Neutral Citation Number: [2024] EWCA Crim 997

Case No: 2023000777B4
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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PETERBOROUGH
His Honour Judge Enright
Indictment No.T20227073

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/08/2024

Before:

LADY JUSTICE ANDREWS
MRS JUSTICE CUTTS
and
HER HONOUR JUDGE MUNRO KC
(sitting as a Judge of the Court of Appeal (Criminal Division))

- -

Between :

LEWIS HUTCHINSON — **Appellant**

- and –

THE KING — **Respondent**

- -
- -

Nathan Rasiah KC (instructed by **Jeremy Roberts & Co.**) for the **Appellant**
Duncan Atkinson KC (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. On 8 February 2023, the Appellant, Lewis Hutchinson, was found guilty of murder and conspiracy to rob following a trial in Peterborough Crown Court before HH Judge Enright and a jury. He was sentenced to life imprisonment for the murder. The minimum term was erroneously expressed as 31 years less 414 days served on remand. It should have been expressed as 29 years and 316 days: see *R v Sesay* [2024] EWCA Crim 483.

2. On 23 April 2024 the Full Court (Males LJ, McGowan J and the Recorder of Northampton, HH Judge Mayo) granted the Appellant leave to appeal against his conviction on the single ground that the Prosecution departed from "proper and established procedure" in calling an accomplice – and erstwhile co-defendant - Christopher Pycroft, as a prosecution witness. They directed that his renewed application for leave to appeal against sentence be determined by the Court hearing the appeal against conviction.

3. On 16 July 2024 we heard oral argument in both matters. At the end of the hearing we announced that the appeal would be dismissed and the renewed application refused (save for the purpose of correcting the irregular manner in which the minimum term of the life sentence was expressed) for reasons to be provided in a reserved judgment. We decided to reserve our judgment because the appeal against conviction raises issues of wider importance, and the failings by the prosecution in this case are a matter for serious concern. It is hoped that the guidance in this judgment will help to ensure that they are not repeated.

Factual background

4. Shortly after midnight on 13 April 2022, a drugs dealer named Mihai Dobre drove his car to what he believed to be a rendezvous in a residential area of Peterborough with a prospective customer who had rung his drugs line. His wife was in the passenger seat. When they arrived, Pycroft (whose mobile phone had been used to make the call) and the Appellant approached the car. Pycroft went to the driver's window and engaged him in conversation. The Appellant moved towards the rear of the vehicle and donned gloves, a mask and a hood. Sensing that something was amiss, Dobre started to drive away.

5. As he did so, the Appellant, who was armed with a loaded shotgun, fired it through the rear driver's side window, hitting Dobre in the back of the head. Dobre's wife heard the glass shatter and saw his head fall back towards the headrest. His foot was already on the accelerator and he tried to pull the handbrake off. The vehicle continued to move slowly along the street and rolled onto the footpath, coming to a stop some 150 yards away. Dobre lapsed into unconsciousness. His wife called for help, and a number of residents came out of their houses to give assistance. The police and an ambulance were called. Dobre died in hospital some hours later.

6. Part of the incident, though not the shooting, was captured on CCTV footage. As the Appellant and Pycroft ran off, witnesses overheard someone shout: "I can't believe you just did that" and "why did you shoot them?" The shotgun was taken from the scene. 999 calls made by a witness who lived locally, and who knew the Appellant well, placed him near the scene before and after the shooting carrying something which the witness believed to be a metal pole.

7. The prosecution adduced evidence from a firearms expert about where the person who fired the shot must have been standing when it was fired, namely, alongside the rear quarter of the car. He thought it was likely the gun had been held at about 4 feet 6 inches above the ground, pointing slightly downwards, and that it was fired through the rear window from the rear driver's side of the car, partly hitting the driver's headrest and otherwise hitting his head. Mr Dobre's head was turned slightly to the right when he was shot, consistent with his looking out of the driver's side window.

8. Following the killing, the Appellant initially evaded apprehension by the police. He persuaded his grandmother Diane Riley to collect him and take him to her home in Skegness so that he could "lie low". She and his aunt, both of whom subsequently pleaded guilty to attempting to pervert the course of justice, then attempted to dispose of his clothing. The Appellant was apprehended by the police at Ms Riley's address very soon afterwards and charged with murder, conspiracy to rob, and possession of a firearm with intent to commit an indictable offence. In interview he provided a prepared statement denying that he had a shotgun and denying the murder. He otherwise exercised his right to silence.

9. Pycroft was implicated in the incident because his mobile phone had been used to make the call to the drugs line. When he was initially arrested on 5 May 2022, Pycroft claimed that the Appellant had visited his address that evening to consume drugs, but that he had left and that Pycroft had fallen asleep. When he awoke the next morning he discovered that his mobile phone was missing.

10. Pycroft was not charged with murder and conspiracy to rob until around 3 months later, on 2 August 2022. By that time the Appellant's case had been joined with the indictment against Diane Riley. Both had entered not guilty pleas at the Plea and Trial Preparation Hearing ("PTPH") in July 2022, directions had been given, and a pre-trial review had been fixed for 12 December 2022 with the trial being listed to commence on 4 January 2023.

11. A PTPH was set in Pycroft's case for 22 August 2022. The prosecution sought joinder of the indictment with the case against the Appellant and Ms Riley. An indictment was prepared which charged Pycroft and the Appellant jointly with murder (count 1) and conspiracy to rob (count 2). Pycroft was arraigned on that indictment and pleaded not guilty to both counts. The indications given at that stage were that he was going to maintain his initial defence of alibi.

The statutory regime relating to "Assisting Offenders"

12. CPS Legal Guidance entitled "Assisting Offenders (Immunity, Undertakings and Agreements)", dated 2 August 2022 ("the Guidance") sets out how powers under sections 71 and 72 of the Serious Organised Crime and Police Act 2005 ("SOCPA") and certain sections of the Sentencing Act 2020 may be used by prosecutors to secure

intelligence or evidence from offenders to assist in the investigation or prosecution of indictable offences. Such offenders are referred to as "assisting offenders" and may receive:

i) Immunity from prosecution under s.71 of SOCPA;

ii) Restricted use undertakings under s.72 of SOCPA;

iii) Reduction in sentence under s.74 of the Sentencing Act (formerly s.75 of SOCPA);

iv) Review of sentence under s.388 of the Sentencing Act.

13. Section 71 of SOCPA provides, so far as relevant, as follows:

> "(1) If a specified prosecutor thinks that for the purposes of the investigation or prosecution of an indictable offence or an offence triable either way it is appropriate to offer any person immunity from prosecution for any offence, he may give the person a written notice under this subsection (an "immunity notice").
>
> (2) If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person … except in circumstances specified in the notice."

By s.71(4) the term "specified prosecutor" includes the Director of Public Prosecutions and a prosecutor designated by him or her.

14. The Guidance explains that s.71 empowers the grant of conditional immunity from prosecution, and states that it is only in the most exceptional cases that it will be appropriate to offer full immunity. The criteria to be considered in determining whether it is appropriate to grant immunity to a witness were set out by the Attorney General in a written answer to the House of Commons on 8 November 1981. These include whether, in the interests of justice, it is of more value to have a suspected person as a witness for the Crown rather than as a possible defendant; whether in the interests of public safety and security, the obtaining of information about the extent and nature of criminal activities is of greater importance than the possible conviction of an individual; and/or whether it is unlikely that any information could be obtained without an offer of immunity and whether it is also unlikely that any prosecution could be launched against the person to whom the immunity is offered.

15. The Guidance makes it clear that as a matter of policy, the Attorney General should be consulted no less than 14 days before an immunity notice is required unless there are exceptional reasons why the decision needs to be taken more quickly.

16. Although this is not stated explicitly, the language of s.71 and the manner in which the Guidance is expressed appear to envisage that an immunity notice would be considered only if the offender has not yet been charged with the offence or offences in respect of which immunity is sought. If the offender has already been charged, is willing to admit his guilt, and wishes to give assistance to the police or the prosecution in return for a

reduction in his sentence, then the more apposite regime appears to be the one under what is now s.74 of the Sentencing Act (formerly s.75 of SOCPA).

17. Section 74 provides, so far as relevant, as follows:

> (1) This section applies where the Crown Court is determining what sentence to pass in respect of an offence on an offender who (a) pleaded guilty to the offence; (b) was convicted in the Crown Court or was committed to the Crown Court for sentence and (c) pursuant to a written agreement made with a specified prosecutor has assisted or offered to assist (i) the investigator (ii) or the specified prosecutor or other prosecutor in relation to that or any other offence.
>
> (2) The court may take into account the extent and nature of the assistance given or offered."

18. The process leading to a s.74 agreement set out in the Guidance requires a provisional view to be taken by the prosecutor as to whether such an agreement would be acceptable in principle. It states that:

> "it is important to obtain details in relation to the information or evidence the potential assisting offender is willing and/or able to give before an agreement is made… the investigator will seek to obtain sufficient information to assist a specified prosecutor to decide if an agreement is suitable; this will either be through the offender's legal representatives or through direct contact with the offender."

19. After the provisional view has been obtained, law enforcement (usually the police) should carry out a "scoping interview" which should be audio and/or video recorded. This may be conducted under caution (and preferably should be). The Guidance goes on to state that where it is expected that any agreement would include the assisting offender giving evidence in court, an agreement to provide evidence should not be finalised until a process of "cleansing" (the admission by the offender of their criminality in full under caution) and full debriefing is completed.

20. In *R v Blackburn* [2007] EWCA Crim 2290; [2008] 2 Cr App R(S) 5 the Court of Appeal (Criminal Division) explained at [22] how "pragmatic" decisions which may be unpalatable because they benefit "assisting offenders" may be justified in the public interest:

> "There never has been, and never will be, much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed or given evidence against those who participated in the same or linked crimes… However, like the process which provides for a reduced sentence following a guilty plea, this is a longstanding and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice. The solitary incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute, have accepted

> that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals, in particular, should be caught and prosecuted to conviction."

Events leading up to Pycroft giving evidence at the Appellant's trial

21. On 13 September 2022, Pycroft's solicitors sent an email to the Crown Prosecution Service ("CPS"), headed "Strictly without prejudice", inquiring whether if their client were to plead guilty to count 2 (the conspiracy to rob) and was willing to give evidence against the Appellant in any murder trial, the Crown would consider not proceeding with the murder count against him.

22. After an initial holding response, the CPS sent a substantive reply to Pycroft's solicitors on 13 October 2022 saying that they were "interested in pursuing this avenue" but that before they could determine how to proceed, they required more information on the scope of the evidence that Pycroft was prepared to provide, "so that we can establish under which limb of the assisting offender legislation would apply" [sic]. It was confirmed that the information was only required for that purpose, and any response would not be used in the proceedings. A statement was taken from Pycroft by his solicitors and provided to the CPS by email on 1 November 2022. Receipt was acknowledged on the same day.

23. On 9 November 2022, the Crown emailed the Court chasing the service of Defence Statements, which had been due to be served on 28 October, copying Pycroft's solicitors in to the email. On 10 November 2022, the Appellant's case was listed for hearing in respect of directions regarding joinder with the indictment against Pycroft. On that occasion Ms Riley pleaded guilty to the charge against her.

24. On 15 November 2022 the CPS sent an email to Pycroft's solicitors which in relevant terms stated as follows:

> "the Deputy Chief Crown Prosecutor has asked me to share the below link with you: https:/cpsgovuk.sharepoint.com/prosecution-guidance/Pages/Assisting-Offenders-(Immunities-Undertakings-and Agreements).aspx.
>
> He said that should you wish to discuss the process with him, he is happy to do so in my presence."

25. On 17 November 2022 the police conducted a scoping interview with Pycroft. Pycroft gave a more detailed account of events that led to the fatal shooting, including that he had tried to give Mr Dobre a fake £20 note through the window, that Mr Dobre said "naah, naah" and raised his hands, that Mr Dobre then went to pull away, and then "bam" the gun went off.

26. On 21 November 2022, the Prosecution entered into an agreement with Pycroft pursuant to s.74 of the Sentencing Act. It was signed by the Deputy Chief Crown Prosecutor. The agreement stated that:

> "Christopher Pycroft undertakes during the cleansing and de-briefing process which will be audio and video recorded to fully admit and to

> give a truthful account of his own involvement in the above matters currently under investigation and outline his involvement in the murder of Mihai Dobre.
>
> Christopher Pycroft will plead guilty to or admit and ask for the court to take into consideration when sentencing such of the offences he has admitted as will be determined by the prosecution after the conclusion of these proceedings.
>
> This written agreement may only be relied upon for the purposes of determining a sentence if CP pleads guilty to the offence of conspiracy to commit a robbery such as he has admitted and such as will be determined by the prosecutor after the conclusion of the de-briefing process."

27. Contrary to the Guidance, the s.74 agreement was finalised before the cleansing and debriefing process was complete. Further interviews were conducted by the police with Pycroft on 22 and 23 November 2022, which concluded with his signing a witness statement under s.9 of the Criminal Justice Act 1967 on 23 November. That statement was uploaded to the Digital Case System on 5 December 2022 (approximately a month before the trial was due to commence) as part of the prosecution's case against the Appellant.

28. In it, Pycroft alleged that the Appellant came round to his house on a regular basis to smoke drugs. The Appellant had come to his house on the evening before the murder and they had consumed vodka and crack cocaine together. When they ran out of drugs it was decided that they would rob a drugs dealer. The County line for which Mr Dobre worked, known as "the Turks", was selected. The Appellant then said he would get a "tool". He went away for around half an hour and came back with a shotgun. Pycroft's girlfriend used his phone to contact the drugs line to order the drugs. The Appellant then discussed with Pycroft how they would rob the driver. Pycroft was to go to the driver's window and ask for the drugs. The Appellant would then come round to the window from behind and threaten the driver with the gun. In the event, things did not go according to plan. The driver became suspicious when Pycroft handed him the fake £20 note, and went to pull away. Then there was a loud bang and the driver's side window shattered. Pycroft saw the Appellant running away and ran away too. Pycroft screamed "why did you do that?" but the Appellant made no response.

29. Even on Pycroft's version of events, which included a description of his taking evasive action when the Appellant was "waving the gun around" inside Pycroft's house before they embarked on their plan (suggesting that he knew or believed the gun was loaded), there was a strong case of manslaughter against him. Indeed, there was a case to answer that he was guilty of murder as an accessory. He had already been charged with murder. However, he had only indicated a willingness to plead guilty to the less serious offence of conspiracy to rob. The full extent of his criminality had not been addressed in the s.74 agreement; it would appear that the question whether he was willing to plead guilty to manslaughter was never canvassed. The question which the prosecution left open was whether it continued to be in the public interest to pursue the murder charge against him. At that stage they obviously thought that it did.

30. On 7 December 2022 Pycroft's case was listed for mention; Pycroft was re-arraigned and pleaded guilty to the charge of conspiracy to rob. The Appellant's legal team were not informed about this, and the Appellant was not produced. On that occasion, according to a sentencing note prepared on behalf of the prosecution, the prosecution indicated that it would not try Pycroft for the murder at the trial of the Appellant in January 2023 (even though it appears that he was still jointly named on the murder count on the indictment).

31. The judge at that hearing, HH Judge Bishop, noted that it was the prosecution's intention to call Pycroft as a witness in the trial against the Appellant. He directed that disclosure be made of the s.74 agreement, and noted that further directions would be required once disclosure was made. Regrettably, the order for disclosure of the s.74 agreement was not complied with, and therefore the question of what further directions should be given was not considered by the court before the trial.

32. By the time of the final case management hearing in the Appellant's case on 23 December 2022, his defence statement had still not been served. It was noted on the court file that the Appellant accepted presence at the scene and unlawful killing; the issue would be whether he had an intention to kill or cause serious injury. Consistently with that indication, in his defence statement, served on 30 December 2022, the Appellant accepted unlawful killing but denied Pycroft's version of events. He said there was no conspiracy to rob a dealer. The shotgun was taken to the scene by Pycroft and given to the Appellant to hold. It went off accidentally. He had not intended to seriously injure or kill anyone. It was Pycroft who removed the firearm from the scene after the shooting.

33. The Appellant's plea of guilty to the alternative count of manslaughter was before the jury at the trial. In his written basis of plea, he stated that "he accepts causing Mr Dobre's death by unlawfully being in possession of a shotgun in circumstances where there was a risk of harm."

34. On 5 January 2023 the CPS wrote to the Appellant's solicitors stating that "on the basis of the defence statement that you have served, we are satisfied that to the best of our knowledge and belief there is no further prosecution material requiring disclosure to you at this stage." This was confirmed in an email on 9 January. Dissatisfied by this, on 10 January 2023 the Appellant's solicitors served an application for prosecution disclosure pursuant to section 8 of the Criminal Procedure and Investigation Act 1996.

35. The trial began on 11 January 2023, though there were a number of preliminary arguments before the jury was empanelled. Between 10 and 23 January 2023 the prosecution disclosed Pycroft's scoping, debriefing and cleansing interviews; the record of his previous convictions; the schedule of offences to be taken into consideration; correspondence between the CPS and Pycroft's solicitors, and other relevant material held by Pycroft's solicitors. The Appellant's defence team were also permitted to inspect the s.74 agreement. These steps should have been taken much sooner, irrespective of whether there was a Court order. Disobedience to that order increased the seriousness of the CPS's default, but there is nothing to indicate that this was deliberate.

36. On 18 January 2023, the Appellant's solicitors asked the CPS whether Pycroft had waived privilege, and what Pycroft had been told about his position in relation to the

charges of murder and/or manslaughter in the event he gave evidence. On Friday 20 January 2023, the defence sent an email to the trial judge stating that "we await disclosure as to the extent of the quid pro quo for Mr Pycroft if he gives evidence". They drew attention to guidance in Archbold as to the correct procedure to be followed, and asked if they could air the matter in court.

37. Pycroft, who had been remanded in custody, was due to give evidence the following Monday, 23 January 2023. He was produced from prison that morning; his account of events had already been opened to the jury. At 09.06, the prosecution sent an email responding to the defence inquiries of 18 January. It said that Pycroft's solicitor was double checking the position on any waiver of privilege and would be present in court that morning. As regards the quid pro quo, the email attached a complete copy of all contact between the CPS and Pycroft's solicitors and continued: "[a]s to the debriefing officers we are told that 'he was told if he gave evidence the issue of his involvement in the murder would be considered'."

38. This prompted another urgent email from the defence to the Court complaining of the prosecution's failure to follow proper procedure, and giving notice that the defence might apply to stay the indictment as an abuse of process. Reference was made to the case of *R v Pipe* (1967) 51 Cr App R 17, in which the Court of Appeal (Criminal Division) approved the practice to be followed when the Crown proposed to call an accomplice as a witness. Lord Parker CJ said at page 21:

> "… in the judgment of this court, it is one thing to call for the prosecution an accomplice, a witness whose evidence is suspect, and about whom the jury must be warned in the recognised way. *It is quite another to call a man who is not only an accomplice, but is an accomplice against whom proceedings have been brought which have not been concluded."*

The Court accepted that an accomplice falling into the latter category was a competent witness, but stated that:

> "it was the established practice (a) to omit him from the indictment or (b) to take his plea of guilty on arraignment, or *before calling him* either (c) to offer no evidence and to permit his acquittal or (d) to enter a nolle prosequi." [Emphases added].

39. At the hearing on 23 January 2023, the defence raised with the judge its objections to Pycroft being called whilst he still faced a joint charge of murder. The prosecution initially declined to review their position, maintaining that the procedure they had adopted was appropriate. Leading counsel then instructed on behalf of the prosecution told the judge that there was and remained sufficient evidence to prosecute Pycroft for murder, but that the public interest in prosecuting him would be reviewed following the Appellant's trial, in the light of the evidence that he provided. On hearing this, the judge made it clear that if matters remained as they stood, he would consider using his power to exclude Pycroft's evidence pursuant to section 78 of the Police and Criminal Evidence Act 1984 ("PACE"). He adjourned the trial to enable the prosecution to consider their position further.

40. Prosecution counsel subsequently informed the judge that a decision had been made to offer no evidence against Pycroft on the charge of murder. The CPS also formally undertook not to bring proceedings against him for manslaughter. Following this, the court entered a not guilty verdict in relation to the charge of murder against Pycroft. That meant that the practice endorsed in *Pipe* had finally been followed. No application was made by the defence at that juncture to exclude Pycroft's evidence under s.78 of PACE or to stay the proceedings as an abuse of process. Pycroft was called to give evidence the following day. That evidence was in accordance with the statement he had provided to the prosecution.

41. The judge devoted much of his short summing-up to directing the jury as to the potential unreliability of Pycroft's evidence. He reminded them that from the moment he was recruited as a Crown witness and when he made his witness statement, until after the trial began, Pycroft was uncertain as to whether the Crown would prosecute him and try him for murder or manslaughter, and that he had an incentive to please those who would make that decision. He also directed them that Pycroft had an incentive to tailor his evidence, consciously or unconsciously, because of the expectation of a substantial reduction in his sentence. They should approach his evidence with caution, and put it on one side if he may have tailored his evidence to improve his own position or to falsely implicate the Appellant.

42. The jury returned a unanimous verdict of guilty on the charge of murder, and a 10-2 majority verdict of guilty in respect of the conspiracy to rob.

The appeal against conviction

43. On behalf of the Appellant, Mr Nathan Rasiah KC submitted that there was no place for granting immunity from prosecution "by a nod and a wink", but in essence that was what happened in the present case, and it had caused such unfairness to the Appellant's defence as to render his conviction unsafe. The processes introduced by SOCPA and the Code for Crown Prosecutors ("the Code") were designed to ensure transparency and accountability. Here there was a conflation of what should have been entirely separate considerations, namely, (a) whether Pycroft's offer to plead guilty to a lesser offence should be accepted, and (b) whether, in return for providing assistance to the prosecution, he should be given a reduction in sentence for the criminal offence(s) to which he pleaded guilty and agreed should be taken into consideration.

44. The Code sets out the general principles that Crown Prosecutors should follow when they make decisions on cases, including whether to start or continue with a prosecution. The "Full Code Test" requires prosecutors to consider (i) whether there is sufficient evidence to secure a conviction for the offence and (ii) if so, whether a prosecution is required in the public interest. Mr Rasiah submitted that whether a suspect can provide evidence to assist in the prosecution of another is not a relevant public interest factor identified in paragraphs 4.14 (a) to (g) of the Code, nor in any other relevant policy document. The guidance in the Code makes it clear that particular care must be exercised when considering pleas which would enable a defendant to avoid the imposition of a mandatory minimum sentence. Moreover, the prosecution should ensure that where possible, the views of the victim or the victim's family are taken into account when it is deciding whether it is in the public interest to accept the plea. That was not done here, though Mr Dobre's wife was a witness and available to be consulted at the relevant time.

45. Mr Rasiah complained that taking a statement from Pycroft whilst he was still under the shadow of prosecution for murder meant that he had a powerful incentive to give an account implicating the Appellant and exonerating himself, and made his evidence inherently unreliable. The question whether his proposed guilty plea to conspiracy to rob was acceptable should have been considered first, and without reference to any evidence he could give against the Appellant. If his proposed plea was found to be acceptable, the police could then proceed to interview him and take a statement from him.

46. In any event, even if that submission were rejected, Mr Rasiah submitted that Pycroft's evidence developed in materially prejudicial respects between the proof he gave to his solicitors at the start of the process, and his account to the police in the scoping interview. He said that Pycroft's original proof was not inconsistent with the defence of accidental discharge, but the further detail about the proffering of the forged £20 note and Mr Dobre's reaction to it and his attempt to drive away provided a reason for the Appellant to shoot him intentionally.

47. Mr Rasiah relied on *R v Pipe* (above), and *R v Turner* (1975) 61 Cr App R 67 in support of the proposition that an accomplice should not be called to give evidence on behalf of the Crown unless they have pleaded guilty to <u>all</u> the charges they face on the indictment, or, he submitted, entered acceptable pleas that properly reflected the seriousness of their alleged offending. The latter point has echoes of an unsuccessful submission that was made on appeal in one of the authorities in which the statutory regime for "assisting offenders" introduced by SOCPA was considered by this Court, *R v Daniels and others* [2010] EWCA Crim 2740, [2011] 1 Cr. App. R. 18 (discussed in more detail in paragraphs 73 to 76 below).

48. *Turner* was decided before SOCPA formalised the processes for granting immunity from prosecution or agreeing to a reduction in sentence in return for giving assistance to the prosecution. The accomplice to a series of armed robberies had been granted immunity from prosecution, and the Crown called him as a witness. Lawton LJ was highly critical of the decision to grant the witness immunity, but approved the approach in *Pipe*. The mere fact that a witness can benefit from giving evidence does not mean that calling him is "wholly irregular," but the trial judge has a discretion to exclude the evidence where the inducement is very powerful. He said that in doing so, the judge must take into consideration all factors, including the public interest:

> "It is in the interests of the public that criminals should be brought to justice; and the more serious the crimes the greater is the need for justice to be done. Employing Queen's evidence to accomplish this end is distasteful and has been distasteful for at least 300 years to judges, lawyers and members of the public."

49. In the present case, the prosecution's decision to postpone deciding what to do about the murder charge until after Pycroft had given evidence at the Appellant's trial was antithetic to *Pipe*, *Turner* and the line of authorities which has followed them. Mr Rasiah submitted the incentive here was so strong that Pycroft's evidence was inherently unreliable and could not fairly be admitted, even though the serious charges hanging over him were dropped at the last minute to comply with the requirements in *Pipe*. He acknowledged that in hindsight it was regrettable that he had not made an application to exclude Pycroft's evidence after the procedural irregularity had been

rectified, but said that this was understandable in the circumstances, including the flurry of late disclosure and the pressure to get on with the trial, and should make no difference to the outcome. There would have been no unfairness to the prosecution in not allowing Pycroft's evidence to be admitted as part of the Crown's case, and the prejudice to the Appellant was not remedied by the trial process despite the directions given to the jury.

50. On behalf of the Respondent Mr Duncan Atkinson KC, who was not trial counsel, realistically accepted that a catalogue of errors was made by the prosecution for which there was no excuse. However, he submitted that the procedural irregularities were put right before Pycroft came to give his evidence, which *Pipe* and *Turner* made clear is the critical time. Pycroft's evidence was admissible, the jury knew all about the circumstances in which he came to give it, the judge's directions about it were unimpeachable, and the conviction was safe. Mr Atkinson described the s.74 Agreement with Pycroft as an orthodox agreement of its type. It contained no promise, express or veiled, that Pycroft would not be prosecuted for murder; rather, it reflected the court's discretion to take account of his assistance when sentencing him for the offence to which he had agreed to and did plead guilty, i.e. conspiracy to rob, and any other offences he asked to be taken into consideration. Insofar as that provided an incentive to Pycroft, the judge drew it to the jury's attention and gave them an appropriate direction about it.

51. The s.74 agreement did leave open the possibility of charges remaining outstanding against Pycroft when he gave evidence, and if that situation had not been addressed, that would have been an error. Mr Atkinson frankly accepted that an assessment should have been made much sooner as to whether the public interest was served in continuing to prosecute Pycroft for murder, and that in that context, express consideration should have been given to the alternative of manslaughter. However, the failure to resolve the situation was spotted and cured before Pycroft took the stand. Mr Atkinson told us on instructions that the decision to offer no evidence against him and to give the undertaking with regard to manslaughter was taken in accordance with the Code. He accepted that the decision might be open to criticism, but it did not affect the fairness of Pycroft's evidence being admitted.

52. Mr Atkinson described the failure to comply with the Crown's disclosure obligations as "deeply regrettable", but he pointed out that this was also cured by 23 January 2023, and that by the time he was cross-examined the defence had all the material necessary to attack Pycroft's credibility.

53. Mr Atkinson took issue with the proposition that the prosecution had to wait until after all the charges against Pycroft were discontinued or acceptable guilty pleas entered (or intimated) before taking a witness statement from him. He submitted that it would be wholly unrealistic to expect the prosecution to decide to call a person as a witness at trial without knowing what he was going to say, and a statement would have to be taken before there could be any determination of whether the public interest justified acceptance of a plea or the offering of no evidence against the proposed witness in the manner suggested in *Pipe*. If circumstances arose in which the s.9 statement might potentially be introduced in evidence – e.g. if the witness turned hostile – the trial judge would have a discretion, and all the circumstances in which the statement was taken could be considered at that juncture.

54. Finally, Mr Atkinson submitted that there was a strong evidential basis for the jury, properly directed (as it was accepted they were) to conclude that the firing of the gun was not accidental but deliberate. Whilst Pycroft's evidence was a facet of that conclusion, the Jury was properly directed as to the care to be taken in that regard, and the material relevant to their assessment of his credibility was properly before them.

Discussion

55. Whether they give evidence for the prosecution or in their own defence, an accomplice will always have an incentive to lie, to minimise their own involvement, and to blame a co-accused, and the jury must be warned about that. A proper warning given to the jury of the dangers inherent in the accomplice giving evidence in such circumstances and the need to take them into account in their assessment of that evidence will usually be sufficient to meet those dangers. However, as was expressly recognised in *Pipe*, a proposed prosecution witness who potentially stands to gain by the prospect of the prosecution abandoning serious criminal charges against him, provided that he helps them to secure a conviction, has a much more powerful incentive to say whatever is necessary to bring about the desired result. That incentive will only cease to exist if that situation is resolved by the time the witness is called to give evidence. The practice which was endorsed in *Pipe* and *Turner* provides an important additional safeguard for the defendant against the heightened danger of false or tailored evidence which would otherwise arise in that situation. Without it, the trial judge may well be justified in taking the view that the prejudice to the defendant would be too strong to allow such a witness to be called.

56. This heightened danger does not arise, and therefore the established practice to which Lord Parker CJ referred in *Pipe* does not apply, if the witness is not an accomplice and the charges left hanging over them concern an unrelated offence, as in *R v Chan Wai-Keung* [1994] 2 Cr App R 194. In that situation, the incentive is of a different nature, namely, a possible reduction in sentence for the unrelated offence in return for the assistance given to the prosecution in the case against the defendant. Nowadays s.74 provides the means by which any such deal with the prosecution can be formalised. There would generally be no unfairness in calling such a person as a witness, so long as the jury are told of that incentive and given appropriate directions as to the caution with which they should approach the witness's evidence because of it.

57. The same applies in principle to an erstwhile co-defendant who has entered into a s.74 agreement, and whose position in relation to all related offences has been resolved in the manner envisaged in *Pipe*: see *R v Daniels* (above).

58. The practice endorsed in *Pipe* and *Turner* is concerned with addressing the mischief caused by calling as a prosecution witness someone who still faces serious criminal charges arising out of the same (or closely related) events. The legitimate concerns raised by that scenario relate to the reliability of the evidence given at trial under oath or affirmation, not the reliability of a statement which the jury would not normally see. There is no jurisprudential basis for the suggestion that the prosecution must ensure that the prospective witness no longer has the prospect of a (relevant) conviction hanging over his head before a witness statement is taken from him.

59. The process which was started by the letter from Pycroft's solicitors required consideration by the prosecution of two separate matters, namely, (i) whether a plea to

something less than murder was acceptable, and (ii) whether to call Pycroft as a witness. Although these were separate issues, there were common factors which were relevant to both, and it was appropriate to consider both matters concurrently before making a decision on either.

60. The suggestion that in a case such as this, the question of the acceptability of a proposed guilty plea to a lesser offence should be dealt with in an evidential vacuum and divorced from the consideration of the accomplice's offer to provide information or evidence to the prosecution, is both impractical and unrealistic. It raises the potential scenario of the prosecution accepting a guilty plea to a lesser offence on the basis of the information currently available, only to discover that by reason of what they say in the course of the scoping interview or the cleansing and debriefing process, the assisting offender is in fact guilty of the more serious offence. The prosecution cannot be expected to tie its hands in this way.

61. By contrast, if in the course of the formal process the assisting offender gives an innocent explanation for their own conduct which the prosecution decides it cannot rebut, e.g. if it accepts that it is a true account, the prosecution would be justified in deciding to discontinue the case against them on one or more of the counts on the indictment. But in that scenario the decision would be more likely to be prompted by a view that the prosecution could no longer satisfy the evidential limb of the Full Code Test rather than by considerations of the public interest.

62. As was observed in *R v Blackburn* (above) at [27], and reiterated in *Daniels* at [30] when considering the statutory regime in respect of "assisting offenders" introduced by ss 71-75 of SOCPA:

> "the essential feature of the new statutory framework is that the offender must publicly admit the full extent of his own criminality and agree to participate in a formalised process."

The regime therefore envisages that by the time that a s.74 agreement is concluded, there should be no loose ends in the form of an unresolved criminal charge arising from the same facts and matters as the offender will be testifying about.

63. The assessment of whether it would be desirable to call an accomplice to give evidence on behalf of the prosecution cannot be made without knowing what they will say, and considering the value of that evidence in the context of the other evidence in the case. In the case of a co-defendant it would usually also entail an assessment of what would happen if the prosecution let matters take their normal course and waited to see if he would give that evidence at trial.

64. An offer to give evidence for the prosecution is unlikely to be made by an offender without seeking something in return. Generally, that will be a reduction in sentence. However, in this case Pycroft's legal team had made it plain that they wanted the prosecution to drop the murder charge against him. If the assisting offender indicates that they are only willing to plead guilty to a lesser offence, and maintains that position, that squarely raises the question whether the prosecution should offer no evidence on the more serious charge(s) or decide not to call them. The prosecution then have to make that stark choice; but they must do so on a principled basis, in accordance with the Code.

65. When a prosecutor is considering whether to accept a defendant's offer to plead guilty to a lesser offence, the primary consideration is whether the plea offered is commensurate to the seriousness of the alleged offending. Of course, it is not the only consideration. Whilst the Code does not specifically deal with the scenario of a co-defendant who wishes to offer evidence to the prosecution, Mr Atkinson pointed out that the Guidance in relation to immunity under s.71 of SOCPA and s.74 Agreements does indicate that the public interest in the prosecution of and conviction of offenders for the commission of serious criminal offences is an important factor when deciding whether to prosecute an accomplice who is a prospective witness.

66. It is understandable how this may play a part in the assessment when the assisting offender is facing a less serious charge than the person whose conviction the prosecution wishes him to help to secure. But where both the assisting offender and the other defendant are facing a murder charge, and there is sufficient evidence against each of them to pass the threshold for a prosecution, the public interest would generally require that both be prosecuted. If the evidential test is met, the circumstances in which it would ever be in the public interest not to prosecute someone for murder are extremely rare.

67. The problem which arose in the present case occurred because the prosecution wrongly believed it could defer taking a decision on the acceptability of Pycroft's guilty plea to the lesser charge of conspiracy to rob until after it knew whether Pycroft's evidence had helped to secure the Appellant's conviction for murder. The clear message being conveyed to Pycroft was that if he gave evidence against the Appellant, there was a very good chance that the prosecution would drop the murder charge against him. Yet the view taken by the prosecution following the completion of the formal s.74 process with Pycroft was that he still had a case to answer for murder, and he remained indicted for that offence.

68. Mr Rasiah drew our attention to the following passage in the Guidance:

> "As a general rule, where sufficient evidence exists to provide a realistic prospect of conviction, the public interest will normally require that an accomplice should be prosecuted, *whether or not he is to be called as a witness.* Therefore a written agreement under section 74 of the Sentencing Act… should be the first option considered by investigators and prosecutors." [Emphasis supplied.]

That passage is capable of being misinterpreted. In context, it attempts to explain that in a situation where the prosecutor envisages calling an accomplice as a witness, the preferable course is to charge him and then wait to see whether he will admit his own criminality in return for an agreement that he will get a reduced sentence if he gives evidence against his co-defendant(s). In that way the accomplice will not escape conviction and punishment for his crimes, even if that punishment may be less than he deserves. It probably was not intended to suggest that (contrary to *Pipe*) an accomplice should continue to face prosecution for the same offences as his co-defendant even though he is due to give evidence against him pursuant to a s.74 agreement. However it could be read in that way, which might provide some explanation for the approach which the prosecution took.

69. It was wholly impermissible for the prosecution to adopt the "wait and see" position that it adopted in the present case. It would have been unfair to the Appellant for them to have called Pycroft as a witness whilst he still faced a charge of murder (and indeed remained jointly named in the murder count on the indictment against the Appellant). The Judge's intimation that if that situation persisted, he would use his powers under s.78 of PACE to exclude Pycroft's evidence accorded with the observations made in *Turner*. But the decision to offer no evidence against Pycroft and his subsequent acquittal, coupled with the undertaking in respect of manslaughter, meant that that situation was addressed before it was too late.

70. In principle, *all* the criminal charges that Pycroft was facing or might face in respect of the events leading to the death of Mr Dobre should have been addressed by the prosecution and a decision taken as to how they were to be resolved at or around the time when the s.74 agreement was entered into, or at the latest, when the s.9 witness statement was signed. There may be exceptional circumstances in which that cannot happen, in which case, the decision about any criminal charges that remain outstanding should be taken as soon as possible, and not left until trial.

71. Had the matter been thought through more carefully once the scoping interview had been carried out, the prosecution might well have indicated that they would only accept a plea of guilty to manslaughter as well as the proffered plea to the conspiracy to rob. Alternatively, they may have decided that the public interest was best served in continuing to prosecute Pycroft for murder and not to call him, given that (particularly in the light of the forensic evidence) the Appellant had a case to answer without his evidence, and it was almost inconceivable that Pycroft would not have given evidence in his own defence which implicated the Appellant. What they could not do was hedge their bets.

72. The upshot of not taking the decision about the murder charge when it should have been taken, was that it then had to be taken under extreme pressure of time. On the face of it, the decision to discontinue the prosecution (and to give the undertaking) appears more pragmatic than principled. Pycroft can consider himself extremely fortunate that he ended up in the position that he did. However, that good fortune did not provide a good reason for excluding his evidence. The jury were made well aware of the incentives he had to lie. The defence eventually had full disclosure and were in a position to cross-examine Pycroft on any material changes in his account over time.

73. There are a number of similarities between this case and that of *Daniels* (above) which also concerned a murder in the course of a conspiracy to rob. The prosecution called as a witness an accomplice, Stewart, who had entered into an agreement under s.75 of SOCPA, the precursor to s.74 of the Sentencing Act. Stewart had been charged with murder. He had denied any involvement and made limited comment in interview. He then initiated contact with the police with a view to negotiating such an agreement. In the course of his scoping interview, but very late in the day, shortly before the statutory agreement was signed, he implicated Daniels in the murder. In the agreement, pursuant to which he agreed to give evidence in the murder trial against Daniels and the other defendants, Stewart agreed to plead guilty to the offences of conspiracy to rob the deceased and to manslaughter.

74. An application was made at trial on behalf of Daniels to stay the case for abuse of process or to exclude Stewart's evidence under s.78 of PACE. The principal complaint

was that there was no proper legal basis for Stewart's plea to manslaughter, since on his own account he was guilty of murder, and thus he did not accept his full criminal responsibility as envisaged by the statutory regime. The trial judge refused those applications on the basis that the appropriate safeguard lay in giving proper directions to the jury reminding them of Stewart's self-interest and any particular flaws or inconsistencies in his evidence.

75. On appeal, the Court of Appeal (Criminal Division) rejected the argument that Stewart's evidence was wrongly admitted, although they accepted that the plea of manslaughter was neither supported by Stewart's own account nor consistent with the way the Crown advanced its case of murder. Indeed they went so far as to state at [57]: "like the judge, we find it difficult to see a coherent legal basis for the plea". But as Richards LJ went on to explain in that paragraph:

> "There is, however, plainly room for pragmatism under the SOCPA regime as in relation to the corresponding processes at common law. It may well be that, in return for giving evidence against his co-defendants, Stewart got off very lightly. Indeed in sentencing him the judge observed: "You are lucky, in my view, not to have been convicted of murder and for that you have the fact that you entered into the agreement you did with the Prosecution to thank." Such a possibility is inherent in the SOCPA regime. It does not provide a good reason for excluding the evidence, though it does reinforce the need to ensure that the jury are properly directed on how to approach the evidence."

76. In that case, the agreement between the prosecution and Stewart meant that Stewart escaped a life sentence for murder, but it did not follow that the introduction of his evidence caused any doubt about the safety of Daniels' conviction, since the jury received appropriate warnings and directions about how to approach it. Stewart's evidence was far more critical to the prosecution case than Pycroft's; Pycroft could shed little or no light on what caused the Appellant to pull the trigger. Indeed, he asked the Appellant why he did it, as they both ran away from the scene. Pycroft's similar good fortune to Stewart's did not affect the fairness of the Appellant's trial, for essentially the same reasons.

77. In general, provided that all the circumstances in which the accomplice came to be called as a prosecution witness and what he stood to gain by doing so are fairly and frankly put before the jury and they are appropriately directed by the judge, the mischief will be adequately addressed. There may be cases where no directions to the jury could possibly suffice to cure the prejudice, but despite Mr Rasiah's submissions to the contrary, this was not one of them. Because of the directions given by the trial judge, the jury in this case knew that Pycroft had come forward to give his account at a time when there was no guarantee that he would not continue to be prosecuted for the murder, at which he was now prepared to admit he was present. They were able to assess for themselves his credibility and motivation.

78. There was also ample evidence on which a properly directed jury could be sure that the gun was fired intentionally even if they wholly discounted Pycroft's evidence. The Appellant went to the scene armed with a loaded shotgun, he disguised himself and wore gloves, the gun was fired in the direction of the head of the deceased through the

rear driver's window, and according to the forensic evidence it was raised and the Appellant must have been standing next to the rear quarter of the car when it was fired. He fled the scene taking the firearm with him, disposed of it afterwards and tried to get his grandmother to hide him from the police and dispose of the clothes he was wearing.

79. This conviction was undoubtedly safe. For all the above reasons, we dismissed the appeal against conviction.

The renewed application for leave to appeal against sentence

80. Mr Rasiah realistically accepted that because the murder involved the use of a firearm, and occurred in the course of an attempted robbery, there were two factors making the seriousness of that offence "particularly high" and giving rise to a starting point for the minimum term of 30 years. However, he submitted that the judge erred in his assessment of the aggravating factors and was wrong to move up from that figure to 33 years before discounting for mitigating features (primarily consisting of the lack of premeditation), leading to a sentence that was manifestly excessive.

81. Mr Rasiah contended that there was an element of double-counting in treating as an aggravating factor the fact that the offence was committed in the course of an attempted robbery. Somewhat more ambitiously, he submitted that the Appellant's state of intoxication through drink and drugs was already sufficiently reflected in the 30-year starting point and should not have been treated as an aggravating factor. A modest uplift for the fact that the offence was committed whilst on bail, and an appropriate discount for mitigation should have resulted in a minimum sentence of around 27 years before the time spent on remand was deducted.

82. We agree with the single judge that there is no merit in those grounds. The minimum term of the life sentence cannot be described as excessive, let alone manifestly so. The Appellant was on bail at the time of the offence, he was under the influence of drink and drugs, and in accordance with the principle of totality, the overall criminality of his conduct had to be reflected in the sentence that was passed for the most serious offence. There was no double-counting in elevating the minimum term from the starting point to reflect the fact that the murder occurred in the course of a pre-planned attempted robbery carried out with an accomplice. Where there are two factors, each of which would independently justify a starting point of 30 years, the offence is more serious than if only one of those factors was present. The other cannot be ignored.

83. As the single judge observed, mitigation was relatively limited, (primarily, even if not solely, amounting in substance to a lack of aggravation), and although the judge was not disposed to attach weight to the Appellant's bad record, he could have treated his previous offences as further aggravating factors. A minimum term of 31 years (before taking into account time spent on remand) was therefore comfortably within the appropriate range.

84. However, as we have said, the trial judge did fall into error in the manner in which the minimum sentence was pronounced. Accordingly leave to appeal against sentence was granted for the sole purpose of correcting the record so that the minimum term is properly recorded as one of 29 years and 316 days.

85. Save as aforesaid, the renewed application for leave to appeal against sentence was refused.