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Case No: 201901476 B4, 201901478 B4, 201901728 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT MANCHESTER
MR JUSTICE POPPLEWELL
T20187361, T20187280

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/02/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MRS JUSTICE MCGOWAN DBE
and
MR JUSTICE FORDHAM

- -

Between:

Carne Michael THOMASSON **Aldaire WARMINGTON**	**Appellants**
- and -	
REGINA	**Respondent**

- -
- -

Mr Simon Csoka QC (instructed by **Pro Bono**) for the **1st Appellant**
Ms Nina Grahame QC (instructed by **Pro Bono**) for the **2nd Appellant**
Mr Paul Greaney QC, Mr Jaime Hamilton QC & Mr Philip Barnes (instructed by **CPS Appeals Unit, Special Crime Division**) for the **Respondent**

Hearing dates: 19th January 2021

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Approved Judgment

Lord Justice Fulford V.P.:

Introduction

1. On 21 March 2019, in the Crown Court at Manchester (Crown Square) (Popplewell J) Carne Thomasson (now aged 30) and Aldaire Warmington (now aged 34) were convicted, on count 3A, of conspiracy to cause grievous bodily harm with intent (section 1(1) of the Criminal Law Act 1977) as an alternative to conspiracy to murder and, on count 4, of conspiracy to do an act tending and intending to pervert the course of public justice (section 1(1) Criminal Law Act 1977).

2. On 12 April 2019 Thomasson was sentenced to an extended sentence of 28 years, comprising a custodial term of 23 years' imprisonment and an extension period of 5 years on count 3A. Warmington was sentenced to an extended sentence of 25 years, comprising a custodial term of 20 years' imprisonment and an extension period of 5 years on count 3A. In the case of each man, a concurrent sentence of imprisonment of 2 years was imposed on count 4.

3. They had a number of co-accused. Jacob Harrison pleaded guilty to conspiracy to cause grievous bodily harm with intent (count 1) and was sentenced to 14 years' imprisonment. John Kent was also convicted on count 1, as well as count 2 (conspiracy to do an act tending and intended to pervert the course of public justice), and was sentenced to a total of 14 ½ years' imprisonment. Christopher Hall was convicted on count 3A and count 4, and was sentenced to an extended sentence of 18 ½ years, comprising a custodial term of 14 ½ years and an extension period of 4 years in respect of count 3A and a concurrent term of 18 months' imprisonment on count 4. His application for leave to appeal against sentence was refused by the single Judge and has not been renewed. Lincoln Warmington was convicted on count 4 and sentenced to 2 years and 3 months' imprisonment. Dominic Walton and James Coward were also convicted on count 4 and each was sentenced to 2 years' imprisonment. John Thomasson (the appellant Carne Thomasson's father) was acquitted of conspiracy to cause grievous bodily harm with intent (count 3A) and conspiracy to pervert the course of justice (count 4).

4. Before this court, Thomasson appeals against conviction by leave of the full court. He renews his application for leave to appeal sentence following refusal by the single judge. Warmington renews his application for leave to appeal sentence following refusal by the single judge, who gave a loss of time warning.

An Outline of the Prosecution Case

The Background

5. Between February 2015 and October 2015, a series of highly violent incidents occurred in the Salford area of Greater Manchester. Various men were shot and stabbed, and a hand grenade was thrown into residential premises. It was the prosecution's case that these were planned attacks carried out by various members of two competing criminal gangs. The first gang, the "*A-Team*", was headed by a man called Stephen Britton. Aldaire Warmington and Carne Thomasson were said to be prominent members of this group. The second gang, the "*Anti-A Team*", was headed by a man called Michael Carroll.

6. The present crimes are said to have been a result of this escalating violence. Most notably,

in July 2015, Paul Massey, a mentor to Stephen Britton, had been shot and killed with a sub-machine gun on his doorstep by a man associated with Michael Carroll and the Anti-A Team. Mark Fellows, an associate of Michael Carroll, was convicted of his murder. As a consequence of this killing, it was the prosecution's case that the appellant Carne Thomasson and another member of the A-Team decided by way of revenge to select and kill someone with strong associations with Michael Carroll and the Anti-A team.

The Shooting of Jaime Rothwell (count 1 – conspiracy to cause grievous bodily harm with intent) Operation Sun

7. On 30 March 2015, a man maned Jaime Rothwell was shot at a carwash by a Heckler and Koch self-loading pistol. Rothwell, who survived and refused to cooperate with the police, was an associate of Michael Carroll and was said to be a member of the Anti-A Team. The prosecution alleged that the A-Team deployed a "*spotter*" vehicle to wait for Jaime Rothwell to appear at the carwash. This vehicle was said to have been driven by John Kent, the father of Warmington's long-term partner. A second vehicle contained two other alleged members of the A-Team. The prosecution alleged Jacob Harrison was likely to have been the driver of this second vehicle and an unknown passenger fired the gun. As set out above, Harrison pleaded guilty to conspiracy to cause grievous bodily harm (count 1). In the aftermath, John Kent unsuccessfully sought to protect himself by pressurising his employer into providing a false alibi (count 2).

Shooting of Jayne Hickey and Christian Hickey junior (count 3A – conspiracy to cause grievous bodily harm with intent) Operation Mera

8. On 12 October 2015, at around 9.25 pm, Jayne Hickey and her seven-year-old son, Christian Hickey junior, were at their home in Eccles, Lancashire. Her husband, Christian Hickey senior, a close friend of Michael Carroll, was also at the premises. There was a knock to the window and Jayne Hickey went to the front door, accompanied by Christian Hickey junior. She opened the door and saw a man standing in the driveway. He shouted, "*Is your husband in*?" Jayne Hickey replied, "*one sec*", at which point she heard the man say, "*nah, nah*." A second man appeared. He was armed and started shooting, using the same Heckler and Koch pistol that wounded Jaime Rothwell (count 1). Jayne Hickey slammed the door closed. Mrs Hickey and her son had both been shot in the legs. The gunman was not traced. The Crown's case was that the first man was Carne Thomasson and he directed the words "*nah nah*" to the gunman, thereby indicating that he should not shoot because the intended target (Christian Hickey senior) was not in the doorway.

9. Carne Thomasson's suggested role, therefore, was to "*flush out*" Christian Hickey senior in order for him to be shot on his doorstep. Whether he was present or not, it was contended he had been a party to the agreement to carry out this shooting as he had been involved in the arrangements to move the Heckler and Koch pistol.

10. In December 2015, Aldaire Warmington and Christopher Hall were arrested in possession of two handguns, one of which was the Heckler and Koch pistol. Both men pleaded guilty to two counts of possession of a firearm on a separate indictment.

Removal and destruction of an Audi motorcar (count 4 – perverting the course of justice)

11. The prosecution alleged that Lincoln Warmington, Dominic Walton and James Coward, all members of the A Team, provided assistance by disposing of an Audi motor car that had been used by the attackers for the incident in count 3A. The day after the shooting of the Hickeys, Christopher Hall was alleged to have driven it to Scotland for disposal. The arrangements were said to have been made by Carne Thomasson, who liaised with

a contact of his in Scotland and Thomasson thereafter travelled to Scotland to ensure that the motor car had been dealt with.

A Summary of the Relevant Prosecution Evidence

The identification of Carne Thomasson by Jayne Hickey

12. Mrs Hickey was interviewed by the police over a number of days while she was in hospital. Each interview was appropriately video recorded. On 13 October 2015 whilst awaiting emergency surgery, she described her attacker as a man of medium build with a local accent, wearing a baseball cap and a bubble coat, who was "*like stubbly*". On 17 October 2015, she repeated her earlier brief description, adding that it looked as if the man was trying to grow a full beard. She suggested he was about 19 or 20 years of age (Thomasson was 25 at the time). He was white, scruffy looking, with sideburns and lumps on his skin "*not like boils but like lumps. It looked quite rough, like it would be sore … lumpy*". On 18 October 2015, she set out that her attacker's hair came over his ears, as if it needed cutting. On 27 October 2015 she suggested his face was marked by scar tissue or "*acne, boils or moles … a bit lumpy*". On 11 November 2015 she said he would stand out in a crowd, and he was "*not your average Joe*" because he looked "*a bit dodgy*". As to his face, there were "*like dark marks but they weren't freckles, so they could be classed as moles I guess and that's what I'm really struggling to kind of describe*".

13. At some stage, the name of Carne Thomasson was suggested to Mrs Hickey and her husband as one of the men who had been involved in the shooting.

14. Some months following the incident, and after the name of Carne Thomasson had been suggested to Mrs Hickey, she said she came across an article on the website of The Sun newspaper concerning the arrest of Carne Thomasson, Stephen Britton and Declan Gorman in Spain on 16 February 2016. The article contained a police custody photograph of Carne Thomasson from 2013 and Mrs Hickey immediately recognised him as the man standing on her drive with whom she had spoken just prior to the shooting on 12 October 2015. She informed the police of this recognition on 22 February 2016 and she was interviewed on 1 March 2016. The iPad on which she said she had viewed the Sun article was not retained by the police at that stage. On 4 May 2016 officers attended Mrs Hickey's home and she handed over the device when reassured it would be replaced. She had been aware that the officers were coming to her home and she deleted her search history 90 minutes before their arrival. However, the cookies on the device (which had not been deleted) did not indicate that the device had been used to visit the Sun newspaper's website as described by Mrs Hickey.

Cell site evidence

15. The prosecution relied on cell site and other mobile telephone evidence which demonstrated Carne Thomasson's telephone had been used, and had moved, in circumstances that were consistent with him having made the arrangements for providing and retrieving the Heckler and Koch pistol, before and after the shooting. Christopher Hall lived in Little Hulton, Salford – an area infrequently visited by Carne Thomasson – and was said to be the armourer who kept firearms for use by the A-Team. Carne Thomasson used his mobile telephone to contact Hall on the day of the shooting. In summary, it was suggested that the cell site evidence revealed that Carne Thomasson had been with his uncle John Thomasson when they visited Christopher Hall before and after the shooting in order to collect and return the gun. The prosecution alleged Carne Thomasson left his mobile telephone at his home during the events surrounding the

shooting in order to avoid being implicated by cell site evidence. Use of his telephone resumed some 25 minutes after the incident. Thereafter, the appellant used different telephones.

16. In evidence, Carne Thomasson accepted he had been involved in the transfer of the Heckler and Koch pistol when it was recovered from his associates in December 2015.

Eyewitness and ANPR/CCTV evidence concerning an Audi motorcar

17. The Audi motorcar had been seen undertaking a reconnaissance of the area and it was on a street close to the scene of the shooting at the relevant time (see [11] above). It was the prosecution's case that there were three occupants of the car on 12 October 2015: the driver and the two attackers. Carne Thomasson's mobile telephone was used to contact Christopher Hall to arrange the disposal of the car in Scotland the following day. Indeed, as set out above, Carne Thomasson travelled to Scotland shortly after the incident and the jury were invited to infer this was to ensure that the arrangements for the car's disposal had been carried out.

An Outline of the Defence Case

18. Carne Thomasson's defence was alibi. He maintained he was at home with his mother, Diane Thomasson, and her friend, Lynne Shepard, at the time of the shooting of the Hickeys.

19. He contended he did not fit Jayne Hickey's original description of the "*nah nah*" man and he suggested she had later identified him from an article in The Sun newspaper at the instigation of Michael Carroll and her husband. He suggested that Mrs Hickey was lying when she suggested she had seen him standing on her drive. It was his case that his telephone contact with Christopher Hall and a telephone number registered in Scotland, along with his trip to Scotland, were connected to cannabis dealing, and were wholly unrelated to weapons or disposing of the Audi motorcar.

The Appeal against Conviction (Carne Thomasson only)

The identification evidence

20. The appellant Carne Thomasson submitted to the judge that the identification evidence from Jayne Hickey fell to be excluded under section 78 Police and Criminal Evidence Act 1984 ("PACE"). It was suggested that the identification was poor and the circumstances in which it was obtained were unsafe. Mr Csoka Q.C., on behalf of the appellant, described the evidence as tainted. He contended that Mrs Hickey's description of the "*nah nah*" man did not match the appellant and, in particular, her account that he had a notable facial disfigurement or facial markings, along with her description that his hair covered part of ears and that he appeared young was wrong. It was submitted that his face was not distinctively marked, as alleged; his hair was worn short at the time (a crew cut); and he looked old for his years. Furthermore, it was emphasised that the appellant's name had been provided to Mrs Hickey by Michael Carroll, who was a close friend of her husband. Mrs Hickey was said to be unreliable and to have been inconsistent in her account as to how she came to view the Sun article and on the issue of whether she had otherwise seen a picture of the appellant online. It was argued that the appellant had been denied the opportunity of addressing the suggested identification of him from a picture in the Sun newspaper on the iPad, given its browsing history had been erased less than two hours prior to it being handed to the police.

21. The judge in his ruling indicated that the jury would be able to assess the description of the man provided by Mrs Hickey in the various recorded police interviews set out above. She could be cross-examined on all the features of the circumstances in which she said she recognised the appellant, including i) the suggested prompting by others that the man was the appellant; ii) the circumstances of the occasion when she saw the article in the Sun and whether her confidence in her identification of him was shaken by the descriptions she had provided when contrasted with the actual appearance of the appellant; and iii) whether she had viewed a photograph of the appellant before the article in the Sun newspaper was published (it had featured on the websites of the Daily Mail and the Manchester Evening News since, respectively, 2012 and 2013).

22. The judge referred to the submission that the appellant does not suffer from acne scars, that he does not have boils, moles or sideburns on his face and that he purportedly had short hair on the night before the incident, meaning he did not have long hair over his ears. It was contended that he can readily grow a beard and he looked distinctly unlike a 19-year-old. The judge observed that these were all assertions and there was no evidence before the court by way, for instance, of photographs showing what he looked like at the time of the shooting. In any event, these were matters which could be explored before the jury. We note that after the ruling, Mr Csoka drew the judge's attention for the first time to a photograph of the appellant on the night before the shooting which the judge indicated would not have affected his decision.

23. The prosecution offered to take a witness statement from Mrs Hickey as to the deletion of the browsing history to ensure that the appellant was not taken by surprise during cross-examination on this discrete issue and the judge indicated that time would be afforded for counsel to marshal additional material on the issue of the relationship between Michael Carroll and the Hickey family, as relevant to the appellant's suggestion that this was a "*malicious identification*". The judge concluded:

> "Taking together cumulatively all the points on which reliance is placed, it seems to me that they are all matters which are for the jury to weigh. They are capable of undermining the credibility and reliability of the identification but it is not obvious at this stage that they must do so and it would be open to a jury, in my view properly directed, still to place some reliance on her identification evidence as part of the case against Carne Thomasson. Whether and to what extent the jury will do so is part of the jury's function and will be a matter for them.
>
> Accordingly, I cannot conclude that in all the circumstances the admission of the evidence would have such an adverse effect on the fairness of Carne Thomasson's trial so as to exclude it and the application will be dismissed."

24. In support of this ground of appeal, Mr Csoka essentially rehearsed his submission before the judge that the flaws in the identification of the appellant by Mrs Hickey were so extensive and its unreliability was such that it was dangerous evidence which ought to have been excluded. In his oral submissions, he described the identification as "*transparently unreliable*". He emphasised that the appellant's position was twofold: first, Mrs Hickey was a malicious and not a mistaken witness, and second, the circumstances of the identification were in any event difficult. Furthermore, Mr Csoka suggested that the admission of this evidence placed the appellant in the difficult position of needing to accuse one of those who had been badly injured during the incident of lying.

25. The judge referred at the commencement of his ruling to the relevant legislative provision, section 78 PACE:

> **"Exclusion of unfair evidence.**
>
> (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.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

26. It is to be stressed that this was not framed as an application to exclude evidence pursuant to the decision in *R v Turnbull and another* 1977 QB 224. It has not been suggested, therefore, that the quality of the identification evidence was "*poor*" in the sense that Mrs Hickey's evidence depended solely on a fleeting glance or that this was a longer observation of the individual in difficult conditions (see pages 229 and 230 of *Turnbull*). Nor was it suggested that there was an absence of evidence that went to support the correctness of the identification. Instead, it is argued that the judge should have concluded that introduction of this evidence would have such an adverse effect on the fairness of the proceedings that the court ought to exclude it.

27. This submission is without any proper foundation. Mrs Hickey made a clear identification of the appellant as the man standing in her driveway who spoke with his co-conspirator before the pistol was fired. As to the submission that the inconsistencies in her description, along with the other potential weaknesses set out above, ought to have led the judge to conclude that the proceedings would be rendered unfair, in *Quinn* [1990] Crim LR 581, Lord Lane C.J. observed:

> "The function of the judge is therefore to *protect the fairness of the proceedings*, and normally proceedings are fair if a jury hears *all* relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another, the other side cannot properly challenge or meet, or where there has been an abuse of process, *e.g.* because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice."

28. As regards the deleted browsing history on the iPad, in *R. (Ebrahim) v Feltham Magistrates' Court* [2001] 2 Cr App R 23, Brooke LJ observed that *"(t)he circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between*" [26]. He continued:

> "27. It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or

> fingerprints or DNA material is likely to hamper the prosecution as much as the defence."

29. In *R v PR* [2019] EWCA Crim 1225; [2019] 2 Cr App R 22, this court considered whether the trial judge was right to allow a case to proceed when evidence gathered by the police in 2002, relevant to D's defence, had been destroyed by water damage and was unavailable for the trial in 2018. The court observed at [73]:

> "The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the prosecution had been able to prove, so that they are sure, that he or she is guilty."

30. More generally, although the appellant was correct to emphasise that he had significant material to deploy in order to suggest that Mrs Hickey's identification was unreliable and that she was a liar, the extent and strength of those points did not mean that the introduction of her evidence rendered the proceedings unfair for the purposes of section 78. It is a common feature of criminal trials that the prosecution relies on evidence that can be criticised, sometimes with considerable force. Criticisms that are properly made are likely to increase the prospect that the jury will not accept that part of the prosecution's case. Equally, the deletion of the browsing history – the unavailability of that evidence – was a feature of Mrs Hickey's evidence that could be, and was, dealt with in cross-examination.

31. It is to be emphasised that there was no suggestion that there had been impropriety on the part of the prosecuting authorities as to the way this evidence was obtained. Therefore, the admissibility challenge was not based on the suggested unreliability of the identification evidence, for instance because it had been obtained unlawfully, improperly or unfairly. Nor was it suggested that the appellant had, for some other reason, been unjustly prejudiced in relation to this evidence. Instead, the challenge was founded on the wholesale lack of credibility of the witness who was alleged to have made a malicious and untruthful identification, coupled with the deletion of the search history on the iPad. The bases for the attack on Mrs Hickey's credibility were clear and Mr Csoka was able to deploy the relevant material during cross-examination, including as to the loss of material from the iPad. Although all cases differ on their facts, we agree with Mr Greaney Q.C. for the Crown that when the objection raised under section 78 is based on the extent of a potential challenge to the credibility of an identifying witness, that factor, without more, is unlikely to lead to the exclusion of the evidence on fairness grounds. Save exceptionally, it will not be unfair to leave it for the jury to resolve any issues relating to credibility – however far-reaching – which counsel will be able to investigate in cross-examination and otherwise. This is entirely different from challenges that are made based on substantive unreliability or unjust prejudice, for instance because there has been a breach of the provisions of PACE or the Codes of Practice, or because of some other impropriety on the part of those who obtained the evidence.

32. Additionally, there is no challenge to the judge's direction to the jury on this issue and nor could there be. The judge carefully highlighted all the relevant considerations, which included his observation that the deletion of the browsing history meant that it was impossible to verify Mrs Hickey's account of having made the identification in the way she claimed. The judge stressed this was an example of the factors that weakened her

evidence. He warned the jury, additionally, that they must exercise caution and that experience has demonstrated that with identification evidence, honest and convincing witnesses can be mistaken. The judge's approach to the application under section 78 and his directions to the jury were faultless. It is immaterial for these purposes that the judge expressed a view in passing sentence that he was unsure whether the identification was correct. For the purposes of the trial this was a matter for the jury, not the judge whose role – in this context – was to resolve the question of admissibility rather than to decide whether the evidence led to a particular conclusion on this issue. His role when sentencing was entirely different, and it was for him to reach his own view of the facts, consistently with the decisions of the jury as reflected in their verdicts.

33. It follows that the convictions are not unsafe on account of this ground of appeal.

The Appellant's Application to Introduce an E-Fit picture

34. Jayne Hickey, with the assistance of a technician, produced an E-Fit picture of the "*nah nah*" man. This picture was admitted by agreement while Mrs Hickey gave evidence as it featured in the questioning of her during the recorded interviews of her account. Furthermore, it was accepted as being admissible for the purposes of cross examination as an inconsistent statement under section 4 Criminal Procedure Act 1865 and section 119 Criminal Justice Act 2003 ("CJA").

35. However, Mr Csoka additionally sought to introduce evidence that a number of police officers had indicated it resembled certain members of the A-Team, but none suggested it matched the appellant. Of the 21 police officers who viewed the E-fit, four identified an A-Team member: two as regards Jacob Harrison and two as regards Liam Dodds. The judge ruled against the appellant's application to introduce this evidence of the views of the officers on the identity of the person depicted in the E-Fit picture, on the basis it amounted to opinion evidence and was thus inadmissible. The judge determined it involved an officer expressing "*pure opinion evidence*" on the basis of primary material, which he suggested is different from recognition evidence. He concluded that an E-Fit image was a pictorial form of a description given by a witness and was not in the same category as an image from a video or CCTV recording. With a film, a witness is able to give first-hand recognition evidence.

36. Mr Csoka submits the judge erred in excluding this evidence of "*identification*" of other members of the A-Team, and not the appellant, from the E-Fit image. He relies on *Att.-Gen.'s Reference (No. 2 of 2002)* [2002] EWCA Crim 2373; [2003] 1 Cr App R 21, a case in which this court held that evidence of an identification from photographs or video could be given by witnesses who had not been present at the scene and who knew the defendant. The court additionally held that such evidence could be given by a witness who did not know the defendant and who had spent time viewing and analysing relevant photographic or film images thereby acquiring special knowledge that the jury did not have. He or she could give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant. We observe immediately that the *Att.-Gen.'s Reference (No. 2 of 2002)* was not concerned with E-Fits but with photographs or film footage (whether expertly enhanced or not).

37. Further, Mr Csoka relies on *R v Cook* [1987] QB 417; [1987] 84 Cr App R 369, a case in which a victim of robbery and indecent assault in the street described her attacker to a police officer, who pieced together a photofit picture. At the appellant's trial for robbing and indecently assaulting the victim he submitted, as a preliminary point, that the photofit

picture was inadmissible in evidence as being hearsay and a previous consistent statement from the victim. The submission was rejected, and the victim adduced the photofit during examination-in-chief. Watkins LJ at page 424 observed:

> "[…] What, however, is clear is that what was said by a prospective witness to a police officer in the absence of a defendant is hearsay and cannot, therefore, be admissible as evidence. But admissibility of a photofit is not dependent upon a recital by a witness when giving evidence of what that person said to the police officer composing it. So that aspect of hearsay need not further be considered.
>
> The rule is said to apply not only to assertions made orally, but to those made in writing or by conduct. Never, so far as we know, has it been held to apply to this comparatively modern form of evidence, namely, the sketch made by the police officer to accord with the witness's recollection of a suspect's physical characteristics and mode of dress and the even more modern photofit compiled from an identical source. Both are manifestations of the seeing eye, translations of vision on to paper through the medium of a police officer's skill of drawing or composing which a witness does not possess. The police officer is merely doing what the witness could do if possessing the requisite skill. When drawing or composing he is akin to a camera without, of course, being able to match in clarity the photograph of a person or scene which a camera automatically produces."
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> […]
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> And at 425:
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> "We regard the production of the sketch or photofit by a police officer making a graphic representation of a witness's memory as another form of the camera at work, albeit imperfectly and not produced contemporaneously with the material incident but soon or fairly soon afterwards. As we perceive it the photofit is not a statement in writing made in the absence of a defendant or anything resembling it in the sense that this very old rule against hearsay has ever been expressed to embrace. It is we think sui generis, that is to say, the only one of its kind. It is a thing apart, the admissibility to evidence of which would not be in breach of the hearsay rule.
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> Seeing that we do not regard the photofit as a statement at all it cannot come within the description of an earlier consistent statement which, save in exceptional circumstances, cannot ever be admissible in evidence. The true position is in our view that the photograph, the sketch and the photofit are in a class of evidence of their own to which neither the rule against hearsay nor the rule against the admission of an earlier consistent statement applies."

38. In *R v Constantinou* 91 Cr App R 74 this court followed the decision in *Cook,* citing at page 76 the headnote in *Cook*:

> "Photofit pictures, together with photographs and sketches, are in a class of their own, to which neither the rule of hearsay nor the rule against the admission of an earlier consistent statement applies."

39. Additionally, it is suggested by Mr Csoka that there may be greater justification for excluding E-Fit evidence when it is relied upon by the prosecution than when it is relied on by the defence, albeit the justification for this suggested difference in approach between the parties was not properly explained in submissions. In any event, it is argued that every instance of recognition is a form of opinion evidence. E-Fits, it is contended, are in the same position as recognition from photographs, videos and CCTV footage because film-based evidence can be partial and poor in quality. It is emphasised that one of those identified by the officers (Jacob Harrison who pleaded guilty to count 1) was an individual whose name was provided to Mrs Hickey by a friend. In all these circumstances it is suggested that the identification by way of this E-Fit picture of other members of the A-Team as suspects was plainly relevant to the jury's assessment of the contested identification evidence.

40. With respect to Mr Csoka, he has relied, at least in part, on authorities that have been overtaken by legislation. As Mr Greaney Q.C. observes, the hearsay rules have been reformulated by the Criminal Justice Act 2003. The admissibility of hearsay is now governed Part 11 of the CJA. Section 114 (1) provides that "*in criminal proceedings a statement not made in oral evidence in the proceedings is admissible of any matter stated if* […]" and thereafter the section sets out the various routes to admissibility. Section 115 (2) CJA provides that, for the purposes of Part 11, "*a statement is any representation of fact or opinion by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form*." This plainly covers an E-Fit picture such as that with which this appeal is concerned. We note that a description of the background to this change is usefully described in the Law Commission's Consultation Paper entitled "*Evidence in Criminal Proceedings: Hearsay and Related Topics*" (1995), in which the difference of approach to the words of a witness and a photofit image was described as "*distinctly anomalous*" (see [13.16]). Furthermore, in its subsequent 1997 report, the Law Commission, as part of a proposal for wide-ranging changes in the hearsay rule, recommended, for the same reason, that this distinction be abolished (see paragraphs 10.6, 10.46 and 10.51 – 10.52).

41. It is clear beyond doubt, therefore, that Parliament intended for Part 11 to regulate the admission of an E-Fit picture in the circumstances of the present case. As already indicated, during the trial, the E-Fit was admitted with the agreement of the parties, pursuant to section 114(1)(c) CJA ("*all parties to the proceedings agree to it being admissible*") because Mrs Hickey had referred to it during her interviews and on the basis that it was potentially a previous inconsistent statement (section 4 Criminal Procedure Act 1865 and section 119 CJA). There were other potential routes of admissibility, such as section 120 CJA ("*other previous statements of witnesses"*).

42. The reasoning expressed by this court in *Cook* and *Constantinou* on this issue, therefore, has been superseded. E-Fits can no longer be treated as being "*in a class of their own*" or "*akin to a camera*", given they are, following the implementation of the CJA, to be treated as hearsay evidence of "*a representation of fact or opinion by a person*". Indeed, it is to be observed that the decision in *Cook* has long had its respectful detractors. Professor Smith in the Criminal Law Review 1987 page 402 at 404 suggested that:

> "The analogy with the photograph is surely groundless. The information recorded by the camera does not pass through any human mind. There is no risk of inaccurate observation, concoction, or defective memory which are the reasons for excluding evidence as hearsay. It is no different in principle from the

> information recorded by a thermometer or barometer, a radar speedmeter, the radar set in *The Statue of Liberty* [1968] 2 All E.R. 195 or the Bank of England computer when it sorts and records the numbers of bank notes (wrongly assumed to be hearsay in *Pettigrew* (1980) 71 Cr.App.R. 39--see [1981] Crim.L.R. at 387).
>
> One sympathises with the court's wish to admit very cogent evidence: but it is not necessarily more cogent and may be less than the hypothetical written description of an assailant […] and that is clearly inadmissible as hearsay. The photofit picture, it is submitted, is indistinguishable in principle."

43. The editors of Phipson on Evidence, nineteenth edition, have been perhaps rather more trenchant, at 28-41:

> "The Court of Appeal has consistently refused to confront the hearsay nature of a visual representation of the culprit constructed from information supplied by an eyewitness to the crime. In *R. v Smith (Percy)* a sketch drawn by a police officer under the direction of a witness was held admissible, apparently as part of the latter's testimony. The policeman was treated as a mere conduit pipe so that the sketch was not his but that of the witness. This solution is far from convincing. Even if a human intermediary can act purely passively in transmitting information given by a witness, this is not what happened in *R. v Smith*. Had the witness dictated a list of features rather than drawn a sketch and then gone on to give evidence, the list would have been no more than a previous consistent statement. He would be able to refresh his memory from it; but the list itself would not be admissible. Had the witness not testified, it would have been inadmissible hearsay—even if the witness had written out the list himself. The decision to admit photofit pictures in *R. v Cook* is similarly flawed. The Court of Appeal described the photofit pictures as "another form of camera work". This is patently untrue. It is the statement by A of what B has said are individual features similar to those of a person whose identity is in issue. It is more clearly hearsay than evidence of an act of identification. The Criminal Justice Act 2003 has introduced important changes. Under this Act, a representation of fact or opinion "in a sketch, photofit or other pictorial form" adduced as evidence of any matter stated is hearsay. If W1 gives evidence, the pictorial representation, as W1's previous statement, is admissible as evidence of any matter stated provided that W1 "indicates that to the best of his belief he made the statement, and that to the best of his belief it states the truth". If W1 is not a witness, the pictorial representation may be admissible under s.116 or s.117 or, failing that, the court in its discretion might exercise the safety-valve discretion to admit it. These provisions are analysed in Ch.30."
>
> (See also Phipson at 15-10 on the detailed consequences of sections 114 and 115 CJA.)

44. This approach is echoed by the editors of Blackstone's Criminal Practice 2021 at F19.23:

> "Artist's sketches and composite images or 'photofits' (which now use digital E-FIT, or EFIT-V technology) are fundamentally different from photographs or video in that they depend on the fallible (and potentially mendacious) assertions of the witnesses who help to compile them. An image showing a bald or bearded suspect is manifestly a product of a witness's assertion that the suspect was bald or bearded, and must logically be categorised as a kind of statement, albeit one in

> visual form. This is now recognised in the CJA 2003, s. 115, which defines a 'statement' for the purpose of the hearsay rule as 'any representation of fact or opinion made by a person by whatever means; and it includes a representation made in a sketch, photofit or other pictorial form'. Such a statement may well be admissible in support of the witness who made it, under the CJA 2003, s. 120, or in the unavoidable absence of that witness, as provided for by s. 116 (see F19.8), but it is no longer possible for courts to proceed (as they did before the enactment of the CJA 2003) as if the hearsay rule has nothing to do with it."

We respectfully suggest that it follows that the commentary in Archbold Criminal Pleading Evidence and Practice 2021 at 14-70 is now out of date.

45. The E-Fit picture, therefore, was hearsay evidence and for these purposes it is to be treated in the same way as a written record made by a police officer of a description provided by an eyewitness as to the appearance of someone the witness had seen. In the present case, Mr Csoka's proposal would have involved a number of police officers viewing the E-Fit picture and comparing it to their memory of the appearance of various other people. The officers would, therefore, have been expressing their opinion as to the match between (a) the ***perception*** of the artist who compiled the E-Fit picture as to the ***perception*** of Mrs Hickey as to the man on her drive and (b) and a range of other people.

46. The present situation is markedly different from the process approved in *Att.-Gen.'s Reference (No. 2 of 2002)* when an officer or other witness, not present at the scene, gives identification evidence from photographs or film footage, whether or not they knew the defendant. The critical difference is that there is no hearsay involved in this situation, because the identifying witness who was not present is not reliant on the perception of another human being, for instance the individual who created an E-Fit picture or recorded a written description. The individual or machine taking the photograph or compiling the film footage which captured the image had no part to play other than the mechanical one of recording the image. (This is the same point as can be seen to have been recognised by Parliament in section 129 CJA and the Law Commission at paragraph 7.44 of the 1997 report.) The witness viewing a photograph is undertaking essentially the same task as an eyewitness at the scene, save that they are looking at a photograph or a film. That role is quite distinct from the E-Fit artist who influences the image on the basis of what he or she perceives the witness is describing when creating the image.

47. We have no doubt that it would not have been in the interests of justice for this hearsay-based evidence (itself hearsay in the present case because the police would not have been called to give direct evidence) to have been admitted. The evidence would have included, as just rehearsed, the opinion of various police officers on the ***perception*** of the artist who compiled the E-Fit picture of the ***perception*** of Mrs Hickey as to the man on her drive, and whether that individual matched a range of other people known to the police officers. Certainly, in the present case, this would have represented a wholly unreliable exercise, fraught with the risk of serious mistakes occurring during the various stages in the process, given the cumulative layers of perception, impression or opinion on the part of at least three different individuals (*viz*. Mrs Hickey, the artist and the police officer(s)). The risk would simply have been too great that the jury would have been misled by undetected human error. If the route to admissibility was via section 114(1) (d), we are confident it would not have been in the interests of justice for it to have been admitted. Nor, for that matter, would it have been right to allow the evidence to be admitted had it been proposed to call the police officers to give direct evidence of their opinion based on the E-Fit picture (and we stess the same would have applied if their

opinion related to any eyewitness's (hearsay) description of a person given in words rather than an E-Fit). Finally, we note the court's other exclusionary powers under section 126 CJA and section 78 Police and Criminal Evidence Act 1984.

48. It follows, therefore, that our decision is based on our understanding of the law relating to hearsay evidence and it does not depend on drawing a distinction – if one, in reality exists in this context – between a witness's *"opinion*", on the one hand, and his or her *"state of mind*" or "*belief*", on the other. Mr Greaney suggests that there are different processes in play when looking at an E-Fit picture and looking at a photograph or film footage which should determine admissibility. He argues that the witness is expressing an opinion as regards the former (resulting in it being inadmissible) and is testifying as to his or her state of mind or belief in relation to the latter (resulting in it being admissible). This posits a somewhat intangible distinction which we need not analyse further because it has not played any part in our reasoning, given we consider that the admissibility of the E-Fit picture is essentially dependent on the provisions governing hearsay evidence.

49. We are, therefore, against Mr Csoka on this ground of appeal.

The Application to Re-Open

50. The appellant applied to introduce evidence concerning Leevon Birchall once all the evidence was closed and Mr Greaney for the Crown had made his closing speech. Mr Csoka advanced the application on the basis that he resembled the individual in the E-fit picture. What had not been disclosed until the beginning of the trial was that he had contacted Aldaire Warmington, who was alleged to have organised the shooting, several hours before it occurred. His telephone had been turned off at the time of the incident and 45 minutes afterwards he again contacted Aldaire Warmington.

51. It was suggested that this material provided a compelling alternative case that Birchall was the "*nah nah*" man. The judge ruled against the introduction of this material given the late stage of the trial at which the application was made. The Crown, he suggested, would be put at a disadvantage because the suggested involvement of Mr Birchall had not been investigated with Jayne Hickey during her evidence.

52. It is submitted that the judge erred in refusing the application to re-open, given this material had been discovered in late disclosure and Mrs Hickey could have been recalled in order to address the possibility that Birchall was the "*nah nah*" man, a process which would not have taken longer than 30 minutes.

53. The Crown dispute that the appellant had been put at any material disadvantage. Leevon Birchall's name had been referred to on numerous occasions throughout the case, including in the agreed facts circulated on 27 February 2019 (in the context of the journey to Scotland at the time of the Audi's disposal and his possible membership of the A-team). Although the appellant made a number of applications relating to disclosure under section 8 Criminal Procedure and Investigations Act 1996, none of them related to Birchall.

54. A telephone number, 07419803848 ("848"), was attributed to Leevon Birchall in the unused material served well in advance of the trial. This number was referred to in a report served on all parties by the co-accused Coward on 20 December 2018. The handset using the 848 number was identified as having travelled to Scotland in a mobile telephone report which was served as part of the evidential bundle on 18 September

2018. The appellant's defence statement was only served two weeks before the commencement of the trial, on 13 January 2019. This was the trigger for further disclosure, which resulted in the material relating to the use of Birchall's telephone on the day of the incident being provided.

55. We agree with Mr Greaney that allowing the appellant to reopen his case would have created real unfairness for the Crown, given the stage of the proceedings when the application was made, namely following Mr Greaney's closing speech. For a considerable period of time, the appellant had been in possession of ample information that placed Birchall in the category of those who were involved in these events, most particularly as regards the disposal of the Audi. Once the defence statement was served, further disclosure was made, *inter alia,* concerning the use of Birchall's telephone on the day of the incident. It is critical that trials are run on an orderly basis, in fairness to all involved. This was not a case involving a dereliction by the prosecution of their duties as regards disclosure and it was wholly open to the judge to decide that the interests of justice did not require that the appellant should be allowed to reopen his case, given this material had been available to be deployed throughout the duration of the trial.

56. We therefore reject the criticism of the judge that he wrongly refused to allow the appellant to reopen his case.

57. In light of the above conclusions, the appeal against conviction is dismissed.

The Application to Appeal against Sentence (Thomasson and Warmington)

58. Those involved in the Rothwell and Hickey shootings were sentenced on the same occasion. Jacob Harrison, who had pleaded guilty to conspiracy to cause grievous bodily harm, was aged 22 at the time of the Rothwell shooting. His youth and his conduct before and after the shooting contributed to the judge deciding he was not a dangerous offender. He was afforded enhanced credit for being the first defendant to plead guilty. As set out above, a determinate sentence of 14 years' imprisonment was imposed.

59. The judge determined that Carne Thomasson and Warmington were senior members of the A-Team. Having seen Warmington give evidence, the judge concluded he was the "*most senior amongst those in the dock*".

60. The judge was in no doubt that Carne Thomasson, Warmington and Hall were dangerous offenders, given their membership of the A-Team, the nature of their involvement in the Hickey shooting and the subsequent movement of guns demonstrated the significant risk of serious harm to the public by further offending on their part.

61. In addition to the greater harm resulting from the injuries inflicted, the serious gunshot wounds and the greater culpability resulting from the use of a gun, the following aggravating features were identified:

    i) There was careful planning and preparation, including the procurement of a gun and the reconnaissance expedition;
    ii) The shooting took place in the victims' home;
    iii) There were two victims, one of whom was a 7-year-old boy;

iv) The physical and psychological injury to both victims was serious and lasting (a victim personal statement from Mrs Hickey was considered by the judge and they both underwent multiple operations);
v) The shooting was in furtherance of serious organised crime, which alone would merit a deterrent sentence;
vi) The shooting was with a semi-automatic handgun from relatively close range;
vii) There was a serious impact upon the community and its resources resulting from the campaign of violence; and
viii) The offence was not committed by a single individual but was in furtherance of a conspiracy.

62. In respect of perverting the course of public justice, the substantive offence was a serious one, the conduct undertaken was sustained and planned and it was successful in that it resulted in the destruction of evidence.

63. The judge reduced Warmington's sentence by 3 years to account for the fact he was already serving a sentence of 6 years' imprisonment relating to possession of firearms on 15 December 2015.

64. Carne Thomasson had 8 convictions spanning from 2005 to 2013. His most recent conviction was in 2013 for possession of a Class B drug with intent to supply when he was sentenced to 18 months' imprisonment. Warmington had 8 convictions for 13 offences, including a conviction for violent disorder in 2008 for which he received a sentence of 14 months' imprisonment.

65. Thomasson argues that the sentence was manifestly excessive because an extended sentence was unjustified. The appellant had no previous convictions for any serious violent offences and was sentenced on the basis that he was not at the shooting. Furthermore, it is submitted there is a disparity between the sentence imposed upon the applicant and that imposed upon Jacob Harrison whom had been involved in the Rothwell shooting. Harrison did not receive an extended sentence but was present at the shooting. In a similar vein, it is submitted there is a substantial difference between the sentence imposed for the instant offence and that imposed on the offender (Dmaine Robinson) who "knee-capped" the appellant's brother in revenge for the instant offending. A determinate sentence of 16 years' imprisonment was passed for this offending that was carefully planned and took place in a busy public place where others were at risk.

66. Warmington argues there was no evidential basis for the judge to ascribe to the applicant a senior role within the A-Team. It is suggested the judge should not have concluded the applicant wielded influence over others or that he had a leading role as regards this offending. It is suggested that the roles of the applicant and Carne Thomasson were indistinguishable, and that the difference of 2 years in the starting point for their sentences on count 3A was unjustified. A ground of appeal in relation to the credit afforded as regards the 2015 sentence was not pursued in oral argument.

67. As regards both the appellant and the applicant, the judge correctly identified that the Definitive Guideline on Assault was applicable to the offence in Count 3A. The attack on the Hickeys involved the infliction of serious, life changing injuries by the use of a firearm and unquestionably, therefore, fell into Category 1 (with a starting point of 12 years' custody and a sentencing range of 9 to 16 years' custody). Moreover, as the judge identified, the case was marked by a number of serious aggravating features set above.

This was an exceptionally serious case of its type and the judge was justified in concluding that the aggravating features *"taken together elevate the starting point above the top of the range for such a single offence by a first time offender."*

68. As regards Carne Thomasson, we agree with the single judge that Popplewell J was justified in concluding that the appellant was dangerous and that an extended sentence was required. The judge had conducted the 8-week trial and was well placed to form a judgment on this issue. His identification of the appellant as being closely involved in the movement of the firearms and his involvement with this serious offending was sufficient.

69. Carne Thomasson's role, along with his previous convictions and admitted drug dealing (he dealt with five to ten kilos a week), made his offending more serious and meant that the starting point for the appropriate custodial term on Count 3A was 19 years. We agree with the judge that the starting point of 19 years fell to be increased by his involvement in the events on 15 December 2015. On that date, two months after the shooting of the Hickeys, police officers stopped a taxi in a Cheshire village. Christopher Hall was a passenger (who was also convicted on Counts 3A and 4: see [10] above). He had with him a green carrier bag. The bag contained three teddy bears, beneath which was a plastic container, with tape and wrapping around it, hiding two handguns, one of which was the Heckler & Koch pistol. In due course, Christopher Hall pleaded guilty to the possession of these two firearms. Telephone evidence confirmed that Warmington was involved, directing events from some distance away. He was arrested the following day and also pleaded guilty to the possession of the two firearms, receiving a sentence of six years' imprisonment. At the time, the investigators did not appreciate that the telephone evidence demonstrated that Carne Thomasson was with Warmington as the weapons were transported and was also therefore involved. As a result, Carne Thomasson was not then prosecuted for this offending. However, by the time of the trial, the position was clear, and this was conceded by the appellant when cross-examined. Hence, Carne Thomasson's involvement in this conduct went to increase the appropriate custodial term to 21 years. We agree with Mr Greaney that the judge's reasoning in this regard cannot be faulted. Carne Thomasson's conduct on 15 December 2015 in moving the firearms out of Manchester represented significant criminality on its own and went to aggravate the seriousness of his offending in Count 3A.

70. In addition, the judge correctly took into account the fact that Carne Thomasson had also been convicted on the connected Count 4 (conspiracy to pervert the course of justice) in calculating the term on Count 3A, and he avoided double counting by imposing a concurrent sentence. The judge indicated that the starting point in Carne Thomasson's case if he had been sentenced on Count 4 alone would have been 3 years' imprisonment but reduced the uplift on Count 3A to 2 years to reflect totality producing a total custodial term of 23 years. Again, we agree with Mr Greaney that that reasoning cannot be faulted.

71. The differences between Carne Thomasson and Harrison were self-evident. The latter was younger, he did not occupy a senior role, he was not convicted of conspiracy to pervert the course of justice and he pleaded guilty at a significant stage in the proceedings. He had strong personal mitigation. The offender (Dmaine Robinson) in his brother's case was not a gang member, he did not have high level of organisational involvement, there was a single victim, the consequences were less serious and there was no charge of conspiracy to pervert the course of public justice.

72. We refuse this renewed application for leave to appeal sentence.

73. Turning to Warmington, we agree with the single judge that Popplewell J was entitled to conclude that he was a senior member of the A-Team and had influence on others. The judge was similarly entitled to conclude that he played a notably leading role in the Hickey shooting and was responsible for involving others in it. In this regard, his distance from all of the offending, unlike Carne Thomasson, was a particularly telling feature. By keeping himself at a remove from the events he was able to control others and the unfolding events from a distance. This displayed a notable position of authority. Together with his previous convictions and admitted drug dealing (he admitted benefiting by hundreds of thousands of pounds a year), this feature made the applicant's offending particularly serious and in those circumstances it was fair for the judge to conclude that the appropriate custodial term on Count 3A was 21 years. Again, the reasons set out above address why it was appropriate for the judge to move above the top of the range provided by the Definitive Guideline. It follows it was reasonable for the judge to take a starting point in Warmington's case that was 2 years (*i.e.* 10%) higher than that in Carne Thomasson's case given Warmington's more senior role within the gang and his responsibility for recruiting others to the plot. We stress these were all conclusions that were particularly open to the judge, given he had heard the evidence during this long trial. There is no basis for suggesting that the judge took into consideration impermissible factors, such as involvement in count 1 for which he had not been charged. The judge expressly indicated he would disregard any suggestion that he had been responsible for involving Kent.

74. We also refuse this renewed application for leave to appeal sentence. We do not make a loss of time order, given this was a complicated sentencing exercise in which careful assessments needed to be made about the role of the offenders. Although the submissions did not justify granting leave, they were not wholly lacking in merit.

75. We are grateful to all counsel for the quality of their submissions in this case and for helping us navigate some complicated issues.