



Neutral Citation Number: [2022] EWCA Crim 897

Case No: 202101087 B3/ 202101098 B3/202101101 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM The Central Criminal Court

Her Honour Judge Poulet QC

T20207047

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2022

Before:

LORD JUSTICE FULFORD

MR JUSTICE HOLGATE

and

HHJ WALDEN-SMITH

Between:

RAJAE HESLOP
SAHARDED HASSAN
IRWIN CONSTABLE

- and -

REGINA

Appellants

Respondent

Mr Brian St Louis QC & Mr Justin McClintock (assigned by by the Registrar) for the appellant
Heslop

Mr Timothy Moloney QC & Mr Mark Kimsey (assigned by by the Registrar) for the appellant
Hassan

Ms Tana Adkin QC & Mr Simon Smith (assigned by the Registrar) for the appellant Constable
Mr Alan Kent QC & Ms Catherine Pattison (instructed by Crown Prosecution Appeals Unit) for
the Respondent

Hearing dates: 22nd March 2022

Approved Judgment

Lord Justice Fulford:

Introduction

1. On 19 March 2021, in the Central Criminal Court before Judge Poulet QC and a jury at the conclusion of “Trial 1”, the appellants were convicted of murder (count 1) and attempted murder (count 2). On 26 March 2021, Heslop was sentenced to imprisonment for life on count 1 and the period of 28 years (less 402 days spent in custody and on remand) was specified as the minimum term under section 322 of the Sentencing Act 2020. A concurrent sentence of 18 years’ imprisonment was imposed on count 2. Hassan was sentenced to imprisonment for life on count 1 and the period of 32 years (less 402 days spent in custody and on remand) was specified as the minimum term. A concurrent sentence of 20 years’ imprisonment was imposed on count 2. Constable was sentenced to custody for life on count 1 and the period of 24 years (less 402 days spent in custody and on remand) was specified as the minimum term. A concurrent sentence of 17 years’ detention was imposed on count 2.
2. Kaleel Nyeila, Samuel Agyeman, Armani Ogilvie-Pitt and Abdi Karama, who were said to have been involved in the planning and facilitation of the shooting with which these proceedings were concerned, were acquitted on 15 June 2021 at the conclusion of “Trial 2”.
3. Before this court Heslop and Hassan appeal against conviction by leave of the single judge. Constable also appeals against conviction, but limited to the ground of appeal relating to Ground 1. He has not renewed his application to appeal on other grounds.

The Facts in Outline

4. Shortly before 9pm on 1 May 2018, two men were shot at close range with a handgun whilst sitting in a car that was parked in Essoldo Way in Queensbury, Edgware, London. One of the bullets hit Leon Maxwell (“LM”) in his lung. The injury proved to be fatal and he died at the scene. Antoine Jean-Marie (“AJM”) was shot in his torso but managed to run away. He took a taxi to Northwick Park Hospital and was successfully treated for his injuries. AJM was unable to provide a description of the attackers because they had been wearing motorcycle crash helmets. LM and AJM had been involved in the sale of cannabis at the time of the incident.
5. Two men carried out the shooting, arriving together on a stolen moped. Both were dressed in black North Face jackets. The pillion passenger, wearing a grey helmet and said to be Constable, alighted from the bike and fired five shots at or into the car, one bullet hitting each victim, whilst the driver, wearing a red helmet and alleged to be Heslop, manoeuvred the moped to facilitate their escape.
6. CCTV footage captured the moped as it travelled from Essoldo Way to Wealdstone, where it was left for 24 hours before being moved. The moped and grey helmet were recovered on 25 May 2018, in Windrush Road, London NW10. DNA attributed to Heslop was recovered from the helmet.
7. While the motive for the shooting was not immediately apparent, the prosecution’s contention was that it bore the hallmarks of rivalry between two gangs in the area: the Stone City Gunners / “Greyset” gang (“SCG”) and the “Queensbury’ Boys” (“QB”).

Indeed, the prosecution were able to link the three defendants to the SCG. Hassan, who was known by the nicknames “Krafty”/ “K” / “K-Man”, was identified as the leader of this group. His DNA was found on one of the bullet casings retrieved from the scene. The prosecution’s case was that he had organised the attack, having provided the ammunition and possibly the firearm. Constable was known by the nicknames “Primal” / “Primus” / “Prime” / “PM”. Heslop was affiliated to the gang through his brother, who was a known associate of the SCG.

8. The prosecution case was that the plan that evening was to make an armed incursion into the rivals’ territory, with all those involved intending to kill anyone who appeared to be a member of the QB. The appellants committed the offences together as part of a joint plan, each having the requisite intent. Hassan was a leader of the SCG, and had recruited Heslop and Constable to carry out the shooting, supplied the ammunition and possibly the firearm, and arranged the use of a stolen moped as transport. All the defendants in Trial 1 and Trial 2 were associated with the SCG. Since neither victim was associated with the QB gang, the prosecution’s case was that they were simply in the wrong place at the wrong time

The Facts in Detail

9. During the investigation, the police utilised CCTV imagery to establish the movements of the moped. It had been stolen in the early hours of 1 May 2018 by a male called Jahdelle Williams-Campbell, and later that afternoon it was driven from Wembley to the High Street, Wealdstone, stopping en route for Williams-Campbell to collect a red crash helmet. It was then driven to Byron Park and handed over at about 5 pm to the four men who were the defendants in Trial 2: Agyeman, Nyeila, Kamara and Ogilvie-Pitt. It was thereafter taken to a nearby location by Ogilvie-Pitt and Agyeman.
10. During the early evening, CCTV evidence revealed Heslop and Hassan meeting inside a premises called the Cashino, located on the High Street. Constable was outside and remained in the vicinity of the premises. By 19.21 Constable had swapped jackets with Ogilvie-Pitt and at 19.22 Constable (now wearing a black North Face jacket with white logo) walked into the Cashino whilst Heslop was still inside.
11. Thereafter, Constable and Heslop left the Cashino and walked up the High Street together, turning into Headstone Drive. Constable returned to the High Street minutes later, where he spoke with Karama and Agyeman who then retrieved the moped. Constable was captured on CCTV at 19.35 walking in Whitefriars Avenue. Heslop rode his own moped to Grant Road where he retrieved something from a white carrier bag. Between 19.34 and 19.38 Heslop drove to a house in Marthorne Crescent. He parked in nearby Wickham Road and entered 6 Marthorne Crescent, where his girlfriend sometimes stayed. He was wearing a grey crash helmet. At 20.16 hours, a figure arrived at Marthorne Crescent, which was said by the prosecution and Heslop to be Constable (Detective Constable Emmanuel, having considered a variety of factors, testified, “*I have concluded that is Irwin Constable*”, albeit the judge advised the jury to ignore the evidence that had been given as to this individual’s gait). Agyeman and Karama drove the moped to the vicinity of Marthorne Crescent (Whitefriars Open Space). Just after 20.30, two figures left 6 Marthorne Crescent (said to be Constable and Heslop). One of them, Heslop, returned to the address at 20.33 and left again at 20.36.

12. At 20.39 hours, the moped began the journey to Essoldo Way. The two individuals on the moped were wearing black North Face jackets. After the shooting, the moped had been driven to the vicinity of Athlestone Road/Whitefriars Open Space by 20.59 hours, and the two riders headed towards number 6 Marthorne Crescent minutes later.
13. On arrest, the appellants declined to answer any questions during interview.

The Evidence relating to Gangs

14. The prosecution averred that the defendants were all involved in drug trafficking and violence and that the material seized when they were arrested demonstrated – certainly as regards Heslop and Hassan – their glorification not only of drug dealing, but also of gun and knife violence, especially vis-à-vis their rivals. Handwritten lyrics found at Heslop’s home were suggested to be directly and incriminatingly related to this shooting. These were written on pieces of paper headed “*Exeter Prison*”, and they contained a large body of notes amongst which were apparent clear admissions to belonging to a gang and antipathy towards the QB gang. They included references to making the rival gang members fearful. One section appears to relate directly to Heslop’s own role in the present shooting, which the Crown suggested amounted to a confession. Images and videos of individuals holding weapons were recovered from his mobile telephone. A mobile telephone linked to Hassan when he was arrested contained what appeared to be lyrics that boasted of shootings and guns, and in which the lyricist makes it clear he is a senior gang member. There was reference to the “stones” (said to be the Stone City Gunners). Police Sergeant Jones gave evidence, in part based on direct contact, that Hassan was the leader of the gang and lived close to the High Street, Wealdstone.
15. As described above, neither victim was associated with the QB gang and the Crown’s case was that this was a case of misidentification and that they had simply been in the wrong place at the wrong time. It was postulated that a critical false assumption had been made about them, given a cannabis sale was underway at the time of the incident. One of the Agreed Facts was to the following effect:

“8A. PS Paul Jones is a police officer who between 2014 and 2018 was in charge of investigating gang-related crime in the Borough of Harrow. PS Jones is experienced with gangs, how they operate and gang-related activity. **In his opinion, for someone to deal drugs within the ‘territory’ of a gang, they would have to be dealing on behalf of the gang that controls that area.**” (our emphasis)

16. Given this context, in a written application dated 15 January 2021, the Crown applied to adduce various strands of gang-related evidence to demonstrate that the murder and the attempted murder, which were otherwise unexplained, bore the hallmarks of gang activity. In essence, the prosecution alleged that the three defendants, as members or associates of the SCG, had undertaken what is known as a “*ride out*”: two of those involved travelling on a moped to an area outside their “*turf*”, armed with a lethal weapon looking to kill a rival gang member. Thus, it was said this was not a random shooting of a passer-by in the street.

17. Having considered the parties' submissions, the judge restricted the Crown's opening as regards the gang-related evidence. She considered it was necessary to determine the admissibility of this material once the mobile telephone, cell site and CCTV evidence had been given, to enable her to assess the nature and strength of the case, based on the evidence that was independent of the gang material. The Crown was permitted at the outset, however, to refer to a selection of particular "*drill lyrics*" seized from Heslop, written it was suggested whilst he was in custody, along with the lyrics recovered from a mobile telephone attributed to Hassan (see [14] above).
18. In due course this issue was substantively addressed on 29 January 2021, towards the close of the prosecution case. It was once again urged by the Crown that the jury should be informed of the rivalry between the two gangs, along with the links between each of the defendants and the SCG. The prosecution sought particularly to rely on the evidence of Police Sergeant Paul Jones, who had had direct dealings with most of the defendants and who was said to have extensive knowledge and experience of the gangs in Harrow and the surrounding boroughs. This background contextual evidence fell to be combined with the material already introduced in evidence, as rehearsed above, which was found, first, on a mobile telephone associated with Hassan and, second, within written notes in the possession of Heslop (as already indicated, the latter was said to contain a confession). It was argued that in these circumstances, the existence of the gangs and the defendants' affiliation to the SCG was not bad character evidence but instead formed part of the facts of the case.
19. Those acting for the appellants submitted that Police Sergeant Jones should not be regarded as an expert witness, and in this regard reliance was placed on *R v Myers* [2015] UKPC 40; [2016] AC 314. It was highlighted that the officer did not appear to have been trained in relation to gangs. It was suggested that his knowledge of and interactions with most, if not all, of the defendants – partly in an effort to dissuade them becoming or remaining gang members – had the potential to bias him against them. In any event his evidence was suggested to be anecdotal. It was argued, furthermore, that much of the material served in support of his opinion did not demonstrate ongoing rivalry between the QB and SCG gangs. Further, there had been no "*trigger event*" which could permit the Crown to assert that this was a revenge attack.
20. It was submitted additionally that neither of the victims had been shown to have any gang connections, notwithstanding the fact that they had been conducting a cannabis sale. Whilst there were incidents that were said to be part of ongoing gang warfare, they could not be attributed to the QB or the SCG. It was argued that the jury should not, in those circumstances, be invited to consider whether this shooting was the result of gang rivalry between the SCG and the QB. The prosecution, it was argued, would be speculating as to a motive when none could reliably be shown to exist. The admission of the evidence would, therefore, unfairly prejudice the jury against the appellants. Additionally, it was unjust to assert in the present proceedings that the four defendants in the following trial could be linked to the SCG when they were unrepresented in the instant proceedings.
21. By way of discrete submissions for each of the individual accused, Ms Tana Adkin Q.C. on behalf of Constable suggested that the material relied upon to demonstrate that he was a member of SCG revealed little more than that he was a prolific cannabis dealer with two associated knife convictions. Mr Brian St Louis Q.C. on behalf of Heslop

argued that the prosecution had failed to prove his alleged association with the SCG. The references to gang membership in the notes on the Exeter Prison paper potentially related to any gang rather than focussing on the SCG. Mr Tim Moloney Q.C. on behalf of Hassan submitted that the prosecution had been unable to establish a motive which could be laid at the door of SCG and in any event the Crown had failed to establish that this was an instance of misidentification by the killers. The lyrics in the mobile telephone attributed to Hassan were no more than the words of a song and they should not be relied on to demonstrate a propensity towards dealing with firearms or ammunition. It was observed that drill lyrics frequently reference guns and violence without the writer substantively espousing their use.

22. The judge ruled that the admissibility of gang evidence inevitably depends on the circumstances of the individual case. She judged that the evidence in this instance bore the hallmarks of a murder carried out by a gang. She observed that every feature of the shooting had the characteristics of gang activity rather than that of individuals acting with a different murderous motive. As the judge put the matter, “*Fundamentally, the very action of two men travelling 3-4 miles across London on a stolen motorbike to shoot two men involved in a cannabis sale suggests gang activity between two postcodes. This is underlined by the numbers involved with the arrangements for the obtaining and positioning of the stolen moped*”. There was ample evidence of incidents of apparent gang warfare in the material set out by Police Sergeant Jones and the judge concluded that whilst there may have been no obvious triggering event clearly attributable to the QB gang, the existence of the rivalry of these two gangs was part of the facts in the instant case. This was borne out by the writings of Heslop and Hassan. The judge referred to part of the judgment of Hallett LJ in *R v Awoyemi and Ors* [2016] EWCA Crim 668; [2016] 4 WLR 114, at paragraphs 34, which included the following:

“Gangs will not necessarily commit their specific feuds to writing or to camera and declare their intent to seek revenge in a way that can be proved directly; that does not mean evidence of a gang’s culture, membership and attitude towards violence will be irrelevant. It may provide an important link or part of an important link between an accused and the crime.”

23. The judge particularly focussed on the notes written by Heslop, with especial reference to QB (who must “*burn*”, in other words must die) and the lyrics of Hassan in which he described himself as the leader of the gang. This evidence, in the judge’s estimation, provided sufficient support for the proposition that the existence of the gangs of Wealdstone and Queensbury, along with their rivalry, formed an essential part of the facts of the case. The judge concluded that the affiliation on the part of the defendants to the SCG, within this context, was evidence which “*has to do with the alleged facts of the offence*” with which the defendants were charged for the purposes of section 98 (a) of the Criminal Justice Act 2003 (“CJA”). The involvement in gangs by the defendants was relevant to their intention, along with their motive, and it was germane as to whether they shared a common purpose. It tended, furthermore, to rebut the defendants’ assertions that their persistent contact with each other simply concerned cannabis dealing and spending time “*chilling*”.

24. In the alternative, the judge determined that the gang evidence was admissible pursuant to section 101(1)(c) of the CJA, as important explanatory evidence, without which the

jury would find it impossible properly to understand other evidence in the case. The evidence, for instance, of Heslop's Exeter Prison notes and the lyrics of Hassan would otherwise be incomplete and incomprehensible. Similarly, the web of contacts via mobile telephones and the movements of those involved immediately prior to the shooting would lack their proper context if there was no reference to the existence of the gangs.

25. The judge noted that Police Sergeant Jones was in a position to testify about the existence of the gangs and to assist with their territories and rivalries. In the circumstances, he could act as an expert witness, applying the approach set out in *Myers*. Police Sergeant Jones had sufficient experience to act as an expert and was uniquely placed to assist the jury as to the circumstances in which the gangs conducted themselves in the relevant area. He was acquainted with these defendants, their culture and the nature of their feuds, and he would be warned to give the court a fair, independent and balanced account. The judge observed that Police Sergeant Jones had known Constable from late 2016. He was acquainted with his street name, "*Prime*", and was aware that he was a member of SCG. Constable regularly dealt in cannabis. He had £23,000 in his possession on arrest but was simultaneously homeless. He had no other obvious means of earning money. The judge determined that Mr Jones was entitled, furthermore, to give his opinion as to the likelihood that someone regularly dealing in cannabis in a particular area would have to be a member of the gang controlling the area (see [15] above).

26. In the event, the judge admitted the following evidence:

- i) The handwritten notes on Exeter Prison notepaper seized when Heslop was arrested and the interpretation of them by another police officer, Detective Constable Declan James. This included the suggestion that they contained a reference to a retaliation attack on a man called Davis Kula on 6 May 2018 (see immediately below). From the content it appeared that the notes had been written between 5 and 18 September 2018 whilst Heslop was in Exeter Prison. The Crown suggested that it constituted a confession, given, *inter alia*, the following was set out:

“Opps can't say I aint on it, been on there block wid my rocket, hand ting and you cocked it. Had man dashing like forst, forest gum see man run, see dimmdawg put 2 in lung. Anything qb soon get burn, been in the field young it like how many times am I gonna ride on these punks, they come with the dots but no one burn, that what I call some amuter cunts.”

It was suggested by the Crown that the latter part of the text referred to the retaliation attack a few days later (6 May 2018) when Davis Kula, a friend of Constable, received pellet wounds in his skull and back when shot at by two men on mopeds in Wealdstone. No serious injury was caused, a fact which matches the observation: "*but no one burn*". Heslop additionally indicated he belonged to a gang and hates "*the Opps*" (see [60] below on this issue).

- ii) The evidence of Police Sergeant Jones regarding Hassan's position as leader of the gang and his observation that others associated with Hassan followed his instructions whenever police officers were in attendance.

- iii) Various Apple Notes on Hassan's mobile telephone and their interpretation by a Detective Constable James, including his reference to himself as a senior gang member/leader, and his mention of a fellow gang member "*Prime*" (said to be Constable).
- iv) Part of the lyrics on Hassan's mobile telephone which are said by the prosecution to relate to the Essoldo Way murder. The judge determined that the lyrics appeared to include boasting in relation to shootings, guns and ammunition as well as sending young gang members into opposition territory. The judge determined this evidence revealed a propensity to handle both firearms and ammunition and it was, as a consequence, admissible under section 101(1)(d) of the CJA.
- v) Constable's gang association, as demonstrated by his very extensive cannabis dealing, reflected *inter alia* in the fact he was in possession of £23,000 when arrested. Additionally, the judge admitted material discovered on his telephone in which he referred to himself as "*Prime*", along with images of large quantities of drugs and a text message exchange with David Kula.
- vi) Police Sergeant Jones's evidence of his experience in this context, the existence of the SCG and QB gangs and the extent of their respective territories and their rivalry, including in May 2018, the relevance of the area outside the Cashino and the shooting of Davis Kula. He was permitted to testify as to his opinion that a drug dealer operating in a particular area needed to be affiliated to a gang (see [15] above).
- vii) The co-accused Agyeman could be demonstrated to use the "*Menace*" telephone line. Material from his mobile telephone of conversations/arguments in relation to gang disputes and the references to "*qb yutes*" was deemed admissible to show his association with the SCG.

27. The relevant parts of the admissions read as follows:

"Stone City Gang/Grey Set Gang

7. The Stone City Gang formally known as the Grey Set Gang ("*SCG/GSG*") is based in the HA3 post code area of Wealdstone. Their territory includes the High Street, Wealdstone, and the area outside and in the vicinity of the Cashino.

8. The Queensbury Boys ("*QB*") is based in the HA8 area. Their territory includes Essoldo Way, Queensbury.

9. There is a history of apparent rivalry between the *SCG/GSG* and the *QB*.

10. On 6 May 2018 there was an attack on Davis Kula in the Wealdstone involving two suspects, each riding a moped. One of the suspects fired three shots at Mr Kula. He sustained pellet wounds to his skull and back. The injuries were not life-threatening or life-changing.

11. Irwin Constable, also known as "*Prime*", "*Prime Minister*" and "*PM*" is associated with the *SCG/GSG*.

12. Saharded Hassan is also known as “*Krafty*” “*K*” and “*K-Man*” is associated with the SCG/GSG. He is considered a leader of the gang.

13. Samuel Agyeman, also known as “*Sammy*” and “*SI*” is associated with the SCG/GSG.

14. All of the defendants in trial 1 are known to each other, and to the defendants who feature in trial 2.

15. There is no known connection between either Leon Maxwell or Antoine Jean-Marie and any gang.”

28. The judge directed the jury as to this evidence as follows:

“Gang evidence [...]

82. Part of the evidence [...] told you of the existence of the Stone City Gunners/Greyset gang and the Queensbury Boys and their territories. The agreed facts included the existence of the gangs’ apparent rivalry. The facts also set out the association of Irwin Constable with the SCG and the role SH was considered to have within the group. The prosecution also assert that RH is associated with a gang based on his extensive cannabis dealing in Harrow and what he has written in the notes found at his home on his arrest in 2019. Why have you heard about this evidence?

83. This evidence is before you as it is part of the facts of the case and because it tends to prove a motive for this attack and a common purpose of those said to be involved. You should bear in mind that the prosecution did not establish any link between Leon Maxwell and Antoine Jean Marie and any gang. However, the prosecution say that given the evidence of group planning, the specific geographical movement of the moped, the fact that the two victims were engaged in a cannabis deal in the Golf and the use of a firearm by the assailants all suggest this attack had an objective of gang rivalry and hostility.

84. You should approach this evidence fairly; gang association does not automatically mean that D is guilty of the offences charged but you may use the information as part of the body of circumstances which may tend to show a common purpose between those who you find had such an association and so a motive for the attack.

85. SH’s telephone [...] was downloaded. The lyrics [...] were found in that download. As you know SH admits he wrote only one section of these notes. No part of these lyrics can be evidence against IC or RH. They are only evidence in the case against SH.

86. You should consider this material. The first section “*got 1 on the n got one on the q*” is said to relate to the Queensbury shooting. This material may link the SCG gang to this shooting. The writer speaks of himself as a leader of the gang. In addition, the material makes several mentions of what are said to be shootings “*gang done couple drillings this summer*”. Overall, the content of these lyrics and

the notes of RH may be said to demonstrate gang culture which apparently adheres to a particular way of life, the use of weapons and attacking other groups in order to sustain reputation and for personal kudos. Glorify guns. Overall, the prosecution say the content illustrates gang activity generally which displays violent rivalry.

87. Once again you should remember that gang association alone could not make an individual guilty of the crime alleged but you may take it into account as part of the evidence in the case.”

The Appellants' Cases

29. It was the case for all the appellants that the attack may not have had connections with gang activity and there was an insufficient basis for the jury to be sure that it was the men on the moped who were responsible for the shooting.
30. Heslop, whilst accepting that he regularly rode a moped to make cannabis deliveries, often wearing a gunmetal grey helmet, denied he was the driver of the stolen moped. During the evening of 1 May 2018, he went to Cashino either to obtain drugs from or pay a debt to Hassan. Thereafter he was at Marthorne Crescent, where he “*bagged up*” his supply of cannabis. The drugs were below the expected quantity and he called Hassan who arranged for Constable to bring an additional supply to offset the shortfall. Constable stayed 5-10 minutes. He denied that he left the property, alone or with Constable, prior to 9.30 pm when he took a taxi home to North Finchley. He suggested he had never ridden on the stolen bike, and he maintained he had no role in the shooting. The presence of his DNA on the grey painted helmet must have been the result of secondary transfer. He flew to Jamaica on 13 May 2018, because his uncle was unwell.
31. Hassan accepted that he was one of the leaders of the Stone City Gang. A number of younger men worked for him as drug dealers and runners, including Agyeman. He supplied a man called Max Walcott, whose runner was Heslop. He also supplied Constable, along with a number of other individuals. He denied that he knew about the arrangements to steal the moped. He did not play a part in the attack or intentionally provide any assistance or encouragement. He spent the afternoon on the High Street, engaged in his business of dealing in cannabis. The mobile telephone calls he made to Heslop were concerned with drugs and money. He met up with Heslop who gave him some cash and he arranged for Heslop to obtain additional drugs (he arranged for Constable to take drugs to Heslop). The presence of his DNA on the bullet casing was not the result of primary transfer. He suggested the lyrics found on his mobile telephone had been written by someone else, as he had only recently taken it over.
32. Constable maintained that he was on the High Street in Wealdstone on 1 May 2018 on account of his occupation, namely that of dealing in cannabis. This was the reason for his telephone contact with Hassan. He denied involvement in the shooting, and he suggested he had swapped his jacket because he had recently been made homeless and was without access to washing facilities. He did not know Heslop and had simply been aware of his association with another drug dealer. It was highlighted that there was no telephone contact between them. He maintained that his only contact with Heslop was when, at the request of Hassan, he delivered the drugs referred to above. He suggested that Hassan had attempted to use him as “*cover*” for the collection of the gun. He denied

that he was the person seen on CCTV footage in Marthorne Crescent with Heslop and he disputed the identification evidence by Detective Constable Emmanuel. He suggested that battery on his mobile telephone was drained of power at 7.02 pm, which had made him uncontactable before the time of the “*ride-out*”. He had been at 70 Sefton Avenue at the time of the shooting, getting ready to go to an event in Dalston.

The Grounds of Appeal

(It is to be stressed that not all the points raised before the judge, as summarised above, were repeated in the Grounds of Appeal.)

Heslop

33. It is submitted that the judge erred in law in admitting the evidence relating to gangs, since its prejudicial effect significantly outweighed any probative value it may have had. It is highlighted that there was no known motive for the shootings and that, consequently, the evidence relating to gangs simply introduced fatal speculation into the trial. It is suggested this material had no relevance to the case.
34. It is accepted that gang evidence can be admissible on the issue of motive, but only if the prosecution is able to demonstrate relevance. In this regard, the appellant Heslop relies on the judgment in *Myers* and it is emphasised that the prosecution was unable to identify a “*trigger event*”. Mr St Louis stresses that with evidence of this kind, there is usually evidence of active rivalry between two gangs at the relevant time. It is suggested that this critical feature is absent in the present case.

Constable

35. On behalf of Constable, Ms Adkin similarly submits that the judge erred in permitting the prosecution to admit the evidence of gang rivalry and affiliation, for reasons broadly akin to those advanced by Mr St Louis. It is suggested that there was no evidence of “*tit for tat*” exchanges between the SCG and the QB, and it is contended that there was no evidence that the QB were responsible for shooting Davis Kular.
36. It is suggested, additionally, that the judge erred in refusing to discharge the jury when an irrelevant, but significant, piece of “*gang evidence*” was introduced by mistake (this point was argued by Hassan at trial, unsupported at that stage by Constable and Heslop). A recording which the prosecution obtained from the telephone of Agyeman was introduced which included a heated exchange involving two men, demonstrating – it was contended – the extent of the rivalry between the QB and the SCG. It contained threatening language, references to gang rivalry and violence; there was “*goading*” and threats were exchanged. The judge had been led to understand that one of the speakers was Agyeman, in part because the date given for the exchange was 2018. Instead, it related to a conversation in 2020 and did not feature any of the defendants in Trial 1 or Trial 2. The judge indicated that she had thought that one of the speakers was Agyeman and it was on this basis that it had been admitted. Mr Moloney (on behalf of Hassan) applied to discharge the jury, an application which – as we have just indicated – was not supported by Heslop and Constable. The judge declined to halt the trial and the jury were directed to ignore the content of the recording and Police Constable Declan James’s interpretation of it, given the date of the recording was corrected from 2018 to 2020. Although Constable did not support the application to discharge the jury at the

time, it is now suggested that, on reflection, it is apparent that this event had rendered the trial unfair.

37. It is emphasised that as regards Constable, unlike his co-accused, there was no evidence of notes or lyrics that were said to have been written by him relating to the incident on 1 May 2018, nor are there any references or images, as with Heslop and Hassan, to involvement with guns, shootings and gang membership or affiliation. There was said to be an absence of material to link the appellant to the events in Essoldo Way.
38. Constable accepted that he was connected to Hassan, and his defence involved relying on the bad character evidence that his movements were explained by his occupation, that of a dealer in cannabis.

Hassan

39. Mr Moloney on behalf of Hassan joined the submissions that any evidence of motive as available to the prosecution was insufficient to justify the admission of the gang-related evidence. He argued this material had been admitted, at least in part, on an erroneous factual basis, given there had been an admitted misunderstanding as to the reasons for the shooting of Davis Kula. Apart from motive, there was no sustainable basis to admit the gang-related evidence.
40. It was emphasised that although there was a case for the appellant to answer, it was circumstantial in nature, with the prosecution relying principally on evidence of the telephone contact with his co-accused and a DNA finding on a single bullet casing found at the scene of the shooting. In those circumstances, the gang evidence was fatally prejudicial to the appellant's defence: given Hassan was alleged to be the leader of the gang, if the jury accepted the killing was gang-related, it was almost inevitable that the jury would conclude that he must have authorised what had occurred.
41. Mr Moloney joined Ms Adkin in her objections to the introduction of the recording of the highly charged, gang-focussed argument, which (as already summarised) was said to have involved Agyeman, purportedly demonstrating the existence of hostility between the SCG and the QB. Once the true position had been revealed, the judge refused Hassan's application to discharge the jury, following the playing of the above recording. Instead, she directed the jury to disregard the recording and any evidence relating to its contents. It is submitted that the judge should have acceded to Hassan's submission.
42. As to the supposed rivalry between the SCG and the QB, it is submitted that not only was this unsupported by the evidence, but that any rivalry appeared to involve a group from Northolt.

Discussion

43. In *Myers* (an appeal to the Privy Council from a conviction in Bermuda), as in the present case, the murderous intention of the gunmen was not in dispute, and therefore the evidence of motive did not assist on that issue. Instead, the prosecution's case was that the evidence of a feud between rival gangs was relevant to identity, which was the core issue in dispute. We stress this is the identical position in the present case: the evidence of the gang feud arguably demonstrated that the appellants had a motive to kill the victims. They were members of a group which was likely to have had an axe to

grind, in the sense that they would have targeted the victims on the grounds of their perceived membership of the opposing group. The evidence contributed, therefore, to the prosecution's proposition that it tended to demonstrate who was responsible, and it supported other incriminating evidence (see Lord Hughes at [44]).

44. Contrary to the submissions advanced before us, it is not a precondition for the introduction of gang evidence that the prosecution is able to establish that there had been a "trigger event". The judgment of Lord Hughes has been misunderstood in this regard. For the appellants *Myers* and *Cox*, it happened to be the position that an important strand in the "*rope of evidence*" relied on by the prosecution was that there had been a trigger event which would have created a grievance within the opposing gang. As Lord Hughes observed, "*If that is a necessary part of the Crown case, it is for the Crown to prove the trigger event*" (see [49]). The Privy Council did not, however, go further by imposing an obligation on the prosecution in every gang case to establish a relevant trigger event as a precondition for the admission of gang-related evidence (see the first sentence of [50]: "*Brangman's case was not put as one of reprisal in the course of a gang feud, nor did the Crown advance the case as depending on a plainly identifiable trigger event*"; Brangman was said, instead, to have a powerful motive via his gang association for the shooting).
45. *R v Ayowemi* is an example of a case in which evidence of this kind can be admitted by more than one route. It was accepted in that appeal that evidence of gang membership and gang activity may be admissible in evidence, if it has "*to do with*" the alleged facts, pursuant to section 98 of the Criminal Justice Act 2003 ("CJA") or as "*bad character*" evidence pursuant to section 101(1) of the CJA 2003. However, in that case the judge admitted the relevant gang-related material under section 101(1) of the CJA, and it was that section on which this court focussed in the judgment on the appeal. But a preliminary question in these circumstances is whether the evidence comes within the meaning of section 98(a). As Sir Brian Leveson P pointed out in *Ditta* [2016] EWCA Crim 8 at [7]:

"Section 98(a) of the 2003 Act provides that where evidence is "to do with the alleged facts of the offence with which the defendant is charged", no bad character application need be made in relation to that evidence. In *R v Sule* [2013] Cr App R 3, Stanley Burton LJ commented, at [11], that the words "to do with" have a broad application: they would certainly cover prior conduct which provided a reason for the commission of an offence. "

46. Section 98 provides:

"*Bad character*"

References in this Chapter to evidence of a person's "bad character" are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.”

47. The decision in *Sule* merits detailed consideration in the present context. As summarised in the headnote, the victim was shot in circumstances that were said to have been, in effect, an execution, albeit the deceased was not the intended victim but had been mistakenly identified. In support of its case, the Crown introduced evidence of three incidents involving shootings that had occurred during a three-month period prior to the relevant shooting. It was submitted that these incidents demonstrated a feud for which the murder was intended to be a reprisal. Against that background, the judge held that the evidence of the three incidents was highly relevant to, and had to do with, the alleged facts of the offence with which the defendants were charged within the meaning of section 98. On an application for permission to appeal, it was submitted that evidence of the three earlier incidents ought not to have been admitted pursuant to this provision because the inference to be drawn was that the defendant was involved in a violent gang, probably dealing in prohibited drugs. It was additionally argued that the evidence was not “*to do with the alleged facts of the offence*” because the incidents were too distant in time from the murder that was the subject of the indictment. It was submitted the evidence concerning these incidents amounted instead to evidence of either the defendant's or another individual's bad character and that the requirements of the various statutory gateways to the admission of bad character evidence were not met.

48. Stanley Burnton LJ set out the court's conclusions on this as follows:

“12. In our judgment, the evidence of the three incidents was evidence that was alleged 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. Take these examples. A man is wounded in a shooting. He is hospitalised for six months. On discharge, he is alleged to have shot the man who is alleged to have been his attacker. In another case, the reprisal is the day after the first attack. In the second case, the evidence of the first attack is not bad character for the purposes of s.98, in the first it is.

13. In our judgment, the judge's decision was clearly right, and we pay tribute to his clear and cogent ruling. Incidents (1) and (3) gave rise to the alleged motive for the murder that was the subject of the indictment. Incident (2) [...] was part of the pattern: as was put by Mr Price, part of a series of “tit for tat” incidents. Each of them had to do with the others, as had the index offence. They were not merely relevant: they were intrinsic to the prosecution's case.

14. We add that, given these four incidents took place within a period of three months, if there were a temporal requirement in s.98(a), we would have held it to be satisfied.”

49. The same reasoning applies in the instant case. What otherwise might have been viewed as a random or inexplicable shooting, was on the prosecution's case a vital event forming part of the ongoing feud between two drug gangs in Northwest London – the SCG and the QB. For this material to be admissible there was no necessary temporal qualification, and any requirement for the prosecution to prove a “*trigger event*” depended on whether it is an important strand in the “*rope of evidence*” relied on by the Crown. That was not how the prosecution put its case.

50. We have no doubt but that this material was admissible on this basis. It had to do with the alleged facts of the offences with which the defendants were charged and the judge set out its relevance and ambit with admirable clarity. We quote once more from the relevant passage in the summing up:

“83. This evidence is before you as it is part of the facts of the case and because it tends to prove a motive for this attack and a common purpose of those said to be involved. You should bear in mind that the prosecution did not establish any link between Leon Maxwell and Antoine Jean Marie and any gang. However, the prosecution say that given the evidence of group planning, the specific geographical movement of the moped, the fact that the two victims were engaged in a cannabis deal in the Golf and the use of a firearm by the assailants all suggest this attack had an objective of gang rivalry and hostility.

84. You should approach this evidence fairly; gang association does not automatically mean that D is guilty of the offences charged but you may use the information as part of the body of circumstances which may tend to show a common purpose between those who you find had such an association and so a motive for the attack.”

51. Having been properly admitted and having been the subject of entirely appropriate judicial directions, it was for the jury to decide whether the contentions based on the gang-related evidence were established.

52. We turn next to the recording which the prosecution obtained from the telephone of Agyeman and introduced into evidence. As summarised above, it included a heated exchange involving two men, demonstrating – it was contended – the extent of the rivalry between the two gangs, the QB and the SCG. The judge had made earlier detailed rulings in which she indicated that the Crown could adduce evidence of association vis-à-vis only one of the other four defendants from Trial 2, Sammy Agyeman. He had made a significant contribution to the planning of the attack, and he had the use of the “Menace Line” telephone. The judge limited the evidence in support of his gang association to an argument recorded on his telephone in which the principal speakers, apparently one from each of the two relevant gangs, were involved in a loud dispute. This was said to demonstrate the rivalry between, and posturing

adopted by, the two gangs. As the judge observed, the conversation was frequently very difficult to hear and comprehend.

53. The front sheet of the transcript of this conversation suggested that it was downloaded from Ageyman's mobile telephone which had been seized on 27 March 2018 (therefore, shortly before the murder). On Monday 1 February 2021 the recording was played to the jury and Detective Constable Declan James gave brief evidence as to its meaning. He explained that what could be heard was a conversation between two opposing gang members who were discussing "scores". One was a QB member and one a SCG associate. The two speakers are aggressive and voluble, and it is to be emphasised that much of the content was very difficult to decipher even with the help of a transcript. Once this evidence had been given, it was immediately realised that the recording had been made in January 2020, 20 months after the murder. In addition, the recording was of two unknown speakers, and neither of them was Mr Ageyman. The judge had mistakenly understood that he had been involved.
54. Hassan thereon submitted that the jury should be discharged, given inadmissible and highly prejudicial material had been placed before the jury and he argued that no judicial direction was capable of curing the extreme prejudice occasioned by the admission of this material.
55. As the judge observed, the effect of the recording – on the basis of the most prejudicial, but plausible, interpretation – was to make the jury aware of the level of rivalry and antipathy between the two gangs, which was considerable. There was no mention of the three appellants, and the judge correctly pointed out that the discord between the two gangs had already been described in other material before the jury, and that this evidence simply constituted an element of a much wider picture. Therefore, it did not, in her view, create further impermissible prejudice.
56. However, the judge accepted that given this recording was made 20 months after the shooting, it was not necessarily relevant to the jury's assessment of the position at the relevant time. In those circumstances it should not be relied on by the prosecution as part of its case. The judge was confident the mistake could be cured by a judicial direction: there was a logical reason which could be explained to the jury as to why the material should not form any part of the evidence on which they could rely. The jury would understand that the position 20 months after the incident would not necessarily reflect the position of the gangs in May 2018. Similarly, the interpretation of what was taking place given in evidence by Detective Constable James was also irrelevant and to be ignored. The judge concluded that the error could be rectified in a way which would be understood and applied by the jury. Accordingly, she refused Hassan's application for a retrial.

57. The judge thereon directed the jury that it had been brought to her attention that the heated conversation had been recorded in the middle of January 2020, some 20 months after the incident with which they were concerned. She directed the jury to rely neither on the contents of the conversation nor on the interpretation of it by Detective Constable James. Put simply, it did not constitute evidence against any of the three appellants. On her direction, the transcripts that had been distributed to the jury were handed back to the court usher.
58. In our judgment, it is noteworthy that the fundamental difficulty with this evidence was appreciated immediately after it had been given, and it was addressed straightaway. It is relevant that only Hassan applied for the jury to be discharged, the other two appellants clearly having determined that the trial had not been rendered unfair. There was no further mention of this audio recording during the remainder of the trial, including during the course of the summing up. The appellants each received copies of the proposed legal directions as drafted by the judge in advance, and it was not suggested that the issue of this recorded conversation needed to be readdressed.
59. We are wholly confident that the verdicts are not rendered unsafe by this event. The appellants were not mentioned in the recording, which supplemented other material on the topic of gang rivalry. The jury would have readily understood that the conversations occurred long after the shootings in the present case, and, as just highlighted, the judge promptly and comprehensively dealt with the problem.
60. We should mention finally that Mr Moloney on behalf of Hassan contends that close examination revealed that if there was any “gang” rivalry with the SCG, it appeared to be with a group from Northolt. He relies on the contention that the Davis Kula incident (see [26] above) was subsequently revealed by the prosecution to be the responsibility of a group from Northolt. It is an unexceptional event during a trial that assertions are rebutted and some points made on the evidence lose their force. This is a classic demonstration of the way in which evidence emerges in criminal trials and the verdicts in the present case are not rendered unsafe as a result of this shifting evidential landscape.
61. In our judgment these verdicts are safe and the appeals are dismissed.