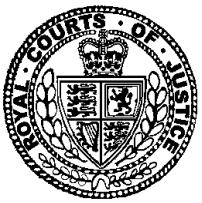

Neutral Citation Number: [2022] EWCA Crim 1088

Case No: 202100853 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Bate
T2014-7298

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

LORD JUSTICE HOLROYDE, THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
MR JUSTICE JOHNSON
and
MRS JUSTICE HILL

- -

Between:

REGINA	**Respondent**
- and -	
T'SHAI ENNIS	**Applicant**

- -
- -

Dr Felicity Gerry QC (instructed by **G T Stewart Solicitors and Associates**) for the **Appellant**

Hearing date: 14 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 2.00pm on 29 July 2022

MRS JUSTICE HILL:

1. On 30 March 2015 at the Central Criminal Court the applicant (then aged 19) was unanimously convicted of murder (Count 1) and wounding with intent contrary to section 18 of the Offences Against the Person Act 1861 (Count 2). His co-accused Idris Daud and Ayman Koshin were also convicted of both offences. On 23 April 2015 the applicant was sentenced to custody for life for the murder, with 20 years specified as the minimum term under section 269(2) of the Criminal Justice Act 2003. A concurrent sentence of 9 years' detention was imposed for the wounding with intent.

2. The applicant renews his application for an extension of time (2,157 days, around 5 years 11 months) to seek leave to appeal against conviction, following a refusal by the single judge. He also seeks leave pursuant to section 23 of the Criminal Appeal Act 1968 to introduce several items of fresh evidence.

3. We have had the benefit of written and oral submissions from Dr Gerry QC on behalf of the applicant and a Respondent's Notice drafted by Mr Tim Cray QC. He had been leading counsel for the prosecution at the trial. The applicant was represented at trial by Queens Counsel and a junior, but Dr Gerry QC was only instructed by him after the trial.

The factual background

4. At approximately 12.33am on Sunday 29 June 2014, three men took a taxi from Wembley to Harlesden. Shortly after 1.00am, two of the men got out of the taxi and attacked Kamar Hewitt (aged 19), on Park Parade in Harlesden. Mr Hewitt and David Headlam (also aged 19) had been walking home after a night out. Mr Hewitt sustained a knife wound to his left thigh. Two of the males from the taxi then chased Mr Headlam on foot for around 400 metres. The two men cornered Mr Headlam in the front garden of a property on Drayton Road and fatally stabbed him in the right thigh, as the occupant of the house watched on. The two assailants left Mr Headlam on the floor and returned to the same taxi, which had followed them to Drayton Road, and left the scene.

5. The attack was captured on CCTV and lasted a little over 30 seconds from when the deceased was chased to when the assailants left the scene in the taxi. Mr Headlam suffered two wounds to his right thigh which pierced a major artery and a further stab wound to his left thigh. In addition, he had a number of incised wounds or cuts to his face and head. The arterial wounds led to rapid collapse through blood loss, and he was pronounced dead at 3.15 that morning.

6. The applicant and his two co-accused had known each other for a number of years. The applicant described Daud as his best friend.

7. The applicant was arrested on 4 July 2014. He provided a prepared statement in interview, in which he denied the allegations, and said he was not present when the attacks took place and was not with anyone else who was involved in the attack. He declined to answer any further questions in the interview.

The trial

8. The prosecution case relied on witness evidence from Mr Hewitt, the taxi driver and people who had witnessed the attacks, the aftermath and the taxi leaving the scene; CCTV evidence; medical evidence as to the injuries to the deceased; and agreed facts including as to calls made to the taxi firms and a visit to Northwick Hospital by the applicant and Daud between 10.19pm and 11.33pm on the night of the murder.

9. A PC Clark also provided evidence of knives he had found on 26 June 2014 in some bushes by a tree at the back of some flats on Kings Drive, Wembley. One was wrapped in a purple paisley patterned bandana and the other in a blue patterned bandana.

10. The prosecution case was that this was a premediated joint enterprise knife attack and that the taxi was stopped minutes into the journey to retrieve weapons for that intended attack, from the location where PC Clark had found knives earlier in the week. It was said that the male who stayed in the taxi whilst the deceased was attacked was equally guilty because he was there to control the taxi and ensure that it could be used as the getaway vehicle.

11. The applicant accepted at trial that he had lied in the prepared statement he had given at the outset of his interview. His case at trial was that he was present in the taxi that went to Harlesden, but he denied playing a part in the assaults perpetrated by the other two passengers, who were Daud, and a male named Dills. He said he was the person who remained in the taxi throughout. He asked the taxi driver to stop on Drayton Road because he could see Daud and Dills in the front garden of a house kicking and punching. He denied being the person seen by one of the eyewitnesses as he was wearing a red t-shirt.

12. Daud's case was that the third male in the taxi was Koshin. It was the applicant and Koshin who had left the taxi. He saw a male running and the applicant and Koshin running after him. He asked the taxi to turn round towards them.

13. Koshin denied presence and said he was at home in Wembley when the incident occurred. He said the third male was Dills, who had accidentally taken possession of his phone earlier in the evening.

14. It follows that the applicant advanced a "full cut-throat" defence with his friend Daud, with each blaming the other for being one of the two people who left the taxi and played a direct role in the attacks. He also supported his co-defendant Koshin as to his role, which Daud did not.

15. As to the earlier stop of the taxi, the applicant gave evidence that he got out of the taxi minutes into the journey to pick up some cannabis he had hidden. He did not go to where the knives had been found two days earlier and did not pick up knives, whether independently of anything that Daud was doing or otherwise. He texted Koshin's girlfriend in the taxi pretending to be Koshin and used Koshin's phone to call a person called Ahmed whilst he was out of the taxi walking towards the cannabis.

16. The applicant said he did not know how the events turned in to a fight. He was not trying to help Koshin with his evidence - he was more likely to try and help Daud. When they returned to Kings Drive after the incident, he and Dills had an argument about drawing attention to Daud, because Daud was on an electronic tag. Dills told him to calm down and said it was only a "punch up". He then left and dropped Koshin's phone back at Koshin's

house. He then returned to where Daud was, got a taxi to Ealing Broadway and then a train back home to Slough.

The extension of time application

17. The applicant seeks an extension of time of approximately 5 years, 11 months. A chronology has been provided by the applicant's solicitors in support of this application. This shows that the applicant's current solicitors, who did not represent him at the trial, were first instructed by him from September to December 2015, five months after he was sentenced. An appeal file was opened following initial enquires with his trial solicitors. During 2016 a conference took place with the applicant and the relevant transcripts, education and medical records were obtained. 2017-2020 were spent securing funding from the Legal Aid Agency, obtaining the expert evidence from Dr Marriott and Dr Hulley and securing advice from counsel. The detailed application for leave to appeal the conviction out of time was lodged in March 2021.

18. In our view the timescales in this chronology pose a number of difficulties for the application to extend time. However, in fairness to the applicant we have focussed our attention on considering the merits of the grounds. Consideration of the merits is, in any event, an integral part of determining whether it is in the interests of justice to extend time.

The fresh evidence applications

19. Under section 23(1)(c) of the Criminal Appeal Act 1968 this court may, if it thinks it necessary or expedient in the interests of justice, receive any evidence which was not adduced in the proceedings from which the appeal lies. Under section 23(2), the Court shall, in considering whether to receive any evidence, have regard in particular to (a) whether the evidence appears to the Court to be capable of belief; (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal; (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

20. The applicant seeks to admit by way of fresh evidence two reports from Dr Sinead Marriott, Consultant Clinical Psychologist, dated 18 December 2017 and 29 October 2021.

21. These expert reports are plainly capable of belief. They would, in principle, have been admissible in the original trial. On that basis the factors set out in sections 23(2)(a) and (c) would militate in favour of the reports evidence being admitted.

22. As to factor (d), the applicant has provided *McCook* evidence from his junior counsel at trial, Christos Georgiou, Higher Court Advocate. He explains that he and the solicitor with conduct of the trial had represented the applicant in five other criminal matters before the trial, over at least a four-year period. During their large number of meetings with the applicant, he was consistently able to provide clear, coherent and detailed instructions and respond to challenges to his account with reference to the evidence. The applicant saw the court matron regularly during the trial, largely for stomach issues, and did not raise any difficulties with his comprehension or mental health during the trial. His mother, who regularly attended court and had close contact with the legal team, did not raise any

concerns. They therefore had no reason to consider that it was necessary to have him examined by a psychologist.

23. The applicant has provided a *Gogana* affidavit from Julie Ann Boyle, his current solicitor. She indicates that her firm, unlike the applicant's previous solicitors, considered that it was necessary to have the applicant assessed by a psychologist. She implicitly casts doubt on whether Mr Georgiou's explanation is "reasonable" for the purposes of section 23(d). She states that the applicant's educational and medical records, which showed a long history of learning difficulties and a diagnosis of ADHD, made it "apparent that the applicant should have been psychologically assessed as it was likely that he was disadvantaged during the trial process".

24. The fact is that Mr Georgiou and his team did not take this step, and we do not consider it necessary to decide whether they should have done so. Rather, we have focussed our consideration on the applicability of factor (b) to Dr Marriott's evidence, namely whether it appears to the Court that the evidence may afford any ground for allowing the appeal.

25. The applicant also seeks to admit as fresh evidence a report from Dr Susie Hulley and Dr Tara Young. This report provides some commentary on the applicant's case, but the bulk of the report is evidence of wider contextual issues relating to joint enterprise, silence, the use of rap/drill/grime music and videos in criminal trials and race. While this report is capable of belief under section 28(2)(a), it is highly unlikely that it would have been admissible in full at the trial under section 28(2)(c). As to section 28(2)(d), Mr Georgiou's evidence offers a partial explanation for why this evidence was not adduced at the trial, namely that the trial pre-dated the Supreme Court's restatement of the principles relating to joint enterprise in *R v Jogee* [2016] UKSC 8; [2017] AC 387. This explanation does not embrace all the other topics covered by Dr Hulley and Dr Young, and we note that the issues around the admissibility of rap music in criminal trials are not new. However, we again consider it appropriate to concentrate on the applicability of factor (b) to this expert report.

26. The applicant has provided a series of published or draft academic articles on joint enterprise, silence, and the relevance of rap evidence. These do not constitute fresh 'evidence' for the purposes of section 23.

The grounds of appeal and discussion

Ground 1: The jury was wrongly directed with respect to joint enterprise

27. The grounds and written submissions on behalf of the applicant focussed on the argument that the jury had been wrongly directed on joint enterprise in light of *Jogee*. At the outset of the hearing Dr Gerry QC indicated that her primary position was that this was not in fact a "change in law" case. However, her submissions reiterated concerns over the trial judge's approach to the issue of foresight, the central issue raised by *Jogee*, and so this was clearly her secondary position.

28. We deal first with the submissions that the judge's directions to the jury were flawed based on the law as it was at the time of the trial.

29. *First*, it was argued that the directions to the jury were insufficiently clear as to the concept of joint enterprise in particular with respect to the prosecution case against the man in the taxi. We disagree. The jury was told that:

> "The essence of joint responsibility for the targeted crimes alleged here is that the Defendant whose case you are considering shared with one or more of his co-accused the intention to commit that offence or foresaw the risk of such harm and took some active part, underlined, so as to achieve that contemplated aim. One can lead and others can follow but mere presence at the scene without prior involvement in the criminal enterprise is insufficient" (see pages 16B-16C of the summing)."

Further, there were only two people shown on the CCTV directly engaged in the stabbing of the deceased. The jury was directed that the prosecution case against the third man was that his role in the "common enterprise" was:

> "…helping control the taxi to ensure it arrived at the scene, giving directions within the scope of the joint enterprise so that it could be then a getaway vehicle" such that "there are a variety of ways…in which a third person in the context of this case can be involved without offering the physical violence directly to the victim" (page 16D-E of the summing up)."

We are satisfied that those directions were correct in law and were sufficient in the circumstances of this case.

30. *Second*, it was argued that the judge did not direct the jury sufficiently clearly as to whether there was a plan between the defendants, what the nature of any such plan was, whether it was an intentional plan, what the applicant knew of the plan and whether he acted in accordance with it.

31. We cannot accept this. The judge referred to the following "key factual issues" for the jury in relation to each of the defendants who they found went to Harlesden that night: "1) Did he bring the knife in the taxi? 2) Did he know that either or both of the other passengers were carrying knives?" (page 17E of the summing up).

32. Further, the judge directed the jury as follows in the steps to verdict with respect to count 1:

> "To convict any defendant of either murder as indicted on count 1 or the lesser alternative of manslaughter you must first be sure that the individual defendant whose case you are considering knew that one or more of the three passengers in the taxi was armed with a knife before these Harlesden assaults began. Of course, that knowledge could be in two ways: either because he was armed himself or because he knew one of his co-passengers was. If he was not there at all, of course, the issue does not arise. If you are not sure that was so, that he had that knowledge of his armed expedition, then you acquit the defendant of count 1. If you are sure he knew this fact, then part (b) is engaged, and you go next to it.

> Part (b) sets out in a similar structured way to count 2 the necessary elements: physical and mental. To convict the defendant whose case you're considering of murder you must be sure that (1) he joined in the contemplated assault on David Headlam. In other words he was present and participated in the contemplated assault in the ways portrayed; and (2) at the time he did so, and then either of two things under (2), (i) he intended that David Headlam would be caused at least grievous, ie really serious bodily harm or (ii) he realised that one or more of the other assailants might intentionally do David Headlam a grievous injury; and (3) which is the final causation element, David Headlam thereafter sustained the stab wounds to his right thigh that caused his death" (page 19C-G of the summing up).

33. At times Dr Gerry QC appeared to suggest that "merely" staying in the taxi would be insufficient to render the applicant "criminally culpable". However, this was not the prosecution case, which relied on the taxi driver's evidence of the directions he was given by the person who remained in the vehicle, so as to facilitate the escape from the scene.

34. *Third*, criticism was made of the judge for initially directing the jury, erroneously, that it was not in dispute that this was a premeditated, armed attack. However, the judge later corrected this to make clear to the jury that the applicant and Daud did not accept this characterisation of the attack and invited the jury to amend their written directions to this effect (see the discussion with counsel, the correction and the summary of the applicant's case at pages 64C-67B, 80E-F and 101G-102B of the summing up). It is unrealistic to suggest that the jury should have been discharged at this point rather than the correction made. We note that the experienced counsel who represented the applicant at the trial did not make any application to discharge the jury.

35. For these reasons we do not consider it arguable that the summing up was wrong, based on the law as it was before *Jogee*. The ground of appeal framed in this way crystallised during the trial and so it is also very substantially out of time, with no fresh evidence or good reason in support of an application to extend time.

36. We turn now to the submissions based on the change in law effected by *Jogee*. In that case, the Supreme Court rejected the principle that if two people set out to commit an offence and, in the course of it, one of them committed another offence, the second person is guilty as an accessory to the second crime if he foresaw its commission by the principal as a possibility, but neither intended it, nor agreed to it, expressly or tacitly, even on a conditional basis. The Court held that the correct approach to foresight is to treat it as evidence (albeit sometimes strong evidence) of intent to assist or encourage, but not as an inevitable yardstick of common purpose.

37. Individuals affected by the restatement of the law of joint enterprise in *Jogee* are not automatically entitled to leave to appeal their conviction out of time. Rather they must demonstrate that a "substantial injustice" would be caused if the grant of exceptional leave was denied. This is a high threshold. In order to determine whether it has been met, the court will have regard to the strength of the case advanced that a change in the law would in fact have made a difference. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct: *R v Johnson* [2016] EWCA Crim 1613 and *R v Crilly* [2018] EWCA Crim 168.

38. Dr Gerry QC contended that the substantial injustice hurdle sets far too high a threshold, which has proved impossible to surmount in practice. It amounts to a lack of access to justice and involves the surreptitious return of the proviso previously set out in section 2(1) of the Criminal Appeal Act 1968 which was repealed on 1 January 1996. Further, it is discriminatory. Dr Hulley and Dr Young's work illustrates the over-representation of black and ethnic minority men in cohorts of people convicted under joint enterprise principles. She argued that the test also raises particular issues relating to the convictions of those with disabilities which may have complicated the approach to foresight.

39. However, the substantial injustice test is well established. It flows directly from the Supreme Court's observations as to the rationale for it in *Jogee*. The approach to cases of this nature was clearly set out by this Court in *Johnson*. We do not consider that there is any basis for us to depart from it. It follows that to the extent that the applicant relies on the change of law since *Jogee*, in order to justify an exceptional grant of leave to appeal his conviction, he must show substantial injustice.

40. In our view the evidence against the applicant was strong. He had travelled from Slough to the Wembley area on the evening before the attack and had met with both his co-defendants by 9.30pm. He attended hospital with Daud, to assist in giving Daud a reason for being in breach of his curfew. There was the evidence that the taxi stopped minutes into the journey, which the jury could conclude was to retrieve the knives which PC Clark had in fact already seized. There was evidence that all three men had left the taxi when Mr Hewitt was stabbed before one returned to the taxi. There was evidence that the man who did so was controlling the taxi in the ways described above. The applicant was also found guilty of other, though less serious, criminal conduct.

41. More fundamentally, however, this was not a case that depended on foreseeability or events developing unexpectedly. Rather, there was strong evidence of a planned knife attack and it could therefore easily be inferred by the jury that all the defendants, including the applicant, shared the intent to do at least really serious harm.

42. As we have already set out, the directions (pages 16B-16F of the summing up) and the steps to verdict (pages 19C-19E) made clear to the jury that they had to be sure that this was a planned knife attack and that knowledge that a knife or knives were being taken to the scene was a necessary element of conviction. The judge later strengthened the initial directions by making clear that an accessory present at the scene had to have the same intent as the principal (page 102).

43. For these reasons we do not consider that the restatement in the law effected by *Jogee* would have made any difference in this case. The applicant therefore cannot meet the test set by *Johnson* and *Crilly*. It follows that we see no basis on which Ground 1 could be argued.

<u>Ground 2: The evidence relating to rap music and bandanas should not have been admitted</u>

44. This ground relates to a rap video involving the applicant and Daud. The applicant wrote the lyrics in April 2013 and the lyrics included talk of the enemy being stabbed such as "He got cut so I know that he's scheming; Fucking with my niggas that's the reason; I'll creep up on your yard, leave your brains on the ceilin'". The video of it was made on 21 June 2014 on the Chalkhill Estate. Daud organised the video and the applicant was the

main artist within it. The blue bandanas in the videos were said to be similar to those in which the knives had been found by PC Clark and to evidence a "sort of badge of association" between the Defendants based on photographs found on Koshin's phone.

45. On 25 June 2014, Daud informed the person who made the video that the name of the track was "Chalkhill Catch You Slipping". At 9.35pm on 28 June 2014 Daud sent a text message to that person asking if the video was going to be uploaded that night. Daud was told that it would be, and it was uploaded to YouTube the next day. On the evening of 29 June 2014, the applicant and Daud watched the video together.

46. The applicant gave evidence that the rap video had been made because he and Daud shared an interest in the same music. The lyrics were not an indication of past or future violence and were merely part of the genre of that type of music. He said that on the evening of 29 June 2014 Daud attended his house unexpectedly. They watched their rap video on YouTube. He had no idea what had happened in Harlesden apart from some messages of sympathy he saw on Facebook for the deceased. He did not connect it to the incident he had seen from the back of the taxi.

47. According to Mr Georgiou a computer expert was instructed on the applicant's behalf and established that the lyrics had been written in 2013, which the prosecution accepted. It appears that leading counsel initially sought to argue that the video should not be played to the jury but then conceded that it was admissible because it was connected with the facts of the offence within the meaning of section 98(a) of the Criminal Justice Act 2003. It was not admitted as generic "bad character" evidence.

48. The judge directed the jury that the prosecution's contention was that "from the lyrics and the attitude displayed on the video" the Defendants were "letting the world know they were not to be messed with" and that the "central message" was that "anybody who crossed them would wind up dead". The judge also told the jury that the applicant and Daud emphatically denied this interpretation of the video and said that the video was simply an example of the rap genre and was not sinister (see pages 31A-E of the summing up).

49. At section 10 of their report, Dr Hulley and Dr Young refer to this passage in the summing up. They argue that there is a risk of police officers, prosecutors and juries misinterpreting rap lyrics; that presenting rap (and its derivatives, such as grime and drill) music and videos in court is embedded in racial biases; and that doing so presents a significant risk of disproportionate, prejudicial impact on black defendants. These broad themes are developed further in 'The Irrelevance of Rap' by Dr Abenaa Owusu-Bempah, Associate Professor or Law, London School of Economics (provided by the applicant to the Court in draft form in December 2021 but published in 2022 at Criminal Law Review [2022], 2, 130-151). Dr Gerry QC also argued that the type of clothing in question (bandanas) carries with it racial tropes.

50. The judge told the jury that the prosecution had accepted that "viewed alone" the video "could be regarded…as either harmless boasting or merely an expression of that particular genre of youthful musical activity" (page 36B-C of the summing up).

51. However, the evidence in this case relating to the rap video went well beyond potentially murderous lyrics, a fact that Dr Hulley and Dr Young do not engage with. The prosecution argued that there was a "chilling significance" to the timings, given that three hours before

the knife attacks the three Defendants were together, not far from where PC Clark had recovered the knives two days before, and enquired whether the video would be uploaded to YouTube imminently (page 36C-E of the summing up). There was also the evidence as to when the video had been made (relatively shortly before the killing) and watched by the applicant and Daud (soon after it). We agree with the single judge that the evidence of the proximity in time to the killing at which the video was made, uploaded and viewed was evidence capable of establishing knowledge and planning. The bandanas also provided potential links between the video and the knives found by PC Clark and between the defendants.

52. In light of these factors the trial judge was entitled to conclude that the rap video evidence was "to do with the alleged facts of the offence with which the defendant is charged" under section 98(a) such that it was admissible. The inferences to be drawn from it, if any, were a matter for the jury. We reiterate that this material was not admitted as generic bad character evidence but rather had a specific relevance to the issues in the trial.

53. We also note that the judge gave the jury careful directions as to the relevance of the rap video evidence, summarising the inferences the prosecution drew from the video and the applicant's evidence about it (see pages 29H-32F, 35G-37A and 110F-111C of the summing up).

54. For these reasons we do not consider it arguable that the fact that this evidence went before the jury renders the applicant's conviction unsafe, even if the evidence contained in the report from Dr Hulley and Dr Young was admitted.

Ground 3: The adverse inference direction in relation to silence should not have been given

55. Dr Gerry QC argued that the adverse inference direction on silence should not have been given by the judge for two reasons.

56. *First*, the fresh expert psychology evidence from Dr Marriott indicates that the applicant's cognitive abilities fall between the Low (Borderline) to Low Average ability ranges and place him between 4-10 per cent of the population. He meets the criteria for diagnoses of ASD and ADHD. This evidence is directly relevant to how reasonable it was for him to decline to answer questions and should have been placed before the jury.

57. *Second*, Dr Hulley and Dr Young's research suggests that for those convicted of serious violence using joint enterprise, the fear of legal risks was the most common explanation for silence in police interviews; and that the feeling of powerlessness which encouraged many young people to stay silent was particularly so for young black men.

58. As to Dr Marriott's evidence, the mere fact of a subsequent diagnosis, after trial, of a mental disorder such as ASD or ADHD will not necessarily result in a successful appeal. The task of the Court is to identify the issues at trial to which the fresh evidence would have been relevant and to assess the likely evidence on those issues: *R v Grant-Murray and others* [2017] EWCA Crim 1228 at [53].

59. This was a case where the applicant accepted that he lied in his prepared statement but said that he did so to protect himself and Daud from Dills because he feared what might happen if he was a 'snitch'. He answered no questions in his police interview and provided no

defence case statement. He then gave a detailed account in his evidence at trial that differed from that in his prepared statement.

60. In those circumstances, the judge was entitled to give the adverse inference direction based on the information available to him. The judge also gave a full *Lucas* direction, ensuring the jury were properly directed as to how to approach the question of why the applicant had lied in his prepared statement. It is unrealistic to suggest that the jury should not have been able to draw inferences from these facts.

61. In our view Dr Marriott's evidence would not properly have resulted in the judge declining to give the adverse inference direction. Her evidence does not suggest that the applicant's cognitive abilities necessarily impaired his decisions with respect to the various accounts he gave and did not give. Further, we do not accept the submission that even if her evidence had been provided to the jury it would "inevitably" have led to the conclusion that it was reasonable for the applicant to have remained silent in his interview.

62. As to the evidence of Dr Hulley and Dr Young, the decision as to whether to give an adverse inference direction and the details of it must be made on the basis of the facts in each case. We are not persuaded that the judge's decision to give the direction in this case was wrong, or that further direction as to the reasons why the applicant may have stayed silent were required.

63. We therefore do not consider that this ground is arguable even if the evidence contained in the further reports relied on were admitted.

Ground 4: The summing up contained inappropriate judicial comment

64. Dr Gerry QC confirmed in submissions that the only judicial comment on which she relied for the purposes of this ground was the judge's initial comment that it was not in dispute that this was a premeditated, armed attack. We have considered this in detail under Ground 1 and do not consider it arguable that the conviction was unsafe for the reasons given there. This ground is also very substantially out of time.

Ground 5: The circumstantial evidence direction was inadequate

65. It was argued that the circumstantial evidence direction given as part of the summing up (page 13D-G of the summing up) was inadequate and should have been clearer on eliminating other possibilities, in accordance with *R v Kilbourne* [1973] AC 729. It was submitted that the summing up was, overall, imbalanced.

66. We consider that the direction given was appropriate for the facts of the case, which did not rely solely on circumstantial evidence, not least as the applicant admitted presence at the scene. Other than his complicity in the attacks, the only other realistic possibility was that the applicant remained in the taxi unaware of what the other two men were doing. The jury was well aware that this was his case. We consider that the summing up was overall fair.

67. We therefore do not consider this ground arguable, and again it faces significant time limits difficulties.

Ground 6: The fresh evidence of the applicant's disabilities was relevant to the issues the jury had to consider and indicates procedural unfairness

68. Dr Gerry QC argued that the jury should have received evidence relating to the applicant's cognitive disabilities, as these would have affected his ability to plan a common purpose or be complicit with others.

69. Dr Marriott's evidence suggests that the applicant's low IQ, ADHD autism, suggestibility and compliance would have impacted significantly on his ability to foresee the risk of an offence happening. However, these cognitive difficulties are not at a level that would have afforded the applicant a defence to the charges against him. We agree with the prosecution's interpretation of the reports that they do not suggest that the applicant was incapable of forming the requisite intent. Further, as explained above in the context of Ground 1, this was not a case that relied on foreseeability or events developing unexpectedly.

70. In terms of procedural fairness, the applicant's grounds argued that knowledge of the applicant's conditions would have allowed for a more relaxed court environment and a lower likelihood that the trial judge would treat his evidence as "anecdotal".

71. While Dr Marriott's evidence is that the applicant may have masked some of his difficulties, neither his legal team who had known him for some time, nor his mother, identified any concerns about his ability to follow proceedings or about him giving evidence or, nor did he raise any himself. He was able to give evidence and advance a complex cut-throat defence. For example, in cross-examination he advanced his case by responding to the prosecution's suggestions about the rap lyrics, explained how he had used Koshin's phone and responded to the case put on behalf of Daud (see pages 31D, 60G-61B, 85D-F and 95H-96C of the summing up). The judge referred to the "anecdotal" details of his account in evidence. However, this was not a general comment about the applicant's demeanour but an observation that he, and his co-defendants, had provided many more details in evidence at trial than when questioned by the police.

72. We therefore do not consider this ground arguable, even if Dr Marriott's evidence were admitted.

Conclusion

73. For these reasons we are satisfied, despite the detailed submissions of Dr Gerry QC, that none of the grounds of appeal are arguable. It follows that no purpose would be served by our granting an extension of time, even if the applicant were able to overcome the difficulties he faces in that regard, because an appeal would have no prospect of success. This renewed application is therefore refused.