Neutral Citation Number: [2025] EWCA Crim 12

Case Nos: 202400786 B2; 202400922 B2; 202400380 B2; 202401872 B2; 202303800 B2; 202202221 B2; 202400820 B2; 202202331 B2; 202201861 B2; & 202202255 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM MANCHESTER CROWN COURT
Mr Justice Goose
Ind. No. T20217072 / T20217166 / T20217217

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/01/2025

Before :

LORD JUSTICE DINGEMANS
MRS JUSTICE COCKERILL
and
SIR ROBIN SPENCER

- -

Between :

Harry Oni	**Appellants**
Jeffrey Ojo	
Brooklyn Jitoboh	
Martin Thomas (Junior)	
Ademola Roheez Mark Adedeji	
Raymond Savi	
Omolade Okoya	
- and -	
Rex	**Respondent**
- and -	
Justice	**Intervener**

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Mr Green KC and **Ms Kramo** instructed by **Sperrin Law Solicitors** on behalf of **Harry Oni**
Mr Newton KC and **Ms Webb** instructed by **Sperrin Law Solicitors** on behalf of **Jeffrey Ojo**
Mr Abraham instructed by **Sperrin Law Solicitors** on behalf of **Brooklyn Jitoboh**
Ms Piercy and **Ms Papamichael** instructed by **Hodge Jones and Allan solicitors** on behalf of **Martin Thomas (Junior)**

Mr Monteith KC and **Ms Mogan** instructed by **Sperrin Law Solicitors** on behalf of **Ademola Roheez Mark Adedeji**
Mr Temkin KC and **Mr Palmer** instructed by **Cunninghams solicitors** on behalf of **Raymond Savi**
Mr Kane KC and **Mr Gray** instructed by **Cunninghams solicitors** on behalf of **Omolade Okoya**
Mr Sandiford KC and **Mr Smith** on behalf of the **Prosecution**
Dr Tunde Okewale OBE and **Oliver Mosley** instructed by **Clifford Chance LLP** on behalf of **Justice** (intervening by written submissions only)

Hearing dates : 19 & 20 December 2024

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Approved Judgment

This judgment was handed down remotely at 12.00, noon on 15/01/2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans:

Introduction and grounds of appeal

1. This is the judgment of the Court, to which we have all contributed. This is the hearing: of appeals against convictions for conspiracy to murder on the part of Mr Oni, Mr Ojo and Mr Jitoboh; and of appeals against convictions for conspiracy to cause grievous bodily harm with intent on the part of Mr Thomas (Junior) Mr Adedeji, Mr Savi and Mr Okoya. It is also the hearing of appeals against sentence on the part of Mr Adedeji, Mr Savi and Mr Okoya. The conspiracies were alleged to have occurred between 4 November 2020 and 6 February 2021.

2. On 31 July 2024 the full court, having heard applications for leave to appeal against conviction and sentence and various extensions of time on 12 July 2024, gave judgment [2024] EWCA Crim 893, and granted leave to appeal against conviction to all the appellants on specific grounds that gave rise to the following issues, being whether: (1) the approach to the law of conspiracy by the judge was wrong; (2) the judge's direction on the use of the guilty pleas of the appellants Mr Oni and Mr Ojo to count 2 was wrong; and (3) the judge misdirected the jury on section 34 of the Criminal Justice and Public Order Act. These three issues were common to all the conviction appeals.

3. There were further grounds giving rise to issues on which leave to appeal against conviction was granted to Mr Adedeji and Mr Okoya only. These were: (4) the judge was wrong to admit the photograph of the appellants Mr Adedeji and Mr Okoya with cash by the ear (sometimes referred to as "the money phone"); (5) the summing up by the judge of the photograph showing cash by the ear in relation to Mr Adedeji was wrong; and (6) the identification evidence by PC McGregor of the appellant Mr Adedeji wearing a blue bandana in a photograph was wrongly admitted, or was now shown to be wrong in the light of fresh evidence. In the last respect Mr Adedeji was granted permission to apply to adduce as fresh evidence on the appeal the witness statements of Mr Tyrone Numa and Mr Ian McMeekin, the latter of whom was junior counsel for Mr Adedeji at the trial. Both Mr Numa and Mr McMeekin gave evidence at the hearing of the appeal and were cross-examined on behalf of the prosecution.

4. By the end of the hearing it was apparent that there was a further issue to be determined, namely: (7) in the event that any of the convictions were quashed, whether a retrial should be ordered.

5. Leave having been granted for an appeal against sentence, there was a further issue, being (8) whether the sentences for Mr Adedeji, Mr Savi and Mr Okuna were wrong in principle or manifestly excessive.

6. The full court had refused extensions of time, leave to appeal in respect of all the other grounds of appeal against conviction, and leave to rely on other fresh evidence, for the reasons set out in the judgment [2024] EWCA Crim 893.

7. With two exceptions, the appellants were represented on the appeal by counsel who had not appeared at the trial below. The parties each prepared helpful written submissions, and at the hearing of the appeal oral submissions were made by: Mr Monteith KC and Ms Mogan on behalf of Mr Adedeji; Mr Green KC and Ms Kramo on behalf of Mr Oni; Mr Newton KC and Ms Webb on behalf of Mr Ojo; Mr Abraham on behalf of Mr

Jitoboh; Ms Piercy and Ms Papamichael on behalf of Mr Thomas (Junior); Mr Temkin KC and Mr Palmer (who were trial counsel) on behalf of Mr Savi; Mr Kane KC and Mr Gray (who were trial counsel) on behalf of Mr Okoya; and Mr Sandiford KC and Mr Smith (who were trial counsel) on behalf of the prosecution. We also received written submissions from Dr Okewale and Mr Mosley on behalf of Justice, intervening in the appeal of Mr Adedeji, raising issues about racial stereotyping adultification of black and ethnic minority defendants, and the misinterpretation of drill music as evidence of criminal activity.

8. We were very grateful to counsel and their legal teams for their co-operation with each other in preparing for the appeal, and for their agreement of timetables for the hearing of the appeal, and for all of the assistance provided to the court.

Reporting restrictions

9. Reporting restrictions were imposed on the judgment dated 31 July 2024 [2024] EWCA Crim 893, and on the hearing of this appeal. This was because if any of the appeals against conviction had been allowed, the court might have ordered a retrial, and it was necessary to avoid the risk of prejudice to any fair retrial arising from what was said in the judgment or at the hearing of the appeal. We now lift those reporting restrictions because there will be no retrials. This is in circumstances where, for the detailed reasons given below, we have dismissed the appeals against conviction for all of the appellants save Mr Adedeji, whose appeal against conviction is allowed in the light of fresh evidence going to the issue of his identification on a video clip. We have allowed the appeals against sentence of Mr Savi and Mr Okoya.

Pleas and convictions

10. Mr Oni, Mr Jitoboh, Mr Thomas (Junior), together with a co-defendant Simon Thorne, pleaded guilty before trial to the offence of violent disorder which occurred on 5 November 2020 around 7 pm in Birchenhall Street, Moston. Mr Oni and Mr Ojo pleaded guilty before trial to the count of conspiracy to cause grievous bodily harm with intent.

11. Mr Oni, Mr Ojo and Mr Jitoboh were found guilty of conspiracy to murder, together with a co-defendant (Gideon Kalumda), on 17 May 2021 after a trial before Goose J and a jury which lasted some 10 weeks. Mr Thomas (Junior), Mr Adedeji, Mr Savi and Mr Okoya, together with other co-defendants (Simon Thorne and Azim Okunola), were found guilty after trial on the same date, of conspiracy to cause grievous bodily harm with intent.

12. The appellants before this court, in the order in which they appeared on the indictment and with their ages at the time of sentencing and at the time of the offences are: (1) Harry Oni, 15/5/03 - 19 years (17 years at time of offences) no previous convictions but two cautions for possession of a knife and possession of cannabis on 15 November 2019; (2) Jeffrey Ojo, 27/1/01 - 21 years (19 years at time of offence) no previous convictions; (3) Brooklyn Jitoboh, 30/8/03 – 18 years (17 years at time of offences) no previous convictions; (4) Martin Thomas (Junior), 14/2/03 - 19 years (17 at time of offences) a previous conviction of possession with intent to supply Class A drugs; (5) Ademola Adedeji, 1/6/03 - 19 years (17 years at time of offence) no previous convictions; (6) Raymond Savi, 27/1/03 - 19 years (17 years at time of offence) no

previous convictions; and (7) Omolade Okoya, 24/2/03 - 19 years (17 years at time of offence) no previous convictions.

The relevant factual background to the offences

13. This summary is based on: the findings of fact set out in sentencing remarks by the judge, who had heard a trial over some 10 weeks; extracts from the agreed facts at trial; and an extract of some messages taken from a telegram social media chat.

14. The judge found that the background to the offences lay in a rival gang culture between two gangs. Complaint was made on the applications for leave to appeal against conviction, and again on the appeal, about the use of the word gang. It is obviously important in any case to ensure that separate individuals are not unfairly treated as one entity, and that groups of friends or individuals sharing an interest in music are not unfairly labelled as gangs. It is clearly necessary to consider whether bad character evidence of gang membership is relevant to a particular individual's case, see generally *R v Alimi* [2014] EWCA Crim 2412.

15. There are, however, two answers to the general complaint about references to the gang on this appeal. The first is that in the agreed facts, being facts agreed by the prosecution and each defendant to be true, the M40 gang and the RTD gang, were described as gangs. The second is that, on the relevant facts, there could not be any doubt that two gangs, namely the M40 gang from the Moston area of north Manchester, and the RTD gang from Rochdale and Oldham, were engaged in a rivalry which led on 5 November 2020 to the stabbing of Joseph Raji, a person identified with the RTD gang, in central Manchester, and the murder of John Soyoye, a member of the M40 gang who had taken part in the attack on Mr Raji. The judge found that in this case the rivalry between the gangs manifested itself on social media and through drill rap music, with threats of violence, the display of weapons, including firearms, machetes and crossbows. It is apparent that many of the lyrics in the rap music picked up actual events which had occurred during the course of the rivalry, as appears from the prosecution case relating to Mr Oni. The judge said that entering the territory of one gang or group was treated as provocation, to be met by violence or the threat of violence.

16. The fact that the gangs existed did not, however, mean that each defendant was a member of the gang, or that each member of the gang carried out the actions or shared the same responsibility for any actions which were carried out by other members of the gang.

17. On the 5 November 2020 at 2.40 pm in the afternoon a group of young men, including Mr Oni, Mr Jitoboh, Mr Thomas (Junior) and Mr John Soyoye, also known as MD, chased down and attacked Mr Raji, a member of the RTD gang in Manchester city centre, in Piccadilly Gardens. The RTD gang member was kicked, punched and stabbed whilst on the ground. It was a very public display of serious group violence captured on CCTV and observed by frightened members of the public.

18. The agreed facts at the trial summarised those events as follows:

> "At approximately 14:40 hours members of the M40 gang attacked Joseph Raji as he stood with a group of males, including Christopher Semedo and Mohammed Al-Jaf, in Piccadilly

> Gardens, Manchester. Harry Oni, Brooklyn Jitoboh, Martin Junior Thomas, Simon Thorne and Alexander John Soyoye were all present at the time. Nobody was arrested or charged in relation to this incident. Joseph Raji was taken to the ground where he was punched, kicked and stamped and stabbed to the leg before onlookers intervened and the attackers made off. As Alexander John Soyoye walked away he was captured on CCTV footage filming the attack on his mobile telephone. Joseph Raji was taken to Manchester Royal Infirmary where he was treated for a deep one to two inch stab wound to the inside of his right thigh."

19. It was also agreed that: "Following the attack in Piccadilly Gardens there was communication between members of the two rival gangs, which led to a violent meeting when twenty one [21] armed males met in Moston later that evening." It is a tragedy that in this case otherwise sensible children (as the evidence showed that most were – though they are now adults in prison), who had many talents and the potential to become useful members of society, decided that arranging a violent confrontation was a sensible way to act towards each other.

20. The judge recorded that later that evening further events of violent disorder occurred. At about 6pm, 13 men with knives, machetes and other weapons travelled to Moston Lane, Moston. They were associated with the RTD gang and were seeking violent revenge for what had happened earlier. They were searching for the M40 gang. Eight of the M40 gang, including Mr Jitoboh, Mr Thorne, Mr Thomas (Junior), Mr Samedo and Mr Oni as well as Mr John Soyoye (who was aged just 16 years at the time), prepared themselves for the fight with machetes, sticks and poles.

21. The two groups came together. Mr Soyoye openly carried a machete, as did another unidentified youth. Mr Oni, Mr Jitoboh, Mr Thorne and Mr Thomas (Junior) carried either long poles or a baseball bat. Mr Samedo had no weapon at the start, but was carrying one later. All were prepared for a fight with weapons. All weapons were visible in their hands. The CCTV recording of what happened was seen by the court during the trial.

22. When they realised that they were outnumbered by the RTD gang, the M40 gang ran, but Mr John Soyoye was caught and attacked with machetes. He received 15 separate stab wounds and died at the scene. As already partly noted, Mr Jitoboh, Mr Thorne, Mr Thomas (Junior), Mr Samedo and Mr Oni subsequently pleaded guilty to the offence of Violent Disorder arising out of that conflict.

23. In a subsequent trial before a different jury, seven of those 13 men of the RTD gang or group were convicted of the murder of Mr Soyoye and one was convicted of his manslaughter. Sentences of life imprisonment were imposed.

24. The judge, in sentencing the appellants, stated that the prosecution case, accepted by the jury, was that after Mr Soyoye's murder on the 5 November 2020, ten persons formed a criminal agreement or conspiracy, in which the defendants decided that one or more of them would attack the rival gang or group. The jury found that four of them (being Mr Oni, Mr Ojo, Mr Kalumda and Mr Jitoboh) intended that they would kill a member of the RTD gang. The jury found that the others (being Mr Thorne, Mr Thomas

(Junior), Mr Adedeji, Mr Savi, Mr Okoya and Mr Okunola) intended that grievous bodily harm would be caused.

25. The judge was sure that the conspiracy was formed quickly, within days after the murder of Mr John Soyoye. In a Telegram social media chat on the 8 November 2020, the judge found that seven individuals were exchanging ideas in planning, identifying where the targets could be found and who might be threatened to disclose information about the targets. The judge found that the Telegram social media chat was clear evidence of the conspiracy in action and not just its formation. The discussion quickly turned to the issue of revenge by 'touching' (stabbing) members of the rival gang or group responsible for the murder of Mr Soyoye. From this it could properly be deduced that those invited to participate in the chat were trusted members or associates of the M40 gang or group. Seven potential targets for attack were identified by name - the participants exchanged information about where those targets could be located and attacked - the participants discussed an attack on a person called Jair (Ismael Correia) which had been arranged later on the afternoon of 7 November 2020. The participants discussed kidnapping Jair and forcing him to reveal the whereabouts of others that the gang or group wished to attack. The participants discussed the use of violence, bribery and blackmail against young female associates of their intended targets to force those females to provide information about the whereabouts of those targets and ensure the said females did not go to the police.

26. So far as Mr Adedeji is concerned, he joined the Telegram chat, using the pseudonym of "Shay Mya" and was known to others as 'Stormzy'. The judge found that he did not express any surprise or concern about being invited to or participating in a discussion, the focus of which was seeking out and attacking and stabbing those believed to be responsible for the murder of Mr Soyoye.

27. What is clear is that Mr Adedeji: (i) did reveal and share his accurate knowledge that one of those responsible for the murder of Mr John Soyoye lived on Lime Side Street, Oldham and that was where most of them were based; (ii) a short time later provided a postcode for the address that he had obtained in a separate chat from a female associate informing his co-conspirators that there was "drop there" (a location where one of their intended targets could be found and attacked); and (iii) enquired about another target of the conspirators called Khalid, asking where he lived. There was evidence at the trial, including from Mr Adedeji's interview under caution, showing that the word "touch" was a euphemism for stab.

28. We have considered carefully the Telegram chat messages. These are of particular significance in circumstances where Mr Savi was convicted apparently solely on the basis of those messages. Like Mr Adedeji he was of previous good character, and he was a talented sportsman, attended Church, and had aspiration to attend university. The evidence suggested that Mr Adedeji, Mr Okoya and Mr Okonula were close to each other, but not particularly close to Mr Oni, Mr Ojo or to the others.

29. A summary of relevant events from the Telegram chat is set out below:

> "12:57:50 [Group chat created by Ojo - all participants invited to join via link]
>
> 13:04:32 [Savi joins chat]

13:09:00 [Adedeji joins chat]

13:14:39 Oni U man need to stop going to that spot till we touch something.

13:14:56 Oni We can't be grieving everyday while nothings going on

13:14:58 Adedeji Yooo one of them man live on lime side street in Oldham

13:15:07 Oni How you know?

13:15:07 Adedeji That's where most of them base

13:15:16 Ojo Man know if a next man got touched md would have done something by now

13:15:26 Adedeji I have my links girls who used to chill them

[discussion about whether a female named Nadia might give information on locations of individuals]

13:17:36 Adedeji Where does Khalid live

13:17-13:19 [Discussion principally between Ojo and unidentified identifying the main persons (targets)]

13:19 Okoya suggests accessing targets via another girl. Naomi, and Okoya opines she won't give them up because they are her "slimes, especially hellion"

13:19:49 Ojo Anything Rochdale affiliated gets burnt

Oni I know where Octavio flats is

13:20:33 Unknown So we got the drops and we sat here doing nuen

13:21:11 Adedeji [postcode given] Drop there

13:22:30 Adedeji [sends photo of a relevant address]

13:22:52 Savi Who's gaff is that?

13:24:10 Savi Benson what's that?

13:25:02 Oni So we can do this jair guy

13:25:13 Savi Is he coming? Like deffo?

13:25:36 Adedeji

> 13:25:58 Oni Mans not bringing my whip for some hot shit are u lot caked
>
> [responses] [affirmatives]
>
> 13:26:27 Savi Man should just nap him until he gives the drop on each person
>
> 13:27:20 Adedeji Word
>
> 13:28:33 Savi Sure he's coming by himself?
>
> 13:28-13:34 [Discussion about who to target in what order]
>
> 13:34:42 Savi Yh nap him to get the drop on all of them
>
> 13:35:11 Oni Nah we not napping him. Straight drop him Trust me
>
> 13:35:43 Ojo Yo we can't drop a civi
>
> 13:35:53 Savi Yh true but trust me he's a civi Cah if he was really on it like that he wouldn't come
>
> Discussion turns to kidnapping him
>
> 13:36:46 Savi Make sure to take his phone so he can't contact them man
>
> Further discussion of bringing rope and t-shirts" (emphasis added)

30. It is apparent from those extracts from the chat that there was discussion about touching (stabbing) those believed to have been involved in the murder of John Soyoye, who was referred to as MD. There was discussion about the fact that MD would have done something by now if anyone else had been stabbed. It is apparent that there were locations shared where those who were believed to have been involved in the murder of John Soyoye lived, and that there were discussions about getting more information from girls who knew those believed to have been involved in the murder of John Soyoye.

31. Some reliance was placed on matters not directly evidenced from the chat but apparent from it. It was said that it was apparent from the Telegram chat that Mr Savi already knew about an arrangement to "sell" airpods to Jair, the person identified as the first target.

32. For both Mr Savi and Mr Adedeji there was in each case one additional chat relied on by the prosecution. As far as Mr Adedeji was concerned there was a Snapchat with a person using the name Prince Abu on 7-8 November. It appears that Mr Adedeji had accused Prince Abu (referred to as PA below) of posting an offensive video about the death of Mr Soyoye. What followed was:

> "PA: wtf man believe me I love Jon I am the last guy who would ever kill him if I would have knew that he died at that I wouldn't have put that fucking video on it Mums jon is like a brother to me infackt like a father." …
>
> Adedeji: … Wait so it was not yiu that record the video? …
>
> PA: I don't have any contact with portages
>
> Adedeji: Snm bless but I just fine you a weird person fo[cutoff] posting that can't lie and if I ever find out you post something like that again I am going to k[cutoff] you bro no cap so you best apologise."

33. As far as Mr Savi was concerned Mr Savi was part of the same Telegram chat when it was revived on 14 November with some discussion initiated by Mr Okonula directed to "this guy… get him down ….I'll give you 2k… make sure to strip him and record", to which Mr Savi responded "who is he? What's he saying?"

34. There was also evidence from the other defendants as to the contacts each of them had with Mr Savi and Mr Adedeji. This amounted to going to the same high school, seeing them at parties and so forth.

35. It is plain that the Telegram chat was a central part of the prosecution case against those whom the prosecution accepted were the lesser participants in the conspiracy such as Mr Adedeji and Mr Savi. The prosecution closing speech was principally based on what was said in that chat, what could be inferred from it as to previous exchanges, what those who participated must have understood from it, the fact that each used false names, and the apparent hopelessness of late suggestions by some of the defendants that there was a side chat mocking the Telegram chat, suggesting that the Telegram chat was not meant either literally or seriously. It is fair to say that the conviction of Mr Savi was solely on the basis of the Telegram chat.

36. So far as Mr Adedeji is concerned, the chat was identified by the prosecution as "most important". There were some further matters to add to the Telegram chat. There was the "Prince Abu" Snapchat, relied on in closing by the prosecution as evidence that "Mr Adedeji was prepared to threaten to kill". There were a number of matters relied upon as indicating membership of or affiliation with M40. There was the picture with cash to his ear, which forms the basis for one of the grounds of appeal. There was his friendship with Mr Soyoye, who had been murdered giving Mr Adedeji a motive for revenge. There was the alleged identification in the video with the bandana which forms the basis for another of the grounds of appeal. There was an image on Mr Adedeji's phone of John Soyoye in what was contended to be the M40 gang colours of blue. In particular reliance was placed on a photo which Mr Adedeji posted with a moving message of grief ("my heart's broken in a million pieces…."), the point being that to accompany this important and personal message he had used not a front face view, but a rear view photo of John Soyoye in a MD40 t-shirt, and he had specifically cropped "most of the things out so it would just say MD40".

37. The judge found that in pursuance of the conspiracies, three incidents of violence were carried out against some of those who were targeted. These incidents of violence were

carried out before either those who had joined the conspiracies could be arrested for their part in the conspiracies, or the targets of the conspiracies could be arrested for their part in the murder of John Soyoye. The judge was sure that these incidents were just the start of what was intended, because despite the violence that was used, the men identified in the Telegram chat as the prime targets, were not found or attacked before they were arrested by the police for their part in the murder of John Soyoye.

38. The three incidents were as follows. First, on 10 November 2020 Mr Oni and Mr Ojo confronted Hellion Santos at Hopwood College. Mr Oni took with him a large knife, most likely a sword or machete in a sheath, which he revealed to Mr Santos. Mr Ojo was present as back up. Although Mr Oni denied that he had a bladed weapon, the judge was sure that he had one. This was because it was around the time he was purchasing significant numbers of machetes online, within weeks he used a machete to attack another victim, and he was found in possession of a quantity of machetes on later arrest. In the event, Mr Santos managed to escape after being chased by both Mr Oni and Mr Ojo.

39. Secondly, on 16 December 2020 Mr Oni and Mr Kalumda travelled to the Freehold Flats area of Rochdale, to what they considered to be the territory of the RTD gang. Mr Oni took a machete again. This time Mr Oni caused serious injuries. The attack was captured on CCTV as both Mr Oni and Mr Kalumda chased after the victim. The victim was struck across his back several times, causing very deep and long slash type injuries. As the victim ran across the road to reach safety in a shop, Mr Oni struck him again across the back, in front of traffic. The judge was sure that, had Mr Oni not been disturbed by the traffic and the victim's escape into the shop, his injuries would have been even more severe. The judge found that Mr Oni's intention was obvious, namely that it was to kill, as part of the conspiracy.

40. Thirdly, on 28 December 2020 four men, including Mr Kalumda, travelled in a stolen car, again to Freehold Flats in Rochdale. The driver remained in the car while the other three, including Mr Kalumda, chased another victim, who initially managed to escape. Mr Kalumda and the other two returned to the waiting car and went in search of the victim. When he was found, the same three with machetes got out of the car and ran after the victim who was brought to the ground and attacked in full view of a CCTV camera. Two of them, not Mr Kalumda, repeatedly struck the victim with their machetes, causing very serious slash injuries while he was on the ground. Mr Kalumda stood close by with his machete in hand. They returned to the car leaving the victim on the pavement. The car was then used as a weapon in an attempt to drive over the victim whilst still lying on the ground. It was only because that man realised what was to happen, that he managed to get up and was thrown onto the bonnet of the car. The judge found that the intention of those men in that car was clear, it was to kill as part of the conspiracy

Some issues and rulings at trial

41. The prosecution case was that there were four key issues at trial being: (1) was the M40 a criminal gang or group involved in a real feud or just a music group; (2) were any of the defendants at trial a member, affiliate or supporter of the M40; (3) was there a conspiracy to take violent revenge on the rival gang or group with an intention to kill members of the rival gang or group (count 1) or to cause grievous bodily harm with

intent to members of the rival gang or group (count 2); (4) if so, were any of the defendants a party to either of the agreements.

42. It is apparent that prosecuting and defence counsel at the trial co-operated (in accordance with their duties under the Criminal Procedure Rules) and agreed a number of matters at the trial including: (a) the admission of evidence, including 'gang or group' evidence and evidence of drill lyrics; (b) the admission of the evidence of PC McGregor; (c) other agreed facts under the Criminal Justice Act 1967; and (d) the directions of law given to the jury as appropriate to the issues and circumstances of this case.

43. One ruling related to an image found on Mr Adedeji's phone showing him holding cash to his ear. The judge ruled that the evidence was admissible for the following reasons. First, the applicant denied gang or group membership. Secondly, the image of holding a substantial amount of cash to the right ear in a similar way to other images of other gang or group members was potentially relevant to the issue of his membership of or affiliation with the M40 gang or group. Thirdly, the judge did not conclude that the admission of the evidence reversed any burden of proof. It was relevant evidence to a significant issue, namely whether Mr Adedeji was a member or affiliate of the M40 gang or group, some of whose members held cash in the same way to show the camera how much they had.

44. It was contended on behalf of Mr Adedeji that the prosecution suggested the money held to the ear by him had come from drug dealing and that Mr Adedeji's evidence that the money had come from working in a shop had been accepted. The prosecution referred to drug dealing during the closing speech. It had been common ground that some of the defendants had been involved in drug dealing. By reference to the cash to the ear photographs it was said: "you may think that the showing off cash in this case is again consistent with connections to the gang."

45. The next ruling related to Mr Okoya and images extracted from Mr Okoya's mobile telephone. These were two images of the applicant with unknown youths making hand gestures; a screenshot of a news article about the arrests in the case; and a "selfie" photograph of the applicant holding a small fold of cash.

46. The judge ruled that the evidence challenged by Mr Okoya was admissible. Mr Okoya did not admit gang membership or affiliation so it remained a significant issue for the jury to determine. The images of the appellant in 2019, before the indictment period of the conspiracy, with unknown youths making hand gestures indicating the possession of or intention to use firearms, coupled with images of blue bandanas being worn by other unknown youths, provided relevant evidence of gang or group membership or affiliation by the applicant. The screenshot of the news article of the arrest of six youths concerning the trial offences was also potentially relevant evidence of gang or group affiliation or membership. It showed a clear interest by the applicant of their arrest. The selfie image was also potentially relevant evidence of gang or group membership or affiliation. It was not just the possession of cash but that it was a significant quantity of cash and was held in the hand to the right ear in a similar fashion to other members of the M40 gang or group. Each of the images was therefore admissible.

Summing up

47. The judge summed up to the jury. It is apparent that there were several drafts of the legal directions which the judge sent to the parties. Submissions were made on behalf of Mr Jitoboh in relation to the draft direction on acts and declarations in the course of the conspiracy. It is apparent from the written submissions that the objection related to the use being made of certain lyrics and whether those were within the time period for the conspiracy.

48. In the final event the directions were agreed by all counsel save with the exception of those acting on behalf of Mr Okoya in relation to the use to be made of the fact that Mr Oni and Mr Ojo had pleaded guilty to conspiracy to cause grievous bodily harm. The jury had the judge's legal directions in writing. The judge directed the jury in relation to conspiracy in conventional terms. The judge noted that a conspiracy is an agreement between two or more people to commit an intended crime by one or other of them and that such a conspiracy is itself a crime, separate from the intended crime. The offence is complete once the agreement is made.

49. The judge expressly recorded that defendants may join and leave a conspiracy at different times. The judge said that the defendants do not have to join it at the same time and they may play different parts in the conspiracy, and they do not necessarily need to know, meet or communicate with all of the other conspirators, but they must communicate with one or more to be a party to the conspiracy. The defendants do not have to know all the full details of the conspiracy, or exactly what each of the conspirators will do.

50. The judge distinguished between the two forms of conspiracy. He directed that the difference between count 1 and count 2 was the purpose of the conspiracy, whether it was to kill someone, or it was to intentionally cause them grievous bodily harm.

51. In the directions the judge directed the jury: "To be guilty of Conspiracy to Murder (**Count 1**), the prosecution must prove:- (1) That there was an agreement between 2 or more of the defendants or others, that at least one of them would kill another person; (2) That the defendant, whose case you are considering, was a party to that agreement; and (3) He intended that the agreement be brought into effect. To be guilty of Conspiracy to Cause Grievous Bodily Harm (**Count 2**), the prosecution must prove:- (1) That there was an agreement between 2 or more of the defendants and/or others, that at least one of them would intentionally cause grievous bodily harm to another person; (2) That the defendant, whose case you are considering, was a party to that agreement; and (3) He intended that the agreement be brought into effect." The judge then directed the jury on intention to kill and cause grievous bodily harm with intent.

52. The judge directed the jury in relation to the pleas saying: "… so how are you to treat the guilty plea of Oni and Ojo to count 2? You do not decide that count in their cases because they have admitted, you will only consider count 1 for them: Are you sure that the conspiracy was to kill rather than only to cause grievous bodily harm? Further, the fact that Oni and Ojo have pleaded guilty to count 2 does not prove that any other defendant is guilty of either count on the indictment. You must not find any of those defendants guilty because of Oni and Ojo's guilty plea to count 2."

53. The judge continued: "What you may conclude, however, is that a conspiracy to cause grievous bodily harm existed and it included those two defendants, Oni and Ojo. It does not prove that there was a conspiracy to kill – count 1. Whether the conspiracy included any other defendant and whether it was to kill or only to cause grievous bodily harm is for you to decide on all of the evidence. If you conclude that both Oni and Ojo are guilty of count 1, the conspiracy to murder, then you will have rejected the evidence in their cases of the lesser alternative in count 2 and you will return verdicts of guilty on count 1 for them. In those circumstances their guilty plea to conspiracy to cause grievous bodily harm will not be admissible evidence in the cases of the other defendants. It will be for you to decide on all of the other evidence if those defendants were a party to a conspiracy in count 1 or count 2, as I have directed you in Part 1 of my directions."

54. The judge directed the jury about evidence of what was said or done by one defendant in a criminal conspiracy against another and said:

> "Normally in a criminal trial, evidence of acts or statements of one defendant are only evidence against that defendant. They are only admissible against another defendant if it is adopted by that defendant, or they were present when it was done or said and showed that they adopted it. The reason for this is obvious: if a defendant was not present and did not adopt it, what was said or done cannot be admissible against him.
>
> However, in a conspiracy to commit a criminal offence it is different. If you are sure that a criminal conspiracy existed and that the defendant, whose case you are considering, was a party to that conspiracy, then you may take into account what each of the conspirators said or did as being relevant evidence of the scope of the conspiracy, whether it was to kill or to intentionally cause grievous bodily harm. This is because what the conspirators do and say may be evidence of the conspiracy in action: it may prove what was agreed between the parties to the conspiracy.
>
> An obvious example of the conspiracy in action, say the prosecution, are the acts of some of the defendants who used violence. Those acts are said to be part of the agreed crime to be committed, whether it was to kill or to intentionally cause grievous bodily harm. Whilst no-one was killed (which the defendants say means that it was not a conspiracy to kill), what was the intention of those who carried out the incidents, including the weapons used, the injuries caused and the attempt to drive over one of the men?
>
> Another obvious example of the conspiracy in action, say the prosecution, are the things said in the Telegram and Snapchat group chats."

55. The judge then concluded this part of the directions by turning to the lyrics, telling the jury that they had to exclude the possibility that they were unreliable as mere exaggeration, or were only reporting what others had said, or predated the conspiracy.

56. The judge gave agreed directions about the failure to mention facts in interview in relation to the applicants apart from Mr Adedeji. "Failing to mention facts in interview. This direction does not apply to Adedeji because he answered police questions in his interviews, JB/12. All of the other defendants either made no comment or answered some occasional questions but said little about their defence. Savi, Okoya and Okunola made no comment but provided a prepared statement denying any involvement in a criminal conspiracy. The position of each defendant is set out within paragraphs 80-91 of the agreed facts in JB/2. Therefore all of these defendants have given evidence in this trial and have relied on facts for their defence, none of which did they mention in their police interviews. I repeat, Adedeji is excluded from this direction." The judge then directed the jury in conventional terms about drawing inferences which the jury considered fair and proper, considering whether the defendants could reasonably have been expected to mention what they had now said in evidence, and addressing the reasons advanced by the defendants for making no comment. The judge did not identify the specific facts that any of the nine defendants to whom the direction applied had failed to mention.

57. The judge gave a direction which covered a number of images relating to a number of defendants about cash to the ear saying: "you have also seen mention and images of cannabis and cocaine, as well as large amounts of cash which you may think is evidence of drug dealing by some of the defendants."

Sentencing

58. When sentencing the judge found that he was sure that, had it not been for the arrests carried out by the police, this conspiracy would have led to further incidents of very serious injury or killing.

59. When sentencing, the judge found that Mr Oni, Mr Ojo and Mr Kalumda played equal roles within the conspiracy to murder. Mr Oni and Mr Ojo clearly played the main role in the planning. Mr Ojo set up the Telegram group chat, in which plans to carry out the violence were discussed. Mr Oni and Mr Ojo drove the discussion. Mr Oni and Mr Ojo carried out the attack on 10 November 2020. Mr Oni and Mr Kalumda carried out the attack on 16 December 2020. Mr Kalumda also carried out the attack, with three others, on 28 December. Mr Oni and Mr Ojo each received an extended sentence of 21 years, comprised of a custodial term of 18 years and an extended licence period of 3 years.

60. Mr Jitoboh's role in the conspiracy to murder was slightly less than for the others. He was part of planning targets for attack in the Snapchat conversation, which followed the Telegram chat, identifying the "main targets" the order in which they were to be attacked and how to bleach knife blades to clean them of evidence. He received an extended sentence of 20 years, comprised of a custodial term of 17 years and an extended licence period of 3 years.

61. In respect of the conspiracy to cause grievous bodily harm with intent, the judge found that the co-defendants Mr Thorne, Mr Thomas (Junior), Mr Adedeji, Mr Savi, Mr Okoya and Mr Okunola each played a role of similar culpability. Those roles were to seek and acquire weapons, and to locate the targeted victims or to obtain the information necessary to locate them. The judge found that each of them played an important role in the conspiracy to cause grievous bodily harm with intent, which offence was carried out on two occasions and was attempted on another. The judge was sure that the

weapons planned and used as part of the conspiracy, both in count 1 and count 2 were highly dangerous machetes, which were acquired for the purpose only of threatening and causing very serious injuries.

62. Mr Adedeji had no previous convictions or cautions. The pre-sentence report described his progress in education and charity work. The Court had been provided with a report from Dr Pearce, a Clinical Psychologist, a letter from Mr Adedeji and character references describing the good work which Mr Adedeji had done prior to the offence. The judge found that Mr Adedeji's involvement in the conspiracy was not confined just to the messages he sent on the Telegram chat; he supplied information to assist the process as a fellow-conspirator. The jury found that he intended what he helped to plan and which happened.

63. Mr Savi had no previous convictions or cautions. The pre-sentence report described his progress in education and in sports. Letters of reference from Mr Savi's family and college tutors were considered along with a letter from Mr Savi. The judge found that Mr Savi's involvement in the conspiracy was not confined just to the messages he sent in the Telegram chat because that was an open discussion about the obtaining of weapons and targeting a number of victims to cause them grievous bodily harm, and kidnapping. Mr Savi supplied information to assist that process as a fellow-conspirator. By the jury's verdict, part of Mr Savi's joint plan which was intended to be carried out actually occurred.

64. Mr Okoya had no previous convictions or cautions. He had significant letters of reference from others who spoke of his good character. His pre-sentence report was considered. The judge found that by the jury's verdicts, Mr Okoya was part of a joint plan intentionally to cause grievous bodily harm which was intended to be carried out and, in part, occurred causing very serious injury.

65. The assault guideline for offences of section 18 grievous bodily harm was the appropriate starting point. The correct sentence category was 1A: the overt acts on 16 and 28 December involved "high culpability", with a significant degree of planning and premeditation, the use of highly dangerous weapons and revenge violence. There was Category 1 "harm" because particularly grave or life-threatening injury was intended. The second of those incidents was a sustained attack with machetes and an attempt to drive over the victim as he lay on the ground. The "harm" intended must be seen in the context of revenge after one of their friends had been murdered.

66. The starting point was twelve years with a range of ten to sixteen years. There were two victims, the offence was further aggravated in its seriousness by the rise of criminality both in time and in those involved, so as to increase the custodial period to fifteen years. Each was effectively of good character before the offence. Whilst some had slightly stronger personal mitigation, the Judge was not persuaded that it created a significant difference between them. The sentence was further reduced to eight years because of the appellants' young age. Each of the appellants convicted of causing conspiracy to cause grievous bodily harm with intent received a sentence of 8 year's detention in a Young Offender Institution.

The approach to conspiracy and the pleas to counts two – issues one and two

67. The essential complaint at the heart of this appeal is that there was a failure at trial to confront the fact that there were in essence two separate agreements, one to kill and one to cause really serious bodily harm, giving rise to the separate conspiracies which were on the indictment. The first was an agreement to murder members of the RTD gang, giving rise to a conspiracy to murder under count one, and the second was an agreement to inflict really serious bodily harm on members of the RTD gang giving rise to a conspiracy to cause grievous bodily harm with intent under count two. It was submitted that although the judge had directed the jury about counts one and two, he had treated the two conspiracies as the same when giving directions and when sentencing the defendants.

68. Mr Monteith, on behalf of Mr Adedeji, in submissions adopted on behalf of other appellants, complained that the prosecution did not demonstrate two separate conspiracies with different intentions existed, that it was not possible to have one conspiracy with two separate intentions, and that the judge had been wrong to give the directions about words and actions of conspirators being attributable to other conspirators, because the evidence of the conspiracy to murder was inadmissible in relation to the conspiracy to commit grievous bodily harm. Mr Kane, on behalf of Mr Okoya, in submissions adopted by other appellants, submitted that the directions given on the pleas of Mr Oni and Mr Ojo were wrong because the judge stated that the jury might conclude from the guilty pleas that "a conspiracy to cause grievous bodily harm existed, and it included" Mr Oni and Mr Ojo. Although the judge had been persuaded, as a result of submissions made by Mr Kane at the trial, to direct the jury that if Mr Oni and Mr Ojo were convicted of conspiracy to murder their guilty pleas "will not be admissible evidence in the case of the other defendants" the damage had been done by the earlier directions. Mr Kane complained that the prosecution's approach was effectively alleging a conspiracy to "do bad things" which was not a conspiracy known to the law. Mr Newton, on behalf of Mr Ojo, submitted that there was one agreement, which was count two. The conspiracy to cause grievous bodily harm with intent encompassed the other relevant states of mind including those who joined with an intention to kill, and that the reality of the prosecution case was that there was an agreement to take revenge, the prosecution had not proved that all parties to the agreement had an intention to kill, and that the convictions for conspiracy to murder should have been for conspiracy to cause really serious bodily harm with intent.

69. Mr Sandiford, on behalf of the prosecution, submitted that there was an agreement by all of the appellants to take violent revenge for the murder of John Soyoye, and the defendants had joined the conspiracy with an intention to kill or an intention to cause really serious bodily harm. Those who joined the conspiracy did not sit down and work out what sort of offence they were planning or would commit. At the trial both Mr Oni and Mr Ojo wanted the jury to know that they had pleaded guilty to the conspiracy to cause grievous bodily harm with intent, because they contended that this represented the extent of their criminality. It had been no one's case that Mr Oni and Mr Ojo were not guilty of count two on the indictment.

70. Section 1 of the Criminal Law Act 1997 (CLA 1977) provides:

> "(1) Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course

> of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—
>
> (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
>
> (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,
>
> he is guilty of conspiracy to commit the offence or offences in question."
>
> (2) Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of subsection (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.
>
> [...]
>
> (4) In this Part of this Act "offence" means an offence triable in England and Wales [...]"

71. Section 1A of the CLA 1977 covers conspiracies to commit offences outside of England and Wales and section 2 covers exemptions from liability for conspiracy.

72. In the course of the written and oral submissions reference was made to Law Commission papers, to academic writing including Smith & Hogan and Professor JR Spencer, and to a number of authorities including: *R v Barnard* (1980) 70 Cr App R 28 (*Barnard*); *R v Gray* [1995] 2 Cr App R 100 (*Gray*); *R v Roberts* [1998] 1 Cr App R 441 (*Robert*); *R v Crothers* NICA [2000] 2158 CARC 3285 (*Crothers*); *R v Saik* [2006] UKHL 18; [2007] 1 AC 18 (*Saik*); *R v Ahmed Ali* [2011] EWCA Crim 1260; [2011] 2 Cr App R 22 (*Ali*); *R v Mehta* [2012] EWCA Crim 2824 (*Mehta*); and *R v Shillam* [2013] EWCA Crim 160 (*Shillam*).

73. In our judgment it is possible to identify a number of principles relevant to this appeal from the provisions of section 1 of the CLA 1977 and the authorities. As is apparent from the wording of section 1 of the CLA 1977, it is an agreement that lies at the heart of conspiracy to commit an offence. Such an agreement need not have the formalities of a conventional contract, and the courts have warned against introducing into the straightforward concept of an agreement to pursue a course of conduct ideas that are derived from the civil law of contract.

74. It is not necessary in order to be guilty of conspiracy to commit an offence that anything should be done apart from the making of the agreement, so long as there is an intention to carry out the course of conduct which will necessarily amount to or involve the commission of any offence or offences, see *Saik*. It has been noted in the academic writings that conspirators may repent and stop, or may have no opportunity to commit

the offence, or may fail to commit the offence but the crime is complete when the agreement with the necessary intention is made, as appears from section 1 of the CLA 1977. Stopping participation in the conspiracy is only relevant to matters of sentence.

75. As was made clear in *Mehta* and *Shillam* a conspiracy requires that the parties to it have a common unlawful purpose or design. A common design means a shared design. A common design is not the same as similar or parallel but separate designs. The design must be unlawful, that is an agreement to commit an offence or offences. It is possible to have what are sometimes called "wheel" or "chain" conspiracies, and it is not necessary for all the conspirators to meet either in person, or online. An early reference to wheel and chain conspiracies was in *R v Meyrick and Ribuffi* (1930) 21 Cr App R 94 where Lord Hewart CJ observed at page 102 that it is: "necessary that the prosecution should establish, not indeed that the individuals were in direct communication with each other, or directly consulting together, but that they entered into an agreement with a common design. Such agreements may be made in various ways. There may be one person, to adopt the metaphor of counsel, round whom the rest revolve … There may be a conspiracy of another kind, where the metaphor would be rather that of a chain; A communicates with B, B with C, C with D, and so on to the end of the list of conspirators". The decision in *Meyrick and Ribuffi* long pre-dated the CLA 1977 but it remains the case that wheel or chain conspiracies can be committed, so long as there is a shared intention to carry out the course of conduct which will necessarily amount to or involve the commission of an offence or offences.

76. It is possible to indict a conspiracy comprising an intention to carry out a course of conduct which will necessarily involve the commission of a number of different offences, but unless two or more of the conspirators have agreed to commit all of those different offences, the count for conspiracy will fail, see propositions 4 and 5 in *Roberts* at page 449. *Roberts* was a case where the count on the indictment was a conspiracy to cause criminal damage in the context of protests against live animal exports. During the trial it was alleged that the defendants had carried out a campaign against exporters of live freight. This included an agreement to commit offences of criminal damage, criminal damage with intent to endanger life, criminal damage being reckless as to whether life would be endangered, and arson by damaging lorry tyres with nails, depositing oil on roads used by the lorries and carrying out a petrol bomb attack on lorries. Various complaints were made on appeal. It was held that although it was permissible to charge a single count of conspiracy to cause criminal damage, such an approach was not appropriate in a conspiracy that involved different offences subject to different maximum penalties. The approach in that case was held to be fatally flawed, although one conviction for conspiracy to cause criminal damage was safe in the light of a guilty plea.

77. For the offence of conspiracy to murder it is necessary to prove an intention to kill, see the obiter dicta to that effect in *R v Siracusa* (1990) 90 Cr App R 340 at 350 and *Crothers*. It is therefore not sufficient to convict a person of conspiracy to murder to show that that person intended to cause really serious bodily harm, there must be an intention to kill, as for attempted murder. It is, however, permissible to convict defendants of the lesser offence of conspiring to cause grievous bodily harm with intent when trying defendants for an offence of conspiracy to murder, see the Northern Ireland case of *Crothers*. In *Crothers* Carswell LCJ accepted that a count alleging conspiracy to murder members of the RUC permitted the trial judge (sitting without a jury) to return

a verdict of conspiracy to cause grievous bodily harm. In that case there had been found by the trial judge only a conspiracy to cause grievous bodily harm.

78. As a matter of reality a conspiracy to cause grievous bodily harm can only be committed if there is an intention to cause grievous bodily harm, and so adding the words "with intent" at the end of the count on the indictment is tautologous, but it does have the benefit of underlining what is required to be proved.

79. Acts or statements made by co-conspirators in furtherance of a conspiracy are admissible against other conspirators "provided that it was proved that there was a conspiracy to which he was a party", see *Gray* at pages 124-125. This is because there is an implied authority to each conspirator to act or speak in furtherance of the common purpose on behalf of the others. If there are two separate conspiracies what one person does in furtherance of that conspiracy is not admissible against another conspirator in respect of the second conspiracy, (again see *Gray* approving passages set out in the then current editions of Phipson on Evidence and Archbold).

80. Another case which highlighted the limitations of using acts and statements made by parties to separate conspiracies was *Barnard*. Mr Barnard, a career burglar, held discussions with various other criminals about breaking into a jeweller's shop and stealing the contents. Mr Barnard had a way of working which involved gaining entry from the roof or ceiling of the jewellery shop and stealing the stock after hours. After surveillance it became clear that the jeweller removed his stock each night and Mr Barnard gave up interest in the project. The various other criminals decided to enter the shop during the day, use violence against the jeweller, and take the stock. Those others and Mr Barnard were indicted for conspiracy to rob. A count of conspiracy to steal was added to the indictment for Mr Barnard at the start of the trial, and he was convicted. It was held that that conspiracy to steal was not a lesser form of conspiracy to rob, but was a different agreement. In that case the safety of Mr Barnard's conviction was undermined by the fact that the judge allowed the evidence of the robbery to be used as evidence against Mr Barnard, when it was a separate conspiracy.

81. It should be recorded that there have been criticisms of the breadth of the law of conspiracy, and it has been said that conspiracy charges have been regarded with suspicion by lawyers in England and Wales. It seems that is in part because trials for conspiracy can be long and complicated, and the culpability of the individual defendants can vary greatly. There are many advantages for both prosecution and defence in indicting substantive offences, rather than bringing an indictment for conspiracy, see *Shillam* at paragraph 25. It is apparent, however, from the Encrochat cases that the law of conspiracy continues to serve a principled role in the prosecution of some criminal offending, particularly serious professional crime.

82. In the light of the principles set out above, in our judgment it is not permissible to prosecute as a single conspiracy an agreement to take violent revenge with either an intention to kill or to cause grievous bodily harm with intent. They are in law two conspiracies, albeit with overlapping facts. Thus in this case, one is a conspiracy by two or more defendants to pursue a course of conduct of taking violent revenge (which is the course of conduct for section 1) with the intention of killing those involved in the murder of John Soyoye (the intentions for section 1) which would necessarily amount to the offence or offences of murder (the offences for section 1(a)). The other is a separate conspiracy to pursue a course of conduct of taking violent revenge (which is

the course of conduct for section 1) with the intentions of causing grievous bodily harm to those involved in the murder of John Soyoye (the intentions for section 1) which would necessarily amount to the offence or offences of causing grievous bodily harm with intent (the offences for section 1(a)).

83. It is clear, however, that, in this case, the course of conduct for both of the separate conspiracies is the same, and what differs is the intention of those involved in the separate conspiracies. On the facts of this particular case it was therefore inevitable that those who were guilty of count 1 (the conspiracy to murder) were necessarily also guilty of count 2 (the conspiracy to cause grievous bodily harm with intent). This is because, the course of conduct pursued by the defendants intending to kill those involved in the murder of John Soyoye (being those conspirators guilty of count 1 who were Mr Oni, Mr Ojo and Mr Jitoboh) would inevitably have caused those involved in the murder of John Soyoye grievous bodily harm on the way to their deaths. We note that in *Crothers* at page 123 it was said that the allegation that those conspirators intended to murder the officers included an allegation that they intended to inflict the lesser harm of grievous bodily harm upon them.

84. Whatever difficulties that there may be in establishing overlapping conspiracies on the facts of other cases, such as those addressed to us in submissions where persons intending to cause really serious bodily harm might not want to be associated with those intending to kill, they did not exist on the facts of this case. It was apparent, from the Telegram chat at the least, that some who were party to the chat intended to kill those involved in the murder of John Soyoye, whereas others intended only to cause really serious bodily harm.

85. In these circumstances we do not consider that the final form of the indictment providing for two separate counts of conspiracy to murder (count 1) and conspiracy to cause really serious bodily harm with intent (count 2) was flawed or defective, or that trying all of the defendants on the two counts was impermissible. The fact that there may be two overlapping but separate conspiracies is contemplated by the commentary by Professor JC Smith on *Barnard* in [1980] Crim LR 23, a commentary referred to by Professor Glanville Williams with apparent approval at footnote 6 on page 423 of the second edition of his Textbook on Criminal Law (1983).

86. For similar reasons we consider that the judge's original formulation of his directions on the effect of Mr Oni and Mr Ojo's pleas to count two was correct. In those directions, part repeated in the final formulation, the judge told the jury that the pleas proved the existence of a conspiracy on count 2. That meant that the judge's directions on the pleas, after reflecting on the submissions from Mr Kane to the effect that if the jury convicted Mr Oni and Mr Ojo of count one (the conspiracy to murder) those pleas were not admissible evidence on count two, were wrong. This is because in fact and law those pleas remained admissible evidence of the lesser conspiracy. This does not, however, render the convictions unsafe. This is because the final direction was too generous to those convicted of the conspiracy on count two.

87. That leaves only the question of whether the acts and declarations (or statements), of those convicted on count one could be taken into account as evidence against those convicted in relation to count two. The evidence was properly admitted at trial because all of those involved in the conspiracy were tried together. It is, however, a separate

question as to whether the acts and statements of one conspirator is admissible to prove matters against another conspirator.

88. As appears from the extracts of the summing up above, the judge treated what were in law two separate conspiracies as one, and directed the jury that "you may take into account what each of the conspirators said or did as being relevant evidence of the scope of the conspiracy, whether it was to kill or to intentionally cause grievous bodily harm". That said it is apparent from the analysis set out above that those convicted of conspiracy to murder were, in the particular circumstances of this case, party also to the conspiracy to cause grievous bodily harm with intent. Their acts and statements pursuing the conspiracy to cause grievous bodily harm with intent were admissible as evidence against their fellow conspirators, but their acts and statements in pursuing the separate conspiracy to murder were not admissible as evidence of, for example, the intention of those pursuing the separate conspiracy to cause really serious bodily harm with intent, compare *Roberts*.

89. As it was, and notwithstanding the efforts to kill made by those who were party to the conspiracy to murder, none of those involved in the murder of John Soyoye who were attacked were in fact killed, but they did suffer grievous bodily harm. There were, however, statements, such as that made by Mr Ojo on a Snapchat message to "just start killing anyone" which identified Mr Ojo's intention that those involved in the murder of Mr John Soyoye should be killed. That was not a statement admissible as evidence of the intention of the other defendants who only intended that those involved in the murder of Mr John Soyoye should be caused grievous bodily harm, although a literal reading of the judge's directions might suggest the contrary.

90. In this particular case, however, in our judgment the judge's direction about admissibility of acts and declarations did not render the convictions unsafe. First, this is because it is apparent from the jury's verdicts that they could not have relied on, as against the other conspirators, what Mr Ojo implied as to his intention to kill. This is because they did not convict all of the other conspirators of conspiracy to murder. Secondly much of the other evidence was admissible against all of the defendants in relation to the conspiracy to cause grievous bodily harm with intent to which, for the reasons given above, all of the defendants must have been a party. Thirdly all counsel agreed to the final version of the directions, and in our judgment that was a reasonable approach on the facts of this case.

91. We have considered the separate points made by Mr Abraham on behalf of Mr Jitoboh about factual inaccuracies made by the judge during the summing up of evidence relevant to Mr Jitoboh. Mr Abraham submitted that, taken together, these were material and prejudicial to Mr Jitoboh, particularly given that there were two separate conspiracies. As noted above, those defendants who were party to the conspiracy to murder must, on the facts of this particular case, have been party to the separate conspiracy to cause really serious bodily harm with intent. Further, again for the reasons given above, the jury could not have used the evidence of the intentions of those who intended to kill against the other conspirators, otherwise all of the defendants would have been convicted of conspiracy to murder.

92. It is apparent that the judge set out a fair summary of the prosecution and defence cases for each appellant, including Mr Jitoboh. It does appear that the judge did make one error in relation to Mr Jitoboh, in referring to 7 November 2020 and not 7 December

2020, but the jury had the timeline where the correct date was set out, and the judge had made it clear to the jury that they were the judges of fact. As it was, Mr Jitoboh's visit on 7 December 2020 to the Freehold Flats in Rochdale together with Mr Ojo and Mr Thomas (Junior) was relevant and important evidence against Mr Jitoboh. There was also video evidence showing Mr Jitoboh making another visit on 9 December 2020. As to the complaints about the judge's failure to emphasise other parts of evidence, we can see nothing in the judge's approach to the evidence that would render the conviction of Mr Jitoboh unsafe.

93. For the detailed reasons set out above we are sure that the judge's approach to the issue of conspiracy in this case, and the directions given by the judge on the guilty pleas of Mr Ojo and Mr Oni and the admissibility of evidence of what was said or done by one defendant, did not render any of the convictions unsafe.

Directions on failure to mention facts in interview – issue three

94. We turn to deal with the next ground, common to all of the appellants except Mr Adedeji who gave a full comment interview, which relates to section 34 of the Criminal Justice and Public Order Act 1994 (CJPOA 1994).

95. The judge gave agreed directions about the failure by the appellants (except Mr Adedeji) to mention facts in interview. However the judge did not identify the specific facts that any of the nine defendants to whom the direction applied had failed to mention. The relevant directions are set out above under the heading "summing up".

96. Mr Green, on behalf of Mr Oni, whose submissions on this issue were adopted by all of the other appellants apart from Mr Adedeji (who had been excluded from the direction), submitted that the judge's failure to identify the facts which were not mentioned in interview denied the jury the opportunity properly to consider the particular facts and whether any failure was reasonable at the time. Mr Sandiford, on behalf of the prosecution, submitted that for the judge to have listed for each defendant every fact not mentioned in interview would have resulted in "an encyclopaedic direction that would have been overly complicated and counterproductive", and made the point that if the direction was inadequate at least one of the seventeen counsel for the nine defendants to whom it applied would have drawn it to the attention of the court. Mr Sandiford referred to the judgment in *R v Miah* [2009] EWCA Crim 2368 (*Miah*) at paragraph 45.

97. Section 34 of the CJPOA 1994 permits the jury to draw such inferences as they think proper where an accused has, when interviewed, failed to mention a fact which in the circumstances he could reasonably have been expected to mention. The section does not remove the right to silence, but the section encourages answers to be given in interview to avoid the inferences that might be drawn from a failure to mention facts that the accused could reasonably be expected to mention. As was said in *Miah* at paragraph 41 "to identify what it is that the defendant relies on now but did not state is something which ought to be done so that the ambit of section 34 in a particular case can be made clear". There seems to us to be little point in having section 34 of the CJPOA if the prosecution do not identify what facts they say the accused could reasonably have been expected to mention, and what inferences they say should be drawn. In *Miah* the court was troubled by a similarly "compendious" section 34 direction but concluded that it had not damaged the appellant's case or occasioned

unfairness. The case of *Miah* is not authority for the proposition that the judge may give a direction which fails to specify the facts not mentioned by the relevant defendant.

98. We consider that in this particular case the judge should have required the prosecution to produce a list (agreed with the defence if possible) for each defendant of the facts that the prosecution submitted should reasonably have been mentioned in interview. The matter should have been canvassed fully before closing submissions. As was identified in the written and oral submissions, the relevant facts which had not been mentioned were not complicated or particularly lengthy. The prosecution should have been required to identify the inferences which the prosecution said should have been drawn from the failure to mention those facts. It appears from the submissions, that the inferences to be drawn were that those facts were not true, and that the defendants had made them up after the event in an attempt to give them a defence at trial. It should be remembered, however, that a failure to mention a fact which is admittedly true cannot found an adverse inference.

99. As indicated when the full court granted leave, this complaint alone is not sufficient to make the convictions unsafe. This is in circumstances where on the facts of this case, if the relevant points had been identified, it would hardly have advantaged any of the defendants. As it is, for the reasons given above, we consider that the directions should have been more extensive, but that does not undermine the safety of the convictions.

The admissibility of the cash by the ear photos – issue four

100. Photographs of Mr Adedeji and Mr Okoya showing them with cash to the ear (sometimes called the "moneyphone") were admitted at trial. As appears above (under the heading "rulings") the judge ruled that the evidence was admissible because Mr Adedeji and Mr Okoya denied gang membership and the image of holding a substantial amount of cash to the right ear in a similar way to other images by other gang members was relevant to his membership or affiliation with the M40 gang. The judge did not accept that admitting the photograph reversed any burden of proof. The photographs were relevant evidence to a significant issue, namely whether the relevant defendants were a member or affiliate of the M40 gang, some of whose members held cash in the same way to show the camera how much they had.

101. It was submitted to us, partly in reliance on the submissions by Justice, that the photograph was part of an imitation of celebrity culture where similar "moneyphone" photographs had been taken, and that this was an example of racial stereotyping and adultification of young black children by showing them as part of a gang.

102. We agree with Mr Monteith that there should be reliable evidence that the action relied on to show gang membership (in this case the cash by the ear photograph) was evidence of the way that the relevant gang operated. It is vital in any case to avoid the unfair stereotyping of individuals, based on their race, as members of gangs. In this case it was an agreed fact that there was a M40 gang, which was engaged in rivalry with the RTD gang. Given the evidence in this case, it is not surprising that such formal admissions about the existence of the gangs in this particular case were made.

103. The way in which the existence of gangs may be proved at trials has been addressed in previous authorities which it is not necessary to set out and was not controversial before us. One way in which the existence of gangs may be proved is for all the parties to

agree it as a fact, as happened in this case. It is an unfortunate and grim reality that children, in their immaturity, are sometimes persuaded to join gangs, and that some members of gangs believe that it is a grown up action to exclude other gangs from what they regard as their territory, and that some members of gangs believe violence against another gang is acceptable. The terrible consequence of such actions evidenced in these appeals was the death of John Soyoye and the stabbing of some members of the RTD gang.

104. The question of whether Mr Adedeji or Mr Okoya were part of or affiliated in some way with the M40 gang involved in the rivalry with RTD was a relevant issue at trial. There were photographs of alleged M40 gang members with cash to their ear. The prosecution case was that this was part of the way in which individuals might be recognised as members of the M40 gang. At the appeal it was common ground that some celebrities had had photographs showing them with cash by the ear, and it was submitted therefore that the photographs should not have been admitted by the judge.

105. In our judgment the judge was entitled to admit the photographs. The prosecution contended that the photographs were part of the way in which individuals might be recognised as members of the M40 gang, and they were entitled to adduce the evidence. The fact that celebrities were photographed doing the same act, so as to make the gesture potentially one associated with celebrity culture, is not a complete answer. This is because others may do the act in completely different circumstances. For example if there was evidence that members of a particular gang saluted each other, and if there was an issue about whether a particular person was a member of the gang, it would be admissible evidence against that individual to show that he had saluted a member of the gang. It would be no answer to the admissibility of the evidence to say that members of the Armed Forces salute each other. If the relevant person gave evidence that he was simply imitating the actions of the Armed Forces that would be a matter to be assessed by the jury. Similarly a gesture or phrase first associated with celebrity culture may be routinely used by a group as to associate with them. All will depend on the facts.

106. The issue of whether the photographs were just an imitation of celebrity culture or an indication of membership of the M40 gang or group was before the jury, was fairly left to the jury by the judge, as appears for example from page 139B of the summing up.

107. Finally we should record that the judge's direction on the relevance of gang membership was careful: "Are you sure the defendant whose case you are considering joined a conspiracy to murder or to cause grievous bodily harm? This evidence of gang membership, affiliation and of drug dealing cannot of itself prove the case against the defendants or any of them. Just because a defendant may be a member of the M40 gang or be affiliated with it and/or be involved in drug dealing does not alone mean that they are guilty. It is relevant to the background of these events. You should not, however, convict any defendant largely upon the basis of this background evidence."

The judge's directions in relation to the cash by the ear – issue five

108. In their closing speech the prosecution referred to drug dealing. It had been common ground that some of the defendants had been involved in drug dealing. Several of the defendants had admitted as much when they gave evidence.

109. The judge in the summing up said "At the heart of this trial is the allegation that each of the defendants was an M40 gang member or affiliate of the gang. Part of the activities of some of the defendants was drill rap music and some involved in drug dealing. You have read lyrics, heard drill rap and you have also seen mention and images of cannabis and cocaine, as well as large amounts of cash which you may think is evidence of drug dealing by some of the defendants."

110. In our judgment this was a proper direction. It was common ground that some of the defendants had been involved in drug dealing. The judge did not say that all of the defendants were involved in drug dealing. The judge followed it up with a direction that "you should not, however, convict any defendant largely upon the basis of this background evidence".

111. The judge had also identified the relevance of the drill rap for the jury saying that interest in drill rap did not mean that any defendant was guilty of the offence, and that it was relied on because the prosecution said that the music was being used to threaten the RTD gang and because it contained admissions about what had been done. The evidence given by some of the defendants that the lyrics were not to be taken seriously was also fairly put before the jury. We can see nothing that would make the conviction unsafe on this ground.

The identification of Mr Adedeji by PC McGregor and the fresh evidence – issue six

112. On this issue we heard evidence from Mr McMeekin, junior counsel for Mr Adedeji at trial, and from Tyrone Numa. Mr McMeekin's evidence was principally to explain why Mr Numa had not been called at trial. Mr Numa's evidence was that he was the person depicted in the nine second video clip and not Mr Adedeji. Both Mr McMeekin and Mr Numa were cross examined by Mr Sandiford. We heard the evidence for the purposes of deciding whether toadmit it as fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968 and, if it was admitted, to determine whether Mr Adedeji's conviction was safe.

113. The chronology of events about the identification by PC McGregor of Mr Adedeji as the person appearing in a video clip is based on the evidence given by Mr McMeekin. It appears that it was only some six weeks before the trial that the prosecution served a statement from PC McGregor in which he purported to identify Mr Adedeji in a nine second video clip. The clip and a still photograph taken from it showed a young man with his hood up and wearing a blue bandana and someone was rapping with drill music in the background. The prosecution case was that blue was the colour associated with the M40 gang. The video clip had been recovered from Mr Oni's phone.

114. The video clip was played for us at the appeal a number of times, but it was difficult to identify what was said during the rap. PC McGregor had first stated in his witness statements that the words were "Aye, aye, aye D why you so rude yo". In evidence PC McGregor said "RD, why are you so rude" and the prosecution later suggested that it was "RTD you're so rude". The development from D to RD (which might be Rochdale) to RTD (which was the name of the rival gang) was said by Mr Monteith in submissions to be evidence of the stereotyping of Mr Adedeji as a gang member involved in a feud. Details of the circumstances in which PC McGregor came to identify Mr Adedeji were not particularised in the statement served before the trial.

115. The defence statement served on behalf of Mr Adedeji did not address this piece of identification evidence for the reason that the evidence had not been served at that stage, nor had Mr Adedeji been interviewed about it. Following service of this evidence it is apparent that Mr Adedeji denied to his legal team that he was the person in the video, and that was consistent with his evidence at trial. He said the person in the video was called Tyrone, whose second name he did not know, and whose whereabouts he did not know. Mr Adedeji found on social media a photograph of Tyrone, shown outside an identifiable shop. It appears that Mr McMeekin and his solicitors considered whether to make further inquiries at the shop to find the identity of Tyrone, but it seems that they considered that it would be very difficult to find Tyrone given the paucity of information. Instead the defence prepared a small bundle of photographs for the jury, in which the photograph of Tyrone was put alongside the still from the video clip, and then a photograph of Mr Adedeji was put alongside the still from the video clip. Mr McMeekin took the view that it was obvious that the person in the video clip was not Mr Adedeji. Although there was a difference in view between counsel and solicitors about whether to challenge the admission of the photographs, in the event no challenge was made. At the trial it is apparent from the transcripts that there was cross examination on behalf of Mr Adedeji of at least one co-defendant about whether he knew Tyrone.

116. We do not find that the judge was wrong to admit the video clip on the basis of the facts before him. First no challenge to its admissibility was made. Secondly it was apparent that PC McGregor had purported to recognise Mr Adedeji when going through the download from Mr Oni's phone. It is right to record that PC McGregor had not given details of exactly when this occurred, but it was reasonable for Mr Adedeji's legal team to consider that the evidence was likely to be admitted in such circumstances.

117. Mr McMeekin's view about the effect of the clip of photographs of the still from the video and Mr Adedeji and Tyrone was not the view taken by the prosecution at trial. It was pointed out in closing that Tyrone had, in the photograph taken outside the shop, a different and lighter skin tone than the person shown in the video, although it is apparent that the light in which and angle at which a person is photographed may affect such matters.

118. The judge gave full directions on the identification evidence in which the judge specifically noted that although PC McGregor had been able to observe Mr Adedeji over a substantial period during his police interview, it was many months later that he made the identification in the video clip, and he was not able to say how many months. The judge warned the jury to avoid the risk of "confirmatory bias" which concept was explained in the direction.

119. So far as the fresh evidence is concerned having heard Mr McMeekin we are satisfied that it would be appropriate to admit the evidence both from Mr McMeekin and Mr Numa, pursuant to section 23 of the Criminal Appeal Act 1968. This is because: the evidence appears to the Court to be capable of belief, for reasons given below in relation to Mr Numa; the evidence from Mr Numa might afford a ground for allowing the appeal because it would call into question the reliability of the identification evidence from PC McGregor; the evidence would have been admissible in the proceedings at trial; and there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

120. As to the last point we accept to a degree Mr Sandiford's submission that more effort might have been made to find Mr Numa perhaps through social media or, we suppose, through enquiry agents but, having heard Mr McMeekin, we accept that the matter was conscientiously considered by Mr Adedeji's legal advisers. They made reasonable decisions when dealing with what was, in the scheme of these proceedings, comparatively late evidence.

121. This brings us back to Mr Numa's evidence and whether it is capable of belief. There was nothing to suggest that Mr Numa was aware at the time of the trial of the discrete issue of whether PC McGregor's identification of the person in the video clip was Mr Adedeji. Mr Numa gave evidence that he was the person in the video clip, and it was apparent from seeing Mr Numa at court that if it was not clear that he was the person, there was sufficient resemblance for that evidence to be capable of being believed. There were some unsatisfactory features about Mr Numa's evidence, for example about what was being said on the clip, and why it was being said, and who had recorded it. That said, having considered his evidence as a whole, and having reflected on the fact that Mr Numa was unlikely to expose himself to the risk of a prosecution for perverting the course of justice or perjury by coming to court in a matter that did not concern him, we accept Mr Numa's evidence that he was the person shown in the video clip.

122. In these circumstances it follows that PC McGregor's identification of Mr Adedeji as the person on the video clip was wrong. It is necessary to consider the effect of that wrong identification on the safety of Mr Adedeji's conviction.

123. It is apparent that the video clip was relied on to show that Mr Adedeji wore a blue bandana, and that the prosecution alleged that blue was the colour of the M40 gang, suggesting that he was closer to the M40 gang than he accepted. As noted above the prosecution also relied on the cash by the ear and the fact that Mr Adedeji had a picture of John Soyoye on his phone in blue kit with MD40 on the back. Mr Adedeji gave a number of answers to this evidence, pointing out that the cash by the ear photograph was what celebrities did, and that John Soyoye was his best friend, whom he had known through Church, and was like a brother to him, so it was not surprising that he had a photograph of him.

124. We also note that although Mr Savi was not alleged to have any prior links to the M40 gang, he was convicted on the basis of the Telegram chat. This suggests that the prosecution might not have needed to go to the effort of attempting to tie Mr Adedeji to the M40 gang, and could just have relied on the Telegram chat alone. It is apparent that in that chat Mr Adedeji gave the address and location of persons who were believed to have been involved in the murder of John Soyoye on the Telegram chat and discussed "touching" persons.

125. We also note, however, that Mr Adedeji was cross examined about this issue of his identification as the person in the video clip, and the issue of the video clip did feature in the prosecution closing submissions in support of the case against Mr Adedeji. This was in circumstances where Mr Adedeji put forward evidence challenging the identification, which was submitted by the prosecution in closing to lack credibility. The jury might have wrongly found that he was the young man in the video clip, and might have regarded his denial as undermining his credibility, which was central to his defence. In circumstances where: a false identification of Mr Adedeji in the video clip was made; and Mr Adedeji's identification of "Tyrone" was correct; we find that Mr

Adedeji's conviction is unsafe. The evidence of identification was part of the chain of evidence linking Mr Adedeji to the M40 gang, and was relied on by the prosecution. For these reasons, and in the light of the fresh evidence given by Mr Numa, we quash Mr Adedeji's conviction.

No retrial – issue seven

126. This brings us to the issue of the retrial. It was apparent from all of the evidence that Mr Adedeji had a case to answer on count of conspiracy to cause grievous bodily harm with intent. He had identified on the Telegram chat persons believed to be responsible for the death of his best friend in the context of a discussion of "touching", which it was common ground referred to stabbing. We have already noted that Mr Savi was convicted on the basis of the evidence of what he had said on the two chats, together with evidence of what had been done afterwards to persons believed to be responsible for the murder of John Soyoye.

127. In these circumstances we would have considered it in the interests of justice to order a retrial save for one particular feature. This arises from our decision to allow the appeal on sentence for Mr Savi and Mr Okoya and to impose a sentence of 4 years 6 months less the discounts given by the judge for time served. We can say that the sentence which would have been imposed on Mr Adedeji if we had found his conviction to be safe would not have exceeded that sentence of 4 years 6 months (it is not necessary to calculate the exact sentence because his conviction has been quashed). In such circumstances Mr Adedeji has already served the time that he would have had to serve if convicted, given his role in the conspiracy. We therefore do not order a retrial.

The appeal against sentence – issue eight

128. Ms Mogan, on behalf of Mr Adedeji, submitted that the sentence was wrong in principle and manifestly excessive because: the judge took account of the violence of those convicted of the conspiracy to commit murder; the judge had failed to have proper regard to the Sentencing Children and Young Persons guideline and the principles summarised in *R v ZA* [2023] EWCA Crim 596; [2023] 2 Cr App R(S) 45; the judge failed to have proper regard to the appellant's role in the conspiracy; and the judge failed to give consideration to the disproportionality of sentencing in relation to black defendants as identified by the Sentencing Council guidelines. These submissions were adopted on behalf of Mr Savi and Mr Okoya by Mr Temkin and Mr Kane. It was submitted that the sentencing was mechanistic and that there was no fair reflection of what the individuals had done, which meant that Mr Thomas (Junior) and another defendant Mr Thorne had received the same sentences when their actions were more serious and not comparable.

129. Mr Smith on behalf of the prosecution identified relevant parts of the Telegram chat and the activities that had taken place after the chat. He submitted that the trial judge was uniquely placed to assess culpability, that these were sentences imposed after a trial which took place over some 10 weeks, and that the sentences were neither wrong in principle or manifestly excessive. Mr Smith submitted that Mr Thomas (Junior) and Mr Thorne may have been fortunate in their sentences, but that did not make the sentences imposed on Mr Savi and Mr Okoya (or Mr Adedeji) wrong.

130. In *R v Greenfield* (1973) 57 Cr App R 849, which was approved in *Ali* at paragraph 38, it was recorded that it was for the trial judge to determine the role of a particular defendant in the conspiracy. We also have particular regard to the fact that the sentences were imposed by the judge who had heard the trial over a period of some 10 weeks.

131. As to the first point, in our judgment the judge was entitled to take account of the actions of those who were party to the conspiracy to cause really serious bodily harm with intent, which included all of the defendants in this particular case, for the detailed reasons given above. The judge was not entitled to take account, and did not take account, of statements made about their intentions by those who were party to the separate conspiracy to murder. Whether the judge reflected on the actual roles played by Mr Savi and Mr Okoya (and Mr Adedeji if his conviction had not been quashed) is a separate point to which we return below.

132. As to the second point on sentencing children and young persons, it is right to say that the judge did not follow the stepped approach suggested in *ZA* but it is apparent that the judge did have regard to the principles relevant to sentencing children and young persons and did make a discount to the sentence to reflect this. In this case a Youth Rehabilitation Order with intensive supervision was not an appropriate sentence. This is because Mr Savi and Mr Okoya joined a conspiracy to cause grievous bodily harm to members of the RTD gang who were believed to have been involved in the murder of John Soyoye, and there were attacks carried out on those persons pursuant to the conspiracy.

133. As to the third point, as noted above, the judge concluded that the assault guideline for offences of section 18 grievous bodily harm provided was the appropriate starting point and categorised the offending as category 1A because the overt acts on the 16 and 28 December involved "high culpability", with a significant degree of planning and premeditation, the use of highly dangerous weapons and revenge violence. He found that there was Category 1 "harm" because particularly grave or life-threatening injury was intended. The second of those incidents involved a sustained attack with machetes and an attempt to drive over the victim as he lay on the ground.

134. In our judgment the judge's approach had the effect of treating Mr Savi and Mr Okoya (and Mr Adedeji) as if they were participating in the actual attack, and failed to reflect the fact that their role in the planning of the attacks lasted for a short period of time a month before any violence was carried out. In our judgment the level of culpability most appropriate for Mr Savi and Mr Okoya (and Mr Adedeji) was "lesser role in group activity". This is apparent from their respective contributions on the chats, and the absence of their involvement on the ground. They were not, in any sense, the leaders of this conspiracy sending others to do the work on the ground.

135. Further it is not apparent from what was said by Mr Savi, Mr Okoya (and Mr Adedeji) that anything more than "grave injury" category 2 harm, was intended by them. There was no evidence on which the judge could be sure that they had intended "particularly grave or life threatening injury" (which has to be calibrated taking into account the fact that the offence itself requires very serious injury) as opposed to "grave injury", because they were neither present at the particular attack in December or had been involved in deciding what should take place during that attack.

136. In these circumstances in our judgment the appropriate category for an adult would have been medium culpability B (lesser role in group activity) and category 2 (grave injury). This would give a starting point of 5 years with a range of 4-7 years. The judge was right to aggravate from the starting point to take account of the actions carried out pursuant to the conspiracy, which should have taken the sentence to the top of the range of 7 years. Further as this was a conspiracy the judge had to reflect the intended harm of further attacks, which might have justified going above the sentencing range for one attack.

137. There were then discounts for mitigation which included positive good character, and evidence from pre-sentence reports and expert psychologists, and then a discount to reflect age and immaturity. Given the respective roles that Mr Savi and Mr Okoya had carried out, and their particular mitigation and circumstances, the judge was right not to draw a distinction in sentence between them. In our judgment a proportionate sentence to be imposed on Mr Savi and Mr Okoya would have been four years six months custody, to which the discounts for time served identified by the judge are to be applied.

138. As to the final point about disproportionality when sentencing Black defendants under the guideline for section 18 offences, the Sentencing Council guidelines specifically identify that sentencers should be aware that there is evidence of disparity in sentence outcomes that indicates that for Black and Asian offenders immediate custodial sentence lengths have on average been longer than for White, Mixed and Chinese or other ethnicity offenders. This is important guidance and we have had regard to it in identifying the appropriate sentences for Mr Savi and Mr Okoya.

139. We therefore allow the appeals against sentence of Mr Savi and Mr Okoya. We therefore quash the sentences of 8 years' detention and instead impose for each of them sentences of 4 years and 6 months detention in a Young Offender Institution. As before, the time served on remand, including the days on qualifying curfew specified by the judge, will count towards sentence.

Conclusion

140. For the detailed reasons given above, we dismiss the appeals against conviction of the appellants save Mr Adedeji, whose appeal against conviction is allowed in the light of fresh evidence going to the issue of his identification in a video clip. We do not order a retrial. We allow the appeals against sentence of Mr Savi and Mr Okoya and in substitution for their sentences of 8 years detention we impose for each of them a sentence of 4 years 6 months detention, and, as before, the time served on remand including the days on qualifying curfew specified by the judge, will count towards sentence.