



Neutral Citation Number: [2026] EWCA Crim 903

Case No: 202401838 B2; 202401847 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NOTTINGHAM CROWN COURT
HER HONOUR JUDGE SHANT KC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/07/2026

Before :

LORD JUSTICE FRASER
MRS JUSTICE CUTTS DBE
and
HIS HONOUR JUDGE PATRICK FIELD KC

Between :

REX
- and -
COURTNEY McLEARY
DAVID FRANCIS

Respondent

First Appellant
Second Appellant

Rossano Scamardella KC and Julia King (instructed by **Phillips Solicitors**)
for the **First Appellant**
Laurie-Anne Power KC and Rebecca Coleman (instructed by **The Johnson Partnership**)
for the **Second Appellant**
Andrew Vout KC and Katrina Wilson (instructed by **The Crown Prosecution Service**)
for the **Respondent**

Hearing date : Friday 12 June 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 15 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE FRASER :

1. These are both appeals by each of the two appellants against their convictions for murder. Leave to appeal was granted by the Full Court on 26 February 2026. We start by thanking all counsel for their careful and detailed written submissions, and also for their helpful oral advocacy on the hearing of both appeals. All of these submissions have been of extremely high quality and have greatly assisted the Court. We have also had not only Respondent's Notices in respect of both appeals, but a schedule of evidence in respect of the second appellant. This was ordered by the Full Court on the grant of leave to appeal. That document, which must have taken some time in preparation both by the Crown and also counsel for Francis, has been of considerable assistance too. We reserved judgment at the conclusion of the hearing of these appeals.
2. We shall refer to the first appellant Courtney McLeary as McLeary, and the second applicant David Francis as Francis. No disrespect is intended by the use of their surnames alone which is purely for convenience.
3. On the morning of 28 April 2023 Mr Davices Anderson, who was also known as Ricardo, died as a result of a single stab wound to the heart. He also had stab and other wounds in addition to the fatal one. This injury was suffered by him in a flat at High Cross Leys in Nottingham. It occurred in the early morning, towards the end of a late-night gathering at the flat occupied by McLeary and his partner Lisa Barlow. After being stabbed, Mr Anderson left the flat and made his way down the stairs from the flat to the ground floor, collapsing in the foyer area. There is CCTV footage of his final moments, as he did this and then fell to the floor. The Court has viewed that footage many times, as it is directly relevant to the way that Francis puts one of his grounds of appeal. We shall deal with that in the section of this judgment below that deals with the facts in detail.
4. After a trial in the Crown Court at Nottingham that involved other defendants facing charges other than murder, namely assisting an offender, on 20 April 2024 McLeary was unanimously convicted of murder by the jury. Francis was convicted of murder by a majority of 10-2. Three other defendants were also charged, not with murder, but with assisting an offender. Lisa Barlow pleaded guilty to this; Gregory Bailey and Danny O'Keefe were both convicted by the jury of this offence. We shall refer to these others only where necessary for these appeals, and when we do so, we shall similarly use only their surnames. The facts constituting their offending are not relevant to these appeals. On 29 April 2024 the trial judge, Her Honour Judge Shant KC, sentenced both McLeary and Francis to life imprisonment, with their minimum terms being 19 years for McLeary and 16½ years for Francis.

The facts

5. McLeary and Barlow are partners and at the time both lived together at the flat in High Cross Keys. The deceased was staying there for a period as he had nowhere else to stay. On the night of 27 April 2023 a number of people were invited to the flat to share dinner, that being prepared by McLeary and Barlow. One of these was the deceased; another was called Katrina Intrass. There were a number of people who came and left throughout the course of evening, and almost all of the occupants were

smoking crack cocaine and heroin at different times. At one point the deceased, McLeary and the deceased's girlfriend left the flat to obtain some more drugs, which they may or may not have purchased. In the taxi returning to the flat, the deceased is said to have produced a weapon, which in some of the police interviews is referred to either as a tomahawk, and in others as a hammer with a blade attached. There appears little doubt that it can sensibly be described as a weapon. This weapon was taken back into the flat by the deceased. People came and went throughout the evening and there were a large number of people overall involved in the gathering.

6. It was agreed evidence at the trial that during the course of the evening the deceased had displayed aggressive and violent behaviour, at times producing weapons. The agreed evidence was that in particular he made a number of threats to Barlow, being extremely aggressive towards her over a period of time. The party or gathering went on throughout the night. At some time in the morning, shortly before 8.00 am, violence broke out. Most of the other guests had left by this stage and there were very few present in the flat when this violence occurred. However, Katrina Intress remained, and so did Francis. Those who were there seemed to have stayed up all night. In the course of the violence flaring up in the sitting room in the flat, a knife was produced and the deceased was stabbed. The wound to his chest was the fatal blow.
7. The prosecution case was that although the deceased had been behaving aggressively at points during the evening, he had been calm for approximately fifteen minutes before he was stabbed. He had been sitting on a chair in the living room when suddenly and unexpectedly McLeary had attacked him, and stabbed him in the chest with a knife. The prosecution case was that McLeary was the principal because he inflicted the fatal stab wound. The case against Francis was that he was a secondary party. This was substantially based on the evidence of Katrina Intress. She was the only eye witness to what took place inside the flat in the lead up to, and at the time of, the fatal stabbing. Her evidence and how it was dealt with at trial forms McLeary's sole ground of appeal, and the first of Francis' three grounds.
8. Following the stabbing, Katrina Intress, McLeary, Francis and Barlow all left the flat. Katrina Intress left first, and rapidly. The deceased then left the flat a little later and he staggered as far as the foyer, which is part of the common parts of the flats. He removed his t-shirt, and was bleeding from his wound or wounds. The CCTV evidence to which we have referred shows him in some considerable distress. The footage shows, a few minutes after he has appeared and then collapsed in the foyer, McLeary and Barlow also appearing in the foyer. They step over him as he lay on the floor by the entrance; they do not interact with him in any way, and they then leave the building. Francis also then left the flat and entered the foyer. However, when he came across the deceased, he stayed with him, at one point holding his hand. Francis also activated the emergency fire alarm in that area of the common parts. In one of his interviews, Francis explained to the police that a family member of his had previously died from being stabbed and he was very concerned for the deceased. A passer by, Coby Bunyan, who was returning home from the gym saw what was going on and also stayed to help. The police and the paramedics were called by Mr Bunyan. Tragically, the wound that the deceased had suffered was a fatal one and he died shortly afterwards. Mr Bunyan told the police that the deceased had told him that he had been mugged or attacked by a group.

9. There was no dispute that McLeary had stabbed the deceased. The defence case for McLeary was that he was acting in self-defence, alternatively that what had occurred in the flat was an accident. The defence case for Francis was that he was not involved and had effectively been acting as a peacemaker when the deceased had been threatening others in the flat, in particular Barlow. Francis' case was that he was essentially uninvolved in the violence, and insofar as he had been involved in earlier interactions with the deceased, he had been trying to calm things down.
10. Although there was evidence, including CCTV evidence, of what happened in the immediate aftermath, there was limited evidence about what had happened in the flat itself inside the room in the critical moments.
11. Katrina Inness was a drug user and had a range of mental health issues, as well as a number of convictions. Initially she was very reluctant to speak to the police, although she was interviewed under caution and gave them an account of the evening. She had specifically said in that interview that she had not seen the stabbing. Later, on 23 October 2023 she signed a witness statement that gave another, much fuller, account. She said in that statement that she had witnessed the stabbing. She died on 31 October 2023 only a few days after this second statement had been given; the cause of her death was the acute toxic effects of class A drugs, which in places in the submissions made to us was described as a drugs overdose. By the time of the trial therefore, she had died and could not give evidence herself.
12. In her statement of 23 October 2023 she said, and we are going to quote extracts:

“Courtney McLeary used to be in a relationship with my mum when I was young and so he’s been like a stepdad to me all my life. I knew that Courtney had taken Ricardo under his wing and let him stay with him.

Ricardo was a typical 23 year old cheeky lad. He had his ups and downs and had his issues but he had always been alright with me.

I want to say now that everything in my police interview was true and the best memory of the incident that I gave....

I’m giving this account six months after this all happened but what I do want to say is that just before I left the flat I saw Courtney stab Ricardo.

I remember Courtney and Lisa were sat next to me on the settee at one side of the room and Ricardo was standing over in the corner on the opposite side of the room, nearest to the door to the living room.

He seemed like a little boy at that point – he had calmed down and he was quiet.

Fifteen minutes had passed since everything had calmed down. Ricardo wasn’t saying anything.

The next thing I know Courtney had launched himself across the room towards Ricardo. I didn’t even really know what was going [on]. I saw a knife was in Courtney’s right hand and I saw him swing towards Ricardo.

I remember seeing Ricardo’s eyes roll up into the back of his head. Courtney never even said anything. It all happened so quick.

I knew I had to leave straight away – I knew I didn’t want to be there.

Dave Francis was stood in the doorway of the living room and as I tried to get past him Francis tried to stop me by putting his arm out but I ducked under his arm, left the flat and went straight home. I didn’t see Ricardo again or speak to him as I left the flat. I just wanted to get away and didn’t look back.”

Grounds of Appeal

13. Katrina Intress was not available to give evidence in person at the trial because by the time of the trial she had sadly died. The trial judge allowed her evidence to be adduced by the prosecution under the admission of hearsay provisions of the Criminal Justice Act 2003. It is that admission of her evidence which forms the sole ground of appeal by McLeary, and the first of three grounds of appeal by Francis. The grounds are as follows
14. McLeary has one ground of appeal which is as follows:

Ground 1.
The Learned Judge should not have allowed the hearsay evidence of Katrina Intress to go before the jury.
15. Francis has three grounds of appeal. They are as follows:

Ground 1.
The Learned Judge should not have allowed the hearsay evidence of Katrina Intress to go before the jury.
Ground 2.
The Learned Judge should have withdrawn the case from the jury following a submission of no case to answer.
Ground 3.
During his closing speech, leading counsel for the prosecution invited the jury to rely on matters not advanced in evidence.
16. The first of Francis' three grounds is the same as the single ground of appeal by McLeary. They raise identical issues, and we shall determine those two grounds first and together. Indeed, it is necessary to do so because unless and until that ground of appeal has been determined, it is not possible properly to consider Francis' second ground, because the statement of Katrina Intress does contain some evidence which relates to Francis.
17. We should deal first with some background to Katrina Intress. There were a large number of agreed facts in relation to her which appear at O591 on the DCS system. There are 19 about her background and medical history and 18 about the chronology and the history of her providing her second written statement. There was considerable material which went to her credibility. She had previous convictions and was therefore what is called of bad character. That terminology is generally in use, and those who practice and sit in the criminal jurisdiction know what it means. However, it can be something of a blunt tool when describing someone who had the sort of life that Katrina Intress had endured. Her convictions were for drug offences and theft, and some of them were committed at a time that put her in breach of a suspended sentence order for other, earlier convictions of similar type.
18. Her childhood years were spent in care, and she had made allegations of sexual abuse against her during that time which were not proceeded with. She became addicted to drugs and alcohol and had a number of mental health issues to which we have referred and which it is not necessary to recite fully. It is the general experience of the criminal courts that those who suffer childhoods of this type will often go on to have very

difficult lives; describing it as “bad character” may not be fully accurate. We turn to the specifics of her statements, as well as her two differing accounts, both of which were given to the police. She also said certain things to other people about what had happened and what she had seen. In May 2023 she spoke to two different social workers. To one she said she knew who had stabbed the deceased, but could not say because she was frightened. To the second, she said that she had not seen the stabbing. Neither of these two social workers were prepared to give evidence at the trial and neither were called. She was hospitalised in the period between the two statements (that is, between April and October) and the agreed facts included a detailed narrative of what occurred during that period. She had described herself as in a dilemma, and the police tried to obtain a subsequent statement from her on more than one occasion and were rebuffed.

19. She had initially been arrested and interviewed under caution as a suspect in relation to the murder allegation. In her police interviews she had described Francis as a peacemaker who was attempting to break up the altercation between McLeary and the deceased. In her final written statement as we have explained, she said that Francis was attempting to stop her leaving the living room by putting his arm out as he was stood in the doorway.
20. The law permits the hearsay evidence of someone who is not available to be admitted through the provisions of section 116 of the Criminal Justice Act 2003, in particular for someone who has died under section 116(2)(a), as that is one of the conditions that must be satisfied. Other sections that are relevant are section 124 which states, in summary, at (2) and (3) that evidence which would have been admissible had the maker of the statement given evidence in person relevant to credibility is admissible, and with the court’s leave evidence can be given of matters relevant to credibility that could have been put in cross-examination, including evidence of a previous inconsistent statement.
21. Mr Scamardella KC for McLeary maintains that the court ought to consider reliability at the stage of considering whether to admit hearsay evidence of this type at all. In a helpful summary of the approach required, he cited *R v Riat* [2012] EWCA Crim 1509; [2013] Cr App R 2, in which the court stated that the statutory framework provided by the hearsay provisions of the Criminal Justice Act 2003 (“CJA 2003”), can usefully be considered in successive steps.
22. In *Riat*, the law in this area was comprehensively stated, drawing threads together from earlier cases including that of *Horncastle*. The case also provides practical guidance which is indeed set out in seven steps at [7]. That paragraph states:

“The statutory framework provided for hearsay evidence by the CJA 03 can usefully be considered in these successive steps.

 - i) Is there a specific statutory justification (or 'gateway') permitting the admission of hearsay evidence (section 116-118 CJA 2003) ?
 - ii) What material is there which can help to test or assess the hearsay (section 124 CJA 2003) ?
 - iii) Is there a specific 'interests of justice' test at the admissibility stage ?
 - iv) If there is no other justification or gateway, should the evidence nevertheless be considered for admission on the grounds that admission is, despite the difficulties, in the interests of justice (section 114(1)(d) CJA 2003) ?

v) Even if prima facie admissible, ought the evidence to be ruled inadmissible (section 78 PACE and/or section 126 CJA 2003) ?

vi) If the evidence is admitted, then should the case subsequently be stopped under section 125 CJA 2003?"

23. The judgment continues at [8]: "Although there is no rule to the effect that where the hearsay evidence is the "sole or decisive" evidence in the case it can never be admitted, the importance of the evidence to the case against the accused is central to these various decisions".
24. In terms of the criteria that should apply when assessing what outcome is demanded by the interests of justice, Mr Scamardella drew our attention to *R v Cole and Keet* [2007] EWCA Crim 1924 which as he put it, offers some help. In that case, the Court of Appeal suggested that the interests of justice test for the admissibility of hearsay evidence under section 114(1)(d), which appears in section 114(2), would be apt when considering the power to exclude such evidence under section 126, or section 78 of PACE.
25. The court must then have regard to a number of factors. These include how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case. Lord Phillips CJ made clear that section 126(2) preserved the power of the court to exclude evidence under section 78 of PACE 1984, and stated at [7]:

"It seems to us that this test is unlikely to produce a different result from that of 'the interests of justice' in section 114(1)(d). In either event the court can and must ensure that the requirements of a fair trial, as laid down by Article 6 of the European Convention of Human Rights ('ECHR'), are observed. Because the provisions of the 2003 Act leave the court free to comply with the requirements of Article 6 there is no question of the hearsay provisions of the Act being incompatible with the Convention...."

26. The law in this area has been recently restated in the case of *R v BOB* [2024] EWCA Crim 1494. That case was decided on 5 December 2024, and therefore after the convictions occurred in this case. However, the judgment makes clear that it does not involve any development of the law in this area, and that *Riat* remains the guiding authority (although it did reformulate the steps in *Riat* from six to seven at [31]; we do not consider that changes the substantive law). This therefore means there is no need for this court to consider the decision of the trial judge in this case in the light of any change in the law that occurred later in 2024; all the judgment of *BOB* does is re-state, in slightly different terms, the law as it was at the time. In *BOB*, Edis LJ (now VP CACD) together with Bright J and HHJ Morris, the Hon Recorder of Winchester, said at [6] and [7] that the test at section 124 dealing with credibility was necessary because the purpose of that section – and we quote from [7] of the judgment:

"....is to enable evidence which tends to undermine the reliability of the hearsay statement to be adduced before the jury to enable them to assess its reliability. This encompasses any evidence relevant to credibility (abrogating the common law rule as to the finality of answers in cross-examination on issues of credit only) and any other statement made by the maker of the statement which is inconsistent with it. If the existence of material undermining the credibility of the maker of the statement or a

previous inconsistent statement by that person were invariably a reason for excluding the statement section 124 would not be necessary.”

27. When the prosecution at trial made its application to admit the statement of Katrina Intress, this application was opposed by counsel both for McLeary and for Francis. There were detailed skeleton arguments lodged with the court for that application, and counsel for McLeary made it clear that although reliability of a witness is something ordinarily for the jury, for applications of this type both statute and case law required the judge to – as he put it – grapple with issues of reliability at the point of the application, and not leave them to the jury.
28. The judge gave a written ruling on the application. She set out the statutory provisions and quoted the relevant extracts from *Riat* which we have quoted above. She considered the different matters, and when she came to what material was available to test the evidence, she addressed both apparent reliability and also the practicality of the jury testing and assessing its reliability. She identified specific entries in the records that supported reliability of the second statement, including other statements that had been made by Katrina Intress about being present and withholding information from the police because she was afraid, that the statement was taken by a police officer and had the usual words at the beginning of the document making clear the warning about telling lies. The learned trial judge described, understandably, as “ample” the material available to test the credibility of this witness.
29. She observed that there was no specific “interest of justice test” in the statute that refers to this gateway. She did however consider that even if the evidence were admissible, the court would need to consider whether it ought to be excluded both under section 78 of PACE and/or section 126 CJA 2003.
30. She concluded in her ruling:

“In this case the evidence contained in the statement of [Katrina Intress] is important evidence and there are features that are capable of making it unreliable equally there are features that support her reliability. The prosecution have made the concession that they will not seek to adduce the reason of fear that she gave, for not disclosing in her interviews, matters she set out in her statement. This is an important concession which is extremely fair to the defendants. Additionally and importantly there is so much information available to the defence to deploy in order to test [Katrina Intress]’ reliability as to the contents of her statement, that admission of it would not in my judgment have such an adverse effect on the fairness of the proceedings that I should exclude it. For similar reasons this is not evidence that the court should exclude pursuant to Section 126 of the Criminal Justice Act 2003.”
31. Counsel for McLeary submits, relying upon the case of *R v Ibrahim* [2012] EWCA Crim 837, that the judge must assess the evidence at the admission stage, and not at close of the prosecution case. That is undoubtedly correct, as is the passage at [106] in that case that makes clear that it is a pre-condition to admitting it that the evidence must be potentially safely reliable before it can be admitted at all. That has to be done using all the available material.
32. It is also said that, and we quote from his written skeleton: “that the learned trial judge rendered this issue a ‘matter for the jury’ by acknowledging the very many profound

difficulties suffered by Miss Intress but still determining that the evidence was admissible. It is not enough for a trial judge to acknowledge the matters affecting the credibility of a key witness and then hand the issue over to a jury. It is submitted that where there is demonstrable, multi-faceted unreliability, the judge is duty-bound to refuse to admit the evidence.”

33. Mr Scamardella submits that the only safe conclusion the judge could have reached was that Miss Intress was an unreliable witness, such that the evidence ought not to have been admitted.
34. Other matters are also prayed in aid, such as the judge wrongly concluded that the evidence of another witness, McLeary’s daughter, supported Ms Intress’ evidence when in reality it did not, as well as reliance upon the difficulties caused by an inability to cross-examine her. It is said that the prosecution case was elevated and strengthened by the evidence of a dead witness, which was unfair and highly prejudicial.
35. It is also said that by introducing the evidence of Ms Intress, the attack on McLeary contained in the final of six interviews the police had with Mr Francis, based on what Francis had said in that interview about him, may have had a damaging impact on McLeary’s credibility and his case. It is said therefore the interview ought to have been excluded. Criticism is made of the effectiveness of the legal directions that go to co-defendant’s statements and their admissibility and therefore impact on other co-defendants.
36. Ms Power KC for Francis adopted Mr Scamardella’s submissions. She also submitted that the lack of reliability of the statement by Ms Intress is central to why the statement ought not to have been admitted. In the written skeleton the following is stated:

“The question was therefore which account could the jury safely rely upon, given that the defence were unable to challenge her account. It was argued on behalf of the applicant that if the witness statement was admitted into evidence, it was inevitable that her earlier account would also have to be admitted in some form and therefore the Prosecution would effectively be impugning their own witness, whilst asking the jury to rely upon her later account, and to disregard the earlier account she gave at a time when she accepted her recollection of events was much better and she was under caution.

... There was no remedy capable of curing the problems caused by the giving of two different accounts in respect of the specific actions which were at the heart of and gave rise to the allegation of murder.”
37. The evidence was admitted, as we have already said. The agreed facts that were given to the jury set out a great deal of her history, including a number of factors that went to her reliability or lack thereof. Legal directions were given to the jury in conventional form setting out the necessary caveats in terms of how the defence had not been able to test her account, and why – she was dead and therefore could not be questioned.
38. The prosecution submits that the judge considered the correct legal tests and applied the law correctly. Further and importantly, after concluding the statement was

admissible, she considered whether to exclude it under section 78 PACE and section 126 CJA 2003. Mr Vout KC submits that the nature of the material, both for and against in terms of her reliability, was properly put before the jury together with the necessary directions. He submits that whether the second statement was reliable, and the extent to which this helped the jury in determining the issues in the case, are classic questions which are for the jury itself to decide.

Discussion of Ground 1 for both appellants

39. It is important to bear in mind that [106] of *Ibrahim* states that it is a pre-condition to admitting such evidence that it must be potentially safely reliable before it can be admitted at all. However, it is important to realise that the relevant word is “potentially”. Previous inconsistent statements do not render a later statement not potentially safely reliable. If they did, then section 124(2)(c) would not be worded as it is. This expressly, and we quote, refers to

“evidence tending to prove that he made (at whatever time) any other statement inconsistent with the statement admitted as evidence is admissible for the purpose of showing that he contradicted himself.” (emphasis added)
40. In other words, the fact that such a person has made a statement previously that shows “he contradicted himself” does not render their later statement inadmissible, or mean that the witness or statement becomes unreliable such that the later statement cannot be admitted through these statutory provisions. What that sub-section does is make that previous inconsistent statement admissible precisely for that purpose – to show that in a previous statement the witness said something different – in order to allow the jury to form its own view as to the reliability of the later statement. Previous inconsistent statements can be put to a witness during cross-examination, but obviously for a statement admitted through this provision, that mechanism is not available to a defendant.
41. The previous statements by Ms Intress were before the jury, and indeed the defence relied upon those in order to impugn her credibility. Whether her first statement to the police was positively inconsistent (as Mr Scarmadella submits) or omitted certain material elements (as Mr Vout submits) does not much matter, in our judgment. In that first statement she did not positively identify McLeary as the assailant who stabbed the deceased, ultimately killing him; in her later one, she positively did. As the court in *BOB* said in the passage we have quoted above “If the existence of material undermining the credibility of the maker of the statement or a previous inconsistent statement by that person were invariably a reason for excluding the statement section 124 would not be necessary.” We do not accept the submission that where there is what has been called here “demonstrable, multi-faceted unreliability” the judge is duty-bound to refuse to admit the evidence. That is not the test. The test remains as set out in *Riat* and further explained in *BOB*.
42. The judge did not expressly consider [7](vi) of *Riat* in the sense of specifically referring to that element of the test, but it is clear that she properly considered the subject matter of that question, and we have also done so. Her failure to recite that element of the paragraph in that case and state that was a point being specifically

considered by her, does not mean that she did not consider the essence of that subparagraph, and indeed in our judgment she plainly did so in her ruling.

43. As has been accepted by the appellants, there is no rule to the effect that where the hearsay evidence is the "sole or decisive" evidence in the case it can never be admitted. However, it is settled law that the importance of the evidence to the case against the accused is central to the various decisions that the court must make when considering whether to admit the evidence. Here, it was not the sole or decisive evidence; essentially, McLeary admitted stabbing the deceased. It was, however, extremely important evidence in the context of the central issue in the case. This was the circumstances in which McLeary came to stab the deceased.
44. We conclude that the second statement of Ms Intress was properly admitted under the hearsay provisions in the Criminal Justice Act 2003. The judge took into account all the relevant factors that she was required to consider, even though this was not done against a specific checklist outlined in the authorities. She considered its importance, and she also had very much in mind its potential reliability, which she was bound to do.
45. There is no doubt that McLeary faced some difficulty involved in challenging the statement, but this was not insurmountable. We agree with the judge about the broad scope for challenging her evidence given the amount of material. A significant difficulty for McLeary was that there does not appear to have been any evidence of a reason why Ms Intress might have lied in her second statement about what she saw; equally, McLeary always had the option of giving evidence himself about what happened.
46. We therefore turn to potential prejudice impacting the fairness of proceedings. The judge concluded that whatever prejudice there was did not have such an adverse effect on fairness of the proceedings that the evidence should have been excluded. She had, by the time she made her ruling, heard practically the entirety of the prosecution case, with just the agreed facts to come. She was at that stage in the case in a good position to assess the prejudice to McLeary, and her decision is not one that is outside the range of decisions she was entitled to make on this point. Given the maker of the statement could not be cross-examined, any prejudice that arose from not being able to cross-examine her was properly manageable within the trial process by appropriate directions to the jury.
47. Balancing the relevant features, we have concluded that the trial judge was entitled to admit the evidence by applying the statutory provisions that she did, and to conclude that any prejudice to the appellants could be addressed by the amount of material available to them to allow for proper consideration by the jury of the reliability and weight to attach to that evidence.
48. All of the material that could point to the later statement not being accurate, such as the agreed facts about her background, as well as the earlier statements that were inconsistent, were put before the jury. The jury were then properly directed as to how they should approach this evidence, and to be fair to counsel for both appellants, they do not take issue with the directions of law that were given. These included the conventional ones about statements by a co-defendant not being admissible against the other defendant. The crux of their challenge is that for all the different reasons

relied upon that we have explained, the later statement given by Ms Intrass was not reliable, could not properly be relied upon and should not have been admitted at all. In other words, the jury ought not to have been given the opportunity to weigh up all the different factors, for and against what she had said, and concluding that what she said was true. We are not persuaded that submission is correct. Reliability in these circumstances is, as Mr Vout submits, a classic question for the jury to decide.

49. We would add the following. Ms Intrass had an obviously troubled background. The prosecution in their skeleton argument used the phrase “very difficult life”. That is undoubtedly a fair description, if not understating it. This is not only in terms of her mental health issues, and having been in care as a child with all that she said had happened to her then, but also her previous convictions, what she said had happened originally in her first account to police, together with the fact that she was a long term drug addict and alcohol addict. She died very shortly after giving this second statement as a result of drug use. However, that does not of itself mean that she could not be telling the truth when she said she saw what happened in the room that early morning, and described it in her second statement. The somewhat sad features of her life which impacted her reliability do not mean that she could not be telling the truth.
50. This incident happened in a flat where everyone present was using class A drugs on the night in question, and also drinking vodka and other alcohol. Those who are involved in that type of lifestyle will rarely have a background free of matters that could potentially impugn their credibility. It does not mean that they are incapable of telling the truth or cannot be relied upon for factual accuracy. Whether, in any particular set of circumstances, a statement made by a person with that general background or history is reliable, or their statement can be relied upon, is a fact-sensitive question in each case. The reason that the relevant sections of the CJA 2003 are drafted as they are is so that, if a statement is properly admissible when the necessary conditions are satisfied, these matters can be considered at trial by the jury. The requirement of “*potentially* safely reliable” is phrased as it is, in order to make clear that absence of factors that challenge reliability is not determinative. Such factors directly impacting reliability may sometimes be present, as they were here. However, those factors are not of themselves, in principle, wholly determinative, nor do they of themselves require that the statement be ruled inadmissible.
51. There were doubtless significant consequences to both defendants that arose as a result of her statement being admitted. She was the only person present in the room who explained what she said had happened when the stabbing took place. In her second statement she said that McLeary was essentially an aggressor. He had suggested in one of his police interviews that the stabbing was an accident. He also in his defence statement raised self-defence. The impact upon both, or each, of those defences of the second statement of Katrina Intrass does not mean, of itself, that her evidence ought to have been excluded. Significant evidence against a defendant can be addressed in a number of ways, including by that defendant giving evidence themselves of what had occurred. However, the fact that evidence is highly significant does not of itself and alone go to the fairness of admitting the evidence in the first place. Edis LJ said in **BOB** at [26] that the section 125 duty had to be considered.
52. Section 125 states:

“Stopping the case where evidence is unconvincing

(1) If on a defendant's trial before a judge and jury for an offence the court is satisfied at any time after the close of the case for the prosecution that —
(a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings, and
(b) the evidence provided by the statement is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury."

53. Edis LJ said:

"This duty is an important safeguard which should, in our judgment, be considered by the court, at its own initiative if no party raises it, in all cases where it applies. This is because the Act places a duty on the court, and does not say that the duty only arises if a party raises the question. In some cases this may occur at the stage when a submission of no case to answer may be made, but we would suggest that most commonly it would arise at the close of all the evidence when the issues will have become very clear, and the importance of the hearsay statement and any difficulty a defendant has in challenging it can be assessed."

54. Here, neither defendant called evidence. This means that there was no further evidence, after the statement had been admitted, that would have impacted upon the section 125 exercise. The judge did not do that as a separate stand-alone exercise but the essence of it was considered when she delivered her ruling at the close of the prosecution case. She made that ruling by applying the law correctly, and there is no discernible error in her doing so, nor in the exercise of her discretion in considering whether to exclude it under either section 78 PACE or section 126 of the Criminal Justice Act. In our judgment, the second statement of Katrina Inness was properly admitted and the jury were properly directed on how they needed to approach the statement, including assessing the reliability issue against all the other facts. This is McLeary's only ground of appeal, which we dismiss. His conviction for murder is not unsafe and we dismiss McLeary's appeal. We also dismiss Francis's first ground of appeal.

The remaining grounds by Francis

55. We therefore turn to the second and third grounds of appeal by Francis in turn. The second ground is that the trial judge should have dismissed the case against Francis when an application was made by the defence on his behalf that he had no case to answer at the end of the prosecution case. This must be considered including within that assessment all of the evidence against him, which includes what was said in that statement. We reproduce here for convenience.

"The next thing I know Courtney had launched himself across the room towards Ricardo. I didn't even really know what was going [on]. I saw a knife was in Courtney's right hand and I saw him swing towards Ricardo.

I remember seeing Ricardo's eyes roll up into the back of his head. Courtney never even said anything. It all happened so quick.

I knew I had to leave straight away – I knew I didn't want to be there.

Dave Francis was stood in the doorway of the living room and as I tried to get past him Francis tried to stop me by putting his arm out but I ducked under his arm, left

the flat and went straight home.” (emphasis added)

56. The test to be applied by the court if a submission of no case to answer is whether the evidence, taken at its highest, is sufficient for a jury, properly directed, to convict the defendant.
57. At the application for leave to appeal, because of what appeared to be a paucity of evidence against Francis, the prosecution were ordered to serve a schedule of all the evidence against him specifically. The defence was then to respond to that schedule. This exercise was accomplished and the contents of that evidence must be considered as a whole. Some elements of it, such as lies that were told by Francis initially, and whether a nail file he had in his possession might or might not have caused some of the superficial cuts that the deceased had, were individually insufficient but the evidence must, of course, be taken as a whole and must be taken at its highest. However, one important part of the evidence was contained in the underlined passages above in the second statement of Katrina Intress. The issue on this ground therefore becomes whether all the evidence, taken at its highest, is sufficient to justify the conclusion that a properly directed jury could make a finding that he was engaged in some sort of joint enterprise that resulted in the stabbing of the deceased.
58. In this respect we are in disagreement with the trial judge and we are satisfied that the evidence as a whole is not sufficient for the case to have proceeded against him. Joint enterprise is fully explained in the seminal case of *Jogee and Ruddock v The Queen (Jamaica)* [2016] UKSC 8, UKPC 7 at [77] which stated that the expression itself “occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law.” There is no place in our jurisdiction for someone to be found guilty “by mere association”. *Jogee* then proceeds to explain at [89] and [90] what the two issues are likely to be in any joint enterprise case. It states:
- “[89] In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.
- [90] The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1.”
59. In our judgment, on the particular facts of this case, there is insufficient evidence to justify categorising Francis as a participant. Nor is there sufficient evidence to justify any conclusion that he either encouraged or assisted McLeary. Standing in the doorway with one’s arm across it – a pose described in the earlier statement by Ms Intress as Francis “lounging against the door” – is not sufficient to contribute to the force of numbers, even if the hostile confrontation could have been predicted (which she is clear it could not, as it happened so suddenly). We consider that the evidence against Francis amounts to little more than his being present at the scene, which was an event, party or social gathering that had gone on for some hours. The violence

erupted suddenly and unexpectedly. The full schedule of evidence for the appeal merely reinforces the point that there was very little evidence against Francis at all, and in our judgment he cannot properly be described as a participant.

60. This means that we are in disagreement with the learned trial judge, who we consider ought to have allowed the submission of no case to answer by Francis when it was made at the end of the prosecution case against him. This means that his second ground of appeal succeeds and the conviction against him is unsafe.
61. In the light of that conclusion, it is not therefore necessary to consider the third ground of appeal, although we will deal with it in very broad outline only. The thrust of this ground is that prosecution counsel made comments to the jury in his closing speech that were not made out on the evidence, and which had not formed part of the case against Francis prior to that point in the case. The main point relates to what occurred when the deceased was dying in the hallway, when Francis stayed with the deceased as he was dying, at points holding the hand of the deceased as he lay on the floor. The prosecution suggested in closing remarks that Francis was doing this in order to make sure that the deceased did not give anyone who might come to assist the deceased any details about the attack. That was not part of the way in which the case was opened, and such a suggestion had not been made at any point before then. There were also two secondary points which arose similarly by way of comment, one regarding a nail file found on Francis when he was arrested, and whether that could or did cause any of the injuries suffered by the deceased; the other relating to some blood splatter evidence behind the door.
62. Given our conclusion on the second ground, this ground need not be considered in any detail. However, we make the following observations. Mr Vout described these comments as being acceptable comments on the evidence. We do not accept that description in relation to what Francis was, or was not, doing when he remained with the deceased in his final few minutes. Juries should not be invited to speculate on what other evidence there might be, and they are directed to this effect. Indeed, that this jury were particularly astute is shown by a note that they sent to the judge on this very point, which demonstrated that they realised that there had been no evidence at all put before them on this point. As it happens, this point is not determinative of the appeal of Francis for the reasons we have explained on his second ground. However, counsel should be careful that they do not invite juries to speculate on other evidence that they have not heard. The comments in this case invited speculation. We would also make it clear, as a general rule, that if or when matters such as the ones relied upon by Ms Power KC on the third ground occur during closing speeches at the end of trial, the proper way and time for these to be dealt with is immediately at the time and with the trial judge. The necessary directions to the jury to ignore such comments by counsel can then be given.
63. It is not necessary to consider what the consequences of what occurred might have been on this appeal were the third ground a stand-alone point.

Conclusion

64. In conclusion therefore, McLeary's sole ground of appeal, and Francis' appeal on his first ground, both fail. McLeary's appeal against conviction is therefore dismissed.

65. Francis' second ground of appeal succeeds, and the case against Francis ought to have been stopped by the trial judge who should have granted the submission of no case to answer in his case. It is not necessary to consider his third ground of appeal in those circumstances. Francis' appeal against conviction therefore succeeds on his second ground of appeal; his conviction is unsafe and is hereby quashed. Due to the nature of that ground and its success, there is no issue regarding any re-trial and there is no need for one, or for any other consequential directions.