the applicant's then legal team sought to rely upon it at trial, as they obviously could have done, since the foundation of it is ASA/5, which was then available, the trial judge would have been entitled to refuse to admit it, not merely because it was of no value, but because its admission was apt to mislead the jury into thinking that it had some form of evidential significance when it did not do so.
72. As Mr Denison pointed out, the plan itself as presented to Mr Ahmed was confusing and without any markings as to scale; further, where Mr Ahmed marked his own position on ASA/5, and the position of the two cars were obvious errors when compared to all his other accounts. Nor was it clear what was said to be going on at the point when he was in the position marked. In any event, it was unrealistic to regard the positions in which Mr Ahmed had marked the two BMWs as being anything more than general approximations. Certainly, Mr Ahmed's markings did not pinpoint with any precision (let alone with the precision or pinpoint accuracy necessary for the purposes of the elaborate reconstruction scenarios to be viable) where the Applicant was standing at the moment when Robert Darby was stabbed; or where Power and Moore were, or their heights, or where the two BMW's were. The particular postures attributed to the three men for the purposes of the reconstruction were used, Mr Marcel said in cross-examination, because there was no other



information to go on. There was some further uncertainty as to whether all the parked vehicles that were photographed two-and-a-quarter hours after the event, had been there at the time of the stabbing – albeit, there was evidence of the scene being cordoned off at around 12.15pm. In short, it was obvious that a reconstruction, which relied on the precise accuracy of the markings on ASA/5, would be worthless – as it was so clearly demonstrated to be, during the course of Mr Marcel’s cross-examination before us.

73. It follows that the reconstruction evidence affords no ground for allowing the appeal; we are far from persuaded it would have been admissible at trial, and there is in any event no reasonable explanation for its production now rather than at trial. We add in this context, that no criticism is made by the Applicant’s new legal team of his former legal team, or of the way that his highly experienced leading counsel, Mr Howker QC, conducted the defence case on the applicant’s behalf: on the contrary, it is apparent from the transcripts, that he conducted the case with great skill. In our view, it is not arguable therefore that the reconstruction evidence is fresh evidence that is capable of undermining the eyewitness evidence of Mr Ahmed and we decline to admit it.
74. We would add that insofar as the submissions of Mr Scobie sought to suggest the various inconsistencies in Mr Ahmed’s evidence were capable on their own of undermining the safety of the Applicant’s conviction, this travels outside the bounds of this Ground of Appeal (which rests on the fresh reconstruction evidence). In any event, the submission is not arguable. Mr Ahmed’s evidence was the subject of intense and expert scrutiny at the trial, and any inconsistencies were properly before the jury for their consideration. Moreover, we have read with care the transcripts of Mr Ahmed’s evidence, and in our view it is perfectly clear that the central thrust of Mr Ahmed’s (independent) account was consistent; it was moreover supported in material respects by the (independent) evidence of Sally Palmer, and by the pathological evidence; it was open to the jury to accept it, as they clearly did.
75. It is fair to say however, that this ground did not form the centrepiece of the application before us. This was said to be provided by other fresh evidence, forming the basis of Ground 2, in particular, the evidence of Witness X, to which we turn next.

*Ground 2: Other fresh evidence*

*(1) The evidence*

76. We heard live evidence, *de bene esse*, from four witnesses. These were Emma Ross, the partner in 2005 of Paul Hunt; James O’Rourke, a close friend of the Applicant; Geoffrey Emmanuel, a good friend of the Applicant and Timothy Darby, the oldest brother of the deceased. We also had before us and took into account, again *de bene esse*, the witness statements of Mr Bowen, the Applicant’s solicitor; of Alex Maxwell, another friend of the Applicant and of Witness X. The following passage, and passages in subsequent paragraphs, have been redacted to preserve Witness X’s anonymity. They deal with his evidence, the submissions made on it by the parties and why we have concluded that it is not credible.
- [REDACTED]

77. Emma Ross said that the deceased came to the flat she shared with Paul Hunt in the late afternoon of 23 August 2005. Whilst there, he borrowed her phone and used it to make a call. During the call he became angry and said that he wanted his money back. He then passed her the phone and she had asked who she was speaking to. The person at the other end said that her name was Terri (as indicated above, Martin Power's girlfriend was Terri Beales). A man then came on the phone and said that his name was Martin. He shouted and swore and said to put the deceased back on. She passed the phone back to the deceased, and the argument about owing the deceased money continued. Adele's name was also mentioned. After the call, the deceased said that Martin owed him money. He was very angry with Martin and threatened to kill him. There had also been at least one other call in the same vein, but she was not sure if it was made on her phone.
78. The deceased stayed the night of the 23 August, and left early in the morning of 24 August 2005. Later that morning she went to Gatwick to pick up her mother and children, and on her way back, at about midday, she received a telephone call from Hunt, who said: "*Martin's just done him*". Two days later, after Hunt had been released by the police, he told her again that it was Power who had stabbed the deceased, and said that Power had also threatened him. Hunt then told her not to mention anything to the police, and she did not do so in the witness statement that she made to the police on 16 September 2005. She did not give evidence at the trial.
79. After the trial, the Applicant's sister, Kirsty, came to her flat, which had frightened her. Kirsty gave her a phone number and asked her to call, which she did, and they then met twice. Kirsty told her what had happened at trial, and knew that the deceased had been at her flat the night before the murder. Ms Ross said that she then saw a solicitor and made a statement, but did not sign it. Kirsty had rung her a lot trying to get her to sign, and she eventually did so on 27 March 2015 after speaking to Geoff Emmanuel, a friend (who said that the Applicant was his friend).
80. However, the critical aspects of Ms Ross's account were demolished in cross-examination. In particular, the telephone records demonstrated that her account to us of Robert Darby's call to "Martin" (Power) was untrue. Her telephone records showed that at the time of the purported call by Robert Darby to Power using her telephone, a call which she claimed had lasted about 15 minutes, her telephone had been used to ring the Applicant's landline three times (calls of 34 seconds and two calls of 54 seconds). Moreover, between the last two of those calls, the Applicant's landline made a call out to Power's number. The latter call went on for some time and was still going on when a further call was made to that landline number from her telephone. In short, it seems that Robert Darby's calls were to the Applicant, not to Power; and whilst they were being made, it was the Applicant who was in contact with Power by telephone, not Robert Darby. For this Ms Ross had no sensible answer.
81. Further, though Ms Ross initially asserted that she had not lied in her police witness statement of 16 September 2005 but had merely omitted certain facts, she then admitted that if her account to us was true, she had lied to the police in her witness statement, in a number of important respects. In her 2005 statement (made several weeks after the murder, rather than nearly 10 years after the events in question, as was her second statement) she had said for example, that Paul Hunt had simply told her that the deceased had been stabbed; that Robert Darby had seemed normal on the

afternoon of 23 August 2005 and that she did not hear a conversation he had by telephone from her flat on that occasion.

82. In his evidence, Mr O'Rourke said that he attended the trial. After the verdict, he had to see Power again for his own "peace of mind", and as part of the effort of the Applicant's family to revisit the Applicant's conviction. He gave an account of six meetings with Power thereafter. First, he had come across Power by chance in the changing room of the Virgin Sports gym in Brentwood. Power had said: "*Before you say anything, your team ruined you*" and "*Not that I am saying that I did anything*". Mr O'Rourke asked to see Power again, and Power had said that he would have to go through Power's friend, Alan Mahoney. Mr O'Rourke did not have Mahoney's contact details and sought the help of Geoff Emmanuel – a friend who he had known for some years, also a friend of the Applicant.
83. The second meeting occurred after he and Mr Emmanuel had gone looking for Power: they found him in Hollands Wine Bar in Shenfield. There Mr Emmanuel had spoken to Power alone. Afterwards, Mr Emmanuel had told him that Power had said that he had defended himself, that it was every man for himself and that it was a cut-throat. After this, a third meeting was arranged with Power through Mahoney, at the Post House in Brentwood in April 2014, that is, four months after the trial. Mr O'Rourke went with the Applicant's partner, Sandra Dumont (we interpolate, it was she who had given evidence at the trial that Power had confessed to her, and she was also the organiser of the Applicant's appeal). In the end, the four of them, Mr O'Rourke, Sandra Dumont Power and Mahoney, met up at the Nags Head public house. The atmosphere had been frosty. Power kept on saying that the Applicant had tried to put him away. Sandra Dumont said that Power had to help the Applicant with his appeal, to which Power replied that the only thing that he could do was to help with a new legal team. Sandra Dumont suggested that Terri Beales could now come forward to help the Applicant, but Power said that she had not helped him at trial and that he had no reason to think that that would happen.
84. Towards the end of May 2014, Mr O'Rourke said he had had three more encounters with Power alone, each at the Nags Head. At the first, Power had been accompanied by another man. It had not been a good meeting. The other man had said that it was the Applicant's fault as he had gone cut-throat. At the second, Power, accompanied by the same man, had laughed at him and said words to the effect: "*Do you really think that I am going to put my hands up. What do you want me to do?*" He also said that the deceased was a lunatic; that he (Power) was defending himself; that he did not want to keep meeting O'Rourke; that he had friends at Belmarsh and Long Sutton and that he did not want to hear about being bad mouthed by the Applicant. At the third and final encounter, Power was accompanied by the same man and another "powerful man", who said that because of the eye witness the Applicant was gone and should just get on with it and do his time.
85. In cross-examination, Mr O'Rourke accepted that he had nine convictions for twelve offences – including obtaining by deception, blackmail, wounding and two assaults occasioning actual bodily harm. He said that prior to the trial everyone had known that Power had defended himself against the deceased. The Applicant told him that Power had done it and he believed him – but that had not coloured his approach. Having heard the evidence at trial he had formed the firm view that Power had defended himself against the deceased. He had not been keen on Sandra Dumont

accompanying him to the Post House / Nags Head. He accepted Power had not told him that he had stabbed the deceased, but he had taken it that he had done so.

86. Mr Emmanuel said that he had known the Applicant for over 20 years, and was also quite friendly with Power, who had been an acquaintance of his for around 10 to 15 years, although they had not spoken for some 10 years. He had not been to the trial or followed it extensively, but had been at court for the Applicant's sentence. In the aftermath, friends of the Applicant had got together to see if they could organise an appeal. He had been approached by Mr O'Rourke, with whom he played sport and had once been on holiday, for help in tracking down Power. Mr Emmanuel said that he had also wanted to meet up with Power and to find out what had gone on at the trial. He had had various meetings and conversations with Mr O'Rourke, and they had eventually been successful in finding Power at Hollands Wine Bar. He had spoken to Power alone. They had exchanged a few pleasantries, but Power had been very cold. Mr Emmanuel had asked him what had gone on. Power had said that he had had to defend himself, and that it was every man for himself. Mr Emmanuel had said that their mate was doing 18 years. Power had replied to the effect; *"It's not my fault that the eye witness got it wrong, what would you have done?"* Power had then left, and he had not seen him again.
87. In cross-examination Mr Emmanuel accepted that he had not made a witness statement about the conversation with Power until 4 to 6 months after it had taken place. Where he came from, he said, it was not the done thing to tell the police (who, in any event, were not thought to be on the Applicant's side) or to go to a solicitor. He had had to go over it with certain members of the family and friends first. They were looking to secure a successful appeal. He knew Emma Ross quite well as a friend. He had found out in 2014 that she had made a statement, but (contrary to her evidence) he said he had never discussed it with her – that wasn't a done thing. He did not know where she lived, but he might have met her or Hunt. He had, he said in re-examination, told the whole truth. His previous convictions include one for money laundering in 2006.
88. Mr Timothy Darby said that he was not giving evidence to help the Applicant, but rather to see that justice was served. After the murder, he had made his own enquiries as to what had happened. He had tracked down Paul Hunt who had told him that he had been asleep at the time of the incident, which he (Mr Darby) had not believed – but Hunt had not wanted to have any further interaction with him. He had attended every day of the trial. He and his brother had always been told that Power was the stabber. So, in the aftermath of the trial, thinking that the outcome was not the right one, having spoken with the Applicant's sister Kirsty, and wanting to find out the truth, he had tracked down Hunt. This was in January / February 2014 and he had a heated argument with him. Hunt had said that it had all stemmed from a £3,000 drug debt that Power owed to the deceased. Hunt said (echoing Emma Ross's evidence) that the night before the murder an arrangement had been made to meet and for Power to pay. At the scene, Hunt said he had seen Power and the deceased come together, and had then seen the deceased run off. At the time, he (Hunt) had been threatened by Power to keep his mouth shut. Mr Darby said that he had then become heated with Hunt, and had asked what part the Applicant had played – to which Hunt had replied that he had not seen the Applicant until afterwards. There was no other conversation about the Applicant as Mr Darby was not particularly interested in him.

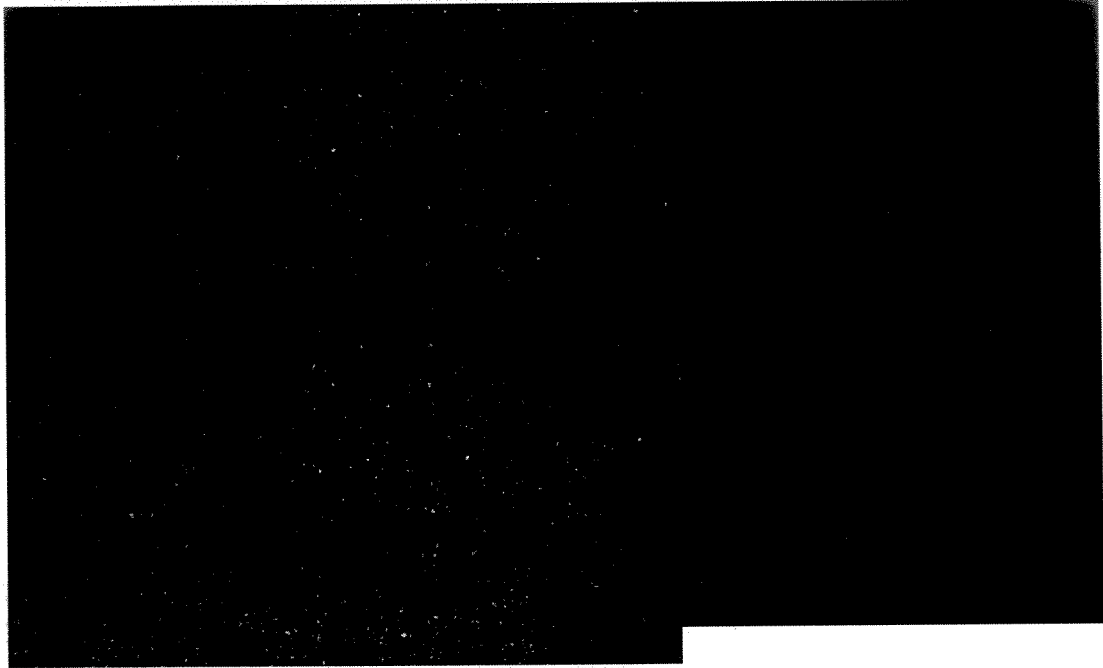
89. A few days later, in the early hours of the morning, the police had visited his home and had given him a reverse *Osman* warning – telling him to back off as he was unhappy about the outcome of the trial. He accepted that to a certain extent, the police had been right to warn him, but he had not heeded that warning. Thereafter he had spoken to the family liaison officer, who had told him that *Osman* warnings had been given to both Power and Hunt. Having spoken with his own solicitor, he had eventually made a witness statement on 31 October 2014. He had spoken with the Applicant’s sister, Kirsty, on a few occasions since the aftermath of the trial, but was not giving evidence for the Applicant – rather, because he was aware that the Applicant had not stabbed the deceased, he believed that Power had walked away scot free and that therefore the Applicant’s conviction was wrong. •
90. In cross-examination, Mr Darby asserted that he had told the police about his conversation with Hunt. However he then accepted that in his witness statement to the Applicant’s solicitor, he had said that he had not told the police about it – saying that his family knew about it, which was all that mattered. He had later approached the Applicant’s family, had had a conversation with Kirsty Moore, and that it was after that, and at her request, that he had made the statement. As to the discussion with Hunt being heated, he said had not laid a hand on him, and had not intimidated him – whilst you could do more with your mouth than with your hands, he had only raised his voice. In re-examination, he said that he had believed what Hunt had told him even though “*the Geezer is a total liar anyway*” as Hunt wasn’t going to tell him lies that day.
91. In his witness statement dated 14 October 2015 Alex Maxwell stated that he had been a friend of the Applicant for some 20 years, and that he had also known, and got on well with, Power for about 15 years. He had been aware, prior to the murder, that the deceased had been harassing the Applicant about a supposed relationship with an ex-girlfriend of the deceased, and recounted aspects of which he had been told. Some months after the murder he had seen Paul Hunt at a garden centre and Hunt had told him, amongst other things, that he had stayed in the deceased’s car during the incident and had told the police that he had not seen anything. Hunt had expressed the view that if he said that he had not seen the incident then he could not be forced to put anyone “in it”, and wanted to avoid telling the police that he had actually seen what had happened. He was just hoping that everything would blow over so that he could get on with his life. He would not speak any further as he did not want to be seen as a grass. A few months after that, at the same garden centre, he had bumped into Hunt again, but nothing of substance had been discussed. After the Applicant’s conviction, he had become aware that the Applicant’s family were trying to secure evidence to support an appeal. Therefore he had provided his statement for use in the appeal if required.
92. Witness X was originally due to attend court to give evidence on the first day of this hearing. By that stage, the court had made various directions designed to preserve his anonymity (including granting him anonymity, and making special arrangements so his anonymity would be preserved while he gave live evidence). However, at the end of the first court day we were informed he declined to attend as he was in fear (the detail is set out in Mr Bowen’s witness statement dated 21 March 2017 and its exhibits). Mr Scobie then proposed, and Mr Denison agreed that his witness statement

dated 28 January 2015 should be taken into account, with its eventual weight being a matter for the Court.

93.



94.



95.



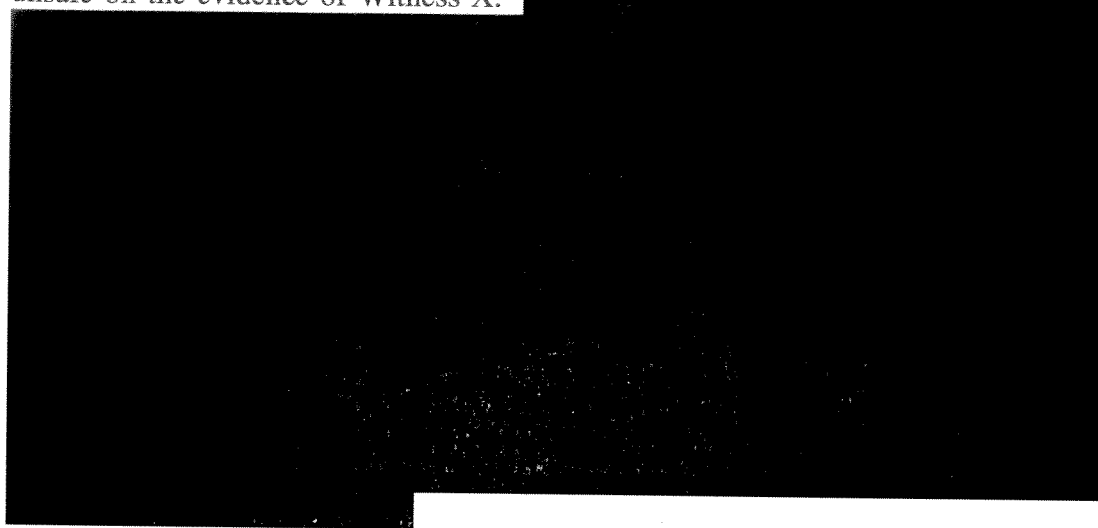
96. The Respondent placed before us the statement, dated 17 March 2017 of DC Ballantine. DC Ballantine had spoken to Power on 15 March 2017; Power denied meeting Mr Emmanuel at Hollands Wine Bar, or ever telling anyone that he was responsible for the death of the deceased. DC Ballantine had also spoken to Hunt on the same date. Hunt recalled meeting Mr Darby, but denied making the remarks alleged by Mr Darby, whose statement he emphatically described as untrue. Hunt said that the family and friends of the Applicant had put Emma Ross under a lot of pressure to provide a statement and that maybe that was why she had said what she had said, which was also not true.

(2) *Submissions*

97. On behalf of the Applicant, Mr Scobie accepted that the application for an extension of time could not be taken for granted. However, he submitted there had been no point in making a half-baked application at an earlier stage. For example, the Applicant had not been aware of the 3D Geomatic and Virtual Reconstruction

technology at the outset, and the use of Witness X's statement had only been permitted relatively recently. Reliance was placed on the content of Mr Bowen's statement dated 4 July 2016 – which set out some of the details of the circumstances in which the fresh evidence witnesses had come to provide their statements.

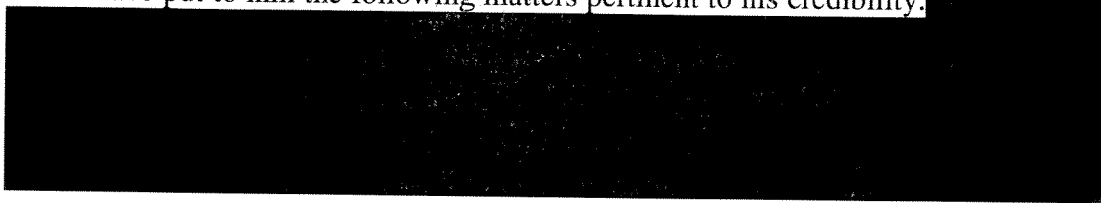
98. As to the merits, Mr Scobie pinned his case that the Applicant's conviction was unsafe on the evidence of Witness X.



99. Mr Scobie acknowledged that there had been a “concerted effort” as he described it, by those supporting the Applicant, to see what could be done to rectify what they perceived to be an injustice. Whilst Kirsty Moore and Sandra Dumont (whose evidence at trial incriminating Power had not been accepted) had been involved in the obtaining of the new evidence, their involvement had not been hidden, and it could be that, if the jury had been aware of the bigger picture now available, they would have been believed at trial. It was not surprisingly after this length of time, that a lot of the detail would be wrong, but he said, this evidence was capable of belief, the witnesses had no motive to lie and adding the various accounts together the theme was all one way, which was that the conviction was unsafe.

100. On behalf of the Respondent Mr Denison submitted that the further evidence had to be seen in the context of the evidence given by Ronda Moore and Sandra Dumont at trial. At trial, both claimed that Power had implicitly confessed to them. Yet despite numerous opportunities (including, in Ronda Moore's case, the subsequent making of a witness statement) neither had mentioned that to the police. At trial Kirsty Moore, who had been in the public gallery, was seen speaking to Sandra Dumont before she gave evidence; and Ronda Moore accepted that she too had spoken to Kirsty Moore before she gave evidence. In any event, the jury must have concluded that both their accounts were false. The further evidence was more of the same, and both Sandra Dumont and Kirsty Moore had been involved in obtaining it.

101. In relation to Witness X, Mr Denison said that had he attended to give evidence he would have put to him the following matters pertinent to his credibility.



[REDACTED]

102.

[REDACTED]

103.

[REDACTED]

In this instance, the evidence was weakened further by Witness X's failure to attend to give evidence on oath, despite the anonymity order and other steps taken to preserve his anonymity whilst giving evidence. If his evidence was true, he had nothing to fear from giving it; it was not capable of belief, and could not undermine the safety of the Applicant's conviction, given the other evidence which had led to his conviction.

104.

Mr Denison submitted that Emma Ross was not an independent witness – she was a friend of Mr Emmanuel who was a friend of the Applicant. In any event, as demonstrated in cross-examination, her evidence was wholly incapable of belief. In particular, her evidence about the phone call on 23 August 2005 was eerily reminiscent of Sandra Dumont's evidence at trial, and was shown by the telephone evidence to be untrue. It was also significant that she had never mentioned it until contacted by Kirsty Moore in 2015, and had only signed her witness statement after speaking with Mr Emmanuel.

105.

As to Mr Darby's evidence, Mr Denison highlighted that the encounter with Hunt had resulted in a reverse *Osman* warning to Mr Darby, and submitted that even if the encounter was treated as no more than a heated conversation, what Hunt was alleged to have said was plainly involuntary and unreliable. It was more of the sort of evidence that had been presented to the jury, and Hunt had no credibility anyway. In any event, if Hunt had said what was alleged, Mr Darby would have told Kirsty Moore at the time, but had not done so. Nor had he informed the police. Nor did he make a statement until nine months later, and the reasons that he had given for those failures and delay was not credible. Nor, it was submitted, did Mr Maxwell's statement advance the Applicant's case.



106. As to Mr O'Rourke and Mr Emmanuel, Mr Denison underlined Mr Scobie's acceptance of the fact that their evidence did not take the case much further. Their evidence, he submitted, had the same smell about it as the others. It was wholly unrealistic to suppose that Power would have made implicit admissions, let alone reliable implicit admissions, in the sort of circumstances postulated by the witnesses. In particular, it was submitted that Mr Emmanuel's explanations for his failure to inform the police at all, and for the fact that he did not make a witness statement until about 4 to 6 months later, were not credible.

107. In the result, Mr Denison submitted, the applications made should be refused.

(3) *The merits*

108. Section 23(2) of the Criminal Appeal Act provides that:

*"The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –*

- (a) *whether the evidence appears to the Court to be capable of belief;*
- (b) *whether it appears to the Court that the evidence may afford any ground for allowing the appeal;*
- (c) *whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and*
- (d) *whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."*

109. The critical issue in relation to Ground 2 is whether the evidence appears to the Court to be capable of belief. That issue arises against the background of our conclusion that Ground 1 is unarguable, and of the matters set out in the next paragraph.

110. There is no doubt that Mr Darby was murdered via a single stab wound to the left side of the chest. The Applicant admitted presence at the scene in Perth Road as the passenger in Power's silver car. He was significantly taller than Power, and was admittedly wearing a dark blue jacket. He had undoubtedly been the subject of harassment by the deceased – which provided a motive to have a knife and to use it. Even if he saw anything, Hunt was not going to describe it. There were, however, two independent eyewitnesses to the events, Abdul Ahmed and Sally Palmer. Mr Ahmed provided a detailed account within a few hours of the event. Between them, they provided compelling evidence that there had been a confrontation on foot between the deceased, Power and the Applicant, and that it was the Applicant who had stabbed the deceased. The accuracy of Mr Ahmed's description of the stabbing motion was supported by the medical evidence. There was no evidence that Power had a knife, rather the reverse. It was wholly improbable that the deceased's Stanley knife was used to cause the fatal injury. There was no evidential support for the Applicant's claim that the confrontation had involved only the deceased and Power, that he had remained in the car throughout that confrontation, that both the deceased and Power had fallen to the ground (or Power's claim that he alone had fallen to the ground), and that it was only then that he had got out of the car, and that he had

chased the deceased. Nor was there any support for the claim made by the Applicant in his witness statement and in interview (but resiled from in evidence) that Power had suffered a bad cut to his ear. Equally, it is clear that, against that background, and unsurprisingly, the jury rejected the evidence of Sandra Dumont and Ronda Moore that Power had implicitly admitted being the stabber to each of them (something that neither woman saw fit to mention until trial, notwithstanding its obvious implications for the Applicant).

111. Against that background, and essentially for the reasons advanced on behalf of the Respondent, which we have set out in detail at paras 100 to 106 above, we have reached the clear view that the further evidence, other than the formal evidence of Mr Bowen, insofar as it implicates Power, is not capable of belief. In short, we can attach no weight to the evidence of Witness X; the points regarding its lack of credibility, were well made on behalf of the Respondent, necessarily, in the absence of the witness. Furthermore, Mr Darby's second hand account of what Hunt told him, also lacks credibility given the circumstances in which it was made, and Mr Darby's frank admission that the "*Geezer is a total liar anyway*". It is also extraordinary that having apparently wrung the information he was seeking from Hunt, Mr Darby then did nothing with it, for many months. As we have said, the material parts of the evidence of Emma Ross were undermined in cross-examination, and Mr Scobie was rightly not disposed to place the evidence of Mr O'Rourke and Mr Emmanuel at the forefront of his submissions. We would add that the idea that those who approached Power did not go with a tape recorder, or that knowing that they were strong supporters of the Applicant he would make any sort of confession to them, beggars belief. There is we feel bound to say, a pervasive "smell" about the evidence, as Mr Denison submitted, with justification in our view, echoing as it did the attempt at trial to falsely implicate Power as the stabber - with pressure being put on Emma Ross and Hunt, and attempts to put pressure on Power.
112. Accordingly, we decline to admit the evidence. This Ground is also, in our view, unarguable. Nor, in all those circumstances, is it appropriate to grant the extension of time sought in relation to both Grounds.
113. Finally we should mention that after the trial, the Applicant's then lawyers wrote to the Registrar to express their concern about the outcome; to indicate that however, at that stage, there were no arguable grounds of appeal; and to forewarn the Registrar of the possibility of arguable grounds coming to light in the future. Obviously such a letter does not dilute the requirements for an appeal to be mounted within the appropriate time limits, nor does it provide a platform for arguing for an extension of time.

### *Conclusion*

114. For the reasons set out above, these applications are refused.