Judgment Approved by the court for handing down.

Neutral Citation Number: [2023] EWCA Crim 697

Case No: 202100625 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WORCESTER
HH Judge Burbidge KC
T20207123, T20207111

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION,
LORD JUSTICE HOLROYDE
MRS JUSTICE FARBEY
and
MR JUSTICE COTTER

- -

Between:

MOHAMMED SADDAM HUSSAIN
FAISAL FIAZ
ADAM CARPENTER

Applicants

- and –

THE KING

Respondent

- -
- -

Baltaj Bhatia KC for **MS Hussain, Felicity Gerry KC** for **F Fiaz** and **David Bentley KC** for **A Carpenter**
(all counsel assigned by the Registrar of Criminal Appeals)
Michael Burrows KC (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing dates: 31 January, 1 February 2023

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Approved Judgment

Lord Justice Holroyde:

1. Colton Bryan, aged 22, was stabbed to death in his home on 15 July 2020. It is common ground between the prosecution and the defence in these proceedings that the fatal injury was inflicted by Mohammed Hammad Hussain (the younger brother of the applicant Mohammed Saddam Hussain), who fled to Pakistan on the following day and has not been arrested. On 15 February 2021, at the conclusion of a trial in the Crown Court at Worcester before HH Judge Burbidge KC and a jury, each of these applicants was convicted of murder and of conspiracy to rob. The first applicant had earlier pleaded guilty to an offence of doing acts tending and intended to pervert the course of justice. They were each sentenced to life imprisonment. Their applications for leave to appeal against conviction and for leave to appeal against sentence have been referred to the full court by the single judge.

2. In summarising the relevant facts, we shall for convenience, and intending no disrespect, refer to persons mainly by their surnames alone. We shall refer to the Hussain brothers as Hammad and Saddam.

3. The indictment contained three counts. On count 1, all three applicants were charged, together with Hammad, with murdering Bryan. On count 2, they were all charged with conspiring together and with Hammad to rob Bryan. On count 3, Saddam alone was charged with doing acts tending and intended to pervert the course of justice by assisting Hammad to avoid arrest.

4. It was the prosecution case that Bryan had been dealing in cannabis and that he was stabbed because his attacker wanted to steal his stock and cash, and/or to put him out of business. It was further the prosecution case that Hammad had been assisted and/or encouraged by the three applicants, who were all parties to a joint plan and who all intended that Bryan would, if necessary, be caused really serious injury.

Summary of facts:

5. The prosecution presented a circumstantial case at trial. In particular, the prosecution relied on evidence, summarised in a timeline, of contacts and mobile phone calls between the applicants. We think it sufficient to give the following bare outline of the sequence of events.

6. On 14 July 2020 Saddam was in phone contact with Carpenter. Carpenter and Fiaz were both in phone contact with Hammad, and both travelled from Redditch to Birmingham.

7. On 15 July 2020 Carpenter and Fiaz again drove together from Redditch to Birmingham, and each of them was in phone contact with both Saddam and Hammad. Whilst in Birmingham, and later when back in Redditch, Carpenter made calls to Bryan, which the prosecution alleged were arrangements to go to Bryan's flat. Carpenter told a friend that he was going to have a smoke at Bryan's home. Carpenter then drove in his Skoda car, with Fiaz and Hammad as passengers, to the area near Bryan's flat. At 8.40pm he parked on Highfield Avenue and waited for Bryan, who returned with his girlfriend Chelsea Durber at 9.04pm. At 9.08pm, Fiaz called Carpenter, who then walked to Bryan's flat. Fiaz remained in the car with Hammad. Carpenter was buzzed into the block of flats by Bryan: as he entered, he propped the outer door open with a stone before going into the flat. At 9.12 pm Daniel Allcott, a friend of Bryan, arrived and also went into the flat.

8. At 9.26pm Fiaz's phone was used to send a message to Carpenter, asking "Drop ready?". Two minutes later, a further text was sent asking "Shall I send him or wat?". Two minutes after that, Hammad was captured on CCTV walking towards the flat. Fiaz remained in or near the car in Highfield Avenue.

9. Hammad entered the flat. He was armed with a large hunting knife. Allcott gave evidence that Hammad was holding the knife at his side, with the blade pointing down, which caused Allcott to think that the knife was being carried for the purpose of intimidation rather than use. Allcott said that Hammad went towards Bryan, who was sitting down. Ms Durber gave evidence that Hammad, as he approached Bryan, said "Fuck you": there was no demand for drugs or money. Bryan reached for a baseball bat and the two men scuffled. Ms Durber went into the kitchen and picked up a frying pan. Allcott left the flat. So too did Carpenter, despite Ms Durber's pleas to him to help Bryan. Hammad inflicted a total of five stab wounds, three of which were to the chest. One of the chest wounds was the fatal injury. Ms Durber struck Hammad with the frying pan, causing him to drop the knife. Hammad then departed. Ms Durber rang 999.

10. Carpenter returned to his car, where he joined Fiaz. A minute or so later, Hammad joined them. They drove away from Highfield Avenue before the emergency services arrived, and travelled to Birmingham via a route which avoided ANPR cameras. As they travelled, both Hammad and Fiaz called Saddam.

11. In Birmingham, they went to a car park at which other cars were waiting. Fiaz left in one of those cars, and Hammad – who had changed his trousers – left in another. Saddam and Fiaz were in phone contact. Carpenter cleaned the Skoda, changed his clothes and left. About 30 minutes later he returned to the car park, where he was joined shortly afterwards by the car in which Hammad was travelling. Carpenter later returned to Redditch but, instead of going to his own home, booked into a hotel at about 2am.

12. In the early hours of 16 July 2020 Saddam booked flights for his brother to travel that morning from Birmingham to Islamabad via Istanbul. Saddam, Fiaz and Hammad thereafter drove in Saddam's car to Birmingham Airport, but arrived too late for Hammad to board the flight which had been booked for him. Saddam arranged an alternative flight from Gatwick Airport. At 6.40am all three left Birmingham Airport together.

13. Later that morning, Carpenter returned to his home. He told a friend that Bryan was dead, saying that he had been at Bryan's flat when a man wearing a balaclava had run in and grabbed Bryan. Carpenter also gave his mother a similar account, and said that he needed to get out of the country. His mother's partner, Paul Harris, took him to the police station, though Carpenter first gave his phone to his friend, told her it needed fixing and asked her to sort that out for him.

14. Interviewed as a witness, Carpenter told the police that a large man wearing a balaclava had come into the flat holding a big knife. He said he had been scared and had run back to his car. He had dropped his phone and smashed the screen. He said he could not provide any information to help identify Bryan's killer. After leaving the police station, Carpenter rang Saddam and Fiaz before calling his mother.

15. Hammad, Saddam and Fiaz arrived at Gatwick Airport just before 3pm. By shortly after 5pm, Hammad had left the country. The other two drove away from the airport. Both were in phone contact with Carpenter, who had left Redditch around 5pm to go to stay in a hotel in Weston-super-Mare.

16. On the following day, 17 July 2020, Carpenter was in phone contact with Saddam. That afternoon, Carpenter drove away from his hotel in his Skoda car, but returned on foot. He later claimed that he had been attacked and robbed of the car and a phone; but he did not report that crime to the police at the time and did not mention it when Harris rang him around 7.25pm.

17. There were further phone calls between Carpenter and Saddam. At 10.44pm Carpenter rang Harris and said he had been threatened by men who put a bag over his head and took his car and phone. He told his mother that he had to get out of the country because he had been made to set up a robbery at Bryan's flat, and the person who killed Bryan had now taken his car. Harris said he would come and collect him. Carpenter's mother and Harris then contacted the police.

18. There were then two calls by Saddam to Carpenter, after which Saddam travelled south-west, exchanging calls with Carpenter as he went. The prosecution case was that Carpenter was arranging for Saddam to collect the Skoda car and dispose of it.

19. At 3am, the police went to Carpenter's hotel. He told them he needed to dress before opening the door, but could be heard doing something with his phone: the prosecution case, denied by Carpenter, was that he was trying to delete records. He was arrested. Interviewed under caution, he made no comment.

20. Fiaz was arrested on 21 July 2020. In interviews under caution, he gave differing accounts. In a later interview he said he was now ready to tell the truth about what happened on 15 July 2020. He said he had been in Birmingham with Hamad and Carpenter. Hammad was asking Carpenter to find someone he could rob in Redditch, and Carpenter mentioned Bryan. Fiaz told them it was wrong to rob someone, but they didn't listen to him. They drove back to Redditch, and Carpenter made calls arranging to visit Bryan. Fiaz said that Hammad told him he would only beat up Bryan and grab the drugs: Fiaz did not know a knife would be involved. Fiaz said that it was Hammad, not he, who used Fiaz's phone to call Carpenter when Carpenter was in the flat. Hammad had then gone to the flat.

21. Fiaz said that when Carpenter had returned to the car he had told Fiaz that Hammad had pulled out a knife and slashed Bryan's hand. Hammad then ran back to the car and said "I think I murdered him". As they drove away, Fiaz had asked Carpenter to drop him home, but Carpenter had refused and driven them all to Birmingham via a country lane. Fiaz stated that he had been told not to say anything about what had happened and was put under a lot of pressure: he had not wanted to go to the airport, but Saddam had insisted.

22. Saddam was arrested on 22 July 2020. In interview, he denied any involvement in either the murder or a planned robbery, but otherwise made no comment.

The submissions of no case to answer:

23. At the conclusion of the prosecution evidence, each of the applicants submitted that there was no case for him to answer on the charge of murder. Saddam and Fiaz also made a similar submission in relation to the possible alternative charge of manslaughter, and the count of conspiracy to rob. The judge rejected all those submissions. He gave his reasons in a detailed judgment.

24. In brief summary, the judge said that there was incontrovertible evidence that Hammad stabbed Bryan to death, though the judge acknowledged that issues of accident, intent or self defence might arise if Hammad was on trial. He reminded himself of the familiar principles in *R v Galbraith* (1981) 73 Cr App R 124 and *R v G and F* [2012] EWCA Crim 1756. He also considered the decision of this court in *R v Bassett* [2020] EWCA Crim 1376, on which the applicants relied, but concluded that it established no different principle from *R v G and F* and merely dealt with the application of the principle in the particular circumstances of that case. He directed himself that, in a circumstantial case, the test he should apply – as stated by this court in *R v G and F* – was whether, on one possible view of the evidence, a reasonable jury could reject all realistic possibilities consistent with innocence and draw the inference of the guilt of the accused: it was not necessary that all reasonable juries would do so.

25. The judge also reminded himself of the principles stated by the Supreme Court in *R v Jogee* [2016] UKSC 8, [2017] AC 387 ("*Jogee"*), in particular at paragraphs 92-98.

26. The judge referred in detail to the submissions of counsel, analysed the evidence relating to each applicant, and concluded that each had a case to answer.

The defence cases:

27. The case for each of the applicants was that he had not intended to assist or encourage any robbery of Bryan, had not intended any harm to Bryan, and was not in any way responsible for the actions of Hammad or the death of Bryan.

28. Saddam gave evidence to that effect. In summary, he said he was not aware of what his brother or his co-accused were doing on 15 July 2020, and his calls with Fiaz and Carpenter that day were nothing to do with the murder or with any plan to rob Bryan. He admitted he had helped his brother to leave the country after Hammad said he had stabbed someone.

29. Saddam admitted that he used cannabis and sold it on a very small scale in Redditch, including on a few occasions to Carpenter, but denied any knowledge of Bryan and denied knowing he was a rival drug supplier in Redditch. He said that on 15 July 2020 he obtained cannabis from his supplier in Birmingham and gave it to Carpenter, who was with Fiaz and Hammad, but he did not know where they were going after that. He said he had made two phone calls to Hammad between 9 and 10pm to tell him to come home for his dinner, but did not know what Hammad was doing. Hammad had then called him at 10.10pm saying something bad had happened and he needed a flight. Hammad had quickly ended the call, and Saddam said he then rang Carpenter, and later Fiaz, to see if Hammad was still with them. After further phone calls, in which Hammad was repeating his need for a flight to Pakistan, Fiaz and Hammad had arrived at the Hussain family home. Hammad said he had stabbed someone, but neither he nor Fiaz told Saddam who had been stabbed.

30. Saddam accepted that he had taken Hammad to the airports. He also admitted that he had spoken to Carpenter on 16 July about burning his car, because there was blood in it, but said that was in order to protect his brother. He said that he had pleaded guilty to doing acts tending and intended to pervert the course of justice, but that was all he had done. He was not involved in any plan with Hammad and had never seen the knife which his brother had used to stab Bryan. Saddam said he had followed his solicitor's advice in declining to answer questions in interview.

31. Fiaz did not give evidence. The judge when summing up summarised Fiaz's case by reference to what had been said in interview, in particular the later interview at which he was represented by a solicitor.

32. Carpenter gave evidence that he had known Bryan for a number of years and knew he sold cannabis. He said he himself sold cannabis, including with Fiaz, and through Fiaz he met Saddam and Hammad. He said that in 2019 he had felt under pressure from Saddam to bag up drugs for him, but denied that he was in fear of the Hussain brothers. He was aware that Hammad was selling class A drugs.

33. Carpenter said that three or four weeks before the killing Hammad had bought a knife in Birmingham and had showed it to him: that was the murder weapon. Carpenter gave an account of that occasion which provided a possible explanation for the later finding of his DNA on part of the knife.

34. Carpenter denied that phone calls on 14 July 2020 were anything to do with a plan to injure Bryan. He said that on 15 July he drove to Birmingham to obtain cannabis from Saddam. Fiaz had travelled with him, and they had met up with Hammad. When Carpenter and Hammad were alone in the car, Hammad had said he wanted to rob Bryan because Bryan had quite a lot of drugs and money. He knew that Carpenter was a friend of Bryan and wanted him to keep the door open so that Hammad could run in, take the items and run straight out. Carpenter said he resisted this idea, but was then threatened by Hammad, who said that he would rob the homes of Carpenter and his mother. Carpenter said he therefore believed he had no choice. He did not know that Hammad would have a weapon or that any force would be used. Carpenter said that he had called Bryan as required and arranged to go to his flat. When buzzed into the block, he had propped the door open. He had not expected to see Allcott also there. He had texted Fiaz to say that the doors were open and that money and drugs were in the flat. When Hammad had entered the flat, he knew that he would be

wearing a mask and gloves, but he had not expected him to be carrying a knife. Allcott had run out, and Carpenter had also left after seeing Hammad and Bryan scuffling.

35. Carpenter said that when he joined Fiaz in the car, Fiaz too had been shocked by the information that Hammad was carrying a knife. Hammad then joined them, with blood around his stomach, and told Carpenter to drive back to Birmingham. They had stopped in a field, at Hammad's direction, and Carpenter had seen a lot of blood on the back seat. He had cleaned the car and given Hammad some shorts which he had in the boot. Hammad then directed Carpenter to drive to a car park in Birmingham: Carpenter said he didn't want to, but Hammad threatened that he would end up like Bryan if he did not do what he was told. Hammad also told him to burn his car and to burn Hammad's clothes, and Carpenter said he felt he had no choice.

36. Carpenter admitted that he had told lies to the police when interviewed as a witness, and had tried to mislead them as to the identity of the killer, but said he had done so because he had to comply with Hammad's directions. He did not say that Fiaz had been with him because he knew Fiaz would not want his name mentioned. He said that whilst in Weston-super-Mare he had been in phone contact with Saddam, who told him to burn his car, and Carpenter had done so. He had also burnt a phone. He said he had followed his solicitor's advice as to which questions to answer when interviewed under caution. He said he had not told the truth when interviewed under caution because he didn't want to snitch on anyone, was frightened of Hammad, feared retribution from Bryan's friends and feared he would be charged with murder.

37. A clinical psychologist, Mr Eric Wright, was called by Carpenter to give expert evidence. Mr Wright's evidence was that testing showed that Carpenter was abnormally compliant. Mr Wright gave his opinion that Carpenter was therefore significantly more likely than others to do what he was told if he was threatened, and more likely to follow the advice of a solicitor whether or not he agreed with it.

The judge's directions:

38. The judge provided the jury with written directions and routes to their verdicts. His directions included the following:

> "**Joint responsibility for a crime**
>
> A crime can obviously be committed by a person acting alone or indeed by two or more people acting together. Indeed a crime may be committed by people who are present but engage very little or not at all in the activity of the crime. However, to be jointly responsible they must assist or encourage and intend to assist or encourage the other participant or participants to commit the crime in question. … So a person can participate in a crime in different ways, **provided** he intentionally assisted or encouraged the offence to be committed however great or small his participation in that way is. Mere presence at the scene of a crime or association with another who commits crime is not enough to prove guilt and that is something you must bear in mind in this case given the positions of [Carpenter] and [Fiaz],

but if an accused was deliberately present at the scene and by his presence either assisted or encouraged or did participate intending to, he would be guilty of the particular crime alleged. …

There are two routes to the consideration of murder in this case.

First route: The prosecution allege that this was a case where the shared intention by those who were involved was to rob [Bryan]. … It is the prosecution case that if this was a conspiracy to rob, those who were engaged in it would anticipate that [Bryan] would not necessarily allow his property to be taken by the mere threat of force, but the person carrying out the robbery would need to use some actual physical violence. If it was intended that the person carrying out the robbery would if necessary use physical violence with intent to cause serious bodily injury, that would be murder by the person who carried out the physical violence with that intent and an**y** person who encouraged or assisted him to so with that shared intent. This is sometimes called a "conditional intent". …

Second route: The prosecution say that whether or not what was being carried out by Hammad was a conspiracy to rob with the intention to take his drugs and money, there was what might in the vernacular be called a 'turf war'. A straightforward attack by a rival supplier of drugs, and Hammad's intention was, in fact, to kill [Bryan] or cause him really serious injury. This would be another way that murder is committed. If that was his intention and anybody knew of his intention and shared it and encouraged him or assisted him in carrying out that attack with that intention, they too would be guilty of murder

…

An overwhelming supervening event [going beyond the plan]. Note this is a consideration in relation to both the offence of murder and manslaughter.

If you were satisfied that the defendant you are considering encouraged or assisted [Hammad] in an unlawful act or an attack on [Bryan], before you could convict of murder or manslaughter you would have to be sure that the prosecution have proved that [Hammad's]actual conduct in stabbing was not an overwhelming supervening act which nobody in the defendant's shoes (who you are considering) could have contemplated might happen, such that it relegated the defendant's act of assistance or encouragement to history. If [Hammad's] act may be such an overwhelming supervening act in this way, then the defendant you are considering would be acquitted of murder and manslaughter.

> An overwhelming supervening event might be the use of a knife by [Hammad] especially if a defendant was not aware such a weapon existed or would be used. However, lack of knowledge of a knife does not necessarily mean the use of it would be an overwhelming supervening event. It is a matter for you in the circumstances of all the facts of the case what would amount to an overwhelming supervening act such that a secondary party/accessory would not be responsible for it because it consigns what he did to history in the course of the events.
>
> So if it were the case when considering the individual cases of [Saddam/Carpenter/Fiaz] you were sure that they were involved in a conspiracy to rob [Bryan] with [Hammad] or indeed had planned and intended an attack on [Bryan] by him, but it might be the case that [Hammad] stabbing [Bryan] was an overwhelming supervening act that nobody in the shoes of the defendant you are considering could have contemplated might happen, such as to relegate the encouragement or assistance of the defendant you are considering to history, that defendant would not be guilty of murder or manslaughter."

39. We would add that the judge directed the jury to treat Saddam as "a man of essentially good character" notwithstanding his previous convictions and his guilty plea to count 3, and Saddam was given the benefit of both limbs of the standard good character direction.

The convictions and sentences:

40. As we have said, the jury convicted all three applicants of both count 1 and count 2.

41. At a later sentencing hearing, the judge considered victim personal statements from Ms Durber and members of Bryan's family, and pre-sentence reports in relation to Fiaz and Carpenter. No report had been obtained in the case of Saddam, and we are satisfied that none is necessary now.

42. At the time of the murder, Saddam was aged 23. He had previous convictions for relatively minor offences. Fiaz, aged 20, had received a youth caution, which the judge ignored, but had no previous conviction. Carpenter, also aged 20, had no previous conviction.

43. The judge found that all three applicants and Hammad had been engaged in selling drugs, though not necessarily in a substantial way; that Bryan also ran a modest operation selling cannabis to friends; and that the applicants and Hammad had decided to rob Bryan of his drugs and cash and to attack him if necessary. He further found that the plan had been agreed before Fiaz, Carpenter and Hammad left Birmingham on 15 July 2020; that Saddam kept a close eye on the operation having sent the other three off; and that all the applicants knew that Hammad had the knife and would use it if necessary.

44. The judge held, in accordance with schedule 21 to the Sentencing Act 2020, that the appropriate starting point in assessing the minimum term in each case was 30 years. He held that it was appropriate to move downwards because of the applicants' relative youth, and took into account their personal mitigation. He did not distinguish Saddam from the other applicants, either because he was slightly older or because he had previous convictions. He accepted that Carpenter was now remorseful, but found that he was the most culpable. In Saddam's case, he increased the minimum term by 18 months to reflect the role of Saddam in helping his brother to flee the country.

45. The judge imposed sentences of life imprisonment on count 1, with minimum terms of 24 years 6 months in Saddam's case; 23 years in Fiaz's case; and 25 years in Carpenter's case. Each of those minimum terms was reduced by the days spent on remand in custody. On count 2, there were concurrent determinate sentences of 10 years' imprisonment for Saddam and Fiaz, and 11 years for Carpenter. On count 3, Saddam received a concurrent sentence of 2 years' imprisonment.

The grounds of appeal - Saddam:

46. In his grounds of appeal against conviction, Saddam challenges the judge's ruling on the submission of no case to answer; contends that his convictions are unsafe because the judge failed adequately or at all to direct the jury about their approach to Hussain's guilty plea to count 3; and contends that the jury could only have convicted by misapplying the judge's directions of law.

47. On Saddam's behalf, Mr Bhatia KC submits that the evidence of contacts and movements shown in the timeline, as expanded by additional defence entries during the trial, was all consistent with discussions and arrangements relating to the obtaining of cannabis. He relies on an exchange of text messages on 13 July 2020 in which Carpenter and another person referred to cannabis being in short supply. In those circumstances, Mr Bhatia submits, the judge was wrong to rule that it would be open to the jury to find that Saddam's actions and contacts before the killing related to the attack on Bryan and showed Saddam organising that attack: it was not possible for the jury to exclude the alternative inference that they were all connected with the acquiring of cannabis. Mr Bhatia draws a comparison with the decision in *R v Bassett*, in which this court allowed an appeal against conviction, saying at paragraph 21:

> "The question in this case was whether the possibility that he washed his hands, panicked, threatened Wayne Anglin and told him not to call the police, and took the gun and ammunition(thereafter disposing of them) because he had just shot his friend and was frightened of the consequences of the shooting rather than because he had been in possession of the gun before he arrived at the flat. It appears to this court that when the question is postulated in that simple way, the possibility of panic as an explanation for his actions after the shooting cannot be eliminated. His actions were consistent with someone who was unaware of the gun until after he arrived at the flat, but who reacted in shock after it had been accidentally discharged. If that possibility could not properly be excluded on the available evidence, then a jury could not have safely concluded that the only inference to be drawn from

> that conduct was his guilt of the count of possession of the weapon before arriving at the flat. The submission that the count should not have been left to the jury should have been allowed … ."

48. It is further submitted that the judge wrongly held that Saddam's actions after the killing could give rise to an inference of his having been a party to a plan or to the attack on Bryan.

49. As to the second ground of appeal, Mr Bhatia submits that a specific direction should have been given that the guilty plea to count 3 (which was the subject of an agreed fact) could not provide any support for the allegation that Saddam was involved in any plan or had the necessary shared intention for either count 1 or count 2. In the absence of such a direction, he submits, there was a real risk of prejudice to the applicant.

50. In relation to his third ground, Mr Bhatia makes a detailed analysis of the evidence against Saddam, and submits that at the conclusion of the evidence there was no basis on which the jury, properly applying the judge's directions of law, could have been sure that the applicant was guilty of either count 1 or count 2: the reasonable possibility of an alternative explanation for his contacts and associations with his co-accused could not be eliminated. He points, amongst other things, to the absence of any text messages providing direct support for the prosecution case that Saddam was an organiser of a plan to attack Bryan.

51. Those three grounds were contained in the initial grounds of appeal settled by Mr Bhatia. Subsequently, different leading counsel put forward a fourth ground, namely that the judge erred in failing to direct the jury to ignore out of court comments about Saddam made by Carpenter: comments by Carpenter to his parents which it is said could be understood to mean that "Momo" (a nickname for Saddam) and Fiaz had been more involved than he was; and an assertion in Carpenter's defence statement that he was in fear of the Hussain brothers and was terrified of what they would do to him if he told the police the truth about Bryan's death. It is submitted that the jury should have been directed that they could not use any of that as evidence against Saddam. The point is made that such a direction was given in relation to answers given by Fiaz in his interviews under caution, in which he blamed the crimes on Hammad and Carpenter.

52. All four of those grounds of appeal against conviction have been referred to the full court by the single judge. Saddam has not applied for leave to appeal against his sentence. Mr Bhatia indicated, however, that if Fiaz and/or Carpenter succeeded in their appeals against sentence, he would wish to apply for an extension of time to apply for leave to appeal against sentence.

The grounds of appeal - Fiaz:

53. Fiaz submits that his conviction for murder is unsafe because there was no evidence to take the case beyond an attempted robbery where the conduct of Hammad amounted to an overwhelming supervening act; the judge wrongly left the jury with an alternative route to verdict based on conditional intention, which was not the prosecution case; the prosecution were wrongly permitted to put their case on the

basis that applicants "must have known"; and the prosecution wrongly characterised the background circumstances as showing that the applicants "would have contemplated" an attack on Bryan because he was a drug dealer.

54. Dr Gerry KC argues that there was no evidence on which the jury could be sure of Fiaz's guilt of murder. In particular, there was no evidence that Fiaz knew of any plan to cause really serious harm to Bryan or knew that Hammad had a knife. She challenges the judge's decision to reject the submission of no case to answer, which she suggests was "surprising" because there was no evidence capable of excluding the realistic possibility that Fiaz was neither a conspirator nor complicit, and no evidence that Hammad's stabbing of Bryan was not an overwhelming supervening act. She submits that the judge wrongly failed to explain what was meant by a defendant being "more than merely present".

55. Dr Gerry relies on *R v G and F* and *R v Bassett*, pointing to paragraph 36 of the former case in which Aikens LJ said:

> "… (2) Where a key issue in the submission of no case is whether there is sufficient evidence on which a reasonable jury could be entitled to draw an adverse inference against the defendant from the combination of factual circumstances based upon evidence adduced by the prosecution, the exercise of deciding that there is a case to answer *does* involve the rejection of all realistic possibilities consistent with innocence. (3) However, most importantly, the question is whether a reasonable jury, not *all* reasonable juries, could, on one possible view of the evidence, be entitled to reach that adverse inference. If a judge concludes that a reasonable jury could be entitled to do so (properly directed) on the evidence, putting the prosecution case at its highest, then the case must continue; if not, it must be withdrawn from the jury."

56. Developing at some length her submissions about the law relating to joint enterprise, and relying on *Jogee*, Dr Gerry urges this court to confine, and not to expand, liability so as not to over criminalise secondary parties. She submits that proof of shared intention to commit a crime requires proof of knowledge of the essential facts of the crime, as well as actual and intentional assistance or encouragement. Subjective knowledge must be shown, and it is therefore not sufficient to say that a defendant "must have known" of an essential fact. She also submits that it is necessary for the prosecution to prove that an accessory made at least a measurable contribution to the commission of the crime by a principal.

57. Dr Gerry relies on the preservation by the Supreme Court in *Jogee*, at paragraphs 97-98, of the principle that a defendant will not be criminally responsible for a death if it is caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history. She also relies on the decision of this court in *R v Grant and others* [2021] EWCA Crim 1243. Dr Gerry argues that the prosecution in this case could not prove that Fiaz – who remained in the car when Carpenter and Hammad were in Bryan's flat – conspired to rob, or that the events were intended to involve an unlawful act causing harm, still less serious harm or

death. The evidence did not show that Fiaz was more than merely present in the car and did not show that Hammad's actions were within the scope of what Fiaz knew, intended or participated in. The judge, she submits, should therefore have allowed the submission of no case to answer.

58. Dr Gerry said she was not seeking to go behind *Jogee*, or *R v Rowe and others* [2022] EWCA Crim 27, and accepted that it is not necessary for the prosecution to prove that the conduct of a defendant in encouraging the commission of a crime by another did in fact cause that other to commit the crime. But, she argued, it was nonetheless necessary to prove that the conduct of the accessory made a measurable contribution to the crime. In support of that argument she relied on a paper by Professor Matthew Dyson, "The Contribution of Complicity" (The Journal of Criminal Law 2022, vol 86(6) 389-419). Professor Dyson's thesis is that *Jogee* passed over the important issue of what contribution an accomplice needs to make to a principal's crime. He argues that English law is too willing to assume that such a contribution has occurred and has little detailed law to test for it, and that a more rigorous approach is needed. He suggests that there should be a two-part approach: to be liable for assisting or encouraging a crime, the accomplice must make a substantial contribution to the principal's commission of it; to be liable for procuring the principal's crime, the accomplice must bring the crime about. Whether the accomplice's assistance or encouragement had made the necessary substantial contribution would be a jury question. Such an approach, Professor Dyson argues, would be consistent with what was said in *Jogee* about overwhelming supervening acts: where such an issue arose, a jury would first have to decide what level of contribution the assistance or encouragement of the accomplice had made, and would then have to decide whether that had persisted to the point when the principal committed the offence.

59. The present case is concerned with assistance and encouragement rather than procuring. Adopting Professor Dyson's approach, Dr Gerry submits that the judge had to decide whether there was sufficient evidence to go to the jury that a defendant's assistance or encouragement had made a substantial contribution to Hammad's killing of Bryan. She submits that there was insufficient evidence in the case of Fiaz, who remained in the car (parked, she suggests, in a location where he could not effectively act as look-out) and may not have been using his own phone when the important messages were sent to Carpenter in the flat. She questions the meaning of the familiar phrase "more than merely present", and submits that the evidence could not prove that Fiaz actually assisted or encouraged Hammad to kill Bryan.

60. Dr Gerry also seeks to leave to argue a further ground, put forward after the single judge had referred the initial grounds to the full court, to the effect that the conviction for murder is unsafe because fresh evidence supported a conclusion by the jury that Fiaz could not have known or contemplated what Hammad would do. She seeks to adduce as fresh evidence a draft schedule of loss in a pending personal injuries claim by Hammad in relation to injuries he sustained in a road traffic accident many years ago, when he was aged 6. It is pleaded in this draft that following the accident Hammad suffered personality change as a result of traumatic brain injury: he was irritable, got into fights, was easily provoked, was hyperactive and impulsive, had an oppositional defiant disorder which includes temper and defiance and was touchy and easily annoyed. Dr Gerry argues that this evidence would have been admissible at

trial through cross-examination of Saddam. Dr Gerry submits that if this evidence had been before the jury they would have concluded that Fiaz could not have known or contemplated how Hammad would act.

61. Fiaz's ground of appeal against sentence is that the minimum term imposed on count 1 is manifestly excessive, in particular because the starting point should have been 15 years, not 30 years; the minimum term of 23 years was disproportionate for a 20-year old Asian male who was not present at the scene and who was sentenced on the basis of a conditional intention for really serious harm; and if the starting point of 30 years was correct, a greater reduction from it should have been made. She goes so far as to submit that the minimum term imposed was cruel and unusual punishment prohibited by the Bill of Rights 1689 and by articles 3 and 5 of the European Convention on Human Rights. She argues that the judge was not entitled to be sure of some of the facts which he found when deciding the basis for sentence.

The grounds of appeal - Carpenter:

62. Carpenter's application for leave to appeal against his conviction of murder similarly challenges the judge's ruling on the submission of no case to answer. Mr Bentley KC submits on his behalf that the conviction is unsafe because a jury properly directed could have convicted of conspiracy to rob and manslaughter, but could not convict of murder because on the evidence they could not reject the realistic alternative possibilities of a conditional shared intention of harm in the course of robbery falling short of death or really serious harm, or of an overwhelming supervening act by Hammad in stabbing Bryan after the applicant had "fled the scene having withdrawn from any agreement when [Hammad] entered carrying a Rambo knife". The judge, he submits, should have allowed the submission because there was insufficient evidence to prove that Carpenter shared in an intention to cause death or really serious injury.

63. Mr Bentley further submits that the conviction is unsafe because at the conclusion of all the evidence a jury properly applying the judge's directions could not have convicted of murder.

64. Mr Bentley also seeks to leave to argue a further ground, put forward after the single judge's decision, to the effect that fresh evidence is available which shows that Carpenter may be autistic. Dr Irani, a consultant child and adolescent forensic psychiatrist, has tested Carpenter and expresses the opinion that he is "on the range of having autistic spectrum traits" but does not meet the criteria for a diagnosis of autism. She further indicates that the applicant has some specific difficulties in his communication and social interaction. Mr Bentley submits that, if this evidence had been available at trial, it would have been relevant to the jury's assessment of the evidence as to what the applicant was told and believed and how he was able to cope with pressure and threats. It would also have assisted the applicant in relation to the challenge to his credibility, and would have prompted consideration of whether he needed the assistance of an intermediary during his trial.

65. Mr Bentley acknowledges that an expert witness, Mr Wright, was called in Carpenter's defence at trial. He submits, however, that Mr Wright only addressed the issue of an abnormal degree of compliance: there had been nothing to alert Carpenter's legal representatives to possible autism and Mr Wright was not asked to

consider that possibility. It is further submitted that Mr Wright was working within Covid-related limitations, and only saw the applicant face to face during the trial. Mr Bentley relies on *R v Sossongo* [2021] EWCA Crim 1777 as an example of a post-trial diagnosis of autistic spectrum disorder leading to the quashing of a murder conviction.

66. Carpenter's grounds of appeal against sentence are that the judge was wrong to impose a longer sentence on him than on his co-accused, and that the minimum term was manifestly excessive for an offender aged only 20 at the time of the offence. Mr Bentley acknowledges that the judge found this applicant to be more culpable because of his betrayal of his friend Bryan. He submits however that there was no justification for the marked disparity between this applicant's minimum term and those imposed on Saddam (who had encouraged this applicant to destroy his car and phone, and whose case had the significant aggravating feature of his attempt to pervert the course of justice) and Fiaz (whom the judge found to have been involved from the outset and who went to Birmingham Airport with the Hussain brothers).

67. Further and in the alternative, Mr Bentley submits that the judge failed to make a sufficient reduction from the starting point of 30 years to reflect the applicant's age, immaturity, abnormally compliant personality, remorse, previous good character and progress in prison.

The submissions of the respondent:

68. All of the grounds of appeal against conviction are opposed by Mr Burrows KC on behalf of the respondent. He submits, first, that the jury could properly conclude that each applicant was knowingly involved in more than a theft or robbery and intended that Bryan should be confronted, attacked and caused at least really serious injury. He submits that the jury were entitled, having regard to the sequence of events shown in the timeline for the evening of 15 July 2020, to infer that all the applicants, and Hammad, were engaged in the same activity. He points out that about 20 minutes before the killing, when the Skoda car was parked near Bryan's flat, Saddam called Hammad and, unlike on other occasions, Hammad chose to answer and they spoke for 15 seconds. He submits that the jury would be entitled to infer that it was not a conversation about a mundane matter unrelated to what was about to happen in the flat.

69. In relation to Saddam, Mr Burrows further submits that the directions as to the guilty plea to count 3 were proper and sufficient, and that the judge made it clear that the applicant's conduct in helping his brother to leave the country could not show that he had known his brother was going to Bryan's flat or what he was going to do there. There was no reason to suppose the jury misapplied the judge's directions. As to the additional ground, he submits that the absence of a direction to ignore comments made by Carpenter does not render the conviction unsafe, because nothing Carpenter said implicated Saddam in the murder of Bryan. Mr Burrows points out that at trial, no one had seen any need for the direction which is now suggested.

70. In relation to Fiaz, Mr Burrows submits that the evidence showed that Fiaz had waited for Bryan to return to his flat; had sent messages to Carpenter when he was in the flat, including asking "shall I send him?"; had stayed with his co-accused after the attack, when he could have walked away at any time during the period when he remained in

or near the car; and had told numerous lies in interview. He submits that the jury were properly directed and must have been sure that Fiaz shared an intention sufficient for murder, whether it was primarily an intention to attack Bryan and cause him really serious injury, or an intention to rob Bryan with a conditional intent to cause him at least really serious injury. As to the additional ground, Mr Burrows submits that the proposed fresh evidence is irrelevant to the issues in the case.

71. In relation to Carpenter, Mr Burrows submits that the evidence showed that Carpenter arranged to meet Bryan in his flat, waited for him to return, and helped Hammad, knowing that Hammad was armed with a Rambo knife. There was no reason to suppose the jury misapplied the judge's directions. As to the additional ground, he submits that Dr Irani's report contains no new information, but merely covers topics about which Mr Wright gave evidence. The suggested autistic difficulties do not provide Carpenter with any defence and cannot explain his lies to the police and others, including his mother.

Analysis:

72. We are grateful to all counsel. Having reflected on their submissions we have reached the following conclusions.

The applications for leave to appeal against conviction: grounds relating to the submissions of no case to answer and possible alternative inferences:

73. In considering the submissions of no case to answer, the judge directed himself correctly in accordance with the test stated in *R v G and F*. Indeed, it is not suggested that the judge was in error as to his approach: the real complaint is that he should have accepted the submission that the jury could not exclude alternative explanations (namely, a joint plan limited to theft or robbery with only limited violence, with no intent to cause serious injury; or an overwhelming supervening act by Hammad) and therefore could not draw the inferences necessary to convict of murder.

74. As his later directions to the jury show, the judge also had well in mind the principles applicable to joint responsibility for a crime. Dr Gerry conceded that there was no criticism of the judge's directions, given the law as it stands.

75. The evidence adduced by the prosecution was in our view unarguably sufficient to enable a reasonable jury to conclude that each of the applicants was party to a plan to attack and/or to rob Bryan, if necessary causing him really serious injury. The applicants all accepted that there was a plan at least to steal, if not to rob; and the jury were entitled to reject as unrealistic any suggestion that drugs and money would be taken from Bryan without any intention to use violence and to cause serious injury if required. We accept Mr Burrows' submission that the jury were entitled, having regard to the sequence of events shown in the timeline for the evening of 15 July 2020, to infer that all the applicants, and Hammad, were engaged in the same activity. We also accept Mr Burrows' submission that the timing and sequence of events and contacts after the killing could properly be regarded by the jury as giving rise to an inference that Saddam was involved before the killing and not merely helping his brother after the event.

76. Dr Gerry in making her submission of no case to answer accepted that the jury could infer that it was Fiaz who sent the text message asking Carpenter whether to send Hammad in, and made a phone call. Although she now says that concession should not have been made, it was in our view a fair and realistic one; and in any event, it was the basis on which the judge was invited to consider the submission. In addition, whilst we agree with Dr Gerry that it is important not to treat an omission to act as necessarily being evidence of complicity, the jury were entitled to view Fiaz's action in remaining in or near the car as evidence of his intentional assistance or encouragement.

77. We have seen photographs of the knife with which Hammad killed Bryan. It has a wide blade some 9 inches long, sharply pointed and with two cutting edges, one of which has deep serrations. The name "Rambo" is engraved upon it. We note that there is no suggestion that Hammad could have any legitimate use for such a knife. Anyone stabbed with such a knife would be very likely to suffer death or really serious injury. Carpenter had seen the knife when Hammad had purchased it some weeks before the killing; Hammad had the knife with him when travelling to the scene with Fiaz and Carpenter, and whilst they were all waiting in the car; and the jury would be entitled to think that Hamad would have had no reason to conceal the knife from his accomplices. In those circumstances, the jury were plainly entitled to infer that each of applicants, including Saddam, knew that Hammad was armed when he went to the flat. As Mr Burrows submitted, a plan to steal could have been accomplished by burgling the flat in Bryan's absence, but those in the Skoda car waited for Bryan and Ms Durber to return before Carpenter entered the flat and left the door ajar for Hammad to follow.

78. We note also the evidence that the applicants were not deflected from their plan by the unexpected presence of Allcott as well as Ms Durber; that when Hammad approached Bryan he did not demand money or drugs, but instead made an aggressive remark; and that Carpenter ran from the flat even though Ms Durber asked him to help his friend Bryan. Allcott's assessment of the situation was part of the evidence for the jury to consider, but was not determinative of the inferences they could properly draw.

79. There were of course jury points to be made about the inferences to be drawn form the evidence. Many of them were repeated in the submissions to this court. Some, with respect, required what would in our view be an unrealistic view of the inferences which the jury could properly draw. All were, in any event, arguments for the jury to consider, not reasons for withdrawing an issue from the jury.

80. Like the judge, this court is bound by the clear principles as to joint responsibility for a crime which were laid down by the Supreme Court in *Jogee*. The following extracts from the judgment in *Jogee* are in our view particularly relevant to the issues raised by this appeal:

> "12. Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of

a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.

…

88. … in some cases the prosecution may not be able to prove whether a defendant was principal or accessory, but it is sufficient to be able to prove that he participated in the crime in one way or another.

89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing the force of numbers in a hostile confrontation.

90. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1 (as stated in para 10 above). If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent.

…

92. In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with intent to do grievous bodily harm at least. …

93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent

(the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.

94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

…

96. If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious injury, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other violent act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results. …

97. The qualification to this … is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

98. This type of case apart, there will normally be no occasion to consider the concept of 'fundamental departure' as derived from *R v English*. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in possession. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

81. Paragraph 12 of that judgment was described in *R v Grant & others*, at paragraph 32, as "an insuperable obstacle" to a suggestion that the concept of overwhelming supervening act should be viewed through the lens of causation: it is encouragement and assistance that count. This court went on to say, at paragraph 34, that the Supreme Court in paragraphs 12, 97 and 98 of *Jogee* significantly limited the circumstances in which a jury will need to consider the possibility that there had been a departure from the agreed plan.

82. In the light of *Jogee* and *R v Grant & others*, this court in *R v Rowe & others* rejected as unarguable a submission that although the accessory's encouragement of the principal need not have caused the offence, the accessory must nonetheless have had some effect on the events. The court did not accept the suggestion that there was a tension within paragraph 12 of *Jogee*, the first part of which dealt with the conduct element of an accessory's liability for assistance or encouragement, and the last part of which dealt with an exclusion from that aspect of liability, namely an overwhelming supervening act. Referring to *R v Calhaem* and to *R v Stringer* [2012] QB 160, the court said:

> "132. … [In *Calhaem*] the Court of Appeal held at p813 E-G that the word 'counselling' does not imply any causal connection between the counselling and the offence. True enough, the actual offence must have been committed by the person counselled. To that extent there must be contact between the parties and, in that sense, a connection between the counselling and the offence.
>
> 133. Likewise, in [*Stringer*], Toulson LJ (as he then was) … explained that the accessory's conduct must be 'relevant' to the offence of the principal and, in that sense, there must be a 'connecting link'. So encouragement should have the capacity to act on the principal's mind ([49]). Then at [50] he stated:
>
> 'If D provides assistance or encouragement to P, and P does that which he has been encouraged or assisted to do, there is good policy reason for treating D's conduct as materially contributing to the commission of the offence, and therefore justifying D's punishment as a person responsible for the commission of the offence, whether or not P would have acted in the same way without such encouragement or assistance.'
>
> 134. There is no additional requirement for the prosecution to prove that the encouragement or assistance did contribute to the commission of the offence. "

83. Applying those principles to the facts and circumstances of the present case, we see no basis on which it can be argued that the judge erred in his ruling on the submissions of no case to answer. For the reasons which he gave, the judge was unquestionably entitled to conclude that, on one view of the evidence in relation to each applicant, a reasonable jury could properly convict.

84. Dr Gerry submitted that there is a need for this court to lay down detailed rules including at least a measurable contribution by an accessory to the commission of the crime by a principal. We cannot accept that submission. We had some difficulty understanding what exactly was meant by "a measurable contribution". *Jogee* clearly confirms that there is no need to prove a causal link between the secondary party's assistance or encouragement, and the principal's commission of the crime, but the secondary party must be proved to have assisted or encouraged the principal to commit the crime, or the type of crime, which the principal in fact committed. It seems to us that the suggested need for a "measurable contribution" is no more than a restatement of that requirement. We are therefore unable to accept the submission that a more detailed direction was needed in order to assist the jury to distinguish between mere presence and intentional assistance or encouragement.

85. Nor do we accept the submission that the judge wrongly left the case to the jury on the basis that a defendant "must have known" of a particular fact. In context, that phrase plainly means "must have known, and did know".

86. The submission that nobody in the shoes of the applicants could have contemplated that violence would be used at all is in our view unrealistic in the circumstances of a plan to steal the drugs and/or cash of a young man who, notwithstanding his good qualities, was in fact engaged in supplying drugs, and who was in his flat with his girlfriend and another young man. The judge in his summing up left the issue of overwhelming supervening act to the jury, and no criticism can be made of his direction in that regard.

87. In those circumstances, we see no arguable basis for the challenges to the judge's ruling that each applicant had a case to answer, or for the grounds of appeal based on a submission that the jury could not exclude alternative inferences consistent with innocence.

The applications for leave to appeal against conviction: other grounds:

88. We see no merit in the grounds of appeal by which Saddam criticises aspects of the summing up. First, on what we have read and been told, it seems that there was no request at trial for the judge to give any direction about count 3. Even before this court, no specific suggestion was made as to what the judge should have said. In any event, we are not persuaded that any direction was, even arguably, necessary. Secondly, Saddam's actions after the killing were largely admitted by him and formed an important part of the evidence on which both the prosecution and Saddam himself relied. His actions were relevant to the jury's consideration of what inferences they could properly draw as to whether Saddam was involved in a conspiracy to rob and/or in the murder. The judge reminded the jury of the defence submission that Saddam's conduct after the killing "cannot show that he knew that his brother was going to Colton Bryan's flat or what he was going to do at Colton Bryan's flat". We are not persuaded that the judge could or should have said anything more.

89. As to Saddam's fourth ground, we accept Mr Burrows' submission that none of the relevant comments by Carpenter – which the prosecution alleged were completely untrue – could be regarded as implicating Saddam in the murder; and Carpenter himself gave evidence that his comments did not refer to Saddam. The fact that Mr Bhatia did not ask the judge to give any particular direction about those comments is

in our view an indication that no importance was attached to them at trial. It is impossible now to argue that the absence of a direction renders Saddam's convictions unsafe.

The applications for leave to appeal against conviction: grounds relying on fresh evidence:

90. In relation to the additional grounds which Fiaz and Carpenter seek to put forward, we remind ourselves of the principles stated by this court in *R v James* [2018] 1 WLR 2749, in particular at paragraph 38. These include that as a general rule, all grounds of appeal which an applicant wishes to advance should be lodged with the notice of appeal; the requirement of leave from the single judge is an important filter; and any applicant who applies for leave to vary the notice of appeal so as to add a new ground faces a high hurdle.

91. As to Fiaz's proposed additional ground, we are unable to accept that the draft schedule of loss (see paragraph 60 above) provides any basis for an arguable ground of appeal. Setting aside the difficult question of how exactly the contents of that document could have been adduced as evidence that after his accident in 2006 Hammad was in fact irritable, easily provoked, inclined to fight, etc, it seems to us impossible to argue that any such personal characteristics could have passed unnoticed by Fiaz, who was Hammad's friend, or by Hammad's own brother or by other mutual friends. It follows that, far from supporting a conclusion by the jury that Hammad's actions could not have been foreseen by Fiaz, this proposed evidence if anything supports the opposite conclusion. In any event, the inescapable fact is that Hammad went into Bryan's flat, having waited for a significant period of time with Fiaz and Carpenter, using a means of access arranged with them in advance, and armed with a large and vicious knife which had been in his possession all the time they were in the car together. That, as it seems to us, is the opposite of impulsive behaviour.

92. We are therefore satisfied that the proposed fresh evidence cannot satisfy the criteria in section 23 of the Criminal Appeal Act 1968. We accordingly decline to receive it as fresh evidence, with the result that the proposed additional ground of appeal falls away.

93. As to Carpenter's proposed additional ground, we heard Dr Irani's evidence *de bene esse*. She stated her opinion that Carpenter showed some deficits in his ability to communicate and in social interaction, affecting his conversation and his ability to show emotions. She said he had difficulty in maintaining eye contact and in exhibiting facial expressions, which could have been clarified to the jury if her assessment had been made before the trial. In cross-examination, Dr Irani accepted that these deficits did not prevent Carpenter from choosing to commit offences or from identifying a rival drug dealer and choosing to attack him. Nor did they explain his decisions to tell lies about what had happened, including to his mother.

94. Mr Bentley submitted that this evidence would have prevented the jury from mistaking Carpenter's flat affect when giving evidence for callousness, would have enabled the jury properly to assess Carpenter's evidence that he was under pressure to act as he did, and would have provided the necessary context for the jury to assess his

intention at the material times. He relied on *R v Sossongo* as having "echoes of this case", though he accepted that cases are fact-dependent.

95. The facts and circumstances in *R v Sossongo* were indeed very different, and in our view the decision in that case cannot assist Carpenter. Dr Irani's evidence cannot in our view meet the criteria in section 23 of the Criminal Appel Act 1968 for the admission of fresh evidence. Implicit in the application is the submission that evidence to the effect of Dr Irani's report was not available at trial. Although Mr Wright was working within Covid restrictions, he spent some time assessing Carpenter. He is a very experienced expert witness, whose specialist areas of work include autistic spectrum disorder, and who was instructed to establish whether Carpenter "displays any psychological vulnerabilities, such as suggestibility or compliance, which might be relevant to his defence". If Carpenter was then exhibiting the deficits to which Dr Irani refers, it could be expected that Mr Wright would have observed them and commented upon them. We therefore do not accept that Dr Irani provides fresh evidence which was not available at trial. In any event, her evidence could not in our view provide any ground for allowing an appeal. We therefore decline to receive it. There is accordingly no basis for giving leave to appeal on the proposed additional ground.

The applications for leave to appeal against sentence:

96. We turn to the applications for leave to appeal against sentence. We can deal with them briefly.

97. The judge, having presided over the trial and heard all the evidence, was entitled to make the findings which he did for sentencing purposes. In particular, in the light of the jury's verdicts, he was entitled to sentence on the basis that all the applicants and Hammad had a shared intention to rob, a shared intention to take a knife to the scene and a shared intention that the knife would be used if necessary. By section 8 of the Accessories and Abettors Act 1861, an accessory shall be liable to be punished as a principal offender. The judge was entitled to sentence on the basis that each of the applicants was as culpable as Hammad, even though it was Hammad who took the knife into Bryan's flat and who inflicted the fatal wound.

98. The life sentences for murder were required by law. By section 322(3) of the Sentencing Code the judge when deciding what minimum term each offender should serve was required, amongst other things, to have regard to the general principles set out in schedule 21 to the Act. By paragraph 3(2)(c) of that schedule, a murder done for gain, such as a murder in the course or furtherance of robbery, will normally be a case of particularly high seriousness, and the appropriate starting point in determining the minimum term will be 30 years. By paragraph 8, detailed consideration of aggravating or mitigating factors may result in a minimum term of any length, whatever the starting point.

99. In the light of those statutory provisions, and the judge's findings, it is not arguable that he should not have taken a starting point of 30 years. He expressly treated the aggravating factors as confirming that starting point rather than requiring him to move upwards from it. He made a significant downwards movement to 23 years to reflect the comparative youth of the applicants and the other, limited, mitigating factors. In

the cases of Saddam and Carpenter he then made a further upwards adjustment to reflect particular aggravating features of their cases.

100. We see no basis on which Fiaz could argue that the minimum term of 23 years in his case was wrong in principle or manifestly excessive. So far as Carpenter is concerned, whose role in the offence included the calculated betrayal of his friend Bryan, the judge was entitled to treat him as the most culpable of the three applicants and accordingly to make an upwards adjustment. The minimum term in his case of 25 years involved no error of principle and was not, even arguably, manifestly excessive.

101. Saddam has not applied for leave to appeal against his sentence. In our view, that was a realistic course to take. Saddam's actions after the murder successfully enabled his brother to escape justice – potentially for all time, unless Hammad returns to this country, as the judge rightly observed. The additional and discrete criminality of those actions significantly increased his overall culpability, which the judge necessarily reflected in an increased minimum term.

Conclusion:

102. For those reasons, each of the applications for leave to appeal against conviction or sentence, and each of the applications to adduce fresh evidence, fails and is refused.