



Neutral Citation Number: [2021] EWCA Crim 44

Case No: 201804288 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT MANCHESTER
MR JUSTICE LEGGATT
T20167623

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/01/2021

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE FULFORD
MR JUSTICE DOVE
and
MR JUSTICE FRASER

Between:

Nathan DANIELS
- and -
REGINA

Appellant

Respondent

Mr John Cooper Q.C. & Mr Dominic Thomas (instructed by Draycott Browne Solicitors)
for the Appellant
Mr Andrew Thomas Q.C. & Ms Anna Chestnutt (instructed by CPS Criminal Appeals
Unit) for the Respondent

Hearing dates: 7th, 9th & 10th December 2020

Approved Judgment

Lord Justice Fulford V.P. :

Introduction

1. On 6 June 2017 in the Crown Court at Manchester (Leggatt J), the applicant (now aged 30) was convicted (by a majority of 10 to 2) of the murder of Michael Blake (“MB”) (count 1). On 7 June 2017 he was sentenced to imprisonment for life with a minimum term of 30 years.
2. Joe Wilson and Nathan Quigley were jointly charged in count 1 with the applicant; they both pleaded guilty to manslaughter and were respectively sentenced to 8 years and 7 years’ imprisonment. In the case of Nathan Quigley, the guilty plea was tendered after the jury had been sworn and the case had been opened, with the result that the first jury were discharged and the trial of the applicant recommenced with a fresh jury.
3. John Edwards and Leo Fallon were charged with assisting an offender, contrary to section 4(1) of the Criminal Law Act 1967 (count 3). They pleaded guilty and were both sentenced to 21 months’ imprisonment, suspended for 2 years.
4. The applicant was represented by GLP Solicitors from November 2016 to May 2017, and thereafter by Farleys Solicitors. Mr Gary Hughes had de facto management of the case and he instructed Mr Lewis Power QC leading Mr Ian McMeekin of counsel.
5. In the circumstances discussed hereafter, the applicant’s legal team withdrew during the course of the trial, an event which underpins a significant part of the submissions on this application for leave to appeal against conviction, for an extension of time of 470 days and for leave to adduce fresh evidence, the case having been referred to the full court by the single judge. The issue of the lengthy extension of time required is explained in a witness statement from the applicant’s solicitor (Mr Mann of Draycott Browne). Essentially, it is said that time had been required in order to raise the funds for an appeal, and in order to research the further information necessary to do so.

The Facts

6. The prosecution case was that the applicant murdered MB as a result of a dispute concerning drugs. During 3 November 2016, the applicant was trying to contact MB. That evening, the applicant drove his Ford Transit van to MB’s home accompanied by Wilson and Quigley. They picked up MB, who sat in the rear nearside seat. The applicant drove the van a short distance before stopping in an industrial estate. He got out and went round to where MB was sitting and opened the side door. The applicant, on the prosecution’s case, then deliberately shot MB twice with a handgun that he (the applicant) had taken to the scene, once above the left knee and once in the back of the head. Immediately after the shooting, the van drove back to MB’s house where he was dumped on the pavement outside his house, still alive but mortally injured. The wound to the head proved fatal, and MB died early the following day.
7. A bullet casing recovered during the investigation matched the DNA profile of the applicant. The probability of that DNA profile not being that of the applicant was 1:1 billion. There was no DNA link to the deceased on the bullet casing.
8. Mobile telephone data showed, *inter alia*, various mobile telephone calls and some messaging traffic on 3 November 2016 between the applicant, MB and his co-accused.

The mobile telephones registered to Wilson and Quigley, after regular use throughout the day, were switched off at approximately 10.00 pm. Between 9.59 pm on 3 November 2016 and 1.40 am on 4 November 2016, the applicant's mobile telephone was inactive. Any telephone calls were either diverted to voicemail or failed to deliver.

9. On 4 November 2016, the applicant employed John Edwards to clean his van, which – together with the firearm, the applicant's clothing and the deceased's mobile telephone – was never recovered. The police made repeated attempts between 3 and 13 November 2016 to trace the applicant at his home address and via his family and his known contacts. He was arrested at an address in Burnley on the afternoon of 13 November 2016.
10. In due course, the applicant accepted that he was the driver of the van. The defence case was that after the applicant had stopped the van, there was a confrontation between the applicant and MB. The latter had produced a gun and a short violent struggle then occurred. The applicant maintained he was trying to defend himself and, during the struggle, MB discharged the gun twice.
11. Dr Philip Lumb, a pathologist, conducted a post-mortem examination on the deceased on 4 November 2016. He found that the left knee of the deceased was flexed at the time the bullet entered the body, which indicated that he may have been in a sitting position. He observed two injuries to the left side of the head, an abrasion to the left cheek and a superficial laceration with bruising around it on the upper left side of the head. He opined that these had been caused by blunt force which could have been a blow struck with a weapon, but equally may have been caused by the deceased going to the ground. Similarly, there was a deep bruise on the upper back and right shoulder of the deceased which could have been caused either by a direct blow or a collapse to the ground. There was a gunshot wound towards the back of the head. The direction of the bullet was left to right across the skull, but critically it also travelled forwards towards the front of the skull at an angle of 30 degrees and slightly upwards.
12. Mr Khaldoun Kabbani, a ballistics expert for the prosecution, gave evidence on 18 May 2017 that the two bullets were both fired from the same firearm, a 9mm pistol with a smoothbore barrel. He and the defence firearms expert, Mr Philip Boyce, were in agreement that the bullet wound to MB's left leg was the result of a direct shot. Mr Kabbani did not accept the suggestion made to him in cross-examination that the bullet in the deceased's brain had ricocheted off another surface prior to penetrating the skull. He suggested there was no angular damage to the bullet of the kind he would expect to see following a ricochet, and furthermore given the location and track of the gunshot wound, if the deceased was sitting in the back of the van when the gun was fired it was not physically possible for the bullet to have ricocheted off one or more surfaces before entering the back of his head. Mr Boyce gave evidence on the same day and testified that it was possible that the gun was not pointing at MB when the fatal shot was fired (potentially at a distance of more than three feet). He considered that there were a number of surfaces in the back of a Transit van which would have enabled the bullet to have ricocheted, whether or not it was MB who had pulled the trigger.
13. The deceased had been wearing a pair of cotton shorts and a hooded puffa jacket, both of which were cut from him during his medical treatment. Neither Mr Kabbani nor Mr Boyce had inspected the clothing prior to commencing their evidence as summarised

above. Mr Kabbani indicated in his first report (which was dated 8 November 2016) that he had not inspected the clothing for “*close range assessment*” and he only saw Mr Boyce’s report suggesting the possibility of ricochet less than a week before the trial commenced.

14. Leggett J was told by junior counsel for the Crown on 19 May 2017 that the scenes of crime investigators had indicated that there was no evidence of gunshot damage to MB’s shorts, but the decision had now been taken that the deceased’s clothing was going to be examined by the two experts.
15. On Wednesday 24 May 2017, a new report became available from Mr Boyce (dated the same day) in which he indicated he now agreed with Mr Kabbani that the ricochet theory could be ruled out. Both shots were fired with the muzzle of the firearm in very close proximity to, or in contact with, the clothing.
16. It would appear that events thereafter moved at some notable speed. Although it is not possible to identify precisely the number of discussions with the applicant and his advisers that took place and the permutations of those present, it is clear that there were one or more short conversations involving the applicant, Mr Power and Mr Hughes after Mr Boyce’s report became available, and there may have been a separate meeting between Mr Hughes and the applicant. Mr McMeekin, who was dealing with a professional commitment in another courtroom at Manchester Crown Court, was not involved in any of the relevant discussions, save that he spoke with Mr Power in the absence of the applicant and Mr Hughes on the concourse after the decisions set out below had been taken.
17. Thereafter, at some stage before 12.30 pm on 24 May 2017, Mr Power informed the judge that the defence solicitors and both counsel were compelled to withdraw because they were in receipt of instructions from the applicant that “*put an entirely new gloss on the defence case*”, with the result that they were professionally embarrassed. The relevant endorsement, dated 24 May 2017 and signed by the applicant, was in the following terms:

“I, Nathan Daniels, have provided my legal team with new instructions regarding the incident concerning the shooting of Michael Blake on the 3rd November 2016. These instructions contradict my previous instructions to my legal team. My Queen’s Counsel has told me that he now feels professionally embarrassed in presenting my defence and feels he has no alternative but to withdraw from my case.”
18. Steps were then taken without delay to find an alternative legal team for the applicant, who expressed his wish in open court for this course to be followed. A local firm of solicitors, Draycott Browne, had been identified and enquiries were made as to the availability of replacement counsel. Again, the applicant expressed the view that Draycott Brown was a suitable firm of solicitors (Mr Mann from that firm had previously acted for the applicant). The applicant indicated he wished to choose leading counsel. He additionally told the judge that Mr Boyce had been the author of the ricochet theory. We interpolate to note that this contention is not entirely correct, in that Mr Hughes in his instructions to Mr Boyce had specifically asked him to consider the possibility of ricochet.

19. Draycott Browne solicitors, in due course, indicated to the judge that they would require an adjournment of six weeks, later reduced to two weeks, to be in a position properly to represent the applicant. The judge expressed the view that this would constitute an unacceptable delay to the trial of the applicant, which had already been disrupted and delayed by the guilty pleas of his co-defendants, and instead he would adjourn the case until Tuesday 30 May 2017. Two alternative firms, Olliers Solicitors and Forbes Solicitors, were identified as being potentially available to represent the applicant.
20. On Thursday 25 May 2017 the court reconvened with three firms of solicitors appearing, Olliers Solicitors, Forbes Solicitors and Farleys Solicitors. Mr Hall of counsel represented Forbes Solicitors. The applicant agreed to retain Farleys Solicitors (to whom the legal aid certificate was transferred), instructing Alistair Webster Q.C. The jury were invited to return on Tuesday 30 May 2017.
21. On Friday 26 May 2017 the judge was informed in open court by Mr Webster that the legal aid certificate had been transferred to Messrs Farleys, and Mr Paul Schofield, the senior partner, had conduct of the case. Mr Webster applied for the case to be adjourned until Monday 5 June 2017 because of difficulties that had been encountered in securing available leading counsel (Mr Webster, as it transpired, was not in a position to accept the brief). Mr Webster indicated that two or three days should be sufficient time for counsel to prepare. Furthermore, he had spoken with Mr McMeekin, and he explained that he did not understand why counsel, together with Mr Hughes, had withdrawn from the case. Having seen the applicant's instructions from the moment of his arrest through to the date of counsel's withdrawal he had formed the view there had been no substantial deviation in the applicant's account. Finally, Mr Webster expressed the strong view that both the prosecution and the defence should have inspected the clothing before the expert ballistic evidence was called before the jury.
22. The judge adjourned the trial until Wednesday 31 May 2017. Counsel, Mr Taylor (called to the Bar in 1985), leading Mr Wyn Jones, and Mr Schofield from Messrs Farleys had seen the applicant in conference, and particularly during Tuesday 30 May 2017. On Wednesday 31 May 2017 Mr Taylor informed the judge that the applicant had decided not to retain their services and instead intended to represent himself.
23. The applicant thereafter sought an adjournment to secure representation of his choice, notably Mr Mann of Draycott Browne. He suggested the loss of his original lawyers had not been his fault and that he was not well placed to represent himself against the prosecution team, led by an experienced silk. He criticised his previous lawyers for their failure to inspect the clothing before Mr Kabbani gave evidence. The judge decided that it was not in the interests of justice to grant an adjournment for the length of time requested, which would result in the jury, once again, being discharged. He stressed that Mr Taylor, Mr Wyn Jones and Mr Schofield were available to represent the applicant. The applicant continued to represent himself for the remainder of the trial.
24. Mr Kabbani was recalled, following the joint examination of the clothing, particularly on the issue of gunshot residue. He stated he had inspected an area of damage to the left leg of the shorts which was consistent with a gunshot entry wound. There was a dark area around the bullet hole which comprised gunshot powder sooting. This was the result of a firearm having been discharged when in contact with, or very close to, the

surface on which the sooting was found. In the result, the firearm was either touching, or was within 1cm of, the shorts when it was discharged. Similarly, as regards the fatal wound to the head he concluded the weapon was in very close proximity to MB's body. In relation to the puffa jacket, Mr Kabbani said that he found damage to the left lower side of the hood which matched the entry point of the bullet wound to the head. This meant that the bullet first passed through the side of the hood before it entered the left rear part of the skull. Furthermore, he concluded that the shoulder of the deceased must have been close to his head when the shot was fired because the bullet travelled through the shoulder area of the jacket, and having exited, it then re-entered the garment via the lower left hood area. He demonstrated this by way of a composite picture or illustration in which he used a long red needle which followed the trajectory of the bullet through the jacket and into the skull of MB. As a firearms expert he was unable to comment on whether or not there had been a struggle. The Crown read Mr Boyce's report of 24 May 2017, summarised above at [15].

25. The applicant then gave evidence. He said that some months before the shooting, MB had approached him to ask if he would make a false insurance claim on his behalf. MB was planning to engineer a car crash in order to claim a sum of money from his insurer so that he could pay off an existing debt. The applicant refused but after MB's car was damaged, he agreed to buy it from him and had paid MB a deposit of £2,500. MB failed to provide the car and on the evening of the incident the applicant went to meet him to recover his deposit, having made unsuccessful telephone calls to establish contact. He was accompanied by Wilson and Quigley. The applicant said that he wanted his friends to accompany him to provide safety in numbers, although he was not intending to confront, attack or threaten MB. The applicant's evidence was that MB asked to be taken to a different location where they would be able to resolve the matter. Whilst they were driving, MB spoke with someone on his mobile telephone. The applicant started to argue with MB. He stopped the van and asked MB to get out. The latter refused to do so, and the applicant alighted and went around to where MB was sitting in order to confront him. MB pointed a gun at the applicant when he opened the door.
26. His evidence was that his instinctive reaction was to push the gun away from him in a downwards direction as he leant into the van. Although he stated that he could not remember if he touched the gun or just MB's hand, he additionally suggested in cross examination that at some stage he took hold of the top of the gun. In either scenario, when he pushed forwards the gun went off for the first time. They were, he said, struggling violently all over the place, backwards and forwards, whilst he was just trying to keep the gun away from him which went off for a second time, whilst still in MB's hand. He was unable to recall exactly how this had happened. After the second shot, he wrestled the gun out of MB's hand and threw it away. He then noticed that MB had been shot, seemingly in the head.
27. He jumped back into the van and drove off without shutting the side door. He stated that he was panicking and wanted to take MB to hospital but did not know the area. Quigley was directing him and told him to take the deceased back to his house. Upon arrival, he left the deceased and Quigley at the roadside and drove away.
28. The applicant admitted that he destroyed his mobile telephone, albeit he claimed he had not turned it off. The reason he disposed of the telephone and the van was because he received very bad advice from others following MB's death. He denied disposing of

MB's mobile telephone. When he conferred with a representative of his solicitor, Mr Hughes (who was also a personal friend), at the police station, they prepared a statement to be handed to the police (the "*Prepared Statement*") when he was interviewed. He stated that he did not answer any questions in the interview due to the legal advice he received. We observe that the Prepared Statement, in the event, was not shared.

29. As to his DNA having been detected on the bullet casing, the applicant stated this must have been due to secondary transfer, either when he shook hands with the deceased when he arrived at his house, or when he pulled the deceased out of the van to the roadside on Manchester Road before driving away. He stated that if he had a gun and was going to load it with bullets, he would have worn gloves.
30. Mr Hughes confirmed that the applicant's prepared statement was not given to the police.

The Grounds of Appeal

Ground 1: Criticisms of the original legal team

31. It is contended that the applicant's legal team at trial acted with flagrant incompetence. The main areas of complaint are that:

- i) they failed to examine the deceased's telephones/telephone records (this assertion, set out in the written Grounds of Appeal, was withdrawn on 8 July 2019 in the "*Reply to the Grounds of Response*" but we address it for completeness given the particular circumstances of this case);
- ii) they failed adequately to instruct the firearms expert;
- iii) they failed to advance the case in accordance with the applicant's instructions;
- iv) they failed to apply to discharge the jury;
- v) they manipulated the applicant's instructions to engineer their withdrawal; and
- vi) they failed properly to advise the applicant of the consequences of their withdrawal.

Ground 2: Criticisms of the judge

32. It is suggested the trial judge erred in law in that:

- (i) he erroneously refused several applications to adjourn the case for a sufficient length of time following the withdrawal of the applicant's legal team;
- (ii) he failed to exercise his discretion pursuant to section 78(1) of the Police and Criminal Evidence Act 1984 to exclude the picture or illustration demonstrating the path of the bullet; and

- (iii) he failed adequately to advise the applicant of the consequences of waiving privilege to rebut the suggestion of recent fabrication in relation to his prepared statement and his silence at interview.

Ground 3: Criticisms of prosecuting counsel

33. It is suggested that prosecuting counsel acted unfairly in that:

- (i) leading counsel for the Crown alleged that the applicant had “*put (his) head together with Gary Hughes to invent*” the Prepared Statement, and this allegation was not put to Mr Hughes and did not feature in the Crown’s closing address.
- (ii) leading counsel made inappropriate comments that included that (a) the deceased’s mobile telephones had “*barely been used*” (a contention that is said to have been unsupported by the evidence); (b) the “*gun could not have been in Michael Blake’s hand and caused that damage*” (again, a contention that is said to have been unsupported by the evidence), (c) an unfair question was posed querying why the expert should have examined the deceased’s clothes, and (d) that the prosecution unfairly commented that they would have wanted to see the entire file relating to the police station and the prepared statement from the applicant’s solicitors.

Ground 4: Fresh ballistics evidence

34. The applicant sought to introduce what is suggested to be fresh evidence from the defence ballistics expert, Mr Boyce, to address whether the trajectory of the bullet and the range of fire was consistent with the applicant’s account of an accidental discharge during the struggle. This application and ground of appeal was abandoned during the hearing.

Discussion

The consistency of the applicant’s account and the circumstances of his lawyers’ withdrawal

Introduction

35. Before we address the grounds of appeal individually, there is a cross-cutting issue to be considered, namely whether the applicant’s instructions remained consistent from the time of his arrest, together with the linked issue of the circumstances of his lawyers’ withdrawal from the case. It was the applicant’s clear contention in his evidence before this court that his explanation as to what occurred at the time MB was shot has at all times remained the same. Put otherwise, he maintained that there was no material change in his instructions between when the Prepared Statement was drafted at the time of his police interviews through to his evidence at trial. The applicant suggests that he was persuaded to accept a false version of events, of which he was not the author, in order to secure the discharge of the jury. This is an issue of considerable importance in the context of certain of the grounds of appeal, including the circumstances of the withdrawal of his original legal team. It is convenient, therefore, to begin our analysis

of the merits of this application by rehearsing the main iterations of the applicant's account as to what occurred at the time MB was shot and indicating our conclusions on this issue.

Mr Hughes's Notes at the Police Station

36. Mr Hughes's first written notes at the police station on 14 November 2016 of what the applicant said to him were as follows "*Started arguing – got out of van and MP pulled out a gun – he struggled and he let it off – hands on his wrists/gun – gun went off again.*"

The Prepared Statement

37. The applicant gave evidence to us that the statement which was prepared for the interviews – albeit, as it transpired, not provided to the police – accurately reflected what he said to Mr Hughes (the statement is written in Mr Hughes's handwriting). He told Mr Hughes that MB was a good friend. On the day of the incident, the two men had a conversation and MB informed him that the applicant could come to his house to collect his money. When he knocked on MB's door, the latter asked for a lift. The applicant agreed. MB asked the applicant to turn into a particular street. He started to argue with the applicant because the latter had been asking another person in a telephone call during the journey for a particular address to enable him to rob the occupant. The applicant got out of the van to remove MB, who then produced a firearm. They began struggling and grappling, and the gun went off on two separate occasions. The applicant hit MB with the gun, but he did not deliberately shoot him. He tried to find a hospital but was unfamiliar with the area, and instead took MB to his home address. In his evidence before us the applicant suggested that this account of the incident reflected his defence.

The Defence Statement (dated 12 April 2017)

38. This document, signed by the applicant, contained a brief description of the relevant events, as follows:

"8. [...] However the deceased produced a gun and a struggle took place. During the course of the struggle the gun was discharged twice. It was a short but violent struggle with the Defendant trying to defend himself."

The Proofs of Evidence

39. Mr Hughes adopted the somewhat unusual practice of not saving the different versions of the applicant's proof of evidence. Instead, he simply amended and saved the same version. However, he printed out copies of the proof, albeit they are undated. There were, therefore, different versions of the proof available before this court on this appeal. We accept Mr Hughes' evidence that the various versions of the applicant's proof of evidence reflected the changing instructions he received from the applicant. It would be illogical and it would have served no useful purpose to draft a proof of evidence that was other than the account the applicant was then providing.
40. One version, sent to the applicant's present solicitors as an attachment on 22 May 2018, included the following:

"I therefore approached MB with my arms out with a view to physically removing him from the van. Whilst I was moving forwards MB reached into his coat with his right hand and he produced a gun that he was pointing directly at

me with an outstretched right arm. I must have been one metre away from him at this point. I had a view of the firearm because it was very close to me although the van was only slightly illuminated throughout by the rear interior light. I instinctively took hold of MB's right wrist with my right hand with an over-hand grip and forced his arm down. As I did this I swivelled my body so that I was able to place maximum pressure upon his right hand and prevent him from lifting the gun towards me. Almost immediately after I had taken hold of MB's hand he fired the gun. I am unsure exactly where the bullet hit at this point but MB let a roar that must have been a combination of pain, anger and adrenaline. In this moment he was able to force his arm upwards and whilst we were both struggling, the firearm has been discharged for a second time. On this occasion MB's grip loosened and I was able to remove the gun from his hand and I admit to hitting him with the gun. At this point I did not know that he had received the gunshot wound to his head or his knee. The gun connected with the left side of his face. MB almost immediately went into a state of semi-consciousness and appeared to be having a seizure."

41. A copy of the proof of evidence headed V 2 contained a different account of the shooting of MB. The material divergence with the version set out above follows the description of the gun being produced:

"I had a view of the firearm because it was very close to me but the whole area was very dark with only a small light on that illuminated the van. I instinctively took hold of MB's right wrist with my right hand with an over-hand grip and forced his arm down. As I did this I swivelled my body so that I was able to place maximum pressure upon his right hand and prevent him from lifting the gun towards me.

Almost immediately after I had taken hold of MB's hand he fired the gun. I am unsure exactly where the bullet hit at this point but MB let out a roar that must have been a combination of pain, anger and adrenaline. In this moment he was able to force his arm upwards and we both began struggling for the firearm.

I was able to twist MB's forearm and forced him to let go of the gun. I immediately hit him across the face with the gun and whilst he lowered his head he was still grappling with me. I had hold of the gun but I did not know if I had the muzzle or the handle. MB at this point took hold of the gun and pulled it towards him – whilst doing this he has pulled the trigger and the gun went off for a second time. I did not know if the gun was pointing directly towards him or not. MB almost immediately went into a state of semi-consciousness and appeared to be having a seizure."

42. The applicant denies that he provided critical aspects of this account to Mr Hughes. Particularly he did not state that he twisted MB's forearm, forcing him to let go of the gun, which he wielded to hit MB across the face, and that whilst he still had hold of the gun it was discharged a second time. This sequence of events, on the applicant's evidence to this court, was invented by Mr Hughes, who made suggestions to him as to how the incident might have developed. The applicant testified that it was untrue to suggest that he had told Mr Hughes that he hit MB with gun shortly before the second discharge.

43. In the copy of the proof of evidence in the possession of Mr Power, sent to counsel on 5 May 2017 by Mr Hughes, the main divergence is as follows:

“I instinctively took hold of MB’s right wrist with my right hand with an over-hand grip and forced his arm down. As I did this I swivelled my body so that I was able to place maximum pressure upon his right hand and prevent him from lifting the gun towards me.

Almost immediately after I had took hold of MB’s hand he fired the gun twice in quick succession. I am unsure exactly where the gun was pointing at the time he fired it. Inside the van was very dark with only a small light that was on in the rear of the vehicle. MB’s grip loosened and I was able to remove the gun for his hand and I admit to hitting him with the gun. At this point I did not know that he had received the gunshot wound to his head. The gun connected with the left side of his face and I accept that the weight of the gun and the force I hit him with caused him to slump on the back seat. MB almost immediately went into a state of semi-consciousness and appeared to be having a seizure.

44. It is to be noted that this version of the applicant’s account contains, in effect, no mention of any significant struggle and the pistol is fired in quick succession.

The Change of Instructions: the Version of 24 May 2017

45. It is alleged by the applicant that once Mr Boyce’s report dated 24 May 2017 was available (see [15] above), he (the applicant) had various meetings with different permutations of his then legal team. During one of these discussions, Mr Power allegedly suggested that the applicant’s former instructions were untenable, given the shot seemingly entered MB’s skull from behind. In a meeting which took place thereafter with Mr Hughes alone, the latter indicated that the lawyers had been discussing the situation. The applicant was presented with three options: first, he could continue with the trial and receive a life sentence with a minimum term of 35 years; second, he could sack his lawyers and continue the trial unrepresented; or, third, he could engineer a situation in which his present legal team felt obliged to withdraw and continue the case with a new team. Although the applicant claimed he did not receive any substantive advice on the issue, the applicant believed that under the third option the trial would restart with a new jury. According to the applicant, Mr Hughes suggested that for option 3 he needed to “*change something*” concerning the circumstances in which MB was shot in the head, such as “*I got the gun off him and then it went off*” or “*I hit him with the gun and the gun goes off*”, thereby shooting him in the head. The applicant agreed to follow this advice.
46. Thereafter, in a further meeting, Mr Power purportedly said that he had seen the picture or illustration prepared by Mr Kabbani showing the red needle, which demonstrated that the gun came from behind (see [24] above). According to the applicant, Mr Power was concerned that the failed ricochet theory undermined his professional standing and he refused to accept the applicant’s instructions. As it seemed to the applicant, Mr Power was in effect suggesting that option 3 was the best solution, which, when it was accepted by the applicant, led Mr Power to say “*good lad*”, whilst winking at him. The applicant claims that he did not want to sack his lawyers but felt pressurised into doing so. He accepted a version of events (*viz.* “*I got the gun off him and then it went off*”

shooting MB in the head) that did not reflect his instructions, but which was instead suggested by Mr Hughes. His account, he maintained, had been consistent throughout.

The Evidence at Trial

47. The applicant's testimony as regards the fatal incident:

“Michael had a gun in his hand, and straightaway I just like -- it all was a scary, scary situation, I've never been in a situation like that in my life and then like when he's come up with it I've just automatically like pushed forward to the firearm to try and move myself away from it. I don't know whether Michael -- I don't know whether Michael was intending on shooting me it was just an automatic reaction, I was like -- you know, I shit myself, what the fuck, and I've pushed, and when I've gone down with it, when I've pushed it down it's gone bang, (inaudible) and I shit myself and when it's gone I thought shit, so I looked across at Nathan who was just sat just at the other side of Michael and saying: “Can you not help me?” do you know what I mean? He jumped over, Joe that was in the passenger seat, he jumps over out the driver's -- out the driver's door of the van.

And then we was just struggling with the gun, we were struggling with the gun. I was like trying to move myself, I'm trying to move myself away from it (inaudible) all over the place and then somewhere -- somewhere within it, within the struggle and me trying to get off him it's gone off, the gun, bang, it went off and at that point came -- I just started like shaking, I thought fucking hell, I was like feeling, I was like fucking hell has it hit me? Nathan was fucking screaming, he was screaming and shouting as well and then I've looked up and at this point I've pulled the gun off Michael, I've pulled the gun off him and then there was like -- I didn't even know it had hit him, I'm just like start shouting at him, I mean I was swearing and stuff like that about taking the fucking piss out of us and along them levels, and only at that point I was like -- looked at Michael and his like head dropped on the seat and then when his head dropped in the seat it was just like: fuck, shit, what the fuck has just happened and he just like started like convulsing and I said: “Oh my God”. Nathan started shouting: “What the fuck's happened? What the fuck's just happened?” So I was like: “Michael” so I'm like shouting at him: “Michael, Michael” and then I've turned his head and I'm like -- then I turned it and said: “Michael”, because I've grabbed hold of him because he was (inaudible) and when I grabbed his head I looked at my hand like that and there was all blood over my hand.”

48. This account does not include any reference to the applicant hitting the deceased over the head with the gun. The applicant maintained to us that his evidence at trial represented the truth.

Mr Hughes

49. Mr Hughes testified during the application before this court. He decided not to provide the Prepared Statement to the police during the interviews because he was concerned that it would provide the prosecution with evidence they lacked to make a case against the applicant. He suggested that at the time of the interview there was no evidence available to the police that linked the applicant to the scene.

50. As to the iteration of the proof of evidence entitled V 2, he said that the contents were entirely based on what the applicant said to him. Each version was based on the instructions he received.
51. Addressing the ballistics evidence, he had not considered asking for the clothes to be inspected because he thought they would be irrelevant given the fatal shot had entered through MB's skull. Therefore, it did not occur to him that the clothes would have been damaged. He stressed that no one thought of inspecting the clothes until the trial, including the experts and the lawyers acting for the prosecution.
52. Mr Boyce, the independent Forensics Consultant, was instructed by Mr Hughes to review the firearms findings and in particular to comment on the condition of the bullets. This led him to conclude that:

“5.1 The bullet (which entered the skull of MB) had suffered damage to its nose and side. Its nose was flattened suggesting contact with a smooth surface and its side was dented, typical of damage caused by ricocheting. This damage was not typical of striking a skull alone and it is possible that it had been caused by the bullet ricocheting against at least one (possibly two) surfaces prior to striking Mr Blake. As there was not transfer of material to the bullet it was not possible to determine the exact nature of the surface/s or indeed if the bullet had encountered more than one surface with any certainty. Given this it is possible that the firearm was not pointing towards Mr Blake when this shot was discharged.”

53. The applicant was informed of this development. The applicant suggested in evidence to this court that his legal team latched on to the ricochet theory and “*ploughed on*” with trial preparation in accordance with this theory, considering that it was more likely to succeed than his own instructions. He complains that this tactic “*subsequently turned into a disaster*” when the prosecution and defence expert conferred, leading to the inspection of the clothing. We return to these contentions below.
54. Mr Hughes was shocked when the ricochet theory had to be abandoned when they received Mr Boyce's report of 24 May 2017:

“6.1 The gunshot damage to the jacket SQ7 and the shorts item NH/4 shows that both shots were fired with the muzzle of the causative weapon at very close range or contact.”

55. According to Mr Hughes, he, together with Mr Power, had a conversation with the applicant after Mr Boyce's report of 24 May 2017 was received. The applicant remarked that the bullets might have gone in directly. According to Mr Hughes, this statement by the applicant prompted Mr Power to observe that there had been a material change of instructions that necessitated the withdrawal of the applicant's legal team. Mr Power suggested the judge would discharge the jury and the applicant would not be expected to represent himself. It appeared to Mr Hughes that Mr Power was very concerned at having to concede in front of the jury that the ricochet theory had been demonstrated to be implausible, particularly given Mr Power considered he had undermined Mr Kabbani by advancing this theory during cross-examination. Mr Power

dictated the terms of the endorsement signed by the applicant set out at [17] above. Mr Hughes denied suggesting to the applicant that he had three options, as summarised at [45] above.

56. Mr Hughes recalled that junior counsel, Mr Meekin, was concerned, first, that their withdrawal from the case was taking place with undue haste and, second, that the applicant might be forced to represent himself.

Mr Power

57. Mr Power gave evidence during this application that faced with Mr Boyce's report of 24 May 2017, the applicant changed his instructions and said that whilst the struggle was underway following the first shot, he managed to wrest the gun off MB with which he "*pistol whipped*" him. Then, with the gun still in his hand, it discharged accidentally. Up until that point, the applicant had stated that the gun had been in MB's hand on both occasions when it was fired. Mr Power gave evidence that he concluded the applicant was tailoring his instructions to meet the new evidence. He rang a representative of the Bar Council and the leader of his circuit on 24 May 2017, who supported his decision to withdraw. In an email dated 2 June 2017 to the representative of the Bar Council, Mr Power set out his summary of the conversation that had taken place which included the following:

"I called in respect of my role as Queen's Counsel acting for the defendant Nathan Daniels who was facing a murder charge in his trial before Leggatt J at the Manchester Crown Court. I informed you that having reached a stage in the trial where new forensic evidence had come to light in respect of the ballistic evidence that I had had a conference explaining the ramifications of such with the Defendant and my instructing solicitor. This was a case in which it was alleged that Mr Daniels had shot the victim twice, once in the knee and also to the back of the head. The Defence which had been run on instructions was that Mr Daniels had had a close struggle with the victim in which they had struggled together with the gun and that whilst both had hold of the gun, it was fired twice by the victim and that the first shot went to the knee of the victim and the second shot ricocheted resulting in the shot to the victim's head.

When confronted with new evidence from the ballistics experts that there was a bullet hole in the victim's hoodie which was only consistent with a direct shot and therefore completely inconsistent with a ricochet, the Defendant in conference materially changed his instructions by telling Queen's Counsel that whilst there had been a struggle and that the gun had gone off to cause the shot to the knee, he was now saying that he managed to wrest the gun off the victim, used the gun to pistol whip the victim around the head and that it was then that the gun went off in the Defendant's hand only accidentally which caused the shot to be fired into the back of the victim's head.

Queen's Counsel was concerned that these were completely new instructions which moved away from the crux of the case rather than towards it." [...]

58. The representative of the Bar Council confirmed the accuracy of this record, although it was disputed by Mr Hughes.

Mr McMeekin

59. Mr McMeekin was not present during the critical conversations with the applicant on 24 May 2017 when Mr Power took the decision that the legal team was professionally embarrassed. When he was told about the suggested reasons, he did not feel comfortable with the decision to withdraw, which in his view was put into effect far too quickly. In his view, they should have applied for more time to see if a solution could be found.

Conclusions on the issue of the consistency of the applicant's account and the circumstances of his lawyers' withdrawal

60. We have no doubt that the applicant did not tell this court the truth about the suggested lack of changes to his account, including what was said in his meetings with Mr Power and Mr Hughes after they received Mr Boyce's report dated 24 May 2017. Contrary to his evidence – that he has been constant in his narrative as to what happened – his explanation varied substantially over the months following the drafting of the Prepared Statement, with the result that he has been significantly inconsistent in the way he described the final moments leading to the fatal shooting of MB. In summary:

The Prepared Statement

- i) The prepared statement provided only a minimal account of what occurred: the two men struggled and grappled, and the gun went off twice; thereafter, the applicant hit MB with the pistol. This failed to reveal any detail of the circumstances of the fatal shooting, including who was holding the weapon when the second shot was fired.

The Defence Statement

- ii) The defence statement is equally unforthcoming as to what happened, indicating no more than the gun was discharged twice during the course of a short but violent struggle.

Version of the proof received on 22 May 2018

- iii) In the version of the proof of evidence received by the applicant's present solicitors on 22 May 2018, MB had the gun which was being held down by the applicant when the first shot was fired by MB. The latter forced his arm upwards, and during the continuing struggle the second shot was fired. Then the applicant wrested the pistol from MB and struck him on the left side of his face with it.

Version 2 of the proof

- iv) The applicant took hold of MB's wrist and forced his arm down. Almost immediately the pistol was fired for the first time. MB then forced his arm upwards and the two men struggled for the gun. The applicant forced the pistol out of MB's hand which he then used to hit him across his face. Thereafter, while the applicant was holding the gun by the muzzle or the handle, the applicant, whose head was lowered, pulled it towards him and it was discharged for the second time. He suggested MB pulled the trigger and at that stage it may have been pointing directly at MB.

Version of the proof with counsel

- v) In the version of the proof sent to counsel, the applicant applied pressure to MB's right hand preventing him from lifting the gun, and MB fired the gun twice in quick succession. The applicant then took hold of the pistol which he used to hit MB.

The version of 24 May 2017

- vi) The applicant suggests that during 24 May 2017 he was persuaded by Mr Hughes and Mr Power to accept the account that "*I got the gun off him and then it went off*" or "*I hit him with the gun and the gun goes off*", the applicant thereby shooting him in the head.

The applicant's evidence at trial

- vii) The first shot was fired when he was hold MB's arm down and the second shot was fired whilst they were struggling.

61. Version 2 of the proof is notable in this context for a number of reasons. First, it is significantly at variance with the narrative set out in the other accounts (save for the version on 24 May 2017), and most particularly it includes the vital description that after the first shot, the applicant wrested the gun from MB which he then used to hit MB across the face *prior to* the final and fatal shot being fired. Second, he had hold of the gun by either the muzzle or the handle as MB pulled it towards him, with the pistol discharging when it may have been pointing at MB. Third, Version 2 is essentially identical to the account which the applicant suggests was invented for him by Mr Hughes "*I got the gun off him and then it went off*" or "*I hit him with the gun and the gun goes off*", thereby shooting MB in the head. The change of instructions on 24 May 2017, therefore, simply reflected or approximated to something the applicant had earlier said to Mr Hughes, but which had not been incorporated in the version of the proof of evidence sent to counsel, which set out a significantly more minimal narrative. In light of the matters rehearsed above, we are sure the applicant has been untruthful on a critical issue: namely that his instructions did not change. Instead, over time they varied significantly. Furthermore, Version 2 closely reflected the new instructions Mr Power suggested the applicant gave on 24 May 2017, namely "*that he managed to wrest the gun off the victim, used the gun to pistol whip the victim around the head and that it was then that the gun went off in the Defendant's hand only accidentally which caused the shot to be fired into the back of the victim's head.*" The only difference of any note is that in Version 2 the applicant suggested that although he had hold of the gun by the handle or the muzzle, MB pulled the trigger.

62. The allegation that Mr Power and Mr Hughes unprofessionally manipulated the judicial process to secure a retrial is entirely dependent on the account of the applicant. He has provided a version of events which we unhesitatingly reject. We are sure that on 24 May 2017, faced with the collapse of the ricochet theory, the applicant sought to explain the fatal wound by reverting to the account he had earlier given Mr Hughes in Version 2 of his proof of evidence. We note that the applicant was faced with an extremely difficult choice. Of the two options available to him, if he accepted that the gun was in his hand when the fatal shot was fired, he risked the jury rejecting a claim on his part that this was accidental. If he suggested it was in MB's hand, he then needed to explain how the bullet entered through the back of MB's skull in the way that it did. Such an event, albeit physically achievable, was highly implausible given the contorted position that would have been required, particularly given the damage the bullet caused to the

puffa jacket. It would have been necessary for MB's arm to have been pulled either across in front of his face or round behind his head, with the pistol twisted at a sharp angle directed at the rear of his skull. We have no doubt that the varying accounts set out above reflected the extent of the dilemma the applicant faced and how, as a consequence, he moved between these two options, settling finally for a relatively minimal account in the instructions sent to counsel that potentially allowed for both possibilities.

Ground 1 (complaints against counsel)

The deceased's telephone records

63. For completeness, we deal briefly with this contention set out in the written Grounds of Appeal by Mr Cooper Q.C., but (as we have already indicated) later withdrawn on 8 July 2019 in the "*Reply to the Grounds of Response*". It was suggested that the applicant's trial lawyers failed to arrange for MB's telephones to be inspected for relevant information. No indication was given as to what should have been sought save that material from the mobile devices might have provided "*valuable insight*" into the deceased's life (*viz.* drug dealing, debts and firearms). As Mr Thomas Q.C. for the Crown suggested, this ground of appeal was misconceived. The police were never in possession of the iPhone MB had with him during the incident because it remained in the applicant's van and in all likelihood was disposed of by one of the accused after the shooting. Otherwise, three devices were recovered. Some text messages were recovered from a Nokia mobile telephone found in MB's car. A further iPhone found in MB's car was PIN protected and attempts to access the data were unsuccessful. The contents of a Blackberry handset found in MB's kitchen drawer were encrypted and it had never been used on any UK networks.
64. On 9 May 2017 the applicant's representatives requested disclosure of any text messages recovered that were relevant to the applicant's defence, including debts owed by MB and his drug dealing. The prosecution responded that nothing relevant had been retrieved. There is no reason to doubt the accuracy of that response.
65. We note in this regard that the jury were aware that MB was involved in significant drug dealing and that items associated with him that were recovered from his house included cash, cocaine, body armour and a machete.
66. There was no credible basis for suggesting that the conviction is unsafe under this ground of appeal. This line of enquiry was properly pursued by Mr Hughes, and the prosecution responded appropriately. In our view, Mr Cooper properly did not pursue this contention.

The failure properly to instruct the firearms expert

67. The complaint by Mr Cooper in this regard is twofold. First, Mr Boyce only discovered on the day he was due to give evidence that the shooting took place inside a van. It is remarked that it is a matter of good fortune that this did not cause him to amend his conclusions as to the viability of proposition that the fatal wound was potentially the result of a ricochet. Second, the deceased's clothing was only inspected after Mr Kabbani and Mr Boyce had given evidence.
68. Mr Thomas agrees, as do we, that Mr Boyce should have been provided with more detailed instructions. In particular, it is remarkable that he was not provided with details

as to the relative positions of the applicant and MB when the pistol was discharged. However, in the event this did not affect his opinion and it did not lead to an adverse impact on Mr Boyce's testimony before the jury.

69. As to the clothing, it is now clear the shorts and the jacket should have been inspected by both experts before they gave evidence. However, this step had been overlooked by the prosecution as well as by the defence. As Leggatt J was informed, the scenes of crime investigators had apparently indicated that there was no evidence of gunshot damage to MB's shorts. The forensic scientist, Anna Sheikh, who was instructed to obtain DNA profiles and who made a detailed inspection of the deceased's jacket, made no reference in her substantial report to bullet holes in that clothing. In these circumstances, it is explicable, although unfortunate, that it was only during the trial that there was focus on the potential relevance of the clothing. In any event, both experts did examine the clothing and each gave evidence before the jury based on their final conclusions having done so.
70. Against that background, for the reasons set out in [73] below, we reject the contention that because the clothing revealed the fatal wound could not have been the result of ricochet, the jury should have been discharged and the conviction is in consequence unsafe.

The failure to advance the case in accordance with the applicant's instructions; the failure by counsel to apply to discharge the jury; the manipulation of the applicant's instructions and the withdrawal of counsel and solicitors; and the lack of advice to the applicant on the potential consequences of the legal representatives' withdrawal.

71. We have taken all of these issues together, in that they are linked and they each relate to the suggested deficiencies in the way in which the case was prepared and presented, and the circumstances of the departure of the applicant's legal representatives. It is argued that the conviction is unsafe because the case was poorly prepared; the defence became dominated by a wholly implausible "ricochet" theory; counsel and solicitors withdrew in circumstances that did not justify their departure; and they failed to provide the applicant with adequate advice as to the consequences of this step.
72. We are confident that the case was prepared and presented in accordance with the applicant's instructions. As we have already set out in detail above, his instructions varied markedly over the course of time, and the version of the proof of evidence sent to counsel, which provided a minimal account of what had occurred, did not include the suggestion there had been a notable or prolonged struggle. Instead, it was simply indicated the pistol was fired twice in quick succession with MB's hands held down. That account failed to provide a credible explanation as to how the fatal bullet entered the back of MB's skull. It also, in providing such a minimal account, failed to deal in any detail with a very important and central part of the case, namely the circumstances in which the gun came to be discharged. Mr Hughes acted entirely appropriately in those circumstances in exploring the possibility of ricochet, and Mr Boyce provided a favourable report. The applicant did not resist this possible explanation being deployed as part of this defence; indeed, in his evidence to the jury he indicated that he thought it explained what had happened. Furthermore, he actively engaged in the exploration of this possible avenue of defence, as his written instructions to Mr Hughes establish (*e.g.* "have we all the measurements and thickness of steel inside van to see where the bullet has ricocheted?" as set out in the "Observations on ND's Notes" at appendix two to the

statement of Mr Power, 11 November 2020). Given the applicant's instructions, there was essentially no other credible explanation for what had occurred, and his lawyers were attempting to find a sustainable case to present to the jury. As Sir Igor Judge P. observed in *R v Ulcay* [2007] EWCA Crim 2379; [2008] 1 Cr App R 27:

“27. The correct meaning of the phrase “acting on instructions”, as it applies to the professional responsibility of the advocate in any criminal court, is sometimes misunderstood, even by counsel. Neither the client, nor if the advocate is a barrister, his instructing solicitor, is entitled to direct counsel how the case should be conducted. The advocate is not a tinkling echo, or mouthpiece, spouting whatever his client “instructs” him to say. In the forensic process the client's “instructions” encompass whatever the client facing a criminal charge asserts to be the truth about the facts which bring him or her before the court. Those instructions represent the client's case, and that is the case which the advocate should advance. [...]”

73. Criminal trials involve the calling and testing of evidence, as part of a dynamic process. Save in wholly exceptional circumstances, juries are not discharged because a particular contention pursued by either the prosecution or the defence has been undermined during the evidence. Indeed, such occurrences are commonplace and the system of trial by jury is well equipped for counsel to deal with shifts in the strength of the respective cases as the trial progresses. It would not have been in the interests of justice for the judge to have discharged the jury simply because a potential explanation for the fatal injury had been removed. Counsel would have been able to explain why this had occurred, and the jurors would have been urged by the parties and directed by the judge to concentrate on the remaining live issues in the case. It was, therefore, entirely sustainable for Mr Power to decide that there would be no merit in applying for the discharge of the jury. The applicant's submissions to the judge in this regard are considered below.
74. We have already rehearsed our conclusions as to the suggested manipulation of the applicant's instructions by Mr Hughes and Mr Power. This allegation is entirely based on the applicant's evidence, which we reject. Instead, the only sustainable interpretation of the evidence on this issue is that, once the ricochet theory had been ruled out, the applicant returned to a version of the events that was broadly in line with Version 2 of his proof of evidence. He provided his representatives with a scenario in which the pistol could have been fired with the bullet directly entering the back of MB's skull. It follows that we do not accept the suggestion that Mr Hughes offered the applicant the “three options” set out at [45] above or that Mr Power intimated that he was conniving in an unprofessional device to secure a retrial for the applicant.
75. We have, nonetheless, grave doubts that the withdrawal of counsel and solicitors was justified by what was said by the applicant following receipt of the report of Mr Boyce on 24 May 2017. Under the relevant version of the Bar Standards Board Handbook in force at the time (31 March 2017) counsel was entitled to cease to act and return instructions, *inter alia*, if there was some substantial reason for doing so (rC26.8). Such a reason of substance would potentially exist if there had been, for instance, a truly material change of instructions which involved the defendant resiling from his or her earlier acceptance of one or more significant elements of the prosecution case; to adopt the expression in Mr Power's email to the Bar Council, if he had moved “*away from the crux of the case rather than towards it*” (see [57] above). *R v Ulcay* provides a

useful example of such an event. In that case, the appellant had accepted that his voice was to be heard on certain significant intercept tapes, and the defence case had been prepared and presented on that basis. During the trial, he changed his instructions and said that it was not his voice, and he suggested that the contents of the defence statement did not reflect his case. Sir Igor Judge observed at [28]:

“By the time the trial starts, there should be no confusion about the defendant's factual account or explanation of every essential issue. There was none here. At the end of the prosecution case when the defendant completely changed his instructions, counsel was presented with an impossible situation. If he could properly do so, of course he had to continue to represent his client, but there are occasions, and this was one of them, when he could not do so. It is for counsel to decide whether, consistent with his obligations to his client, and the court, and the rules of his profession, he is so professionally embarrassed that he cannot continue with the case. [...]”

76. By contrast, in the present case the applicant had not “*completely changed his instructions*” in a manner which involved him resiling from an earlier acceptance of one or more significant elements of the allegations made against him. To the contrary, the account Mr Power recalls the applicant provided on 24 May 2017 took him substantially closer to an acceptance of the prosecution’s case, namely that the fatal shot was fired when the pistol was in his hand, after he had pistol whipped MB. The bullet, on this account, entered MB’s skull directly and not via a ricochet. In our judgment, the acceptance by an accused of a significant part of the case against him or her will not, save exceptionally, constitute a change of instructions that causes defence counsel professional embarrassment. It follows that Mr Webster was correct to voice his disquiet to the judge that the applicant’s legal team had withdrawn unnecessarily, and Mr McMeekin’s concerns that events moved too rapidly were justified. We agree that insufficient time was afforded for proper reflection on whether this step was necessary. The entire process, including conversations with the Bar Council and the leader of Mr Power’s circuit, were concluded in two or three hours during the morning of 24 May 2017. We note, moreover, that there was no joint consultation involving Mr Power, Mr McMeekin and Mr Hughes, together with the applicant, to consider in detail whether they were professionally embarrassed. Although the time taken to reach a decision of this kind is not necessarily determinative of whether the process was appropriate, we are left in this instance with a strong impression that matters were significantly rushed. We assess the impact, if any, of this regrettable state of affairs on the safety of the conviction in our conclusions ([92] – [95] below).
77. We would add further that a full and contemporaneous record should have been made of the applicant’s suggested change of instructions, preferably signed by him, and timed and dated. This did not happen, and we are dependent as a consequence on *ex post facto* recollections of what occurred. This is demonstrably unsatisfactory, not least given we have been left with three contradictory accounts from Mr Power, Mr Hughes and the applicant as to what in fact took place. If lawyers are intending to take the grave step of withdrawing mid-trial, there needs to be a clear and full record made at the time explaining in detail the circumstances that led to this decision. The whole purpose of an endorsement signed by a defendant is so that there can be no disputes of fact afterwards about what has transpired. Mr Power was wrong to conclude that it was necessary to omit the new instructions from the endorsement he dictated in order to

protect the applicant. Legal professional privilege would have ensured that what the applicant said in this context remained confidential, unless he waived privilege (as has happened for the purposes of the present proceedings).

78. A further consequence of the lack of any detailed record of what occurred at this critical juncture is that there is uncertainty as to what the applicant was told would be the consequence of the withdrawal of the lawyers, and particularly whether the jury would be discharged. Nonetheless, it would have become clear at a very early stage – indeed, as soon as the position was explained to the judge – that the case was being put in readiness to continue with the same jury, unless a successful application to discharge was made by the applicant’s new representatives.
79. Otherwise, there has been no substantive criticism of the cross-examination by Mr Power of the 11 witnesses for the prosecution called before the lawyers withdrew. We have considered the transcript of the trial and his conduct of the trial, which in our view was entirely appropriate given the live issues in the case.

Ground 2 (complaints against the judge)

The judge failed to adjourn the case for a sufficient length of time

80. The argument is advanced that the judge’s refusal to adjourn the trial for two weeks to allow for preparation by Draycott Browne renders the conviction unsafe (see [19] above). This submission is without tenable foundation. As Mr Webster correctly observed to Leggatt J the case – at the particular juncture reached in the proceedings when the withdrawal occurred – only required newly instructed counsel to spend two or three days in order to address the remaining stages, namely the concluding evidence of Mr Kabbani, taking the applicant through his evidence and making a speech on his behalf. Counsel, Mr Taylor, and Mr Schofield from Messrs Farleys had seen the applicant in conference and were ready and prepared to represent him. There was no suggestion that they were unable to proceed because they had been afforded inadequate time. The applicant decided instead to represent himself.
81. In our view the judge was right to adjourn the case not beyond Wednesday 31 May 2017. This provided sufficient time for the applicant to give his instructions to a new team of suitably experienced lawyers, albeit without leading counsel. This was a serious but uncomplicated case, which essentially concerned the circumstances of a short-lived incident in which MB was fatally shot. Adequate time was afforded for the new lawyers, or alternatively the applicant, to be ready to address the final and relatively short stages of the case. Further, it must be remembered that trial-management issues such as arose in this case involve the exercise of the trial judge’s discretion. He was ideally placed to take into account all of the relevant factors, and in our view did so entirely correctly.

The bullet path photograph

82. Mr Cooper contends that the judge should have excluded the picture or illustration introduced by Mr Kabbani, when giving evidence on the second occasion, in which a long red needle was used to demonstrate the trajectory of the bullet through the jacket and into the skull of MB (see [24] above). This argument is unsustainable. The trajectory of the bullet was an uncontroversial, indeed essentially incontrovertible, piece of evidence, given the post mortem examination. MB was shot to the left rear side of the head and the bullet had a 30 degree forwards trajectory. Although the precise

position of the clothing could not be determined as Mr Kabbani made clear in his evidence, the bullet undoubtedly passed through the holes that were highlighted by way of the red needle. The picture was shown on screen when Mr Kabbani gave evidence for the second time. He suggested in his testimony:

“The only thing that I’m able to say at this stage is that [...] the shoulder of the clothing was basically in contact with the hood, so that’s why we have one track of the bullet, but [...] there are lots of dynamics [...].”

83. He suggested, therefore, that MB’s shoulder was close to his neck at the moment the shot was fired. A paper copy of the picture was provided following a request by the jury whilst in retirement and the judge warned them to follow the evidence that had been given on this issue by Mr Kabbani.
84. This was a visual aid of a kind routinely provided to assist juries understand scientific, technical or medical evidence. Mr Kabbani clearly identified its limitations and the judge provided appropriate directions. The introduction of this evidence does not undermine the safety of the conviction.

The failure to give sufficient advice on the consequences of waiving privilege

85. It is contended that while he was unrepresented the applicant indicated he wished to introduce the Prepared Statement. It is suggested that the prosecution and the court failed to provide him with an accurate analysis of the admissibility of this document and whether privilege would be waived generally if it was introduced. This suggestion misrepresents what occurred. There was instead a discussion in the absence of the jury as to the extent that privilege would be waived if Mr Hughes gave evidence as to the reasons underpinning the applicant’s decision not to answer questions during the police interviews. It was made clear by the judge that privilege in those circumstances would only be waived as regards “*the full reasons and everything that underlay that decision*”. The applicant had told the jury that although he had not answered questions in interview, he had instead set out his defence in the Prepared Statement which he did not hand to the police on the advice of Mr Hughes (albeit he simultaneously suggested he was uncertain as to whether it was provided to the officers). In his submissions to the judge prior to calling Mr Hughes, the applicant made it clear that he wished to limit his questions for Mr Hughes in this context to whether he had witnessed the applicant sign the Prepared Statement.
86. It is unnecessary to analyse this ground of appeal in any greater detail other than to observe that the applicant had not sought to introduce the Prepared Statement as a document in the trial. Instead, he was correctly advised by the judge that if he went into greater detail than merely asking Mr Hughes whether the Prepared Statement had been drafted at the time of the interviews, there could be implications as regards a waiver of privilege, although the judge indicated he would give the applicant an appropriate warning if this risk emerged. The applicant stated that he wanted to establish no more than the existence of the Prepared Statement in the context of his failure to answer the questions put to him in interview. The judge, therefore, did not incorrectly set out the legal position to the applicant. In any event, as just set out above, contrary to the applicant’s present contentions, he did not seek to introduce the document. If he had done so in order to justify his decision not to answer questions in interview, this would

have exposed Mr Hughes to questions as to the tactical stance he and the applicant had adopted, which in turn may have been considered by the jury to be inconsistent with the behaviour of an innocent person faced with a false allegation of murder.

Ground 3 (complaints against prosecuting counsel)

Invention by the applicant and Mr Hughes

87. Mr Thomas suggested to the applicant during his evidence that the Prepared Statement was a fiction invented by the applicant and Mr Hughes. The applicant denied this suggestion. Thereafter, Mr Thomas did not pursue the issue. On the evidence, Mr Thomas was entitled to test whether the Prepared Statement was a later invention designed to meet the failure by the applicant to answer questions in interview. Having heard Mr Hughes give evidence on other issues, Mr Thomas elected not to pursue the matter any further.
88. This question did not involve any impropriety by counsel and the judge was not obliged to direct the jury to disregard the question. The conviction is not rendered unsafe by the fact that this contention, having been appropriately raised, was not followed up in either the cross-examination of Mr Hughes or in Mr Thomas's closing speech.

Inappropriate comments

89. Mr Cooper in the written grounds of appeal objects to various comments made by Mr Thomas in his closing speech concerning the Blackberry mobile device (*viz.* it had barely been used), the feasibility of MB shooting himself in the back of the head (*viz.* the gun could not have been discharged by MB causing death by ricochet), the failure by Mr Kabbani to analyse the clothing of the deceased (*viz.* he had already determined the bullet had entered the skull directly) and concerning the failure to introduce the Prepared Statement
90. This ground of appeal was not pursued in either the skeleton argument or in Mr Cooper's oral submissions. These were all fair and appropriate comments for prosecuting counsel to make and the safety of the conviction is not undermined as a consequence.

Ground 4 (fresh evidence)

91. It was argued that the court should hear fresh ballistics evidence, from Mr Boyce. However, as already indicated this application was withdrawn during the hearing.

Conclusions

92. It follows that the sole issue that has been raised on this application that causes the court any substantive concern is that the applicant's lawyers withdrew during the trial when the circumstances did not justify this step. Although Mr Power was correct to take professional advice as to the course to be followed – from the Bar Council and the leader of his circuit – the decision remained wholly one for the lawyers who had been instructed. In reality, it would have been difficult for either Mr McMeekin or Mr Hughes to continue to act for the applicant once Mr Power, as leading counsel, decided that those representing the applicant were professionally embarrassed. Indeed, it would have been highly unusual for either the junior or the solicitor to adopt a contradictory stance in these circumstances to that advised by the Q.C. We stress that this was, therefore, essentially Mr Power's decision on behalf of those charged with defending the applicant.

93. Apart from the elimination of the ricochet theory, the trial had been short and unremarkable. Mr Power had established all of the relevant points for the defence in his cross-examination of the 11 prosecution witnesses who had been called to give evidence. The issues in the case were straightforward and would have been clear to the jury. Most particularly, the jury would have been able to focus on the central dispute, namely who produced the gun and the circumstances in which the second bullet was discharged. There is no criticism of the judge's summing up, during which he set out the law, the evidence and the respective cases with significant clarity. Although we regret the hiatus caused to this trial by the unnecessary withdrawal of the applicant's legal team, he was granted an adjournment for replacement representatives to be secured. Counsel and a solicitor of appropriate experience had met with the applicant in conference and had been afforded sufficient time to prepare for the recall of Mr Kabbani, the applicant's evidence and the closing speech. Furthermore, Mr Taylor and Mr Wyn Jones (counsel) would have been free to distance themselves from the flawed ricochet theory, and to submit to the jury that although the applicant was uncertain as to the precise mechanism, his defence was that the gun, which was in the hand of MB, discharged twice during a short struggle in the dark when he was acting in self-defence. It was the applicant's choice not to be represented by Mr Taylor, Mr Wyn Jones and Mr Schofield and to represent himself. We have examined his evidence, his cross examination of Mr Kabbani and his closing speech. We are confident that the central points in support of his case were clearly identified by him and all the relevant issues were dealt with by the judge in the summing up.
94. This was, therefore, an unusual and unfortunate state of affairs but we are unpersuaded that the conviction is unsafe as a result. In the event, the applicant elected not to complete the trial with the assistance of appropriate replacement counsel and solicitors (albeit not of his choice), and the jury were in a position to return a verdict with all of the relevant matters set out in appropriate detail for their consideration. We have been unable to detect any substantive prejudice as regards the presentation of the applicant's case or the jury's understanding of it, in the sense that all of the relevant issues had been properly explored and explained by Mr Daniels and the judge by the time the jury retired to consider their verdict. It follows that the withdrawal of the original legal team did not cause any substantive unfairness to the proceedings, thereby rendering the verdict unsafe.
95. We grant the extension of time and leave to appeal on Ground 1 only. For the reasons set out above, the appeal on that ground is dismissed.