Neutral Citation Number: [2011] EWCA Crim 2797

Case No: 201101496B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ STEPHENS
T20107162

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2011

Before :

LORD JUSTICE HOOPER
MR JUSTICE EDWARDS-STUART
and
RECORDER OF HULL HIS HONOUR JUDGE METTYEAR
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

IMRAN ASLAM	**Appellant**
- and -	
THE CROWN	**Respondent**

- -
- -

MR. J. DEIN QC and MR. T. SMITH appeared for the **Appellant.**
MR. C. AYLETT QC and MR. B. FITZGERALD appeared for the **Respondent.**

Hearing date: 24th November 2011

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Judgment

Lord Justice Hooper :

1. At the conclusion of the hearing we announced that we were dismissing grounds 1 to 6 of the appeal and refusing permission to appeal on new ground 7. We then heard submissions from Mr Dein QC about sentence. We reserved judgment on that matter.

2. I shall give the judgment of the court on grounds 1-4. Edwards-Stuart J will give the judgment of the court on grounds 5-7 and the Recorder of Hull will give the judgment of the court on sentence.

3. The appellant appeals his conviction (by a majority of 10-2) for the murder of Hayder Ali (count 2). He was acquitted of the murder of Mohammed Ali, Hayder's brother (count 1). The appellant was subsequently sentenced to imprisonment for life with a period of 20 years less 308 days being specified as the minimum term.

4. At about 12.10 am on Saturday 22 April 2006 Hayder Ali and Mohammed Ali were in a white Mercedes van driving along Fircroft Road in the direction of Upper Tooting road in London when, almost at the junction of the two roads, a large group of heavily armed males attacked the van. The attack was the culmination of some three hours of skirmishes, a number of which had been initiated by the occupants of the van. The background to the events of the 21 and 22 April was a long standing feud between Hassan Mir who was a member of the group of heavily armed males and a former friend of his, Hammad Bhatti, who was in the van. In the van with Hammad Bhatti were his brothers Favaad and Javaad. For convenience we shall call the group in the white van, the Bhatti group and the attacking group, the Mir group.

5. Mohammed Ali was stabbed to death shortly after getting out of the van and Hayder Ali was stabbed to death when he came to the assistance of his brother.

6. Within a very short time the appellant fled to Pakistan and did not return until some four years later, by which time the trials of other defendants had been completed.

7. Following a seven month trial presided over by HHJ Moss QC in 2007 Hassan Ahmed Mir, Imran Hussain, Imran Asif Ali, Usman Butt, Noor Kayani and Aazam Mubashir Butt were convicted of the murders of both brothers. The Bhatti brothers were crucial witnesses for the prosecution in the trial.

8. To prevent that trial from becoming unmanageable, four defendants were tried separately in a second trial: Omar Butt, Quadeer Khan, Shazad Kayani and Bilal Kayani. That trial took place before the appeal from the first trial. HHJ Moss was also the trial judge. The Bhatti brothers gave evidence again. During the trial HHJ Moss ruled that the evidence of the brothers was "irredeemably tainted". The judge fearing that, nonetheless, the jury might accept the evidence as true, decided that a fair trial was no longer possible. He stayed the proceedings. His decision to stay the proceedings was upheld on an appeal by the prosecution: [2008] EWCA Crim 238.

9. At the appeal in April 2009 the six convicted defendants submitted that the verdicts of the jury in their trial were unsafe in the light of the ruling at the second trial and of unchallenged fresh evidence. It was not disputed by the prosecution that the Bhatti brothers and the victims' father, Shahid Ali, were involved in a conspiracy to pervert the course of justice in the second trial.

10. The convictions of the six defendants were quashed by another division of this Court in April 2009, see [2009] EWCA Crim 731. The Court ordered that four of the appellants should be retried (Hassan Mir, Imran Hussain, Imran Asif Ali, Usman Butt). In the case of Noor Kayani, the Court of Appeal sentenced him for violent disorder arising out of the fatal incident, an offence to which he had pleaded guilty at the first trial.

11. Thereafter Hassan Mir and Usman Butt pleaded guilty to the murder of Hayder Ali as secondary parties, a basis of plea accepted by the prosecution having regard to the fact that they were unable to rely at all on the Bhatti evidence as a result of the decision of the Court of Appeal and of a further decision by MacKay J who was to preside over the retrials. Imran Ali pleaded guilty to a conspiracy to cause grievous bodily harm, as did Imran Hussein later in February 2010 (but on the accepted basis that he was not present in Fircroft Road).

12. It was only after the resolution of these matters that the appellant returned from Pakistan. On arrest he was interviewed and declined to answer questions. A defence statement was later served to the effect that he had left the area before the fatal Fircroft Road incident. At trial he gave evidence but, during cross examination, refused to answer any more questions. The standard adverse inference directions were given in respect of his failure in the police interviews to mention facts later relied upon and his refusal to answer questions in cross-examination.

13. Whilst in Pakistan he kept up with what was happening in England. He only came back after all the other persons alleged to have been criminally involved in the fatal incident had either been acquitted or convicted on their pleas. He probably assumed that, with the Bhatti evidence no longer available, there would be little direct evidence against him. If he assumed that, he was wrong. The prosecution called a witness, Zak Uddin. The principal grounds of appeal relate to the ruling of the trial judge, HHJ Stephens QC, that the prosecution were not prevented from calling him by virtue of section 78 of PACE 1984 and relate to how the judge dealt with the evidence of Uddin in his directions to the jury.

14. Putting the matter shortly, Uddin went to the police station on 24th April knowing that he was wanted for questioning. He was arrested for murder, cautioned and interviewed in connection with the murders. In his interviews on that day, on the next day and in June 2006, he gave an account of his movements that evening and identified the appellant as one of two people who stabbed Hayder Ali, the other being Hassan Mir (who, as we have said, had pleaded guilty to the murder of Hayder Ali on the basis that he was a secondary party). He identified a knife (ETK/7) as a knife that he saw. The knife bore the blood of Hayder Ali, as well as DNA from Usman Butt.

15. At the time when Uddin was interviewed the Bhatti brothers had implicated Uddin as the person who in Trinity Road, shortly before the attack, had set up the Fircroft Road

meeting. Much later CCTV evidence showed that the Trinity Road meeting had taken place at 10.40 pm and not at about midnight. This was another example of the unreliability or untruthfulness of the Bhatti brothers.

16. In October 2006 Uddin was told that no action would be taken against him. A witness statement had been prepared summarising what Uddin had said in the police interviews. He declined then and thereafter to sign the statement. He was not a prosecution witness at the first or second trial or at the retrials.

17. At the appellant's trial Uddin gave evidence that the appellant was not at the scene of the fatal attacks. On the application of the prosecution he was ruled to be a hostile witness and cross-examined in detail about what he had said in interview. Albeit that he did not completely resile from what he had said to the police in interview about the earlier events of the night, he continued to maintain that the appellant was not at the scene of the fatal attacks.

18. Thus the issue for the jury was whether they were sure that Uddin was telling the truth when he told the police that the appellant had stabbed Hayder Ali. In determining that issue there was evidence which the prosecution submitted supported the proposition that he was telling the truth and evidence which Mr Dein submitted showed that he was not telling the truth about the involvement of the appellant. Mr Dein did not seek to rely on Uddin's evidence to the jury that the appellant was not present at the scene.

19. Uddin was cross-examined by Mr Dein. In substance Mr Dein put it to Uddin that he had lied to the police about the involvement of the appellant to divert suspicion from himself. Mr Dein put it to Uddin that not only did he know that he was under suspicion but that he had every reason to believe that he was under suspicion. Although Mr Dein did not formally put it to Uddin that he was an accomplice to an agreement to commit grievous bodily harm to members of the Bhatti group, the effect of his cross-examination was that Uddin was an accomplice. The prosecution did not accept that he was an accomplice and the judge did not direct the jury that, on all the evidence, they had to treat Uddin as an accomplice. Mr Dein complains strongly about that.

20. We take the background to the events of 21 April to 22 April and take some of the detail from the skeleton argument prepared for us by the prosecution:

> The Fircroft Road attack was the culmination of a series of skirmishes between two rival gangs of young men in the Tooting area that took place over the course of the night in question. The witness, CCTV and telephone evidence demonstrate the following approximate chronology:
>
> <u>9pm: The Chicken Cottage Incident</u> -

A quarrel took place between Hammad Bhatti and Hassan Mir. Hammad Bhatti went back to his father's shop in Earlsfield and thereafter a group of his associates assembled in the family's white Mercedes van, which then headed in to Tooting. Meanwhile, a group of Hassan Mir's associates began to gather in Tooting in the Foulser Road area.

10.15pm: The Foulser Road Incident -

The white van pulled up on the Upper Tooting Road by Foulser Road and the occupants got out. They chased a number of Hassan Mir's group down Foulser Road and smashed the rear windscreen of Aazam Butt's green VW Polo, before getting back into the Mercedes van and driving off down the Upper Tooting Road. They remained in the Tooting area. Hassan Mir's group remained in the area around Foulser Road and Dafforne Road.

10.40pm: Trinity Road - The Meeting with Zak Uddin -

The Mercedes van stopped on Trinity Road and some of the occupants engaged in a conversation there with Zak Uddin. The conversation was captured on CCTV from a passing bus at around 10.42pm (see Exhibit 1 p4a, showing stills from the bus). During this meeting, at 10.41pm, a call was made from Uddin's phone to Omar Butt (call 342 on the combined call schedule at p18 of Exhibit 3). CCTV from the Upper Tooting Road showed Omar Butt amongst Hassan Mir's group at around this time. A number of the group were assembled around the junction of Dafforne Road and Upper Tooting Road (see Exhibit 1 p5-9).

10.45pm: The Dafforne Road Incident -

The Mercedes van drove down Trinity Road and turned right down the Upper Tooting Road. As it passed Dafforne Road, it was attacked by members of Hassan Mir's group, including Mir himself, Usman Butt and Noor Kayani. The van drove off down the Upper Tooting Road (see the CCTV stills of the incident in Exhibit 1 p10-12). Following the incident, the Bhatti group returned to the shop (where Brian Glover was replaced in the van by Zak Sharp), then on to the Bhatti family home, before driving in to Tooting again shortly before midnight. In the intervening period, Hassan Mir's group continued to assemble in the area around Foulser Road, Dafforne Road and the Upper Tooting Road (see CCTV stills in Exhibit 1 p13-28).

12.05am: The Noyna Road Incident -

> Shortly before the fatal attack, the Mercedes van stopped just inside the junction of Noyna Road and the Upper Tooting Road, as did Aazam Butt's green VW Polo. A skirmish took place between those from the van and Hassan Mir's group. The Bhatti group got back into the van, drove up Noyna Road to Glenburnie Road, shortly before driving down Fircroft Road towards the Upper Tooting Road. CCTV stills show Noor Kayani and Kashif Khan running in the direction of Noyna Road at 12.05am, and Hassan Mir walking back towards Foulser Road at 12.07am.
>
> 12.10am: The Fircroft Road Incident
>
> As the van arrived at the junction of Fircroft Road and the Upper Tooting Road, a large group ran across from Foulser Road and started to attack the van and then its occupants. A variety of weapons were used: Knives, screwdrivers, bats, a hammer, planks of wood and other makeshift items. Mohammed Ali was attacked outside number 14 Fircroft Road. Hayder Ali was then attacked, leaving a trail of blood from outside number 14 to outside number 24, where he finally fell to the ground. Both brothers died from stab wounds caused by long thin blades. The attackers fled the scene before the arrival of the police, leaving dozens of weapons scattered around the scene, including two similar knives, exhibits ETK/7 and ETK/35. ETK/7 bore the blood of Hayder Ali, as well as DNA from Usman Butt (see Exhibit 1 p37-56 for the location of the exhibits recovered from the scene).

21. The appellant admitted being present in the Tooting area and in contact with members of the Mir group up until shortly before the Fircroft Road incident, but stated that he had left the scene at around 11.50pm to get something to eat. He had not conspired to do harm to anyone, did not provide any weapons and did not participate in the Fircroft Road attack.

22. Ground 1 relates to the ruling of the trial judge refusing to accept an application that the evidence of Uddin was inadmissible. Mr Dein submits that the ruling was perverse.

23. Mr Dein submitted to the judge and to us that what Uddin had told the police about the involvement of the appellant in the fatal attacks was so unreliable that the judge should have ruled that no reasonable jury could rely on it, a submission that Mr Dein was to repeat later in the trial.

24. Mr Dein submitted that although much of what Uddin had said about the earlier incidents was either true or not demonstrably false, what was demonstrably false was the implied suggestion throughout the interviews that he was not an accomplice to the attacks on the

Bhatti group. To summarise Mr Dein's submissions in the words of his skeleton argument:

> In June 2006 Zak Uddin was interviewed again and asked about a weapon he was seen holding on CCTV. He admitted possession of this weapon only when confronted by the CCTV and said that he had taken it off someone for safekeeping. It was clear from the interview that the police expressed fundamental doubts about the truth of his account, repeating the possibility that he had set the whole thing up and pointing out his widespread involvement on the evidence.
>
> Telephone evidence demonstrated that he had been in contact with both the van group and the Tooting group. His car was seen in Trinity Road meeting with the van group an hour before the killing and he was seen in conversation with the Bhattis. He was in ongoing contact and attempted contact with the van group at the critical stages before the attack in Fircroft Road. There was a clear basis for believing that he had encouraged the two groups to meet and then had participated in the fatal attack.

25. Mr Dein summarised his cross-examination of Uddin in this way:

> During cross-examination on behalf of the appellant Zak Uddin confirmed that he had known himself to be a suspect when he went to the police station and believed he was one of the main suspects for the killings. He had met with the van group an hour and a half before the events in Fircroft Road and was aware the police thought he had set the attack up **(98E)**.
>
> He agreed that he had lied in interview about the school he attended to make his story sound more convincing. He had reason to lie because of the weight of the evidence against him **(98F)**.
>
> Uddin agreed that he had known at the time of interview that he was suspected of having set up the murders **(99B)** in Fircroft Road, standing over Hayder Ali at the time of the murder and had Hayder's blood on his shoes. He was the last person to leave the scene from the Tooting group and thought the members of the van group might have named him as a stabber. Prior to the incident he had been on the Upper Tooting Road, making calls to Azam Butt and members of the van group. Whilst his dealings with Butt followed by events in Trinity Road were mere coincidence, he was aware at the time of interview that there might be considered a strong body of evidence against him **(99C-101F)**.

> Uddin confirmed that he had manipulated his account to the police so that they did not think he was involved. He had a grudge against Imran Aslam for sleeping with his girlfriend **(101F)** and so wanted to get him into trouble. Very little of what he told the police was a truthful account and it was Uddin's unequivocal evidence that nothing he said to the police could be trusted by the jury. His only concern was to protect himself **(101F)**.
>
> Crucially it transpired, based on CCTV and telephone evidence, that Uddin was far more heavily implicated than his interviews revealed. For example, he made telephone contact with Quadeer Khan, who was the driver of the white Metro said to have been used to bring the group's van to a halt about twenty minutes later, at approximately 11:45pm. He was in close association with Hassan Mir, Usman Butt and Noor Kayani throughout the evening. Equally, on his own account, he left the scene in a car with Hassan Mir, met Quadeer Khan at home, had Hayder Ali's blood on his shoes and was in telephone contact with Hassan Mir afterwards **(99D)**.

26. Mr Aylett points to a number of matters which supported the credibility of Uddin on the central issues of what happened at Fircroft Road. Amongst other things Mr Aylett points to the fact that Uddin was being interviewed almost immediately after the events in question and that it was not the appellant's case that his evidence was infected by anything done by the Bhatti brothers. He points to the fact that Uddin repeatedly and forcefully said that he had attended the police station voluntarily and was giving an account because he wanted to see justice done for the dead brothers. His words were compelling, so it is submitted. For example, he said: "Okay, first of all I'd like to make it aware to you that the reason I've come today is 'cos I want justice for the two brothers, the Ali family, and, you know, for what's happened to them. I deeply do feel really sad and I feel very shaken up and still am, even when you say the names and you say the two guys died. I feel I have got butterflies. That's how I actually feel". When first asked to name the initial stabber of Hayder Ali, he was slow to do so, saying: "Well, my life's going to get screwed up, isn't it?" The interviewing officer said it was up to him, but he had said he was there because he wanted justice to be done. In this light, Uddin went on to name the participants. If Uddin had wanted to see Aslam and others punished because he had some sort of vendetta against them, it was strange, so it is submitted, that he did not claim to have seen many elements of the attack in Fircroft Road, most particularly the attack on Mohammed Ali. Mr Aylett pointed to a number of pieces of evidence which tended to support the general account of the events at Fircroft Road being given by Uddin and the identities of the participants. Mr Aylett pointed out that in respect of the actions of those whom Uddin named as involved in the attack on Hayder Ali, Hassan Mir and Usman Butt pleaded guilty to murder, Noor pleaded guilty to violent disorder, Aazam Butt fled to Pakistan the next day and Tanveer Quadeer left the UK soon after and had not returned by the time of Aslam's trial.

27. In our view the judge was entitled to reach the conclusion that a reasonable jury could properly find what Uddin said to the police about the involvement of the appellant in the fatal events at Fircroft Road was both accurate and credible. Mr Dein submits that the judge was wrong not to conclude that the only proper conclusion was that Uddin was an accomplice. We disagree. But even if we were wrong, it would not undermine our conclusion that a reasonable jury could properly find what Uddin said to the police about the involvement of the appellant in the fatal events at Fircroft Road was both accurate and credible.

28. In his application to the judge to exclude the evidence of Uddin, Mr Dein relied on, amongst other things, the fact that Uddin had not been called before as a witness. Mr Aylett has given an explanation for why he was not called before and, in any event, the issue is Uddin's credibility and accuracy when he was interviewed by the police so soon after the killings. Mr Dein also submits that, by the time of the trial of the appellant, there were so many pointers towards Uddin being an accomplice that he should have been interviewed by the police about them. Mr Dein claimed that it was not fair to impose upon him, through cross-examination, the exploration of these pointers.

29. Mr Dein also made the point that he faced considerable pressure in particular because the decision to call rather than apply to read Uddin's evidence was only made very shortly before the trial. However, he made no application to be granted more time. He was also well aware of the facts of the case having been counsel at the first trial and on the appeal and having had to prepare arguments on the issue of whether the prosecution could read Uddin's statement. We accept of course that Mr Dein would have had to do a considerable amount of work to be ready for the cross-examination of Uddin.

30. The fact that the police had not re-interviewed Uddin about these "pointers" does not render the conviction unsafe. Even if Uddin had been re-interviewed it seems unlikely that he would have answered questions and, in any event, we see no forensic disadvantage in Mr Dein having the first opportunity to test Uddin on these matters.

31. We have looked carefully at the reasons given by the judge for rejecting the submission that he should rule the evidence of Uddin inadmissible and we have no doubt that the judge was entitled to reach the conclusion he did.

32. The second ground concerns the ruling made by the judge that Uddin was to be treated as a hostile witness. Mr Dein accepted that the ground was linked to ground 1. It is, in our view, unarguable that the judge's decision was wrong. It was the only decision that he could have made.

33. The third ground concerns an assertion by Uddin in his interview with the police that Hayder Ali (at about the time of the Foulser Road incident) had told him that the

appellant had waved a knife at him. This evidence was admitted by consent (see section 114 of the Criminal Justice Act 2003). Complaint is made about the judge's directions to the jury about how they should approach Uddin's interview in this respect. The complaint is made that the judge should have given more detailed directions than he gave and in particular should have said more than the same limitations applied to this evidence as to the challenged evidence of a witness Umer Butt. Those limitations were: the jury had had no opportunity to see and hear Hayder Ali, the statement allegedly made by Hayder Ali had not been made on oath and Hayder Ali had not been cross-examined about it.

34. The judge warned the jury about the dangers in accepting Uddin's evidence (see below). He told the jury that his directions about what Uddin had told the police about what Hayder Ali had said to him needed special consideration. Later he reminded the jury to be especially careful about what Hayder Ali had allegedly said. In our view there was no need for the judge to say more. The real issue was Uddin's credibility. If Uddin had truthfully reported to the police what Hayder Ali had said then it is difficult to see why Hayder Ali at some point earlier in the evening would have concocted a story about the appellant.

35. We turn to ground 4. Mr Dein submits that a much fuller direction should have been given to the jury about how to approach Uddin's interviews. Mr Dein wanted what could be described as a full accomplice direction and he complains that the judge did not remind the jury sufficiently of the various points made by Mr Dein which, in his submission, tended to show that Uddin was an accomplice. This further undermined his credibility in that he had not admitted that he was an accomplice and in that he had even more reason not to tell the police the truth.

36. This was not a case where the accomplice was giving evidence against a defendant. The evidence which Uddin was giving exculpated the appellant. As we have said the jury had to decide whether what Uddin told the police shortly after the killing was accurate and truthful, so that they could be sure about it, taking into account all the evidence in the case. The principal reason why Uddin might have lied was the fact that he himself was under arrest and being investigated for two murders. Mr Dein submits that Uddin was even more likely to lie if not only was he suspected to be involved but was in fact involved. Mr Dein further submits that the jury should have been given what he described as the traditional direction about hostile witnesses, a direction which in our view would give insufficient weight to section 119 of the Criminal Justice Act 2003.

37. The judge cautioned the jury about relying on Uddin. The fact that the jury had doubts about the reliability of Uddin in respect of at least some of the things which he had said to the police became clear in a question asked by the jury after many hours' deliberations. In the rather unusual circumstances of this case the judge's directions were in our view quite sufficient. It is inconceivable that the jury did not understand that they should approach what Uddin said to the police whilst being interviewed with great caution.

38. Mr Dein also submits that the judge should have given further directions about the lack of any independent supporting evidence. There was no direct supporting evidence of Uddin's statement to the police in interview that the appellant stabbed Hayder Ali. There was however evidence capable of supporting much of what Uddin said and the judge reminded the jury of the prosecution's case on that. The fact that a witness correctly describes A, B and C as being involved in an offence offers or may offer some support for the conclusion that the witness has also correctly described D as being involved. There was also evidence and inferences from that evidence which was capable of undermining Uddin's credibility when interviewed by the police. The jury were reminded of that.

39. We must stand back and ask whether the judge's directions about Uddin gave the jury the necessary help to evaluate his credibility as he spoke to the police. We have no doubt that he did. We dismiss ground 4.

Mr Justice Edwards-Stuart:

40. We turn to ground 5 – the introduction of prejudicial evidence during cross-examination and ground 6, that the conviction is unsafe because of the failure to discharge the jury.

41. These two grounds are inextricably connected and so it is convenient to take them together. Mr Dein submits that matters of evidence were wrongly, and indeed incorrectly, introduced by Mr Aylett during his cross-examination of the appellant and that this resulted in irremediable prejudice to him. Further, he submits, the conviction is unsafe as a result of the judge's failure to take into account all relevant considerations and/or to discharge the jury after these highly prejudicial matters had been put to the appellant.

42. During his cross-examination of the appellant Mr Aylett asked him about certain statements that Mr Aylett said had been made by witnesses in earlier proceedings. The questions were asked during a line of questioning about the appellant's reasons for remaining in Pakistan for some four or more years whilst the trials of the other defendants were taking place.

43. The first exchange went as follows:

> Q. So you did not come back until after the retrials had been sorted out?
> A. That's correct, yes.
> Q. Yes. Did you in fact know, Mr Aslam, that both Hassan Mir and Usman Butt were blaming you for the stabbings, did you know that?
> A. I found out a little, yes.
> Q. You did find that out?

A. Yes.
Q. When did you find that out, please?
A. This is once the convictions had taken place in the first trial.
Q. All right, so after they had been convicted, you found out that they were saying that you had been responsible for the stabbings?
A. That's correct, yeah.
Q. Yes. That is why, Mr Aslam, you did not come back until after the cases of Hassan Mir and Usman Butt had been sorted so they might still have the opportunity to blame you in your absence. That is the truth, is it not?
A. No, it's not.
Q. You only came back once you realised that there was no prospect of your ever having to stand in the dock alongside them, and that is the truth of it, is it not?
A. No, it's not.

44. At this point there was no protest by Mr Dein, perhaps understandably because he must have been taken unawares by the questions and may not have known whether or not what Mr Aylett had said was correct.

45. On the second occasion, the cross-examination was as follows:

Q. What, even though he has told the police back in April 2006, that he actually saw you stab Hayder Ali, you bear no ill feeling towards Uddin?
A. I ran off to Pakistan because I was scared. He went to the police and made up as much lies as he could because he was scared.
Q. I mean, is it the case that anyone who is scared makes up anything about anyone else; including, for example, Hassan Mir and Usman Butt, when they went into the witness box and said that you had stabbed the two boys: is that what happens? People just blame whoever is not there?
A. Well, it's the easiest way of doing it, yes.

46. Leaving aside the issue of the introduction of such evidence by this means, the first problem with these exchanges is that Mr Aylett's questions were factually inaccurate. The true position was that in the first trial Hassan Mir gave evidence that after the Fircroft Road incident (where the murders took place), the appellant told him that he had stabbed two people ("*shanked 2-2 man*"). Usman Butt gave evidence that towards the end of the Fircroft Road incident, the appellant had thrust a knife into his hand and that Butt had thrown it away as he left the scene - by implication, this was the murder weapon. However, the situation was complicated by the fact that the appellant effectively agreed with what Mr Aylett had put to him.

47. On the afternoon of 31 January 2011, shortly after the second series of questions had been asked and part way through Mr Aylett's cross-examination of the appellant, Mr Dein asked if he could raise a matter of law with the judge. He then indicated that he wished to make an application to discharge the jury. Written submissions from both parties were prepared overnight and placed before the judge early the following morning.

48. Having considered counsels' submissions, the judge made a ruling in the following terms:

> "In my judgment, Mr Aylett should have given some indication to defence counsel of his intention to introduce references to the matters which he did put in cross-examination and in particular to what Hassan Mir and Usman Butt had allegedly said on earlier occasions, particularly in the witness box. I for one have no idea about such matters, not having conducted any of the earlier trials. Furthermore, Mr Aylett could have been reminded of what had actually been said and not stated the matter incorrectly as he did. Having said that, I have concluded that there is no high degree of need to discharge this jury at this critical period in the fourth week of this trial. The matters which are of concern, not only to Mr Dein but to the Court, can properly and, in my judgment, adequately be dealt with in the summing up in such ways I decide, having heard from counsel in due course. Whether it is in anyone's interests not least the Defendant's to refer to these matters at this stage whilst the Defendant is still giving evidence I shall take advice from counsel now and I invite any thoughts on that matter."

He then gave Mr Dein a little time to reflect on the position and to respond to the judge's request.

49. Shortly after this ruling had been given, the appellant decided that he was not prepared to give any further evidence or to call any witnesses. At about noon on the same day, 1 February 2011, the judge considered what, if any, direction he should give to the jury about the questions that had been put by Mr Aylett. At this point, Mr Dein took the position that the defence could think of no form of "*comment, direction or formula*" which would satisfactorily address the issue and so left the matter for the court to resolve. So the judge heard further submissions from the prosecution only.

50. After this, the proceedings resumed, in the appellant's absence, at 2:15 pm on the same day. The judge then gave the jury the direction about the questions that Mr Aylett had asked in cross-examination. He said this:

> "First of all, in the course of Mr Aylett's cross-examination he put to Mr Aslam that something had allegedly been said by Hassan Mir and Usman Butt during their trial, the first trial. You should ignore that and put it completely out of your minds. They have not been witnesses and whatever they may or may not have said is not evidence in this case in any shape or form and I will give you a formal direction on that in my summing-up in due course, but I wanted to say that at this stage just in case any of you were wondering about that and how you should approach it."

He then went on to direct the jury in relation to the appellant's absence from the dock and his refusal to give further evidence.

51. The appellant's case is that the direction in relation to the evidence compounded the situation and was quite insufficient to dispel the effect of the questions which were, it was submitted, "*devastatingly prejudicial*" and unnerved the appellant to such an extent that he had refused to return to the witness box. Mr Dein submits that the judge's decision not to discharge the jury then and there was one that no reasonable judge in his position could properly have taken.

52. Mr Dein submitted also that the prosecution's contention that the appellant's motives for remaining in Pakistan were purely tactical would effectively put the defence in the position of having to deal with the incorrect suggestions that had been made during cross-examination, thus highlighting the very piece of evidence that the jury was supposed to ignore. In short, it was submitted on the part of the appellant that the matters put to him in cross-examination and the way they were dealt with by the judge led to an unsafe conviction.

53. In his skeleton argument served in response to this appeal Mr Aylett submitted that "*it was perfectly legitimate for prosecution counsel to explore whether [the appellant] knew what was being suggested about him in those proceedings and whether it affected his decision to remain abroad and avoid a joint trial*" and that, in cross-examining on this topic, "*prosecution counsel's error was not one of principle, but of mistaking the precise evidence that had been given*". Whilst we accept the first of these submissions, we have reservations about the second. However, for reasons that will become apparent, we do not have to decide on this appeal whether that second submission is in fact correct.

54. Mr Aylett also submitted that the appellant's flight to Pakistan very soon after the killings and his decision to remain until the conclusion of all other criminal proceedings relating to the case were inevitably matters that the jury could and should take into account in considering his guilt. It was something that the appellant himself addressed when giving evidence in chief: he told the court that he did not come back initially because he thought it would have delayed the second trial (which was in 2007), and that he did not return after that because it would have delayed the subsequent retrial and that would have been selfish of him. The prosecution suggested, and Mr Aylett submitted that it was clearly open to the jury to conclude, that this account was untrue.

55. It was against this background that the relevant questions were asked and Mr Aylett submitted that the trial judge was in the best position to assess the risk to the defendant as a result of the questions that had been asked and that his decision was not one with which an appellate court should lightly interfere.

56. We accept this last submission made by Mr Aylett. The incident was unfortunate and was one that should never have happened, as the judge observed. However, mistakes of this sort do occur from time to time and can often be remedied by prompt and appropriate action from the trial judge.

57. We consider that this was such a case. We reject the appellant's submission that the judge's direction made matters worse: on the contrary, in our judgment the judge was justified in concluding that the situation could be remedied by means of a clear direction to the jury. His decision was certainly not unreasonable. In considering whether or not to discharge the jury he applied the correct test, namely whether there was a "*high degree of need*" to discharge the jury: see *Archbold*, 2011 Edn, at 4-253. We can see no error either in the judge's approach or in his actual decision.

58. Following this decision and the appellant's refusal to give any further evidence or to call any witnesses, the trial moved to final speeches and summing-up. These gave rise to two further events that were the subject of complaint. First, in his final speech Mr Aylett, without prior notice to Mr Dein or to the judge, told the jury that when putting his questions to the appellant in cross-examination he had been wrong and so the jury should completely disregard them. Second, the judge gave a further direction to the jury in his summing-up about these questions and that direction is also a subject of criticism by the appellant.

59. What Mr Aylett said in his final speech to the jury was that, when asking the appellant about what Hassan Mir and Usman Butt had said in the first trial, he got it wrong. He said that the record had been checked and that what he said was incorrect and that the jury should disregard it. He said also that nothing that was said in evidence in the first trial had any relevance now.

60. In his summing-up, the judge said:

> "Now, any specific suggestion put by Mr Aylett in cross-examination was based on inaccurate information as he readily and properly accepted. If you remember what he said specifically, ignore it, because it is not evidence, and in fact it was incorrect. So I shall not even remind you of what he said, but put it out of your mind if you do remember the specific suggestion he made. But that, he submitted to you, would not weaken his overall suggestion that the reasons Mr Aslam gave in cross-examination for not coming back were nonsense."

61. Mr Dein submitted that the correction by Mr Aylett "*could only have triggered further chaos, confusion and prejudice in the minds of the jury*". Further, since Mr Aylett did not retract his suggestion that the appellant had been behaving tactically in delaying his return to this country (as reflected in the point made in the passage in the summing-up that we have just quoted), the defence had to deal with the point in its closing speech, thus reminding the jury of the very piece of evidence that it had been told to ignore. In addition, this was compounded by the stress that Mr Aylett had placed in his closing speech on the appellant's exit from the witness box. Mr Dein submitted that this was unfair in the light of what happened and again only served to force the defence to deal with the incorrect suggestions that had been made.

62. Mr Dein submitted that the judge should not have compounded the problem by returning to the question, but instead should have simply ignored the whole question of why the appellant had delayed his return to the United Kingdom.

63. In our judgment the judge was right not to ignore the incident and to give both the initial and the further directions in the terms that he did. The point could not simply be ignored because the appellant was being challenged in strong terms as to his motive for remaining in Pakistan for so long.

64. Mr Aylett submitted also that there was no significant prejudice, or perhaps more accurately that any initial prejudice that there may have been was averted, because the jury were told in the clearest terms by Mr Aylett that what he had said in cross-examination was wrong and should be ignored and that, thereafter, the jury received guidance from the judge in the clearest terms to similar effect. In his skeleton argument, he submitted that what the jury was told could be summarised in the following terms:

i) That the matters put in cross-examination were inaccurate.

ii) That the prosecution had accepted that they were inaccurate.

iii) That the prosecution had told the jury to ignore it.

iv) That they were not evidence.

v) That the jury should put them out of their minds.

65. In our view, any prejudice that was suffered by the appellant was wholly or substantially caused by his own decision to leave the witness box and not to return and continue his evidence. Whilst, in a sense, that decision may have been influenced by the fact that Mr Aylett asked the questions that he did and the judge's subsequent decision not to discharge the jury, it was in our judgment not a decision that was a natural consequence of the events that preceded it, particularly given that the appellant was represented by very competent leading and junior counsel and was given legal advice. As Mr Aylett put it, the appellant's decision should be seen properly as a result of his own petulance or design, rather than as the result of any fault on the part of the prosecution.

66. For all these reasons we do not consider that the conviction is unsafe by reason of these grounds of appeal.

67. We turn to ground 7 - the telephone conversation of 14 October 2007.

68. This did not form part of the grounds of appeal for which permission had been given by the single judge and so it was necessary for Mr Dein to apply to the court for permission to rely on it. After hearing submissions we refused permission and said that we would give reasons later. This part of this judgment contains our reasons for that refusal of permission.

69. The thrust of this ground is that the conviction is unsafe because of the recent discovery of a telephone call on 14 October 2007 lasting 42 minutes made by Uddin to Shahid Ali, the father of the two murdered brothers, the implication of which is said to be that Uddin's initial statements to the police during his interviews on 24-26 April 2006 were or may have been contaminated by Mr Ali.

70. It seemed that both the defence and the prosecution had overlooked the existence of this telephone conversation, the details of which were buried in a mass of unused material that had been disclosed by the prosecution. We do not make any criticism in respect of the late discovery of the existence of this telephone call.

71. What is said by Mr Dein is that, if the defence had known of this telephone call at the time of the trial, they would have explored fully Uddin's relationship and dealings with Shahid Ali. Mr Dein told us that, after much agonising, the defence chose not to pursue this aspect. In particular, there had been a disclosure of an earlier relationship between the sister of one of the murdered men and Uddin and this was another matter that the defence decided not to explore. We were told that the purpose of exploring these matters would have been to demonstrate that Mr Shahid Ali had had a malign influence over Uddin which could have influenced what the latter told the police in April 2006.

72. As we have already said, the reason for the abandonment of the second trial, and the subsequent successful appeals against the verdicts in the first trial, were the result of the contamination of evidence given by the Bhatti brothers. Mr Shahid Ali played a material part in the interference with this evidence. The submission on behalf of the appellant is that knowledge of this telephone call in October 2007 would have enabled the defence to mount a similar attack on the evidence of Uddin.

73. We disagree. We can see no arguable basis for the assertion that what was said in a telephone call in October 2007 could affect or undermine the reliability of what Uddin said to the police some 18 months earlier in April 2006.

74. It may or may not be the case that knowledge of the existence of this telephone call might have prompted the defence to explore the lines of cross-examination of Uddin indicated

by Mr Dein, but it is pure speculation whether or not such cross-examination, if it had taken place, would have improved or impaired the appellant's position. The fact that this one telephone call was made by Uddin to Shahid Ali, and not the other way round, does not immediately fit in with a scenario involving the intimidation or manipulation of Uddin by Shahid Ali.

75. Further, as Mr Aylett pointed out in his skeleton argument submitted in response to this application, it was largely unnecessary for the defence to explore why Uddin might have given a false account to the police in April 2006 for the simple reason that Uddin gave that explanation himself during his evidence. The explanation was that the appellant had slept with Uddin's girlfriend not long before the murders and that Uddin wanted to get his revenge by implicating the appellant. The prosecution made the further point that it would be very odd if the result of contact between Shahid Ali and Uddin in 2007 was to cause Uddin when giving evidence to exculpate the person charged with murdering Shahid Ali's son, rather than to incriminate him.

76. For these reasons we concluded that the seventh ground was not reasonably arguable and we therefore refused permission.

77. We conclude by saying that the learned judge conducted what was a difficult case impeccably.

The Recorder of Hull:

78. The application for leave to appeal sentence was referred to the full court by the single judge. We give leave to appeal.

79. The appellant was sentenced to life imprisonment with a minimum term of 20 years specified under s 269(2) of the Criminal Justice Act 2003. Days spent on remand were ordered to count towards the minimum term.

80. In his perfected grounds of appeal against sentence Mr Dein set out a number of individual points. However, he realistically accepted before us that his submission could be summarised as a complaint that the 20 year minimum term was too long when compared to that specified for others who were also sentenced for the murder of Hayder Ali. They were Hassan Mir whose minimum term was 12 years and Usman Butt who received a minimum term of 11 years.

81. On passing sentence on Mir and Butt, Mackay J. said that each of them was “part of a mob that night, a mob of 20 or 30 strong, equipped with a whole range of makeshift weapons, anything that came to hand and setting upon another group, in a public place to

which it had been lured by way of ambush. This was a major piece of public disorder on what should have been the quiet streets of London It caused alarm, fear and dismay to the many members of the public forced to witness it". We add that as a result of the disorder two men died. Mackay J. concluded that but for the discount that he gave each defendants for pleas of guilty the appropriate minimum terms would have been 14 ½ years for Mir and 13 ½ years for Butt.

82. The appellant's position is much worse. Firstly, he does not have the benefit of a guilty plea and so the true comparison between his sentence and those of Mir and Butt is to the notional terms of 14 ½ and 13 ½ years.

83. Secondly, the approach to sentence on the appellant was very different to that appropriate for the other two. This for the following reasons :

(a) At the time of the murder the appellant was 23 years old. Mir was 18 and Butt 17.

(b) Both Mir and Butt were sentenced on the basis of them being secondary parties to the murder. This does not apply to the appellant.

(c) They were sentenced on the basis that they did not have an intent to kill. In sentencing MacKay J. said: "that there was no intent to kill on the part of those members of the group, yourselves included, as opposed to those who actually did the stabbing". The appellant was clearly convicted on the basis that he was one of those who stabbed Hayder Ali and the learned judge was entitled to conclude, as he did, that the appellant intended to kill.

84. Mr Dein concedes, despite submissions to the contrary to the sentencing judge, that it was proper to distinguish between the appellant and the other two in fixing the minimum term. We agree. We also take the view that the distinction had to be substantial.

85. Our conclusion is that the appellant's sentence, looked at individually, cannot be faulted. Nevertheless, looking at the case broadly we take the view that the range of the minimum terms imposed is too great. In these circumstances we reduce the appellant's specified term to 18 years. To that extent only the appeal against sentence is allowed.