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Case No: 201603341 B4/201603903 B4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 15 November 2018

Before :

LADY JUSTICE SHARP DBE

MR JUSTICE GOOSE

THE RECORDER OF RICHMOND UPON THAMES – HIS HONOUR JUDGE

LODDER QC

(Sitting as a Judge of the CACD

Between :

R E G I N A

v

NADEEM AKHTAR

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Mr J Bennathan QC and Mr B Grennan appeared on behalf of the **Appellant**

Mr S Bailey appeared on behalf of the **Crown**

J U D G M E N T
(Draft for approval)

LADY JUSTICE SHARP:

Reasons for judgment

1. On 8 June 2016, at the Crown Court at Stafford, the appellant was convicted after a retrial of attempted murder. On 21 July 2016, he was convicted after a trial at the same court of violent disorder. He was later sentenced to 18 months' imprisonment for the offence of violent disorder and to 18 years' imprisonment to be served consecutively for the offence of attempted murder.
2. The appellant now appeals against both convictions with leave granted by the full court. The cases are factually connected and have been listed to be heard together.
3. The background to the events in question was a long-running feud between two families or groups and associated individuals who lived in the same area of Burton and three incidents of violence which occurred in June and July 2015. The appellant's group included his brother Rehan Akhtar, other family members and Mohammed Zufeer. They will be referred to as group 1. The opposing group, referred to as group 2, included three brothers: Mohammed Aqil, Mohammed Aziz and Mohammed Shakil.
4. The first incident occurred on 12 June 2015, when a violent confrontation occurred between both groups on Shobnall Street in Burton. This is a street where both families lived about a hundred yards from each other.
5. The second incident occurred on 17 July 2015, when Shakil was attacked by two men, alleged to be the appellant and Rehan Akhtar, sustaining serious injuries. The appellant and Rehan Akhtar were arrested, interviewed and released on police bail on 20 July 2015.
6. The third incident occurred later that day, that is after the appellant and Rehan Akhtar had been released on bail. At about 9.56 pm that evening Aziz was struck from behind by a Ford Mondeo car which deliberately mounted the pavement in Shobnall Street and drove into him. Aziz sustained serious injuries, including a major trauma to his head, and he remains in a coma to this day.
7. The appellant was charged with offences relating to all three incidents: violent disorder, the first incident; grievous bodily harm, together with Rehan Akhtar, the second incident; and attempted murder, the third incident. Zufeer was charged with assisting an offender.
8. There were three trials in all, two relating to the second and third incidents, which took place before the trial in relation to the first incident. The first trial, trial 1, on the charges of attempted murder and grievous bodily harm, took place in January 2016 before His Honour Judge Chambers QC, the Honorary Recorder of Stafford. The jury were discharged for reasons that are not relevant.
9. The retrial, trial 2, took place in June 2016 before the same judge. At trial 2, where the appellant was represented by new counsel, Mr Evans QC (as he then was), the appellant was convicted of attempted murder, but both he and Rehan Akhtar were

acquitted of grievous bodily harm. At trial 2 Zufeer was convicted of assisting an offender.

10. Trial 3, which took place in July 2016, was the trial for violent disorder. It involved a number of accused from both groups, including the appellant and Aqil. They, and all but one of the other accused, were convicted of violent disorder.
11. The grounds of appeal concern (i) the introduction of hearsay evidence at trial 2, namely what Aziz said to Aqil in a short telephone call seconds before he was run down, when he named the appellant as one of those who were following him, and the judge's summing-up of that issue; (ii) a decision made by the appellant's then counsel, Mr Evans QC, not to require Aqil to give live evidence about that call at trial 2 - the raising of this issue has required a waiver of privilege by the appellant; (iii) fresh evidence about Aqil that emerged during the course of trial 3; and (iv) the conduct of Aqil at trial 3, in particular his repeated references during the course of his evidence to the condition of Aziz and incident 3.
12. In order to put these grounds into context it is necessary first to give an account of what took place at these various trials.
13. Trial 1, the second and third incidents. The telephone call to which we have just referred occurred about 30 seconds before Aziz was run down when Aziz, according to a witness statement Aqil made shortly after the incident, rang Aqil and said, "The bastards are behind me, Frank and Rehan, come outside". Aqil then stepped out of his house to find Aziz lying severely injured on the pavement. The Ford Mondeo had by then sped off. It is common ground that the appellant is called Frank and that the reference to Frank and Rehan was to the appellant and his brother.
14. The prosecution applied at trial 1 for permission to admit evidence of what Aziz had told Aqil as hearsay under section 116(1) of the Criminal Justice Act 2003 (PACE). That application was opposed.
15. The judge, in a careful ruling, decided it was admissible under the 2003 Act and did not fall to be excluded under section 78 of the Police and Criminal Evidence Act. He also ruled that the conversation was admissible as part of the *res gestae*.
16. The same issue arose at the retrial. The same stance was taken by the parties with the same result. The judge reiterated his reasons for acceding to the application and ruled that the hearsay was admissible both as *res gestae* and under section 116(2)(b) of the 2003 Act. He refused to exclude it under section 78 of PACE or under section 126 of the 2003 Act.
17. The prosecution's case at trial 2 was that the appellant was one of two people travelling in the Akhtar's family Ford Mondeo when it was deliberately driven into Aziz. As part of their case, the prosecution relied upon the hearsay evidence of what Aziz had said to his brother in the call. They conceded he was wrong to say Rehan was one of the two men because there was clear evidence that Rehan was in Birmingham at the relevant time.
18. Aqil was not called to give evidence. Instead, his statement was read as unchallenged hearsay evidence.

19. The prosecution also relied upon mobile telephone usage and vehicle number plate recognition evidence, which it was contended supported their case as to the placement of the appellant and the car at relevant times.
20. After the Ford Mondeo was driven from the scene it was found abandoned in a pub car park in Burton with its windscreen and number plates removed; signs, in other words, that someone had attempted to disguise its ownership.
21. There was evidence that the appellant had telephoned Zufeer just after 10.00 pm on the evening of the assault, a call which the prosecution said was for his assistance in relation to the aftermath, that is to dispose of the car and other evidence. There was a dispute at trial in relation to cell site evidence concerning this call and whether it was consistent with the call having been made from the appellant's home rather than from the point at which the Mondeo was to be seen, as supported by the ANPR evidence.
22. In his evidence, Zufeer admitted driving the appellant and another man away from the area, albeit he denied this was done for the purposes that the prosecution alleged.
23. The prosecution also relied on what the appellant said following his arrest, which took place in Bescot in the West Midlands on the evening of 21 July 2015. The appellant made no comment when cautioned but in the police car made unprompted comments about an unregistered mobile phone that he now possessed. He said, "I've only bought it today. I was hoping you wouldn't find me, give me a chance lads." When he was interviewed by the police he made no reply to all questions asked.
24. Against this background, the prosecution based its case on a number of strands of evidence. The ongoing feud between the appellant's family and the victim's family, which gave clear evidence of a motive to carry out the attack upon Aziz. This was reinforced by the sequence of events which preceded the attack, namely incidents 1 and 2 and the appellant's release on bail. The appellant's connection to the Ford Mondeo. The cell site evidence which placed the appellant in the area at the time of the attack, albeit it was also consistent with the appellant being at his home address. The timing of the telephone call between the appellant and Zufeer immediately after the offence, which tied the appellant to someone who had clearly been involved in disposing of evidence after the attack. In this connection there was strong forensic evidence linking Zufeer and the Ford Mondeo car. Phone evidence and ANPR material showed the movement of the appellant and his phone away from Burton in the direction of the West Midlands immediately after the attack. Other evidence included the appellant's use of his mobile phone viz his abandonment of it after the call to Zufeer and his replacement of it with an untraceable phone. In addition, there was evidence that the appellant had contacted a mobile vehicle recovery operative from Walsall from his new phone number the following day and the appellant's unprompted comments to the police after his arrest.
25. The appellant did not give evidence in his own defence but put the prosecution to proof. At trial 1, Aqil had given evidence but the appellant's counsel had withdrawn on the grounds of professional embarrassment before Aqil could be cross-examined, which had led to the trial being aborted. At trial 2, Mr Evans QC made a decision, with the agreement of the appellant, not to ask Aqil any questions. This decision was

based in part on the fact that Aziz had made a mistake by saying that Rehan Akhtar was one of the two men who were following him.

26. On behalf of the appellant, it was not argued before the jury that Aziz's evidence as to what he had been told by his brother was inaccurate. Instead it was said that the identification by Aziz was unreliable and that the telephone usage before the incident was consistent with the appellant being at home because he lived in Shobnall Street. The appellant further relied on the evidence of his co-accused Zufeer.
27. The following passages from the judge's summing-up are material:

"Next topic, identification evidence. The prosecution case on Count 1 depends on the identification evidence of the witness Mohammed Shakil. You should exercise caution when considering identification evidence. That is because a witness who is genuinely convinced of the correctness of his identification may be mistaken, even in cases of purported recognition. Therefore you should consider the circumstances in which the identification came to be made, how long was the suspect under observation, at what distance, in what light? Was the observation impeded in any way? Had the suspect seen the suspect before (*sic*) i.e. was this recognition? And if so, how often and in what circumstances? What period elapsed between the observation and the identification? Was there any material difference between the description given by the witness at the time and the suspect's actual appearance?"

The witness Mohammed Shakil stated that he's known the Defendants, Nadeem Akhtar and Rehan Akhtar, all his life and recognised them as his attackers. It was not challenged that he would be able to recognise them. It was put to him that he was lying in accusing them.

Next heading is hearsay evidence. And that relates in this case to what Mohammed Aziz has said to his brother, Mohammed Akil, you remember, on the telephone call immediately before he was struck by the Mondeo. So you heard evidence from Mohammed Akil as to what his brother, Mohammed Aziz, said to him by telephone immediately before he was struck by the Mondeo car on the Monday, 20th July. You've heard this evidence as an exception to the rule against the admissibility of hearsay because the maker of the statement said to have been made is too ill to attend Court, because it is said to have been a spontaneous reaction to a sudden - and because it is said to be a spontaneous reaction to a sudden incident. However, it's important that you approach this evidence with care. What the deceased - and obviously not the deceased, can you put a line through that and put 'Mohammed Aziz'. Sorry, that's my error.

What Mohammed Aziz is said to have stated is not disputed by the defence. The statement of Mohammed Akil was read to you

as unchallenged. At 21.55 hours and 30 seconds he received a telephone call from his brother in which his brother stated, 'The bastards are behind me, Frank and Rehan. Come outside.' The CCTV shows that he was struck by the Mondeo at 21.56 hours and 4 seconds. What is disputed is the reliability and accuracy of what Mohammed Aziz said. You should bear in mind that what Mohammed Aziz said has not been tested or explored on oath by cross-examination in the witness box. You should examine carefully the circumstances in which the statement was made. How reliable was the maker of the statement? That is, Mohammed Aziz. For example, what did he see? For how long and in what circumstances? You should have regard to the fact that on any view he was mistaken in asserting that Rehan Akhtar was present, because the prosecution accept that he was not in the car. You should scrutinise this evidence in the context of all of the evidence and give it such weight as you think fit."

28. We turn next to the violent disorder incident. On the evening of 12 June 2015, shortly before 8.30 pm, a violent confrontation took place between two groups of Asian males in Shobnall Street, Burton. The incident was observed by a number of eyewitnesses and part of it was captured on mobile phone video footage, which we have seen.
29. It was accepted by all defendants that a violent disorder had occurred, but save for one defendant who was acquitted the common issue was self-defence.
30. The incident began when a Skoda owned by Shakil was deliberately driven into a stationary Volkswagen Passat owned by the appellant. The Skoda was seen to swerve across the road before the impact. Witnesses observed the appellant and at least one other male exit from the Passat while at least three males exited from the Skoda. Others came from nearby houses. Within a short time two groups of males, each armed, were facing one another across the road, shouting and swearing. The owner of the Passat, said to be the appellant, was seen to argue and shout in a heated manner, before he went to the boot of his car and handed out at least three baseball bats to other Asian males. Another man from the Passat was seen to be holding a small rock hammer. An older male, said to be a brother of the appellant, came from a house holding a paving slab above his head before throwing it towards group 2 on the other side of the road.
31. Two residents captured part of the incident on their mobile phones. While not capturing the collision, the footage showed the middle and later part of the incident and the immediate aftermath. Nine males could be seen on the recording, some with weapons in their hands, engaged in a violence confrontation. Bricks were thrown by both groups across the road at each other. Pedestrians and traffic sought to pass safely. Onlookers were terrified and feared for their personal safety.
32. During the trial the mobile phone footage was played to the jury. It was not disputed by the appellant that he could be seen on the footage. The appellant was shown to have a baseball bat in his hand and threw an item across the road at the opposing group. In a further video recording the appellant was shown crossing the road

towards group 2 with a baseball bat and a hammer. The video recording also showed that the Skoda driven by Shakil contained weapons which were later held by him and Aqil during the incident of violent disorder.

33. The prosecution's case against the appellant was that he had engaged in a violent confrontation using or threatening unlawful violence, causing bystanders to fear for their safety. The prosecution contended that that appellant had not been acting in lawful self-defence. The evidence proved, said the prosecution, that the appellant had a weapon in each hand before charging across the road at group 2. The appellant could also be seen involved in the throwing of objects and missiles at group 2.
34. The appellant's case was that he had been under attack from the beginning of the incident and was seeking to lawfully defend himself and his family from the violence of the group.
35. Aqil was a co-accused in the violent disorder trial. His defence initially was to deny presence at the scene. The prosecution's case against Aqil was that he had been positively identified by a police officer, DC Marriot, who knew him well. Aqil denied having ever met the police officer. DC Marriot was recalled to give evidence and produced body camera footage of an occasion on 5 August 2015 when he had visited Aqil at his home address to discuss safeguarding issues given the escalating violence between the two groups. A transcript of the conversation recorded on video was later produced. This had not been disclosed before the trial.
36. Once Aqil appreciated the significance of this evidence he withdrew his instructions from his legal representatives, criticising their conduct of his defence. New solicitors and counsel were instructed and after a short adjournment trial 3 continued. Aqil changed his defence. He now accepted that he was present at the scene of the violent disorder but said that he, like his co-accused, acted in law self-defence.
37. Before Aqil was able to appoint new legal representatives it emerged that he had spoken to a police officer, DS Bloor, outside court and had threatened to attempt to derail the trial in order to secure a retrial, if he was required to represent himself,. He told the officer that he would ask the appellant in cross-examination about the attempted murder. By this time, of course, the attempted murder trial, trial 2, had reached a conclusion and the appellant had been convicted of that offence.
38. In the absence of the jury DS Bloor gave evidence and described what Aqil had said to him. The evidence was relied upon in later applications to discharge the jury.
39. The appellant gave evidence in his own defence and described his conduct as being in lawful self-defence. Faced with a group attack upon his car and his family he said that he had not acted unlawfully. Other defendants gave evidence and each described their violence as being lawful. Significantly so far as this appeal is concerned, Aqil was asked by his own counsel why he had made no comment to questions by the police and stated as follows:

"I would like the jury to listen to this part please. Give me that second. I refused to answer any questions when I was lifted at the police station because on 20 July somebody ran my brother over and left him for dead ... I was distressed. My

brother was fighting for his life in Stoke hospital ... He was gone under 13 times ... I had my brother. I was distressed, like I'm distressed here. I'm distressed in this dock. I am distressed ... My brother's still fighting for his life. He's never woke up. It's eleven and a half months. I've just got to tell the jury that ... I've got to tell everybody in this room. That's all I'm going to say."

40. As it emerged, that was not all he was going to say. At the end of the evidence-in-chief of Aqil but before cross-examination an application was made on behalf of the appellant for the jury to be discharged and for the indictment to be severed. It was submitted that Aqil had deliberately raised the subject of the attempted murder in order to prejudice the defence of the appellant and the members of group 1.
41. Reliance was also placed upon the evidence of DS Bloor, who described Aqil's threat to derail the trial. His Honour Judge Eades ruled against the application, deciding that the answer given by Aqil was his reason for not answering police questions in interview. Further, any prejudice that might have arisen could be dealt with by an appropriately robust direction to the jury.
42. The trial continued and Aqil was cross-examined. When he was asked about the change of his defence from alibi to self-defence he repeated his description of being distressed and the reason for it. In total he mentioned on seven occasions, expressly or obliquely, what had happened to his brother. We have read 35 pages of transcribed evidence, which give a full favour of his demeanour and his conduct.
43. For the most part, Aqil raised the subject to explain why he was distressed about giving evidence. He did not mention the appellant's name nor that of Rehan Akhtar as having caused the injuries to his brother. However, it was obvious that he blamed group 1 for the plight of his brother. When he was cross-examined on behalf of a co-accused, he said for example:

"I am a distressed geezer as you know, so don't make me say something that I will regret. It's not a game. My brother is in a coma. By the same people in this courtroom ... Is that a game? ... My brother's got five children. He's never woke up ..."

44. In the course of his cross-examination by a co-accused, Aqil was asked if he liked fighting the Akhtars. He replied:

"I've never fought ... I've never fought 'em in my whole life ... 20 years I've been out of trouble. I don't know where they've jumped on that one. Never. I've never fought with the Akhtars. That was the first incident that happened on Shobnall Street ... second incident ... before my brother being taken out on the street on the same side ... getting run over from behind with a tonne and a half metal ... yeah, sorry, that's the second incident, you're right ... Because one brother was taken out, yes, on the same street, by 30 people, yes. In a car. Ran down from

behind with a tonne and a half metal, and he never woke up.
That's right."

45. Though the transcript refers to "30 people", it is common ground, and indeed common sense, that what Aqil said was "some people".
46. Shakil mentioned the same incident during his cross-examination by the appellant's counsel. He was asked about the collision between the Skoda and the Passat as a glancing blow. He said:

" ... when you drive a car at someone, you -- you'll come out with the outcome what he's already done to my brother ... "

47. The application to discharge the jury and for severance of the indictment was renewed. It was argued on behalf of the appellant that Aqil had deliberately made repeated reference to the attempted murder incident so as to create such prejudice that a fair trial could not take place. The judge rejected the application. He said further references to the incident were referable to the distressed manner in which Aqil gave his evidence and his agitated state. The judge repeated he would provide a robust direction to the jury but that it was important in a trial between two groups charged with violent disorder that they were tried together before the same jury. In his direction to the jury, the judge expressly referred to the evidence of Aqil. He said:

"Evidence too has to be relevant to the issues that the jury is deciding here, the violent disorder on the day in June last year we're concerned with which is why, as Mr Henderson and others have explained, you have not heard about wider issues between the two families, because it is not relevant to the issue of what actually happened on the day. In this context I want to refer to the evidence of Mohammed Aqil who told you on a number of occasions that his brother was in a coma, seriously ill, and it was clear, was it not, that he was blaming the Aqil [this is what the transcript says, though again it is obvious that the judge meant to refer to the Akhtar] family for that fact? That assertion is not relevant to this issue of violent disorder as such and therefore in terms of the allegation you must put it entirely to one side. You're not here to resolve what may or may not have happened to his brother, who and who is not to blame. This is not a trial over what happened to his brother, it's a trial concerning the violent disorder so it's a separate issue which you should not look into.

It does though have two potential relevances which is why you have heard about it so bear this in mind. It is particularly relevant to why he went 'no comment' in his police interview, because he says that was why he said nothing to the police. Whether it be true or false may be something you will have to resolve but potentially it has a relevance to that.

Secondly, when he gave his evidence from the witness box he did so, you may think, in a very emotional and excitable

fashion and he gave to you as his explanation for that state that fact his brother was in a coma and he blamed the Akhtars and so on, so again it is potentially relevant to that single issue, which again is why you heard about it but please remember that this evidence is only relevant, potentially relevant, to those two issues and nothing else and you must not in any shape or form hold those allegations he makes against the Akhtars against them. OK?"

48. The grounds of appeal in respect of the attempted murder conviction are as follows:
- i) The trial judge was wrong to admit hearsay evidence naming the appellant as one of the assailants.
 - ii) In the alternative, the judge's directions on the hearsay identification were so inadequate as to render the conviction unsafe.
 - iii) Trial counsel at trial 2 was at fault in not requiring that Aqil attend court to be cross-examined.
 - iv) Fresh evidence that is now available to the defence should be admitted and may affect the safety of the attempted murder conviction. This fresh evidence is based upon material that was not disclosed, comprising the discussion between Aqil and DC Marriot in the welfare visit on 5 July 2015.
 - v) Further, the evidence given by Aqil in the violent disorder trial may cast serious doubt on his truthfulness as a witness.
49. The appellant was granted leave in appeal by the full court on the first and second grounds. The appellant requires leave from this court to argue the remaining grounds and to admit the fresh evidence relied on.
50. The single ground of appeal against conviction for the violent disorder for which leave was is that the judge should have discharged the jury on the basis of the deliberate and repeated introduction of prejudicial material against the appellant which rendered the conviction unsafe.
51. On behalf of the appellant, Mr Bennathan QC submits that the hearsay evidence should not have been admitted before the jury. It was, in short, based upon an identification made by Aziz that left the jury ill equipped to assess its strength, in relation to identification of the occupants of the car at night, in a fast-moving incident in a case, that required an identification direction pursuant to the guidance given in R v Turnbull [1977] 1 QB 2234 in addition to a hearsay direction. In such circumstances, even if a full Turnbull direction had been given, which it was not, the jury had no material with which to assess the quality of the identification so as to judge its reliability. Its weakness was underscored by the admitted misidentification of Rehan Akhtar. On the facts the judge should have considered this was one of those cases where identification was made in circumstances of particular difficulty such that the possibility of error could not be excluded. He should in those circumstances have declined to admit the evidence whether under the *res gestae* doctrine or via the

section 116 gateway (see the observation of Lord Ackner in R v Andrews (1987) AC 281 at pages 300 to 301).

52. As to the alternative ground, the central point is that given the problematic nature of the evidence there was no direction that could have been given to properly and safely address it.
53. We turn next to the grounds for which leave is required. Mr Bennathan QC dealt very briefly with the decision by Mr Evans QC not to require Aqil's live presence at trial 2. In the light of the recent observations made Mr Evans QC after privilege was waived it is acknowledged this was a conscious and considered decision made with the benefit of the knowledge of Aqil's demeanour and what he had said in chief at trial 1. Moreover, it was a decision with which the appellant agreed. Mr Bennathan QC submits nonetheless there was no good reason not to challenge the account of Aqil, albeit he accepts this ground only has "traction", as he describes it, if the court feels there was no sensible basis for that view.
54. This ground has, however, a connection with the evidence that emerged from the footage taken of the welfare visit on 15 July 2015. In this connection, Mr Bennathan QC draws attention to certain parts of what Aqil said, of which there is a transcript. He accepts the failure to disclose the footage at the time of trial 1 was inadvertent (no-one knew the footage existed). But he submits if this material had been in the hands of Mr Evans QC it may have affected the tactical decision he made at trial 2 that Aqil's witness statement, including his hearsay account of the telephone conversation with his brother, could be read. What the transcript shows, he submits, as proved by Aqil's subsequent conduct at trial 3, was that Aqil was a dishonest and a manipulative individual who was prepared to manipulate the trial process for his own purposes.
55. These points all converge for the purposes of the violent disorder conviction at trial 3. There it is said the cumulative effect of Aqil's references to what had occurred in incident 1 were so prejudicial that the judge should have discharged the jury and directed severance of the indictment.
56. Moreover, the manipulative and dishonest conduct of Aqil is such that this fact should be received as fresh evidence bearing on the safety of the appellant's conviction at trial 2.
57. In his hearsay ruling, the judge correctly applied the stepped approach identified in R v Riat [2013] 1 Cr App R 2. The two gateways for admissibility were as part of the res gestae preserved by section 118 of the 2003 Act and under section 116(2)(b) of the 2003 Act, namely that the witness was unfit because of bodily or mental condition. There may be circumstances where hearsay evidence can be admitted as part of the res gestae even if it would not otherwise be admissible under the other statutory gateways. That much is clear from the preservation of the exception in the statute.
58. In this case, however, it seems to us there was no discernible or material distinction between the gateways on the facts. Either the evidence was properly admissible on the judge's assessment of it or it was not.

59. The principal point made by the appellant is that the quality of the identification evidence was inherently poor either because the circumstances of the identification were unclear in the absence of evidence, for example if or how well Aziz knew the appellant, or the conditions under which the identification was made or because the evidence being crucial to the prosecution's case was inherently in that a mistake had been made in the identification of one of the men in the Ford Mondeo. The appellant's submissions cut across both the admission of the hearsay evidence and the directions to the jury.
60. There is no doubt that the judge had at the forefront of his mind the place that the hearsay had in relation to the evidence as a whole. The appellant had been arrested and accused of a serious offence of violence against the brother of Aziz. The appellant had been released from police custody at lunchtime on 20 July, the day of the attempted murder on Aziz. Shortly before 10.00 pm that evening, the Ford Mondeo belonging to Rehan Akhtar was seen with two occupants inside and deliberately drove at Aziz. Moments before the attack Aziz had telephoned Aqil and described the appellant and Rehan Akhtar as being in the car behind him. Moments after the attack the appellant telephoned Zufeer. The Ford Mondeo was traced through CCTV and ANPR evidence to where it was found. The windscreen and registration plates had been removed and attempts made to dispose of evidence. The evidence of motive in the ongoing feud between the appellant's family and the victim's family, reinforced by the arrest of the appellant on 20 July, was relevant to the case against him. The appellant changed his mobile phone shortly after the attack and when he was arrested made unsolicited comments to the police which were potentially relevant. Taking this evidence in the round meant that the hearsay evidence was significant but not the only evidence against the appellant. The judge described the evidence as being "compelling" both as to motive and as to participation.
61. We have considered the judge's careful reasons for permitting the hearsay evidence to go before the jury and we are not persuaded that his reasons were wrong.
62. Equally we are satisfied that the refusal to exclude the hearsay evidence under section 78 of PACE and section 122(6) of the CJA 2003 cannot be impugned. In this connection it is worth reiterating that once the criterion for admissibility under section 116(2)(b) was satisfied, as it plainly was here because Aziz, was unfit to be a witness because of his bodily or mental condition, the evidence was admissible unless the judge excluded it in the exercise of his discretion. That exercise of that discretion is unchallengeable unless it is Wednesbury unreasonable; see R v Gian & Mohd-Yusoff [2009] EWCA Crim 2553 at paragraph 48. In this connection as it happened, it served to assist the appellant's case to demonstrate that the hearsay evidence had wrongly identified one of the two men in the Mondeo.
63. Turning at this stage, as to what emerged at trial, Zufeer (who on the jury's verdict convicted of assisting the appellant) gave evidence that he received a phone call from the appellant, drove to a meeting point to see him and drove him towards Derby. Another man was in the car whom he did not know. The evidence of this meeting shortly after the attack placed these two men together at a critical time.

64. The appellant submits that the direction given to the jury in relation to the hearsay evidence was inadequate. The main thrust of this submission is that the weaknesses of the identification were not sufficiently identified to the jury.
65. However, where identification or recognition evidence is in a hearsay statement, it is often the case that the circumstances of the actual identification are not clear and inevitably cannot be explored in a way that it could if the maker of the statement was present in court and the issues thereby identified so they could be specifically picked out in the summing-up.
66. That on its own does not lead, however, to the necessary exclusion of the evidence or mean that the issues cannot be properly and safely left to the jury to consider in the context of the rest of the evidence in the case, including matters of which the jury would be and were in this case well aware, for example that the car was driven at speed at Aziz from behind.
67. Equally it was conceded by the prosecution that the identification of one of the men was a mistake. This most important weakness was the one that the judge specifically identified in the course of his summing-up.
68. We turn the next of the grounds for which renewed application has been made before us. It is plain that the decision not to cross-examine Aqil was a tactical one made by the appellant. He seeks to argue now that there were no good reasons not to have Aqil cross-examined before the jury. However, the response of Mr Evan's QC under the McCook direction to the criticism of him explains that the appellant was given full and clear advice, which he accepted. The reasons that were given and which the appellant accepted was that the witness was likely to be dangerous and that he might give unpredictable responses and prejudicial answers which were not disclosed on the face of his police statement.
69. That was, in our judgment, a well-reasoned and understandable approach. Aqil might well have caused more damage in cross-examination than could have been achieved in testing his evidence. This had to be balanced against, the fact, that his evidence sought only to repeat what he had been told by Aziz with its mistaken identification of Rehan Akhtar.
70. In the circumstances, we are satisfied that the decision not to cross-examine Aqil was a rational one. The point has no traction, in our view. The decision was properly made and it is not open to the appellant to revisit the decision he made on proper advice at trial.
71. In considering the applications to admit fresh evidence, we obviously have in mind the criteria in section 23(2) of the Criminal Appeal Act 1968. Plainly there is a reasonable explanation for the failure to adduce the evidence at trial. The welfare visit evidence was not disclosed to the defence and the respondent to this appeal now concedes that had it been in the prosecution's hands at the material time it should have been. Of course as a matter of chronology the violent disorder trial did not take place until after the appellant's conviction for attempted murder.
72. Looking at the material itself, the transcript of the welfare visit disclosed no more than further material in addition to that which was already in existence, which

demonstrated the ongoing feud between the two groups. This was something which the jury at trial 2 and trial 3 were well aware. There is some mention made of other people who might have had a grievance against Aqil's family. Nonetheless, it was Rehan Akhtar's car that was used in the attack and it is not necessary to recite the other "associate" evidence to which we have referred.

73. The conduct of Aqil in the violent disorder trial related to the conduct of his defence his explanation for being distressed in the course of his cross-examination. We have considered the passages of evidence on which the appellant relies. It is unfortunately commonplace that witnesses in a trial subsequently conduct themselves in ways that cast their behaviour in an unfavourable light. There may be cases, although we apprehend they would be rare, where such behaviour is directly relevant to events or their evidence given at an earlier trial, but we are not convinced this is such a case.
74. Whether this evidence would have been admissible or not, we are not satisfied it affords any ground for allowing the appeal. It does not begin to undermine the safety of the attempted murder conviction when the evidence against the appellant is taken as a whole. At its highest, it provides further evidence of what was already obvious and before the jury, namely the fact of an ongoing feud between the two groups.
75. The violent disorder trial involved both sides of the dispute: group 1 and group 2. It was inevitable therefore that evidence that one side wished to rely upon would be prejudicial to the other. Against this background, Aqil as a co-accused, was entitled to give evidence before the jury of the circumstances in which he had refused to answer police questions in interview. This led to his description of being distressed after an attack upon his brother. The first ruling made by the judge to refuse the application to discharge the jury was correct. The evidence was admissible in respect of Aqil's defence and, subject to a direction to the jury, it was properly admitted.
76. The evidence of DS Bloor emerged at a time when Aqil had dismissed his legal representatives and wanted to change his defence. He faced the possibility of being unrepresented. At that stage Aqil appeared to be threatening to derail the trial by deliberately naming the appellant as being guilty of attempted murder rather than be unrepresented for the remainder of the trial.
77. However, Aqil was granted further representation and did not name the appellant in what he said in front of the jury despite all else that he said out of court. Clearly there were oblique references to incident 1 but none specifically against the appellant. When Shakil referred to the issue, he did not specify the appellant.
78. In the circumstances, the judge was required to direct the jury about what had been said. The judge directed the jury that:

"This is not a trial over what happened to his brother, it's a trial concerning the violent disorder so it's a separate issue which you should not look into."
79. Later in the same direction, after identifying the two issues of relevance, the judge stated:

" ... this evidence is only relevant, potentially relevant, to those two issues and nothing else and you must not in any shape or form hold these allegations he makes against the Akhtars against them."

80. In our judgment, this was an appropriate way of dealing with the evidence of Aqil in the context of a multi-handed violent disorder trial. It was a clear and robust direction which cannot be faulted. The refusal to discharge the jury did not lead to an unfair trial or an unsafe verdict.
81. We have examined the interconnected points raised by the grounds of appeal, those grounds for which permission is sought and the applications made to receive fresh evidence. Having done so, we are satisfied the appellant's convictions are both safe. We refuse the application for permission to appeal in relation to the further grounds advanced for which permission was not given by the full court and refuse the applications to receive fresh evidence.
82. This appeal is accordingly dismissed.