Neutral Citation Number: [2019] EWCA Crim 1466

Case No: 201804625 C2 & 201805020 C2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM the Central Criminal Court
HH Judge Poulet QC
T2018 7099, 7104

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2019

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JULIAN KNOWLES
and
HH JUDGE MICHAEL CHAMBERS QC

- -

Between:

KEVIN DUARTE **VLADYSLAV YAKYMCHUK**	**Appellants**
- and -	
THE QUEEN	**Respondent**

- -
- -

Ms A Zimbler for the **appellant Duarte**
Mr J Scobie QC for the **appellant Yakymchuk**
Mr J Polnay for the **Respondent**

Hearing dates: 25th July 2019

- -

Approved Judgment

Lord Justice Holroyde:

1. On the evening of 20th March 2018 Beniamin Pieknyi was attacked and stabbed to death at the Stratford Centre shopping mall in east London. On 13th June 2018 Vladyslav Yakymchuk, pleaded guilty to his murder and was subsequently sentenced to life imprisonment with a minimum term of 24 years less the time he had spent remanded in custody. He also pleaded guilty to offences of violent disorder and having a bladed article in a public place, for which he received concurrent determinate sentences of 3 years and 18 months' imprisonment respectively. His application for leave to appeal against the length of his minimum term was refused by the single judge and is renewed to the full court. On 12th October 2018, at the conclusion of his trial at the Central Criminal Court, Kevin Duarte was convicted of manslaughter and violent disorder, for which he was subsequently sentenced to concurrent terms of 12 years and 3 years' detention in a young offender institution. He appeals against his conviction by leave of the single judge.

2. This is the reserved decision of the court, following a hearing on 25th July 2019.

3. For convenience we shall refer to the applicant, the appellant, the deceased and others by their surnames only. We mean no disrespect by doing so.

4. It is sufficient for present purposes to summarise the relevant facts briefly. Duarte and Yakymchuk, together with four others, went to the shopping mall on the evening of 20th March 2018. They made a nuisance of themselves by taking turns to ride a bicycle into innocent persons using the shopping mall, harassing and intimidating them. About 8.30 pm Pieknyi, then aged 21, and his friend Alexandru Suciu became targets of the group. Violence began with Duarte, and one of his co-accused, striking Suciu. The group then surrounded Pieknyi and Suciu and an altercation ensued which turned into a violent disorder, which was witnessed by members of the public. Over the course of 5 minutes, Pieknyi and Suciu were attacked with kicks, punches and by throwing the bicycle. A security guard tried to assist Pieknyi and Suciu to leave the mall, by ushering them towards an exit whilst they were both being physically attacked and actively pursued by the group. Pieknyi was then cornered. Yakymchuk produced from the waistband of his trousers a knife. He stabbed Pieknyi to the chest, inflicting a fatal wound which penetrated to a depth of 20cm into the heart. The evidence of a pathologist was that the inflicting of the stab wound would have required at least moderate force.

5. We begin by considering the appeal of Duarte. He stood trial with three others, who were also charged with manslaughter and violent disorder. The prosecution case was that they were all involved in the violent disorder and that by their presence and their unlawful violent actions they intentionally assisted or encouraged Yakymchuk to attack the deceased in circumstances in which it would be obvious that some bodily injury would result.

6. The ugly violence was captured on good quality CCTV footage, which formed an important and compelling part of the prosecution evidence. A compilation tape was prepared for the assistance of the jury, on which individual defendants were identified by differently-coloured arrows. Duarte was wearing a comparatively distinctive coat, and it was not difficult to follow his actions when viewing the footage. In addition to showing that footage, the prosecution called evidence from Suciu and from a number

of persons who witnessed the events. In summary, the evidence showed that Duarte could be seen to confront Suciu in a very aggressive manner from the outset, and it was he who threw the bicycle at the deceased. Later, when the deceased was cornered as he tried to leave the mall, and after Yakymchuk had pulled out the knife, Duarte was close to Yakymchuk, standing in an aggressive posture with his fists clenched. The prosecution invited the inference that Duarte continued the violent disorder even when the deceased was trying to escape, knowing (because he was in very close proximity) that Yakymchuk had a knife.

7. Duarte did not give or call evidence. His case, as advanced in cross-examination of prosecution witnesses, was that he had been acting lawfully (ie, either in self-defence or in defence of another) and that he did not intentionally encourage any of the others to commit any unlawful acts of violence. He put the prosecution to proof, although it was suggested in cross-examination that Suciu had been the aggressor. It was further suggested that although Duarte rode the bicycle near to Suciu, he did not make physical contact with him.

8. It is unnecessary to go into further detail about the evidence. It suffices to say that, subject to the issues raised by the grounds of appeal, the evidence against Duarte was such that the jury were entitled to be sure that he was guilty of both charges.

9. In the course of the prosecution evidence, the prosecution applied successfully to the judge for a direction that the jury should be given an edited copy of Duarte's defence statement. The grounds of appeal against conviction challenge the judge's ruling in that regard, and also her subsequent direction to the jury as to how they should approach that defence statement.

10. It is necessary to summarise the chronology relevant to the making of the application:

    i) The prosecution evidence (stage 1) was served on 9th May 2018. It included evidence from two police officers who had viewed the CCTV footage and said that they recognised Duarte.

    ii) Those representing Duarte made an application to dismiss the charges against him, on the basis that the evidence identifying him as the man shown on the footage was inadmissible, in particular by reason of breaches of the relevant Code of Practice.

    iii) That application to dismiss was heard and refused on 13th June 2018.

    iv) On 18th July 2018 Duarte served his defence statement, which in material part said:

> "1. The defendant denies involvement in the offences charged. He does not have a particularly good memory of the evening in question and is endeavouring to recall the details; an addendum to this statement will be provided in the event that he is successful.
>
> 2. Issues in the case:
>
> a) incorrect identification

b) breach code D

c) admissibility of the identification of Duarte

d) admissibility of 'generalised' evidence relating to the membership of Duarte with any alleged gang, and comments thereon relating to the behaviour of any such gang members."

v) On 7th August 2018 the prosecution served a body of further evidence which addressed the suggested breaches of Code D and also included statements from further police officers who had viewed the CCTV footage and said they could identify Duarte.

vi) The prosecution later served evidence which supported the identifications of Duarte on the CCTV footage by reference to call data records confirming the making of a call to or from his phone at a time when the CCTV footage showed him to be using his phone. When that evidence was served, only about a week before the trial, defence counsel notified the prosecution that identification of Duarte on the CCTV footage was no longer in issue. As we have indicated, cross-examination during the trial was conducted by defence counsel on the basis that Duarte was present at the mall but that the evidence did not show him to have played any part in any unlawful violence.

vii) On the second day of the trial, the prosecution circulated draft admissions, one of which related to an extract from Duarte's defence statement. When defence counsel indicated that the proposed admission in that regard would not be made, the prosecution made the application to provide the jury with an edited copy of the defence statement.

11. That application was made on the basis that the jury could properly read the defence statement as denying presence at the scene: it was submitted that the reference in the list of issues to "incorrect identification" could only mean that Duarte was denying that he was the man shown in the relevant sections of the CCTV footage. On that basis, it was submitted, the prosecution were entitled to adduce the evidence which was served after receipt of the defence statement, with a view to inviting the jury to conclude that Duarte had only changed his defence once a denial of identification became untenable, and to adduce the defence statement with a view to inviting an inference by the jury in accordance with section 11(5) of the Criminal Procedure and Investigations Act 1996. The prosecution indicated that if the application succeeded, they would seek to agree the terms of admissions which would put the relevant evidence before the jury without indicating why the police officers knew Duarte and were able to identify him.

12. The application was opposed by the defence. It was submitted that the proper time for such an application would be when and if Duarte gave evidence.

13. The judge granted the application. She was satisfied that Duarte was now putting forward a defence which was different from that in his defence statement and that he had accordingly failed to make proper disclosure of his defence. No question arose as to the defence statement having been drafted in error by the solicitor, and the judge was satisfied that Duarte was aware of the possible sanctions for an inadequate or

inaccurate defence statement. In the circumstances, she was satisfied that the jury could be helped to decide the issues in the case by knowing that Duarte had previously maintained a different defence. The prosecution were entitled to adduce the evidence as part of their case.

14. Following that ruling, agreement was reached as to the terms of agreed facts setting out the relevant details and quoting part of the defence statement.

15. The judge helpfully provided the jury with copies in writing of her directions of law. She gave a direction as to the two respects in which Duarte's silence at trial could be relevant to the jury's consideration. One was that there was nothing to explain the apparent inconsistency between his present case and the defence set out in his defence statement. The judge explained the duty upon an accused to make proper disclosure, and quoted from the relevant agreed fact as to what had been said in the defence statement. She reminded the jury that the case advanced at trial was that Duarte was present, and could be seen on the CCTV footage, but that he had played no part in unlawful violence. She continued:

> "The prosecution say, therefore, that the defence he now raises is significantly different from that disclosed in this document, and that you should therefore reject his case that although he was present with the group he did not threaten or encourage violence, and that he played no part in the attack on the deceased.
>
> As you know, the defendant has not advanced any reason for this change in his defence, so there is no evidence to explain the matter. Before you could find this to lend support for the case against him you must be sure that the initial defence was a deliberate lie and that it did not arise through confusion or panic. If you do conclude it was a deliberate lie, you should approach the matter fairly, remembering that a defendant may lie for all sorts of reasons, for example to distance himself from stg bad when in fact he is innocent, or out of panic or confusion, or to help protect someone else. There may be other reasons. If you do conclude this was a deliberate lie, do not hold it against him unless you are sure that he lied deliberately and that there is no innocent explanation for the lie. If you are not sure about this, ignore the lie. If you are sure that he did not lie for an innocent reason, then the lie can be used by you as some support for the prosecution case, and that the version now put forward on his behalf is untrue. You must remember that a defendant must never be convicted based wholly or even mainly on an adverse inference."

16. Later in the summing up, the judge reminded the jury that in his closing speech, counsel for Duarte had suggested that the reference in the defence statement to "incorrect identification" could simply refer to incorrectly identifying Duarte's role.

17. In her submissions to this court on behalf of Duarte, Ms Zimbler contends that the prosecution jumped the gun by seeking to introduce the defence statement as part of

their case. As to the agreed facts which ultimately went before the jury, she argues as follows. There was at trial no issue as to identification. It was therefore wrong for the judge to direct the jury in terms which would have led the jury the jury to assume that the contents of the defence statement amounted to evidence against Duarte. There had been no change in the defence: the evidence of identification which was initially served was insufficient, and Duarte was entitled to put the prosecution to proof. After his unsuccessful application to dismiss, the prosecution clearly recognised that their evidence was insufficient and needed to be strengthened, and so served (a week before the trial) further evidence which the defence accepted was sufficient to prove that Duarte was correctly identified as the man shown on the CCTV footage. Duarte should not have been penalised for requiring the prosecution to prove that which they alleged. Duarte had never made any positive assertion that he was not present, nor had he advanced an alibi: it was therefore wrong to treat his later acceptance of the additional evidence as amounting to a change in his case. In those circumstances, the evidence contained in the agreed facts served only to prejudice the defence.

18. Mr Polnay on behalf of the respondent submits that the defence statement plainly asserted that Duarte had been incorrectly identified as a person seen on the CCTV footage, and that accordingly the judge was entitled, and correct, to find that there had been a change in the defence case. It is wrong to suggest that a defence statement can only be introduced into evidence by cross-examination of a defendant who gives evidence: if inconsistent defences are advanced in the defence statement and in the cross-examination of prosecution witnesses, the prosecution are entitled to apply for the defence statement to go before the jury as part of the prosecution case. Mr Polnay suggests with hindsight that it was not necessary for the prosecution to ask for a copy of the defence statement to go before the jury: it would have sufficed to apply for the relevant contents of the defence statement to be adduced in evidence, whether by calling a witness who could speak to its terms or by drafting facts which could be agreed by the defence. Be that as it may, he submits that, following the judge's ruling, the terms of appropriate agreed facts were accepted by the defence, and the judge's directions in summing up were correct.

19. We are grateful to counsel on both sides for their helpful submissions.

20. We begin by referring to the relevant legislation, which is contained in Part 1 of the Criminal Procedure and Investigations Act 1996. It is common ground that under section 5 of that Act, Duarte was required to give a defence statement to the court and the prosecutor. Section 6A defines a defence statement as follows:

> "(1) For the purposes of this Part a defence statement is a written statement—
>
> (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
>
> (b) indicating the matters of fact on which he takes issue with the prosecution,
>
> (c) setting out, in the case of each such matter, why he takes issue with the prosecution,

> (ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and
>
> (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose."

21. Further provision as to compulsory disclosure by an accused is made by section 6E, which in material part provides:

> "(4) The judge in a trial before a judge and jury -
>
> (a) may direct that the jury be given a copy of any defence statement, and
>
> (b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.
>
> (5) A direction under subsection (4)—
>
> (a) may be made either of the judge's own motion or on the application of any party;
>
> (b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case."

22. The sanctions for faults in disclosure by an accused are set out in section 11, which in material part provides:

> "(1) This section applies in the three cases set out in subsections (2), (3) and (4).
>
> (2) The first case is where section 5 applies and the accused—
>
> …
>
> (f) at his trial –
>
> (i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement …
>
> (5) Where this section applies—
>
> (a) the court or any other party may make such comment as appears appropriate;

> (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.
>
> …
>
> (8) Where the accused puts forward a defence which is different from any defence set out in his defence statement, in doing anything under subsection (5) or in deciding whether to do anything under it the court shall have regard—
>
> (a) to the extent of the differences in the defences, and
>
> (b) to whether there is any justification for it.
>
> …
>
> (10) A person shall not be convicted of an offence solely on an inference drawn under subsection (5)."

23. As can be seen, where section 11(2) applies, the available sanctions are comment by the court or another party, and the drawing by the jury of an adverse inference. Section 11(2) will commonly apply where a defendant has given evidence and has put forward a defence which differs from that in his defence statement. We are however satisfied that if section 11(2) applies, the prosecution are in principle entitled to comment, or to invite the jury to draw an adverse inference, even though the defendant has not given evidence. We agree with the respondent's submission that it inevitably follows that the prosecution may apply to adduce the relevant contents of a defence statement, and/or may apply pursuant to section 6E(5)(b) of the 1996 Act to provide the jury with a copy of the defence statement (edited as may be appropriate), as part of their case. Where it is not clear during the prosecution case whether a defendant will in due course give evidence, it may be possible for agreement to be reached between the parties, and approved by the judge, to the effect that the prosecution will be entitled to delay the formal closing of their case until after the defendant has made a final decision whether to give evidence, or to re-open their case at that stage for the sole purpose of adducing the relevant contents of the defence statement; but subject to an arrangement of that nature, it will in general be too late for the prosecution to delay making any application until after a defendant has stated through counsel that he will not be giving evidence.

24. We therefore accept Mr Polnay's submission on the issue of whether the application to adduce the contents of the defence statement was made, and decided, prematurely. On other issues, however, we see force in Ms Zimbler's submissions, for the following reasons.

25. Whether or not it was necessary to seek to put a copy of the defence statement before the jury pursuant to section 6E of the 1996 Act, the prosecution made that application, and it was on that basis that the judge gave her ruling. Although the prosecution were entitled to make the application when they did, the judge could only grant it if she was

of the opinion stated in section 6E(5)(b). In the circumstances of this case, it plainly could not be said that seeing a copy of the defence statement would help the jury to understand the case: the case was already perfectly clear. The issue we have to consider, therefore, is whether it was open to the judge to form the opinion that seeing the defence statement would help the jury to resolve any issue in the case.

26. The judge expressed herself satisfied that this criterion was fulfilled. However, with all respect to the judge, she did not clearly identify what the relevant issue was. We agree with Ms Zimbler that at trial, there was no issue as to whether Duarte was present at the violent disorder: it had been made clear some days before the trial began that his presence was not disputed. If however the issue was said to be whether he had played any unlawful part in the violent disorder, the defence case in that respect had not changed: Duarte had always denied participating in the crimes alleged, and continued to do so. In this respect, accordingly, it could not be said that Duarte had failed to make the disclosure required of him by sections 5 and 6A of the 1996 Act.

27. Can it be said that the defence statement would help to resolve the issue of whether Duarte had initially put forward a lying defence in which he denied presence? In our judgment, it cannot. The chronology which we have summarised at [10] above is important in this regard. We think there is merit in Ms Zimbler's argument that the evidence of identification initially put forward by the prosecution was weak, and that Duarte was entitled to challenge the sufficiency of that evidence by way of an application to dismiss without thereby being taken to have made a positive assertion that he was not present at the violent disorder. Against the background of that application, and in advance of the service of the additional evidence which enabled the prosecution to discharge the burden of proof in that regard, the reference in the defence statement to "incorrect identification" could not fairly be taken to be a positive assertion that Duarte was not shown on the CCTV footage: the phrase was ambiguous, and was at least equally consistent with an assertion that he was wrongfully identified as participating in unlawful violence. In our view, the prosecution had initially relied on evidence which was arguably insufficient to prove that Duarte was one of the men who could be seen on the CCTV footage, and had thereby created a doubt as to the sufficiency of their evidence which the defence were entitled to test by way of the application to dismiss. Having survived that application, and thus been alerted to the need to adduce further evidence on this point, the prosecution could not then use that development in their own case as a basis for asserting that Duarte had advanced a positive case that he was not shown on the CCTV footage, had later changed his defence, and thus had told a lie which could be relied on in support of the prosecution case against him.

28. We therefore conclude, with respect to the judge, that it was not open to her to find that the criteria of section 6E(5)(b) were satisfied. That erroneous finding was the only basis on which the prosecution were permitted to put the relevant contents of the defence statement before the jury. It follows that there was a material irregularity in the conduct of the trial in this respect.

29. We would add that we are also troubled by the terms in which the judge directed the jury about the contents of the defence statement. In ruling on the prosecution application, the judge had said that she was satisfied that there had been a change of defence. Again with respect, that was not the correct test: the question for her to

consider at that stage was whether the jury could properly be satisfied that there had been a change of defence. When it came to her summing up, we agree with Ms Zimbler that the judge did not clearly leave to the jury the issue of whether or not there had been such a change. The directions which we have quoted at [15] above passed over the question of whether there had been a change and focused on whether the defence statement was a deliberate lie. Moreover, although the direction given in relation to lies was broadly in conventional terms, it did not include any reference to the explanation which defence counsel had put forward (see [16] above) as to the meaning of "incorrect identification". As a result, in our view, the important issue of whether there had been a change in Duarte's defence – the necessary foundation for any finding as to a deliberate lie supportive of the prosecution case - was effectively, and wrongly, taken away from the jury.

30. All that said, however, and notwithstanding the material irregularity and the deficiency in the summing up which we have identified, we are satisfied that Duarte's convictions are safe. Although the contents of part of the defence statement should not have been before the jury, and they should not have been invited to consider whether the making of that defence statement was a lie supportive of the prosecution case, the evidence which was properly before the jury provided very strong evidence of Duarte's guilt of both charges. Although a significant period of time was devoted at trial, and has been devoted on appeal, to issues relating to the defence statement, the point which the prosecution made in relation to the defence statement was in truth of very little significance in the course of the trial. The important part of the case was what could be seen on the CCTV footage, on which - as we have said - the actions of the man correctly identified as Duarte were clearly shown. Duarte did not give evidence and so neither disputed what could be seen nor provided any explanation for his actions. The fair trial of the case against Duarte was not in our view undermined by the wrongful admission of evidence relating to the defence statement.

31. Duarte's appeal against conviction therefore fails and is dismissed.

32. Before leaving Duarte's case, we observe that the problems which we have identified illustrate the care which must be taken when the prosecution seek as part of their case to adduce some or all of the contents of a defence statement filed by a defendant who may or may not subsequently give evidence. There will, of course, be cases in which such an application is appropriate; but a cautious approach should be adopted. Before an application is made on the basis of a change of defence, relying on a contrast between what was said in the defence statement and what has been put in cross-examination of prosecution witnesses, the question of whether the jury could properly find that there had been such a change by the defendant may require close attention. The identification of an issue will not necessarily involve a positive assertion of fact by the defendant, and fairness may require consideration of the extent to which the defendant relied on advice as to whether a particular legal issue should be identified. That, in turn, may raise difficult issues of legal professional privilege. Further, if application is made for a copy of the defence statement to go before the jury, it will be necessary to focus on precisely how the criteria in section 6E(5)(b) of the 1996 Act are said to be satisfied.

33. We turn to the renewed application by Yakymchuk for leave to appeal against sentence. He is now 24 years old. His only previous convictions were for theft from

a shop in January 2018, and an associated failure to surrender to custody, for which he was fined by a magistrates' court.

34. It was common ground that paragraph 5A of schedule 21 to the Criminal Justice Act 2003 applied to his case, because he had brought the murder weapon with him to the scene of the violence. As a result, the starting point for his minimum term was 25 years. In her sentencing remarks, the judge explained her approach as follows:

> "You led the violence. It was entirely unprovoked. It took place in a public place and in the face of strong pleas and warnings from the public. It was not premeditated, but it was brutal and very deliberate. In the light of your actions and the depth of the single wound to the heart, I cannot agree with the suggestion that I should not find an intention to kill.
>
> It is right that you have no relevant previous convictions and certainly nothing for violence. The starting point, had you contested the matter and bearing in mind the aggravating features, particularly the persistent pleas to stop in this public place and the manner in which you led the group, I would have raised the starting point to one of 27 years. But I must take into account your guilty plea which came forth shortly after the matter came to this court, although not admitting the offence to the police, and in those circumstances I reduce the minimum starting point to one of 24 years to reflect your guilty plea."

35. Mr Scobie QC advances three grounds of appeal. First, he submits that there was no basis on which the judge could properly be satisfied, to the criminal standard, that Yakymchuk intended to kill. The prosecution had only ever put the case on the basis of an intention to cause really serious injury; there was only a single stab; and whilst the stab was delivered with at least moderate force, it could not properly be inferred that Yakymchuk must have been intended to kill.

36. Secondly, Mr Scobie accepts that the judge correctly identified aggravating features, but he submits that she failed to give appropriate weight to the mitigating factors which were also present. The judge acknowledged the lack of premeditation, but did not refer to Yakymchuk's young age (23 at the time of the killing), to his expressions of remorse through counsel from an early stage of proceedings, or to the fact that he had never previously served any custodial sentence. Mr Scobie points out that Yakymchuk had only recently arrived in England, having come from Italy in search of work, and had for a time been of no fixed abode. He was sleeping rough, was vulnerable and carried a knife for his own protection. He had no relatives in this country, and barely knew his co-accused. As Mr Scobie put it, he was not all bad. It is submitted that a proper consideration of these factors, and a balancing of them against the admitted aggravating features, should have resulted in a shorter minimum term.

37. Thirdly, Mr Scobie submits that the judge should have given greater credit for the guilty plea. In considering whether he could have admitted his guilt sooner than he did, it should be borne in mind that he spoke very little English. After his first appearance in court he had given clear instructions that he wanted to plead guilty. Mr

Scobie submits that greater credit should have been given to Yakymchuk for entering his plea when many defendants in his position would not have done so.

38. In relation to all these grounds of appeal, Mr Scobie points out that the judge did not clearly identify how she reached the figure of 27 years, or how much credit she gave for the guilty plea.

39. We are grateful to Mr Scobie for his submissions, which were advanced with considerable skill.

40. The judge had heard all the evidence during the trial, and in our judgment she was entitled to find there was an intention to kill even though the prosecution had not put their case on that basis. In any event, given that the stabbing involved the use of a knife with a substantial blade, and the stab wound was inflicted with at least moderate force, the difference in culpability between an intention to kill, and an intention to inflict serious injury in circumstances where there was obviously a very high risk of death, would be comparatively minor. We therefore reject the submission that Yakymchuk should have been sentenced on the basis that he could rely on the mitigating factor of an intention to cause really serious injury rather than death.

41. We see merit in Mr Scobie's second ground of appeal. Although Yakymchuk was also convicted of two further offences, his carrying of the bladed article was fully taken into account by the 25-year starting point. His role in leading the violent disorder was rightly treated by the judge as one of the aggravating features. She correctly identified those other features, and was entitled to treat them as justifying some increase above the statutory starting point. It was however necessary to give significant weight to the mitigating features which Mr Scobie identifies. In our judgment, the aggravating and mitigating factors should have been treated as equally balanced, so that after taking them into account the appropriate minimum term remained at 25 years before giving credit for the guilty plea.

42. As to that, we agree with Mr Scobie that many defendants in Yakymchuk's position would not have pleaded guilty, or would not have pleaded guilty as early as he did. On the other hand, it is necessary to follow the Sentencing Council's definitive guideline on reduction in sentence for a guilty plea, which makes clear that when a mandatory life sentence is imposed for an offence of murder the reduction in the minimum term will not exceed one-sixth and will never exceed 5 years, and that the maximum reduction should only be given when a guilty plea has been indicated at the first stage of proceedings. We have some sympathy for Yakymchuk's position, but we are not persuaded that the guideline's exception F1 applied to his case, and it is accordingly necessary to treat this as a plea which was entered somewhat later than the first stage of the proceedings. In all the circumstances we have concluded that the minimum term which would otherwise be appropriate should be reduced by 3 years to reflect the guilty plea.

43. We therefore grant leave to appeal and we allow Yakymchuk's appeal against sentence to this limited extent: we quash the minimum term of 24 years imposed below, and we substitute for it a minimum term of 22 years, less the 226 days which were spent on remand in custody. Mr Scobie having acted *pro bono*, we grant a representation order to cover his preparation and appearance.