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Case No: 202101420 B4,  
202101131 B4, 202101290 B4

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT WOOLWICH**  
**His Honour Judge Kinch QC**  
**T20207184**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10 August 2022

**Before :**

**LADY JUSTICE THIRLWALL**  
**MRS JUSTICE MAY**  
and  
**MR JUSTICE RITCHIE**

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**Between :**

**Micheala Olive**  
**- and -**

**Appellant/First**  
**Applicant**

**Anthony Olive**  
**John Bowie**

**Second Applicant**  
**Third Applicant**

**- and -**  
**Regina**

**Respondent**

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**D George QC** (instructed by The Registrar) for the **Appellant/First Applicant**  
**P Keleher QC** (instructed by Joseph Hill & Co Solicitors) for the **Second Applicant**  
**K Galvin** (instructed by Virdee Solicitors) for the **Third Applicant**  
**C Donnellan QC and Simon Wilshire** (instructed by the Crown Prosecution Service)  
for the **Respondent**

Hearing dates : 22.03.2022

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**Approved Judgment**

*This judgment was handed down remotely by circulation to the parties' representatives by email, release to the National Archives. The date and time for hand-down is deemed to be 11:30am on 10 August 2022.*

**LADY JUSTICE THIRLWALL:**

1. On 8 April 2021 Micheala Olive, John Bowie and Anthony Olive were convicted of the murder of Essam Ayad after a trial at Woolwich Crown Court. Two other defendants were acquitted, one (Rikki Constable) by the jury, the other (Nathan Johnson – also known as Nathan Johnson junior) on the direction of the judge after a submission of no case to answer at the end of the prosecution case which was not opposed. Micheala Olive appeals her conviction with the leave of the single judge on three grounds. She renews her application for leave to argue seven further grounds. She is the mother of the two applicants and of Nathan Johnson junior. John Bowie and Anthony Olive renew their applications for leave to appeal against their convictions after refusal by the same judge.
2. Essam Ayad, 26, was shot in the face at 9.22pm on 4 December 2018 as he leaned out of the upstairs window of a house in Ogard Road, Hoddesdon. He died the following day as a result of injuries to his head and face caused by gunshot. He had gone to the address with another man to collect a cannabis grinder. The other man stayed outside in his car. He got out of the car to see what was taking Ayad so long. He saw four men with their hoods up running down the road towards him. He ran back to his car and heard gun shots. He drove away.
3. Another witness, Mr Wright, was walking his dog down Castle Road. He saw a small, white, 4 x 4 vehicle stationary in front of some garages. He said he was no expert, and it was a bit of a guess, but he thought it was a Nissan Juke, or a Duster but he was not sure. Its lights were on and the engine was running. He heard the gun shot (which he thought was a firework) and saw four or five men running towards him, from the direction of Ogard Road. They were all dressed in black. He could see only their eyes. One of them appeared to be carrying something inside his jacket. They all got into the waiting white car which drove off at speed. It was the prosecution case that Micheala Olive was the driver of the car, a white Vauxhall Mokka, which belonged to her and that her sons were among the group of men which included the gunman. Mr Wright said in cross examination that he had walked in front of the bonnet of the car. The engine was running. He walked alongside the driver's side, within half a metre of it. He did not see whether there was anyone in the vehicle. He also said that he had heard 4 doors close. The car drove away.
4. The police arrived on the scene. One of them recovered a spent shotgun cartridge from the alley way. It contained Gunshot residue (GSR) type 2 elements (lead, antimony, barium, and aluminium).
5. The reason for the killing was said to be retribution for Nathan Johnson junior who had been involved in an altercation with the victim at a shopping centre earlier in the day. Essam Ayad had spat at Nathan Johnson junior, who was 16, during the incident and may have threatened to stab him.
6. After John Bowie had been told of the altercation between his younger brother and Essam Ayad he made a number of calls to the latter and to his girlfriend, Shannon Davis and her brother. He threatened to gather a "Watford Team" to come to the deceased implying they would be violent to the deceased. It was the prosecution case that John Bowie had recruited Nathan Johnson junior, Anthony Olive, and others to take revenge on Essam Ayad with whom they had previously been friendly.

7. Phone records showed that during the course of the day John Bowie had called Anthony Olive and his friend Rikki Constable. He travelled to Watford where he met Rikki Constable. He and Constable drove back to the appellant's home in Constable's Audi. The Crown suggested that ANPR records showed Anthony Olive being collected from Roydon Marina by the Vauxhall Mokka. All the defendants then gathered together at Micheala Olive's home ("Waterworks Cottages"). Their phones and that of Micheala Olive were all at her home during the period when the murder was committed.
8. A white car was used by the group of attackers and image analysis experts interpreted various CCTV images of a white car captured nearby before and after the murder, opining that they were of the same colour and type as the appellant's car. It was the expert view that the car shown on the CCTV images was not a Nissan Juke. Clive Evans gave evidence that imagery from CCTV on the adjacent Lea Road provided strong support for the contention that a light-coloured Vauxhall Mokka was one of the vehicles to pass the camera shortly before the shooting.
9. Two particles of characteristic GSR were found on the rear nearside seat of the appellant's car.
10. After the shooting John Bowie and Anthony Olive were driven away from their mother's house in the Audi owned and driven by Constable to Watford. CCTV evidence showed Anthony Olive getting out of the front passenger side. (John Bowie said in evidence that he was in the front seat of the car and the seat was tipped forward so that his brother could get out).
11. Three particles of characteristic GSR were found in the Audi. All of type 2. One was taken from the seat face of the front passenger seat, one from the front passenger seat back and headrest, one from the back nearside seat back and headrest.
12. Firearms officers arrived at Waterworks Cottages on 6 December 2018. When they left, unarmed police searched the home. They took possession of the appellant's mobile phone and she provided them with the PIN. They downloaded the contents of the phone shortly after that,
13. The appellant collapsed during the search of her home. She was taken to hospital. Initially it was thought she had had a stroke, but it was, in fact, a panic attack. She was kept in hospital overnight. She suffered a number of seizures. A police officer went to the hospital to speak to her on 7 December 2018. At that time, it was the police belief that her vehicle, the Vauxhall Mokka may have been used as a getaway car. Their enquiries had shown that a white Vauxhall Mokka belonging to the appellant may have been in the area at the relevant time. ANPR cameras had recorded images of the car. The police officer wanted to know where her car had been on 4 December. He spoke to the duty nurse and said he wanted to speak to the appellant. No note exists of that conversation in the clinical records, and he was unable to say who the nurse was but said that he had been given permission to speak to the appellant. He was unaware, as was the case, that she had taken medication. He spoke to her at her bedside. He had drawn the curtains. The appellant was on a general ward and so the content of conversation would have been audible to those within earshot. The officer asked questions and made notes which he put into a handwritten formal statement which she corrected. The appellant told him that she was the driver of the vehicle and no one else had driven it that day. She

had driven it to her mother's house that afternoon and had remained there until she returned to her own home later in the evening, at about 9.45pm.

14. The appellant's account was not correct in a number of respects. Amongst other matters there was evidence that her phone was in her car which drove towards Watford at the time that John Bowie was going towards Watford and making calls. The obvious inference was that the appellant was driving the car towards Watford with John Bowie in the car. He made threats in those calls to Essam's girlfriend, and in calls to her brother. There was evidence that the calls to her brother were made first, and while John Bowie was in the car. It is unlikely that the calls to Essam's girlfriend were made when he was still in the vehicle. The ANPR evidence showed the car in King's Langley not far from the flat of Constable.
15. At the time the appellant was being interviewed the police were aware that there was a sighting of her vehicle in Hoddesdon, after 8pm on 4 December 2018 so DC Robinson knew (or should have known) that what she had said about going to her mother's and staying there was untrue. In the event he drafted a formal statement which the appellant signed. We shall return to this matter later in the judgment.
16. In the light of the lie she had told about her use of the car the police suspected her of seeking to pervert the course of justice and she was charged accordingly. The evidence was reviewed at a later stage, and she was charged with murder.
17. In the meantime, the other defendants had been charged. John Bowie was on licence at this time. He was recalled to prison. On 24 December he and Anthony Olive discussed on the phone Anthony Olive going back to the area of the murder and checking whether ANPR cameras were in place. Anthony Olive said that the police "*ain't got the reg*" and "*there's enough cameras that caught us coming out*" and "*as long as they didn't get no phones they didn't swab us for no residue*". Anthony Olive was unaware that the phone call would be recorded, as a matter of course in the prison. It was his case that the call was consistent with innocence. He did not give evidence.

### **The evidence against Micheala Olive**

18. It was the prosecution case that the appellant was the driver to and from the shooting. Stripped to its essentials the evidence was as follows:
  - i) The white Vauxhall Mokka which it was alleged was used to transport the killers to the scene was hers. The car was not registered in her name because it was owned via the motability scheme, but it was her car.
  - ii) She was the mother of Nathan Johnson junior, John Bowie and Anthony Olive.
  - iii) The inference to be drawn from the movements of the car earlier on 4 December was that she had been aware of the plan to take revenge for the incident with Nathan Johnson junior and had been involved in its execution. There was evidence that she had driven John Bowie to Watford to recruit Constable to take part in the shooting (see above). There was ANPR evidence that suggested she had collected her son Anthony Olive from Roydon Marina to bring him back to Waterworks Cottage.
  - iv) She lied to the police about the whereabouts of her car on the evening of 4 December when asked about it by DC Robinson. The inference to be drawn was that she had been driving it to the shooting.

## The Trial

19. This was the second trial. The first, in the Crown Court at Luton, was abandoned during the prosecution case as a result of difficulties with disclosure. There was a change of prosecution team and the case was listed in Woolwich. Part way through the prosecution case it emerged that there had been a serious failure of disclosure in respect of the involvement of firearms officers. We shall return to the detail of that later.
20. At two separate stages of the trial an application was made to exclude the evidence dealing with the finding of GSR in the Vauxhall Mokka. Both were refused.
21. There was an application to exclude the evidence of the interview in hospital with the appellant and of the resulting statement. Having heard evidence on the voir dire and submissions the judge excluded the statement but allowed evidence of the contents of the interview to go before the jury. It included the appellant's assertion that to "her belief" only she had driven the Mokka on the evening of the murder. It was not suggested that the police officer was wrong about what she had said about the movements of the car.
22. There was an unsuccessful submission made at the end of the prosecution case on behalf of the appellant that there was no case to answer.
23. After the discharge of Nathan Johnson junior, on the judge's direction it was discovered that one of the jurors had been vociferous in her criticism of the acquittal. An inquiry led to her being discharged. An application for the discharge of the whole jury was rejected.
24. The appellant did not give evidence. It was her case that she had nothing to do with this criminal enterprise. In support of her case Mr George pointed to the following.
  - i) the evidence of Mr Wright that he had not seen a driver, had seen 4 or 5 men (no woman), and had heard 4 doors close.
  - ii) a number of voice calls received and answered on her mobile phone at her home during the time that the car was said to be being used to transport the participants to and from the murder scene. The calls were from a friend of hers and her daughter. The mobile phones of the other defendants were all at her home, all were silent. It was the prosecution case in respect of those defendants that this proved that they were all together elsewhere, involved in the murder. The prosecution had opened the case on the basis that the appellant's phone too was unanswered during that period. Cross examination of the relevant police officer revealed that the phone had received voice calls which had been answered. It was accepted by the prosecution that if the appellant had been the person answering a call in 1 Waterworks Cottage at 21.15.42, she could not have been the driver. Mr George described this as the equivalent of an alibi. The prosecution took issue with this description since there was no evidence about who answered the phone.
  - iii) Finally, the appellant is in her 50s, she has heart problems, limited mobility and a number of mental health issues including depression, anxiety, and panic attacks. Before these events she had suffered two strokes resulting in left sided weakness. She walked with a stick or crutches. Sometimes she used a wheelchair. It was highly unlikely that she would have been asked to or agreed to being the driver in

this criminal enterprise. In response to this the prosecution pointed to the fact that she was an active person, had been driving members of her family around throughout 4 December.

- iv) John Bowie gave evidence to the effect that other members of the household used the appellant's car from time to time. All had access to the key. Nathan Johnson junior's father (Nathan Johnson) was her partner and lived at the house with the appellant.

## **Grounds of Appeal**

- 25. There are ten grounds. We deal first with the grounds upon which leave to appeal has been granted, grounds 8, 9 and 10. They all relate to the evidence of gunshot residue in the Vauxhall Mokka:
  - Ground 8: The learned judge wrongly permitted gunshot residue evidence to be admitted
  - Ground 9: The prosecution's expert was permitted to and gave over inflated evidence about the significance of the gunshot residue evidence/too little weight to the involvement of the firearms officers and their effect on contamination (the prosecutor's fallacy)
  - Ground 10: The learned Judge wrongly failed to direct the jury about the failures of the prosecution's gunshot residue expert in coming to her conclusions, and failed properly to sum up the evidence and its significance or lack thereof, and failed to direct the jury on relevant matters in the summing up.
- 26. These are all aspects of the same issue namely how the evidence about GSR was dealt with.
- 27. The background to the evidence of the finding of GSR was this. Firearms officers and other police officers went to the appellant's home on 6 December 2018, two days after the murder. Both that address and the Vauxhall Mokka were specified in both the firearms warrant and the search warrant obtained by the police. For months, beginning before the first trial and continuing until the second, the defence persisted in their assertion (which turned out to be correct) that the prosecution could not have made proper disclosure about the involvement of firearms officers. It was the prosecution position that there was no material to be disclosed in respect of firearms officers.
- 28. In the meantime, the Crown served the evidence of an expert, Joanne Pryke. The defence of the appellant relied on the evidence of Angela Shaw, a more experienced and senior expert. Another defendant relied on another expert. It was not in dispute that two GSR particles were found on the rear nearside seat of the Mokka: one type 1 (containing lead, antimony and barium) and one type 2 particle containing aluminium in addition to the other three elements. Both types of particle are accepted to be characteristic of originating from ammunition. It was agreed that the cartridge case contained primer of type 2.
- 29. In due course, in a section of the summing up about which there is no complaint the judge gave a clear explanation, derived from the agreed evidence, as to what GSR was.

In particular, he explained that GSR came from the primer in a cartridge (in a case involving a shotgun), that a primer of type 2 could produce either a type 1 particle or a type 2 particle. So, some of its particles might contain aluminium some might not. But a type 1 primer cannot produce a type 2 particle, there being no aluminium. So, the starting point for the jury was “In the alleyway between Lea Road and Ogard Road you have the fired cartridge case recovered and when that was tested the primer was of type 2: lead, antimony, barium and aluminium present. So that cartridge case would be expected certainly to produce type 2 residue but capable, as I understand it, of producing type 1” .

30. The issue was not about the primary findings, about which the experts agreed. The issue was what, if any, significance could be attributed to the GSR evidence.
31. In her first report for the trial Ms Pryke observed that the GSR particles found in the Mokka were at the lowest level on the scale being used which started at the level of 2-5 particles. The description for the category is low level. The next level, moderate, described findings of between 6 and 15 particles and so on. Ms Pryke opined that the GSR findings were inconclusive when considered alone, but when combined with separate GSR findings (three particles) in respect of the Audi which had driven John Bowie away from Waterworks Cottage after the shooting, they provided limited support for the prosecution’s case, that someone who had been involved in the shooting had been present in the Mokka. The alternative scenario was that the GSR had arrived in the car by chance.
32. Ms Shaw considered the findings in the Mokka irrelevant because of contamination of the control sample taken by DC Coe (see below).
33. Before the prosecution opening the judge was asked to rule on the admissibility of the GSR evidence in respect of the Vauxhall Mokka and the Audi. We are concerned in this appeal with the evidence in respect of the Mokka only. Mr George sought to exclude the primary evidence about the presence of GSR in the car and the opinions as to the significance of the findings. The judge said, correctly in our view, that at that stage it was necessary only to consider the arguments in relation to the primary evidence. It was Mr George’s argument, in summary, that the level of residue was so low that it was not probative of anything and was thus inadmissible.
34. In his ruling on the first application, the judge refused to exclude the GSR evidence. Notwithstanding Ms Pryke’s cautious assessment that the GSR evidence (two particles) when considered alone was inconclusive, he accepted the prosecution argument that it could be considered a component in the body of circumstantial evidence advanced as the prosecution’s case. The low level of the GSR did not mean that the evidence had no probative value at all. There was no unfair prejudicial effect in admitting it. The judge referred to two authorities, first **R v George [2014] EWCA 2507** where two particles were found on a jacket which was said to belong to the defendant. The judge said, “In reviewing the developing science and considering the question of admissibility of low levels of residue the CACD held at para 46 “ the fact that scientists have adopted a cautious approach to reporting low levels of residue...such that for that residue on its own, no evidential significance can be attached to it does not mean that the evidence is necessarily inadmissible or irrelevant.”” He referred also to the decision of this court in “**R v Gjikokaj [2014] EWCA Crim 386**, a case involving two particles found in a hired car, the court observed at paragraph 35, “The primary scientific opinion was admissible.



It was admissible to show, in a case where the evidence was circumstantial that it was not open to the defendant to say that there was an absence of scientific evidence connecting him with the crime.”” The judge added “That case emphasizes the importance of ensuring that the jury had a careful and fair direction as to the use that could be made of such evidence in a circumstantial case.”

35. The judge concluded, “I am satisfied that this is not a case where Mr George’s argument that the low level of the findings means that the evidence has no probative value can be sustained. The low level is not in itself determinative of the question. I am also satisfied that the prosecution argument that the evidence needs to be considered as a component in a body of circumstantial evidence is correct.”
36. In our judgment the decision the judge came to was correct. It was in accordance with the approach taken in **Gjirkokaj** and, as he rightly observed, a careful and fair direction to the jury would be needed.
37. Ms Pryke had prepared her first report on the GSR evidence on the basis that she had been told that no firearms officers had been involved in stopping or searching the car. Although that was strictly correct, it was not the case that firearms officers had nothing to do with the vehicle. Just before Ms Pryke was due to give evidence, footage from body worn cameras showed firearms officers, of whom there were 12, standing outside Waterworks Cottages and going inside. En route they passed the Vauxhall Mokka. They conducted a room to room search in which the defence contended that it was clear that they would have been contaminating the rooms, items in the rooms and surfaces within them. It was not in dispute that firearms officers are often contaminated with type 1 and type 2 GSR. Their body armour and firearms are used continuously.
38. The camera footage showed one firearms officer leaning on the bonnet of the Vauxhall Mokka, other officers were standing near it, one shining his torch into the window and touching the car. The boots of the firearms officers’ vehicles were open – they were full of weapons and other instruments.
39. Later the same day the Scenes of Crime Officer, DC Coe came to the address. He had been informed, wrongly, that no firearms officers had been involved in searching the address or come into contact with the car. He had asked about their involvement because it made a difference to the way he performed his tasks. In the event he went to the address in ignorance of the firearms officers’ attendance. He opened up the car and leaned inside to take a photograph. He was not wearing a body suit, but a fleece jacket. He was wearing the same jacket the next day when he went to a police pound to carry out gunshot residue tapings inside the car.
40. Before carrying out the sampling process the next day, he took a control swab as usual. The purpose of that exercise was to ensure that neither the officer nor the surfaces were contaminated. The test showed that the control sample was contaminated with a type 1 characteristic GSR particle (lead, antimony, barium) and silicon. DC Coe must have contaminated the sample before taking tapings from the car. It was not, as the experts agreed, a particle that could have come from the cartridge case recovered from the alleyway nor was it otherwise connected to the shooting. As Mr George submitted, the control sample was contaminated by an outside source that was unconnected to the shooting. Mr Coe examined the car wearing gloves. He said it had not been cleaned. He

took a large number of tapings and recovered the two characteristic GSR particles (type 1, type 2) on the rear nearside seat.

41. After disclosure of the involvement of the firearms officers there were discussions between Ms Pryke, for the prosecution, Ms Shaw for the appellant and Mr Boyce. It was agreed by all the experts that it was no longer tenable to interpret the GSR findings from the Mokka alongside the findings in respect of the Audi. As the judge observed in his ruling later, in that regard Ms Pryke had shifted her position. In her evidence before the jury, she did not suggest that the GSR findings from the two cars could be combined.
42. As to the position in respect of the Mokka, in the light of the new information, Ms Shaw considered it “likely” that the GSR came from contamination by the firearms officers, as opposed to anyone in the car being involved in the shooting. Before she knew of the firearms officers’ involvement it was her view, as we have said, that the contamination of the control sample meant that an outside source of GSR had been brought to the car and undermined the integrity of the findings. As a result, it was already her opinion that the findings should not be relied on. The fact of the involvement of the firearms officers gave a reason for the contamination and confirmed her view.
43. Ms Pryke could not say how the two particles came to be on the rear nearside seat. Mr George told us that she accepted that the type 1 particle could not have come from the cartridge case discarded from the shotgun. This seems to be at odds with her earlier evidence that a type 1 particle could come from type 2 primer – a point Mr George expressly acknowledged in his submissions. As to the type 2 particle, Ms Pryke said it could have been there as a result of contamination by the firearms officers/DC Coe, or it could have come from a person who had been involved in the shooting. She could not express a view as to which was the more likely.
44. In oral evidence Ms Pryke said that she would place the likelihood of contamination at the same level as the GSR being there by chance. In cross examination she contended that if one considered the proposition that the residue came to be there as a result of firearms officers, this likelihood was at the same level, as it being there as a result of someone involved in the shooting, although there was a greater possibility of it getting there from the firearms officers than by chance. What this seemed to suggest was that the likelihood of the particle being left by a person involved in the shooting was about the same as the likelihood of it being left as a result of contamination and each of them was more likely than a chance finding. Whatever its precise meaning she made it clear that she could not assist the jury in deciding which (if any) of the three possibilities was likely to be correct.
45. The judge conducted a review of the evidence and heard renewed submissions from all counsel about the admissibility of the evidence of Ms Pryke in the light of the evidence about the involvement of the firearms officers.
46. The judge found that the effect of the evidence about the involvement of firearms officers was that there was now another possible explanation for the presence of the GSR in the Mokka (in addition to chance and the likelihood that a person who had been involved in the shooting had left it). He regarded this development as a factor going to the weight of the evidence rather than to its admissibility. He concluded that the admission of the evidence would not cause unfairness. The GSR could be put before the jury in such a way that they would understand its possible application as circumstantial evidence. The

defence contention that it should be disregarded was strengthened by the evidence in respect of the involvement of the firearms officers.

47. Mr George submits that the judge's ruling was flawed. This was not, he submits, as he did below, a matter which went only to weight. He relied before the judge and before us on the fact that the control sample taken by DC Coe was contaminated. It was overwhelmingly likely that he picked up from either the house or the outside of the car GSR left by firearms officers. Ms Shaw had opined that the GSR was probably there as a result of contamination. Ms Pryke could not rule it out. Since contamination could not be excluded, the findings could prove nothing. As a minimum, the prejudicial effect outweighed any probative value. The evidence should not have been admitted and the judge should not have relied on the evidence when considering the submission of no case to answer. It follows that the conviction is unsafe.

48. Mr Donnellan submits that the judge was right. He submits, as he did before the judge, that the effect of Ms Pryke's evidence was, if the jury accepted it, that GSR was in the car as a result of

- chance or
- contamination by firearms officers or
- a person or persons who had been involved in the shooting had been present in the car.

Mr Donnellan acknowledged that had the GSR evidence been all that there was to link the Vauxhall Mokka to the shooting he would not have sought to rely on it. But that was not the case. It remained the prosecution contention that notwithstanding that the GSR evidence was not on its own probative it could be aggregated with other circumstantial evidence and so support the conclusion that the type 2 particle was in the car as a result of a person or persons involved in the shooting being present in the car.

The circumstantial evidence relied upon was:-

- (i) the evidence of the movements of a white car which corresponded with the Mokka on CCTV on a route from Waterworks Cottage to the scene and back,
- (ii) the ANPR evidence of the movements of the Mokka earlier in the day, as John Bowie put the team together, evidence that the mobile phones of the appellant and John Bowie were together as the Mokka was being driven.
- (iii) the eye witness evidence of Mr Wright at the scene
- (iv) the cartridge casing found in the alley
- (v) the evidence of the telephone conversation between John Bowie and Anthony Olive.

It followed that the GSR evidence was admissible, and it was for the judge to direct the jury as to how to approach it in his summing up.

49. We accept Mr Donnellan's submission. The GSR evidence was admissible at this second stage, as it was at the time of the first application. The argument about contamination was stronger at the second stage than it was at the first but that did not render the evidence inadmissible. All of the compelling points Mr George made were points for the jury to consider. We are satisfied that the judge was right to leave that evidence before the jury. It was not unfair to do so. It follows that we reject ground 8.

## **Ground 9**

50. This ground is an attack on the evidence of the prosecution expert and the judge's approach to it.
51. Ms Pryke's evidence about the primary findings was uncontroversial. As to contamination she accepted that the armed officers had compromised the integrity of the search of the car. She agreed in cross examination that they were a potential source of the particles that were found inside and that they had compromised the integrity of the exercise. When re-examined, she said that it was her "considered view that the actions of the officers were likely to have resulted in the contamination of the Vauxhall Mokka, either from themselves or from their equipment, to the outer surface of the vehicle. She had not seen any of them enter the vehicle. So, the potential for that degree of contamination was not realised so far as she was concerned".
52. Mr George was critical of this evidence, having elicited details from DC Coe about the fact that he was wearing a fleece jacket, not a body suit, the obvious implication was that he may have picked up residue from somewhere outside the car and brought it inside. The judge did not remind the jury of that particular point but there could have been no doubt in the jury's mind that this was part of the defence case. There was no error by the judge.
53. Mr George made a number of criticisms of other parts of the evidence of Ms Pryke, again in respect of the issue of contamination. Mr George submitted that she had not followed professional guidelines (drafted, in part, by Ms Shaw) in respect of the approach to be taken to control samples. She was recalled to deal with this issue. It was her evidence that the guidelines said in terms that they were not a substitute for judgment, which is what she had applied. True it is that she was less experienced than Ms Shaw and had been a junior member of her team in the past but that was not a reason for the judge to intervene and seek to undermine her evidence.
54. Mr George was critical of the three-options approach taken by Ms Pryke. He relied on the evidence of Ms Shaw who was clear about the approach to be used when considering different scenarios. It is for the expert to examine two propositions (that the GSR was left by someone involved in a shooting – the prosecution proposition and, in this case, that it was left as a result of contamination). The choice is a binary one, she said. When there is no positive defence proposition – usually when there is no evidence of possible contamination – then the second proposition is that the GSR is there by chance. It is not acceptable to consider three propositions. We note that the judge reminded the jury that an alternative approach (suggested on behalf of another defendant) was to describe the propositions as "connected with the shooting" and "unconnected with the shooting". It was not incumbent upon the judge to criticise Ms Pryke for her approach (which, we note, was the same as that taken by the expert in **Gjirkokaj**, without complaint).
55. This ground of appeal is an eloquent and detailed disagreement with the expert. It identifies no error of law or misdirection. We reject it.

## **Ground 10**

56. The focus in this ground is the summing up. The complaint is that the judge wrongly failed to direct the jury about the failures of the prosecution's GSR expert in coming to her conclusions and failed properly to sum up the evidence and its significance or lack

thereof. We do not repeat what we have said in respect of Ground 9. A judge is not required to repeat every point made by the defence. What matters is that the summing up is fair and balanced and that it assists the jury.

57. We have found it helpful to review the decision in **Gilkokaj** in detail. In that case two characteristic particles (one type 1, one type 2) had been found in car said to have been used by the appellant on his way to shoot the victim. The residue was, as this court recorded “of the same two types of gunshot residue that had been found on the body and the clothing of the deceased”. The level of GSR was low. That was to be considered, the court said, in the context of the cautious approach to the evidence by the scientists which was that they did not provide an evaluative opinion in the circumstances where the level of GSR was low.
58. As in this case, there were three possible explanations for the GSR findings in the car: chance, contamination or that a person using the car (the appellant) had used or been close to a firearm. As the court explained, the evidence as to potential contamination was that 4 days before the killing (which occurred on 6 October 2008) the appellant had been spoken to by an officer attached to a Police tactical Firearms Group after he had been involved in a minor accident. The police officer and the appellant had a conversation after the appellant had got out of his car (the one that was linked to the shooting). The officer did not believe he had touched the car. He was wearing body armour but was not armed. The last time he had fired a firearm was on 28 July 2008.
59. The primary scientific evidence (ie that two particles were found, as described) was consistent with the appellant being in the car and he could not therefore claim that the absence of forensic evidence showed he could not have used the firearm. This court found that the primary scientific evidence was therefore admissible for that purpose.
60. In support of the fact that the appellant was the source of the GSR were the following pieces of circumstantial evidence: the fact that shell casings which matched the bullets found in the deceased were recovered from a drain taken with the appellant’s admission that he had parked the car near the drain and his admission that at some stage he had sat in the passenger seat (where the GSR was found). He had been driving the hire car for some days.
61. In that case the trial judge directed the jury as follows.  
"In the opinion of [the expert’s] laboratory you cannot reliably interpret two particles. They may be there quite by chance. In giving that opinion he does not consider other evidence in the case. He considers the two particles in isolation and his opinion is ... looking at his two particles in isolation, no reliable interpretation can be given to the finding of a low level of GSR [gunshot residue] on the samples from the Chevrolet."

He went on:

“The central point is this, is it not: bear in mind that [the expert] can only give his opinion from the evidence at his disposal. He cannot go beyond the evidence relating to the two particles, and because that is a low amount of particles, he must necessarily be cautious. You can go further, as I have already observed. You can add one limb of evidence relating to firearms to another limb of evidence relating to firearms. That is your privilege and your right. You can aggregate evidence, [The expert] cannot. ....”  
The judge then added:

"But let me add this: if you think that either the possibility of innocent contamination by reason of the incident in Reading on 2 October or by the sheer chance of there being two particles in the vehicle are possibilities which you, the jury, cannot rule out, then my direction to you is absolutely clear, please ignore this evidence. It has no value in the case at all.

If you, on the other hand, are driven by other firearms evidence in the case and are satisfied and sure that the first possibility, namely that the two particles are on and in that Chevrolet because the defendant was in close proximity to the firearm which murdered the deceased, can you use this evidence as being consistent with and confirmatory of that other firearms evidence?"

62. Whilst this court in **Gjikokaj** considered that it would have been better had the judge phrased the sentence so as to use the word "aggregate" as he had earlier, the use of "confirmatory" did not lead to a misdirection. The context was clear, and the conviction was safe. The jury had been directed that if they were unable to rule out the two possibilities (innocent contamination or chance) then they should ignore the evidence. The expert could not assist. In this case one expert (Ms Pryke) said she could not assist. The other (Ms Shaw) said the GSR was probably there as a result of contamination and explained why she had come to that view.

63. In this case the judge's direction to the jury, having set out in detail the evidence of Ms Pryke and Ms Shaw and the disagreements between them was as follows:  
"You may think it is clearly most unfortunate that firearms officers came close to that vehicle. The risk of contamination, we understand, is clear. And there is established, for you to consider, a link to the contamination of the control sample taken by Mr Coe from his hands.

"Now, if as a result of all that, you are doubtful about the reliability of Ms Pryke's conclusions or if you prefer Ms Shaw's approach then really this evidence, the gunshot residue evidence in relation to the Mokka cannot help the Prosecution in relation to that vehicle and you should disregard it.

At its highest, if you accept Ms Pryke's analysis, this is a piece of circumstantial evidence that is consistent with the presence of someone connected with the shooting. It is at a low level, so it is not enough on its own to conclude that the involvement is proved of anyone in the car being connected to the shooting. Ms Pryke cannot rule out chance or contamination as an explanation and, in those circumstances the weight which might attach to it as a piece of circumstantial evidence may depend on your conclusions about other pieces of evidence."

The judge then moved on to summarise the case for the prosecution and defence in respect of each defendant.

In our view the judge made it clear to the jury that,

i) if they thought the GSR may have got into the car by chance or contamination then the GSR evidence should be disregarded.

ii) That the GSR on its own it proved nothing because it was at such a low level.

iii) Whether it could be added to the case against the defendants depended on their view of the other evidence. The evidence which connected the car with the shooting is set out at paragraph 48 above. The jury had enough evidence upon which they could be sure that the Mokka was used in the shooting to which they were entitled to add the GSR. Whether or not they did so is unknown. Either way the admission of the evidence does not undermine the safety of the appellant's conviction.

## **RENEWED APPLICATIONS FOR LEAVE TO APPEAL**

64. Micheala Olive renews her application for leave to appeal in respect of grounds 1-7.

### **Ground 1**

65. This ground arises out of the judge's decision not to exclude the evidence of DC Robinson about his interview with the appellant in hospital on 7 December. The judge did exclude the statement obtained at the end of the interview. A summary of the facts is set out earlier in this judgment at paragraph 9.

66. Mr George complains that the judge's ruling was flawed and incomplete. He submits that what the appellant said amounted to a confession and the judge should have addressed his submission that section 76 of PACE applied.

67. The judge heard evidence on the voir dire from DC Robinson and from Detective Superintendent Kent, the Senior Investigating Officer. Mr George cross examined them both. It was his case that the appellant was plainly a suspect (her home had been searched and her mobile phone had been seized; whilst the former could be explained by the presence of her sons, there was no reason to take hers unless she was a suspect).

68. The judge accepted that the officers were conducting the enquiry in good faith. He accepted that the search warrant provided the police with authority to seize any mobile phone at the property. Her phone was on the window ledge in the same room as the phone of Nathan Johnson when it was seized. The fact that she later said it was her phone and provided the PIN did not alter his view.

69. It was logical, reasonable, and appropriate to for the police to ask her if she could help as to the movements of her car.

70. There were no grounds at that time to view her as a suspect rather than a witness who might be able to identify whether the car needed to be looked at more closely or eliminated from the enquiry. Any other holding would "allow hindsight to infect an objective assessment". The fact that her son was a suspect did not make her a suspect.

71. When the appellant had become ill at home the police had summoned an ambulance to take her to hospital. DC Robinson, accompanied by a female officer, was correct not to press for an interview that day. The judge said that it would have been better had he been accompanied by a female officer the following day, but he accepted the evidence that this was not possible.

72. He saw no reason to criticise DC Robinson for asking questions on 7 December. He rejected the suggestion that there was no urgency. These were basic questions about her car's movements.

73. The judge rejected the submission that DC Robinson had contravened guidance in respect of the treatment of vulnerable witnesses as “wide of the mark”. He said, “She is a vulnerable person and entitled to be treated with sensitivity. I am satisfied that she was. The questions she had to be asked were straightforward and uncomplicated. The sooner they were asked the greater the chances of a clear recollection. Her statement did not amount to a confession but even if the parts of it relating to her driving could be characterised in that way there is no substance to the suggestion of unreliability.”
74. The judge found that once the appellant had confirmed the details in writing the position changed. “Viewed objectively, her account (as it was to be signed in the witness statement) was in conflict with a key piece of the investigation team’s knowledge, namely the identification of the Mokka on ANPR in the Hoddesdon area between 8 and 9pm. At that point she became a suspect and should have been cautioned or the officer should have sought further guidance. In the result, deciding to ask her to sign the witness statement without the protection of a caution was a breach of the Code.” He therefore excluded the statement itself but permitted the police officer to give evidence about what had been said.
75. The findings of fact were all open to the judge. His approach to the application was correct in law. He was not required to consider Section 76. He was right to consider there was no confession. There was nothing illogical about the decision to exclude the statement but allow evidence of the conversation. There was no evidence that the appellant was unfit to be interviewed. It was open to her to challenge what it was asserted she had said. In the event there was no challenge as to the substance of what she said. The significant challenge was to the approach taken by the police officer and the circumstances of the interview.
76. This ground is not arguable.

## **Ground 2**

77. It is said that the judge was wrong to reject the submission of no case to answer. It is plain from all that has gone before in this judgment that we are satisfied that there was a case to go to the jury. As the prosecution put it during the course of argument, there was evidence from which a properly directed jury could safely draw inferences from which they could be sure that: the appellant’s Vauxhall Mokka was the vehicle seen by the witness David Wright near the scene of the shooting; those responsible for the shooting had been driven to the scene in that vehicle; The appellant was the driver.
78. We agree with the single judge that this ground is not arguable nor is **Ground 3** which relies on the fact that John Bowie gave evidence that others had access to the car in support of the argument that the judge should have changed his ruling.

## **Ground 4**

79. After the jury were directed to enter a verdict of not guilty in the case of Nathan Johnson a juror was reported to have referred to him as a murderer when talking to a security guard in the car park. She was very angry. The incident was investigated appropriately, and the juror was discharged. It was the defence contention that she must have infected the rest of the jury and so the whole jury should be discharged. This was all appropriately investigated by way of a series of questions being put to the jury. Against that



background they were asked whether they could continue to approach the case with open minds. They said they could. It is submitted on behalf of the appellant that this was the only answer that they could give. The single judge said, “There was no basis upon which to doubt the sincerity of the other jurors when they told the judge that they could continue to approach the case with open minds.” We agree. The acquittal of Rikki Constable reinforces that view.

### **Ground 5**

80. It is said that the judge should have given a modified good character direction given the age of her convictions and their type.
81. A conviction and a caution for minor matters had been adduced before the jury as agreed facts at a time when Nathan Johnson junior was still a defendant and his good character was recorded. As a matter of judgment, the appellant’s team included these minor matters, to avoid any speculation that she had more serious offences recorded against her. The offences were 20 years ago. The prosecution were not seeking to rely on either matter in support of the prosecution case. The judge refused to give a modified good character direction and gave no reasons for his decision. Mr George argues that given what the appellant was said to have said in hospital, credibility was all important. Both limbs of the good character direction should have been given because it was being suggested by the prosecution that she had lied. This was not entirely easy to follow in the absence of any challenge as to what she had said, particularly when she had not given evidence.
82. Mr George accepts that this was a matter for the discretion of the judge but submits that his discretion could only have been exercised in favour of the applicant, given the age of the matters recorded and the fact that they were not relevant to the case. That submission comes close to saying that there was a requirement upon the trial judge to give a modified good character direction. That is not the law as the decision of this court in **R v Hunter [2015] EWCA Crim 631** makes clear. We do not accept that the judge was bound to exercise the discretion in favour of the appellant. His decision was not irrational. We reject this ground as unarguable.

### **Ground 6**

83. The judge was wrong to permit the prosecution to rely on the previous convictions of John Bowie as evidence against the appellant.
84. At the time of the incident John Bowie was 25. He had a number of convictions for offences of violence and dishonesty. In particular, there was a conviction on 16 December 2013 for assault occasioning actual bodily harm and possession of an imitation firearm (a BB gun) with intent to cause fear of violence. In short, he discharged the weapon into the face of the victim at close range. He was sentenced to 6 years in a Young Offenders Institution. The conviction was admitted in evidence against John Bowie. There were significant similarities between that conviction and the current offence. There had been a dispute between Bowie and the victim. It was not particularly serious. A meeting was arranged. Bowie took a gun with him and, within moments of meeting the victim he used the weapon as we have described.

85. The reference to the conviction and what his mother knew about it was made during the prosecution closing speech. Nothing was said about it at the time and no reference was made to it in the summing up.
86. As the single judge put it “whether or not [the appellant] knew of Bowie’s previous conviction was of some relevance to the case. It could properly form part of the basis for deciding whether, if the jury accepted that you drove him to the scene of the crime, you did so knowing what he was intending to do there.” We agree. This ground is not arguable.

### **Ground 7**

87. The complaint in this ground is that the judge misdirected the jury in respect of a lies direction.
88. Mr George had initially favoured the giving of a **Lucas** direction but changed his mind in the light of the absence of a good character direction and because of the way the judge had framed his proposed direction on lies. He therefore invited the judge not to give the direction. Reliance was placed on the decision of this court in **R v Dixon [2003] EWCA Crim 1141**. The defence position was that the jury needed to be sure of the questions asked of the appellant in the hospital, to note that the timings on the ANPR had not been put to her, the reliability of the way the police officer had recorded the answers (including his use of the 24-hour clock), and whether any such answer was reliable given her being in hospital and her condition.
89. All that being so there was in our view an obvious risk that the jury would conclude that the appellant had lied about the whereabouts of the car. It was against that background that the judge gave the **Lucas** direction. Its purpose was to protect the appellant from the jury jumping from a finding that she had lied (if they so found) to the conclusion that she was guilty of murder. The single judge said, “It was a protection which the judge (who was best placed to assess things) felt necessary on the facts of the case. Neither was it arguably wrong for him to have done so, nor did it arguably prejudice your defence.” This was correct. We do not consider this ground arguable either.
90. In Ground 10 of the Grounds of Appeal there are references to errors in the summing up in addition to the issue of GSR in respect of which leave was given. We deal with them briefly now.
91. Three of the suggested errors form the basis of grounds of appeal which we consider unarguable. As to the remaining two matters.
92. We also consider it unarguable that the judge failed properly to deal with the error in respect of the timing of the 5 Lea Road CCTV footage. We reject the assertion that the judge’s summing up of the evidence of what happened when the appellant was in hospital was defective.
93. We are satisfied that this conviction is safe. We dismiss the appeal and the renewed application for leave to appeal.

### **Anthony Olive**

94. The applicant applies to renew his application for leave to appeal after refusal by the single judge. Initially, there were two proposed grounds of appeal in respect of which the single judge refused leave. To those grounds were added a further proposed ground on a late application out of time for leave to appeal.
95. We deal first with the third proposed ground which was that the GSR in the Vauxhall Mokka was wrongly admitted. Mr Keleher adopted the submissions made in respect of Micheala Olive in support of this ground. In the light of our conclusions in the case of Micheala Olive we are satisfied that this ground of appeal has no prospect of success and we refuse the necessary extension of time for the application for leave to appeal.
96. The two remaining proposed grounds of appeal are:-  
that the judge erred in admitting evidence of his previous convictions (Ground 1) and misdirected the jury as to the relevance of that evidence (Ground 2).
97. These grounds are both unarguable. This applicant was the only defendant to advance a case that “some other enemy of Ayad” was responsible for his murder. It was part of the Prosecution case that Ayad had gone with a friend to buy cannabis pots. No application was made, as it should have been, to adduce bad character of the deceased. As the judge noted in his ruling there had been no discussion between counsel as to whether questions would come within S98 or S100 CJA 2003. Without notice, witnesses, all friends of the deceased, were cross examined about the deceased’s criminal history. This included the suggestion that he led a life of crime, that he was a drug dealer, and that he had a conviction for dangerous driving when his young child was in the back of vehicle he was driving. The judge observed that there was an attack also on the character of the applicant’s partner.
98. It was the applicant’s case that there was a feud between the deceased and others, arising out of their shared criminality, although in the event no evidence was called in support of that suggestion. A still from the unused material showed the deceased standing outside the home of those with whom he was said to be in dispute. There was a wide range of possible suspects.
99. In his written ruling allowing the Prosecution application to admit evidence of his bad character, the judge recorded that in the light of the way the evidence had emerged it was agreed that an application under S101(1)(g) had to be considered. In his assessment of the application, he observed that “The cross examination that has taken place has gone much further [than the prosecution case] for the arguably legitimate purpose of seeking to establish that there may have been criminals connected to EA who harboured violent intentions towards him.”
100. The judge concluded that the defence having put in issue an argument that the jury should look for the culprits in the direction of others and not in his direction, “It is in these circumstances material to the jury’s consideration of the credibility of that issue raised by the defendant to understand the character of the defendant.” The judge was satisfied that there was no unfairness from the admission of the evidence of bad character.

101. The single judge put it thus, “Questions asked of prosecution witnesses is one of the ways of opening that gateway expressly referred to in s106. Those questions having been asked, the jury had to decide whether the suggestion that someone other than you killed the deceased based on that bad character was justified. It was not a line of attack that was needed in order to present your defence – you could simply have relied on your primary defence of alibi. You having decided to make this part of your case, the jury had to decide whether they accepted it. In order to do so, they were entitled to know about your character in order to assess whether the possibility you floated through your counsel might have explained the death or was being used by you as a smokescreen”.
102. We agree with the single judge. There was no error by the trial judge either in this decision or in the way he summed the matter up. In any event, this issue did not begin to undermine the safety of the conviction.
103. We refuse the renewed application for leave to appeal.

**John Bowie**

104. This is a renewed application for permission to appeal after refusal by the single judge. Here too, there were three grounds of appeal; leave to appeal was refused in respect of the first two and, on a later application, in respect of the third ground. It is only in respect of the third ground that an application to renew the application for leave is made.
105. The third ground follows grounds 8, 9, 10 in the case of Micheala Olive. We have dismissed her appeal on those grounds. To the reasoning in her case, we would add this, as did the single judge: in addition to the GSR evidence in respect of the Mokka there were three GSR particles found in the Audi vehicle in which this applicant had travelled on the day of the shooting. There was no involvement by firearms officers with the Audi. The issue of contamination did not arise. As the single judge found, irrespective of the position in respect of the Vauxhall Mokka, it is not arguable that this applicant’s conviction is unsafe.
106. Accordingly, this renewed application is also refused.