

NCN: [2019] EWCA (Crim) 2018
No: 201900153 C5, 201900233 C5 & 201900852 C5
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 5 November 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE WARBY

HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the CACD)

R E G I N A

v

HAFEDH RASHID
KS
KEVIN TSHOMA

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London EC4A 1JS Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Ms K Walton appeared on behalf of **Rashid**
Mr M Pardoe appeared on behalf of **KS**
Mr S Smith appeared on behalf of **Tshoma**
Mr R Kent appeared on behalf of the **Crown**

J U D G M E N T

LORD JUSTICE SIMON:

1. On 11 and 13 December 2018, following a trial in the Crown Court at Snaresbrook before Her Honour Judge Hughes QC and a jury, the appellants were convicted on a number of counts on an indictment: counts 1 and 2, conspiracy to possess a firearm with intent to endanger life, contrary to section 1(1) of the Criminal Law Act 1977; count 5, possession of ammunition without a certificate, contrary to section 1(1)(b) of the Firearms Act 1968; count 6, possession of an offensive weapon in a public place, contrary to section 1(1) of the Prevention of Crime Act 1968 and count 7, a second charge of possession of an offensive weapon in a public place.

2. On 14 June 2009, Hafedh Rashid, aged 23, and Kevin Tshoma, aged 28, were sentenced to an overall term of 13 years' imprisonment. KS, now aged 17, has not yet been sentenced. They appeal against conviction with the leave of the single judge, in the case of Rashid limited to a single ground. Ms Karen Walton appears for Rashid, Mr Simon Smith appears for Tshoma, Mr Matthew Pardoe appears for KS and Mr Rupert Kent appears for the prosecution.

The prosecution case

3. During the afternoon of Monday 21 May 2018, police officers were observing a secure underground car park attached to Britannia Court flats in East London near the home address of Tshoma and KS. Officers saw an Audi arriving, driven by Tshoma with Rashid as a passenger. They subsequently observed their movements, particularly in relation to a VW Golf which was in the secure car park and which was registered to Tshoma.

4. Tshoma and Rashid were both separately seen opening the Golf and leaning into it. Tshoma then went to his family home address before returning to the car park a short time later. KS was standing nearby and, on the prosecution case, was acting as a look out. After about an hour-and-a-quarter the three of them went off in the Audi with a fourth man and officers gained entry to the Golf in the secure car park. It was clear that it had not been moved for some time. Inside they found a loaded double-barrelled sawn-off shotgun, a loaded revolver and further ammunition for these firearms. A fired bullet case was in the revolver. These discoveries gave rise to counts 1, 2 and 5. It was the prosecution case that the appellants were members of a gang and were using the vehicle as a safe place for their weapons in order to use them as and when they needed them for gang-related activities. Although the shotgun was later found not to be workable in its current state, the handgun was in full working order.
5. The Golf was taken away for further examination which resulted in the discovery of a box containing a machete, count 6. KS's fingerprints were on the box. Tshoma's DNA was found on the mouth of a drinks bottle which was inside the car.
6. Later that day the Audi was stopped by officers and the appellants were arrested on suspicion of involvement in firearms offences. The fourth man was not charged. Among items seized from the Audi was a baseball bat (count 7) and gloves in the foot well of the passenger seat where Rashid had been sitting tested, which tested positive for gunshot residue.
7. The prosecution case was that Rashid and Tshoma were senior members of an East London

gang called The Beckton Boys or ACG ('Anyone Can Go'), and that KS was a junior member. The prosecution argued that there could be no reason for them to possess firearms and ammunition other than with the intention of endangering life.

8. The defence case on behalf of all appellants was to deny being members of this or any gang and having any knowledge or possession of the firearms and the machete found in the Golf. In respect of the baseball bat, Tshoma accepted possession of it, but maintained that he had it for a legitimate reason and not for use as an offensive weapon.

The judge's ruling on gang-related evidence on 15 November 2018

9. Before opening the case, the prosecution applied for leave to adduce evidence in relation to gang membership: specifically that the appellants were members of the Beckton Boys or ACG gang which was involved in acts of tit-for-tat violence with other gangs. On 15 November the judge gave her ruling. She noted that Rashid and KS had served a defence statement in which each denied being a member of the Beckton Boys, the ACG gang or a gang associated with the number 6, (the Beckton area having the postcode E6), or with any other gang. The judge noted that the application was made under section 98 and section 101(1)(d) and (3) of the Criminal Justice Act 2003. She also noted a number of authorities to which she had been referred: *Nathan Elliott* [2010], *Stewart* [2016], *Sahid Sule* [2012], *Lewis and others* [2014] and *Iarani and others* [2016] - see further below. In *Lewis and others*, she noted that evidence of gang affiliation was held to be admissible under section 98 and section 101(1)(d) of the 2003 Act.
10. She identified five categories of evidence on which she had been asked to rule. First, the

evidence of PC Saban, an experienced officer who had dealt exclusively with Newham gangs for the previous three-and-a-half years. Second, the admissibility of video evidence and PC Saban's ability to interpret the lyrics of the music in the videos. Third, the admissibility of evidence found on KS's mobile phone. Fourth, probe evidence. Fifth, evidence obtained by the police when Tshoma and Rashid had been arrested, interviewed and charged, and were being held in cells in a police station.

11. The judge, who heard PC Saban give evidence on a *voir dire*, concluded that "he has all the qualifications of an expert in the field of gangs. He studied the language used, offered interpretations; and it was open to counsel to challenge his conclusions." In the judge's view there was no doubt that the evidence of alleged gang membership fell within section 98 and section 101(1)(d) being relevant to an important issue between the defence and prosecution. PC Saban's evidence on the *voir dire* was clear and his statement of 23 October 2018 dealt succinctly with what he knew about gangs and what video material he relied on in support of his evidence that the defendants were members of the Beckton Boys gang. The judge referred to a further statement of 7 November and the officers' acknowledgement that, although he knew Rashid and KS, he had never met Tshoma, but that he was readily identifiable in two videos, numbered 5 and 6.
12. The judge noted that no counsel had cross-examined the police officer on the *voir dire*, but that Mr Smith on behalf of Tshoma had objected in the course of legal argument to his interpretation of lyrics. The judge ruled that such points could be dealt with in cross-examination in the trial. She also noted the objection from Ms Walton on behalf of Rashid that it was sufficient for the jury to know how a gang performed in a criminal

context and that the videos added nothing, particularly because there was a risk of Rashid being confused with his twin brother. The judge concluded:

I have no hesitation in ruling that PC Saban's evidence is admissible, and he may comment on the lyrics, as he has already done. He can be cross-examined by all defence counsel if it is alleged he has not correctly interpreted something. It will be a matter for the jury to make what they will of the evidence, but in my judgment it is capable of going to show, if accepted, that the defendants are members of or associated with gangs which exhibited violence or hostility and links with firearms...

Clearly, if accepted, the evidence will be adverse to the defendants, but the jury can and must be properly directed with regard to its nature and the weight they place on it, and in my judgment it is not so prejudicial that it must be excluded.

13. She made a separate ruling admitting a video which was said to include KS holding a gun. The judge rejected the defence submission that the evidence ought to be excluded under section 78 of the Police and Criminal Evidence Act 1984.

The prosecution case

14. The prosecution relied on a number of strands of evidence. Evidence that the appellants were affiliated to or members of the Beckton Boys or the ACG Gang which had been in dispute with other gangs in the East London area; and of numerous incidents of tit-for-tat violence. Their gang membership was relevant to the issue of intention. Background evidence relating to the nature of this gang and its violent dispute with other gangs which was relevant to the motive or intention in relation to the possession of arms. Evidence concerning gang affiliation from police officers with expertise in this area, including PC Saban. These officers had analysed videos on the internet, and videos and stills found on the mobile phone of KS, as well as covertly recorded conversation involving KS and

Rashid through a probe placed on a vehicle said to belong to a senior ACG member, Isaac Donkah, who was an elder in the gang. Rashid was also said to be an elder and KS was known as a 'younger', someone sponsored by Donkah. The probe evidence showed that KS would willingly carry out violent tasks on behalf of others. The prosecution relied on PC Saban's evidence as to gangs in general and the ACG gang in particular and his knowledge of and dealing with the appellants to the extent that he had.

15. DC Harrison was part of the Gang Unit in Newham and had met KS several times. He identified him in a video in which he was said to be holding a firearm. DC Moody gave evidence about local gang culture and the ACG gang in particular, and offered his interpretation of the videos as well as conversations captured by the probe in the car.
16. Whilst Rashid and Tshoma were in custody there were recordings taken of discussions including between themselves from their respective cells. Rashid was heard saying that one of those arrested would have to take the blame for the firearms and mentioned certain details about the shotgun ("the dotty") that would only be known by someone who had knowledge of the weapon. The prosecution relied on evidence that Tshoma had been stopped driving the Golf on previous occasions and that Rashid and KS had been seen with Donkah on 4 April 2018 and again in May.
17. The prosecution also relied on material found on KS's phone in which KS described himself as "running Newham". He was seen in three music videos. In one image he was holding a firearm and in others he was holding other weapons. He was making references associated with gang affiliation and violence, and he could be seen making the Beckton

Boys ACG sign, number 6.

The defence case

18. All appellants gave no comment interviews to the police. KS handed in a prepared statement. The jury were directed that they were entitled to draw an adverse inference from the failure of Rashid and Tshoma to mention facts in interview which they relied on in their evidence under section 34 of the Criminal Justice and Public Order Act 1984; and in relation to KS the jury were directed that they were entitled to draw an inference from his decision not to give evidence, section 35.

19. Rashid and Tshoma gave evidence in their own defence. Tshoma gave evidence that he was not a gang member and had no fixed address. He knew Rashid as his brother's friend. He knew KS because he lived in Britannia Court. He knew Isaac Donkah through the music business. He had an innocent explanation for his movements on 21 May 2018. He went to Britannia Court to visit his aunt and cousins. He drove there in his Audi, which was a present from his cousin who was a footballer. He was with Rashid and another friend. KS let them into the underground car park. The VW Golf was his dead brother's car and was no longer in working order. It was due to be scrapped. He was seen going over to it because he noticed that the door was open and so he looked inside. The tow truck was due to come later that day to take it away. He denied knowing anything about guns or weapons in the car. He had then talked with some friends. He was seen leaving with a baseball bat because he needed it for a music video. He was not intending to use it in violence. He enjoyed making music and videos, but denied that this material was gang related. It was just a performance.

20. Rashid gave evidence that he was not a gang member. He lived with his mother and brothers, one of whom was his identical twin. He was studying for a university degree. He also worked in music and video production, together Donkah. As to the probe recording with Donkah, he did not recall the specific conversations but Donkah liked to talk about guns and such, and he would just “go with the flow”. It did not mean that he was involved with guns, gangs or violence. He had known Tshoma for a couple of years and had met KS through Donkah.
21. On 21 May he had accompanied Tshoma to Britannia Court so that Tshoma could change his clothes. They were then going to get something to eat. He denied knowing anything about guns in the Golf. KS had given them entry to the secure car park. Tshoma had asked him to get a bag out of the Golf, which he did. The car door was not locked. He thought the bag contained spanners. He put it in the Audi. He was on the phone and they waited for the tow truck while Tshoma went inside to get changed. He did not know about any guns or ammunition or weapons, and there was no discussion about them. They then got in the Audi and drove to a restaurant in Edmonton.
22. So far as the cell conversation was concerned, he was simply in shock at the allegation that he was in possession of guns. It was put to him that the probe caught him talking about going on a "ride out", meaning going into another gang's territory for violence. He denied having been on any 'ride out', being involved in gang-related violence, having any role in an ACG or talking on the probe about new members joining the gang. It was just a matter of appeasing Donkah. Rashid himself was nothing more than a music manager and had appeared in some of the videos. It was put to him and denied that the cell conversation

showed that he had a close knowledge of the firearms in the case.

23. As noted, KS did not give evidence and relied upon the contents of his prepared statement. He said he had no knowledge of the firearms.

Issue for the jury in respect of the appellant they were considering

24. On counts 1 and 2, was the defendant party to an agreement to possess the firearm? Did he have the requisite intent? So far as intent was concerned the jury was directed to look at all the circumstances to decide the issue. On count 5, did the appellant know that the ammunition, four cartridges from the revolver, found in the door of the Golf was there and was it in his possession or control, in other words readily available for him to use? On count 6, did he know that the machete found in the Golf was there and was it readily available for him to use in violence? Was it an offensive weapon? Count 7, did he know that the baseball bat found in the Audi was there? Was it readily available for him to use in violence? Was it an offensive weapon?

The summing-up

25. The judge began her summing-up on 6 December. It appears she declined an invitation to give a split summing-up, that is to say summing-up the law before closing speeches. She also declined to give written directions on the law; and a route to verdict was not provided until the conclusion of the summing-up, in circumstances to which we will come.
26. At page 7H she gave this direction in relation to the initial counts:

Did at least two people, including one or more of the defendants, agree to

possess a firearm? If you cannot find any agreement, they are not guilty of conspiracy. But if they did, you have to go on to consider why were they doing it, what was the intention? Did they intend to endanger life or enable another, so that is somebody else has access to this, to also cause harm to someone, endanger life.

With regard to intention, you must be sure in the case of the defendant whose case you are considering, that when the defendant possessed the gun, he intended to endanger life. You decide intent by considering in the case of each defendant, the evidence of what he did or did not do and by what he said or did not say.

You should look at his actions throughout the period covered by the evidence, including the observation period until arrest and you may take into account all the evidence about each defendant in turn. His role, if you find he had one, may shed light on his intentions.

27. She directed the jury about how they should approach the expert evidence, including police officers, giving evidence about gangs. She told the jury that the evidence of experts was not unusual and was called to assist them in relation to matters that might be outside their own expertise, (gangs and identification), that it should be seen as part of the evidence and they should have regard to the totality of the evidence. The further direction on expert evidence at page 26B to G was in conventional terms.
28. The judge reminded the jury that the prosecution alleged that the three defendants were members of a gang. She continued:

P.C. Saban gave evidence about the Beckton Boys in E6 or ACG, and his knowledge of their activities. He believed all three defendants were, in his opinion, a member of the gang. He spoke of the clothing worn by gang members, how they dressed and act. He accepted that they were involved in making music videos but said in his view these were not simply made for music lovers to enjoy, but because of the nature of the lyrics and the gestures used, in his view they were made to incite violence.

All three defendants deny being members of Beckton Boys ACG or Young ACG. You must consider the evidence and be sure they are gang members before you rely on that evidence. If you are not sure they are gang members you must disregard the evidence. However, the fact they may be gang members does not necessarily mean they are violent, or they have committed the offences with which they are charged. If you conclude they are gang members you can use this to assist you with the question of their intent.

You should not be prejudiced against the defendant if you conclude he is a member of the gang and it is a matter for you to decide what weight you give the evidence and how it assists you in the case of each defendant.

29. The judge then summarised the evidence of PC Saban at pages 31C to 43E of the summing-up.

30. So far as material to this appeal, two aspects of this evidence give rise to challenge. First, reliance on one of four videos with the title "Only time will tell". The lyrics refer to the killing of a 14-year-old boy, Corey Davis Junior, in terms that would leave little doubt that the participants in the video, which included Rashid, Donkah and KS celebrated his shooting. Second, the prosecution relied on a video clip I/1462 taken from KS's phone. PC Saban identified the person holding a gun as KS. This evidence was also supplemented by other police officers, as we have indicated.

31. The judge gave this direction about identification at 43E:

Now members of the jury, I need to warn you, at this stage, because I am about to come to other evidence also about identification. But you have to be very careful when you consider identification evidence. People can say they are certain it is somebody, but there have been misidentifications in the past in cases and you must be very careful when you are considering identification and coming to a conclusion about that evidence.

32. She went on to summarise the evidence of the other police officers who had identified KS

as the person in the video clip and whose evidence was challenged by Mr Pardoe on behalf of KS. Towards the end of the summing-up (at page 102E of the transcript), Mr Pardoe invited the judge to direct the jury more fully on the identification of his client by reference to the guidance on identification evidence in the Crown Court Compendium published by the Judicial College. The judge considered that the point had been sufficiently covered in the light of the nature of the evidence.

Grounds of appeal

33. Each of the appellants challenges the safety of the conviction on the basis of the judge's ruling and summing-up. The first ground of appeal is that having admitted the evidence of PC Saban and reminded the jury of his evidence, the judge failed properly to direct them as to the uses to which it could be put. This is advanced by Mr Smith on behalf of Tshoma, Ms Walton on behalf of Rashid and is supported to some extent by Mr Pardoe. Mr Smith challenges the initial ruling on the basis that PC Saban's evidence was based "only on an interpretation of music videos, knowledge gained from social media and discussions with people who were not identified." In her perfected grounds, Ms Walton drew attention to the failure of the judge to engage in any discussion about the direction she was going to give on this or any other legal direction, and did not provide any written directions to the jury.

34. It was crucial that if PC Saban's evidence about gangs and associations were to go before the jury, that they should be directed as to the use to which it could be put. The judge herself had recognised the importance of properly directing the jury on this issue, yet when it came to the summing-up she did no more than give a direction that they had to be sure

that they were gang members. If they were sure of this, they could use it to assist them on the question of intent and they should not be prejudiced against the defendant if they concluded that he was a member of a gang but they could decide what weight to give it.

Our conclusion on gang-related evidence

35. This court has, on a number of occasions, addressed the issue of the admissibility of "gang evidence" under section 98 and section 101(1)(d) and (3) of the Criminal Justice Act 2003.
36. First, in our view there can be no legitimate complaint about the judge's ruling admitting the evidence of gang association through the means of PC Saban. No point was taken that he was not qualified to give opinion evidence on the matters about which he gave evidence. The evidence came within the same ambit of evidence considered in *Smith* [2009] 1 Cr.App.R 36, *Elliott* [2010] EWCA Crim. 2378 and *Lewis* [2014] EWCA Crim 48 at paragraph 89. If there was an issue as to the admissibility of the officer's evidence, on the basis that he did not have the requisite knowledge or experience, that was a matter that could be raised on the *voir dire*. It is clear from the ruling that no such point was taken and we can understand why.
37. Second, in her ruling the judge identified the potential relevance of the bad character evidence. It was capable of showing that the defendants were "members or associated with gangs which exhibited violence or hostility and links with firearms". It is clear from *Lewis* (paragraph 76 to 102) that bad character evidence is admissible to prove association between defendants and association with a gang, as well as what is sometimes described as "pro-firearm" and "anti-police" tendencies. Such evidence is admissible

under section 101(1)(d) as being "relevant to an important issue between the defendant and the prosecution".

38. Third, the judge rightly accepted that the admission of the evidence was adverse to the defendants, and recognised that the jury needed to be properly directed on this issue.
39. Fourth, on counts 1 and 2 the central issue for the jury was whether they were sure that each defendant was party to a conspiracy to possess firearms or whether their presence in the vicinity of the car in which the weapons were found was or might be coincidental. In the present case if the jury were sure that the defendants were gang members the evidence was relevant in two ways that run together. First, it rebutted innocent presence and association with the Golf vehicle in which the weapons were found. Second, it went to the question of whether the appellants, either personally or jointly, were people who had an interest in, links to or access to firearms with the requisite intent.
40. Fifth, the direction, although it covered most of the material points, did not focus on the relevance of the gang evidence and should have directed the jury that they should not convict on this evidence alone.
41. Sixth, we are clear that this was a case where the judge should have taken time to discuss draft jury directions in advance of the summing-up, not least because she had recognised the need for a direction. If a judge declines to follow this course, he or she is rejecting potential assistance from an obvious source, trial counsel. We note that the evidence had concluded on 28 November and the judge did not begin her summing-up until 6 December.

42. Seventh, we are also clear that in this case it would have been sensible for the directions of law to have been given in advance of final speeches, so that the prosecution and defence could address the jury in the light of those directions.
43. Eighth, it was also a case that required written directions on the law. These should have been agreed if possible. There should also have been a route to verdict for the jury's assistance at the start of the summing-up, see Crim PD 26K.8 to 12. These matters are helpfully covered in the relevant part of the Crown Court Compendium at paragraph 1 to 9.
44. Ninth, in the present case the judge failed to produce any written directions. Such an omission will always bring with it the risk, at the very least, that errors may have to be corrected and a revised direction given at an inconvenient stage of the summing-up, as occurred here. It may also lead to an over defensive response to a submission that a direction should have been fuller or different.
45. Tenth, there will be some cases where a judge is satisfied that a direction is sound and sufficient, notwithstanding a point taken by the defence. However if a prosecutor thinks that a particular direction should be given he should say so rather than simply leaving it to the judge.
46. Eleventh, although a route to verdict was eventually provided, it was at the last stage of the summing-up, and was generated and drafted by counsel. This was, in our view, an unsatisfactory state of affairs.

47. Before coming to our conclusion on the safety of the convictions, we must deal with various other matters of complaint raised by Tshoma and KS.

Tshoma

48. First there is a complaint about the insubstantial nature of the evidence (participation in music videos and knowledge gleaned from social media as well as from unrevealed sources). In relation to evidence of this sort, the authorities are clear that a police officer may present expert evidence "of the practices, mores and association of gangs" see the Privy Council decision in *Myers v Queen* [2015] UKSC 40, [2016] AC 314 at paragraphs 57-61. Police officers are entitled to draw upon the body of expertise in this field, including the use of unidentified sources (see also *Lewis* at paragraphs 94 to 95).
49. In any event, PC Saban's opinion evidence that Tshoma was a gang member was to a large extent based on Tshoma's participation on two music videos, in one of which he could be seen with Issac Donkah and Rashid, and in one of which he could be seen brandishing a firearm, identifiable notwithstanding pixilation. As stated in *Elliott* [2010] EWCA Crim 2378 at paragraph 31:

Violent gangs, which provide no social amenity and exist for criminal purposes, are unlikely to issue membership cards, and so proof of membership will almost inevitably involve the prosecution putting forward evidence of a number of circumstances from which gang membership could be inferred.

50. Proof of gang membership could be inferred from the particular videos in which he appeared and gang membership was celebrated. The prosecution made it clear that Tshoma was not seen or referenced in other gang videos featuring the other appellants and

so there was no need for a specific direction to that effect.

51. Second, there is a complaint by Tshoma that the judge failed to give adequate directions as to how the evidence of covertly recorded cell conversations could be used. These related to the conversations conducted between suspects in the cells at Fresh Wharf Custody Centre after the appellants' arrest. There were recordings involving conversations between Tshoma, Rashid and the fourth man in the Audi. The judge ruled that this evidence be admitted in her bad character ruling, largely with the agreement of the parties, subject to the removal of references to drugs and a direction that it was not evidence against those not present at the time. The objectionable references were removed and the judge gave a direction that evidence given by one defendant was not evidence against another who was not present at the time. The judge gave an example as follows:

Now, there is one matter that I want to deal with at some point and I think now is the easiest time to deal with it. You must bear in mind that evidence by one defendant whose case you are considering ...

So, giving you an example of this, when Mr Rashid was talking to the [other man in the Audi] in the cells, and he said 'Mr S is clumsy' that is not evidence against Mr S and you must not consider it because Mr S was not present, he had no opportunity to deal with it and therefore you must disregard it. So, if a defendant is talking about another defendant in that way and the other defendant is not present, it is not evidence against the other defendant. Please keep that in mind at all times.

52. Although she did not specifically refer to Tshoma, it would have been apparent to the jury that this applied to him as well, not least because the prosecution had not relied on this evidence against Tshoma. We note that this point was not taken on his behalf in the course of the summing-up during which his counsel was not diffident about raising points

that concerned him.

53. Third, it is said on behalf of Tshoma that the directions as to the elements of the offence on counts 1 and 2, and the importance of the specific intent required at the time of possession of firearms, were inadequate. In our view the summing-up in relation to this point at page 8B to C was entirely sufficient.

54. Finally, a matter that was not pursued before us orally but a matter that we should deal with: complaint was made that the direction about offensive weapons was unsatisfactory since the items, a machete (count 6) and a baseball bat (count 7) were not of themselves offensive and required the prosecution to prove an intent. The term "offensive weapon" is defined in the statute as "any article made or adapted for use to cause injury to the person or intended by the person having it with him for such use". We do not regard this as a point of substance. It is difficult to imagine what possession of a machete and a baseball bat in the borough of Barking and Dagenham could have been intended for, other than violence. But in any event the judge did give an appropriate direction in relation to intent in the summing-up at page 136E.

55. We turn then to the points taken on behalf of KS. Mr Pardoe accepts that the prosecution evidence plainly showed that he was a gang member and was associated with violence by his willingness to use a blade in the context of gang violence. However, he submits that the connection between KS and the use and connection with firearms was limited to two items. First, the evidence of PC Saban that KS was the person in the video clip IMG1641 sitting disguised in the rear of the car and holding a shotgun. That evidence was, as we

have noted, supported by two other officers. Mr Pardoe submits that the jury was not properly directed about the deficiencies in the identification. In particular, that it was possible for seemingly credible witnesses to be wrong in recognising a particular person as someone they knew. The judge failed to direct the jury in the terms indicated in *Turnbull* [1977] QB 224.

56. This was a point taken at the time and was not opposed by the prosecution. However, the judge concluded that the direction was sufficient in drawing attention to the dangers of recognition evidence. She recorded Mr Pardoe's challenge to the correctness of the identification of KS in the video clip and at page 43E said this:

Now members of the jury, I need to warn you, at this stage, because I am about to come to other evidence also about identification. But you have to be very careful when you consider identification evidence. People can say they are certain it is somebody, but there have been misidentifications in the past in cases and you must be very careful when you are considering identification and coming to a conclusion about that evidence.

57. A *Turnbull* direction tailored to the facts of the case should always be considered when dealing with disputed identification or recognition evidence. However, we are satisfied that the nature of the judge's direction, albeit omitting a warning that confident recognitions from PC Saban and others could still be mistaken, does not throw doubt on the safety of the conviction. Three police officers had given evidence that they recognised KS from the clip. The jury had the clip before them and they could see KS in the dock.
58. The second item of evidence to which objection is taken is the admission of the video "Time Will Tell" which was said to link directly to the murder of the 14-year-old Corey

Davis Junior. Mr Pardoe submitted that it was highly prejudicial and such prejudice could not be cured by any direction. The judge had ruled that the video was admissible and although the parties agreed to the removal of certain aspects of the gang evidence, this did not include reference to Corey Davis Junior's shooting in the drill video. We accept that it would not have been admissible but for the fact that the conspiracy related to guns. However, it was. As such, it was material because it showed KS, not involved in the shooting of Corey Davis Junior, but in a video exhorting that shooting. In our view there was no objection to the admission of this evidence.

Conclusion

59. We have concluded that the only complaint of substance was the direction as to the use to which the gang evidence could be used. Although the direction did not focus on the correct way in which the evidence could be used, it did make three crucial points. First, the jury had to be sure that the defendant they were considering was a gang member. This was a point specifically raised by Tshoma who said he was not. Secondly, even if they were gang members that did not mean they were violent or that they committed the offences with which they were charged. Thirdly, and linked to the second point, the jury should not in any event be prejudiced against the defendants because they were gang members, but they might give it weight.

60. We have considered whether, despite the judge's approach to the summing-up and the error which we have identified, the convictions were unsafe. We have concluded that they are not. There was evidence that on 1 May 2018 Tshoma and Rashid were acting in a way that was consistent with the handling of one or more firearms stored in the VW Golf; KS

(whose fingerprint was found on the box containing the machete in the vehicle) was acting as facilitator and look out; Rashid had covered his head with clothing before approaching the vehicle consistent with an attempt to avoid being identified; Rashid and Tshoma wore gloves consistent with an attempt to avoid leaving fingerprints on the car or its contents; the car had been insured and driven by Tshoma whose DNA was found in a bottle in the boot; there was evidence that all three appellants were members of the ACG gang, this was established by the evidence of PC Saban, the YouTube Drill videos, videos and photographs on KS's phone and the probe evidence in relation to Rashid and KS. In addition, there was evidence of tit-for-tat feuds with other gangs. Such feuds typically involved the commission of potentially lethal violence with weapons such as were found in the VW Golf. On 21 May, having checked the loaded firearms, the appellants with the other man in the Audi, went on a scoping expedition armed with a baseball bat, Balaclava, stick on number plates, walkie-talkie and gloves. The gloves found in the foot well in the place where Rashid had been sitting in the Audi had traces of gunshot residue. In evidence Rashid amended his account from that given in his defence statement in an effort to tie-in his evidence with Tshoma. This was in the context of no comment interviews from both men and a defence statement only served by Tshoma mid-trial. KS, who had given a limited prepared statement in interview denying knowledge of the firearm, did not give evidence in his own defence to refute the very strong prosecution case.

61. For these reasons and in these circumstances the appeals against conviction are dismissed.