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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 11 December 2018

B e f o r e:

LORD JUSTICE GROSS

MRS JUSTICE CUTTS DBE

SIR BRIAN KEITH

R E G I N A

v

JACK JUNIOR HARVEY

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Mr M Ivers QC appeared on behalf of the **Appellant**
Mr P Jarvis appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE GROSS: This is another tragic instance of knife crime, all too prevalent, which has had disastrous consequences, in particular for the deceased and his friends and family, of all of which we are very conscious; it has also, of course, had calamitous consequences for those convicted of the crime or crimes in question.

2. As it is, before saying anything else we would like to thank both Mr Ivers QC and Mr Jarvis for their considerable assistance today.

3. On 9 November 2017, in the Central Criminal Court, before Her Honour Judge Judge Munro QC the appellant was convicted of murder (count 1) and of two counts of wounding with intent, contrary to section 18. On 15 November, before the same judge, he was sentenced to be detained during Her Majesty's Pleasure in respect of count 1, with a minimum term of 19 years specified. On count 2 he was sentenced to 6 years' detention, under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 concurrent, and on count 3 he was sentenced to 9 years' detention concurrent.

4. The appellant is now aged 18, he was 16 at the time of the offences in question.

5. There were co-accused: Aaron Jackson was acquitted of counts 1 to 3; Jahliel Rose was convicted of counts 1 to 3; he was sentenced to life imprisonment with a minimum term of 25 years on count 1, concurrent terms of imprisonment of 9 and 12 years were imposed in respect of counts 2 and 3 respectively. Marcus Asemota was acquitted on counts 1 to 3. We should add that Rose was 20 years old at the time of the offences.

6. The appellant appeals against conviction and sentence by leave of the single judge.

7. In very broad terms, the grounds of appeal as to conviction were these. Mr Ivers criticises the judge's failure to discharge the jury after the late introduction of evidence of the appellant's bad character at the behest of the co-defendant, Jackson. Further, the judge failed to deal adequately with Jackson's bad character and various assertions made in the closing speech of Mr Mendelle QC, leading counsel for Jackson, both as to Jackson and as to the timing of the introduction of the evidence of the appellant's bad character. Mr Ivers was also critical of the prosecution's failure to correct what he described as a "misleading impression" given by Jackson in his evidence.

8. As to sentence, Mr Ivers advances three grounds of appeal: (i) the sentence was manifestly excessive in the light of the appellant's age; (ii) the judge erred in attributing a leading role to the appellant and (iii) there was objectionable disparity between the appellant and Rose, in that if the appellant's sentence or minimum term justified, then it is difficult to see how Rose's could have been and the way Mr Ivers puts that is as follows. On the basis of the sentence passed on Rose the appellant's minimum term was simply too high.

9. <u>Appeal against conviction</u>

10. We shall deal first with the conviction appeal before, if need be, turning to the appeal against sentence. The facts themselves can be shortly summarised. The case concerned an attack by a group of young men in the area of King George's Park,

Croydon, on 31 October 2017, which resulted in the stabbings of Scott Kouebetra (the deceased), Keith Hawker and Adil Jamal-Abdilahi.

11. Shortly after 8.00 pm on the day in question paramedics were called to Gloucester Road, Croydon. Keith Hawker was found by the paramedics lying in the doorway of one of the houses along the road. It transpired that he had been stabbed in the leg and he was conveyed to hospital for treatment. The deceased was seen lying on the ground in the front garden of the house. His clothing was soaked in blood and he was not breathing. Further assistance was called. The emergency services did what they could but he was pronounced dead at the scene just after 9.00 pm. A post-mortem examination revealed that the deceased had a number of minor injuries including a stab wound to his left arm that might have been caused by a screwdriver or a similar weapon. The fatal injury was a stab wound to the right side of his neck which had been caused by a knife. The knife had been plunged downwards at a steep angle and the blade had gone into his chest, lung and then aorta. The track wound ran from around 11 centimetres and had caused massive internal injuries.

12. That evening Adil Jamal-Abdilahi presented himself at Croydon Hospital. He had been a passenger on a moped and travelling in the vicinity of the road in question. He had become caught up in the attack. As his friend had tried to drive away one of the men had stabbed him in the stomach.

13. The prosecution case was that the appellant, then aged 16, and his co-accused were part of the group who participated in the attack. The group had arrived at the scene in two vehicles and they were party to a plan that one or more members of the group would intentionally cause at least really serious harm to people in the area of Gloucester Road, Croydon.

14. The prosecution relied as against the appellant on the following evidence. Evidence from Mr Hawker and Mr Jamal-Abdilahi (the complainants in counts 2 and 3) and various eyewitness in relation to the incident. Additionally, there was closed circuit television evidence showing the attack, the fact that the group responsible for the attack arrived at the scene in two cars and the movement of those cars before and after the attack. There was agreed expert evidence in relation to the identification of the cars as a Volkswagen Golf and a Vauxhall Astra and evidence demonstrating that the co-accused Jackson and Asemota were linked to such vehicles.

15. There was, furthermore, CCTV evidence in relation to the appellant's movements on 31 October and the clothing he was wearing. In particular, there was evidence that the deceased's blood was found on the appellant's snood and trainers. There was cell site evidence and telephone evidence showing contact between some of the accused and between the accused and their mutual contacts. There was evidence on 31 October that the appellant had breached his court ordered electronically monitored curfew, in force from 8.00 pm to 7.00 am. Still further there was the appellant's admission that he had disposed of his mobile telephone following the incident. Finally, there was evidence of the appellant's "no comment" interview and his failure to mention his drug dealing and the use of a bicycle in his defence statement.

16. The defence case was that the appellant was not involved in the attack. He gave evidence that he made money from dealing cannabis and had run out on the day in question. He had been in the park as he was due to meet the co-accused Rose and a contact so he could buy more cannabis. He saw the fight and ran out of the park. He then saw the co-accused Jackson's car by chance, jumped in and they drove off. He did not know how the deceased's blood had ended up on his snood. He also relied on bad character evidence in relation to the co-accused, Jackson.

17. The issue for the jury was whether they were sure that the appellant was part of the group responsible for the stabbings of the deceased and Mr Hawker and Mr Jamal-Abdilahi and if they had acted with the requisite intent. There was also an issue between the appellant and his co-accused, Jackson, to which we shall return.

18. To explain the nature of the appeal it is first necessary to summarise the various rulings which the judge made.

Ruling 1: Initial Ruling on Evidence of the Bad Character of the Appellant

19. This application was made by those representing Jackson in the course of their cross-examination of the appellant. The judge ruled that apart from the agreed fact in relation to the appellant being subject to a dispersal notice, his previous convictions did not meet the test in section 101(1) (e) and 104 of the Criminal Justice Act 2003 and were not admissible. Counsel on behalf of Jackson had applied under sections 101(1)(e) and 104 of the Criminal Justice Act 2003 for the following evidence to be adduced in respect of the appellant: (i) evidence from a police officer detailing the background evidence in support of a dispersal notice in which the appellant and Jackson were amongst the 14 named individuals; (ii) evidence of the appellant's previous convictions, committed both whilst riding a moped and involving thefts of mopeds.

20. The relevant issue concerned when and why the appellant got into the co-accused Jackson's car.

21. As already recorded, the appellenat asserted that he had seen Jackson's vehicle by chance. By contrast, Jackson's evidence was that he had been asked by the appellant to drive him around various locations to try and find his moped which had been stolen. This account was put to and denied by the appellant.

22. The judge said that the evidence in relation to the dispersal notice was of some relevance as it proved an association between the appellant and others including Jackson, who were responsible for anti-social behaviour including joy-riding on mopeds in the relevant area. The evidence contradicted the appellant's evidence that he was not responsible for such behaviour and it was not seriously disputed that the evidence was both relevant and admissible. In the circumstances the judge ruled - very sensibly if we may say so - that the parties should have been invited to agree a form of words which reflected the position.

23. The appellant had a number of convictions for offences committed whilst riding mopeds or for offences of stealing them. These were not relevant to the matter in issue, namely when and why the appellant got into the co-accused Jackson's car. In the circumstances, the relevant test was far from being met.

Ruling 2: Ruling on renewed application to introduce evidence of the appellant's bad character

24. Counsel for Jackson, that is Mr Mendelle QC, renewed his application on the basis that since the first ruling his client had been cross-examined in such a way by Mr Ivers QC so as to render the convictions were relevant and admissible under sections 101(1)(e) and 104 of the Criminal Justice Act 2003.

25. It was put to Jackson that he had fitted his defence statement to the prosecution case summary and had lied. It was repeatedly put to him that his suggestion of the appellant, 10 years younger than him (we interpose to say that Jackson was 26 at the time) was telling him where to go and what to do, was ridiculous. Accordingly, Mr Mendelle had submitted that the jury should not be misled and the impression that the appellant was an innocent and criminally naïve young teenager should be corrected. Further, the authorities of R v Lawson [2006] EWCA 2572; [2007] 1 WLR 1191 and R v Hussain [2015] EWCA Crim 383, which had now been referred to, demonstrated that the initial dismissal of section 104 was incorrect. The judge indicated that the issue went beyond the mere question of whether the appellant had been in the Volkswagen Golf when it was being driven around the area by Jackson and upon its arrival at the scene of the murder. There was a linked issue as to whether the appellant was telling the truth when he said that he was not in the car prior to the incident, or whether the co-accused Jackson was being truthful when he said the appellant was in the car.

26. Summarising shortly, the judge indicated that, given the way in which the appellant's defence had been put and in the light of the authorities, the appellant's convictions should now be introduced in evidence. They went to important matters in issue, namely which accused, if either, was telling the truth and whether the appellant, despite his age, might have been directing the co-accused Jackson as to where he should drive.

27. In so far as the decision conflicted with the original ruling, the judge was content to state that the earlier ruling had been in error. She added that since the jury had heard that the appellant was living in supported housing, was dealing drugs and subject to a court imposed tagging curfew it would not come as much as a surprise to hear that he had previous convictions.

28. Nonetheless, the judge ruled very clearly that the jury would be given directions as to the use of the convictions namely they were relevant only to credibility and not to propensity. As we have indicated, this application was made and allowed after the appellant had concluded giving his evidence and after the conclusion of Jackson's evidence.

29. In the course of this ruling the judge recorded (at [16]) that, on the conclusions she had reached as to the importance of the issue and the probative value of the evidence, it was agreed she had no discretion to exclude the evidence.

Ruling 3: Application to discharge the jury or for severance of his case from the indictment

30. Following the decision to admit the appellant's convictions for offences of dishonesty Mr Ivers, for the appellant, had applied for the jury to be discharged or, in the alternative, for his case to be severed from the indictment. The judge refused both applications. There was no requirement for evidence of bad character to be given by a defendant or for him to be asked about it. It was to the appellant's advantage that he was no longer open to being cross-examined about his previous offending. It was not accepted that additional questions could have been put to the co-accused Jackson if it had been known that the appellant's convictions were to be admitted. The judge went on to say that any application to ask questions about unproven allegations against Jackson would have required a formal bad character notice and a ruling in relation to the admissibility of the evidence. This application was due to be considered and, if allowed, nothing would be lost in admitting the evidence at that stage. There had been no unfairness caused to the appellant by the introduction of the evidence and no risk of the jury being given the impression that the appellant had kept anything back from them. The jury would be directed that the evidence was admitted only after he had given evidence, and for a very narrow purpose, as set out in the written legal directions which had been agreed by all counsel.

Ruling 4: Ruling in relation to evidence of the co-defendant Jackson's bad character

31. Mr Ivers applied, as the judge indicated, under section 101(e) of the Criminal Justice Act 2003 to adduce details of the co-accused Jackson's reprehensible conduct in the form of (i) a caution for criminal damage; (ii) a conviction for criminal damage; (iii) evidence that he had been interviewed following allegations of hurting someone; (iv) evidence of other unproven allegations which led to his involvement in the criminal justice system.

32. In the event, the judge ruled that much of the material sought to be adduced was simply not reliable, admissible or probative evidence. The only matter that should be admitted was that in 2012 Jackson was interviewed in relation to allegations of assault on his mother, despite the fact that these were never pursued or proven. This matter was of substantial probative value in relation to the credibility of Jackson, was an important matter in issue between him and the appellant. Counsel were invited to draft a short set of agreed facts to deal with the matter as well as the bad character evidence that was to be adduced in relation to the appellant. We record that counsel did so and that the admissions made included the reference to Jackson in the following terms: "that on 26 November 2012 allegations were made by his mother that he had assaulted her at home on that day. He was interviewed by the police and denied the allegations. He was not charged".

33. So far as concerns Harvey, the admissions included the fact that on 1 September 2016 he had pleaded guilty to conspiracy to rob and to a separate conspiracy to steal along with others. The two conspiracies comprised a course of conduct over a 3-month period from 18 April 2016 to 25 July 2016. They included two attempted robberies, two attempted thefts and five thefts, to all of which he had pleaded guilty. These offences all involved either the thefts of mopeds or thefts by people on mopeds. Furthermore, and going back to the earlier application, paragraph 2 of the admissions recorded that 16 named individuals, including the appellant and Jackson, were each sent a dispersal notice letter on 21 June 2016.

34. We now turn to the final speech of Mr Mendelle QC for Jackson. Following the conclusion of that speech Mr Ivers, for the appellant, raised a number of matters which led to ruling 5.

Ruling 5: Ruling in relation to directions given to the jury

35. It was clear that the closing speech of Mr Mendelle gave rise to significant disquiet. Thereafter, Mr Ivers raised the questions: (i) waiver of privilege; (ii) assertions about Jackson's character; (iii) a suggested misrepresentation as to the reason for character evidence to be given by a witness; and (iv) the timing and the introduction of the appellant's convictions for conspiracy to rob and steal.

36. The judge ruled that no further direction was required in relation to point (i). There had been no waiver of privilege in counsel for Jackson's submissions in his speech; Jackson had told his solicitor what he had told the jury. In cross-examination Jackson made the same assertion. The jury would be reminded that Jackson had received legal advice before his interview and communications between him and his solicitors were private. There had been no evidence as to the precise content of the communications other than the fact that he was advised to make no comment.

37. In relation to (ii), it was said by counsel that the incident with Jackson's mother had been trivial or in the context of a silly argument. This ought not to have been said as there was no evidence in relation to the nature of the argument. The judge ruled this had created a misleading impression, albeit not deliberately, which could be corrected by a direction to the jury.

38. In relation to (iii), the jury had been invited to conclude that Jackson had no propensity for violence following Mr Mendelle's assertion that they should consider whether the character witness was a sort of woman who would support a man who, in her mind, was likely to have committed a murder. The judge ruled that this was no more than a rhetorical flourish and there was no risk that the jury would place any undue, unfair or unlawful weight upon her evidence.

39. In relation to (iv), Mr Mendelle suggested that the appellant had kept his convictions from the jury until the end of the case; that it was a calculated decision not to tell the jury about them and that the convictions had to be dragged out of him. The judge stated that the convictions were adduced as a result of her ruling and it would be emphasised to the jury this was the case. Such a direction would balance the position

as between the defendants and avoid any unfair conclusion being drawn against the appellant.

40. As foreshadowed in that Ruling (ruling 5) the judge returned to two of these matters in the summing-up. Thus she said that as to Mr Mendelle's observations with regard to the incident concerning Jackson (summing-up page 16B-G):

> "You have heard that Aaron Jackson has convictions. Those convictions provide no support for the prosecution case. They are, however, relevant to his credibility for the same reason as I set out in relation to Jack Harvey. You will bear in mind that Aaron Jackson has no convictions for violence, and that may mean it is unlikely that he offended in the way alleged here.
>
> You have heard about another matter in relation to Aaron Jackson, and that is in relation to the further agreed fact. The further agreed fact was number 8 on the list that you were given towards the end and reads as follows: 'On 26 November 2012 allegations were made by his mother that he had assaulted her at home on that day. He was interviewed by police and denied the allegations. He was not charged.' You heard about that solely because it is relevant to his credibility because at one point in his evidence he said that he had never been accused of being violent to anyone. However, there is no more evidence about it than that which appears in the agreed facts. In his address to you Mr Mendelle referred to 'a trivial allegation or a silly argument in comparison to the murder charge.' However, there is no evidence about that and you should ignore those comments..."

As to the timing of the introduction of the bad character evidence concerning the appellant the judge put the matter this way (summing-up pages 15D-16A):

> "You have heard that Jackson Harvey has convictions for conspiracy to steal and conspiracy to rob. You heard about those convictions for a very specific reason: it was for me to decide if and when Jack Harvey's convictions were relevant to any issue which you had to resolve, and I made that decision having heard legal argument after both Jack Harvey and Aaron Jackson had given their evidence. As you know, there was a dispute between Aaron Jackson and Jackson Harvey about when he (Jack Harvey) got into Aaron Jackson's Golf on 31 October 2016. Aaron Jackson has been accused of lying about that and about the fact that it was, he says, Jackson Harvey directing him as to where he should drive or stop. Jackson Harvey convictions are relevant relevant only to his credibility when you are weighing up the conflicting accounts."

41. We come next to the grounds of appeal. These were helpfully summarised by counsel, Mr Ivers, in his written grounds of appeal. They are five in number and are as follows:

> "(1) That the learned judge should have discharged the jury when bad

character evidence was introduced against the applicant late and after he had given evidence. This had the effect of preventing being asked about the matters and also being able to cross-examine the co-defendant about the matters which were then admitted in response. The applicant is a youth and in the circumstances should have then had a separate trial pursuant to the Criminal Procedure Rules III.30.4. This breached this young applicant's right to a fair trial and renders his conviction unsafe.

(2) That the learned judge did not allow sufficient detail of the previous conduct of Mr Jackson to go before the jury in order to correct the false evidence which had been given to the jury and undermine his credibility, a vital aspect of the case. Additionally the prosecution failed in its duties to ensure that the trial process retained integrity in terms of false information not being given to the jury.

(3) The speech on behalf of the co-defendant Jackson gave a wholly misleading impression of the previous conduct where his client was involved exploiting the limited basis of the agreed facts allowed in (2) above. This was not adequately corrected by the learned judge in the subsequent summing up rendering the conviction unsafe.

(4) Additionally the speech on behalf of the co-defendant Jackson gave a misleading impression of the admission of the applicant's bad character. Indicating that Mr Harvey had chosen when it was introduced before the jury. This was wholly wrong and deeply misleading. The learned judge agreed that this was a danger but failed adequately to correct it in the summing-up. The overall effect was that the jury were likely to believe that the applicant was manipulating the proceedings and this may seriously have influenced the jury, this rendering the conviction unsafe.

(5) During his speech Mr Jackson asserted to the jury that 'he had told his solicitor what he had told you'. This was a categorical waiver of privilege likely to lead the jury to conclude that Mr Jackson had throughout been consistent (where they had heard no such waiver on behalf of the applicant or any other defendant). The learned judge attempted to correct the position again but without criticism of counsel who made the comment. The effect will have been to allow the jury to draw an improper conclusion about the competing consistency of a defendant in conflict with the applicant."

42. In the view we take of the matter we shall deal with grounds 2, 3 and 5 first, before turning to grounds 1 and 4.

Grounds 2, 3 and 5

43. These all concern Jackson. The context was attractively outlined by Mr Ivers before us today. There was a major issue between the appellant and the co-defendant, Jackson. The issue was whether the appellant was in the car before the incident, or

whether he only got into Jackson's car by chance as a convenient means of escape after the incident. The question went to the credibility of both Jackson and Harvey and was, in Mr Ivers' words "a key decision for the jury". It had a knock-on effect on whose account was likely to be believed. Mr Ivers submitted that the trial had become dysfunctional because, in the way in which he summarised it in his written advice, Mr Jackson's evidence was deeply misleading. He had presented himself as someone who would never be violent to anyone else and this indeed was not a fair representation of the position. Moreover, the Crown had failed in its own duty to keep the trial properly organised and ensure that the jury was not misled. The Crown itself should have made an application under section 101(1)(f) of the Criminal Justice Act 2003 to introduce the evidence of Jackson's previous reprehensible conduct so as to guard against the jury being misled. We summarise Mr Ivers' submissions in that way but we think we have fully conveyed their flavour.

44. We are however ultimately not persuaded that there is any merit in these three grounds concerning Jackson either individually or collectively. As to ground 2, the criticism of the judge is unfounded and we think that the criticism of the prosecution somewhat overstated.

45. So far as concerns the prosecution, it was not under a duty to make an application to adduce the evidence of Jackson's bad character in order to correct any false impression. The reason is that the matters were all unproven allegations which were not admitted by Jackson. There was therefore a very real danger of the position developing whereby much further time was spent on adducing the evidence of allegations against Jackson, all of which would have been denied - and in a very real sense would have given rise to satellite litigation.

46. Some prosecutors may in the circumstance have felt it appropriate to introduce the evidence and we would have fully understood such a course being followed. The prosecution in this case did not. We do not, however, think that there was a breach of duty in the present case on the part of the prosecution in not doing so.

47. So far as the judge is concerned, we think the matter was well summarised in the respondent's notice, where Mr Jarvis put the matter this way. The judge was concerned about the unproven nature of these allegations. Moreover, allegations of damage to property had little bearing on Mr Jackson's creditworthiness or in the issues of the case more generally between himself and the applicant. The allegation of physical violence was different because Mr Jackson had created the impression in the minds of the jury that he was not a violent man, whereas the occasion when he was said to have assaulted his mother tended to suggest otherwise. For that reason the judge allowed Mr Ivers' application in part and in due course an agreed fact was placed before the jury that set out the allegation. The prosecution went on to submit that the judge's ruling had struck the appropriate balance by enabling the jury to learn about those aspects of the unproven allegations that were capable of correcting the impression created by Jackson in his evidence that he was not a violent man.

48. With that we agree. We do not think that further elaboration is necessary, save to say that Mr Ivers' submission today, that there was a further aspect of credibility going to

Jackson's assertion of forgetting these matters when he gave evidence does not, upon analysis, advance the argument any further. Ultimately, had more been admitted as to Mr Jackson's bad character, it would simply have involved more debate about unproven allegations. In the event, there was material placed before the jury as to bad character on the part of Jackson, as appears from the admissions.

49. As to ground 3 the comment made by Mr Mendelle as to the trivial nature of the incident was, with respect, inappropriate and should not have been made. We record that, in the light of the criticisms of Mr Mendelle made by Mr Ivers, we invited Mr Mendelle to attend this morning and he very courteously did so. We raised with him the concerns as to his observations in the closing speech and he described this one as "no more than a rhetorical flourish". That it may have been, and like the judge, we do not conclude that he was deliberately intending to mislead but the observation as to the incident concerning Jackson was capable of misleading and it is unfortunate that the comment was made. The short answer to ground 3, however, is that the judge dealt with the comment in terms at page 16 of the summing-up (as already set out) – and, in our judgment, the judge dealt adequately with it.

50. As to ground 5, there is less to it than might first meet the eye. The background is again helpfully summarised in the respondent's notice, in broad terms, as follows: that Jackson had been cross-examined by Mr Ivers QC and accused of fabricating his account; that Jackson's answer was that he had given the same account to his solicitor at the police station. Very properly Mr Ivers had stopped him from saying more. But that was the evidence and no application had been made at the time as to the effect of those remarks amounting to a waiver of privilege. In those circumstances, the judge agreed with the Crown that there had been no waiver of privilege and, again, the judge had dealt adequately with this matter in the summing-up at page 52. In short, this point goes nowhere.

51. We therefore turn to grounds 1 and 4 which concern the appellant and gave us more cause for concern. As to ground 1, which goes to the late introduction of the appellant's convictions, we begin by observing that, with respect, we are unable to agree with the judge in so far as she held that she had no discretion in the matter - see, Blackstone 2019 F13.71. Courts are not powerless to deal with late applications and have the power to exclude evidence sought to be adduced in such a fashion that may unbalance the trial and result in unfairness.

52. The judge therefore had, in our judgment, discretion or power to exclude the evidence sought to be adduced at a late stage. That said, the conclusion to which the judge came, that the evidence should be admitted, was one to which she was amply entitled to come even had she properly acknowledged her discretion in the manner. The reasons are straightforward: first, the suggestion that any unfairness resulted to the appellant through not being cross-examined is, with great respect to the attractive manner in which it was advanced, simply fanciful. The appellant would not conceivably have benefited from being cross-examined as to his previous moped convictions. Secondly, had there been realistic concern as to prejudice to the appellant, an application could have been made to recall him. In our judgment, very understandably, no such application was made. Thirdly, we are wholly unpersuaded that any cross-examination

of Jackson would have been different, let alone significantly different had the appellant's convictions been adduced earlier.

53. We add only this. In so far as the judge's ruling suggested that the late admission of the appellant's convictions was due to the manner in which Mr Ivers had put the case to Jackson, we would not, with respect, share that view. In our judgment, the real reason for the convictions coming in at that stage was because the relevant authorities had been missed, with respect, by all concerned, when the earlier application to adduce that evidence was made. Once the authorities were placed before the judge, then the force of the application became clear and the judge admitted the evidence.

54. We turn to ground 4 which we found troubling. The judge acquitted Mr Mendelle of any intention to mislead. The judge conducted the trial and we are not at all minded to go behind her conclusion. Mr Mendelle, as we have indicated, attended today. He described what he had said as again no more than a rhetorical flourish. Nonetheless, with great respect, we are firmly of the view that the observation should never have been made. It was potentially misleading. It is not an observation we would expect from counsel. Moreover, the judge's treatment of that observation (at page 15 of the summing-up) was somewhat more forgiving than perhaps the observation warranted. Thus far we see force in ground 4.

55. However, we part company with counsel for the appellant at the next step. Even assuming, without deciding, that the judge's treatment of Mr Mendelle's comment was inadequate, we are nowhere near persuaded that it rendered the appellant's conviction unsafe. In our judgment, the strength of the case against the appellant was simply too strong: he was present in the park at the time of the stabbing; he had the deceased's blood on his clothing; he was in the getaway car being driven away by Mr Jackson; he dumped his mobile telephone shortly after the incident in the park; he had "developed" his account from his defence statement when giving evidence and put forward an embellished account which the jury rejected. Whatever impact Mr Mendelle's comment may or may not have had, it does not, in our judgment, impact at all or significantly on the safety of the conviction.

56. For all these reasons we dismiss the appeal against conviction. We turn to the appeal against sentence.

57. <u>The appeal against sentence</u>

58. In her very careful sentencing remarks the judge said this: despite the age difference between the appellant and the co-accused, Rose, it was clear they were close friends. The appellant had numerous previous convictions and had been subject to a youth rehabilitation order with intensive supervision and surveillance at the time. Further, he had been subject to an electronically monitored curfew at the very time of the stabbing. In evidence he had volunteered that he was a long-standing dealer in cannabis. Irrespective of the veracity of the comments, it did not add to the sentence or the minimum term that would be imposed. The co-accused, Rose, had been before the courts on 10 occasions for a total of 21 offences including robbery, possession of an offensive weapon, assaults and wounding. At the time of the offence he was on bail

for an offence of conspiracy to rob for which he was subsequently convicted and sentenced to 9 years' imprisonment.

59. On the evening in question the appellant with the co-accused was in the leading car and directing the driver as to where he should go. They, or at least others with their knowledge and intention, were armed with knives and other weapons. It was not clear on the evidence why they were intent on such serious violence or to whom the violence was to be directed. It was however clear that they played a leading role in a planned group attack with knives and other weapons. They were also disguised in hooded tops and balaclavas. Following the attacks, they had disposed of their telephones to avoid detection. When the appellant was arrested his snood and trainers were seized and the deceased's blood was found on them.

60. Despite his young age, the appellant's evidence had shown he was a determined and brazen liar in the face of challenging questions. However, it was accepted that this maturity when giving evidence may have been different from how he was at the time of the murder itself. The co-accused, Rose, had given a false account in interview and did not give evidence at trial so his character could not be assessed any further.

61. The judge then dealt with the minimum term which had to be set, pursuant to schedule 21 to the Criminal Justice Act 2003. As knives and other weapons were taken to the scene with the specific intention of causing serious, if not, fatal injury, the appropriate starting point for the appellant was 12 years and for his co-accused it was 25 years. Although the starting point for an adult convicted in these circumstances had been increased by the legislation, this had not been the case for those under 18. However, the case law made it clear that despite the unchanged starting point, the actual term was left to the court's discretion to deal with in accordance with the facts of the case. Other authorities demonstrated that despite the comparative youth of the offender minimum terms in excess of the 12-year starting point were justified and necessary in some cases.

62. The two associated offences of wounding with intent also had to be taken into account and fell within category 1 of the Sentencing Guidelines. For those offences the starting point for an adult would have been 12 years with a range of 9 to 16 years. For a youth the guidelines made it clear that the court should pass a sentence between one-half or two-thirds of the adult term.

63. The judge then set out the aggravating factors. There was a significant degree of planning and premeditation with vehicles driven in convoy, reconnaissance carried out at the scene of the intended attack and CCTV footage showing the number plates of the Golf being removed and occupants of the car changing their clothes. The following also had to be taken into consideration: the use of a disguise; the disposal of the mobile phones or numbers; the fact that the offences occurred at night in a public park on Halloween when there were a number of young people around and the fact that the appellant and his co-accused were subject to court orders or on bail at the time of the offence.

64. The mitigating factor was that although both intended to cause serious harm to people they had not formed the intention to kill.

65. The minimum term for the co-accused, Rose, had to be adjusted to take account of his current sentence of imprisonment. It would be set at 25 years with concurrent sentences for the offences of wounding with intent. The appellant's minimum term was set at 19 years, minus remand time with concurrent sentences for the offences of wounding with intent.

66. The grounds of appeal developed by Mr Ivers were these. The first focused on the appellant's young age and emphasised, as had been conclusively demonstrated, that the appellant was not the stabber. Though the relevant guideline which we will mention in a moment was not applicable in a case of murder, as Mr Ivers put it, age is not to be ignored even in murder. The second ground of appeal was that the judge erred in assigning to the appellant a leading role; there was no foundation for that conclusion. The third ground of appeal was that there was objectionable disparity; given that Rose was already serving a substantial sentence, the appellant's sentence was simply too high in the light of the sentence passed on Rose. Moreover, Mr Ivers reminded us of the appellant's very difficult upbringing, over and above the question of his age.

67. So far as it was for the Crown to comment on sentence, Mr Jarvis reminded us of the facts of the matter and the judge conducting the trial - and, as he put it, when it came to the difficult question of different starting points for those of different ages, there was no cliff edge.

68. We begin with a number of preliminary points. First, the appellant's sentence is one of detention during Her Majesty's Pleasure. However, Parliament requires the court to fix a minimum term before he can be considered for release. That means exactly what it says. The term fixed is a minimum and is stated in calender years. He may or may not be released on the expiry of the minimum term. He cannot be considered for release before then.

69. Secondly, we understand the grief of the deceased's family and friends. No sentence we pass can make good their loss.

70. Thirdly, paragraph 5A of schedule 21 to the Criminal Justice Act 2003 increased the starting point to a minimum term of 25 years for a murder committed by an offender aged 18 or over who took a knife to the scene with the necessary intent but left the minimum term at 12 years for an offender, aged under 18, who committed the same offence with the same intent. In this regard, Parliament can be taken to have left the fixing of the minimum term for an offender aged under 18 to the discretion of the judge to deal with as is just on the facts of the individual case: see, R v Moore [2010] EWCA Crim 2197; [2011] 1 Cr App R(S) 94, at [25(ii)]. Thus, youth is necessarily taken into account although it will be appreciated that starting points are no more than starting points; the minimum term may ultimately be above or below the starting point.

71. Fourthly, the sentencing exercise was not straightforward. The judge faced the acute problem of sentencing two convicted defendants for an offence jointly committed who, on account of the differences in their age, attracted very different starting points. In such circumstances the judge cannot approach each defendant in isolation. Instead, he or she should generally and never mechanistically move from each starting point to a

position where any disparity between the sentences, all other things being equal, is no more than a fair reflection of the age difference between the offenders: Attorney-General's References Nos 143 and 144 of 2006, [2007] EWCA Crim 1245; [2008] 1 Cr App R(S) 28 at [27].

72. Fifthly, a point we underline, the judge had the great benefit of conducting the trial over a period of 5 weeks and forming a view of the incident and of the defendants.

73. Turning next to the framework within which the sentence on the appellant was to be considered, given his age, regard must ordinarily be had to the Sentencing Council's Definitive Guide Sentencing Children and Young People. However, the guideline is in terms made inapplicable to the offence of murder: paragraph 1.1, footnote 2. Nonetheless the judge did not and we do not regard age as irrelevant even in murder.

74. Next, the judge needed to take account of the very different starting points on account of age, in respect of the appellant and Rose as already explained. The judge dealt very carefully, if we may say so, with these considerations in her sentencing observations at pages 7 to 8.

75. There were, here, three offences, including the two section 18 offences which cannot be overlooked. The brackets for the two section 18 offences were not in dispute and were recorded by the judge in her sentencing observations (at page 8).

76. Finally with regard to the framework, it is the sentence as a whole we need to consider. That we might have favoured a different route to the sentence passed or the minimum term fixed is by itself neither here nor there.

77. In our judgment, having carefully weighed Mr Ivers' submissions, the judge's sentence, though undoubtedly severe, was not manifestly excessive or wrong in principle.

(1) We do entertain some misgivings about the additional year for his antecedents which formed a part of the judge's route to her conclusion. But as already explained, that is not crucial if we nonetheless take the view that the sentence as whole was neither manifestly excessive nor wrong in principle.

(2) Despite his young age, the judge had perfectly properly formed a view of him. On the jury's verdict, he appeared more dominant than Jackson who was in any event acquitted. The appellant and Rose were close friends. In all these circumstances, including that this was a case of murder, the age difference between the appellant and Rose is of much less importance than it might first seem. It leads to a very different starting point, but not necessarily a markedly different finishing point. While there may be some concern that the judge uplifted the appellant's starting point on account of over anxiety to minimise the difference between the minimum terms fixed for him and Rose, we are ultimately satisfied that the appellant's minimum term cannot be categorised as manifestly excessive. There were a number of features of the case which reinforce this conclusion. The aggravating factors, to which reference has already been made, outweighed and significantly outweighed the mitigating factors to which the judge also had regard, in particular the appellant's youth and his start in life. These

factors include the planning, the fact that weapons were taken to the scene with the necessary intent, the group attack, the disguises, getting rid of telephones, the breach of curfew and of the intensive youth rehabilitation order. In addition, and importantly, any sentence passed needed to reflect the criminality involved in the section 18 offences and the fact that there were three victims. Those section 18 offences cannot be air brushed out of the picture. Thus, to repeat, despite the appellant's very young age, we would not regard the minimum term as manifestly excessive in all the circumstance on that account.

(3) Turning to Mr Ivers' complaint with regard to the leading role assigned to the appellant, put simply, the judge was perfectly entitled to reach the conclusion she did having had the benefit of conducting the trial.

(4) With regard to the question of objectionable disparity, as it seems to us, the highest that it can be put is that Rose may have been fortunate not to have received a somewhat higher sentence. That Rose was fortunate does not mean that the sentence passed on the appellant was on this ground manifestly excessive.

78. Accordingly, and for the reasons given, in this tragic case, we would dismiss the appeal against sentence.