Neutral Citation Number: [2020] EWCA Crim 280
No: 201901380/B3 & 201901490/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 20 February 2020

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE WALL QC
(Sitting as a Judge of the CACD)

R E G I N A
v
JACK STEVENS

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Mr M Ivers QC appeared on behalf of the **Appellant**

Mr H Davies QC and Miss L Oakley appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 13 March 2019 at the conclusion of a trial in the Central Criminal Court before Her Honour Judge Dhir QC and a jury, this appellant, Jack Stevens was convicted of the murder of Nashon Esbrand. He was subsequently sentenced to custody for life, with a minimum term of 23 years, less the 203 days he had spent on remand in custody. He appeals against his conviction by leave of the single judge, who referred to the full court the appellant's application for leave to appeal against sentence.

2. Nathan Esbrand, the deceased, was 27 years old when he was stabbed and fatally wounded by Dior Lupqi, a youth aged only 15 years 10 months. The appellant was then aged 18 years two months. Others involved included Dhillon Zambon, aged 19 years six months, and John Berhane, aged 17 years eight months. For convenience, and intending no disrespect, we shall use surnames only.

3. The appellant was a member of a gang called the Cally Boyz. Berhane was a member of an associated gang. The deceased had been involved in an incident with the appellant and other members of the Cally Boyz on 1 March 2017. In the following months the deceased had been subject to intimidation. In July 2017 he was attacked in the street by three youths. The prosecution alleged that the appellant bore a grudge against the deceased, whom he believed to have assisted the police in relation to the earlier incident.

4. On the evening of 24 August 2017, the appellant and Zambon, who were riding bicycles, chanced to see the deceased, who was on foot. They pursued him and he began to run. The appellant made phone calls to Berhane. Berhane, Lupqi and a third man (who has not been identified), all riding bicycles and all with their faces covered, then joined the pursuit. All five followed the deceased as he ran through the streets, using their bicycles to block his path. The deceased called his father as he ran, asking to be collected by car and his father tried to locate him. The deceased reached a house where he knew the occupants and ran to the front door, but he was caught by Lupqi and stabbed three times with a large knife. All five pursuers then cycled off as a group.

5. One of the stab wounds had severed the deceased's femoral artery, causing massive blood loss. Despite medical intervention, he sadly died in hospital a few hours later.

6. The appellant fled to Spain, where he remained until extradited back to the United Kingdom.

7. Lupqi, Berhane and Zambon were arrested and charged with murder. Lupqi pleaded guilty. The other two were convicted after a trial in March 2018 before Her Honour

Judge Dhir and a jury. On 25 June 2018 Lupqi was sentenced to be detained at Her Majesty's Pleasure with a minimum term of 12 years; Berhane to be detained at Her Majesty's Pleasure with a minimum term of 21 years; and Zambon to custody for life with a minimum term of 21 years.

8. At the later trial of the appellant, the prosecution relied on evidence relating to the following: the appellant's gang membership, including YouTube footage of the appellant and Berhane with rap lyrics referring to the Cally Boyz' use of knives; the incidents in March and July 2017; CCTV and mobile phone footage showing the pursuit and stabbing of the deceased on 24 August 2017; the eye witness evidence of persons who saw parts of the pursuit; the evidence of the deceased's father; mobile phone data and cell site information in respect of relevant phone calls; and the appellant's flight to Spain.

9. In addition, the prosecution sought to adduce evidence pursuant to section 74 of the Police and Criminal Evidence Act 1984 of the convictions for murder of Lupqi, Zambon and Berhane. It was argued by the defence that the evidence was not admissible or in the alternative that it should be excluded on the grounds of fairness pursuant to section 78 of the 1984 Act.

10. Counsel on each side referred to a number of decided cases, of which we shall say more shortly, and it is clear that the judge had them in mind when she gave a written ruling dated 1 March 2019. She held that "evidence that Lupqi, Berhane and Zambon murdered Esbrand is plainly admissible in a case where it is alleged that Stevens was party to a joint enterprise with them to murder Esbrand", and that the real issue was whether the evidence of the convictions should be excluded pursuant to section 78.

11. In considering that issue, the judge noted that it was an essential element of the prosecution case against the appellant that the deceased was murdered. Therefore, "If Lupqi was the one who stabbed Esbrand, then the prosecution need to prove, as part of their case against Stevens, that Lupqi murdered Esbrand. But it was not a necessary precondition of Lupqi's guilt that Stevens was also guilty of murder." She held that there would be no unfairness in admitting evidence of Lupqi's conviction. She observed that Mr Ivers QC - then as now appearing for the appellant - had not argued strongly against that conclusion.

12. Mr Ivers had however submitted that it would be unfair to adduce evidence of the convictions of Berhane and Zambon. He argued that the situation was similar to a closed conspiracy involving two parties, in which it is implicit in the conviction of one that the other is also guilty. The judge rejected that analogy, saying at paragraph 18 of her ruling:

    i. "Stevens' guilt was not implicit in the conviction of Berhane (or Zambon). The essence of the case against Berhane (and Zambon)

was that he assisted Lupqi to murder Esbrand. The jury at their trial could find Berhane (and Zambon) guilty of murder whether or not they were sure that Stevens intended to assist Lupqi to cause grievous bodily harm to Esbrand."

13. The judge went on to say that it was relevant to the prosecution case against the appellant to prove that the man whom he telephoned (Berhane) assisted Lupqi to murder the deceased. Although Mr Ivers had indicated that the defence would not be seeking to argue that the attack on the deceased was not a joint attack, there was no specific admission that Berhane was a party to the attack. Evidence of Berhane's conviction would not close off the issue which the jury had to try, namely whether the appellant knowingly participated in a murderous attack.

14. The same applied, the judge said, to Zambon's conviction. She rejected the defence submission that the appellant's role could be regarded as indistinguishable from Zambon's role, so that evidence of Zambon's conviction would come very close to closing off the issue which the jury had to try. She said at paragraph 21:

    i. "The jury will have to consider the evidence as to what Stevens did and what he intended, independently of the case against any of the other participants, and taking account of such evidence (if any) as Stevens may give in explanation of his actions and his intentions. If he gives evidence that he was innocently caught up in the wrongdoing of others, the jury will have to assess that evidence, and their consideration will not be closed off by learning of the convictions of Lupqi, Berhane or Zambon."

15. The judge therefore granted the prosecution application.

16. The appellant gave evidence to the following effect. He had been associating with the Cally Boyz since he was 14 or 15. They were known as a violent gang, and members carried knives or hid them so that they could be available for use, though he did not do so himself. He had no issue with the deceased, even after the incident of 1 March 2017, and wished him no harm. When he and Zambon chanced to encounter the deceased on 24 August 2017, the deceased had made a challenging remark and put a hand into his trousers as if he was carrying a weapon. The appellant only followed the deceased because he did not want to give the appearance that he was scared. He called Berhane and told him he was having an argument with the deceased, but he did not know that Berhane was with others and did not intend him to bring any weapon. He did not intend that the deceased would be attacked, only that the deceased would be scared into thinking that he would be. He continued to chase the deceased in order to scare him, but had to stop because the wheel of his bicycle became loose. He saw Lupqi on the pavement near the deceased and saw that Lupqi was holding something he thought might be a knife. He had not seen any knife before that. He then saw Lupqi leaving on his bicycle and assumed the deceased had gone into a house. He did not know of the stabbing until

later. He went to Spain because he was worried about being arrested for something he had not done.

17. The judge in her summing-up directed the jury appropriately about joint enterprise. She directed them that the convictions of Lupqi, Berhane and Zambon were evidence that each of them was guilty of the murder of the deceased, but that none of their convictions was evidence that the appellant was a party to the murder. She said, in relation to Berhane and Zambon, that the fact that they assisted or encouraged the stabbing of the deceased by Lupqi, and had the necessary intention that the deceased should be caused at least really serious harm, did not prove that the appellant assisted or encouraged the stabbing, or that he had the necessary intention. She emphasised that the jury could only find the appellant guilty if they gave affirmative answers to the questions which she had posed for them in a route to their verdict. No objection is or could be made to these directions.

18. The grounds of appeal are that the judge's ruling was wrong and the appellant's conviction is unsafe for three reasons. First, the convictions of Lupqi, Zambon and Berhane had no relevance to the issues in the appellant's trial and the judge should therefore not have admitted them in evidence pursuant to section 74 of the 1984 Act. Secondly, that evidence should have been excluded pursuant to section 78 of the Act. Thirdly, the evidence of Zambon's conviction was gratuitous in the sense that it added nothing under section 74, but it caused deep unfairness which it was impossible to address.

19. In support of these grounds, Mr Ivers points to the appellant's evidence that he did not tell Berhane to bring any weapon and did not know that any of those who arrived was carrying a knife. He then points to the evidence that the appellant and Zambon were shown on the CCTV footage chasing the deceased along the road and then being joined by others. He points out that save for a very brief interval, the appellant and Zambon were together throughout. In those circumstances, submits Mr Ivers, it was not possible to conceive of a scenario in which Zambon knew of the knife but the appellant did not. Moreover, there was no dispute but that there was a joint attack on the deceased. The jury should therefore not have been informed that Zambon had already been convicted of murder. It would have been sufficient for the jury to learn of the convictions of Lupqi (who stabbed the deceased) and Berhane (whom the appellant had called by phone). The evidence of Zambon's conviction added nothing and served only to leave the jury with the impossible task of deciding whether the previous jury had reached a correct verdict about Zambon. Mr Ivers submits that the prosecution wrongly argued for a looser test of admissibility than that established by case law.

20. As to exclusion of evidence pursuant to section 78, Mr Ivers submits that there was a significant risk that the jury would conclude that the appellant must be guilty of murder simply because others had been convicted of murder, in particular Zambon whose role

was alleged to be very similar to that of the appellant. Mr Ivers renews his submission that the position in relation to the appellant and Zambon was analogous to that of two conspirators in a closed conspiracy. He argues that the admission of Zambon's conviction came very close to "closing off" the issue which the jury had to try in the appellant's case. That evidence should therefore have been ruled inadmissible or excluded pursuant to section 78. More generally, Mr Ivers submits that evidence of the convictions of others did not help the jury to decide the appellant's state of mind or his intentional participation. Any probative value was far outweighed by the risk that the jury would use the evidence in an impermissible way.

21. Mr Davies QC, representing the prosecution in this court as he did below, submits in response that the convictions of others were properly admissible and that the judge was entitled and correct to refuse to exclude them pursuant to section 78. In any event, the evidence against the appellant was so strong that his conviction was inevitable, even if all or any of the evidence relating to the convictions of others was wrongly admitted.

22. We are very grateful to counsel for their thorough submissions.

23. It is convenient first to set out the material terms of section 74(1) and (2) and section 78(1) of the 1984 Act and then to consider what seemed to us to be the most important of the cases cited by counsel.

24. Section 74 provides in material part as follows:

    i. "(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or any other Member State or by a Service court outside the United Kingdom, shall be admissible in evidence for the purpose of proving that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

    ii. (2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom or any other Member State or by a Service court outside the United Kingdom, he shall be taken to have committed that offence unless the contrary is proved."

25. Section 78 provides in material part as follows:

    i. "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to

the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

26. In O'Connor (1987) 85 Cr.App.R 298, the defendant was charged with conspiring with one other person (B) to obtain money by deception from insurers. B pleaded guilty. His plea and conviction were adduced in evidence in the defendant's trial. Given the difficulty for a jury of contemplating that the defendant had not conspired with B, even though B had admitted conspiring with the defendant, the court held that the evidence should have been excluded pursuant to section 78. It went on, however, to uphold the conviction because the evidence against the defendant was in any event overwhelming.

27. In Kempster [1989] 1 WLR 1125, this court approved an observation in the earlier case of Curry [1998] Crim.L.R 527 that "where the evidence expressly or by necessary inference imports the complicity of the person on trial it should not be used".

28. In S [2007] EWCA Crim. 2105, the defendant and T (a prostitute) had been jointly charged with the robbery of T's client and with a firearms offence. T pleaded guilty to both offences. The defendant's case at trial was that he had merely been present when T had stolen money from her client but that she had not used or threatened violence, and had therefore not robbed him, and that there was no gun. The prosecution were permitted to adduce evidence of T's pleas and convictions. The defendant was convicted. On his appeal, this court held that the evidence was wrongly admitted and quashed the convictions. The judgment of the court was given by Hughes LJ (as he then was). At paragraphs 12 and 15, the court held that the convictions were in law admissible and the real question was whether they should have been excluded under section 78.

29. At paragraph 16 and following, Hughes LJ referred to the line of cases including O'Connor and Kempster and continued:

    i. "16. We have been taken to the line of cases which begins with R v O'Connor [1987] 85 Cr App R 98. They are well known; we need not review all of them. We should, however, refer to the helpful distillation of many of them in R v Kempster [1990] 90 Cr App R 14 in the judgment of Staughton LJ. That line of cases indicates that section 74 should be sparingly applied. The reason is because the evidence that a now absent co-accused has pleaded guilty may carry in the minds of the jury enormous weight, but it is nevertheless evidence which cannot properly be tested in the trial of the remaining defendant. That is particularly so where the issue is such that the absent co-defendant who has pleaded guilty could not, or scarcely could, be guilty of the offence unless the present

defendant were also. In both those situations the court needs to consider with considerable care whether the evidence of the conviction would have a disproportionate and unfair effect upon the trial. With those cases can be contrasted the kind of case in which there is little or no issue that the offence was committed, and the real live issue is whether the present defendant was party to it or not. In those circumstances, commonly, the pleas of guilty of other co-defendants can properly be admitted to reinforce the evidence that the offence did occur, leaving the jury independently to consider whether the guilt of the present defendant is additionally proved.

ii. 17. We accept, as did the trial judge in this case, that this line of cases was decided before the passing of the Criminal Justice Act 2003. We agree that that new Act does proceed, as the judge in this case said, upon the basis that in some respects the ambit of evidence with which a jury can be trusted is wider than the law formally allowed. That thinking is, we do not doubt, there to be discerned in the bad character provisions of the Criminal Justice Act 2003 and also in the relaxation of the rule against hearsay. It does not, however, follow that the approach of the line of cases to which we have been referred is simply out of date. It remains extremely relevant what the issue is in the case before the trial court. It remains of considerable importance to examine whether the case is one in which the admission of the plea of guilty of a now absent co-defendant would have an unfair effect upon the instant trial by closing off much, or in some cases all, of the issues which the jury is trying.

iii. 18. It remains a proper approach, we are satisfied, that if there is no real question but that the offence was committed by someone and the real issue is whether the present defendant is party to it or not, evidence of pleas of guilty is likely to be perfectly fair, though of course each case depends upon its own facts. However, it also remains true that such evidence may well be unfair if the issues are such that the evidence closes off the issues that the jury has to try."

30. The court noted that the issues which the jury were trying in that case were whether there had been a robbery, as opposed to a theft, and whether a gun was involved. T's guilty pleas included admissions that the victim had been robbed and that there was a gun. Those were admissions of two important facts which the defendant specifically denied. The court concluded that in those circumstances, admission of the evidence of T's convictions "went a very long way towards closing off the very issues which the jury was trying."

31. In Clift and Harrison [2013] 1 WLR 2093, each of the appellants had been convicted of

causing grievous bodily with intent to a victim who subsequently died. Each was charged with murder and the prosecution was permitted in each case to adduce evidence of the earlier conviction. Dismissing their appeals against conviction of murder, the court rejected an argument that the use of section 74 in such circumstances would prevent a defendant from advancing his defence or prevent a jury from acquitting him. At paragraph 36, Lord Judge, CJ, said:

i. "There is, in addition, the separate safeguard under section 78, which permits the judge to exclude the evidence. Fairness, of course, runs both ways: the exclusion of admissible evidence may well be unfair to the prosecution. Without seeking to curtail the valuable judicial weapon against unfairness in the criminal justice system embodied in and exemplified by section 78, it would be something of a novel proposition for the exercise of this discretion to enable the court to exclude evidence when its admissibility stems from the enactment of a statutory provision deliberately designed to permit the evidence to be adduced. Accordingly, the evidence of the earlier convictions cannot be excluded on the basis of some nebulous sense of unfairness. If section 78 were used to circumvent a clear statutory provision for no better reason than judicial or academic distaste for it, the discretion would be improperly exercised."

32. In Denham and Stansfield [2016] EWCA Crim. 1048, a number of men were charged with conspiracies. Some pleaded guilty. Their convictions were adduced in evidence at the trial of others, who did not deny the existence of a conspiracy but disputed being party to it. On appeal, the court concluded that the admission of that evidence did not have the effect of shutting off the defences of those on trial, or of closing off the very issue which the jury had to decide. Simon LJ, giving the judgment of the court, confirmed at paragraph 39 that evidence admissible under section 74 should be excluded if its admission were unfair in the particular circumstances. He observed that, "The admission of prosecution evidence will often raise difficulties for a defence; but it is unfairness to, and not difficulties for, the defence which is the key." He went on to say at paragraph 40 that:

i. "... the decision whether to admit the evidence, although often described as the exercise of discretion, might better be described as the exercise of a judgment in which a balance has to be struck on the issue of fairness. We mention this because, if it were a pure matter of discretion the basis of challenge to a judge's decision might be unduly confined. Ultimately the decision whether to admit evidence in these circumstances is either right or wrong, although whether the conviction is safe is another matter. Nevertheless, as the judge noted, correctly in our view, such decisions will necessarily be fact sensitive, and the judge will be in a particularly good position to assess the issue of fairness in the

context of the dynamics of the trial process."

33. Finally, in Shirt [2018] 4 WLR 154 the defendants were charged with others with conspiracy to defraud by representing that a forged will was genuine. Two of the co-accused pleaded guilty and their convictions were admitted in evidence pursuant to section 74. As the headnote records, the court in dismissing the appeal held:

    i. "... that although the heart of the defendants' defence was that the will was genuine, they also impliedly asserted that because the will was in accordance with the deceased's intentions they lacked dishonesty and that they were not part of any conspiracy; that although the introduction of the evidence of the co-defendants' convictions would detrimentally have impacted on the defendants' ability to assert that the will was genuine, it would not have had a similar impact on the issues as to whether the defendants were knowingly parties to any conspiracy and whether they had been acting dishonestly, which the prosecution also had to prove; that, therefore, the admission of evidence of the convictions did not make the trial proceedings unfair; and that, accordingly, the judge had been right not to exclude the evidence pursuant to section 78."

34. Having reflected on that case law and on the submissions of counsel, our conclusions are as follows.

35. We respectfully agree with all that was said by Hughes LJ in the passage which we have quoted from S. Subsection 74(1) can only be used where evidence that a person other than the defendant ("X") committed an offence is relevant and admissible. If it does apply, the subsection provides a means by which the fact that X committed his offence may be proved. It makes it unnecessary for the prosecution to prove again that which has already been established against X by his conviction. As the closing words of the subsection make clear, it does not prevent the prosecution from also adducing other evidence that X committed the offence.

36. The effect of subsection (2) is that the admissibility in evidence of the conviction does not automatically conclude the issue of whether X committed the offence. The defendant can dispute that fact, although he takes on a burden of proof in doing so.

37. By section 75 of the 1984 Act, the contents of the indictment on which X was convicted are admissible in evidence for the purpose of identifying the facts on which the conviction was based. Again, this provision is without prejudice to the adducing of other admissible evidence for that purpose.

38. It is therefore always necessary when considering admissibility under section 74 to

analyse the purpose for which it is sought to adduce the fact that X committed his offence and the extent of any facts which it is sought to prove under the ancillary provisions of section 75. The need for a careful and fact-specific analysis of this kind is well illustrated by the decision in Shirt. In our view, the references in some of the older cases to "sparing" use of section 74 are to be understood as requiring this careful analysis.

39. Where evidence of X's conviction is in principle admissible pursuant to section 74 and the real issue is whether that evidence should be excluded pursuant to section 78, the important question will be whether, and if so to what extent, X's conviction imports complicity in the crime on the part of the defendant. As Hughes LJ put it - in words which we think are a convenient test of whether an issue would be closed off by evidence of X's conviction - it is necessary to consider whether X could not or scarcely could be guilty of the offence unless the present defendant were also guilty. This, obviously, will be a fact-specific decision in each case. O'Connor provides a stark illustration of circumstances in which a defence may be unfairly closed off by evidence of the conviction of another. But as the decisions in S and Denham and Stansfield show, there may well be no unfairness in using section 74 in cases involving an allegation of joint enterprise in which there is no substantial issue as to whether the crime was committed and the main issue for the jury is whether the defendant was party to that crime.

40. When exclusion under section 78 is being considered, we respectfully agree with the court in Denham and Stansfield that the task of the court is more appropriately regarded as an exercise of judgement rather than as an exercise of pure discretion.

41. In the present case, the prosecution alleged that all five of the pursuers were parties to the attack on the deceased and that each of them intended that the deceased would suffer at least really serious injury. It was therefore relevant to the prosecution case to prove that each of the pursuers was guilty of murder. Evidence that each of them had committed murder was in principle admissible, as is implicitly accepted in the submissions on behalf of the appellant. In the case of three of the pursuers, one way of proving they were guilty of murder was by adducing evidence of their respective convictions for murder.

42. We cannot accept the submission that such evidence was unnecessary because it was not in dispute that the deceased was unlawfully killed and that the killing was a joint crime. The prosecution was entitled to adduce evidence that the killing was murder, and that each of Lupqi, Berhane and Zambon participated in the crime with the intent necessary to make them guilty of murder. No admission of those facts was made by the appellant. The prosecution was not seeking to use the convictions to prove anything more than those facts.

43. In the circumstances of this case, it is in our view clear that the judge was correct to rule that the evidence of the convictions of Lupqi, Berhane and Zambon was admissible. Her ruling did not depart from or loosen the principles stated in S. The real issue, as the

judge said, was whether all or any of that evidence should be excluded pursuant to section 78.

44. On this issue, we are unable to accept the submission that admission of the evidence of the convictions, or at least of the conviction of Zambon, would close off the issues which the jury had to decide in the appellant's trial. The issues in the trial where whether the jury were sure that the appellant intentionally encouraged or assisted the attack upon the deceased and that he did so with the intention that the deceased would be killed or really seriously injured. The resolution of those issues required the jury to focus upon the acts and intention of the appellant as an individual. The judge made that clear in her directions of law to which, as we have said, there is no challenge, and we can see no basis for the suggestion that the jury could not be expected to follow her directions. They were able to assess the evidence against and for the appellant as an individual, and we reject the suggestion that it was not possible for them to reach a not guilty verdict because to do so would in some way require them to find that the previous jury had reached one or more wrong decisions. In any case in which the prosecution allege a joint enterprise, juries have to consider the acts and intentions of each alleged participant separately, and in that respect the appellant's position was no different from what it would have been if he had stood trial jointly with the others. Evidence that others had committed murder no doubt made the appellant's defence more difficult; but it did not prevent him from advancing his defence, which in essence was that he did not intend any actual violence or any harm to the deceased, and did nothing to assist or encourage a stabbing of which he only became aware subsequently. The jury were not prevented from considering that defence and assessing it dispassionately. We reject the suggested analogy between the present case and a closed conspiracy such as was alleged in O'Connor.

45. Nor can we accept the submission that the evidence of Zambon's conviction should have been excluded, even if the evidence of other convictions was to go before the jury. The judge had to consider the fairness of the trial, not simply the interests of the appellant. It was not in our view necessary in order for there to be a fair trial for one part of the prosecution's admissible evidence to be excluded, and exclusion of it would have been unfair to the prosecution.

46. For those reasons, we reject the grounds of appeal against conviction and we are satisfied that the conviction is safe. The evidence that three others had committed murder was relevant and admissible against this appellant, and the judge was correct to refuse to exclude that evidence under section 78.

47. Having reached that conclusion, it is not necessary for us to consider the prosecution's alternative argument that the conviction is safe even if the judge had been wrong not to exclude some or all of the contentious evidence. We do, however, observe that we see considerable force in that argument.
48. It follows that the appeal against conviction fails and is dismissed.

49. We turn to the referred application for leave to appeal against sentence. We grant leave.

50. The appellant, as we have said, was just 18 at the time of the murder. He had previous convictions, none of which was for an offence of violence. His most serious conviction was for causing death by careless driving, for which in May 2015 he was sentenced to a detention and training order for 12 months.

51. Lupqi had no previous convictions. Zambon had previous convictions including a robbery for which in October 2015 he was sentenced to three years' detention. He was on licence from that sentence at the time of this murder. Berhane's previous convictions included offences of possessing an offensive weapon, and a collection of knives was found at his home when he was arrested for this murder. In addition, Berhane had been sentenced not only for the murder but also for serious offences of kidnap, false imprisonment, blackmail, causing grievous bodily harm and robbery which had been committed on the day after the murder. The seriousness of those subsequent offences is shown by the fact that the concurrent determinate sentences imposed for them included two custodial sentences of 12 years in length. The judge therefore clearly faced a difficult decision as to totality in Berhane's case. It should be noted that there was evidence that Berhane had a low IQ. The judge indicated that if she had been sentencing for the murder alone, the minimum term specified in Berhane's case would have been 17 years.

52. In sentencing the appellant, the judge referred to the loss suffered by the family of the deceased, which had been described by members of the family in a number of victim personal statements. We note in this regard the poignant feature that the CCTV footage showed that a very short time before the pursuit began, the deceased had been walking with his partner, pushing a pram in which was their two-week-old child. The judge noted that the appellant's flight from the jurisdiction had served to prolong the anguish of the bereaved. She described the murder as a coordinated and brazen attack on the deceased. She was satisfied that the appellant, motivated by a grudge which he bore against the deceased, was the leader of the group. He was the organiser and the instigator. When he called Berhane, it was to arrange for reinforcements and for a knife to be brought to the scene. The deceased knew that he was at risk of attack and was scared. The appellant and others had blocked his route as he tried to escape, trapping him so that he could be stabbed.

53. The judge took a starting point in accordance with paragraph 5A of schedule 21 to the Criminal Justice Act 2003 of 25 years. She found a number of aggravating features: the appellant's leading role, the degree of planning in summoning reinforcements, the preceding campaign of harassment and violence towards the deceased, the appellant's gang membership, his previous convictions and the fact that the stabbing took place in a crowded public area. She accepted that the evidence did not prove that there had been an intention to kill the deceased. She took into account in the appellant's favour his age

at the time of the murder, noting that he was at the bottom end of the age range of offenders to whom the 25-year minimum term applies. He was, however, an intelligent young man, an experienced criminal who by his own admission was at the time making his living by stealing from others, and he had shown a chilling lack of remorse.

54. The grounds of appeal against sentence are that the minimum term of 23 years was manifestly excessive in length having regard to the appellant's age and to the sentences imposed on others.

55. Mr Ivers points out that the judge had to deal with young offenders who had committed the same offence but for whom different starting points were prescribed by Parliament: a minimum term of 25 years in the cases of the appellant and Zambon, but of 12 years in the cases of Lupqi and Berhane. He relies on case law, starting with Peters [2005] 2 Cr.App.R (S) 101 and Attorney General's Reference Nos 143 and 144 of 2006, [2007] 1 Cr.App.R (S) 28, which make clear that in such cases the starting points are not to be applied mechanistically but that some flexibility is required and that there should be no sudden acceleration of a sentence due to age. He also relies on the recent and more general observations of the Lord Chief Justice in Clarke [2018] EWCA Crim. 185 to the effect that reaching the age of 18 does not present a cliff edge for the purposes of sentencing, and that full maturity is not conferred on an offender's 18th birthday.

56. From that basis, Mr Ivers submits that there is in this case an unjustified and unfair disparity in sentencing. He submits that the judge, when considering the issue of totality in Berhane's case, had reduced the term which would have been imposed for the later offences if they had stood alone and not the minimum term for this murder. Mr Ivers points out that Berhane was also a gang member, that he had appeared with the appellant on the YouTube video glorifying gang culture, that he had more serious relevant previous convictions and that it was he who brought to the scene Lupqi and another man, all three of them masked and Lupqi armed with a large knife. Mr Ivers submits that there is no justification for a difference of six years in the minimum term imposed in the appellant's case. He points to the fact that even taking into account the serious offences which were committed on the day after the murder, Berhane's minimum term was two years shorter than in the appellant's case.

57. Mr Ivers similarly submits that there is no justification for the difference of two years between the minimum terms for Zambon and the appellant. He points out that Zambon is appreciably older, that he had been with the appellant throughout the pursuit and that he was at the time on licence.

58. This was a callous murder which ended one life and blighted many others. The deceased must have been in great fear as he tried unsuccessfully to escape from his pursuers in the minutes before his death. We think it important to keep in mind the finding of the judge that the appellant was the instigator and organiser of the crime and that but for him, the

murder would not have been committed. Having presided over both trials, the judge was in the best position to make that important assessment. The fact that the appellant instigated the crime was a serious aggravating feature which distinguished his case from others.

59. However, the judge also found that the appellant's intention was to cause really serious injury, not to kill. That is one of the mitigating factors listed in schedule 21 to be reflected in some reduction from the statutory starting point. In addition, in accordance with the case law on which Mr Ivers relies, weight had to be given to the fact that the appellant was only just an adult, and to the need to avoid a mechanistic approach to the widely differing starting points applicable to the appellant at 18 years two months and Berhane at 17 years eight months. There is nothing to suggest that at the time of the murder the appellant was any less mature than others of his age and, having become involved in gang culture at a very young age, he had experience of crime. The judge did not however make any finding that he was particularly mature for his age.

60. We agree with Mr Ivers that the minimum term of 17 years which the judge indicated in Berhane's case is strikingly shorter than the appellant's sentence. As we have indicated, an important consideration in sentencing Berhane was the need to observe the principle of totality. We are not persuaded by Mr Ivers' submission that that feature of Berhane's case played no part in the judge's decision as to the appropriate minimum term for murder in his case. Even taking that into account, however, we are troubled by the difference in sentence between these two young offenders.

61. The appellant had of course delayed his trial by many months by his flight from the jurisdiction, and it may well be that at trial he presented a much more mature appearance than he did at the time of the murder. Be that as it may, we have concluded that with all respect to the judge, she fell into error in failing to give sufficient weight to his young age at the time of the offence. The appellant's leading role did not justify a difference of six years between his minimum term and that in Berhane's case. Nor in our view did it justify a difference of two years between his minimum term and that of Zambon, who although not the instigator was active throughout the pursuit and was appreciably further into adulthood. As Mr Ivers submits, a difference in age of 16 months in early adulthood can be significant. We do not understate the aggravating feature of the appellant's leading role, but it has to be balanced against his young age at the time. Balancing the considerations applicable to each of the offenders respectively, we conclude that the judge fell into error in imposing a minimum term in the appellant's case which exceeded that in Zambon's case.

62. We therefore allow the appeal against sentence to this limited extent: we quash the sentence of custody for life with a minimum term of 23 years and we substitute for it a sentence of custody for life with a minimum term of 21 years.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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