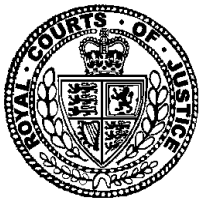

Neutral Citation Number: [2023] EWCA Crim 960

Case No: CA-202201102-B5
CA-202201163-B5
CA-202201833-B5
CA-202202478-B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM WOOD GREEN CROWN COURT
His Honour Judge Lucas KC
T20207504

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/08/2023

Before :

LADY JUSTICE MACUR DBE
MR JUSTICE MARTIN SPENCER
and
MRS JUSTICE THORNTON DBE

- -

Between :

ROSHANE WATSON **GIZEM OZBAHADIR** **LEO DONALDSON**	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Ali Naseem Bajwa KC (instructed by **Claytons Solicitors**) for the **appellant Roshane Watson**
Aftab Jafferjee KC for the **appellant Gizem Ozbahadir**
Sarah Forshaw KC for the **appellant Leo Donaldson**
Brian O'Neill KC and Louise Oakley for the **respondent**

Hearing dates : 21 July 2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 08/08/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Macur DBE :

1. On the 11th March 2022 Roshane Watson ("RW") was convicted of the murder of Christopher George ("CG"), possession of a firearm with intent to endanger life and perverting the course of justice. On the 23rd May 2022, he was sentenced to life imprisonment with a specified minimum term of 32 years less 641 days on remand. He appeals against conviction with the leave of the single judge.

2. On the 18th March 2022 Gizem Ozbahadir ("GO") was convicted of murder and three offences of fraud by false representation. She was acquitted of possession of a firearm with intent to endanger life. On the 23rd May 2022, she was sentenced to life imprisonment with a specified minimum term of 23 years less 633 days on remand. She renews her application for leave to appeal against conviction following refusal by the single judge. She appeals against sentence with leave of the single judge.

3. On the 18th March 2022, Leo Donaldson ("LD") was convicted of manslaughter, as an alternative to murder. He was acquitted of possession of a firearm with intent to endanger life. He had previously pleaded guilty to perverting the course of justice and four offences of fraud by false representation. On the 23rd May 2022, he was sentenced to 18 years imprisonment. His application for an extension of time of 48 days and for leave to appeal against sentence has been referred to the Court by the single judge.

4. Terrique Tomlin ("TT") was convicted of manslaughter, as an alternative to murder and acquitted of possession of a firearm with intent to endanger life. He was sentenced to 11 years imprisonment. There is no extant application in his case.

Background facts:

5. On the 29th July 2020 at about 20:56 two men exited an Audi motor car on Sebastopol Road, Edmonton and approached CG's black Mercedes. One of them fired two shots. CG was fatally injured by a single gunshot to the chest; the second penetrated his left buttock. The firearm, a revolver, has not been recovered.

6. The prosecution case was that this had been a "planned and targeted" murder albeit that the motive was unclear. Each defendant had joint possession of the revolver and was jointly responsible for murder. The 'shooter' was RW, TT had accompanied him to the scene, GO had obtained and provided the firearm that was used, LD was the driver of the Audi. LD had driven RW and TT away after the killing before meeting up again with GO. LD and RW had taken part in dismantling the Audi, after the event, which had perverted the course of justice.

7. It was agreed evidence that LD had been driving the Audi motor car with two passengers; "Man A" and "Man B", and that GO had been driving a BMW. Both vehicles had been 'hired' fraudulently. Both GO and LD were involved in supply of drugs.

8. Of particular relevance was the attribution of the phone '2736'. LD gave evidence that phone 2736 was in the Audi with Man A, the 'shooter'. GO accepted attribution of phone 1026. In the early hours of the 30th July 202, attempts were made by Fuad Ahmed to contact the phone 2736 and those of TT, and GO.

9. The prosecution relied, inter alia, on CCTV evidence, telephone attribution, contact and cell site evidence to prove the movements of the two key vehicles and the circumstances of the stripping of the Audi as circumstantial evidence to identify the defendants as involved in the murder/manslaughter. The prosecution said that Man A could be identified as RW from clothing and footwear comparisons between a still of RW taken from a music video recorded on the 19th June 2020, CCTV and stills of Man A getting out of the rear seat of the Audi and stills and body worn footage from a stop and search of RW on the 9th July 2020.

10. A combination of the evidence indicated that the BMW passed CG walking along the street, and withing a minute GO, called phone 2736 for 39 seconds, inferentially alerting the recipient to the presence of CG. The Audi made a U-turn and from this time both cars were engaged in following CG. At one stage the BMW and Audi in traffic performed simultaneous U-turns. At another, the Audi and BMW drove along parallel roads, as the judge found, "anxious [CG] would not be lost and … attempting to box him in." Unaware of the following cars, CG stopped his car and alighted; the Audi and the BMW drove past him and no attempt was made at that time to approach or attack him. The Audi, parked in a position to discreetly observe CG. GO drove away, disappearing from the scene for about 15 minutes. Her explanation for coming back to provide a lift to one or more of the occupants of the Audi was "plainly farcical" and rejected by the jury.

11. Just after 20:34, CG drove off. The Audi followed him about 10 or 11 seconds behind and continued to keep him in sight and to remain inconspicuous. The Mercedes turned left into a cul-de-sac. The Audi and the BMW 'rendezvoused' on a parallel road. The Audi then drove just past the junction of the cul-de-sac. Man A, the rear-seat passenger got out, bent double, and ran in the direction of the Mercedes. The front seat passenger followed him in similar fashion. Meanwhile, the Audi drove a little further up the road, where it waited.

12. Man A shot CG at very close range in the heart and again, hitting him in the buttock as he ran away. Man A and Man B then ran back to the Audi, which made off at speed. Thereafter the Audi was hidden before being dismantled. The BMW made its way to the same location and GO assisted LD to move the Audi to a less conspicuous parking space.

13. RW did not give evidence, but it was submitted that the circumstantial evidence upon which the prosecution relied was so weak and tenuous that it did not call for an answer from him and that no adverse inference should be drawn. The case put on his behalf was that it was impossible to identify him as the Audi rear seat passenger, and therefore the shooter, from the CCTV (the clothing worn by Man A was commonplace); the 2736 phone was a drugs line manned by a number of different people, and RW was not in possession of the 2736 phone at the time of the shooting.

14. GO said that she had been in the Edmonton area between 8 and 9 pm to sell cannabis. Her call to Man A on phone 2736 was in response to a message from him. She declined to answer questions about the identity of Man A because she was in fear for herself and her family. She had been asked to provide a lift to some or all of the Audi's occupants and that's the reason she followed the car. Her movements in the area were no different to those before or after the 29th July and consistent with drug dealing activities. In cross examination on behalf of RW she agreed that in the afternoon she had attended a party

in Hackney; she had spoken to RW about LD who may need a lift. She had dropped Fuad Ahmed off in Waltham Cross and he had then been in possession of the 2736 phone.

15. LD accepted that Man A was sitting in the rear nearside seat and was in possession of the 2736 phone and Man B was sitting in the front passenger seat. Both Man A and Man B got out of the Audi before he drove off, but that he had no knowledge that CG was to be killed and he had nothing to do with the killing. He had not known that either Man A or Man B were carrying a gun. He had been driving Man A to collect money. He said he was frightened of Man A and Man B and declined to name them. He had dismantled the Audi, with help; by the time he came to do that he had learned that there had been a shooting and that the Audi had been used to follow the deceased's car. He did not talk about the shooting with RW who was the head of his organisation.

16. TT's case at trial was that he was not present or in any way involved in the killing of CG. At trial, he did not give nor call any evidence.

17. The trial was lengthy and frequently interrupted for reasons associated with the pandemic, as we will need to refer to in some more detail below in discussion regarding GO's renewed application for permission to appeal against conviction. However, immediately prior to the close of evidence, and after GO had given evidence in which she had referred to 'Shani', Fuad Ahmed and Daniel Brehun, the jury had sent a note asking:

"The jury is wondering if we are to hear evidence from witnesses including Shani, Fuad Ahmed, and Daniel Brehun".

After discussing the same with Counsel, the judge answered the jury and directed them in the following terms:

"You know the answer to that question now, because the evidence has closed. Let me give you this direction, and I hope in the clearest possible terms. Members of the jury, you must not – and I stress those words – must not speculate as to why these persons have not been called by either side. You must not speculate as to what they might have said had they been called to give evidence, and you must try this case only on the evidence you have received in this trial, remembering at all times where the burden and standard of proof lies."

18. The judge went on to deal with part 1 of his summing up, namely "the legal directions" and route to verdict in relation to each defendant, which he also provided in writing. The judge repeated that the jury were not "to be drawn into any form of speculation or guessing. Can I just pause and say this morning I have already told you not to speculate about why certain people did or did not give evidence. Please do not speculate."

19. On the 19th January 2022 Mr O'Neill KC, made his closing speech on behalf of the prosecution. He commented on RW's failure to give evidence and/or his failure to call certain witnesses. Specifically he said:

    i) "the SIM card for 2736 has never been recovered, nor has the handset that that SIM was being used in on 29 July, and you don't have a word of explanation from [RW] as to what happened to that handset or what happened to that SIM.

> Nor do you have any evidence from him or anyone else called by him to contradict the prosecution's case that 2736 was his phone and in his possession on the evening of 29 July. He could have called any of the people who were contacting 2736 that evening to tell you that it wasn't him they were speaking to but someone else. He could have called his girlfriend, he could have called Daniel Brehun, he could have called Fuad Ahmed – just three of the names that were contacting that phone uphill, down dale that evening – all capable of coming to court, all capable of being summoned to come to court, if that's what it took, but not a word: not a word from him, not a word from any of his friends to challenge the prosecution's case that 2736 was his phone and in his possession on the night that he murdered Chris (sic) George." (emphasis provided)

ii) "And in a similar vein, there's not a word of evidence from him or anyone else called on his behalf to challenge the prosecution case that he was the man who got out of the back seat of [LD's] grey Audi in Sebastopol Road at about five to nine that night. No evidence that he was still at a family gathering in Hackney to celebrate his cousin's release from prison earlier that day. Not a single friend or family member has come forward to give [RW] and alibi to say he couldn't have been the man in Sebastopol Road because he was with me wherever at that time."

20. At a break in the proceedings, Mr Rose, junior counsel for RW, took exception to those comments saying "that's taking it too far, and he shouldn't be permitted to go that far. I've asked him if he will agree to withdraw or resile from the comments, which seems to have flown in the face, or at least conflicts with the direction that Your Honour has already given about this issue [prosecution counsel had refused] and we wonder whether Your Honour would consider making a further direction or reference to the jury that they shouldn't speculate, and that what [counsel] is inviting them to do is just that. How does he know, for example, what is the evidential basis for submitting that they are all capable of coming to court?" He said there were witnesses who could have been asked of the whereabouts and availability of the named individuals even though RW had not given evidence.

21. The judge regarded it "a difficult balance to draw, …. Of course there is no burden on a defendant to prove anything at all, and I have said that in terms to the jury. The ownership of the 2736 is a very important point in this case for both sides." Mr Rose agreed that it was not impermissible to comment but "that what has been said goes far beyond what should properly be said and undermines Your Honour's direction…"

22. The judge prevailed upon Mr O'Neill to caveat his comments. Mr O'Neill maintained that it was a "perfectly proper observation that the defendant has been questioned, called no evidence about the attribution of 2736, or to establish an alibi." Nevertheless, on resumption of its closing speech, he said: "can I be perfectly clear, please, that nothing I have said or raised about any defendant not calling any witnesses to support his or her case undermines or was ever intended to undermine His Honour's clear and unambiguous written directions as to where the burden of proof lies. From beginning to and we bear it, and we bear it now."

23. At the short adjournment, Mr Jafferjee KC for GO addressed the judge to the effect that the counsel's clarification was insufficient and did not cure the mischief of inviting the

jury to speculate. The judge disagreed, finding that there was a distinction between the general direction not to speculate and the more focused observation along the lines of: "if it is really suggested that for example, [the appellant]'s girlfriend wasn't speaking to him on occasions when she rang that phone, she would be able to come along and say so"? That is not speculation: that is dealing head-on with a challenge."

24. We do not have transcripts of the closing speech made by Ms Bennett-Jenkins KC, RW's leading counsel at trial but Mr Bajwa KC who now represents RW, assumes that there is every reason to suppose that she responded to the prosecution closing speech in this regard.

25. Convictions followed as we have indicated above.

26. The single judge granted permission to appeal against conviction on the ground that: "The judge failed to give the jury a direction to correct extensive and impermissible prosecution closing comments as to the appellant's failure to call witnesses in support of his defence caused incurable prejudice to his case.".

27. Mr Bajwa has expanded the ground of appeal drafted by Ms Bennett-Jenkins, to seek to persuade us that we should find, as a matter of law, that there is an absolute prohibition on any judicial comment, and therefore necessarily by extension to counsel for the prosecution or any co-defendant, as to absent defence witnesses. He submits that:

    A. No matter how carefully it is worded, the comment transfers the burden of proof onto the defendant and necessarily invites speculation by the jury as to why the absent witness has not been called and what they would have said had they been called;

    B. Section 35(2) of the Criminal Justice and Public Order Act 1994 ('CJPOA'), 'modifies' a defendant's right to silence by permitting inferences to be drawn from a failure of the defendant himself to give evidence in their trial; no such legislation was introduced then or since to permit inferences from the defendant's failure to call a witness in his defence; there is no equivalent safeguard to the section 35 direction to be given where a defendant does not call a witness, nor can such a direction be formulated that is sensible or workable.

28. We have considered his submissions on this issue, although we consider that technically Mr Bajwa should have given notice of the 'amplification of grounds of appeal', in other than his skeleton argument post grant of leave; see as required by Criminal Procedure Rule 36.14 (5). Having done so we conclude that he invites us to ignore the clear precedent established in previous authority and which, variously, have contemplated these same points.

29. That is, in *Wheeler [1967] 1 WLR 1531,* Winn LJ said that the judge's direction to the jury that the defence failure to call a witness was "a matter which you are fully entitled to take into account" was "unfortunate and unhelpful, and that any repetition of such a reference…is undesirable". However, in *Gallagher [1974] 1 WLR 1204* Megaw LJ said: "this court should make it clear that in its view, and in the view of each member of it, it would not be right to say as a matter of general principle, if that was what was indeed intended in Wheeler's case, that it is unfortunate and unhelpful that a judge

should tell the jury that the absence of a potential witness for the defence is a matter which the jury are entitled to take into account. It is permissible for a judge in an appropriate case to tell the jury that they are entitled to take into account the fact that a potential witness who has not been called has not indeed been called. It is of course clear that in making any such comment, the judge must exercise care, just as a judge has got to exercise care when he thinks it right to make a comment in respect of the failure of a defendant himself to give evidence at trial. But, it would be wrong and inappropriate to seek to tie the hands of the trial judge by laying down or attempting to lay down any particular formulae, because it must depend essentially upon the infinitely varying facts of different cases…"

30. In *Wright*, 1999 unreported, Kennedy LJ commented at [14] that "For as long as any of us can remember, everyone involved in criminal trials has recognised, or should have recognised, the dangers of a judge commenting on the defence failure to call a particular witness", but did not denounce the practice outright. Further, Mr Bajwa concedes that, if this Court's judgment in *Yousefi (Parviz) [2020] EWCA Crim 791*, is authority for the principle which he promotes, it was certainly decided *per incuriam*. In any event, we do not conclude that Fulford LJ, VPCACD giving the judgment of the court was suggesting such a blanket prohibition, for after which he remarked that "To the extent that this and other passages [in the summing up] appear to suggest that the jury could draw inferences from the failure by the appellant to call witnesses, such a direction was not in accordance with the law", he went on to find that "[the judge] gave no assistance as to how such a failure to call evidence **could** be used and instead adopted the formula "it is a matter for you""(emphasis provided) … This was an issue on which the judge should have given the jury short, clear and accurate directions in just a few sentences. …".

31. In *Shakeel Khan [2001] EWCA Crim 486* Pill LJ reviewed the authorities including *Gallagher, Couzens and Frankel [1992] Crim LR 822, Wilmot (1989)89 Cr App R 341, Weller [1994] Crim LR 856, Forsythe [1997] 2 Cr App R 299 and Wright (supra*) saying :

> "17.. In the absence of guidance, juries will inevitably speculate first as to why an apparently relevant witness has not been called, and secondly, as to what evidence that witness might have given had he been called. There will be situations in which the jury are entitled to ask themselves why the defence have not called a witness, as acknowledged in Gallagher and Wilmot . A universal requirement to direct the jury that they must not speculate as to why a witness has not been called might, as between prosecution and defence, work unfairness in some situations. On the other hand, to give no direction may be to invite speculation and thereby to work injustice. To comment adversely may work injustice to the defence because there may be a good reason, but one which in some circumstances it would be unfair to disclose to the jury, such as previous convictions which may damage the defendant by association, why the witness has not been called. Moreover, there may be an issue between prosecution and defence as to whether a witness is available. The judge cannot be expected to try an issue as to availability before deciding whether or not to comment on the failure to call the witness.
>
> 18. There is no simple answer to the problem and much depends on the judge's sense of fairness in the particular situation. In our minds, (as of those of the Court in *Wright*) the dangers of making adverse comments and of failing to warn the jury

> not to speculate will usually be the paramount consideration. On the other hand, now that a defendant's failure to give an explanation in interview or his failure to disclose his case in advance may be the subject of comment, the case for permitting comment on failure to call an available and obviously relevant witness may be stronger. The absence of power to comment would be an encouragement to dishonest evidence naming persons alleged to know of relevant events, if they can be named in the certain knowledge that the jury will be directed not to speculate on why they have not been called.
> 19. If comment is made, while we note the logical force of Sir John Smith's comment that the issue has no bearing on that of burden of proof, a reference to the burden of proving the case remaining on the prosecution may in some situations be appropriate. Moreover, a judge who is proposing to make adverse comment upon the failure to call a witness should first invite submissions from Counsel in the absence of the jury."

32. In *Martinez-Tobon [1994] 1 WLR 392*, an appeal heard prior to the introduction of section 34 and 35 of the CJPO 1994, in which this Court reviewed authorities concerning comment upon a defendant's failure to give evidence in his own behalf. Lord Taylor of Gosforth CJ recognised that;

> " the dividing line between permissible and impermissible comment is, under the present law, not easily discernible" but went on to accept that as long as the jury understood that the defendant was under no obligation to testify and the jury should not assume he is guilty because he has not given evidence, " the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which (a) are at variance with prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant. The nature and strength of such comment must be a matter for the discretion of the judge and will depend upon the circumstances of the individual case."

33. In *Cowan 1995 QB 373*, Lord Taylor of Gosforth, dismissed arguments that the advent of section 35 had "breached or verges on breaching long established principles". Specifically, the argument that section 35 "alters the burden of proof or "waters it down" was dismissed as misconceived."

34. Subsequent appeals dealing with comment upon the defence failure to call a witness have been determined on their own specific facts.

35. The principle of *stare decisis* in the Court of Appeal Criminal Division was considered in *Simpson [2003] EWCA Crim 1499* in which Lord Woolf CJ at [32] commented that

> "32. That the position in the criminal jurisdiction of the Court of Appeal should be different from that in the civil is derived from the judgment of Diplock LJ in *R v Gould [1968] 2 QB 65 , 68-69*. The relevant passage reads as follows:
> "In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision

notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 as justifying the Court of Appeal in refusing to follow one of its own decisions in a civil case *(R v Taylor* [1950] 2 KB 368)."

36. We respectfully agree with the analysis conducted and conclusions reached by Pill LJ in *Shakeel Khan (supra).* There is no per curiam authority which prohibits appropriate comment regarding the failure of a defendant to call witnesses. Mr Bajwa does not argue that the law has been misapplied or misunderstood, rather that he disagrees with it.

37. We decline to attempt to specify the circumstances in which it would/would not be appropriate to make such comment. As per Lawton LJ in *Reg v Sparrow [1973] 1 W.L.R. 488* when commenting upon the '*Bathurst' ([1968] 2 Q.B. 99*) direction said at p. 496:

"In many cases, a direction in some such terms as these will be all that is required; but we are sure that Lord Parker C.J. never intended his words of guidance to be regarded as a judicial directive to be recited to juries in every case in which a defendant elects not to give evidence. What is said must depend upon the facts of each case and in some cases the interests of justice call for a stronger comment. The trial judge, who has the feel of the case, is the person who must exercise his discretion in this matter to ensure that a trial is fair. A discretion is not to be fettered by laying down rules and regulations for its exercise: …
In this sort of matter great care must be taken to avoid the possibility that injustice may be done by leaving the jury under the impression that the failure to call a particular witness is something of importance where in fact there may have been some perfectly good and valid reason why a witness should not be called, which would not bear upon the jury's decision. But, it is impossible to take the view that the failure to call a witness cannot in a proper case be a matter to be taken into account by the jury as a part of the whole of the material upon which they have to decide."

38. We therefore turn to the merits of the ground upon which leave was granted. Mr Bajwa, suggests in his written submissions that the dividing line between permissible and impermissible comment is demonstrated as follows:

a. Permissible comment – "there is no evidence to undermine, contradict, or explain evidence that has been called by the Crown"; and

b. Impermissible comment – " you should hold it against the defendant that he has failed to call one or more witnesses to undermine, contradict, or explain the Crown's evidence and/or support his case".

39. We agree that the comment in (a) is permissible and (b) in the terms drawn, is not. But these are polar positions. The case law, to which we refer above, does envisage circumstances in which it will be appropriate to take a middle line. For example, in this case, we can see no reasonable objection to a comment in terms that RW's counsel had questioned GO regarding her sighting of RW with X, Y or Z at a 'prison release' party but that (a) RW had provided no alibi notice saying that he had been at the party throughout the relevant time ; (b) there was no legal impediment to the calling of X, Y or Z even if RW chose, as was his right, not to give evidence, and (c) whilst the jury

should not speculate about the reason why XYZ had not been called to give evidence nor what they may have said, it meant there was no evidence to contradict the evidence of the prosecution. Equally, that it was agreed evidence that RW's girlfriend, and Fuad Ahmed had telephoned the 2376 number at the relevant time which led to a legitimate inference that they were telephoning RW, and there was no evidence to undermine that inference.

40. In the main, we are not persuaded that Mr O'Neill's comments overstepped the mark. He was entitled to comment on RW's failure to give evidence in accordance with the judge's directions. The comment that RW had called no other evidence was a statement of fact. There was evidence that certain individuals had contacted the 2736 phone and there was no evidence called to counter the inference that, by reason of their association with RW it was he that they were trying to contact. That is, as a matter of fact there was no evidence to contradict the prosecution case.

41. However, there was no evidential foundation for his comments recorded in [19] (a) above, regarding the ability of the various witnesses to attend court, and they should not have been made. It also appears to us that the comments, originally without caveat, were ill advised having regard to the proximity of the judge's clear directions following the jury question. We reject Mr O'Neill's suggestion that any constraint upon judicial comment does not apply to counsel. Counsel must take care not to undermine the judge's legal directions in their closing address to the jury. Due circumspection is required. Comment will not always be appropriate and may in certain circumstances call for immediate judicial rebuke and challenge. We repeat from the judgment in *Khan*:

> "17. There is no simple answer to the problem and much depends on the judge's sense of fairness in the particular situation."

42. We are satisfied that Mr O'Neill's clarification, taken in context with the judge's clear response to the jury question, consistently emphasized in written legal instructions was sufficient to counter the mischief in this rhetoric. The circumstantial evidence against RW was strong and appears to us to have called for an answer. In these circumstances, the jury were entitled to draw an adverse inference against RW by his own failure to give evidence. That apart, we note that the judge in his sentencing remarks indicated that it would be possible for the jury to have deduced from the evidence of LD, that Man A was RW. The conviction is safe. We dismiss RW's appeal against Conviction.

<u>GO's renewed application for permission to appeal against conviction.</u>

43. Mr Jafferjee first submits that the jury's verdict in convicting GO of murder is inconsistent with that acquitting her of possessing a firearm with intent to endanger life; and/or with the convictions of LD and TT of manslaughter. That is, he submits there was no evidential basis to infer/conclude a murderous intent for any secondary party, without that party having participated in the intention that the principal would use the firearm, which he undoubtedly possessed or for concluding that the principal had some prearranged alternative means of intentionally inflicting at least really serious harm. Any information provided or discussion during the telephone call to RW from GO would have been in the presence of LD and TT, and thus they too would have had the same degree of knowledge that GO would have had, as to what was afoot. There was no alternative basis for murder that the jury could have arrived at. The fact that the jury could conclude that GO was the first to spot the victim adds nothing. There was no

evidence that, prior to spotting CG, RW and GO had agreed that he would be subjected to really serious violence. At most, what might be inferred was that GO was aware of some issue between RW and CG. In this case there can be no safe conclusion available as to participation with separate degrees of violence being contemplated – when the basis for murderous intent was underpinned by Count 2; and each of RW`s co-defendants were acquitted of Count 2 in common with GO.

44. The single judge refused permission to appeal conviction indicating that: "If the jury could reasonably conclude that the call, made soon after the Applicant saw the victim, to the man they were sure was the shooter, was made by this applicant acting as a spotter, that that was good evidence upon which they could be sure of her involvement in the murder. Particularly so as she followed the shooter's car in its change of direction and movement to the scent of the shooting, spoke to him, waited nearby until the murder was committed and was party to the hiding of the car soon after.
The fact that the jury could not be sure that she was, as proposed by the Prosecution, the supplier of the gun does not prevent their being sure of the necessary elements of the offence of murder. If they could not be sure that she supplied the gun then it is not inconsistent that they were not sure that she was in joint possession of the gun, even though she was party to a joint enterprise to kill or cause GBH. This ground is unarguable.

45. We respectfully agree and have little to add. However, in our independent consideration of this application, we note that the judge's directions upon the need for 'separate consideration of defendants and counts' includes the following
'The evidence in respect of each defendant, on each count that defendant faces is not the same and so your verdicts need not be the same. That said, **there may be, subject to your evaluation of the evidence**, obvious consequences to your verdicts; i. If you have concluded a defendant is guilty of murder, it follows that defendant **is also likely** to be guilty of possessing a firearm with intent to endanger life. ii. If you have concluded a defendant is not guilty of murder but is guilty of manslaughter**, it will be for you to determine**, whether that defendant is or is not also guilty of the firearms offence.' (Emphasis provided).

46. Realistically, neither Mr Jafferjee, nor Counsel representing LD and TT submitted that the jury should be directed to consider Count 2, (possession of firearm with intent to endanger life), before Count 1, (murder) on the basis that Count 2 was determinative of Count 1(murder). Nor did any counsel submit that the verdicts in relation to the 'non-shooter' defendants would necessarily be the same.

47. The judge's directions adequately suggest the logic of Counts 1 and 2 standing or falling together, but the non-shooter's possession of the gun was certainly not a necessary element in the jury's decision as to whether a defendant was guilty of murder. The routes to verdict, both as to Count 1 (murder/manslaughter) and Count 2, possession of a firearm with intent to endanger life make this clear. As to Count 2, the jury's verdict does not necessarily support the proposition that GO did not know that RW had possession of the firearm at the time, only that she cannot be taken to have been in possession of the firearm with intent to enable RW to endanger life rather than commit grievous bodily harm.

48. The judge told the jury that the evidence against each defendant was 'different'. This is correct, there was evidence to distinguish between the defendants. The jury were

entitled to draw and inference as to the substance of the conversation between GO and RW on the telephone, although there is no evidence that the telephone conversation was overheard by LD and TT who sat in the front of the car.

49. Mr Jafferjee's second draft ground of appeal concerns jury management. The jury were in retirement for a total of 21 days, incorporating a nine-day break. The judge did ask for Counsel's views on the giving of a majority direction after eight days, although he subsequently thought better of it. Subsequently a juror was discharged for ill health. Later in the morning the jury returned with a note which could not be shared with counsel, but the Bar was informed that they had expressed their dissatisfaction at one of their number being discharged. On day 20 the jury unanimously found RW guilty of all three counts and TT guilty of manslaughter. Nathaniel Donaldson was found not guilty of perverting the course of Justice. On day 21 a jury note was received stating – 'we have tried many times to reach a verdict on one of the remaining defendants but are unable to reach a unanimous or majority verdict - any further directions would be appreciated'. The Prosecution submitted that the jury should be discharged on the basis that "the time has come today – when to require them to continue to deliberate may be considered oppressive and might give rise to verdicts which are the subject of inappropriate compromise, as opposed to what is only give and take". A conventional `Watson` direction was given, although 'discouraged' by Mr Jafferjee.

50. On the following day, another juror was discharged for ill health. We are told that on the same day another of the other jurors requested to have the following Monday as a non- sitting day, for the Iranian New Year. This request was refused. On the same day, guilty verdicts were returned in respect of GO and LD as outlined earlier. Mr Jafferjee submits that, as recognised by both the prosecution and the defence, the deliberations had reached a point whereby there could be no confidence in the safety of the verdicts reached during such a uniquely fractured process of retirement.

51. There is no doubt that the jury deliberations were extended and, obviously, impacted by the regime imposed by the Covid pandemic lockdown. However, as the single judge indicated in her reasons:
"Like very many long trials held during the pandemic this case suffered from an unusual number of breaks and delays. Their [the jury's] deliberations were protracted by gaps but lasted up to 80 hours before most verdicts were returned and a further 20 hours before the verdicts in respect of this applicant were returned. The court was not asked to discharge the jury during the trial, despite delays and there is no reasonable basis upon which to argue that however long the jury took, they did not discharge their responsibilities properly. Particularly so as they acquitted this Applicant of one of the counts and there was a reasonable length of time when they considered her case alone."

52. We respectfully agree and have nothing to add. The decision to discharge the jury was not dependent upon the prosecution view. This judge had the 'feel' of this jury and was obviously sensitive to their rigour and vigour for the role. We see no error in his judgment call regarding the Watson direction or the length of time he permitted the jury to continue in their deliberations. This was a situation that was borne out of the pandemic restrictions and necessarily accommodated the demands of daily life as it had become. There is no suggestion that a juror was impeded in the conscientious discharge of their responsibilities.

53. We refuse GO's renewed applications for permission to appeal against conviction.

GO's appeal against sentence.

54. The real issue in this appeal against sentence concerns the appropriate starting point for the minimum term. Mr Jafferjee maintains that the correct starting point, in accordance with Schedule 21, paragraph 5 is 15 years.

55. However, Sentencing Act 2020 schedule 21, paragraph 3 (1) & (2) provides that:
"(1) If—
(a)the case does not fall within paragraph 2(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associate with it) is particularly high, and
(b)the offender was aged 18 or over when the offence was committed, the appropriate starting point, in determining the minimum term is 30 years.
(2)Cases that (if not falling within paragraph 2(1) would normally fall within sub-paragraph (1)(a) include—
(a)…
(b) **a** murder involving the use of a firearm or explosive" (emphasis provided)

56. This is to be contrasted with the wording of paragraph 4(2):

"(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—
(a)commit any offence, or
(b)have it available to use as a weapon, and used that knife or other weapon in committing the murder. (emphasis provided)."

57. That is, there is a clear difference in the emphasis upon the offence and the offender in the provisions above. The judge interpreted paragraph 3 (1) and 2(b) as applicable to a joint participant in a murder involving the use of a firearm, even if that participant had not 'possessed' the firearm.

58. We agree with the judge's interpretation. The correct starting point was one of 30 years. Thereafter the judge correctly reduced the starting point so to mark that GO was not the shooter and had been acquitted of possession of the firearm.

59. However, even if Mr Jafferjee is correct and the appropriate starting point was 15 years, there were several aggravating features including the degree of planning, however short in inception, and consequent tracking of Mr George, GO's active criminal life style at the time including the offences of fraudulent obtaining of hire vehicles, her assistance after the event and the fact that a firearm was used during the killing which would considerably raise the appropriate starting point significantly upwards of 15 years.

60. This was a severe sentence but in accordance with the facts and cannot be categorised as manifestly excessive. The appeal against sentence is dismissed.

LD's appeal against sentence.

61. We have proceeded to consider the merits of LD's prospective appeal, absent any consideration of the reason why an extension of time is necessary. Ms Forshaw KC submits that having regard to the jury's verdicts (acquitting the defendant of murder and of knowledge that his passenger was secreting a weapon, namely a gun) the culpability of LD for manslaughter fell squarely within category C.

Alternatively, even if Category B was correctly identified, any aggravating factors which did exist did not justify an increase from the starting point of 12 years to 16 years prior to any reduction for mitigation.

62. We disagree that the judge was in error to place the offence within Category B of the Sentencing Council's Definitive Guidelines on unlawful act manslaughter. The judge was well able to conclude on the evidence that the jury's verdict imputed to LD the intent that RW would cause really serious harm to Cg falling just short of grievous bodily harm by the dogged manner in which the Audi trailed CG. Therefore, the starting point was 12 years with a range of eight to 16 years.

63. The judge found "many aggravating features" which he particularised in his sentencing remarks. LD was the oldest of the four defendants. He "revelled" in criminality and had previous convictions which reflected the bulk sale of Class A drugs. He fraudulently obtained cars from rental companies for his own use and that of other criminals and would then dismantle the cars for cash. On the night in question he was "well aware of and participating in something that was really serious". He had been involved in a "really serious case of perverting" the course of justice in dismantling the car he drove that night, knowing that CG had been shot and killed. He had been involved in a leading role in obtaining hire cars by fraudulent representation. This offence was of high culpability and, stand alone would merit a sentence starting at three years. The sentence for manslaughter alone was 16 years, uplifted to reflect the other offences of perverting the course of justice and the fraud by false representation.

64. Regardless that the jury acquitted LD on Count 2, we agree with the judge that, in the knowledge that a gun had been used to kill CG, the fact of dismantling the Audi car with the intent to dispose of evidence was sufficient to raise this offence to the top of the range. Having used this fact as an aggravating feature, there would be double counting if the judge further increased the sentence to reflect the conviction for perverting the course of justice as he seemed to indicate he had in his sentencing remarks. However, some uplift was undoubtedly necessary in relation to the three offences of the fraudulent obtaining of the rental cars, which the judge identified as high culpability and each offence would merit sentences starting at three years, with further aggravating factors of LD's previous convictions and the subsequent dismantling of the motor cars increasing that sentence further. In those circumstances we can see no complaint in an increase to the 16 years which the judge considered appropriate for the manslaughter as a 'standalone' offence of two years to reflect this further offending. The sentence does not offend against the principle of totality.

65. The judge expressly had regard to the "difficult times defendants were forced to endure" during Covid lockdowns. This experienced trial judge has an obvious advantage over a court of review in terms of the weight to apply to the aggravating and mitigating features. The sentence imposed was condign punishment to reflect the whole of LD's offending. We extend time in which to make application for permission to appeal, but dismiss the application. The appeal against sentence is unarguable.