



Neutral Citation Number: [2021] EWCA Crim 673

Case No: 202001085 B1

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT WOOLWICH**  
**His Honour Judge Lees**  
**T20197514**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/05/2021

Before :

**LADY JUSTICE THIRLWALL**  
**MRS JUSTICE LAMBERT**  
and  
**MR JUSTICE HENSHAW**

Between :

**SHAVEEK DIXON-KENTON**

**Applicant/  
Appellant**

- and -

**REGINA**

**Respondent**

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**Clare Wade QC and David Rhodes** appeared for the **Applicant/Appellant**  
**Danny Robinson QC** appeared for the **Respondent**

Hearing dates : 18 November 2020  
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**Approved Judgment**

**Covid-19 Protocol:** This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday, 7 May 2021.

**LADY JUSTICE THIRLWALL:**

1. This is the judgment of the court to which we have all contributed.
2. Shaveek Dixon Kenton is 19 (DOB 12.4.02). On 10<sup>th</sup> March 2020 he was convicted of murder by a majority of 10 to 2 after a trial at Woolwich Crown Court. On 25<sup>th</sup> June 2020 he was sentenced to be detained during Her Majesty's Pleasure. A period of 14 years, less time on remand, was specified as the minimum term to be served.
3. This is his appeal against conviction which he brings by leave of the single judge.
4. The killing took place in Corrance Road Brixton on Thursday 15<sup>th</sup> August 2019. At that time the appellant was 17. The victim, Solomon Small, was 18. It was not disputed at trial that the appellant had killed him, by stabbing him with a large kitchen knife. The cause of death was a single very deep wound which penetrated the chest to a depth of 125 mm causing damage to the ribs, lung, the pulmonary artery and the aorta. There was massive blood loss. The emergency services attended quickly but Small died at the scene. The pathologist noted five other stab wounds, including defensive injuries to the arms, one of which was a full-thickness incision through the left tricep muscle. The appellant was uninjured. The pathologist was unable to say in which order the wounds had been inflicted.
5. After the stabbing the appellant left the scene. His clothing was found some days later partly burnt in the garden of a nearby hostel with which his brother had a connection. On 20<sup>th</sup> August he went with his mother to the local police station and was arrested. He was identified by an eyewitness in an identification procedure. He was interviewed by the police on 5 occasions. He made no comment.
6. Just before the trial the prosecution served statements from a police officer with expertise in South London gangs. The statements had originally been disclosed as unused material. The prosecution sought to rely on a number of strands of evidence from the police officer in support of the assertion that the appellant was a member of a gang and that the killing of Solomon Small, who was a member of a rival gang, was part of a long running gang feud during which another young man, John Ogunjobi, had been murdered. There was also a very late application to adduce evidence of the gang affiliations of the defendant's brother and others. The defence objected to both applications. The judge ruled in favour of the prosecution and gave his reasons later in the trial.
7. In the light of the ruling the defence agreed a number of facts rather than requiring the prosecution to prove them. At the heart of this appeal is the submission that the gang evidence should not have been before the jury.
8. Leave to appeal was given on two grounds:-
  - i) that expert evidence ought not to have been admitted; and
  - ii) that the case that the motive was the trigger event of the killing of John Ogunjobi was a) not sufficiently supported by admissible evidence, b) not put to the appellant in cross examination and c) not accompanied by the required level of disclosure.

9. It was the prosecution case that the appellant and Small were members of two feuding gang factions. The appellant was associated with the Roupell Park, 67, LTH faction and Small with the rival ClapTown, 150, UpTop faction. The prosecution asserted that John Ogunjobi was a member of the LTH faction.
10. The appellant was of previous good character, with no warnings, cautions or convictions. He denied being a member of any gang. It was his case that he killed Solomon Small in self defence, fearing an attack upon him by Small and members of his gang; alternatively, that he lacked intent and had lost control.
11. It is necessary to look at the evidence at trial in some detail.

### **Evidence at trial**

12. The main prosecution evidence came from three eyewitnesses to the stabbing.
13. Daniella Pascoa, a friend of Solomon Small, said that on 15 August 2019, shortly before 2pm, she and Small walked along Corrance Road Brixton to the Lidl store at the junction of Acre Lane. They walked past the appellant who was sitting on a wall outside a kebab shop. CCTV showed that the appellant had been in that area for some time before Small and Pascoa appeared. Pascoa said that Small and the appellant spoke to each other and “fist bumped”. Small and Pascoa then went to a café nearby and on their way back, they passed the appellant again. He was still sitting on the wall. The two boys spoke to each other again. Pascoa was on her phone and so did not know what was said. Small and Pascoa then crossed Acre Lane and walked up Corrance Road to go to the house of a friend of Small’s. Pascoa did not know why he had decided to do this since they had food to take back home. Small asked to borrow her phone to ring her boyfriend. She rang the number and put it on loudspeaker and handed it to Small. She did not think Small was making much sense on the phone. As they were walking up the road, Small kept looking back towards Acre Lane, saying, “why is he following us?” or “why is he there?” They arrived at the friend’s house (Pascoa did not know what number it was) and Small went to knock on the door. Pascoa stayed outside on the pavement, still on the phone. She did not see the appellant arrive and first noticed him when Small started talking to him.
14. Pascoa said she heard snatches of the conversation between the appellant and Small. She heard the appellant say “I want to know, I want to know” but did not hear him say what it was he wanted to know. Small replied something along the lines of “it is not important” and she heard the appellant say “Clapham” or something similar. Pascoa then described the following fast-moving events. The appellant pushed Small against the wall of the house. She thought at first that they were just fighting but then she saw blood coming from Small’s neck. She saw the appellant stab Small several times very quickly around the chest and the neck whilst Small was trying to push him away. She called her boyfriend on her mobile phone, telling him that Small was getting stabbed. By this stage she described herself as having retreated towards the middle of the road. She saw the appellant move towards her, she thought to scare her off, but Small pulled him back whereupon the appellant stabbed him again. He collapsed. She started screaming but managed to dial 999.
15. She told the jury that she had not seen Small holding a knife at any point and she had not seen Small with a knife before they had left the house that day.

16. It was an agreed fact that at 22.33 on the evening of the killing a record was made on the CRIS report that Daniella Pascoa had told PC Ryan that “[she and Solomon] walked down Corrance Road in the direction of Sandmere Road SW4. When they were halfway down, they turned back to see the suspect coming at them with a large kitchen knife”. In cross examination she said that she was in shock when she gave her first account and what she said in evidence was correct. She said she was unaware that Small had been stopped earlier in the day. (It was an agreed fact that there had been a report earlier in the day that he was riding a bike with a knife in his waist band. He had been stopped by the police, but no knife was found). She said that she did not see Small with a knife at any stage. She denied that the appellant had punched Small several times and had succeeded in taking the knife from him.
17. Katie Lau was working from home at 58 Corrance Road. She heard screaming coming from outside and went to the window. She described seeing two boys jogging towards Acre Lane. It looked like one was chasing the other away. They were close together, but she was not sure what was happening, and she could not see everything. She saw the appellant, who was the boy in front, turn around and lunge at the other and then, she thought (although she could not be sure) he lunged a second time and as he pulled back, she saw what she thought was a knife. The lunge was towards the left upper body. They were in the middle of the road. The appellant then ran off towards Acre Lane and the victim then stumbled backwards in the direction he had come from. As he stumbled back, he fell. At this point she called the police.
18. Marie Phipps lived at 59B Corrance Road. On the afternoon of the killing she heard her doorbell. She assumed it was her son coming home. She opened the window to throw the keys down to him and heard a girl screaming. She looked outside and saw a young man on the ground. She thought it was her son and rushed outside to give assistance. In the agreed facts it was recorded that when she first spoke to the police she said “she was at home when she heard a girl screaming. Phipps left her home and saw a girl next to a boy who was lying face down on the pavement”. Her evidence about having heard the doorbell ring was very firmly challenged but she maintained her account, accepting that she had not mentioned it when first spoken to. This was important evidence, supporting as it did the evidence of Ms Pascoa which was that Solomon Small had decided, unexpectedly, to go to a friend’s house.
19. Jonathan Araromi was Daniella Pascoa’s boyfriend and a friend of Solomon Small. Araromi had been at a friend’s house with Pascoa and Small before they had gone off to the shop. He said that Small had called him later on, “spitting things out” in a way which did not make sense, but which made him think that Small was in fear. Small spoke for about 20 seconds then he “cut the phone call”, leaving Araromi thinking that something was wrong. Not long after this he got a call from Pascoa telling him that Small had been attacked. She said “Come, come, he has been stabbed”. He left the house to look for the others. He eventually went along Corrance Road and saw Pascoa running towards him. She took him to where Small lay. By that stage there were other people there.
20. Mrs Segan Ghebrekiden, Solomon Small’s mother, told the jury that she had met the appellant in the past and that he and her son had appeared to get on all right. When they were about 15 or 16 years old, they had played together on PlayStation. Two days before the killing, on 13 August 2019, the appellant had come to her home asking for her son. He was not living with her and she did not know where he lived.

The appellant kept asking her where he was and told her that Small had told him to come round. The appellant did not tell her why he wanted to speak to Small. She later phoned her son and told him that the appellant had come around looking for him. Her impression was that he was shocked.

21. On the day of the stabbing she saw the appellant's father outside his mother's house in Branksome Road. As she was speaking to him the appellant came along and she questioned him about having said (wrongly) that Small had told him to come to her house. The appellant responded by saying "Solomon is a liar". This was probably at around 12.45pm that day. It was put to her that it was not the appellant who had visited her on 13 August, and the appellant denied it in evidence. He said he had not seen her for years. The CCTV showed her walking past him as he was sitting on the wall on the 15<sup>th</sup>. Neither noticed the other. She was cross examined about this but insisted she knew that the person she had seen on 13<sup>th</sup> was the appellant.

### **Gang evidence**

22. The appellant had made no comment at interview save to agree to participate in an identification parade but in his Defence Statement dated 17 November 2019 he accepted that he had stabbed Small and caused his death. The general nature of the defence was self defence and that he did not intend to kill or cause really serious harm. At trial loss of control was also part of his case.
23. Paragraph 5 of the Defence Statement reads, "The defendant believes that Solomon Small and Daniella Pascoa are associated with gangs, in particular the Clapham Town or CT Gang."
24. Under the heading, "Matters with which the defendant takes issue" the following appears: "The defendant puts in issue the character of the deceased... It is the defence case that Mr Small is a gang member who attacked him with a knife and who was calling in reinforcements to assist him in attacking the defendant." In the Defence Statement the defence sought disclosure of any material which might assist that assertion.
25. It was the prosecution case on the application, served just before trial, that the evidence of PC Barr about gangs and the appellant's involvement in a gang was admissible as to do with the facts of the case in accordance with S98 of the Criminal Justice Act 2003 (CJA), providing evidence of motive. Alternatively, it was admissible bad character evidence (i) under subsection 101 (1) (c) CJA, because it provided important context to the actions of the defendant: the value of the evidence to the jury's understanding of the case would be not just substantial but central; and (ii) under subsection 101 (1) (d), because it rebutted the defences of self defence and loss of control: it therefore went to an important issue in the case, namely the truthfulness of his defence.
26. At trial Mr Rhodes submitted that the application was made far too late and in breach of the rules. As a result, the defence were prevented from obtaining their own expert evidence and so were prejudiced. Despite the fact that the application was very late, the judge was not satisfied that any expert evidence would have been called by the defence (and there was no subsequent application for an adjournment); he observed that Mr Rhodes had been able to mount a detailed argument against the application,

and he was satisfied that the lateness had not prejudiced the defence. Ms Wade QC does not complain about that part of the ruling.

27. Ms Wade's first substantive submission before us, as it was before the judge, was that in seeking to adduce gang related evidence of motive the Crown was advancing a contradictory narrative from the one upon which they had previously relied, and which had been based on admissible evidence. She submitted that the evidence of Solomon Small's mother was to the effect that there had been a falling out between friends. She described the appellant coming to looking for her son, and her son being concerned about it (see above). The judge rejected this argument. It was renewed before us. We too reject it. In our judgment that account is consistent with the gang related narrative, whether the appellant and Small had previously been friends or not. In the event, when giving evidence the appellant denied having been a friend of Small and denied having been to his mother's house on the 13<sup>th</sup> August.
28. We turn to the heart of the appeal. It was Ms Wade's submission, first, that the gang evidence to be relied on did not meet the basic requirements of admissibility, namely that it should be relevant and probative. Secondly, some of the evidence was inadmissible as bare hearsay and/or assertion. As a result most of the evidence should not even have been considered under section 98 or the bad character provisions of the CJA since it was not admissible on first principles. Nor should it have been admitted under section 98, section 101 or, in the case of non-defendant bad character, section 100. Finally, to admit the evidence was unfair: it should have been excluded under Section 78 PACE 1984.

### **PC Barr**

29. PC Barr had made a total of 9 witness statements setting out the background of rival gangs and a feud which had been running for over 10 years since the murder of a boy outside his school in Tulse Hill by members of a Brixton gang. The rivalry between Tulse Hill gangs and Brixton gangs is violent and long standing. There have been, he said, 9 murders as a result of this rivalry. The prosecution did not seek to put the fact of the murders before the jury.
30. Expert evidence about the existence of gangs, their ways of operating, their language and culture is increasingly adduced in the courts. Police officers in a number of cities have developed expertise in the gang culture in the areas in which the police officers operate. That such evidence can be admissible is well recognised. In **R v Myers [2016] 1 Cr. App R.11** at paragraph 58 the Privy Council considered police officers as expert witnesses in criminal trials, referring to the necessary expertise as follows:

“It is enough to refer to **R v Ahmed (Rangzieb) [2011] EWCA Crim 184** at [56]-[57] [in that case the expertise in respect of terrorist organisations], essentially adopting **R v Bonython (1984) 38 S.A.S.R. 45**, subject to the refinement set out in **R v Dallagher [2002] EWCA Crim 1903; [2003] 1 Cr. App. R. we (p195) at [28]**. The particular issues which may arise when a new scientific theory is advanced do not arise here. But the officer must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded a balanced body of specialised knowledge which would not be available to the tribunal of fact.” (paragraph 58)

31. PC Barr's expertise in respect of South London gangs, drill video lyrics, gang language etc was challenged on the application before the judge but not before us. It could not seriously be disputed that he was a recognised expert on London gangs. He had given evidence in over a dozen trials over the previous 3 years.

32. After the judge's ruling his evidence was the subject of very detailed agreed facts derived from his statements. For ease we take the evidence about his expertise from the agreed facts:

“Until June 2019 PC Barr was part of a Gangs Task Force tasked with pro-active patrols with the aim of performing interventions in gang affected areas to suppress gang related violence. The role was primarily intelligence led, with the aim of preventing threat and harm and safeguarding gang members, their associates and the wider community as well as supporting the secondary investigations of gang related offences (for identifying suspects via CCTV footage, images and their nicknames/street names).”

“It is agreed that PC Barr is an expert in the composition, activities and allegiances of street gangs in Lambeth. He has a particular expertise in the interpretation of lyrics used in raps made by those who are associated with gangs, and the signs and insignias used by the gangs.”

33. Disagreements may arise when an expert moves from the general and contextual to the particular. It does not follow from PC Barr's undoubted expertise in Lambeth gangs that he was entitled to assert, without more, that X or Y was a member of a particular (or any) gang. That opinion would have to be based on admissible evidence which could be tested in the usual way and which also satisfied the requirements of the CJA.

34. At paragraph 36 of her skeleton argument Ms Wade sets out (as she had before the trial judge) the facts which she submits had to be proved by admissible evidence in order to establish a link between the death of John Ogunjobi and the killing of Solomon Small by the appellant. They are:-

- a. that John Ogunjobi was affiliated to a gang (Lower Tulse Hill);
- b. that the Lower Tulse Hill gang was affiliated to the Roupell Park gang such that the Roupell Park gang would take revenge by proxy for the Lower Tulse Hill gang;
- c. that John Ogunjobi was murdered by members of the rival Clapham Town gang;
- d. that the appellant was an affiliate of the Roupell Park gang;
- e. that Solomon Small was an affiliate of the Clapham Town gang with such links to those who murdered John Ogunjobi that he was a readily identifiable target for a revenge attack.

### **The murder of John Ogunjobi**

35. Ms Wade argued that the murder of John Ogunjobi was a “trigger event”, adopting the description given by Lord Hughes in three cases in the Privy Council (**Myers v R Cox v R, Brangman v R [2016] 1 Cr, App, R 11**) for the events which were the motives for, and led to, the killing in the cases of **Myers** and **Cox** and attempted killing in **Brangman**.
36. The Crown shied away from describing the killing of John Ogunjobi as a “trigger event”, preferring to say that revenge for the killing of John Ogunjobi was the motive, or part of the motive, for the killing of Solomon Small in the context of a long running gang feud. The distinction, if there is one, is immaterial on the facts of this case.
37. The central issue in **Myers** and **Cox** was identity. Each killer had shot dead his victim at close range. Intent was clear. Self defence was irrelevant. If each was correctly identified, each was guilty of murder. Lord Hughes at [44] said “the evidence that there existed a feud between gangs was relevant to identity, which was the core issue in dispute. It went to show that those two defendants had a motive to kill the victims. It showed that they were members of a group which was likely to have felt aggrieved and, moreover, to have reacted by targeting the deceased on grounds of his membership of the opposing association. In each case the evidence of membership of gangs who were in deadly rivalry contributed to the proposition that it was the defendant who had done it, by supporting the other evidence that it was he who was responsible.”
38. In this case there was no doubt about who killed Solomon Small. The evidence of gang affiliation, the rivalry between the gangs and the killing of John Ogunjobi in that context went entirely to the question of motive and, if accepted, undermined the defence of lack of intent, self defence and loss of control.
39. In **R v Sule [2012] EWCA 1130**, a renewed application for permission to appeal against conviction, the trial judge had ruled admissible, as having to do with the facts of the case, evidence of three incidents of violence that preceded the killing on the indictment. It was the Crown’s case that the killing was part of tit for tat shootings which had begun with the shooting of the applicant several months before the killing. It was the applicant’s case that the evidence was bad character evidence and the Crown were unable to satisfy the requirements of any of the subsections of section 100 or 101. The evidence could not be to do with the facts of the case (and so admissible through section 98), they argued, because the events were not sufficiently close in time to the killing. This court upheld the judge’s ruling saying, “In our judgment, the evidence of the three incidents was evidence that was to do with the evidence of the murder in question. The words of the statute are straightforward, and clearly apply to evidence of incidents alleged to have created the motive for the index offence. Indeed, where the evidence is reasonably relied upon for motive, it would be irrational to introduce a temporal requirement.” This approach has been followed on a number of occasions in this court.
40. Whatever description such events bear, what is not in dispute is that they must be proved with evidence which is relevant and probative. Ms Wade submitted before the judge and before us that the death of John Ogunjobi could not be proved by admissible evidence and that the Crown were relying on bare hearsay in the form of



an assertion from PC Barr. We disagree. As the judge explained there was before him on the application CCTV footage of the killing of John Ogunjobi. It showed a young man standing on a street corner on the Roupell Park estate. A vehicle stopped near him and 4 young men got out and attacked him, stabbing him repeatedly. He died from his injuries. That the person killed was John Ogunjobi could easily be proved by formal admissible evidence, as could the fact of his death. The prosecution were in a position to do so. The fact that this was a gang killing was plain on the face of the CCTV footage. We would add that expert evidence to that effect was not necessary. Had there been any risk that a jury would not have recognised the hallmarks of a gang killing, PC Barr was well qualified to give evidence of that feature given his expertise in gang matters set out above.

41. Ms Wade further submitted that in allowing the evidence of the killing of John Ogunjobi to go before the jury, the judge had taken on trust that the prosecution were able to prove the killing with admissible evidence, but in the event the evidence was not called. This was because the killing of John Ogunjobi was admitted, no doubt for good tactical reasons. Further proof of that fact was not needed. On behalf of the Crown Mr Robinson QC informed this court that a post mortem report and a death certificate were provided to the defence before the fact of the killing of John Ogunjobi was agreed. We say no more about this point.
42. We outline below the evidence concerning the facts which Ms Wade submitted needed to be proven (see [34] above).

[a] John Ogunjobi affiliation

43. PC Barr's witness statement of 7 February 2020 referred to "*John Ogunjobi (nickname JaySav) a young male that was known to me and part of LTH (Lower Tulse Hill) gang a peer group of young males in their late teens that frequent and claim the territory on and around the Tulse Hill Estate, SW2*". In context, that evidence of John Ogunjobi's membership of the LTH gang can properly be taken to be based on PC Barr's observation of the development of the LTH gang as described earlier in his statement, and on his personal experience of the gangs in the area. He stated that he had "*over fourteen years' frontline operational experience, over ten of which have been spent serving primarily as an officer in the London Borough of Lambeth with the gangs and robbery pro-active taskforce*". His experience included several years embedded within local schools, with the aim of diverting individuals on the periphery of gang lifestyle, and having until June 2019 been part of a Gangs Task Force tasked with pro-active patrols with the aim of performing interventions in gang affected areas, in order to suppress gang related violence and monitor gang activity. He knew John Ogunjobi from his time working at his school.
44. PC Barr also relied on videos posted on YouTube in support of his opinion that John Ogunjobi was affiliated to the LTH gang:
  - i) an LTH tribute video uploaded on 18 August 2018 in which participants wore t-shirts featuring John Ogunjobi's image and the wording "*JSav's world 2002-2018*"; and
  - ii) videos uploaded on 23 January 2019 and 16 December 2019 by what PC Barr refers to as rival gang members from the Angell Town based 150 gang and the

Wandsworth Road based 17 gang, referring in disparaging terms to John Ogunjobi's death. The first of these included in its title the words "*LTH Diss*", clearly suggesting an association between John Ogunjobi and the LTH gang, and included the lyric "*Jump out on the LTH shout out JaySav he was way too slow*".

45. Solomon Small had himself recorded a video which was posted on 16 August 2019, the day after his death. The video made clear Mr Small's association with the ClapTown and 150 gangs (which he referred to in the video as "*my clappers*" and "*my Aigons*") and mocked the death of John Ogunjobi. That video supported the view that John Ogunjobi had been a member of or associated with a gang with a hostile relationship with one or more gangs with which Mr Small had been involved.

[b] LTH gang/Roupell Park gang association

46. PC Barr stated in his 7 February 2020 witness statement that the LTH gang was closely linked with neighbouring gangs on the Roupell Park estate, who were often seen associating together. The Defence ultimately agreed that "*the two gang factions – 67, LTH and Roupell Park on the one hand, and ClapTown, 150, UpTop and 410 on the other – were in a long-standing feud with each other*". The agreed fact was expressly based on admissible evidence namely videos posted on YouTube including the 'Bling' video in which the appellant participated (see further below).

[c] John Ogunjobi murder by ClapTown gang members

47. We have already concluded that there was admissible evidence that John Ogunjobi was the victim of a gang killing. As to which gang was responsible, the admissible evidence was as follows:-

i) the 23 January 2019 "*LTH Diss*" video referred to above involved a claim to responsibility for his death by (among others) members of the 150 gang, with whom Mr Small was associated (as his 16 August 2019 video subsequently indicated, see above); and

ii) Mr Small's 16 August 2019 video in which he directly sought to claim credit for the killing of John Ogunjobi. Although the video was posted after Mr Small's death, it is reasonable to infer that it would have been notorious that the ClapTown gang or their associates claimed to have killed Mr Ogunjobi: particularly when these two videos are taken together.

[d] Appellant's association with Roupell Park gang:

48. There was evidence from PC Barr, relying on information from other officers that the appellant was stopped on numerous occasions on the Roupell Park estate in the company of known gang members between December 2017 and January 2019. When arrested and briefly detained in January 2019 he was seen by PC Barr to be in the company of two boys who were known members of the Roupell Park gang.
49. As Ms Wade submitted, being stopped and searched is a frequent experience for young black men in London. However, the purpose of the evidence was not to show that he was stopped (and nothing was ever found on him), but to show where he was

spending time and the company that he was keeping. The appellant did not live on the estate albeit his father, with whom he sometimes stayed, lived nearby.

50. Taken at its lowest, the evidence tended to show that he was friendly with Roupell Park gang members. That would be consistent with gang membership but not on its own probative of it. The appellant was subsequently to say, although this was not part of the evidence before the judge on the application, that his brother was in the Roupell Park gang and he was friendly with his brother's friends (but not a member of the gang).
51. The so-called "*Bling*" video was posted on YouTube on 28 May 2019. It was made in a number of locations including the entrance to the Roupell Park estate. Images from the video were said by PC Barr to include the appellant standing next to another participant who was pointing up to the "*Roupell Park*" sign above their heads; the appellant making an "*RP*" hand sign; the appellant making disrespectful gestures apparently directed at Angell Town (where the 150 gang was based) and Brixton (the area in which the ClapTown and Angell Town gangs' territories were located); and the Appellant making a gun gesture at a "*B*" hand sign. The Bling video was direct evidence which was relevant and probative of gang membership of the participants in the video. It showed the appellant participating with known members of the Roupell Park gang (including his brother) in a collective gang activity. The impression given by his participation in the video is that the appellant was part of the gang.
52. The issue before the judge on the application was whether PC Barr's identification of the appellant in the video was sufficiently reliable to go to the jury, not that the video was not admissible evidence of the gang membership of the participants. It was submitted that only the appellant's eyes were visible; he looked very like his brother, with whom he was often confused; and although he was wearing a camouflage puffa coat which looked like one he had undoubtedly been wearing on other occasions (including when arrested and photographed in May 2019 and on 24 January 2019 when he was arrested), a similar coat was retrieved from the bedroom he shared with his brother. The lighting was poor (evidenced by the fact that the coat – if it was the same one – looked a different colour in the custody photograph).
53. As to the risk of confusion between the appellant and his brother, PC Barr had separately identified both the appellant and his brother in the video. There was no risk of confusion. In the event the judge was satisfied that the evidence of identification of the appellant in the video was of sufficient quality to go before the jury. There are no grounds to disagree with the judge's conclusion in that regard. In the event it was a subsequent agreed fact that the appellant was in the video.
54. On 24<sup>th</sup> January 2019, the day after the LTH Diss video mocking the death of John Ogunjobi was uploaded by the 150 gang, the appellant was stopped by police officers. There was direct evidence from one of the officers that on the home and lock screen of his mobile phone was a photograph of John Ogunjobi. When asked who it was, he said it was a friend of his (a fact he later confirmed in evidence).

[e] Solomon Small's affiliation with Clapham Town gang

55. As we have already observed, the Defence Statement served on 18 November 2019 referred to the appellant's belief that Solomon Small and Daniella Pascoa "*are*

*associated with gangs, in particularly the Clapham Town or CT Gang*". Mr Small's own video uploaded on 16 August 2019 included a direct claim to be a member of the ClapTown gang (see above). PC Barr had produced a report on Small's affiliation to the ClapTown gang earlier in 2019 but the prosecution did not seek to rely on that. We return to that report on the issue of disclosure later in this judgment.

56. We do not accept that it was necessary for the Crown to prove that Solomon Small had specific links to the murderers of John Ogunjobi such as to make him a readily identifiable target for attack, as Ms Wade submits. It would suffice that Small was known to be a member of a relevant gang, which the evidence showed he was.
57. In addition to gang membership there was also available a significant amount of evidence about Mr Small's possession of knives. Earlier on 15<sup>th</sup> August 2019 (the day of the killing of Mr Small) someone had reported him to the police on the grounds that he had a knife in the waistband of his trousers. He was stopped by the police but no knife was found. There was also an undated video which seemed to reveal the handle of a knife just inside his waistband. In a separate incident in June 2019 he had threatened the concierge at the hostel in which he was living, and after he had been excluded from the hostel a knife was found in his belongings. All this evidence went before the jury.
58. Having reviewed the background, the law and the detail of the facts relied on the judge succinctly summarised his decision at paragraph 46 of his ruling. He was persuaded that the evidence of gang association was relevant evidence of motive and so was to do with the facts of the case (s98 CJA). He reviewed the decision of this court in **R v Sule** and determined that the killing of John Ogunjobi was not too remote in time from the killing of Solomon Small and that there was a sufficient connection between the killing of John Ogunjobi and Solomon Small to be evidence of motive. He concluded "that the evidence that the defendant and Solomon Small were in rival gangs and that the defendant described John Ogunjobi as his friend and retained pictures of John Ogunjobi on his telephone could be considered by the jury as evidence of the motive of the defendant to attack Solomon Small, a rival gang member who had after all, recorded videos mocking the death of John Ogunjobi, albeit that such videos were only released after Solomon Small was killed." It is clear from his conclusion in the preceding paragraph, when considering the detail of the application in respect of the bad character of John Ogunjobi, Shakur Dixon-Kenton and Zeshaun Daley, that the judge considered that evidence of their bad character had substantial probative value in the context of the case and so, we infer, was admissible under section 100 CJA. Overlap between section 98 and section 100 is not unusual. We are satisfied that the judge's conclusions were correct.
59. The judge went on to consider fairness, applying Section 78 PACE 1984 "Does the admission of the evidence, having regard to all the circumstances, including the circumstances in which the evidence was obtained, have such an adverse effect on the fairness of the proceedings that the court ought not to admit it? In that regard the prosecution has limited the evidence in respect of the inter gang rivalry and do not seek to put before the jury the whole background of serious violence between the two factions, which includes at least nine murders over the last ten years. The evidence the prosecution seek to put forward is measured and evidence which the defence can answer and which the jury can consider without the danger of the adverse effect of

prejudice. In my judgment this evidence would not have such an effect on the fairness of the proceedings that I ought not to admit it.”

60. Mr Rhodes submitted at trial, as did Ms Wade on the appeal, that the evidence of the appellant’s gang affiliation was just not strong enough to justify PC Barr’s conclusion that he was a member of the Roupell Park gang or that there was a gang motive for the killing and that the judge should have excluded it – together with the other gang evidence under section 78 of PACE on the grounds that it was unfair. We disagree. From the time the Defence Statement was served there was to be a gang context to this case. The prosecution had available to it (and disclosed then served) admissible evidence of the gang context in which Small was operating, including of the rival gangs and of the appellant’s involvement with them together with his admitted friendship with John Ogunjobi. In the course of the hearing of the application at trial Ms Wade told the judge that the defence were prepared to amend their approach to omit any reference to the fact that Small was affiliated with gangs but to focus instead on the fact that he was known regularly to carry knives. This was, as she put it in submissions on the appeal, cutting the defence coat according to their cloth. In fact it was changing the defence case when the consequences of it were uncomfortable. It was the appellant’s case (and he subsequently gave evidence to this effect) that he thought that he had been set up for a gang attack by someone he believed to be a member of the ClapTown gang.
61. As well as not seeking to put into evidence information about the murders associated with the gang rivalry over the years, the prosecution did not seek to adduce a video which added to the evidence of Shakur Dixon-Kenton’s gang association. It was called the Local Shop. It featured Shakur Dixon-Kenton and other members of the Roupell Park gang mocking the death of Solomon Small, referred to in the video by his street name S1. The following line appears “Main road swimmings [this means swimming in blood] or *back road swimmings me and bro dun did it*. That’s olders to youngers sprinting where’s S1 [Solomon Small] I don’t know he’s missing” and other unpleasant material apparently gloating over the killing of Solomon Small.” The potential prejudice to the appellant from the italicised section (at least) was obvious.
62. There is no basis to disagree with the judge’s assessment of fairness in admitting the gang evidence. We reject this ground of appeal.
63. In the light of the judge’s ruling, the appellant agreed a number of facts with the prosecution. In particular, that:
  - i) the appellant’s brother, Shakur Dixon-Kenton, and Zeshaun Daley were affiliated with the Roupell Park gang;
  - ii) two gang factions – 67, LTH and Roupell Park on the one hand, and ClapTown, 150, Up Top and 410 on the other – were in a long-standing feud with each other;
  - iii) John Ogunjobi was associated with the Lower Tulse Hill gang; and
  - iv) John Ogunjobi was stabbed to death by four men who jumped out of a car. There was no evidence to identify who was responsible for the stabbing.

64. There was a separate agreed fact that PC Barr had accurately identified the appellant in the Bling video as the person wearing the camouflage puffa jacket.
65. That so much of the evidence was capable of agreement supports the judge's assessment, with which we agree, that the prosecution could prove by admissible evidence each of the links in the chain to which Ms Wade refers.
66. Agreed fact 36 read "In the opinion of PC Barr, Shaveek Dixon Kenton was associated with the Roupell Park gang. That opinion is based on the following", the basis then being set out in the ensuing paragraphs. These included reference to:-
- i) the appellant's appearance in the Bling drill music video and his association with other gang affiliates such as Zeshaun Daley and his brother Shakur Dixon-Kenton;
  - ii) the appellant having been stopped and searched several times on the Roupell Park estate and neighbouring Brixton Hill. His presence coincided with the emergence of a group of youths presenting as a street gang on the estate. On each occasion when he was stopped and searched by police officers he was not found in possession of any weapon; and
  - iii) the fact that PC Barr spoke to the appellant on 24<sup>th</sup> January 2019 (when he was briefly detained on the estate) together with two youths who were standing nearby and who PC Barr knew from his experience as their school's police officer to be linked to Roupell Park and Tulse Hill.
67. It was a matter for the jury to decide whether any of the gang evidence mattered to their determination of the facts of the offence, as the judge made clear to them. All the points made by Ms Wade about the strength of the evidence supporting PC Barr's opinion that the appellant was a member of the Roupell Park gang were, we have no doubt, powerfully rehearsed before the jury. The jury had the advantage of hearing the appellant give evidence at some length. We set out the gist of it below.

### **The defence case**

68. As we have already said, the appellant was of good character (with no warnings, reprimands, cautions, convictions). Evidence of his positive good character was before the jury. It was his case that he was not and never had been a member of any gang. He told the jury, as foreshadowed in his Defence Statement, that Solomon Small was a member of a gang as was his own brother, Shakur. He said that members of the gangs with which Shakur was associated were friendly to him, but he was not a member of the gangs, never went anywhere with gang members and took no part in their gang activities. He had been the victim of gang violence from time to time. In February 2018 he had been stabbed in the arm, and the wound required stitches. He referred to having been stabbed in Brixton by a "rival" gang. The police were involved in the incident. In June 2018 Solomon Small had confronted him when he was out late at night and accused him of snitching. They argued and Small stabbed the appellant just below the collar bone. It was a relatively minor wound and the appellant was prevailed upon by his brother not to go to hospital nor to do anything about it. This was not something he had mentioned until just before he gave evidence. The prosecution suggested he was making it up. He denied this.

69. It was an agreed fact that on 25th April 2019 the two brothers received Osman notices from the police warning each of them that there was a threat to his life. It was an agreed fact that the threat did not come from Solomon Small or any members of any of the gangs with which he was associated. The appellant told the jury that because of concerns about his safety, the area in which he could walk around without fear was reducing all the time. A social worker had visited to see whether he wanted to be moved out of London. His father had strongly objected. The appellant was afraid. He was not in a gang and believed that his life was in danger because of his brother's gang activities.
70. The appellant agreed he had participated in the drill ("Bling") video but denied he was a member of the Roupell Park gang. It was a matter of chance that he encountered his brother and the others on the evening they were making the video. They asked if he would like to take part in the filming. He was pleased to join in. He talked the jury through the participants and the detail of the lyrics. He said he was embarrassed by his participation.
71. He had been at primary school with John Ogunjobi and then at secondary school, but the latter had been expelled in year 7 or 8. He had kept in touch with him mainly by social media. He had met Solomon Small through a mutual friend. When they met, they would spud but they were not really friends. He said he had never played on PlayStation with him. He had not spoken to his mother on 13<sup>th</sup> August.
72. His account of the events on 15<sup>th</sup> August was as follows:
73. He had been living with his father and paternal grandmother for some time. On the 15<sup>th</sup> the two adults were arguing and "slagging off" his mother. He did not like it when they behaved like that, which they did frequently. He left the house. He ended up sitting on the wall near the kebab shop. At one point he went home and returned shortly afterwards. CCTV showed Solomon Small's mother go by. He did not notice her. He had not seen Solomon Small since Small had stabbed him in 2018, and was not expecting to see him that day. The appellant had been sitting on the wall for some time. He was expecting his father to come and find him with some food. He made a phone call to a friend in which he probably talked about girls and greeted another friend who came by on his bicycle (all of this could be seen on CCTV).
74. When Small and Daniella Pascoa passed him on the first occasion Small told him that Nat Nat was in the nearby café, New Tings. The appellant believed he had said that in order to put him on edge, as Nat Nat and his brother were on bad terms, Nat being a member of a rival gang. Small asked him to come round the corner with him but he said he was waiting for his father. Small and Pascoa continued on their way. When they returned they both spoke to him. He said that Daniella Pascoa had told him there was a leng girl waiting for him round the corner. Small had told him to follow him round the corner. Although he was wary, he also thought that Small was being friendly. He was a bit scared but thought that the safest option was to go along with it. There was no mention of Clapham or Clap Town. They walked away, Small told him to hurry up. He caught up with them, walking with them. Nothing was said. They went into a front garden, Small going in first and Pascoa boxing him in, closing the gate and blocking his retreat. Small did not knock on the door. He heard Pascoa on the phone saying "quick quick, he's here; we've got him." Small then asked him "what is all this shit you are talking, all this smack?". He denied having said anything

about Small but realised then that he had been set up and thought that someone was coming after him to hurt him or kill him. Small pulled out a big knife from his waistband and lunged at him. He dodged the knife and punched Small in the face. Small lunged a second time, just missing him. He punched Small in the stomach. Pascoa joined in and was trying to grab his arm but he elbowed her away. He and Small were fighting and he managed to twist the knife free of Small's grip. He thought that he was going to die. He tried to run away, and he still had the knife as he came out of the gate. He thought that he jabbed Small with the knife because he would not let him go. He said that he did not know if he had hit Small as it was all in the heat of the moment. He managed to run away up Corrance Road but he was being pursued by Small and so he jabbed him to get him off. As he got away, Small was still standing and he did not think that he had been badly hurt. He ran off, throwing the knife away in one of the bins as he went.

75. The appellant said that he went to Hayter Road then made his way to Streatham where his grandmother lived, using back roads. He changed his clothes and put them in a box which was later given to his brother (this was all challenged by the prosecution). He stayed away in Kent with his mother for a couple of days. He deliberately broke his phone in a panic (and not, as the prosecution suggested, to avoid incriminating evidence getting to the police). On 20 August he attended the police station with his mother. He could not cope with the fact that Small had died. He made no comment in his 5 interviews on the advice of his lawyer. He had not tailored his evidence to the prosecution case.
76. There was a psychologist's report which says that by the time of the trial he was suffering from PTSD attributed to a number of experiences, including the killing of Solomon Small and the earlier incidents in which he had been attacked. While he was in the witness box he had something of a crisis requiring an adjournment for further medical examination. He recovered and was able to continue his evidence.

### **Prosecution failure to put motive to the appellant**

77. Ms Wade complains, rightly, that Counsel for the Crown did not put to the appellant that he had killed Solomon as revenge for the killing of John Ogunjobi. We agree that he should have done. His explanation was that there had been a break in the evidence because the appellant was unable to continue and when the evidence restarted later the moment had passed. The moment passed only because counsel did not ask the question. Once the evidence was resumed it could and should have been put. However, given the nature of the appellant's evidence and the repeated and consistent denials of gang membership, it is inconceivable that had the proposition been put to him he would have agreed with it. The jury were well aware of his case, he had given detailed evidence and the judge dealt with the omission impeccably in his summing up. We reject this ground of appeal.

### **Disclosure**

78. At trial Ms Wade submitted that there had been insufficient disclosure on the question of whether John Ogunjobi was a member of the Tulse Hill Gang. The judge was under the impression that the issue of disclosure was no longer being pursued. Ms Wade says he was in error in that regard. She points out that the defence were told by way of a letter dated 15<sup>th</sup> October that, at a post-trial conference with the Senior



Investigating Officer in the appellant's case and the Officer in Charge of the investigation into the murder of John Ogunjobi, both officers indicated that there was no material of which they were aware which would indicate that the killing of John Ogunjobi was not gang related.

79. This was of limited interest. The question Ms Wade was pursuing was whether the prosecution were in possession of information that pointed away from the fact that the attack on John Ogunjobi was carried out by members of a gang affiliated to a gang of which Solomon Small was a member. If they were, then there was a duty to disclose it. Ms Wade also sought the disclosure of the report on Solomon Small to which PC Barr referred in his statement, although it was not, in the end, referred to in evidence. If there was any material in it which undermined the prosecution case in respect of Small's gang associations, then there was a duty to disclose it. The prosecution acknowledge their duty of disclosure and have repeatedly said they have complied. We have no reason to doubt that. We reject this ground of appeal.
80. There is, rightly, no complaint about the way the judge summed up the case to the jury. We have rejected all grounds of appeal. We have reviewed all of the evidence. There is no basis for the contention that the conviction is unsafe. Accordingly, this appeal is dismissed.