Neutral Citation Number: [2020] EWCA Crim 1473

Case No: 201900765 C4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM LIVERPOOL CROWN COURT
MRS JUSTICE NICOLA DAVIES
T20117738

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE JEREMY BAKER
and
MR JUSTICE HOLGATE

- -

Between :

REGINA	**Respondent**
- and -	
JASON GABBANA	**Appellant**

- -

(Transcript of the Handed Down Judgment.
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Mr Joel Bennathan QC and **Ms Farrhat Arshad** (instructed by **Jordans Solicitors**) for the **Appellant**
Mr Richard Littler QC and **Ms Anya Horwood** (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 9th October 2020

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Judgment As Approved by the Court

LORD JUSTICE DAVIS :

Introduction

1. On the evening of 24 February 2011 Bahman Faraji (sometimes known as "Ben" or "Batman") was shot in the head at point-blank range with a sawn-off shotgun. He had been standing outside a pub in Liverpool with two other men. He died immediately. It was clearly a planned killing.

2. In January 2012, Edward Heffey and Simon Smart were convicted in the Liverpool Crown Court of the murder: Heffey as the gunman and Smart as having arranged and co-ordinated the killing. It was the Crown's case, however, that it was the appellant, Jason Gabbana, who had given the ultimate instructions for, and had paid for, the killing. He was tried for murder at a subsequent trial in the Liverpool Crown Court. On the 22 March 2012 he was convicted by majority verdict of the jury (11-1). He was duly sentenced to life imprisonment. The minimum term was specified as 33 years. The trial judge was Nicola Davies J, who had also been the trial judge at the previous trial.

3. Nearly seven years after his conviction, the appellant lodged grounds of appeal against conviction, having instructed a different legal team. The Single Judge rejected the application for an extension and for leave to appeal against conviction. On renewed application, the Full Court granted leave to appeal. Its order, as drawn up, did not record a grant of the necessary extension of time for that purpose. The court at all events had said that the delay had not, thus far, been satisfactorily explained and needed to be explained more fully: and its order as drawn up directed an explanation for the delay

4. The grounds of appeal are not based on, and the great delay is not sought to be explained by, proposed fresh evidence or anything like that. Rather, they are in essence based on the trial judge's rulings as to the admissibility of bad character evidence by reference to s. 101 (1) (f) of the Criminal Justice Act 2003 (giving a false impression) and on the judge's subsequent treatment of that issue in her instruction to the jury in the summing up.

5. Before us, the appellant was represented by Mr Bennathan QC and Ms Arshad. The Crown was represented by Mr Littler QC and Ms Horwood. Of counsel, only Ms Horwood had (as junior counsel for the prosecution) appeared at the trial. The arguments, written and oral, were presented with great care and in great detail to us, doubtless reflecting the perceived importance of this case to all concerned.

Background Facts

6. There were a number of evidential strands on which the prosecution had relied at the trial. But fundamental to its case was mobile-phone and cell-site analysis.

7. There was, and could be, no dispute that Faraji had been murdered. In fact, at the trial of the appellant the convictions of Heffey and Smart were adduced in evidence under s. 74 of the Police and Criminal Evidence Act 1984.

8. Shortly before 7pm on 24 February 2011 Faraji was standing outside the Belgrave pub on Bryanston Road in the Aigburth area of Liverpool. He had been making and receiving a number of phone calls beforehand. He was with two friends, described as Witness A and Witness B. As he was standing there, he was approached by a man who had previously got out of a car parked a little way off. On Witness B's evidence, Faraji was asked if he was Ben. He said that he was. He was then immediately shot in the head, at point-blank range, with a shotgun. He died almost immediately. His business phone (or "graft" phone, as it was styled) was later found close to the body. The gunman then ran to the car and was driven away. Partial identification of the registration plate was made by witnesses.

9. The car was traced the next day. It was being driven by a man called Brian Regan, although it was registered in the name of the father of a man called Lee Dodson. Regan and Dodson were, in fact, in due course prosecuted for murder at the first trial, along with Heffey and Smart. It was said that Regan had been the driver of the car on the evening of 24 February 2011 and that Dodson had made the car available for the purpose, each being alleged to have had the requisite knowledge of and involvement in the planned murder of Faraji. Both were acquitted of murder at the first trial; although Regan was convicted of two counts of perverting the course of justice, involving disposal of a pair of gloves on the morning of 25 February 2011 and the inclusion of lies in a witness statement provided by him to the police. The jury at the second trial were informed of these matters by way of agreed facts.

10. There was a good deal of evidence adduced by the defence at the appellant's trial (some in the form of hearsay evidence, without any objection from the prosecution) to the effect that Faraji had been heavily involved in major criminal activity in Liverpool. Further, the agreed facts before the jury included the fact that on a number of previous occasions Faraji had been the subject of violent attacks. There was also evidence to the effect that he had on occasion worn body armour: and so on. It was said by the defence that part of Faraji's modus operandi was to rob or extort from drug-dealers (including one such alleged incident shortly before his death) and that he would have made powerful enemies in the local criminal underworld.

11. Faraji was aged 44 at the time of his death. He was an Iranian national. He had been living in the UK, in Liverpool, for around 10 years. The appellant was also part of the Iranian community in Liverpool. He and Faraji knew each other well. The appellant was some 15 years younger and, as he was to say, he viewed Faraji as in effect a kind of uncle. The appellant was also to give evidence to the effect that he was aware in broad terms that Faraji was involved in serious criminal activity. Indeed at one stage, as he said, Faraji had tried to persuade the appellant to join him in such activity but he had resisted. He was to describe Faraji as being known as a hard man, one who would not back down, one whom he himself considered to be in effect invincible.

12. The appellant had no relevant previous convictions. He had, it is true, been convicted of a certain offence in the Liverpool Crown Court in 2003 and sentenced to a five year term of imprisonment; but that conviction had subsequently been quashed by the Court of Appeal, with no retrial ordered, essentially on the ground of non-disclosure by the police. The jury was made aware of this background. In fact it had material relevance to the defence case, in that the appellant was (as we will come on to say) to explain some of his conduct in the aftermath of the murder by reference to his profound distrust of the police in the light of his experiences in 2003 and by reference

to his belief that they remained determined to set him up. Further, the quashing of his conviction had in due course resulted in the payment to him on 7 October 2009 of a substantial six-figure sum by way of compensation; and that too was to feature at the trial.

13. So far as Heffey was concerned, he was arrested on 31 March 2011. At the police station, an identification procedure was carried out. Witness A identified Heffey as the gunman.

14. A link between Heffey, Smart and the appellant was revealed by mobile phone analysis.

15. It was established from analysis of Faraji's phone billing records than an Asda unregistered pay-as-you-go mobile phone with a number ending 8674 had been in contact with Faraji on the day of the killing. A phone call lasting 34 seconds from that number was in fact the last call received on Faraji's phone. As the prosecution was to say, that phone had been the means by which Faraji had been persuaded to go to the Belgrave pub: he in fact, and perhaps unexpectedly from the point of view of Heffey, had gone in the company of his friends Witness A and Witness B. When at the pub Faraji made and received a number of calls, before the three went outside: which was when he was then shot. The 8674 phone has never been retrieved. It clearly had been disposed of. It was shown that the last call made on the 8674 phone was to Faraji's phone that evening. It was further shown that the only substantive use of the 8674 phone, between 5 February and 24 February 2011, had in fact been to contact Faraji.

16. Analysis of billing records showed that the 8674 phone (the "murder phone" as it was called at trial) had first started to be used on 5 February 2011. It was in effect only ever used to contact Faraji's phone (or on one occasion a takeaway restaurant which Faraji frequented). It was not used after the evening of 24 February 2011. During that period, the 8674 phone made 14 outgoing calls (5 being shorter than 4 seconds' duration) and sent 3 texts. There were also top-up calls. The caller would sometimes identify himself to Faraji as "Mick".

17. Further enquiries, following Heffey's arrest, showed that Heffey had himself been using, on the evening in question, a pay-as-you-go phone ending in the number 7857 (that phone itself was never recovered and again clearly had been disposed of). Examination of the billing records for that phone indicated that it had never had contact with the 8674 murder phone. But it had had contact at around the time of the killing with a phone with the number ending 2066. That was a number in due course identified to be attributable to Smart. In fact the 2066 phone was subsequently found in his possession and retrieved (the prosecution saying that Smart thought that he had not needed to ditch it because he had not thought that it would be necessary). Smart was to be presented as a very heavy user of mobile phones.

18. Moreover, as was the evidence at trial, the 8674 phone (the murder phone) and the 2066 phone (Smart's phone) were in that period often identified, by a process of cell-site analysis, to be in the same general area at relevant times. This included times when top-up calls were made. Further, the one was never in use at a time when the other was. Nor had either phone ever been used to contact the other. It was the prosecution case that all this indicated that the same person was in possession of, and was using, each of those two phones: that is to say, Smart.

19. On the detailed Sequence of Events chart provided by the prosecution and much pored over at trial, there also was, as it was alleged, an identifiable pattern and correlation of phone contact between the 8674 murder phone and Faraji's phone and between Smart's 2066 phone and Heffey's 7587 phone.

20. It had further been identified, in this respect, that on the evening in question Smart's 2066 phone had been in contact with (among others) an unregistered pay-as-you-go phone ending in the numbers 3662. This, as was to be accepted, was a phone belonging to the appellant. Records in fact showed contact between that phone and Smart's 2066 phone in the period preceding 24 February 2011. In addition, the appellant had owned a phone with numbers ending 2493: this number, as also that of phone 3662, were found stored in Smart's 2066 phone. It was said by the prosecution that there had also been regular contact between the appellant's 2493 phone and Smart's 2066 phone in the period between December 2010 and 14 February 2011. (The appellant accepted in evidence that he had then discarded that particular phone.)

21. The prosecution further relied on the fact that after the murder (the 999 call was 18.49.14) Heffey's 7587 phone was never used after 19.06. The 8674 murder phone was itself last used immediately before the shooting, when contacting Faraji's phone at 18.47.53. The Appellant last used his own 3662 phone at 22.25 that evening. All such phones plainly had then been discarded: as the appellant himself was to accept with regard to the 3662 phone.

22. For present purposes, perhaps the particular sequence of calls that can most usefully be highlighted (although the entire contact details in this whole period were of potentially great importance and quite rightly were dealt with in detail by the trial judge in her summing up) are those on the evening itself.

23. During that day there had been, among other things, frequent contact between Heffey's 7587 number and Smart's phone. There was also, as we have said, contact between the 8674 murder phone and Faraji's phone. CCTV evidence retrieved in due course captured the car being driven by Regan that evening travelling to the Liverpool city centre, with Heffey as passenger. It then travelled on to the Aigburth area, towards the location of the Belgrave pub.

24. The phone records at this particular stage show the following:

24/2/2011	18.47.03	Voice call	Smart
24/2/2011	18.47.53	Voice call	Asda 8674
24/2/2011	18.48.38	Voice call	Smart
24/2/2011	18.49.14	999 emergency call	
24/2/2011	18.51.29	Voice call –7	Heffey

		Seconds	
24/2/2011	18.52.28	Voice call -29 seconds	Smart
24/2/2011	19.03.16	Voice call -60 seconds	Heffey
24/2/2011	19.06.43	Voice call -30 seconds	Smart

The prosecution case was that this shows the 8674 murder phone (Smart) arranging the final "set up" of Faraji at 18.47.53. Smart then phones Heffey accordingly. The shooting takes place. Heffey briefly tells Smart of it by phone at 18.51.29 and Smart then informs the appellant. Heffey then gives a longer report to Smart at 19.03.16 and Smart then in turn reports to the appellant at 19.06.43. There had been no other identified phone contact between the appellant and Smart that day apart from those two calls: which the prosecution suggested was designed to distance him from the day's forthcoming events. The defence, on the other hand, among other things pointed to contact between Smart's phone at around the time of the killing and another phone with a number ending 6321 (styled at trial "the mystery man") which, the defence suggested, might indicate the involvement of someone else in what occurred.

25. It was not in law necessary for the prosecution to show a motive for this alleged contract killing. But clearly if one could be identified that would stand to strengthen the prosecution case. Conversely, if none could be identified that would stand greatly to weaken it – the more so given the evidence as to Faraji's involvement in major criminal and drug dealing circles and the suggestion that there were criminals out there with an animus against him.

26. In this regard, the prosecution had obtained the evidence of Yasmin Mistry, a friend of the appellant. Although at one stage previously she had said that she wished to retract her statement, she was to give evidence at trial to the effect that the appellant had told her that Faraji owed him money and they had fallen out. She also described how the appellant had been concerned that he had been receiving threats and that people had gone in a threatening manner to his mother's home; and, for example, he had also taken to parking his car in a street away from where he resided. She was also to say that after the killing of Faraji, when she had been asking the appellant why he seemed out of sorts, he had shown her on his laptop a photograph of Faraji on the Liverpool Echo website, with the caption "shot": and said to her words to the effect "That's what's wrong with me"; and said either that the less she knew the better or that it was better she did not know.

27. Further, it had been established that the appellant had owned an Audi car, said to be worth around £30,000. Faraji had been stopped by the police when driving it in April 2010. By September 2010 Faraji was registered as the new keeper of the Audi

(although the appellant was to say that he had not at the time known this) and with a new, personalised, number plate. It was the prosecution case that all this would have turned the appellant away from his former friend and mentor and produced great hostility: this action of Faraji, in appropriating the Audi to himself, being indicative of contemptuous disrespect of the appellant and a cause or symptom of hostility between the two.

28. Overall, therefore, it was the prosecution case that there had been a serious falling out between the two, of which the Audi was either a cause or a symptom (Witness B was also to give evidence that in September 2010 Faraji had told him that there had been a falling out between him and the appellant.) It was noted that the appellant did not attend Faraji's funeral or send any letter of condolence. In fact, after the killing the appellant made a claim to the police seeking restoration to him of the Audi: saying that he had initially rented the car to Faraji who had defaulted on the payments (the appellant himself having in the meantime acquired a Porsche) and had then failed to return the car. In a statement given to the police on 16 May 2011 in connection with the return of the car, the appellant set out what he said was the background. He also among other things said in that statement that he knew that there were rumours that he had put out a contract on Faraji to have him killed; but said he did not know why this was, as "I had no dispute with Batman and would do him no harm".

Interviews

29. The appellant was first interviewed under caution, with a solicitor present, on 26 September 2011. He was to be interviewed at length thereafter. By this time, as he knew, Heffey, Smart, Regan and Dodson had been charged with and were facing trial for murder. He had in fact previously himself made Facebook entries indicating that he (the appellant) had felt that there was "a bit of heat" on him in relation to the murder.

30. At an early stage of the first interview he was asked some questions about his assets and income. He said that he had bought the property where he resided in Liverpool for £190,000 cash, out of the compensation which he had received for his wrongful conviction. After being asked about his previous rented accommodation, he then said this:

> "Erm, I've just been living basically, Paul [interviewing officer] off, you know, the compensation I received you know, it was quite a large sum. So yeah, I've been living off that really."

He went on to say that he had not worked at all since 2006 (when he was released from prison).

31. He also was to say that he changed phones and SIM cards regularly and had had a "hundred numbers" since he got out of prison. When asked why that was, he indicated that it was mainly to avoid phone-calls from aggrieved or importunate girls. He was during the interview also asked a significant number of questions about the Audi. He said that Faraji owed him between £1,500 and £2,000 for rent for the use of the car. He denied that it caused a rift: "it was just a bit awkward, bit awkward."

32. In further interview, when asked about the evening of 24 February 2011 he said that he thought he was either at home or driving home from watching a football match at the Brookhouse pub. He first heard about the killing of Faraji on the car radio, either that night or perhaps the following day. He at a later stage in the interview process denied knowing Heffey, Regan or Dodson.

33. In a following interview, he was asked at length about Smart. He said that he had known him for over a year: "There is no relationship so to speak, I just know him. It's like Hi and Bye." He was asked when he last saw Smart. He said that was in December 2010 and that he was positive he had not seen him since. He said that he did not actually socialise with him. He said that he had not spoken to Smart or texted him since then, either. In further interview, he denied ever talking to Smart about Faraji. When asked about the (by now identified) contact between his phone and Smart's phone from December 2010 through to February 2011, he said that he could not tell why that was. He then suggested it was at a "social level." He continued to maintain that he had not actually seen Smart after December. He denied speaking to Smart on the night of 24 February 2011. He said also that he had thrown away one of his phones that night (the 3662 phone) as "the battery went on it."

34. He was also in the final interview asked questions about his bank accounts (he had closed three out of four of them in the two weeks after the killing of Faraji). He was asked about very sizeable withdrawals. He referred to gambling (indicating mostly unsuccessful gambling) and foreign travel. He had also, as he said, paid £9,000 in cash and £21,000 on his card for the Porsche, which he had acquired in 2010. He had also, as he said, made payments to members of his family.

35. He was charged with the murder of Faraji on 27 September 2011, shortly before the trial against Heffey, Smart, Regan and Dodson started in the Crown Court. It was agreed at the time that the trial of the appellant did not need to be joined to that of Heffey, Smart, Regan and Dodson.

36. The interviews were a potentially important part of the prosecution case. First, as to the appellant's answers as to his means, they were in due course to provide the basis for the prosecution's subsequent application to adduce evidence of bad character under s. 101 (1) (f) of the 2003 Act, to which we will come. Second, and perhaps of particular importance, they provided the basis not only for two subsequently admitted lies, on which the prosecution at trial placed considerable reliance, but also for an adverse inference arising from matters which the appellant had not raised in interview but which were raised by him at trial.

    (1) The first lie was as to the statement that he had had no contact with Smart after Christmas 2010 or on the night of 24 February 2011. But in his Defence Statement, and then during his evidence at trial, the appellant was to admit phone contact with Smart both in that period and on that night. He was to say that the contact that night was about arranging and then cancelling a party with some girls, as Smart had been unable to obtain a supply of cocaine required for the party. This was something the appellant had never mentioned in interview.

    (2) The second lie was about the reason why he had disposed of his 3662 phone that night. He accepted that the reason he gave in interview was not correct. That had indicated that the disposal of the phone was unconnected with the killing of Faraji.

But he now accepted that it had been connected. In this regard, the police had seized and examined the appellant's laptop. This showed him on 24 February 2011 to have been on the internet, accessing dating or adult sites, for around an hour from 18.10 until he stopped. It also showed him accessing news sites at 3.26 am, after the shooting, seeking news stories about the killing. But the point made by the prosecution was that the victim of the shooting had not by then been named, indeed was not named until two days later, on the following Saturday. Thus on the face of it an explanation was needed as to why he was accessing these stories at this time. What he was to say at trial was – in complete departure from what he said in interview – to the effect that he had been told in a club that night by someone he named as "Michael", of the killing of Faraji and had been told by Michael that there were rumours that the appellant had arranged it. He was to say that this was why he later accessed the news sites and also was why he disposed of his phone that night.

37. The appellant was to say by way of explanation that he thought, because of his grave concerns and suspicions about the police, that his phone might somehow be unfairly used against him. He was also to say that he had not revealed these matters in interview as he had wanted to distance himself from Smart and also wanted to avoid drawing attention to the rumours of his involvement – matters which (because of his past experiences with the police) he considered would be unfairly used against him. He was to say that he had forgotten that he had himself drawn attention to these rumours in his earlier statement of 16 May 2011.

The Initial Ruling on s. 101 (1) (f)

38. At the trial the prosecution was represented by Mr Brian Cummings QC (now Judge Cummings QC) leading Ms Horwood. The appellant was represented by Mr Stuart Denney QC leading Mr Killen.

39. By the time of the trial it was of course known that Heffey and Smart had been convicted of murder and Regan and Dodson acquitted. At the time of those verdicts the appellant had in fact posted messages on Facebook saying that he was "gutted" at the conviction of his "mate" Smart. (Of course, as he would have known, an acquittal of Smart would also have meant the withdrawal of the case against him.)

40. In due course, among other witnesses Witness B gave evidence at trial for the prosecution. So did Yasmin Mistry. In this regard, it appears that the appellant himself only first realised that she was actually going to give evidence against him when he attended court for the trial. It was not disputed that he then rang her on a mobile phone from prison that evening. He remonstrated with her about giving evidence. What he said to her included a reference to how her family would not wish to find out that she had been a lap dancer. She considered that she was being intimidated and told the police. This call then was the subject of evidence at trial, she giving her account of it and the appellant (in due course) his. The prosecution were to present this as an attempt to "nobble" Ms Mistry, in order to avoid her giving evidence to the effect that there had indeed been a serious falling-out between Faraji and the appellant.

41. In the course of the prosecution case, the appellant's legal team launched a strong attack on Faraji's character. In addition, however, they attacked the character of Witness B, among other things accusing him of being complicit in Faraji's asserted

criminality. The prosecution then prepared a bad character application, initially framed solely under s. 101 (1) (g) of the 2003 Act. But this was then, following the interviews being read, extended so as also to be made under s. 101 (1) (f) of the 2003 Act. It was then agreed, at the request of the defence, that the application be made at the close of the prosecution case: so that the defence would know in advance of the appellant giving evidence (if he did) the case which they had to meet on this aspect.

42. It is necessary for this purpose to refer at this stage to some of the provisions of the 2003 Act.

43. References to "bad character" are the subject of s. 98 of the 2003 Act and the definitions in s. 112. Section 101 in the relevant respects provides as follows:

> "(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
>
> (a) all parties to the proceedings agree to the evidence being admissible,
>
> …
>
> (d) it is relevant to an important matter in issue between the defendant and the prosecution,
>
> …
>
> (f) it is evidence to correct a false impression given by the defendant, or
>
> (g) the defendant has made an attack on another person's character.
>
> …
>
> (3) The court must not admit evidence under subsection (1) (d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

44. Section 105, relating to evidence correcting a false impression, provides as follows:

> "(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.

(2) A defendant is treated as being responsible for the making of an assertion if—

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it,

and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) "conduct" includes appearance or dress.

(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)."

Section 109 provides for (rebuttable) assumptions of truth in the assessment of relevance or probative value of evidence.

45. The matter was debated before the judge in the absence of the jury.

46. As it developed, the evidence sought to be introduced by the prosecution was evidence of sizeable cash deposits into and withdrawals from the appellant's bank accounts. In particular, there had been a withdrawal of £5,000 on 8 February 2011 (shortly after the day when the Asda 8764 phone was first used) and £9,500 on 25 February 2011, the day after the killing. Clearly on ordinary principles of evidence there could be no sustainable objection to the admission of those payments, nor was there one – the prosecution were entitled to suggest that those represented payments towards the contract killing.

47. But in addition there were many other deposits, as well as withdrawals, of large cash sums over a lengthy period of around 18 months preceding the killing. The prosecution said that it was a clear inference that so many payments, and in such large amounts, represented the product of criminality and had "the hallmarks of involvement in serious crime." Overall, there was some £80,000 in cash deposits in the identified period of 18 months before the shooting. As for payments made, these included the sum of £30,000 paid for the Porsche acquired in 2010, as the appellant himself said. This had been paid for by £9,000 in cash with the rest paid for by card: although in fact the £9,000 did not correspond to any cash withdrawal at the relevant time on the bank statements.

48. For the purposes of the application as framed under s.101 (1) (f) it was said on behalf of the prosecution that such evidence would correct the false impression given that the appellant "basically" lived off his compensation money, having no employment: thereby impliedly connoting that his means derived from a legitimate source. But these sizeable deposits and withdrawals, it was said, refuted that. Indeed two sizeable cash deposits had actually preceded the receipt of the compensation money. As to the application under s. 101 (1) (g), it was said that the appellant had made an attack not only on the character of Faraji but also on the character of Witness B, and so the bad character evidence was also and in any event admissible under that gateway.

49. The application was opposed. Leading counsel for the appellant said that the appellant had never been specifically asked in interview about payments into the accounts, as opposed to withdrawals. Further, he had referred to gambling and the like. It was in any event disputed that his answers ("basically", "really") had given a false impression. Moreover, it was said, such evidence could not safely ground an inference that the payments must have derived from crime – the suggestion was tendentious and speculative. In any event, even if the evidence were otherwise admissible, it should as a matter of discretion be excluded under s. 78 of the 1984 Act. It was also said that the application in so far as it was based on s. 101 (1) (f) was premature in that the appellant had not yet had, for the purposes of s. 105 (3), the opportunity to withdraw the misleading assertion alleged. In so far as the application was based on s. 101 (1) (g), that likewise was opposed. It was repeated that the deposits should not be taken as indicative of criminality, and hence bad character. Alternatively, it was submitted that such evidence should be excluded under s. 101 (3).

50. In her ruling on 24 February 2012, the judge found that by his answers in interview the appellant had given a false impression. She rejected the submissions to the contrary which had been made on behalf of the appellant. She found that the impression given, that the appellant's lifestyle was sustained by his (lawful) compensation, was inconsistent with all these sizeable payments in. She said this:

> "As to "relevance" there is no specific requirement in section 101 (1) (f), but the facts are as follows. That in addition to his compensation payment the defendant has received substantial amounts of unexplained cash. It is the Crown's contention that this is consistent with illicit activity and whether it is or not is a matter which the defendant can be given every opportunity to address; but in a case where the defendant is said to be the figure behind a carefully executed contract killing the means by which he finances his lifestyle cannot be said to be irrelevant.
>
> I am satisfied that a false impression was given at interview by the defendant, that evidence is now before the court, and the banking evidence sought to be adduced has a probative value in correcting the impression given by the defendant."

She refused to exercise her discretion to exclude under s. 78 of the 1984 Act. Having so ruled, she decided that it was "unnecessary" for her to rule on the application based on s.101 (1) (g).

The Defence Case at Trial

51. The trial then proceeded. The appellant gave evidence over a very lengthy period. In his evidence in chief, no questions were asked of him of his misleading (as ruled by the judge) answer in interview, which he did not seek to withdraw. He was cross-examined thoroughly and rigorously by Mr Cummings QC. He was, as part of that cross-examination, questioned at considerable length about the source of the various cash payments into his bank account. In the course of those answers, it emerged that the appellant, as he said, also routinely kept sums of cash of between £5-10,000 at his home. He had difficulty in explaining the source of his cash receipts (including those received before the compensation payment) or just how he made his money. As to the payment out of £5,000 on 8 February 2011 he could give no specific explanation. Of the further payment of £9,500 on 25 February 2011, he said that £6,000 represented a cash loan to a Mr O'Connor. He said that he had no specific reason for closing three of his accounts in the fortnight after the killing. During the cross-examination, it was on occasion put to the appellant that he was involved in serious crime or had been assisting Faraji in his (Faraji's) criminality or had a "common business interest with him". He denied that. He maintained that the sources of his money (aside from the compensation) came from gambling. He also referred to loans which sometimes he would make and which were always, with interest, repaid.

52. Inevitably, he was also rigorously cross-examined on the evidence of the mobile phone calls and cell-site analysis, and on his lies and his change of account from what he had said in interview. In particular, he was closely questioned on his contact with Smart after December 2010 and on his new account of the planned party for 24 February 2011 being cancelled because Smart (his regular source) had not been able

to procure the cocaine, and the asserted phone contact with him accordingly. He was also closely questioned on his new account about "Michael" telling him that night in the club about the killing of Faraji and about the rumours of his involvement.

53. Also called on behalf of the defence was a witness called Julia Urmanaviciute. Her evidence was to the effect that she had on occasion, with other girls, partied with the appellant and cocaine was supplied for that purpose. There was evidence from her that messages had been exchanged between her and the appellant about just such a party planned for the night of 24 February 2011: which was in line with the appellant's own evidence.

54. The defence had before the trial obtained a downloaded report of Julia's phone calls and texts. But they had not disclosed it. In the light of her cross-examination, doubt was being cast on the frequency of her contact with the appellant, and particularly on the day and night of 24 February 2011, as she was asserting (and hence on her credibility). The defence legal team, after consultation with the appellant, decided over-night now to disclose that report. That report supported the frequency of the contact which Julia had been claiming to have had with the appellant. But the messages revealed in such report also showed that one text sent by her to the appellant on 24 February 2011 at 18.48 said: "yesterday I sold just one but today I need four more because two not enough. Please give me four more and tomorrow I give you all your money." Another text sent to her subsequently by the appellant on 28 June 2011 stated: "I'm going away to South America on Saturday for a holiday and what I told you about on the drive back from Chester." She was cross-examined, without objection from the defence or judge, on those messages. It was put to her that the appellant was a drug dealer: which she denied. One other feature of her evidence was that it was to the effect that there was no mention by the appellant to her of the party having to be cancelled because no cocaine had been obtained. She in fact thought that she had been stood up.

55. Other witnesses were also called for the defence. One spoke of Faraji requiring protection money from his business. There was the read hearsay evidence about Faraji's criminality, including reported torture and robbery of a drug dealer. Mr O'Connor, who appears to have been the subject of powerful cross-examination, gave evidence that on 25 February 2011 (albeit it seems there were no phone records of any contact between him and the appellant after 14 January 2011) the appellant had lent him £6,000 in cash in order to buy a watch for onward resale.

Further s. 101 (1) (f) ruling

56. At the conclusion of the evidence, there was, as is invariable practice, discussion between judge and counsel before speeches about the appropriate legal directions to be given in due course to the jury. We have a transcript of that discussion and of the prosecution's written note on the legal topics intended to be discussed. This took place on 12 and 13 March 2012.

57. In that note, it was (amongst many other topics to be raised) said that the evidence that the appellant had access to substantial sums of unexplained cash "raises an inference that he was involved in criminal activity at an elevated level". It was further said that the defence suggestion that Faraji robbed drug-dealers "in turn raises the question whether the defendant is himself such a person, i.e. a drug-dealer." Reliance

was sought to be placed not just on the gateway of s. 101 (1) (f), as the judge had previously ruled, but also by way of renewed application under s. 101 (1) (g) and now also on s.101 (1) (d) in addition.

58. In the discussion between judge and counsel Mr Cummings QC thus continued to assert reliance on s. 101 (1) (f) (on which the judge had previously ruled). But he also now asserted, in the light in particular of Julia's text messages and evidence, that "things have moved on from the time of the previous ruling" and that a jury could properly infer that the appellant was a drug dealer. He therefore further sought in this regard a ruling on his renewed gateway (g) application, and also on his gateway (d) application.

59. In the light of the defence case as to the asserted criminality of Faraji himself in a drugs context, and of his having made powerful enemies in that context, it was no doubt understandable that the defence would, if possible, wish to avoid further reference to the appellant himself being a drug dealer. It was at all events submitted by the defence that it was not open to the prosecution, on the evidence, to rely on gateways (g) or (d) for this purpose; and that to bring such an allegation in under (f) was unreasonable and went far beyond what that gateway properly could let in.

60. After debate, the judge briefly indicated this:

> "Mr Cummings, let me tell you my thinking. If this were a prosecution application pursuant to (d) or (g) I would refuse it, and I would refuse it because I think that text is too narrow and too tenuous to take it forward on the various extrapolations."

61. There was then this exchange:

> "MR. CUMMINGS: Well, I think in, well that then sets the parameters or the limits of the direction then that your Ladyship needs to give in respect of the bad character evidence. It is whatever direction is appropriate to material that is admitted via gateway f), so it is simply to correct the false impression and I submit the false impression on its narrower basis is simply that the defendant was in receipt of no income beyond his compensation money.
>
> MRS. JUSTICE DAVIES: Yes?
>
> MR. CUMMINGS: And I contend for a somewhat wider interpretation, namely that the false impression was that he was in receipt of no money other than legitimate money, and therefore that impression can be corrected by pointing to the fact that he had money over and above the compensation and that such money came from criminal activity. I see in my peripheral vision my learned friend nodding.
>
> MRS. JUSTICE DAVIES: Yes.
>
> MR. DENNEY: I accept that he could say that.

MRS. JUSTICE DAVIES: Good."

62. The discussion then turned to other topics which are not relevant for present purposes.

63. We were not supplied with transcripts of the closing speeches. However, Ms Horwood helpfully, on the court querying the position, provided a text of Mr Cummings' proposed closing speech. It is to be noted that this was dated 11 March 2012 and so had been prepared before the legal discussion. In the course of it – it is quite a lengthy document – there was, in the context of the defence argument that the killing may have been a revenge attack by an aggrieved drug-dealer, a remark that the jury may think it "was not necessarily a brilliant point for Mr Gabbana, if you reach the conclusion that he was himself a drug dealer". At another stage, it was suggested that the person arranging the killing was, in addition to having other identified attributes, either "personally involved in serious crime or at least moves in those circles." Mr Bennathan also drew our attention to certain other references in that text.

64. We are not disposed to attach much weight to the reliance now sought to be put on behalf of the appellant on these aspects of this draft closing speech. For one thing, it is a draft and it may well (indeed most probably would) have been varied in the light of the judge's subsequent ruling so as at least to exclude reference to suggested drug dealing on the part of the appellant. For another, the appellant was in no position to dispute that he had at all events been involved in criminality in the form of proposed supplying of cocaine. Yet further, the judge had ruled, and Mr Denney had agreed, that it could be presented to the jury that the money coming into the appellant's accounts came from criminal activity.

The Summing Up

65. In summing up to the jury the judge gave a number of legal directions to the jury. She provided them with written copies of such directions. These included directions on the burden and standard of proof, stating, of course, that the jury had to be sure of guilt if to convict. She also gave full directions on circumstantial evidence. This included an instruction: "you should be careful to distinguish between arriving at conclusions based upon reliable circumstantial evidence and mere speculation." She also gave other legal directions to them which were not provided in writing.

66. In giving her directions to the jury on bad character, the judge's instruction to the jury was, as we understand it, oral. But she had prepared a written draft overnight on this (as well as other topics) and discussed it with counsel in the absence of the jury before commencing on her summing up. This extended to a full form *Lucas* direction on lies. It also extended to a failure to mention facts direction. As to the bad character direction, she indicated that she had taken as her template the terms of the then Judicial Studies Board guidance. Counsel for prosecution and defence accepted her draft direction as being in accordance with her ruling. It was also agreed that the direction should explicitly tell the jury not to use the bad character evidence as evidence of propensity.

67. The judge in due course gave the jury this instruction, in the terms discussed with and agreed by counsel. It is necessary to set it out in full:

> "I am now going to move to evidence that you have heard about the defendant, in particular relating to his bank account. During the course of this case you have heard evidence that the defendant has a bad character in that his bank records disclose a number of sizeable cash deposits which the prosecution say have the hallmarks of involvement in serious crime. It is important that you should understand why you have heard this evidence and how you may use it. As I will explain in more detail later, you must not convict the defendant because he has a bad character. You have heard of this bad character because it may correction a false impression said to have been given by the defendant in interview when he stated that he did not work and had no income beyond the compensation which he had received in October 2009 for his wrongful conviction. The prosecution contend, and the defence do not dispute, that the defendants words have a wider interpretation, namely that the monies which he did deposit were obtained by legitimate means.
>
> The defendant does not deny the statements given to police in interview. In evidence to the court, when asked about the various deposits, and, for example, the sum of £9,000 which he paid towards the purchase of his Porsche motor car which was not withdrawn from the bank, the defendant said that the monies were obtained through gambling, wins from horse racing or casinos. As to the horse racing, he said he could place grand bets, up to £1,000. At a casino he could go through £2,000 to £3,000 in a weekend.
>
> You may use the evidence of what the prosecution say is the defendant's bad character for the particular purpose I have just indicated, namely to correct a false impression if you find it helpful to do so. You may also use the evidence in the following way, if you think it right you may take it into account when deciding whether or not the defendant's evidence to you is truthful. A person with a bad character may be less likely to tell the truth, but it does not follow that he is incapable of doing so. You must decide to what extent, if at all, his character helps you in judging this evidence. However, what this evidence does not do is establish any propensity on the part of the defendant to commit murder. Even if you concluded that the evidence of cash deposits does have the hallmarks of involvement in serious crime, this evidence does not amount to evidence of propensity on the part of the defendant to commit murder."

68. Thereafter, the judge summed up the evidence in meticulous detail and in an entirely even-handed way. The summing-up also included extensive reference to the interviews, which had been read out during the trial as part of the prosecution case and of which the jury had a summary in the Jury Bundle. In addition, as well as fully summarising the oral evidence, the judge went through in careful detail the evidence

as to the appellant's bank accounts and cash dealings. She also carefully went through the Sequence of Events chart: which meticulously recorded the various phone call and text sequences over the entirety of the period (and in much more detail than we have thought necessary to set out for the purposes of this appeal).

69. The jury retired during 20 March 2012. On the afternoon of 21 March 2012, following receipt of a jury note, a majority verdict direction was given. The jury returned a verdict of guilty, by a majority of 11-1, on the morning of 22 March 2012. The appellant was sentenced on 26 March 2012.

Delay

70. It is necessary to deal with the question of delay: not least because on the last occasion the Full Court, although granting leave to appeal, had said that the explanation for the delay thus far given was "not satisfactory" and the delay needed to be "explained more fully."

71. The position remains that no satisfactory explanation has still been provided for the delay – some seven years. Following trial his legal team had advised the appellant that there were no grounds. He was then, it was said, overwhelmed and profoundly depressed. A further firm apparently gave negative advice in 2014. He eventually instructed fresh solicitors in September 2016. Thereafter much time was taken, it is said, in seeking funding, obtaining transcripts, contacting the trial lawyers and so on. But, even making all allowances, this overall delay is wholly unacceptable and insufficiently explained.

72. Mr Bennathan noted that the appellant is serving a life sentence. The appellant is convinced, we were told by Mr Bennathan, that he was wrongly convicted: and nothing can be more important, said Mr Bennathan, than the reversal of a miscarriage of justice.

73. Of course such points are there to be made. But if they were in themselves always conclusive they would set the rules as to time limits for appealing against conviction at naught. Besides, it is wrong for the matter to be looked at solely from the perspective of a convicted defendant. Compliance with rules as to time limits is a most important part of the good administration of justice: and one important underpinning aspect of that is the need for finality in litigation. That also finds reflection in the need to consider the interests and feelings of the victim's family in a case such as this. They will inevitably have wanted closure. Now, very many years after, as they will have thought, achieving closure, the matter has been reopened. Further, delay of this order sometimes can give rise to difficulty in ascertaining the actual course of events in question, whether before or at trial: as, indeed, some aspects of this appeal have illustrated. And there is a yet further consideration. A successful appeal against conviction will ordinarily call for assessment of whether there is to be a retrial. But if there has been a very great lapse of time a retrial may prove to be very difficult or, in some cases, wholly impractical.

74. All that said, the fact remains that in the present case the Full Court on the previous occasion thought it right, having considered the proposed grounds of appeal, to grant permission to appeal and clearly intended delay not to be a bar: even though its order as drawn up did not then actually grant an extension of time for that purpose.

Accordingly, we formally now grant the extension of time if and to the extent that one is needed. But in doing so we make clear that we will not permit the appellant in any way to advantage himself in his arguments on the appeal by reason of any uncertainties which may arise because of the lapse of time since conviction.

Grounds of Appeal

75. There are four grounds of appeal.

(1) The first is that the judged erred in permitting the admission of the evidence as to cash payments into the bank accounts as bad character under s. 101 (1) (f).

(2) The second is that in any event the evidence of such payments should not have been permitted to be used as evidence that the appellant had been involved in serious crime.

(3) The third is that the judge's legal direction on bad character in the summing up was erroneous: in particular in that it failed to instruct the jury that they first had to be sure that the appellant had given a false impression in his answers in interview.

(4) The fourth is that the judge failed to direct the jury in terms that they were to ignore any suggestion that the appellant was a drug-dealer.

76. We will deal with these grounds, and the arguments advanced in respect of them, in turn.

(1) Ground 1

77. The key question here is whether the answers given in interview as to the payments into the bank accounts involved implied assertions which were apt to give the jury a misleading impression about the appellant: s. 105 (1) (a) of the 2003 Act. The use of the word "apt" connotes that the approach to be taken is to a degree objective at this stage.

78. The mere making of payments into a bank account would not *of itself* constitute bad character. But context is all. Here, it was properly assessed, in our judgment, by the judge that by his answers in interview the appellant was conveying the impression that he had been living off the compensation payment: that is to say, implicitly, from lawfully derived money in the form of the compensation. He gave no explanation as to the source of the cash deposits: although he had referred to gambling in interview, he did not seek to say in interview that had been a net source of income to him. He had also accepted that he had not been in employment.

79. Mr Bennathan sought to reprise the arguments of Mr Denney in the court below: that the words "basically" and "really" had been equivocal; that the focus of the interviews had been on withdrawals, not payments in; that the appellant did not have the bank records in front of him at the time to refresh his memory; and so on. But all such arguments were, in our opinion, properly rejected by the judge. Such decisions are fact specific; and on such a matter, the appellate court ordinarily will give due weight to the assessment of the judge having the conduct (and the "feel") of the trial: see, for example, *Renda* [2005] EWCA Crim 2826, [2006] 1 Cr. App. R 24.

80. It was nevertheless asserted that the prosecution were in reality seeking not to correct a false impression but to provide a basis for saying that the appellant himself was involved in serious crime, indeed in drug dealing; and thus himself, by implication, was part of the group of persons who the defence itself were suggesting would have had an animus against Faraji. That, it is said, went beyond the scope and function of the admissibility of such evidence under s. 101 (1) (f), given in particular the terms of s. 105 (1) (b) and (6). But we see no reason to think that the application, as made under s. 101 (1) (f), was indeed made in any way other than by reference to that sub-section: as, for the purposes of this argument, the judge herself clearly accepted.

81. The judge in fact had, at the request of the defence, given her initial ruling on the point at the close of the prosecution case. Having so ruled, she decided that she did not need to rule on s. 101 (1) (g). We have to say that this court finds it difficult to see how such evidence could not also have been properly admitted under gateway (g), given the sustained attack not only on the character of Faraji but also of Witness B. But the judge did not rule on that: even though, on one view, that would have been much the more direct way of approaching bad character.

82. It was submitted to us, however, that by ruling as she did by reference to s. 101 (1) (f), the judge gave the appellant no opportunity to withdraw the implied assertion: see s. 105 (3). That is a groundless complaint. In so far as it was said that the interviews could be edited so as to withdraw the assertions, that, as we see it, might have resulted in misleading the jury: see also *Dixon* [2012] EWCA Crim 1263. In so far as it was said that the matter could have been dealt with by way of an appropriate agreed fact, the suggested version of an agreed fact as put to this court was utterly anodyne and irrelevant, relating as it did solely to the payments in and not in any way reflecting the fundamental point: viz. that it had been impliedly asserted by the appellant that the payments in came from a legitimate source. Finally, and conclusively, leading counsel for the appellant at trial had expressly (and sensibly) accepted that the potential question of any withdrawal could be dealt with in the oral evidence. Thereafter, however, the appellant did not seek to withdraw. Instead, in his evidence, he sought to justify.

83. Nothing changed thereafter in the judge's assessment, properly open to her, to cause her to depart from her previous ruling on s. 101 (1) (f).

84. In his oral evidence, the appellant had sought to explain the cash deposits and his living expenses as legitimate – for example, as deriving from gambling or loans where not from the compensation. He also, however, accepted in evidence that he lost more in gambling that he won. He was in actuality not really able to explain in evidence how he made his money. He was indeed, as we have said, to say that, in addition, he regularly kept between £5,000 - £10,000 in cash in his house. Moreover, when he paid £9,000 in cash towards buying his Porsche on 4 June 2010 there was no evidence of a cash withdrawal from the bank at that time in that sum: to the contrary, there was a payment in of a sum of £10,000 at that time (a payment the source of which he said he did not recall). Overall, there was, in our opinion, an abundance of material which the jury could properly view as showing the deposits to be derived from illicit sources, contrary to the impression given in interview.

85. Accordingly, we are in no doubt that the judge was entitled to admit evidence of bad character (in the form of the payments in as deriving from an illicit source) at the

close of the prosecution case under s.101 (1) (f). Thereafter she was entitled to maintain such ruling at the close of all the evidence, as she did.

86. As to whether such evidence was to be excluded under s. 78 of the 1984 Act, that was a matter for the discretion of the judge. There is no basis for saying that she exercised her discretion erroneously or improperly in declining to exclude it.

(2) <u>Ground 2</u>

87. It is submitted under this ground that the cross-examination, and the subsequent submissions of the prosecution to the jury, went beyond correcting the false impression given; and should not have been permitted to be used as evidence of the appellant's involvement in serious crime.

88. We do not agree.

89. Complaint is made of the cross-examination of the appellant, where it was on occasion put to him (and he denied) that he was himself involved in serious criminality, whether or not as an associate of Faraji. Particular complaint is made of the cross-examination of the defence witness Julia, where it was put to her by the prosecution – primarily based on the texts which the defence had, very late in the day, disclosed – that the appellant was involved in drug-dealing. It was submitted that all this went beyond correcting any false impression given in interview.

90. Had this been illegitimate cross-examination, going beyond what was contemplated when the initial s. 101 (1) (f) ruling was given before the defence case was opened, then one would have expected the judge to have intervened. She did not. Perhaps even more strikingly, leading counsel for the defendant raised no objection, either. It is plain that all actually present at the trial thought that what was occurring was legitimate. Indeed in his *McCook* response dated 24 February 2020, Mr Denney QC has indicated that he may actually at the time have indicated to the prosecution that he did not object to such questions being asked. It is evident, therefore, that no one had required any further bad character application to be made. In our own view, the cross-examination was not outwith the ambit of the judge's prior s. 101 (1) (f) ruling, or otherwise illegitimate.

91. As to the specifics of the cross-examination of Julia, these in the relevant respects derived from the texts which the defence themselves had, overnight, chosen to disclose for tactical reasons: wishing to bolster her evidence and credibility. Having so disclosed these texts, there could be no sustainable objection from the defence to Mr Cummings QC for the prosecution then seeking to deploy them as he did in cross-examination: nor, as we have said, was there any objection.

92. It is, in fact, a point of the strongest comment that Mr Denney QC, as he explains in his *McCook* response, had both at the outset of trial and again during trial expressly warned his client that the attack on Faraji and Witness B would have the likely consequence that the Crown would successfully apply under gateway (g) to adduce evidence to show that the appellant was a drug-dealer and criminal. In the result, evidence of bad character was ruled in under gateway (f): and that, as Mr Denney QC observed, "informed the remainder of the trial." Thus, as he said, in the light of that ruling a formal application by the prosecution to cross-examine Julia in the way that

was done would inevitably have succeeded: and so the cross-examination was not opposed by him at the time. This was, we consider, both wholly pragmatic and wholly understandable, coming as it does from leading counsel involved at the trial.

93. Thereafter, as the judge crisply put it when subsequently confirming her gateway (f) ruling before speeches and summing-up, "the evidence was in".

94. As to that further ruling of the judge confirming the applicability of gateway (f) – which, as we have said, was in our opinion a proper ruling (and in many ways, perhaps, was favourable to the defence in not also permitting reliance on gateway (g), if not (d) also) – one point does need some discussion.

95. The implied assertion was that the appellant's payments in had come from legitimate sources: whereas the evidence, if accepted by the jury, was to the effect that they had come from illegitimate sources. In the event, in her final direction to the jury the judge indicated that the jury might conclude that the cash deposits "have the hallmarks of involvement in serious crime" (a phrase in fact used by the prosecution in its written argument on the first application).

96. We do not think, put in context, that this direction goes beyond correcting the false impression. There are, in particular, two points here. First, the form of words used by the judge had had the agreement of leading counsel for the defence (his principal concern being to avoid reference to drug-dealing in this context). That agreement surely must also reflect the "feel" of the trial. To the extent that Mr Bennathan, albeit in courteous terms, suggested that that agreement was a serious error and amounted to a material irregularity, we reject that suggestion. Second, the phrase "serious crime" is not to be regarded as a term of art, set in this particular context, inevitably conveying the kind of connotation it might have for a professional criminal lawyer. As Mr Littler for the Crown pointed out, the payments overall were frequent; involved large cash sums; were over a long period; and were from no specifically identified source. In that context, the underpinning criminality to be inferred could indeed properly be presented to a jury as "serious": not minor.

(3) <u>Ground 3</u>

97. This ground relates to the legal adequacy of the judge's summing-up for the purpose of her direction on the cash deposits and the asserted false impression.

98. What is said is, in essence, this. There was a clear issue as to whether a false impression had indeed been given and whether the deposits were from illegitimate sources and derived from crime. The point had been put to the appellant in cross-examination; he had consistently denied it. Consequently, it was submitted, if the source of such deposits was to be relied upon as bad character (as was the prosecution case at the trial) then such matters had to be proved to the criminal standard. But the jury were not, it is said, so instructed. In consequence, so it is said, this was a material misdirection rendering the verdict unsafe.

99. In support of this argument particular reliance was placed on the decision of the Supreme Court in the case (on appeal from the Court of Appeal of Northern Ireland) in *Mitchell* [2016] UKSC 55, [2017] 1 Cr. App. R 9. As a Supreme Court decision, it is to be taken as declaratory of the law.

100. In *Mitchell*, Ms Mitchell had relied on a defence of self-defence on a charge of murder. At trial, the prosecution had been permitted to rely, as bad character evidence, on evidence of seven previous incidents – none resulting in a conviction – where she was said to have used or threatened armed violence. This was said to evidence propensity (corresponding to s. 101 (1) (d) and s. 103 of the 2003 Act as applicable in England and Wales). The evidence was disputed by the defendant. The trial judge did not direct the jury on whether they required to be "satisfied" of the truth of the evidence or of propensity (paragraph 10 of the judgment of Lord Kerr). Instead, so far as appears from the report, the trial judge's legal direction in his charge to the jury on this issue was simply this:

> "That [bad character] evidence may or may not help you. Take it into account or leave it out of account as you consider appropriate. But do not make an assumption because a person behaves that way that means she's guilty of murder and had the necessary intent just because of these events."

101. Perhaps the particular point of interest arising from the decision of the Supreme Court is the decision that, in bad character cases concerning propensity based on a number of disputed events, a direction that the jury must be sure of each event relied on was wrong. What mattered was that, overall, the jury must be sure of propensity.

102. For present purposes, as it is submitted, the crucial aspect of the *Mitchell* decision is that, if the jury are to rely on bad character adduced under s. 101, they must be sure: see, for example, at paragraph 43 of the judgment of Lord Kerr where he said:

> "…the jury should be directed that if they are to take propensity into account they should be sure it has been proved."

The argument of counsel in *Mitchell* to the effect that all that mattered was that the jury must be sure of guilt on the totality of the evidence, and that no special direction on the propensity evidence was needed, was thus rejected. What is therefore submitted by Mr Bennathan is that, although *Mitchell* was a decision on propensity, the same approach was required in the present case on the s. 101 (1) (f) direction. And here, it is objected, the jury were never so instructed. In consequence, it is said, the summing-up was fatally flawed.

103. In their written argument on this appeal, the Crown seemed (possibly) to be suggesting that a standard of proof direction, where an issue arises for the purposes of s. 101 (1) (f), is different from that under s. 101 (1) (d) relating to propensity (which was the position in *Mitchell*). But we agree with Mr Bennathan: the standard of proof for the purposes of evidence admitted under any gateway in s. 101, where a disputed issue as to bad character arises for the jury to determine, surely must be the same for all gateways. And that standard, as *Mitchell* confirms (albeit specifically in the context of a propensity direction), is the criminal standard. In oral argument, we understood Mr Littler to accept this.

104. So the question is: did the judge materially misdirect the jury on this aspect, for the purposes of her instruction to them on the s. 101 (1) (f) issue, in particular in failing expressly to instruct them to apply the criminal standard of proof?

105. The judge had based herself, as she indicated at the time, on the Judicial College Compendium: albeit that, it has to be said, has subsequently been modified quite a bit. Moreover, Mr Littler was entitled to emphasise that the direction which she gave had had the agreement at the time of all counsel.

106. We can accept that the initial part of the judge's directions on this issue (set out above) possibly might in some respects have conveyed the impression – rather as had happened in *Mitchell* – that the bad character evidence here relied on (viz. that the payments into the bank accounts derived from illegitimate criminal sources) was not really in issue. But reading the direction as a whole we do not think that correct. The judge, as part and parcel of this legal direction (and as then amplified later in the summing-up on the evidence) had referred to the defendant's explanations, such as gambling and lending. The jury well knew that his case was that the cash deposits indeed came from legitimate sources. That this issue was a matter for them to decide would have been clear to them. In any event it was made explicit by the judge's direction "Even if you concluded that the evidence of cash deposits does have the hallmarks of involvement in serious crime…". That clearly connotes that it is a matter on which the jury were free to draw their own conclusion. Set in context of the case overall, and of the general legal instructions to the jury, we consider in the circumstances that the jury would have appreciated (a) that the matter was one for their decision and (b) they must be sure on this matter. The position is different from *Mitchell*: where, in effect, the jury were instructed virtually to assume that there was bad character in the form of propensity and then to make of it what they will.

107. Moreover, while the potential bearing on credibility (if a false impression were accepted as given) was properly, in the circumstances, left to the jury it is to be noted that – importantly – propensity was expressly *excluded* as arising from such evidence.

108. In many criminal cases, of course, a jury may be made sure of guilt, viewing the individual strands of evidence cumulatively, even though each individual strand of itself may not suffice to justify a conviction to the criminal standard. Nevertheless, as we have indicated, we accept that, as *Mitchell* confirms, the criminal standard can apply to an individual element of the prosecution case such as disputed bad character evidence. (A *Lucas* direction on lies is another example where the criminal standard is the applicable standard and a direction to that effect is normally given.) The very fact of this appeal on this ground thus indicates that it would no doubt have been better for the judge, even if very shortly, to have included in her bad character direction a reference to the criminal standard ("so that you are sure") in circumstances where there was an issue of whether the appellant had been trying to mislead the jury and had derived money from illicit sources. The current version of the Compendium also would suggest that: although, it might be noted such words had not featured in the relevant remarks in the seminal case (on propensity) of *Hanson* [2005] EWCA Crim 824, [2005] 2 Cr. App R 21, as to how a summing-up in such a context should proceed: see paragraph 18 of the judgment. But be that as it may, a failure to do so does not necessarily mean in any given case that a conviction is necessarily unsafe.

109. Viewed in the round, whilst we accept that the jury in this case needed to be sure, if to rely on this point, that the appellant had given a false impression (in that he had not been living entirely off legitimately acquired funds and that some or all of the cash deposits derived from criminality) we consider that that was sufficiently conveyed, overall, by the summing up; and in any event the lack of more specific direction on

the standard of proof in dealing with the false impression issue was, in the circumstances of this case, not sufficient to render the conviction unsafe.

110. We should, in this respect, add that, with an intervening interlude of over seven years from the trial, we entertain considerable concerns that this whole issue of conveying a false impression is now being given a far greater prominence than it had acquired at trial, given the realities of this trial as revealed on the papers before us. This at least surely also finds some reflection in the fact that very experienced trial counsel agreed this direction at the time and thereafter saw no basis for it grounding an appeal following conviction. As stated in *Hunter* [2015] EWCA Crim 631, [2015] 2 Cr. App. R 9, quoting from *Renda* (cited above), even if there has been a misdirection on bad character it does not follow that the conviction will be quashed. And the court in *Hunter* also went on, at paragraph 98, to say this:

> "We should also add that if defence advocates do not take a point on the character directions at trial and or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics…."

We think, given the circumstances, that those observations are directly in point on this appeal.

(4) <u>Ground 4</u>

111. We can take this ground shortly.

112. It was a leitmotif of the submissions on behalf of the appellant that the prosecution were in effect insidiously and unfairly trying to present the appellant to the jury as a drug dealer. But, as we have said, the cross-examination accorded with the s.101 (1) (f) ruling and no objection to it thereafter was made. We are also not prepared to assume or infer, in the absence of a transcript, that prosecution counsel in his closing speech maintained an allegation of the appellant being a drug dealer. The references in the draft closing speech to this effect are in fact relatively limited and low key; but in any event, as we have previously indicated, we would infer that they would have been modified yet further in the light of the judge's subsequent ruling, before speeches were actually delivered: and that also accords with the way the judge summed up to the jury. In the light of our comments above, we are in any event not prepared to permit the appellant to profit from making submissions to the contrary, when any possible uncertainties in this respect arise by reason of his own unacceptable delay.

113. Whilst the judge had in neutral terms summarised Julia's evidence, including denial of the appellant, to her knowledge, being a drug dealer, it is to be noted that no suggestion was recorded by the judge of it being maintained that the appellant was a drug dealer. That, we therefore infer, represents the ultimate position at trial. In such circumstances, it might then have been positively unwise for the judge to spell out an express disclaimer of drug dealing on the part of the appellant being an issue. Not infrequently where, by the end of a trial, a potential issue has fallen away, it can

sometimes be sensible for a summing up to leave it at that and make no further reference to the matter.

Conclusion

114. We therefore reject all the grounds of appeal advanced. They acquire no greater substance cumulatively than they have individually, we might add.

115. We do wish to repeat our unease at aspects of the case presented to us after so great a lapse of time. Whilst, of course, we cannot now know we strongly suspect that the arguments presented to us, on correcting a false impression, have adroitly given far greater prominence to that issue than it, realistically, would have had at trial. As far as we can tell, by no means was the prosecution case heavily based on this aspect. The prosecution had, overall, a compelling case independently of it. Here, the appellant well knew Faraji (on his case, a heavy duty criminal). There was evidence that he had had problems with him about the car – a potential symptom or cause of hostility. There was the evidence of Yasmin Mistry. On his own admission at trial, the appellant had also associated closely with Smart (amongst other things, a supplier of drugs, as he knew, and in the event someone who was to be convicted of Faraji's murder). He had very frequently replaced phones and SIM cards in circumstances which could be viewed as unsatisfactorily explained. There then was the potentially damning pattern of phone calls, as evidenced by the Sequence of Events chart, culminating in the calls of the evening of 24 February 2011 and the subsequent disposal of relevant phones. There were the two bank account withdrawals. He then told significant lies in interview; and in significant respects he advanced at trial an explanation of events not raised at the time and which could be presented (as it was by the prosecution) as a subsequent attempt to explain away facts not fitting with his original account.

116. Of course there were points available to the defence. Mr Bennathan and Ms Arshad have advanced them in great detail in their written and oral arguments: and we do not doubt they were no less emphatically advanced at trial. We have borne them in mind. But the fact remains that the appellant gave his explanations and account to the jury over very lengthy oral evidence. Having considered his evidence, they did not believe him. They were made sure by the prosecution of his guilt. There is, on an overall appraisal, no proper basis, in our judgment, for this court interfering with the verdict of the jury.

117. We do not need to say more on this. As will be gathered, we take the view that there was no error of law, either in the judge's rulings or in the judge's summing up, sufficient to vitiate the conviction. Notwithstanding all the efforts of Mr Bennathan and Ms Arshad, we are satisfied that this conviction is safe. We therefore dismiss this appeal.