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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 17th April 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE BUTCHER

and

MRS JUSTICE FARBEY DBE

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**R E G I N A**

**- v -**

**JORDAN DANIA**

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**Mr J Higgs QC** appeared on behalf of the Appellant

**Mr S Perian QC** appeared on behalf of the Crown

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**J U D G M E N T**
**(Approved)**

Wednesday 17th April 2019

**LORD JUSTICE HOLROYDE:**

1. On 8th June 2018, following a trial in the Crown Court at Maidstone before Her Honour Judge Williams DL and a jury, the appellant Jordan Dania and four other young defendants were all convicted of offences of murder and violent disorder.

2. On 14th June 2018 they were necessarily sentenced to the form of life sentence appropriate to their respective ages. In the case of the appellant, the sentence for the offence of murder was that he be detained at Her Majesty's pleasure, with a minimum term of sixteen years. A concurrent sentence of three years' detention was imposed for the offence of violent disorder.

3. The appellant now appeals against his conviction by leave of the single judge, and he renews his application for leave to appeal against sentence following refusal of that application by the single judge.

4. The relevant events occurred in Gillingham on the night of 6th October 2017. The background to them was ongoing rivalry between a group of which the appellant and his co-accused were a part, and a group whose members included Lewis Dilallo, Gabriel Calin and Kyle Yule.

5. The prosecution case was that on the evening of 6th October 2017 the group of which the appellant was a part wanted revenge for previous incidents between them and their rivals. That evening, the appellant was with seven others. The group of eight were together or in close proximity to one another throughout the period which encompassed all relevant events. The group comprised the appellant and his four co-accused, all of whom were black, and three white youths, Ben Lee, William Harris and Radu Niculescu.

6. The five defendants and Niculescu were, it seems close associates of one another. Lee and Harris were not generally part of the same group. They lived in a different area and it seems their point of contact was with one of the defendants, namely, Ephrain Akinwunmi-Streets. We should say that we mean no disrespect when, for convenience, we refer to all those involved by their surnames only.

7. The group of eight initially went to a house in Corporation Road, looking for Gabriel Calin. He was not in, but his younger brother Alfie was. Alfie was assaulted (though not seriously) by two members of the group, neither of whom was the appellant. Alfie Calin's evidence was that at least two people in the group were carrying knives.

8. The group went next to East Street, which is where Dilallo lived. CCTV footage captured their movements from Corporation Road to East Street. It is an important part of the case advanced on behalf of the appellant by Mr Higgs QC that in the course of that journey, which was a walk of a few minutes, the group of eight effectively split into two. The leading group of five comprised the four co-defendants and Niculescu. The remaining three (Harris, Lee and the appellant) followed a short distance behind. That separation between the main group and the remaining three was maintained as they approached East Street.

9. The part of East Street where the murder was carried out is not covered by CCTV cameras. Approximately one minute elapsed between the group passing out of view of the CCTV, as they entered East Street, to their coming into view on a different camera as they left East Street. The footage shows that, as they entered East Street, most of them began to run forwards. It transpired that they had seen Yule sitting in a car parked on East Street, near Dilallo's home. Some of the group attacked the car. That was the subject of the count of violent disorder, of which all five

defendants were convicted.

10. Yule left the car in the course of this attack and ran to the home of Dilallo. He was chased and trapped in the small front garden of the house. It was the prosecution case that all five defendants then played their parts in a merciless attack in which Yule was punched, kicked and fatally stabbed. His pleas to his attackers to stop were ignored. He died of his wounds some hours later, despite every attempt being made at hospital to save his life. Thus this incident ended a young life and caused irreparable harm to the family and friends of the deceased.

11. One of the defendants, Victor Maibvisira, was by the end of the trial identified by the prosecution as, and ultimately found by the judge to have been, the one who inflicted the fatal stab wounds. He sustained a cut to his finger. The inference was that he did so as he stabbed his defenceless victim. Spots of blood matching Maibvisira's blood were found on one of the appellant's trainers and on his jacket.

12. After only about one minute, the group left East Street. One of the co-accused was on a bicycle and was the first to be captured by the CCTV camera which recorded their departure. The sequence in which others followed was that Harris came next, followed by the appellant, followed by Lee and then by the remaining four. Mr Higgs attaches considerable importance to that sequence of departure for a number of reasons. One of his reasons (though by no means the only factor) is what might be referred to (in shorthand) as the "last in, first out" point. Mr Higgs' argument to the jury was that the time between the appellant being one of the last to enter East Street and his being one of the first to leave it, did not realistically provide him with any opportunity to have reached the leading group and played an active role in the fatal attack.

13. The prosecution evidence adduced at trial included testimony from four persons who

witnessed the actual attack and two who saw the end of the attack and the group running away. The case presented by the prosecution, as we have indicated, was that all five accused were participants in the murder. It was not alleged that the other three members of the group of eight were involved in the attack. They were all interviewed. One of them (Lee) was initially to be a prosecution witness. We will return to his position shortly.

14. In interview, the appellant had admitted presence at the scene of the attack and in close proximity to it. But he denied that he had taken any part in the attack and denied that he had had a knife. He said that on previous occasions he had seen all of his co-accused with knives and had seen "one of the white boys" (that is to say, Lee, Harris or Niculescu) with a knife on the night of the attack. He admitted that he had been with the others at Corporation Street with a view to finding Gabriel Calin, and he agreed that two of the group had gone to the front door of Calin's house and had assaulted Alfie Calin.

15. The appellant did not give evidence. Two of his co-accused did; two did not. In each case, however, each of the accused sought to exclude himself from involvement in the murder and to cast blame on one or more of the other accused. It was, therefore, a case involving "cut-throat" defences.

16. Lee, who was aged 17, had made a witness statement which was served as part of the prosecution case. In the light of that statement, the evidence which he was expected to give was set out in some detail in prosecuting counsel's opening speech. In summary, it was to the effect that three of the accused had attacked the car in East Street and that "they" all then ran after the deceased and attacked him. Lee said that he was frightened by this scene and promptly left with Harris. One of the points to which Mr Higgs attaches importance is based upon the fact that, as the group left East Street, the appellant was sandwiched between Harris and Lee. Lee's statement

did not directly mention the appellant by name; but nor did it specifically exculpate him from any involvement. However, for the reasons which we have briefly indicated, Mr Higgs wished Lee's account to be before the jury. In particular, one feature of Lee's account was that the fatal attack had been carried out by Akinwunmi-Streets and three others – a total of four attackers and not, as the Crown alleged, a total of five. Counsel wished to rely on that point in conjunction with the "last in, first out" point. He wished to argue, as we have said, that the prosecution case could not be correct through a combination of the movements shown on the CCTV footage and Lee's account which limited the number of attackers to four, rather than five.

17. Lee and his family are travellers. He signed his witness statement on 29th March 2018 and at that stage gave no sign of any reluctance to attend court. The trial began on 9th April 2018. On 24th April, police officers contacted Lee's father to say that Lee should attend court the following day. They were told that Lee had left his father's home and did not wish to attend court as he thought that the defendants would come after him if he gave evidence. One of the police officers later spoke to Lee himself. Lee was angry and aggressive. He said more than once that he would rather die than attend court. He said that he was not worried about any threats, but that he is a gypsy and gypsies do not go to court.

18. The prosecution subsequently decided that they did not need Lee's evidence as part of their case and notified the defence that they were prepared to omit his evidence altogether. On behalf of the appellant, objection was taken to that proposal. The other accused were all content with what the prosecution proposed.

19. In light of the objections advanced on behalf of the appellant, on 25th April 2018 prosecuting counsel made an application for a witness summons to require Lee's attendance at court. It seems that at an early stage of the trial, the judge had invited the prosecution to reflect on whether they

really wished to rely on Lee, given that he was part of the group of eight. The judge adjourned the application for a witness summons until the following day so that the prosecution could further reflect on whether they wished to pursue it.

20. The prosecution did wish to pursue it. The application was made, and on 27th April a witness summons was issued by the judge. She acted pursuant to section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, the material part of which is in the following terms:

> "(1) This section applies where the Crown Court is satisfied that —
>
> (a) a person is likely to be able to give evidence likely to be material evidence, or produce any document or thing likely to be material evidence, for the purpose of any criminal proceedings before the Crown Court, and
>
> (b) it is in the interests of justice to issue a summons under this section to secure the attendance of that person to give evidence or to produce the document or thing.
>
> (2) In such a case the Crown Court shall, subject to the following provisions of this section, issue a summons (a witness summons) directed to the person concerned and requiring him to—
>
> (a) attend before the Crown Court at the time and place stated in the summons, and
>
> (b) give the evidence or produce the document or thing."

21. That statutory provision is supplemented by relevant provisions of the Criminal Procedure Rules, in particular rule 17.3(2). We note in passing that the form of witness summons requires the witness to attend the specified court at a specified time and on a specified date, but also to attend on subsequent days until released from further attendance by the court.

22. Although the judge granted the application to issue that summons, it is clear that she remained concerned about the prospect of Lee being a witness. She indicated that she felt it was important that when he attended court, Lee should have independent advice as to his position, not least because she took the view that she would be bound to issue him with a warning that he need not answer any question if to do so would incriminate him.

23. The witness summons was served on Lee on 3rd May 2018.

24. As the trial continued, the prosecution reviewed Lee's evidence, which in some respects was inconsistent with eyewitness testimony and with the CCTV footage.

25. On 8th May, prosecuting counsel sent an email to all defence counsel in which he said:

> "We, the Crown, have now come to the view that we no longer rely upon the evidence of Ben Lee. Therefore, we will not be calling him as a prosecution witness."

The email went on to refer to the existing witness summons and indicated a willingness to provide Lee's address to any defence team who wished to call him as part of their case.

26. This matter was also raised in submissions in open court. The judge was later to say:

> "From all that was said, I understood the Crown's position to be that they could no longer put him forward as a witness of truth, that his evidence was unworthy of belief."

Mr Perian QC (who appears today for the Crown, as he did below) confirms to us that that is what was intended to be conveyed by the communication with the defence team.

27. Written submissions were then made on behalf of the appellant to the effect that the prosecution should either call Lee as their witness, or at least tender him for cross-examination. The prosecution response was to the effect that they had applied the principles stated by this court in the familiar case of *R v Russell-Jones*, to which we shall return shortly, and had come to the view that Lee's evidence was suspect and they did not need him. A skeleton argument served by the prosecution in this regard set out their position.

28. On 14th May 2018, Lee attended court, having been brought by the police pursuant to the witness summons and in accordance with sensible, normal practice. He was accompanied by his father. At that stage the prosecution had indicated that they were prepared to tender Lee for cross-examination. Unfortunately, it was not possible for independent counsel to see Lee, as the judge wished, during the morning. Accordingly, Lee did not begin his evidence before the short adjournment. He and his father left the court building at the start of the short adjournment and did not return. When contact was made by phone with Lee's father, the father indicated that they would not return. He explained, in essence, that they were unhappy about having waited all morning with nothing happening.

29. Prosecuting counsel informed the court that he did not intend to take any steps to secure any further attendance by Lee; nor did he intend to make any application for the issue of a warrant to arrest the witness. Such a warrant may be issued pursuant to section 4 of the 1965 Act, which, so far as material for present purposes, provides:

> "(1) If a judge of the … Crown Court is satisfied by evidence on oath that a witness in respect of whom a … witness summons is in force is unlikely to comply with the ... summons, the judge may issue a warrant to arrest the witness and bring him before the court before which he is required to attend:

> Provided that a warrant shall not be issued under this subsection ... unless the judge is satisfied by such evidence as aforesaid that the witness is likely to be able to give evidence likely to be material evidence or produce any document or thing likely to be material evidence in the proceedings."

30. On behalf of the appellant, Mr Higgs then applied to read Lee's statement as hearsay evidence on the ground that Lee could not be found, or, alternatively, that he did not give oral evidence through fear. Having heard submissions, the judge refused the application. In her ruling, of which we have a transcript, she refers to the fact that she had previously expressed concern about the application for a witness summons because "it was plain to the court that he would have to be regarded as an accomplice". She summarised the fact that Lee had been one of the group of eight recorded on the CCTV footage. She referred, as we have indicated, to Mr Perian's statement of his position that the witness was regarded as unworthy of belief. She said that neither of the grounds of the application was made out: first, because Lee plainly could be found; and secondly, any question of the witness being in fear was "problematic", because on the evidence then available to the court he "would have to be regarded as an accomplice. He is unreliable. His fear may stem from his fear of being incriminated in a murder, rather than anything else."

31. The judge went on to refer to the reasons why Mr Higgs wanted Lee's evidence before the court as being supportive of part of the appellant's case. She said that the point about the appellant being recorded as leaving with Lee and Harris could be made from the CCTV footage alone. She noted that Lee's statement about what happened in East Street, to the effect that he and the other white boy were not involved, was contrary to the evidence of another witness and contrary to CCTV footage of the incident (important in this connection) which had taken place in Corporation Street. She also noted that Lee's statement claimed that he had not run into East Street, which was again contrary to the CCTV footage, which later showed Lee "exiting with the group and taking steps to change or hide his identity". She repeated her view that such advantage as might be gained

for the appellant's case could be gained from the CCTV footage alone, without any need for Lee to give evidence, and she suggested that Lee's evidence carried considerable risk for the appellant's case because he did not exculpate the appellant. She concluded her ruling in this way:

> "Ben Lee appears, on all the evidence available, in my judgment, to be a tainted witness, an unreliable witness. He would have to be regarded as an accomplice; he would have to be warned against self-incrimination. An accomplice direction would have to be given to the jury about his evidence. There is no unfairness to [the appellant] in him not being called because, as I have already said, such advantage as is available and is sought to be gained from Ben Lee's presence in East Street, can be gained from the CCTV evidence and from his absence from the dock. …"

32. That ruling on the hearsay application is not challenged on this appeal. Mr Higgs, realistically, acknowledges that the judge was entitled to refuse the application for the reason that the statutory grounds were not made out. He refers to it, however, because of its importance at a later stage of the proceedings.

33. Application was next made on behalf of the appellant for the issue of either a warrant to arrest Lee, pursuant to the existing summons, or, if the existing summons was deemed to have been withdrawn, for a new witness summons. Written and oral submissions were made in respect of this application, which was opposed not only by the Crown but also by all co-accused. The judge gave a short ruling refusing the application. She referred to the relevant statutory provisions and the Criminal Procedure Rules. She acknowledged that the court had the power to grant a warrant pursuant to the statute and the rules, but she said:

> "… I have come to the conclusion that it would not be in the interests of justice to grant a warrant for the arrest of Ben Lee. My reasons for coming to this conclusion are the reasons which I gave yesterday in refusing the application under section 116 for the witness statement to be read, namely that Ben Lee is not a witness, in my judgment, capable of being a reliable witness.

> Going back to my issue of the witness summons originally, I now consider that Ben Lee may well have grounds for seeking to set aside that witness summons on the ground of his right not to incriminate himself."

The judge made clear that her ruling applied equally both to the issue of a warrant and to the issue of a fresh summons. She repeated:

> "… it is simply not in the interests of justice in the very particular circumstances which have arisen in this case, to grant a warrant or a fresh witness summons …"

She repeated her view that this ruling did not result in any unfairness to the appellant. Thereafter, the trial proceeded to its conclusion, without the jury hearing the evidence which Lee might have given.

34. Two grounds of appeal were initially put forward. The first contended, in relation to events on 14th May 2018, that the prosecution had acted in breach of their duties and that the convictions were unsafe as a result. Mr Higgs has helpfully told us this morning that that ground is not pursued. In particular, he realistically recognises that even if he could get home on every other aspect of the ground as originally advanced, he would face very great difficulty in showing that the prosecution's decision at that stage had rendered the verdicts unsafe, given that the judge subsequently heard and refused an application which, if granted, would have secured the attendance of Lee as a witness. It is nonetheless necessary, in our judgment, to mention this first ground of appeal and the sequence of events which we have summarised earlier in this judgment.

35. We move on to the second ground of appeal. It is stated in these terms:

> "The learned judge erred in law in not granting a witness summons to the appellant requiring the attendance of the witness Lee, and as a result deprived the appellant of the ability to call the material eyewitness, whose account was likely to give significant if not unqualified support to the appellant, and his convictions are thereby rendered unsafe."

Mr Higgs submits that in the reasons which she gave for refusing the hearsay application and then the application for a summons, the judge went outside her proper role and, in effect, imposed her own view of the witness instead of leaving it to the jury, as she should have done, to hear the witness' evidence and make their own assessment of it. Mr Higgs argues that the reasons put forward by the judge do not withstand scrutiny. He submits that it is difficult to think of a witness who would be better placed to provide material evidence than the person present at the scene who was an eyewitness and indeed a potential accomplice. The witness had not previously indicated that he would seek to invoke his right against self-incrimination, but even if he did, submits Mr Higgs, that would not be a reason to refuse the issue of a witness summons. Had he attended court and refused to give evidence, circumstances might have arisen in which a fresh hearsay application could have been made. It was not for the judge to substitute her own view about the reliability of the witness, and in refusing to issue a witness summons, Mr Higgs contends that the judge denied the defence equality of arms with the Crown. He submits that she wrongly did so on the basis of her own opinion that the witness may not be reliable, when that was a matter pre-eminently for the jury.

36. The prosecution response to this ground, in summary, is that the judge was both entitled and correct to decide that in the particular circumstances of this case it was not in the interests of justice to issue either a fresh summons or a warrant for the reasons which she gave. Mr Perian submits that the judge properly directed herself and properly applied the two stage approach under section 2 of the 1965 Act.

37. In considering these submissions, we begin by referring again to *R v Russell-Jones* [1995] 1 Cr App R 538, which sets out principles governing the conduct of prosecuting counsel. We do so because, with respect to the prosecution team, we take the view that a failure to apply those principles correctly contributed to some unfortunate features of the events at court, which we have summarised. In *Russell-Jones* the court set out seven important principles as to whether or not the prosecution were obliged to call or tender particular witnesses. The starting point for the principles is that the prosecution should generally have at court all those witnesses who (in modern terms) had been part of the served prosecution evidence. The important features of the seven principles to be extracted for the purposes of this case are these. If the prosecution witness can give direct evidence as to important facts, and the prosecution believe the witness to be truthful (even if perhaps mistaken or even if perhaps untruthful in a particular respect), then the prosecution should call, or at least tender, the witness unless there is some good reason not to do so, which is not inconsistent with the prosecution's duty to act fairly in the interests of justice. But the prosecution are under no duty to call or tender a witness whose evidence they have decided is not capable of belief, for the simple reason that his evidence cannot assist the jury. The prosecution are entitled, and indeed bound, to keep their evidence under review and are entitled to change their assessment of whether a witness is capable of belief. It is far from an unfamiliar situation in a trial that, as the evidence of other witnesses develops and/or as closer attention is given to the statement of a witness to be called in the later stages of the trial, the prosecution come to the conclusion that the evidence of that witness is not merely inconsistent with other evidence, but is incapable of belief.

38. Mr Perian says – and, as we have indicated, the judge accepted – that that is what happened here. We understand why Mr Higgs initially wished to challenge the prosecution's decision-making because there are, with respect, some unsatisfactory features of it. In identifying these features, which we regard as relevant to the surviving second ground of appeal (and not merely to

the abandoned first ground), we make it clear that there is, of course, no question of the prosecution acting in bad faith. We also make it clear that we fully appreciate the pressures on prosecuting counsel in conducting a murder trial against five defendants with diametrically opposed interests and in which the eyewitness evidence relates to a frightening and distressing scene. Nonetheless, we do feel that neither the email of 8th May 2018, nor the subsequent written note provided by the prosecution spelled out with sufficient clarity that the prosecution now took the view that Lee was a witness who was not worthy of belief. Given that we are satisfied that they had come to that conclusion, and were understood by the judge to have done so, it was, with respect, inconsistent with the application of the *Russell-Jones* principles to that stance to tender Lee as a witness on the morning of 14th May. We readily accept from Mr Perian, and fully understand, his explanation that he was conscious that this was a change of stance at a comparatively late stage of the trial and was anxious to avoid any unfairness to the defence. But, on strict analysis, the prosecution that morning proposed to tender a witness whom they regarded as not capable of being believed.

39. The decision which was taken when Lee failed to return to court in the afternoon was one which, as we have indicated, was justified. But we do think it regrettable that no attention seems to have been given by the prosecution either to the fact that the witness had, up until about 1pm, been regarded as a witness they would tender, or to the fact that he was the subject of a current witness summons and had acted in disobedience to that order of the court. No application was made to discharge the summons. We therefore understand why it was that Mr Higgs initially sought to challenge that prosecutorial decision. We equally understand why it is no longer pursued. We have addressed it to an extent which might be thought greater than necessary because, in our judgment, it forms the important foundation of the position in which the judge was placed when application was made to her for the issue of the witness summons or warrant. Her position was that she correctly understood that the prosecution had by then come to the conclusion that Lee was not a witness worthy of belief.

40. Against that background, we turn to the second ground of appeal. We are grateful to both counsel for their submissions upon this ground, which have focused properly on the circumstances of this case but have also assisted the court with wider issues as to the proper approach to an application under section 2 of the 1965 Act. Having reflected upon their submissions, our conclusions are as follows.

41. In circumstances such as these, where defence counsel, with a full appreciation of the potential risk to his case, wishes to call a witness who, on the face of it, is able to give relevant evidence but who will not attend court unless compelled to do so, a trial judge should be slow to refuse an application for the issue of a witness summons. In particular, the judge should be careful not to trespass into the territory of the jury by forming his or her own view as to the credibility of the witness. Nonetheless, section 2 of the 1965 Act requires the judge to consider, first, whether a witness is likely to be able to give material evidence; and secondly, whether it is in the interests of justice to compel his attendance so that he can give that evidence. Section 4, in relation to the issue of a warrant, requires consideration of whether the witness is likely to be able to give material evidence. Although that section does not itself refer to the interests of justice, it is premised on the prior issue of a summons which did require consideration of the interests of justice.

42. Issues as to whether a witness is likely to be able to give material evidence may arise, for example, where a witness could at best only give evidence about a peripheral matter in terms which merely echo other evidence already given or which can be the subject of admissions. Similarly, issues may arise if there is evidence which provides a clear basis for the judge to assess the witness as incapable of being believed. It may be that such circumstances will arise comparatively rarely; but when they do, the judge must address that issue and will not thereby be trespassing upon the proper province of the jury, any more than a judge who withdraws a case on

a submission of no case to answer is improperly trespassing upon the proper province of the jury.

43. In the present case, the judge did not base her decision on a finding that Lee was not likely to be able to give material evidence. At least implicitly she accepted that that first part of the section 2 procedure was satisfied. Her decision was clearly based on her assessment of whether requiring the witness to attend would be in the interests of justice.

44. In our judgment, the assessment of the interests of justice in this regard will necessarily be a fact-specific judgment based upon an evaluation of all relevant circumstances. To take an example used in the submissions to us, it may be proper for a judge to take into account that a witness is in very poor health and would risk further injury to health if required to make the journey to court. Similarly, as it seems to us, consideration of the interests of justice may require the judge to take into account that, on the face of it, the witness could offer very little evidence of any real value or assistance to the jury, but was highly likely, for reasons of personal animosity, to give his evidence in a way which improperly and inadmissibly prejudiced the case of a co-defendant. But importantly for present purposes, it seems to us that the assessment of the interests of justice will often involve the judge in balancing competing interests, such as the need to avoid unfair prejudice to the defendant who wishes the witness to give evidence to the court; the level of assistance which the jury may derive from the evidence if it be given in accordance with any prior statement; and factors relevant to what will happen in practice if the witness is required to give evidence, including, for example, the foreseeable need to warn the witness against self-incrimination, or the prospect that a direction will ultimately have to be given to the jury in accordance with the principles in *R v Makanjuola* [1995] 2 Cr App R 469, in respect of a witness who has or may have interests of his own to serve. Factors such as these may assist and affect the judge's assessment of the balance to be struck. We emphasise that in making the assessment the judge must again be careful not to impose his or her own opinion as to the wisdom of calling the witness and must not

unfairly subordinate the interests of the defendant who wishes the witness to be called to the interests of co-accused who take the opposite view. The judge must bear in mind that were it not for the need to invoke the assistance of the court to compel attendance, the defendant would be entitled to call the witness, however unwise a tactical decision that might seem and whatever the potential for damage to co-defendants from the evidence which may be given.

45. The judge is, nonetheless, entitled to consider objective evidence which bears upon the reliability of the witness: for example, incontrovertible photographic evidence which flatly contradicts an important part of the witness' probable evidence. Such considerations may be relevant to the balancing of competing interests. In the case we have suggested, if the witness could at best give relevant evidence on only one minor point and there was evidence which plainly showed him to be wrong, the judge would, in our view, be entitled to take that evident unreliability into account in determining the interests of justice. It is the trial judge who is in the best position to make difficult assessments of this nature, and this court will be slow to interfere, unless some clear error on the part of the judge can be shown.

46. Here, we are not persuaded that this experienced judge did fall into error. With respect to her, we think it is unfortunate that in her ruling she too passed over the point, important in our view, that a summons was already in force against the witness. But it is implicit in her ruling that she would have discharged that summons if an application had been made. In the passages which we have summarised and quoted, she set out the considerations which prompted her to reach her decision. In doing so, she reiterated points which she had been perceptive enough to raise much earlier in the trial, before concerns about Lee's evidence had sufficiently been appreciated by the prosecution.

47. It seems to us that if Lee had been called and had given evidence in accordance with his

witness statement, which in all the circumstances it was very far from clear he would, he would at best have been able to add very little to points which the appellant could, in any event, make to the jury. We think that the judge was right to take the view that, had he been called to give evidence, he would have to be warned against self-incrimination; and it may well be that she was also right to predict that a further warning might need to be given to the jury about Lee having interests of his own to serve. Such matters would serve only to distract the jury from the issues which they had to decide. In all the circumstances of this case, the judge was entitled to weigh in the balance the fact that there was very little prospect that Lee could give reliable evidence which could be of any significant value in assisting the jury.

48. The challenge to the judge's ruling in ground 2 therefore fails. In those circumstances, and for those reasons, the appeal against conviction must be dismissed.

49. We turn to the renewed application for leave to appeal against sentence. Again, we are grateful to counsel for the assistance we have received. In her sentencing remarks the judge found, as we have indicated, that it was Maibvisira who had inflicted the fatal stab wounds. Moreover, she found that he had acted with intent to kill. Maibvisira was 18 years old at the time. The minimum term of his life sentence was 25 years.

50. In relation to the four younger co-accused, including the appellant, the judge was not satisfied that they had intended to kill. Nonetheless, she rightly described the murder as "a senseless, ruthless and calculated killing", and added that she had not observed any sign of remorse from any of the accused at any stage.

51. The judge went on to say that the appellant, 16 at the date of conviction, had been 15 at the time of the murder, still at school and with no previous convictions or cautions. She was satisfied

on the evidence that he was close to Maibvisira and had on his jacket and one of his trainers blood emanating from the cut to Maibvisira's finger. From that evidence she was sure that the appellant had been "in close proximity to Victor Maibvisira during the attack for that blood to have got on your jacket and your trainer. You were in the thick of the attack". She noted also the evidence that upon arrest the appellant had imagery of knives stored in his mobile phone.

52. In relation to all four of the younger accused, the judge found the following aggravating factors: a significant degree of planning and premeditation; a group attack; a knife taken to the scene; and the fact that the attack was carried out in a public place. As mitigating factors, she referred to their youth and to the fact that she was not satisfied that any of the four intended to kill. In each of their cases she imposed a minimum term of sixteen years. In doing so, she took the starting point prescribed by Schedule 21 to the Criminal Justice Act 2003 of twelve years, but increased it to reflect the fact that "you were all knowingly involved in a murder with a knife which had been taken to the scene and also a murder which was a revenge attack".

53. We should note briefly the position of the other three accused who received a minimum term similar to the appellant. In round figures, the appellant was 15 years and 9 months old at the time of the murder, and we have indicated the judge's observations about his role. Daley was 17 years and 3 months old. He, too, was described by the judge as being "in the thick of it", and he had previously committed an offence involving a knife or bladed instrument. Akinwunmi-Streets was 16 years and 6 months old. He, too, was described as being "in the thick of it". He had no previous convictions, but had committed an offence of affray on 1st October 2017 and had admitted that he was carrying a knife on the night of 6th October. Finally, Ralph was 16 years and 9 months old at the time of the murder. The judge made no specific observation as to the level of his participation. He had previous convictions for offences involving knives.

54. The ground of appeal acknowledges that the judge was entitled to impose a minimum term in excess of the statutory starting point, but submits that in the appellant's case the minimum term should have been shorter than that of his co-accused because he was significantly younger than each of them. On that basis, Mr Higgs argues that the length of the minimum term was manifestly excessive.

55. As we have indicated, Schedule 21 sets the starting point for an offence of murder by an offender aged under 18 as twelve years. That is significantly lower than the adult starting point, particularly when, as here, a knife has been taken to the scene and used in the offence. In such circumstances the adult starting point is 25 years. The youth of a young offender is, therefore, already to a significant degree taken into account by Schedule 21. The sentencing judge must, nonetheless, consider age and maturity. He or she may reduce the starting point below twelve, or may mitigate an increase in sentence which would otherwise be made to reflect aggravating features, if the offender is particularly young or particularly immature for his age. It is not, however, suggested here that the appellant was particularly immature for his age. It is implicit in the judge's sentencing remarks that, having had the opportunity to hear all the evidence and to see all the accused during the trial, she assessed them as being of equal culpability, save in respect of the more serious role of Maibvisira. Because she had presided over the trial, the judge was in the best position to make that assessment. She was entitled to conclude that although the four younger accused differed in age within the range of 15 to 17, their respective involvement was such that it was appropriate to sentence them all equally.

56. Standing back, we find it impossible to say that the minimum term of sixteen years, heavy though we appreciate it is for one so young, was manifestly excessive for his part in this dreadful murder.

57. For those reasons the renewed application for leave to appeal against sentence is refused.

58. It should be noted that in the court below the judge made a direction under section 45(3) of the Youth Justice and Criminal Evidence Act 1999, and an excepting direction under section 45(4) of that Act. The effect of those directions was that the names and areas of residence of the defendants may be included in a publication, but that no other matter may be published about any of the defendants whilst he is under the age of 18 if it would be likely to lead members of the public to identify him as a person concerned in these proceedings. Those directions remain in force.

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