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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



NCN: [2021] EWCA  
Crim 1936  
No. 202003271 B1  
202100039 B1

Royal Courts of Justice

Thursday, 25 November 2021

Before:

LORD JUSTICE POPPLEWELL

MR JUSTICE JULIAN KNOWLES

HIS HONOUR JUDGE BLAIR QC  
(THE RECORDER OF BRISTOL)

REGINA

V

NATHAN SIMEON HAREWOOD  
KHALIL REHMAN

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

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MR J. CHRISTOPHER QC appeared on behalf of the First Appellant.

MR J. CROSS appeared on behalf of the Second Appellant.

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**J U D G M E N T**

LORD JUSTICE POPPLEWELL:

1. In the evening of 18 June 2019, David Bello-Monerville was stabbed five times in the back, close to where he lived in North London. Two of the stab wounds had penetrated his left lung and his injuries proved fatal. He was aged 38. During the course of the incident, his brothers Taiye Bello-Monerville (aged 34) and Jonathan Burke-Monerville (aged 25) were also stabbed. We will refer to the three brothers, for brevity's sake, as David, Taiye and Jonathan BM.

2. The applicants, Harewood and Rehman, stood trial with a co-defendant, Appiagyei, before HHJ Joseph QC and a jury at the Central Criminal Court on a seven count indictment as follows:

Count 1: aggravated burglary;

Count 2: murder of David BM;

Count 3 (an alternative to Count 2): manslaughter of David BM;

Count 4: wounding Jonathan BM with intent contrary to s.18 of the Offences Against the Person Act 1861;

Count 5 (an alternative to Count 4): wounding Jonathan BM contrary to s.20 of the Offences Against the Person Act 1861;

Count 6: wounding Taiye BM with intent contrary to s.18 of the Offences Against the Person Act 1861; and

Count 7 (an alternative to Count 6): wounding Taiye BM contrary to s.20 of the Offences Against the Person Act 1861.

3. Harewood was convicted of aggravated burglary, the murder of David BM and the s.20 wounding of Taiye BM on Counts 1, 2 and 7, respectively. Rehman was convicted of aggravated burglary, the manslaughter of David BM and the s.20 wounding of Taiye BM on Counts 1, 3 and 7, respectively, as was Appiagyei. Harewood and Rehman renew their applications for leave to appeal against conviction following refusal by the single judge, with in Rehman's case an application for an extension of time within which to do so.

The two grounds advanced are:

- (1) The judge wrongly failed to leave to the jury the defence that Harewood was acting in defence of Rehman in the assault on Taiye BM. This, it is submitted, undermines the safety of the conviction of Harewood not only for that assault on Count 7, but also on the murder count, Count 2; and, it is submitted, it undermines the safety of the conviction of Rehman on Count 7 and his conviction for manslaughter on Count 3.
- (2) The judge wrongly gave the jury a direction that they could draw adverse inferences from the failures of each applicant to mention facts in interview which they later relied on at trial pursuant to s.34 of the Criminal Justice and Public Order Act 1994.

4. The incident took place shortly after 10.30 pm on 18 June 2019 in and outside the rented flat at which David BM lived on Welbeck Road, East Barnet. His two brothers lived with their mother, Linda Burke-Monerville, two streets away. Jonathan BM was at the time with his brother David BM at the Welbeck Road flat, having gone there earlier for dinner. Taiye BM was initially at home with his mother. The three accused, Harewood, Rehman and Appiagyei, had known each other for about ten years and were good friends. They all used cannabis, and in the days leading up to 18 June were looking to acquire more.

5. The prosecution case was that the three defendants attended the addresses wearing masks and armed with weapons, intending to steal either money or drugs. Harewood and Appiagyei were armed with knives and Rehman was armed with a hammer. The three men entered the property uninvited when David BM opened the door and proceeded to ransack David BM's bedroom. After they left property the three defendants tried to escape, but were chased by the brothers, including Taiye BM who had now arrived at the scene having been telephoned by David BM. The brothers caught Rehman and assaulted him in order to detain him, having asked a neighbour to call the police. Rehman called out to his friends for help. Appiagyei had run off. Harewood returned to where Rehman was being held and produced a knife. In a confrontation with Taiye, Harewood stabbed him once in the arm. David BM came to help Taiye and was then himself stabbed five times by Harewood. Jonathan BM was also stabbed in the knee. Harewood was guilty of the murder of Davis BM as a principal for inflicting the knife injuries. Rehman and Appiagyei were guilty as secondary parties.
6. Each of Jonathan, Taiye and Linda BM gave evidence, as did a number of other prosecution witnesses and Harewood and Rehman. Appiagyei did not. The account of the four main witnesses who gave evidence was widely divergent. It is necessary to summarise the account of each as to what happened both inside and outside the property.
7. Jonathan BM's evidence included the following:
  - (1) David BM opened the door and the three men ran in. They were wearing masks and bandanas. Rehman had a hammer. Rehman demanded money. He, Jonathan, ran into the lounge and Rehman followed, still demanding money, using the hammer to threaten him. Harewood went into the kitchen and bedroom, and Rehman followed him in, followed by Appiagyei. David BM had already gone outside and Jonathan BM took the opportunity to go outside. One of the defendants closed the door and he, Jonathan, and David BM were locked out.

- (2) Outside, David BM asked his neighbour, Ms McCann, to call the police. He, Jonathan, phoned Taiye, who said he would come straight round.
- (3) He was on the street with his brothers when the three men came out of the flat and started to charge at him. The brothers went towards the defendants, and he, Jonathan, picked up a bin and threw it at them. The three men turned and ran towards Cranbrook Road and the brothers ran after them. One of the men (Appiagyeyi) disappeared and he did not see him again.
- (4) He saw Harewood turn and bring out a knife from his jacket, about 20 yards way. He, Jonathan, turned to run away, but Rehman went for him, holding the hammer at waist height. He retaliated and got into a fight with Rehman. The fight involved punching and kicking and he managed to knee Rehman in the face and began to get the better of him, even though he was only in his socks. Rehman was calling for his friends to come back and help him. Rehman went to sit by the car "seeming dazed, going nowhere. He no longer had the hammer, was no longer calling for help and he did not get involved in what happened next."
- (5) He, Jonathan, then saw Harewood come back brandishing the knife at shoulder height, and thrusting it forward and down at Taiye, with both of them about 20 to 30 metres away.
- (6) Then Harewood pushed David BM against a van and was swinging the knife at him, bringing it down over David's shoulder, stabbing him in the back. He, Jonathan, ran to them and grabbed Harewood's wrist, trying to get the knife off him. In the tussle they fell down and Harewood began swinging the knife at him, which must have been when he got the wound in the back of his knee, although he was not aware of that at that time. He succeeded in getting the knife off Harewood and dropped it on the ground, later pointing it out to the police.

- (7) He, Jonathan, went to help David. Taiye was holding Harewood, but was too weak to keep hold of him, and Harewood and Rehman made off, in that order.
8. Taiye BM's evidence can be summarised as follows:
- (1) He was driven to the flat by his mother and met up with his brothers outside. Three men came out of the house, all with masks and hoods and charged towards them as if to fight. Jonathan tipped a bin over and the brothers charged back at them. The three men turned and ran.
- (2) One of them disappeared and one fell over a bin (Rehman). Jonathan bent over him and beat him. He, Taiye, helped to beat Rehman. He punched him repeatedly to the head or face and stomped on him twice, all, he said, on the spur of the moment to stop him leaving and to restrain him until the police arrived.
- (3) Harewood saw what they were doing to Rehman and came back as if to help his friend. They stopped beating Rehman when Harewood pulled out a knife and was coming back. Rehman got up and ran maybe seven metres off.
- (4) He, Taiye, went three or four steps towards Harewood and tried to foot sweep him. He failed and Harewood stabbed him in the right arm. At the time that he, Taiye, was in conflict with Harewood, Rehman was not playing any part. He was "sat at the side of the road watching" and did not try to join in.
- (5) Then David BM charged at Harewood, jumped on him, and they grappled. He saw Harewood raise his arm over his shoulder and stab David BM five times.
- (6) Jonathan then jumped on Harewood and Harewood stabbed Jonathan in the leg.

(7) David and Jonathan got the better of Harewood. He, Taiye, then started beating up Harewood whilst David and Jonathan watched. Rehman ran off and said "Let's go". Harewood got away because he, Taiye, was weak and dizzy from his wound.

9. Harewood's evidence was in summary as follows:

(1) The three of them were looking to buy drugs. They were not masked or armed. They knocked on the door. It was opened by a man who came to be referred to as Malteser, who invited them in, and they went into the sitting room where the six of them sat down. Rehman said they wanted to buy a nine bar of weed (i.e. nine ounces) and asked for a sample. Malteser left the room and could be heard to speak to another man, before returning with a jar. Appiagyei tried some and said they wanted to buy, and David BM sent Malteser to get the nine bar. Harewood again heard Malteser talking to someone before he returned with a tin.

(2) The money (£2,000) was passed over by Rehman to David BM and given to Malteser. Malteser said there was something funny about it and he was going to check it under the UV light in the kitchen. Rehman said he did not want to let the money out of his sight and Malteser invited him to go with him to the kitchen. The atmosphere in the sitting room changed and a look from Appiagyei told Harewood that they needed to leave. Appiagyei picked up the tin. David and Jonathan BM stood in the doorway to block it. David left and Jonathan was in the doorway. He, Harewood, ran at Jonathan to push him out of the way but Jonathan dragged him back by the hood. They scuffled in the hallway. Appiagyei joined the scuffle and David BM also reappeared and joined the scuffle. Jonathan went flying out of the door and Appiagyei and Harewood pushed David BM out of the door and closed it.

- (3) He, Harewood, went back to the kitchen and could see Rehman rolling on the floor of the bedroom fighting with Malteser. Malteser then left by the back door.  
Rehman said to him, Harewood, that there were more of them. They all three, Harewood, Rehman and Appiagyei, went to the front door and left.
- (4) They saw David and Jonathan across the road marching towards them as if to kick off. He, Harewood, turned and saw Malteser running up behind the three defendants.
- (5) A man emerged from a red car which approached at speed, and went for Appiagyei. They disappeared behind some cars.
- (6) He, Harewood, saw Rehman being beaten by Jonathan BM with a crowbar and by two others with stuff in their hands. One was stamping on him. Rehman was screaming for help and Jonathan BM was saying "We're going to kill you."
- (7) He, Harewood, ran to the other side of the road and slammed a bin on the floor to distract them. Two of the brothers ran at him and he saw Rehman get up so he, Harewood, turned and ran, but then he heard Rehman again cry, "Help, they've got me" and he turned to see Jonathan MB again hitting Rehman with a crowbar and, as he put it, "they all battered him."
- (8) Then when he was running he tripped on the kerb, and there were "four of them" on him with things in their hands kicking and stamping on him. It stopped, he got up, but was then grabbed again and slammed into a van.
- (9) At this stage he heard the words "stab him." He did not see a knife but out of instinct dropped his hands to grab a blade. He could not remember who had it but he grabbed it near the handle and pulled, which accounted for his injury of cuts to his fingers. From then on everything was a blur.



- (10) He dropped the knife and ran. He had not brought a knife with him: this was the knife which he got off his attacker.
- (11) Taiye did not try to footsweep him. He did not stab Taiye. As for David BM, he did not see how he could have stabbed him five times in the back. He said "It could have been me, but I don't think it was ". He did not remember stabbing Jonathan BM in the knee.

10. Rehman's account was as follows:

- (1) They were looking to buy drugs with counterfeit money. Malteser opened the door to three of them and they went into the living room. They discussed buying a nine bar. Appiagyei produced a bundle of notes and asked Rehman to count it. He counted £1,800 in twenties, and gave them to Malteser. Malteser went off to get the drugs.
- (2) Rehman followed Malteser into the kitchen where there was another tall man, who gave his name as TJ after he had asked Rehman to follow him into the bedroom. At this stage Malteser said "They're trying to bump us", and TJ and Malteser together stood over him, Rehman, hitting him about eight times. TJ left and Malteser punched him twice more before someone else said "Oi! Get off him", and Malteser then left the bedroom. He, Rehman, ran to join Harewood in the hallway, and they left. He did not have a hammer at any stage.
- (3) He set foot on the pavement and saw what he thought were six to eight people some 50 metres away charging towards him. He ran, but had only gone four steps when something very heavy hit the back of his head and he fell, leaving him lying on his back in the middle of the road. There were eight people around him with gloved fists and a pole coming towards his face. He was punched and kicked and was in

and out of consciousness two or three times. He said he had pictures in his mind of a number of weapons in the hands of his attackers, including a knife.

(4) When he came to and got up, no one else was around him. He saw his car keys in the road, collected them and left in his car.

11. A lock knife was found by the police in Welbeck Road, from which blood samples showed a link to Taiye BM, Jonathan BM and Harewood. There was evidence from the pathologist that this knife could have caused all of the wounds to David BM.

Ground 1. Leaving Defence of Another to the Jury

12. It was no part of Harewood's defence that he had been acting in defence of Rehman at any stage. He maintained that he had been acting in self-defence and this defence was left to the jury. There is no criticism of the judge's directions in respect of self-defence.

13. However, counsel for Harewood submitted to the trial judge that defence of another should be left to the jury in respect of the wounding of Taiye BM. He conceded that it could not apply to the stabbing of David BM, although this was not conceded by counsel for Rehman, who also supported the application.

14. The judge rejected the application. She summarised the evidence of each of the protagonists as to what had happened outside the flat and concluded that on no view of the evidence could the jury conclude that Harewood had been acting in defence of Rehman. She said she was entirely satisfied that there was no realistic analysis of the evidence by which a jury properly applying the law could acquit Harewood, and therefore other defendants, on the basis of "defence of another" whilst rejecting "self-defence".

15. The argument, as developed before us, is that defence of another was a viable defence if the jury rejected Harewood's evidence but accepted that of Taiye BM in relation to the attack on him. Taiye BM's evidence was that Harewood had been coming to the assistance of

Rehman when, on Taiye's evidence, Taiye had tried to footsweep Harewood resulting in the knife wound to Taiye.

16. We are unable to detect any merit in this point.
17. A judge should normally leave a defence to the jury notwithstanding that it is not one advanced by a defendant if there is evidence of sufficient strength that if accepted, it prima facie establishes such a defence: see *R v Bonnick* [1978] 66 Cr App R 266; *Director of Public Prosecutions (Jamaica) v Bailey* [1995] 1 Cr App R 257 at p.260 and *R v Mula* [2013] EWCA Crim 1293 at para.6 to 7. On the other hand, as Lord Slynn stated in *Bailey*:

"It is clear that perfectly hopeless defences which have no factual basis of support do not have to be left to the jury."
18. The trial judge would have been much better placed than we are to evaluate the evidence on this question. We have only the Judge's summary of the evidence in her summing up, not a full transcript of it, and in any event the nuances of the evidence would be apparent to the judge listening to it in a way which is not reproduced in a transcript or summary. We would not be prepared, therefore, to conclude that the Judge's view of the evidence was erroneous unless that were clear. Far from that being clear, it appears to us that there was indeed no evidential basis upon which a jury could have concluded that Harewood was acting in defence of Rehman in stabbing Taiye. On Taiye's evidence, at the time that he, Taiye, was in conflict with Harewood, Rehman was not playing any part in the conflict; he was "sat at the side of the road watching" some seven metres away and did not try to join in. That appears not only from what the judge by way of summary of the evidence in the course of her summing-up, but is reinforced by the summary of the evidence which she gave in her ruling on the application made to her that the defence of another should be left to the jury. Having recited the evidence in the terms which we have already described, she said in relation to Taiye BM's evidence that although it is suggested that Harewood came back to help Rehman, at no stage did he suggest that the stabbings took place in that context. She

said that all the evidence suggested that whatever the motive for Harewood coming back, by the time the stabbings took place, it was Harewood himself who was the object of attention of one or more of the brothers. Nor was there any evidential foundation for a contention that Harewood was acting in defence of Rehman at the time of the assault of Taiye in any of the evidence given by any of the other witnesses. Harewood did not so suggest; Rehman did not describe the attack on Taiye at all; and Jonathan BM's account was that at the stage of the assault on Taiye, Rehman had gone to sit by the car "seeming dazed, going nowhere." He was at that stage no longer calling for help and "he did not get involved in what happened next"; i.e. the conflict between Taiye and Harewood.

19. There was equally no evidential basis for any contention that Harewood might have been acting in defence of Rehman in inflicting the stabs on David BM, which was even further away from Rehman being under attack in both time and location, as was very fairly accepted by Mr Christopher QC on behalf of Harewood in his submissions to us.

Ground 2: Section 34

20. The agreed facts contain all the evidence which was before the jury as to what happened in relation to the interviews of Harewood and Rehman. They include the following.
21. Harewood was interviewed for the first time under caution on 20 June 2019, having been arrested for murder. In advance of the interview taking place, the police provided disclosure in the usual way. The disclosure was in these terms:

"Operation Rokeby is the investigation into the murder of David Bellow Monerville and attempted murder of Jonathan and Taiye Burke Monerville. On the 18th June 2019 at 22.52 hours police were called to Welbeck Road Barnet to a report of a large disturbance and fight in the street involving several people. On police arrival 3 men were found with varying levels of injuries. These 3 males are brothers or half-brothers. Further enquiries revealed that an incident had taken place at 62 Welbeck Road Barnet. Three

men had entered the premises and attacked the occupants causing fatal injuries to David Bellow Monerville and knife wounds to Jonathan and Taiye.

During the evening of Wednesday 19th June 2019, Mr Harewood attended Edmonton Police Station in the presence of his solicitor and indicated his involvement in the incident at 62 Welbeck Road. Mr Harewood also has visible injuries to his left hand which he confirmed were sustained during the incident.

Police intend to interview Nathan Harewood regarding his involvement in this incident."

22. Having been cautioned, Harewood then submitted a prepared statement in the following terms:

"On the 18th of June, I had gone to an address in Barnet, which I do not know. I was with two others who had organised to purchase drugs, using fake notes. The drug dealer realised the notes were fake. We ran out of the premises. I kept running then I heard a scream. I could see one of the guys I had come with being beaten. He was being beaten with weapons and his head being stamped on. I feared he would be killed. I threw a bin at the direction they were at. This distracted them and he managed to escape.

I carried on running again. The group of males caught up with the guy again and started beating him. I went back to distract them. He got away. And then they chased me.

The group caught-up with me and started beating me. They were using both fist and weapons. It was a big blur. As I was being set upon. I saw a flash of metal and grabbed onto it as I believed I was about to be stabbed. I was still being beaten and tried to grapple with the knife.

The whole incident is a blur. I was in fear of my life. I was being attacked by a number of individuals. All my actions were in self-defence."

23. The police then asked Harewood about the content of the statement. To all questions he was asked he replied no comment. The interview lasted 31 minutes.

24. Harewood was again interviewed under caution later that evening for 27 minutes before a break. Apart from one answer, he continued to say no comment. When the interview resumed after the break, he continued to say no comment. The agreed facts do not record how long that interview lasted after the break.
25. Rehman was first interviewed under caution on 26 June 2019. His solicitor was given similar disclosure to that given to Harewood. Rehman then submitted a prepared statement having been cautioned. His prepared statement said as follows:

"I adamantly deny the offences of murder and attempted murder.

On the 18th of June 2019 on or around 10.40pm I attended 62 Welbeck Road Barnet with 2 others to buy cannabis. When we arrived the front door was open & two black men ran outside. Then within a matter of seconds we were surrounded by 8-10 men. The 2 men who had run out of the house were part of this group. I was then jumped & kicked to the ground by several men. I was beaten unconscious. I remember coming to & then feeling some more kicks and punches and then it went black. It felt like I was beaten with a hammer at one point. I don't know how long I was out for but when I came to, it was silent & no one was there. I think everyone had run off because they thought I was dead. I managed to stagger up but kept collapsing to the floor. I think I fell over twice.

I did not attack anyone in the house or from the group of the 8-10 men."

26. The police then asked Rehman about the contents of his statement. To all the questions he was asked he applied no comment. The interview lasted 28 minutes.
27. A further interview under caution took place later that night. By now Rehman had been arrested for the offence of aggravated burglary. A second prepared statement was submitted. It said as follows:

"I adamantly deny the offence of aggravated burglary and I maintain the account I put forward in my first prepared statement.

On the 18th June 2019 on or around 10.40 [pm] I attended 62 Welbeck Road Barnet with 2 others to buy cannabis.

When we arrived the front door was open & 2 black men ran out of the house. Their hoodies were up & their faces were partially covered. Seconds later we were surrounded by 8-10 men. The 2 men who ran out of the house were part of this group. They all had their faces covered. I tried to run but only got to the middle of the street. I was jumped on, kicked & beaten by several men in the middle of the street. One of the men was wearing red & black trainers. One man was wearing a black Adidas top with white writing on the front.

I sustained injuries & attended hospital on 19th June 2019. I have been unwell for the past 7 days as a consequence of the beating I received. I am still suffering from headaches, blurred vision, nausea, back pain, ligament damage & I am unable to breath properly through my nose & have sharp stabbing pains in groin area."

28. Rehman then having been cautioned continued to make no comment for the remainder of the interview, which lasted 26 minutes.
29. Rehman was interviewed under caution for a third time later that night for 49 minutes. He answered no comment to all the questions asked.
30. The Crown submitted that the jury should be invited to draw an adverse inference from the failure by both Harewood and Rehman to mention in interview facts relied on in their evidence. For Harewood there were six facts as follows:
  - a. that beside the three defendants there were four others in the flat, including Malteser;
  - b. the amount of drugs being bought;
  - c. a fight inside the bedroom between Malteser and Rehman;
  - d. a fight in the hallway between him, Appiagyei, and David and Jonathan BM;

- e. a man getting out of the red car;
  - f. that he threw away the knife he had held, rather than Jonathan taking the knife from him.
31. For Rehman six facts were also identified. They were:
- a. that it was intended to buy drugs with fake money;
  - b. that he went into the flat at all;
  - c. the number of people in the flat, including Malteser and TJ;
  - d. that he went into the bedroom and was attacked there by Malteser and TJ;
  - e. that on the street he was struck with a crowbar and a pole (or poles) and sticks;
  - f. that he saw a knife being held by one of his assailants.
32. In cross-examination of Harewood and Rehman they each accepted that they had not mentioned these details in the prepared statement or when questioned. They each said that they had made no comment in interview on legal advice. Prosecution counsel suggested to each of them in cross-examination that the reason they had not mentioned these facts was because they had later made them up. Prosecution counsel did not, as often occurs, identify in the course of the cross-examination particular questions which had been asked or the particular point at the interviews at which the opportunity would obviously have arisen to mention these facts had they occurred to the defendants at that time.
33. In submissions to the judge counsel for Harewood submitted that the prosecution had failed to establish that Harewood had ever been asked questions about any of the six matters, and therefore that he had not failed to answer questions about them. No evidence had been adduced as to what questions were asked during the interview. Accordingly, it was submitted, the jury, could not properly conclude that these were matters which Harewood could reasonably have been expected to mention. Counsel for Rehman supported



the submissions as applying equally to his case and added two further points. The first was that without having the questions laid out before them, the jury could never be satisfied that apart from the applicant's silence, the rest of the Crown's case put in interview was so strong that it clearly called for an answer. The second point was that Rehman had been misled by inaccuracies in the disclosure material provided in advance of the interviews. Counsel submitted that the disclosure given led to the overwhelming inference that all events happened inside the flat, whereas in fact only the alleged aggravated burglary was said to have done so, whilst the stabbings all took place outside the flat.

34. In her ruling the judge dealt with this last disclosure point by saying that it was unfortunate that the disclosure document was drafted in the way it was, but that there could be no confusion in Rehman's mind, as he was present and accepted that he was present. We would add that the disclosure made clear that the allegations were that the injuries had all been received outside the flat in the street. That aspect of the judge's ruling has not been the subject matter of further submissions before this court. As to the main submission made to the judge, she said that both Harewood and Rehman were questioned over a long period of time. A jury could safely infer that central matters were put, and in advancing the primary features of what took place, a defendant could reasonably be expected to mention those matters - the less central the matter she said, the less sure a jury could be that he could reasonably be expected to have mentioned it unless it was shown that he were directly asked about it. She said she had reviewed the unmentioned facts relied on by the Crown and reduced them to those which she was satisfied the jury could properly infer either must have been the subject matter of questions or should reasonably have been advanced by the relevant defendant in the course of giving an account of events. Accordingly, she gave a s.34 direction limited to the following unmentioned facts.

in Harewood's case:

- a. beside the three defendants there were four others in the flat;

- b. there was a fight in the bedroom between one of these and Rehman;
- c. there was a fight in the hallway between Harewood, Appiagyei and two of these.

in Rehman's case:

- a. it was intended to buy drugs with fake money;
  - b. Rehman and his co-defendants went into the flat where there were at least four others;
  - c. He was attacked in the bedroom by two of the others;
  - d. He saw a knife being held by one of his assailants.
35. Before us counsel for Harewood and Rehman repeated and developed the arguments which had been addressed to the judge. First it was submitted that in the absence of any information about the questions asked during the interviews, the jury could not properly conclude that the matters were the subject matter of questioning since they were not central to the allegations of murder, or in Rehman's case aggravated burglary. Secondly, they argued that in inviting an adverse inference on a more general basis that the details should reasonably have been advanced in the course of giving an account of events, the judge fell into the error of inviting an inference from the exercise of the right to silence simpliciter. Thirdly, it was submitted that the judge failed to direct the jury on the significance of considering what matters were put as questions in interview; and that in directing them in the standard terms that they could only draw an adverse inference if the Crown's case was so strong it called for an answer, she gave them no assistance on how they could answer that question without knowing what questions had been put to the defendants in interview.
36. The relevant wording of s.34 permits an adverse inference to be drawn if "on being questioned under caution" the defendant fails to mention a fact relied on in his defence and

it is "a fact which, in the circumstances existing at the time, the accused could reasonably have been expected to mention when so questioned."

37. In *R v Argent* [1997] 2 Cr App R 27, Lord Bingham CJ set out at p.32-33 the six formal conditions for the operation of the section, the sixth of which is that the accused could reasonably have been expected to mention the fact when questioned. Lord Bingham emphasised that that was usually a question for the jury in the exercise of their collective common-sense, experience and understanding of human nature; and that the expression "in the circumstances" should not be construed restrictively, but permitted the jury to take into account a wide variety of factors which might be relevant to whether the accused could reasonably have been expected to mention the fact in question.
38. We would make a number of observations about the operation of s.34 so far as relevant to this case. First, as Lord Bingham emphasised in *Argent*, the question whether the accused could reasonably have been expected to have mentioned the fact in question is a matter for the jury. A judge should not permit an adverse inference argument to be left to the jury if no reasonable jury could reach such a conclusion on the evidence; but if that threshold is reached, it is for the jury to address and determine the statutory question (absent other considerations which might militate against giving a direction or permitting an adverse inference argument which are not relevant to this case).
39. Secondly, there is no requirement that the unmentioned fact must be one about which the accused has specifically been asked a question. The language of the statute does not impose such a requirement and the test is simply whether in the face of the questioning the fact is one which the defendant could reasonably have been expected to mention. The point is well illustrated by *R v Green* [2019] EWCA Crim 411; 2019 4 WLR 80. In that case the accused had not been asked any specific questions but merely given a narrative of the alleged events by the officer of the prosecution case and asked to give his account. The argument that there had been no "failure to answer when questioned" because there

were no questions was rejected. At para. 20 this court emphasised that the statutory criterion was simply whether the defendant was being questioned under caution, and that that was fulfilled if he were expressly or by necessary implication invited to give his account of the matter which had given rise to the interview. The court stated that it was not necessary that specific questions had been asked of him.

40. Thirdly, the circumstances which the jury are to take into account in determining whether the accused could reasonably have been expected to mention the fact in question will include what it knows about the length of the questioning, and the relative significance or importance of the fact in question to the matters about which the accused is being interviewed; and its relative significance or importance to any answers he does give in interview or to the contents of any prepared statement which he has given. The jury are entitled to infer that if the interviews lasted a considerable period, the questions are likely to have descended to a commensurate level of detail. The jury are entitled to infer that if an accused has provided a prepared statement, such questions will at least in part have been directed to the contents of that statement. This is so even if, as in this case, the jury have not had identified for them in the course of cross-examination the specific questioning which the Crown says gave rise to the particular opportunity to mention the facts. If the facts which the accused failed to mention are central to this account at trial, the jury may more readily conclude that he could reasonably be expected to have mentioned them in interview, whether or not they were the subject of particular questioning. But the operation of the section is not limited to facts which are central to the defendant's account at trial. There is a sliding scale between central facts and relatively unimportant detail. There is no rigid test as to the necessary degree of connection between the unmentioned fact and the account advanced at trial, and it would be too prescriptive to ascribe some epithet such as that it must be a central or significant or important element of the account. The jury must consider all the circumstances, including the degree of relevance or importance of the unmentioned

fact to the account relied on at trial. In doing so the jury may properly take account of the length of the interviews and the background to them, and what can be inferred therefrom about the nature of the questioning and what the accused could reasonably have been expected to volunteer as part of his account of events.

41. Against that background, we are unable to accept the arguments advanced by the applicants. It was not necessary for the prosecution to have identified to the jury what specific questions were asked, or indeed that any specific questions were asked; nor was it necessary to establish that the unmentioned facts which were included in the adverse inference direction were central to the account at trial of either Harewood or Rehman. The question was solely whether a jury could properly conclude that in all the circumstances each applicant could reasonably have been expected to mention the facts in question. The unmentioned facts identified by the judge in her ruling and her direction were in our view important elements of the account of events by both Harewood and Rehman. There had been lengthy interviews. The applicants would have been well aware from the disclosure and their knowledge of what happened on the evening in question that the unmentioned facts which the judge left to the jury as potentially giving rise to an adverse inference were significant aspects of their exculpatory account of events. They were not mere details at the margins. In Rehman's case, all of the facts bar one related to what occurred inside the flat and were of obvious significance to the charge of aggravated burglary. The other fact, that outside the flat one of his assailants had a knife, was also of obvious significance to the murder charge.

42. In Harewood's case, the unmentioned facts all related to what occurred inside the flat. Mr Christopher emphasises in his submissions that Harewood had only been arrested for murder at the time of his interviews, not aggravated burglary, and that the disclosure indicated that the investigation was into a murder of David and attempted murder of the other two brothers. He emphasises that those were events which all took place outside

the flat, whereas the unmentioned facts were related to what occurred inside the flat.

Nevertheless, we agree with the judge that the unmentioned facts are of sufficient significance to meet the threshold that a jury could properly treat them as something which Harewood could reasonably have been expected to have mentioned at the time of the interviews. That is so in the light of a combination of a number of factors:

- (1) The disclosure which was given at that time of the interview focused on what occurred inside the flat, as well as what occurred outside the flat.
  - (2) The prepared statement put forward by Harewood also included an account of what happened inside the flat.
  - (3) What happened inside the flat was important as the background to, and explanation for, what happened outside. The existence of a fourth man, for example, was an important aspect of Harewood's account of what happened outside the flat. He said that when he was outside he turned to see that they were being followed by Malteser and he said that that he was later set upon by four men.
  - (4) The length of the interviews could properly give rise to the inference that Harewood was asked questions in some detail which would likely have included a focus on the content of the disclosure made by the prosecution and on what was said in the prepared statement, each of which addressed what happened inside the flat.
43. The judge did not make the alleged error of treating silence simpliciter as sufficient to give rise to the adverse inference when she said that the jury could properly infer that the unmentioned facts "should reasonably have been advanced by a defendant in the course of giving an account events." She was addressing what the defendants could reasonably have been expected to have done in the circumstances in which they were being questioned at length in more than one interview. The jury could properly infer that they were being asked for their account of events, and as *Green* illustrates, that may be sufficient to give rise to

an adverse inference, especially where there is a prepared statement and the unmentioned facts constitute gaps in the account which is contained in the prepared statement.

44. Nor is it right to say, as was advanced in the written grounds on behalf of Rehman and Harewood, that without detailed questions the jury could not properly conclude that the prosecution case was strong enough to call for an answer. The jury could properly conclude that when interviewed Harewood and Rehman knew that the prosecution case was that they had both entered the flat and had been responsible for stabbing David BM to death. The disclosure revealed that the prosecution was based on injuries which they had received. It would have been obvious to both defendants that the jury might properly conclude, from those defendants' own involvement, that the Crown's case would be based at least in part on the account of the two surviving brothers, amongst others. The jury could properly infer that the lengthy questioning in interview made clear that this was the basis for the prosecution case. It would not have been necessary in our view for the jury to know the details of questions for them safely to reach a conclusion that the prosecution case was sufficiently strong that it called for an answer.
45. We turn to the final argument, which is a criticism of the terms in which the adverse inference direction was given to the jury, on the grounds that it failed to focus on what questions were asked by the police in interview. Whilst we agree that the standard direction might in this case have been tailored to include that aspect, it was not in our view necessary for it to do so. The judge correctly directed the jury that the question for them in this respect was simply whether they were satisfied that the circumstances were such that the defendants could reasonably have been expected to mention the facts in interview. Equally, the direction that the jury could only draw an adverse inference if the prosecution's case called for an answer was sufficient for the jury to address that question on the basis of all the evidence they had. It was not necessary for the judge to refer specifically to the potential relevance of what questions were asked in interview in either respect, which was merely one

possible matter which might inform their conclusion on either of those matters. As the judge observed when giving the direction, the jury had a large amount of direct evidence, quite apart from any inferences which they might draw, on which they could concentrate to determine guilt or innocence. No complaint was made at the time by leading counsel for Harewood or Rehman as to the terms in which the direction was given.

46. We should add, for completeness, that even if we had detected any merit in the criticisms of the judge's approach to s.34, which we have not, we would nevertheless have been satisfied that it was incapable of affecting the safety of the convictions, given the nature of the direct evidence in the case as to the course of events, only some of which we have summarised for the purposes of the specific points which have been raised in this appeal.
47. For all these reasons, the applications will be dismissed.

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