Neutral Citation Number: [2018] EWCA Crim 2082

Case No: 2017/03561 B3
2017/03563 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT KINGSTON
Her Honour Judge Plaschkes QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2018

Before:
THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE HONOURABLE MRS JUSTICE MAY DBE
and
SIR WYN WILLIAMS
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between:

REGINA	**Respondent**
- and -	
EMMANUEL THOMPSON	**Appellant**

- -
- -

Mr Craig Harris appeared on behalf of the Appellant
Mr Tom Nicholson appeared on behalf of the Crown

Hearing date: 11 July 2018

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Approved Judgment

The Lord Burnett of Maldon CJ:

Introduction

1. In May 2017 the appellant, Emmanuel Thompson, and eight other men stood trial at the Crown Court at Kingston, before Her Honour Judge Plaschkes QC and a jury, upon an indictment containing three counts. Count one charged the nine defendants with conspiracy to possess firearms with intent to endanger life; count two charged each defendant with conspiracy to possess prohibited weapons and count three charged them with conspiracy to commit violent disorder. The conspiracies charged under each count related to the same date, 21 June 2016. On each count the defendants were charged with conspiring together and with "other persons unknown".

2. The prosecution presented each count as an alternative. The counts were framed in descending order of seriousness. The prosecution always intended, and presented the case on the basis, that each accused could be convicted of one of the three offences but no more than that.

3. On 9 June 2017 the jury returned its verdicts. On count one, the jury could not agree upon a verdict in respect of the appellant; all the other men were acquitted. On count two, seven of the accused were acquitted; the appellant and a co-accused, Gerson Dos Santos, were convicted. On count three no verdicts were taken in respect of the appellant and Gerson Dos Santos because of their convictions on count two; of the remaining accused five were acquitted but two men, Lesandro (Lee) Agostihno and Jack Dudhill, were convicted. The result was that five of the accused men were acquitted of all the charges brought against them; two men were convicted of conspiring to commit violent disorder and two, including the appellant, were convicted of conspiracy to possess prohibited weapons.

4. The prosecution successfully applied to re-try the appellant upon count one. The re-trial came on quickly before the same judge at the same court centre. When that trial commenced the appellant faced an indictment which contained a single count in identical form to count one at his original trial. He was charged with conspiring with the same eight named individuals and with other persons unknown to possess firearms with intent to endanger life. For ease of reference we shall continue to refer to this single count as "count one". At the close of the prosecution case, and at the judge's direction, count one was amended so that all the named individuals (other than the appellant) were deleted from the particulars of the offence charged. That was because she concluded that the prosecution could not advance a case which required the jury to decide that any of those acquitted on count one was in fact guilty. That meant that count one as finally considered by the jury charged the appellant with conspiracy with other persons unknown to possess firearms with intent to endanger life. On 7 July 2017 the appellant was convicted of that offence.

5. Sentence was imposed upon the appellant (and the other accused men earlier found guilty) on 10 July 2017. On count one the appellant was sentenced to 18 years' imprisonment. No separate penalty was imposed upon count two.

6. With the leave of the single judge the appellant appeals against his convictions. His sentence has been referred to the Full Court to be considered in the event that his appeal against conviction fails or succeeds only in respect of one count.

The evidence at the first trial

7. At about 18.20 on 21 June 2016 an altercation occurred in the open space immediately adjoining a block of flats within Rowland Court, a housing estate in East London. An unidentified man who had driven to the estate in a black BMW motor car began it by brandishing a knife towards a group of men. The group included five of the nine men who were later to stand trial on the conspiracy counts. Of those convicted by the jury Gerson Dos Santos and Lee Agostinho were amongst the group. As the incident unfolded the group responded aggressively towards the unidentified man with the knife. CCTV footage captured Gerson Dos Santos passing a knife to Lee Agostinho. However, despite the threatening nature of the incident and the presence of knives there was no actual violence. The incident came to an end with the unidentified male driving off in his car, although not before he had shouted to the group that he would see them at nine o'clock.

8. The appellant was not one of the men involved in that altercation. However, within about 40 minutes of the incident he arrived at Rowland Court and entered the block of flats outside which the men had congregated. One of the flats, number 45, was occupied by a co-accused, Stuart Dedes.

9. Over the next few hours the appellant and his co-accused gathered together at Flat 45. They did not all arrive together. The appellant was alone when he arrived and others came after him. They did not all remain together in the flat throughout the evening. Rather, from time to time, various of the men in the flat went outside to meet a person or persons who arrived in the vicinity by car. On more than one occasion the appellant was captured by CCTV footage outside the flat. On more than one occasion he was captured returning to the flat carrying an object or objects.

10. At some stage, the police became aware that a violent incident was a possibility and put the flat under surveillance. At 22.36, armed police entered the flat. Before they could gain entry a person sitting in a car parked in a nearby car park, later identified as Lucy Miles, sounded the horn of the car; it seems clear that this was intended to be a warning to the occupants of the flat. She also sent a text warning to one of those inside the flat. Almost immediately, three men appeared on the balcony of the flat and were seen by police officers to throw a number of items from the balcony. One of the men, who was wearing a white top, was seen to throw a bag, described as a man bag, as far as he could from the balcony.

11. As soon as police officers entered the flat the occupants were arrested. The appellant was one of those present in the flat. An extensive search was undertaken of the flat and the area outside. Within the flat the police discovered a bottle of ammonia. Outside the flat the police discovered a quantity of cocaine and a bag of cannabis. The man bag thrown from the balcony was also located; it had within it an Uzi machine pistol and rounds of ammunition suitable for that gun together with a loaded revolver. Both guns were in working order.

12. The prosecution case against the appellant had a number of strands. First, telephone records showed that he had been in contact on a number of occasions that night with a man called Aiyab Mahmood. Mr Mahmood was the brother of the appellant's partner; he was also alleged to be the person who had arranged for the guns to be taken to the appellant and his co-accused sometime after the appellant's arrival at the flat. On 5 September 2016 Mr Mahmood's flat was searched and ammunition seized. Forensic examination of the ammunition recovered from the man bag discovered in the vicinity of Rowland Court demonstrated that it was similar to some of the ammunition recovered from the flat occupied by Mr Mahmood. Secondly, as we have said, during the course of the evening the appellant left Flat 45 and collected items from people who drove to the vicinity. Thirdly, identification evidence from a police officer was to the effect that it was the appellant who had been the man in the white top who had thrown the man bag from the balcony. Following his arrest, the appellant was interviewed under caution. He declined to answer the questions put to him. That failure provided some support for the prosecution case.

13. At the first trial the appellant gave evidence in his own defence. He told the jury that he was a successful drug dealer and he had been engaged in his business of selling drugs in the Ipswich area during the course of the afternoon of 21 June 2016. He was making a profit of £9,000 every three or four weeks from his drug dealing. The appellant accepted that he was at the flat at Rowland Court during the evening and that he had been in telephone contact with Mr Mahmood. The purpose of the calls, said the appellant, was to arrange the purchase of cocaine and cannabis from Mr Mahmood. It was cocaine and cannabis which he had collected from his sister Ayab Mahmood who had driven to the vicinity of Rowland Court during the course of the evening. The bottle of ammonia found in Flat 45 was his, but he had it in connection with his drugs supply business. He had not arranged to take possession of any guns or ammunition from Mr Mahmood. He knew nothing of them. He had not thrown a man bag containing the two guns from the balcony. The officer was mistaken. All he had done was to throw crack cocaine from the balcony once he realised the police were raiding the flat.

14. Gerson Dos Santos gave evidence that he brought the firearms into the flat, but did so without informing any of the other defendants. He also admitted throwing the firearms from the balcony. There was mixed DNA evidence on the barrel of the revolver "which provided strong support" for the proposition that he had handled it. The DNA of another identified person (not a defendant) was also found on the revolver. Dos Santos' explanation was that he was simply looking after the weapons for a short time and intended to return them to their owner. In her sentencing remarks at the end of the second trial, the judge made clear she did not accept that. She concluded that the appellant had collected the guns from Mr Mahmood's sister.

15. The appellant's evidence to the jury amounted to an admission of serious criminality on his part. He gave evidence, too, that Mr Mahmood was a major drug dealer. In giving his evidence, the appellant gave a detailed exposition of his own history of drug dealing. The purpose was to explain to the jury how he came to be in frequent contact with Mahmood. That history is sufficiently described by the trial judge during the course of a ruling she made:

> "I turn then to the evidence … that he gave in chief. … He said that he is now 29 years old and was a drug dealer at the time of

> his arrest; that from the age of 16 to 17 he went to Glasgow; that he has GCE's in maths, English and science, but he got kicked out of his parents' home because he was a handful and he was then living on the streets and sleeping in cars and benches.
>
> He told the jury that he used to smoke weed and, after eight years, started to deal weed. He told the jury 'I did not have anything when I was younger. I was living on the streets. I was not involved in Class A and dealing Class A straight away. When I was 19 I started selling crack and heroin.' He continued to explain how much money he would get. He told the jury he was paid £100 to £200 every two to three days for doing that and he was doing that while he was on the streets.
>
> He further described how he would make his money dealing drugs and then went on to say that went to dealing out of London, because there were not so many people there and he could make more money and then he said this according to my note 'I was not continuously dealing but I stopped and started many times. I first stopped when I was 21, or 22 years old. I had my first child……..
>
> Mr Thompson continued in his evidence that he started dealing again when he was 23. Then he said 'I had another child when I was 24 and stopped again. I stopped dealing because I had savings so I didn't need to sell drugs, because I had money saved from the drug dealing. I went back to drug dealing because I ran low and I needed to survive. I went back when I was 26 or 27'. Then he told the jury that his relationship with Yasmin started again. He had one more child, born, I think, in 2015, and then told the jury that [Aiyab] Mahmood was the source of his drugs."

16. At the close of the appellant's evidence in chief, lead prosecuting counsel, Mr Benedict Kelleher applied to adduce evidence of some of his previous convictions. He did so on the basis that such evidence was admissible "to correct a false impression given by the defendant": section 101(1)(f) of the Criminal Justice Act 2003. The appellant resisted the application but the trial judge ruled that the prosecution was entitled to adduce evidence of two of the appellant's previous convictions, namely a conviction for robbery on 27 October 2006 (when the appellant was 18) and a conviction for conspiracy to rob on 15 January 2010 (when he was 21) ("the robbery convictions"). Upon conviction for each of those offences the appellant had been given custodial sentences and the trial judge ruled that those sentences could also be adduced before the jury.

17. Following the ruling, discussions took place between Mr Kelleher and Mr Harris about the best way to put that evidence before the jury. They agreed that if he chose to do so the appellant could resume evidence in chief and give further evidence relating to his previous convictions. The judge approved that course of action. The appellant

resumed giving evidence in chief and he then told the jury about his previous convictions including the robbery convictions.

18. The trial then followed a conventional course. In summing up the case to the jury the judge directed that, in respect of all the conspiracy allegations, the alleged co-conspirators were the co-defendants:

> "The prosecution must prove the defendant whose case you are considering knew the firearms were in Flat 45 and agreed with one or more of his co-defendants that he or a co-conspirator had physical control of the firearms.
>
> …
>
> If you are sure the defendant whose case you are considering agreed to possess the firearms, then go on to decide whether he agreed with one or more of his co-defendants that the firearms would be used to endanger life."

Thus although the indictment contained the words "or with persons unknown" there was no question in the first trial of the jury convicting on the basis that the material conspiracy was with anyone outside the circle of the indicted defendants.

19. The jury's conclusions show that they were sure that there was a conspiracy to possess the weapons and sure that the appellant and Gerson Dos Santos were party to it. They were sure that there was a conspiracy to commit violent disorder and sure that Lee Agostinho and Jack Dudhill were party to it. The prosecution failed to convince the jury that the five acquitted defendants were party to any of the three indicted conspiracies. They were not asked to return a verdict on the violent disorder count against the appellant or Gerson Dos Santos because of their convictions on count two. In failing to reach a verdict on the appellant on count one, it necessarily follows that some of the jury were of the view that he was guilty of the offence notwithstanding the acquittal of all his co-defendants. That can be explained by the jury approaching count one on the basis that although it was not possible to be sure of the guilt of any particular co-defendant, it was possible to be sure that one or more of them must have been party to the conspiracy to possess a firearm with intent to endanger life.

The evidence and events at the re-trial

20. At the re-trial, the appellant faced an indictment containing one count which was identical to count one of the earlier indictment on which he had been tried with his co-accused. With no dissent from Mr Harris, the prosecution adduced evidence of the appellant's recent conviction for conspiracy to possess a prohibited weapon (count two at the first trial). It also adduced much of the evidence which had been given by the prosecution witnesses in the first trial albeit that the majority of it was reduced to written admissions.

21. The prosecution sought to prove before the second jury not just that the appellant was guilty of conspiracy to possess a firearm with intent to endanger life but that all or some of his co-accused in the first trial were also guilty of that offence,

notwithstanding that they had been acquitted. Although the appellant was said to have conspired with "other persons unknown" in that this allegation remained in the count upon which the appellant was being tried, the case presented to the jury was that he had, as a matter of fact, conspired with some or all the persons who were named in the indictment.

22. The essence of the case, as it had been in the first trial, was that as a result of the confrontation earlier in the evening, the men had all gathered at the flat in preparation for a violent incident knowing that some would be armed with loaded weapons and would use them if necessary.

23. The approach to the evidence adopted by Mr Harris, on behalf of the appellant, was to distance the appellant from the common activities of the others. He "cross-examined in" evidence of gang association between all the original co-accused save for the appellant. He did so because it would enable the jury to conclude that the others were involved in a gang dispute, arising from the incident at 18.20, in which the appellant had no interest. There was evidence of such association between all the accused except for the appellant. It might cast doubt upon the prosecution case that there had been a conspiracy between his client and any or all of these other men.

24. He also adduced evidence, through one of the police officers, of the convictions of a man called Srikantha for drugs offences. He was a candidate to have been the passenger in a mini cab from whom Jack Dudhill collected a package during the course of the evening. He had also been disqualified from driving. The purpose of that evidence was to support the argument that, whatever others may have been doing, part of what was going on in the flat was concerned with drugs and that Srikantha had used a mini cab because he could not drive. Convictions of two of the original co-accused were also placed before this jury, as they had been in the first trial. Alexandre Agostihno had a conviction for robbery and for possession of a firearm whilst committing that offence. Ricky Morgan had a conviction for possession of a firearm with intent to endanger life, a sawn-off shot gun and also robbery. These convictions were relied upon "because the defence say it is relevant to whether other individuals in Flat 45 were capable of having an interest in firearms without any involvement of Emmanuel Thompson", as the judge explained in summing up.

25. The fact of the appellant's drug dealing that day in Colchester and Ipswich was adduced though expert police analysis of his telephone usage and admissions.

26. There was evidence of contact with Ayiab Mahmood and the comings and goings over the course of the evening to the flat. It was clear that the guns had been delivered that evening. There remained some confusion about which of those who arrived in the vicinity of the flat had brought the guns, and indeed who had taken them up to the flat. But it remained part of the prosecution case that Ayiab Mahmood was probably the supplier, supported by the later discovery of weapons at his home and his conviction for simple possession of prohibited firearms and ammunition. It was the prosecution's case that the appellant had arranged the delivery. But Ayiab Mahmood had not been suggested as a co-conspirator on count one either during the first trial or in opening the second; nor were any other unnamed candidates identified generically.

27. As the prosecution case was about to close the judge raised concerns about how the prosecution had been advancing its case. She indicated that she did not consider it

appropriate that the prosecution should advance a case which was to the effect that the jury could be sure that the appellant had conspired with one or more of the men who had been acquitted in the first trial. She drew counsel's attention to a number of decisions of this court, namely, *R v Mitchell* [1964] CLR 279, *R v Austin and Tavakolina* [2011] EWCA Crim 345, *R v C* [2012] EWCA Crim 6 and *R v Ahmed* [2013] EWCA Crim 2307. A debate followed about how to proceed. It ended with the judge indicating her view that count one should be amended to delete all the named individuals. The case would proceed on the basis that the appellant had conspired with "other persons unknown".

28. We do not have transcripts of the exchanges described above nor of the exchange which immediately followed. In accordance with the judge's view, the indictment was amended by deleting reference to the named co-accused. Next, prosecuting counsel applied to discharge the jury. He took the view that it was unfair to the appellant to proceed with the trial. Furthermore, he wished to proceed before a fresh jury with a single count alleging that the appellant had possessed a firearm with intent to endanger life. To achieve that end, count one would be deleted and a new substantive charge substituted for the conspiracy. The judge refused this application whereupon the prosecution closed its case. We have no transcript of any ruling by the judge at that point but there is no dispute between Mr Nicholson for the respondent (who was junior counsel to Mr Kelleher) and Mr Harris that a ruling or decision to that effect was given.

29. The judge gave a ruling at the end of the prosecution case that rehearsed some of these preceding events and also rejected a submission from Mr Harris which had two components. First, that it was unfair to allow the case to go forward on an entirely new basis when throughout the prosecution case he had been concerned to deal with the case that was being advanced. Secondly, that there was no case to answer on the new basis.

30. In the course of her ruling the judge recorded that that the prosecution had been inviting the jury to conclude that the appellant had conspired with intent with at least one of the acquitted defendants; that at least one, if not all, of those named in the indictment was guilty of the conspiracy. The "others unknown" who might be in the frame would be unidentified people with whom the appellant had been in contact that evening (described by prosecuting counsel as a "theoretical possibility") or the supplier of the firearms and ammunition. The evidence had traversed the participation of the unidentified passenger in a mini cab. The judge concluded that:

> "The prosecution cannot invite the jury to convict, on the basis that the defendant conspired with the acquitted named defendants alone, to possess the firearms with intent to endanger life and I have concluded that the indictment needs to be amended to delete the names of the acquitted named individuals and the jury will be directed that they must be sure that Emmanuel Thompson conspired with a person or persons other than the acquitted defendants."

31. The judge indicated that that prosecution could advance the case on the basis that the acquitted defendants were probably guilty and that the evidence relating to those defendants went to the appellant's state of mind. She explained that the evidence of

the earlier confrontation provided, on the prosecution case, the motive for the appellant to acquire the firearms. The judge was here envisaging that the evidence concerning the acquitted co-accused would provide an explanation for the appellant having obtained the weapons and arranged for them to be taken to the flat with the necessary intent, but without it being possible for the jury to conclude that he was acting in concert with any of them when he did so.

32. The judge observed that the words "and with other persons unknown" were in the indictment in the first trial. She noted that the evidence supported the proposition that the appellant had obtained the weapons from Ayiad Mahmood, Mr Mahmood's sister or an associate; that he had left the flat twice during the course of the evening; and that Jack Dudhill collected a bag from a taxi. She recorded Mr Harris' submission that it would be unfair to allow the appellant to be "retried on a completely different basis" and that he had adduced evidence of the gang affiliation of the acquitted defendants, which would have been unnecessary if all the case was about was a conspiracy with an unidentified supplier or intermediary. He submitted that, if it had been apparent that the case was concerned with other unknown conspirators, it would have been defended differently. On the issue of no case to answer, it was Mr Harris' submission that the evidence did not support the inference that the suppliers of the weapons and ammunition would have had the intent necessary to support their involvement in the count one conspiracy. The judge concluded:

> "… the latter points can still be made. As to the evidence of gang affiliation and convictions of Ricky Morgan and Alexandre Agostinho, well it is still the case, the prosecution case, that those individuals were probably involved. The difference is that the jury can only convict if they are sure that Emmanuel Thompson was in a conspiracy with other, or others, than the acquitted named individuals. The evidence is the same. The indictment is the same, just the named individuals removed, and the prosecution can now assert probable, rather than definitely, to be consistent with the jury verdict, so far as those acquitted named individuals are concerned. I am not persuaded that the defence would have put its case differently and I am satisfied that the trial of this defendant is fair."

33. Following the judge's ruling the appellant chose to give no evidence. No evidence was called on his behalf.

Grounds of appeal

34. The appellant advances the following grounds of appeal against his convictions.

35. In respect of his conviction upon count two in the first trial, he argues:

(i) That the judge was wrong to allow the jury to hear of the appellant's two previous convictions for robbery because he had not created a false impression when giving evidence. Accordingly, there was no legal basis to adduce any of his previous convictions. Section 101(1)(f) of the 2003 Act was not satisfied. Moreover, although the appellant (rather than the prosecution) had given the evidence of previous convictions, he would not have done so but for the judge's ruling.

(ii) Alternatively, if a false impression had been created by the evidence in chief, the judge should have exercised her discretion under section 78 of the Police and Criminal Evidence Act 1984 and refused to permit the prosecution to adduce any evidence of previous convictions. Mr Harris argues that the admission of this evidence had such an adverse effect upon the fairness of the appellant's trial that it ought not to have been admitted. One way or the other, says the appellant, his convictions should not have been before the jury. That such evidence was given renders the conviction on count two unsafe.

36. In respect of his conviction upon count one in the second trial, he argues:

(i) That the jury should not have heard of his conviction on count two, for the reasons already advanced.

(ii) The judge (a) erred in allowing the prosecution to change the entire factual basis of its case after having called all its evidence, and (b) should have acceded to the defence submission of no case to answer.

The conviction on count two

37. Section 101(1) of the 2003 Act, so far as material, provides:-

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if, -
>
> …….
>
> (f) it is evidence to correct a false impression given by the defendant"

Section 105 of the Act provides:

> "(1) For the purposes of section 101(1)(f)—
>
> (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
>
> (b) evidence to correct such an impression is evidence which has probative value in correcting it.
>
> …..
>
> (6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.
>
> (7) Only prosecution evidence is admissible under section 101(1)(f)."

38. We have set out at paragraph 15 above the appellant's evidence, as summarised by the judge, which provoked the application to adduce evidence of his previous convictions.

Following argument, the judge ruled that the two robbery convictions could be elicited by the prosecution. She concluded that the terms of section 101(1)(f) of the 2003 Act were satisfied. She explained:

> "Well having carefully considered the evidence that he has given, I am satisfied … that a false impression of his character has been placed before this jury because the impression that has been created is that he was compelled to become a drug dealer because he was homeless, evicted by his parents, and without any other means of support, thus eliciting, or seeking to elicit some sympathy for his plight.
>
> Further, he was a continuous drug dealer. In other words that the impression has been created that he was at liberty, from when he began his drug dealing at the age of 19, until his arrest on 21 June. That impression is false because, according to his previous convictions, he has spent four periods in custody. Further, the impression has been created before the jury that he stopped dealing, only when a child, his child, was born and only returned to drug dealing when he was compelled to do so, when his savings ran out. In other words, financial necessity when, again, according to his previous convictions, he lost his liberty on four separate occasions, which would be a reason why he would not be able to continuously deal drugs."

Later in her ruling the judge said:-

> "I am satisfied, to use the term that was in place before the Criminal Justice Act came into being, that he has put his character in issue and, to borrow the words of another case, that where character is in issue, warts and all, the jury are entitled to know the picture warts and all. That is now reflected in section 101(1)(f) and section 105 and applying, as I do, the statute I am satisfied that the gateway has been crossed and the evidence is admissible under section 101(1)(f)."

39. We do not think that the reference by the judge to the position as it was prior to the coming into force of the 2003 Act was material, but that was no more than a background observation. The judge applied sections 101(1)(f) and section 105 as she was required to do.

40. The principal attack mounted by Mr Harris upon the judge's ruling is that she was wrong to conclude, as a matter of fact or judgment, that the appellant had created a false impression about his character by giving the evidence he did. Mr Harris takes issue with the conclusion of the judge that the appellant had created the impression that he had been compelled to become a drug dealer because he was homeless, evicted by his parents and without other means of support thereby eliciting or seeking to elicit some sympathy for his plight. He argues further that the judge was wrong to say that the appellant created a false impression by suggesting that he had stopped drug dealing only when his children were born whereas, in fact, there were periods of time

when the appellant was serving custodial sentences when, in the view of the judge, it was reasonably to be inferred that he was no longer dealing.

41. Mr Nicholson accepts that it was "finely balanced" as to whether or not the appellant had created a false impression when giving evidence as to his history of drug dealing. However that said, he submits that the judge was correct to conclude that a false impression had been created essentially for the reasons which she gave. In particular, in Mr Nicholson's submission, the evidence given by the appellant about his dealing in drugs was structured to give the impression that he had turned to drug dealing as a youth merely to provide for himself and, in due course, for his children implying that he was otherwise someone who would not commit other types of serious crime, such as was alleged against him in this case.

42. In *R v Renda & Others* [2006] 1 WLR 2948 six appeals were listed before this court to consider some of the practical problems arising from the "bad character provisions" of the 2003 Act. Sir Igor Judge, then President of the Queen's Bench Division, giving the judgment of the Court, began by offering some general observations:

> "3. We have some general observations. Several of the decisions or rulings questioned in these appeals represent either judgments by the trial judge in the specific factual context of the individual case, or the exercise of a judicial discretion. The circumstances in which this court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However we emphasise that the same general approach will be adopted when the court is being invited to interfere with what in reality is a fact-specific judgment. As we explain in one of these decisions, the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instance which this court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called "authority", in reality representing no more than observations on a fact-specific decision of the judge in the Crown Court, is unnecessary and may well be counter-productive."

In the case of *Renda* itself, the trial judge had admitted evidence of bad character in order to correct a false impression created by the evidence in chief of the accused. At paragraph [19] the President explained that the determination of the question whether a defendant had given a "false impression", and whether there was evidence which might properly serve to correct that false impression, was fact-specific in every case.

43. Having reflected upon Mr Harris's submissions, we are far from persuaded that the judge was wrong to conclude that the appellant's evidence had created a false impression. She had the advantage of both hearing the evidence and seeing the appellant give that evidence. Her reasons for reaching the conclusion that the appellant's evidence had created a false impression cannot reasonably be criticised as being wrong. The judge was entitled to find that the appellant's evidence in chief had created a false impression.

44. The judge did not consider it appropriate to admit all of the appellant's previous convictions. It is common ground that had it fallen to the prosecution to adduce

evidence of the appellant's bad character the judge would have permitted the prosecution to adduce only the robbery convictions and sentences for those offences. She would have refused permission to the prosecution to adduce any further evidence as to the appellant's character.

45. In our judgment that approach complied with sections 105(1)(b) and 105(6). The fact of the robbery convictions and the sentences imposed for those offences had a probative value in correcting the false impression and, further, such evidence was no more than was necessary to correct the false impression.

46. We turn to the submission that the judge should have exercised her discretion under section 78 of the 1984 Act and refused to permit the prosecution to adduce any evidence of previous convictions. Mr Harris submits that it was a necessary part of the appellant's defence to explain to the jury (a) that he was a drug dealer but, also, (b) how he had become a drug dealer and how he had ascended the ladder in the dealing hierarchy to become a significant dealer. Evidence about those matters was necessary, submits Mr Harris, to explain how it was that the appellant apparently had such easy access to a major drug dealer like Mr Mahmood.

47. The judge did not accept that it was necessary for the appellant to adduce the detailed account which he did. In her ruling she concluded that evidence of the appellant's drug dealing could have been limited to the period shortly before 21 June 2016. Correctly, in our judgment, the judge was of the view that the appellant's connection with Mr Mahmood could have been explained just as convincingly by reference to an account of the appellant's drug dealing in the proceeding weeks or few months before 21 June 2016 as by the detailed account spanning many years which was given to the jury.

48. The general remarks of the President at the beginning of his judgment in *Renda* are equally applicable when considering the exercise of discretion under section 78 of the 1984 Act. The judge was obviously entitled to conclude that the admission of evidence about the appellant's previous robbery convictions would not have such an adverse impact upon the fairness of the trial that such evidence should be excluded. She noted, quite correctly, that appropriate directions could be given about their probative effect and that, in all likelihood, they would be of peripheral importance. It should not be overlooked that the appellant had given evidence of his involvement in high level drug dealing with all that entails about the environment in which he moved. It might be thought that the addition of information about the robberies would not damn him significantly in addition in the eyes of the jury.

49. It follows that the appeal against conviction on count two must be dismissed. We add for completeness, however, that if, contrary to our view, the judge was wrong to rule that the robbery convictions could be adduced before the jury, we are nonetheless satisfied that the appellant's conviction on count two is safe. In her summing up the judge reminded the jury of the history of offending to which the appellant had admitted. She directed them that "the only reason you heard about [the convictions] was to assist you in informing you about him as a witness and his account". This part of her summing up concluded with a direction that the previous convictions did not prove guilt nor did the fact of previous convictions make it more likely that the appellant had committed any offence as charged on the indictment.

50. All these directions were entirely proper and, in our judgment, such directions inevitably and properly relegated the evidence relating to the appellant's previous convictions to a status which was peripheral in the context of the evidence against the appellant overall.

51. The evidence on count two against the appellant was strong. We have described the main thrust of the prosecution case against him. We are satisfied that his conviction on this count is safe.

The conviction on count one at the re-trial

52. Our conclusion that the appellant's conviction on count two was safe means that the first ground of appeal against conviction on count one falls away. Mr Harris has not suggested that the appellant's conviction on count two should not have been put before the jury if he was properly convicted upon that count.

53. Before dealing in detail with the other grounds of appeal we shall consider, first, the view formed by the judge as the prosecution case was coming to a close, that the prosecution should not be permitted to advance the case that the conspiracy on count one was a conspiracy between the appellant and one or more (or indeed all) of the acquitted men named in the count as being involved in the conspiracy. It is of some note that prior to the commencement of the re-trial Mr Harris did not object to the case being presented to the jury on the basis suggested by the prosecution. He frankly told us that he did not think then and he does not think now that there were any legal obstacles to the case being presented in this way.

54. That is not surprising. Since the decision of this court in *Mitchell* the prevailing orthodoxy has been that where a person charged with conspiracy has been acquitted at trial or on appeal that acquittal binds the Crown against that individual only. Accordingly, in a subsequent trial of another person charged with the same conspiracy it would be open to the Crown to assert and seek to prove that the acquitted person was, in fact, a conspirator with the accused on trial. However, to that general proposition the case law establishes an important exception. The prosecution should not be permitted to act in this way if that would cause unfairness to the accused on trial – see *Austin and Tavakolinia* at paragraphs [24] to [26].

55. Mr Harris did not go so far as to say that the judge was wrong to rule as she did. But the judge does not appear to have focussed upon whether fairness to the appellant was the determining factor in deciding whether the prosecution was entitled to present a case that the appellant had conspired with one or more of his former co-accused. Rather, so far as we can tell from the transcript of the ruling which she gave upon the submission of no case, she was concerned that if the prosecution was permitted to present the case on this basis it would be inconsistent with the verdicts returned against the co-accused on count one in the first trial. If that was the basis of the decision of the judge it would, in our judgment, be inconsistent with the reasoning of the decisions in *Mitchell* and *Austin and Tavakolinia*.

56. Whether or not the evidence adduced in the second trial could convince the jury that an identifiable former co-defendant was guilty of the conspiracy, there was no impediment to the jury being invited to conclude that one or more of them must have been party to the relevant conspiracy. It is not uncommon for it to be abundantly

clear that one or more of group of people is or are guilty of an offence, but for the prosecution to be unable to prove to the necessary standard which. In the context of conspiracy, this has statutory recognition through section 5(8) of the Criminal Law Act 1977, which provides:

> "The fact that the person or persons who, so far as appears from the indictment on which any person has been convicted of conspiracy, were the only other parties to the agreement on which his conviction was based have been acquitted of conspiracy by reference to that agreement (whether after being tried with the person convicted or separately) shall not be a ground for quashing his conviction unless under all the circumstances of the case his conviction is inconsistent with the acquittal of the other person or persons in question."

No case to answer

57. The task for the judge was to apply the principles of the well-known case of *R v Galbraith* 73 Cr.App.R. 124. The contention of Mr Harris before us and before the judge was that at the close of the prosecution case there was no evidence upon which a properly directed jury could convict the appellant of the conspiracy with which he was then indicted.

58. It is as well to remind ourselves of some basic principles relating to the offence of conspiracy. They can be derived from the decision of this Court in *R v Mehta* [2012] EWCA Crim 2824. First, the essence of the offence is an agreement between at least two persons. If the prosecution cannot prove that an accused has made an agreement with at least one other person to commit a crime he cannot be guilty of conspiracy. Second, although "the other person" need not be identified by name, there must be a sustainable case to demonstrate that another person was party to an agreement with the accused. Third, the alleged conspirators must have a common unlawful purpose or design i.e. a shared design.

59. In her summing up the judge outlined these principles:

> "The essence of conspiracy is the agreement. And when two or more persons agree to carry their criminal scheme into effect, the very plot is the criminal act itself.
>
> ….
>
> So that the prosecution must prove first there was an agreement to possess firearms with intent to endanger life; second, the [appellant] joined the agreement; third, that when the [appellant] joined the conspiracy, he knew what he was agreeing to; and fourth, that when he joined the agreement, the [appellant] intended that he or some other party to it should carry the agreement out.

> You heard a previous jury convicted the [appellant] of conspiring to possess prohibited weapons; in other words, the revolver and the Uzi pistol thrown from the balcony of Flat 45. And, therefore, the prosecution have already proved the [appellant] was party to a conspiracy to possess those firearms. The issue for you to determine is whether the [appellant] was in a conspiracy to possess the firearms with intent to endanger life with others unknown.
>
> You heard that the others who had been named in the particulars of the indictment – and I have set them out there – were acquitted of this offence. The first jury were not sure that those individuals were guilty of this offence. It is the prosecution case, and not inconsistent with the verdict, that those individuals were probably guilty of a conspiracy. But the prosecution cannot prove that to the criminal standard of proof. Therefore, the prosecution must make you sure that the [appellant] agreed with other persons, unknown, to possess the firearms with intent to endanger life – and the particulars allege, other persons unknown".

60. We pause to repeat that whilst the prosecution had indeed proved that the appellant was party to a conspiracy to possess the prohibited weapons, he was convicted in the earlier trial on the basis that he conspired with one or more of the named co-defendants (see paragraph [18] above); and that Gerson Dos Santos was also convicted. His earlier conviction did not, and could not, have rested upon a conspiracy with persons unknown given the way in which the jury was instructed.

61. Mr Harris's simple point is that, properly analysed, there was no evidence upon which the jury could be sure that there were persons, unknown or unidentified, who had made the alleged agreement with the appellant and with whom he had a common design – that is to possess the weapons and with intent to endanger life.

62. This submission must be seen in the context of the way in which the prosecution presented its case. As we have said, when the prosecution opened its case the contention was that the appellant had arranged for the firearms to be brought to Flat 45 during the course of telephone conversations with Mr Mahmood. By the close of its case and, in particular, following the amendment to count one, it appears that the prosecution were no longer seeking to prove to the criminal standard that this is what occurred. In her ruling on the submission of no case to answer, the judge made no reference to the position of Mr Mahmood or to the evidence as to how the appellant came to be in possession of the guns. However, in her summing up, she directed the jury that the appellant had obtained the firearms and ammunition "directly or indirectly from another – most probably Aiyab Mahmood or his associates". The prosecution case was that "he may have done so". It must follow from the use of these phrases that as the case was ultimately presented to the jury and as it must have stood at the close of the prosecution case it was no longer being asserted that Mr Mahmood was certainly the source of the guns. In any event, he was not "a person unknown".

63. Was there a sustainable case that the appellant had conspired with any other person as alleged in count one? We have noted (see paragraph [30] above) that the prosecution had identified the supplier of the weapons or unidentified people with whom the appellant had been in telephone contact (the latter described as theoretical) as potential "persons unknown". In argument before us, Mr Nicholson identified "people in the supply chain". That might have included Mr Mahmood's sister. Additionally, no doubt there might have been an agreement of some kind between the appellant and Lucy Miles although she did not feature in the half-time ruling and is mentioned only in passing in the summing up as the person responsible for sounding a horn as police were about to enter the flat; but it was not to the appellant that she sent her warning text. There was no reliable basis upon which the jury could be sure that the appellant and Lucy Miles had reached an agreement with a common or shared design as alleged in count one, nor was it ever suggested that she had. She too was not "a person unknown". But in any event, it would not have been a safe inference for a jury to have drawn that she must have been in an agreement with the appellant in which they both had the requisite shared or common design. Similarly, it might have been the case that the appellant was in a conspiracy with one or more of the persons who travelled to the vicinity of Flat 45, apparently making deliveries of objects to the appellant and other persons within the flat. However, it is difficult to see how the jury could be sure of that. Further, and very importantly, we cannot possibly say that a properly directed jury could be sure that any such courier shared the same common design as the appellant. In our judgment, there was no conclusive basis upon which it could be demonstrated that any courier knew what he or she was delivering or for what purpose. A properly directed jury could not be sure that the appellant shared the requisite common design necessary to prove count one.

64. The basis upon which the prosecution invited the jury to infer the necessary intent was:

> "First, there were two firearms. Second, that both firearms were in working order, save for the damage that was likely to be due to due to throwing from a height. Third, both firearms were loaded with live ammunition. And fourth, the number of rounds loaded into the firearms."

To that might be added knowledge that the firearms were to be available for a gang related confrontation (albeit that none in fact occurred). There is an obvious difficulty in establishing that an unknown person had the requisite intent, when his or her precise role in securing and delivering either or both of two weapons with ammunition is a matter of guesswork and appreciation of any broader circumstances a matter of speculation.

65. In our opinion, following the amendment of count one to delete the names of those who had been acquitted, there was no evidence upon which a properly directed jury could conclude, to the criminal standard of proof, that a conspiracy between the appellant and any other person existed to possess the firearms with intent to endanger life.

66. It follows that the judge erred when she dismissed the submission of no case to answer made on behalf of the appellant. There was no properly sustainable case against a person unknown to demonstrate that such a person had conspired with the

appellant to possess firearms with intent to endanger life. In those circumstances the prosecution was unable to prove an essential element of the crime with which the appellant, by then, stood indicted.

67. The appellant's appeal against his conviction on count one must be allowed and his conviction quashed.

68. In the light of this conclusion, it is unnecessary to consider the alternative submission that the decision to permit the prosecution to amend the indictment just prior to closing its case was unfair to the defendant and independently should lead to the quashing of the conviction on the ground that it is unsafe.

69. Our conclusion will result in the need to resentence the appellant on count two in accordance with section 4 of the Criminal Appeal Act 1968. When circulating this judgment in draft we invited written submissions on sentence. In the light of those submissions, and of the sentence of 8 years imprisonment imposed on Gerson Dos Santos on count two, we impose a sentence of 8 ½ years imprisonment on count two to run from the date of original sentencing. We consider that a slightly higher sentence should be passed on the appellant to take account of the judge's finding that it was the appellant who arranged to collect the guns and then brought them to the flat. The time which the appellant spent on remand will be taken into account automatically in the usual way. Given our conclusion on count one the appeal against the sentence of 18 years' imprisonment does not arise.