No. 2011/04293/C5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 17 May 2012

B e f o r e:

LADY JUSTICE HALLETT DBE

MR JUSTICE OPENSHAW

and

MR JUSTICE SPENCER

R E G I N A

- v -

SAM HALLAM

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(Official Shorthand Writers to the Court)

Mr C H Blaxland QC and Mr P Wilcock QC
appeared on behalf of the Appellant

Mr D Hatton QC appeared on behalf of the Crown

J U D G M E N T

Thursday 17 May 2012

LADY JUSTICE HALLETT:

1. This is yet another tragic example of the effects of gang violence. A fight that began for little reason and lasted less than five minutes left one young man dying in the street and several other young men incarcerated for many years. The appellant was convicted of three offences murder, conspiracy to commit grievous bodily harm and violent disorder. The trial judge His Honour Judge Hone QC ordered him to be detained at Her Majesty's pleasure and specified a period of twelve years as a minimum term to be served.

Background

2. On 8 October 2004 Louis Colley (aged 20) was involved in a minor dispute with some youths outside the Toffee Park Youth Club on St Luke's Estate in East London. The youths plotted their revenge. On Monday 11 October they gathered near to the estate intent on attacking Mr Colley. Rumours of a fight had reached the Toffee Park Youth Club and a large crowd of youths (estimated at up to 40 or 50), some intent on violence and some just wishing to watch, gathered in Bath Street, a small side road off Old Street.

3. Mr Colley was confronted by Bullabeck Ring-Biong and another male. A third male, Scott White, launched the attack by trying to punch Mr Colley. Mr Colley fought back. However, he was then

surrounded and attacked by a number of males. He fell to the ground and was set upon with fists, feet and weapons. Witnesses described seeing baseball bats and at least one knife. One witness, Bilel Khelfa, described seeing a baseball bat with a screw or nail protruding from its end. Mr Essayas Kassahun, a friend of Mr Colley, bravely went to his aid. Mr Colley managed to free himself. He ran around the corner into Old Street, where he was brought to the ground near a branch of Somerfield. He escaped a second time and took refuge inside the store.

4. Sadly, Essayas Kassahun was not so fortunate. During the melee which now focused on him, someone struck him on the head with a sharp, thin object which penetrated his skull. The attackers rapidly made their escape, some on bicycles.

5. Mr Kassahun, bleeding heavily, was helped across Old Street to a nearby Shell garage. Police and ambulance attended, but Mr Kassahun had lost consciousness by the time they arrived. He never regained it. He was taken to hospital where he was pronounced dead two days later. The extent of surgical intervention meant that the pathologist who performed the post-mortem upon him could not determine with any degree of certainty the nature of the weapon used, other than it was of a sharp, penetrating kind rather than a blunt object. It could have been a knife or a modified baseball bat.

6. A trail of Mr Kassahun's blood from the Bath Street road sign to

the corner of Old Street and across Old Street suggested that he had sustained his fatal injury in Bath Street.

7. It will surprise no one to learn that the eyewitness evidence, coming as it did from several young people at the scene, provided a variety of accounts. This was a fast-moving, short-lived incident which took place at night and under artificial lighting. A large number of people were involved, none of whom stayed in one place for long. Most of the attackers had attempted to disguise their features, for example by using the hoods of their hoodies. It was frightening and distressing for witnesses, particularly those who knew the victims.

8. It is necessary to rehearse in a little more detail the accounts given by four of those witnesses for reasons that will become apparent when we turn to the grounds of appeal. First, Gary Rees. He was a friend of both Louis Colley and the deceased. He was tendered by the prosecution at trial and cross-examined regarding an assertion in his witness statement that he saw the deceased being hit with a baseball bat to his left temple. He told the jury that he had seen a bat but did not see it being used on the deceased. He was described by the judge as an "unsatisfactory witness".

9. Christopher Bissett and his brother were originally arrested as suspects. They were later reclassified as witnesses. Christopher Bissett was called to give evidence in relation to Dwayne Mayers who,

he claimed, had a baseball bat with which he hit the deceased on the head. He also told the jury of conversations with his neighbour, Ring-Biong, who confessed to him that he had stabbed the deceased, thrown the knife away and burnt his clothes. Initially, Christopher Bissett did not recall having seen weapons other than bats during the incident, but later said that he had seen what he believed to be a knife in Ring-Biong's hand. Bissett described the appellant as a friend and insisted throughout that the appellant was not present at the incident and took no part. Bissett appears to have been another unsatisfactory witnesses. The judge commented that obtaining his evidence had been "like drawing teeth". The judge warned the jury to approach the whole of Bissett's evidence, including the parts which potentially exculpated the appellant, with caution because Bissett may have had an improper motive in giving evidence, that is a reason to lie to protect himself or his brother by deflecting blame on to others.

10. We turn to the identification evidence which was at the heart of the case against the appellant. Three officers, PC Redknap, PC Dearden and PC Davis were amongst a number of officers who attended promptly in response to calls for the emergency services. They saw and spoke to Phoebe Henville, who was still at the Shell petrol station. She was then aged 17. She told PC Redknap that there had been a fight between youths at the petrol station and the Murray Grove boys. She had seen a black male hit the deceased over the head with a baseball bat. She told PC Dearden that she had seen about 30

black males and some white males attack Mr Kassahun and that one of the males had struck him to the head with a baseball bat. She indicated that the Somerfield store was the scene of the attack. She named three people involved: "Beku" (Ring-Biong), "Pellan" (Pellum McCook), and Kennedy (Kennedy Mwesezi). She told PC Davis that she had seen 50 youths surrounding someone at the junction of Bath Street and Old Street. She saw them punching and kicking before one of the males drew a baseball bat and hit the victim with it. She did not name the person under attack as Mr Kassahun. She told PC Davis that three people were involved: Jamie Martin, Danny Martin and Bullabeck. It was made clear to Miss Henville that she may be an important witness. She was told to go home and to await collection by an officer.

11. Miss Henville was interviewed at length and into the early hours of the following morning. In her statement dated 12 October, extracted from what she said in interview, she identified four of the appellant's co-accused, Danny and Jamie Martin, Pellum McCook and Kennedy Mwesezi, as having taken part in the incident. She again referred to a black youth holding a baseball bat who, she said, had been smirking. She made no mention of the appellant or of a white young man with distinctive features whom she recognised but could not name, albeit she was later to claim that, within ten minutes of the fight, she had heard that someone called Sam was involved or to blame. She was pressed on whether she could provide any more information which might be helpful to the police to catch the

attackers of her former boyfriend. She said: "No, not really. .... These were the ones in the group causing the trouble". She insisted that she did not recognise any faces. She said that she "fixed on" the black boy walking past with the bat and the smirk.

12. On 13 October there was a chance meeting with the appellant in the street at about 7.15pm. The following day Miss Henville was again interviewed by the police. She told them that she and her friend, Sarah Beattie, had been walking down the street when they saw the appellant. Sarah Beattie told her the appellant's name. She said that she recognised him as someone who had been involved in the attack. She referred to his being distinctive and having strange features, as if there was something wrong with him. She said he looked "possibly disabled" and that he had dark brown hair. She also said that he was someone she had seen around "always on the street causing trouble". She said, "There's a couple of them been known for nicking mopeds". There is nothing in the material put before us to suggest that any part of that description fits the appellant, save for the fact that he has dark brown hair.

13. Unfortunately, a close analysis of the interview reveals that Miss Henville's purported immediate recognition of the appellant as one of the boys who attacked Essayas Kassahun was prompted by two leading questions from the interviewing officers. In the statement that followed she again described the man as being distinctive looking with "weird strange features". She then picked out the

appellant on a video identification procedure "as the male you saw attacking Essayas later named as Sam Hallam". Yet, curiously, in her statement of identification she purported to identify him "as part of the group that attacked Essayas who had with him a baseball bat". It was not clear to us from where the addition of the bat had come. It was plainly a mistake.

14. In evidence at trial, Miss Henville described an incident which began with shouting in the middle of Bath Street and which moved to Old Street, towards the Somerfield shop. She said she followed and saw a crowd outside Somerfield. The crowd appeared to be attacking a person in the middle. She could not see who it was. She saw a baseball bat go up and down a few times, but she could not say if it was used to strike anyone. She saw only one bat. The others, she thought, were using their fists. She was able to recognise people only as they left the crowd. She said that she saw Danny and Jamie Martin.

15. When summarising her evidence to the jury the judge interposed at this stage that she may well have been describing the attack on Colley and not the attack on Essayas. The trail of Essayas' blood suggested that she had the wrong location. However, Miss Henville insisted that after the group split up she realised that the person on the ground was Essayas. She said that he was helped up and taken to the Shell garage. She saw people walking away and a short black boy standing on the wall holding a bat. She then went to the

deceased and called an ambulance.

16. Initially in her evidence Miss Henville made no mention of the appellant, but was prompted to do so by prosecuting counsel in perfectly proper fashion. She described how on the evening of 13 October she was with Sarah Beattie when they saw the appellant in the street. She said that she had heard the name Sam Hallam mentioned and had seen his face, but had not been able to put a face to the name. She claimed to have recognised him as someone she had seen in the crowd outside Somerfield on 11 October attacking the person in the middle. She said that she did not see exactly what he was doing, but she saw him coming away from the crowd. She did not put any weapon in his hand. She told the jury that she had spoken to police at the petrol station after the incident and had given them the names of those people she had seen present at the incident.

17. Cross-examined on behalf of the appellant, Miss Henville agreed that she had heard a rumour from a number of people that someone called Sam had been involved. When they saw the appellant on 13 October Sarah Beattie told her his name was Sam Hallam. It was after this that she told police that Sam Hallam had been involved in the incident. Asked why she had not earlier told the police that there had been a white boy whom she had recognised but could not put a name to, she said "Because I didn't know his name". She said that she had concentrated upon those she knew.

18. She said that on 11 October she had been about five feet away from the crowd, although the judge commented that it was obviously more. Albeit nobody asked her for how long she had the appellant in her sights, the judge later suggested it must have been for less than five minutes, In truth, it was probably no more than a matter of seconds.

19. Miss Henville told the jury that the appellant was one of the earlier ones to break away from the group around the deceased. He left just after she had seen the baseball bat being raised in the middle of the group. She could not say if he left on foot or on a bicycle, but he walked towards her. She could not recall the colour of his hair, albeit she agreed that she had described the appellant, whom she had seen on the 13th, as having untidy, dark brown hair. She did not recall telling Sarah Beattie the man whom she had seen on 11 October was wearing a hoodie with blond hair peeping out from underneath the hood. It was put to her that other people had put forward the name Sam and that when Sarah Beattie told her, as they passed the appellant, that he was Sam Hallam, she had thought that he must be the Sam people were saying had been there. She said, "I saw someone who looked like him. If it wasn't him, I saw someone who looked like him". Asked, "So the position is it may not have been him but someone who looked like him?", she replied, "Yes". Later she said, "I saw someone that looked like him running towards me and when I was talking to people they told me it was a Sam, and someone told me it was Sam Hallam and Sarah pointed him out to me". She agreed

that she could not be sure that it was the appellant whom she had seen on the 11th. She did not recall telling PC Redknap that she had seen the deceased being hit over the head by a baseball bat by a black male. She said that if she said that, it must have been in confusion. She agreed that it was her impression that after the group had come away the small black youth whom she saw holding the bat was showing off as if he had been the one who had caused the damage.

20. Passages from her police interview were put to her. She agreed that it appeared from them that her understanding at the time had been that a small black youth holding a bat had hit the deceased, and that he was the only person she saw with a weapon. When she saw the appellant on the 13th she did not recall telling Sarah Beattie that he had been holding a bat. She agreed that had she done so, this would not have been right. She also agreed that, having told the police that the appellant was involved, she then told Bilel Khelfa that someone called Sam Hallam was involved. Cross-examined further, Miss Henville agreed that in her police interview she had said that she did not recognise anyone who was fighting within the group.

21. Finally, in re-examination she said that there had been a group of people around someone in the middle. They were attacking, throwing punches and kicking. This was outside Somerfield. She saw a baseball bat come up a few times. There were about fifteen people attacking and about fifteen watching. She saw Jamie Martin, Danny

Martin and the person she believed to be the appellant move from the huddle, although there appears to have been some confusion as to whether the witness understood the word "huddle" to mean simply those attacking or those attacking and watching. She said that after they saw the appellant in the street two days later, Sarah had told her to telephone Gary (Gary Rees) who had the telephone number for the police officers dealing with the case. When she called Gary she learned that the deceased had died. She felt upset and angry. Asked whether at that stage she had any doubt that the appellant was the person she had seen at the incident, she said "No, I was just looking for someone to blame on the spot really". Asked, "Did you believe you had seen him on the 11th?", she replied "Yes".

22. Sarah Beattie was not present at the incident on 11 October, but she said that she had known the appellant for about a year. When Phoebe Henville saw him on the 15th, she (Phoebe) became distressed and they telephoned a boy they knew. During that telephone call Phoebe learned that the deceased had died and became very emotional. She said that after they had passed the appellant in the street he kept turning round and looking at Phoebe. They saw him a short time later and Phoebe asked him, "Are you proud of what you have done?" He asked, "What?" Miss Beattie said "You are a murderer". He grinned in an evil way. She also alleged that the appellant threatened them both and said that he would petrol bomb her house.

23. Cross-examined on behalf of the appellant, Miss Beattie said

that Phoebe had told her that the appellant was the one holding the bat, and that the one called Sam was "kind of chubby" and pale. Although he had his hood up, she could still see his blond hair. She agreed that in her witness statement of 21 October she had made no mention of any threat of a petrol bomb, which Phoebe had not mentioned either, but said that she had mentioned that the appellant had threatened her, saying that he knew where she and her brothers lived.

24. What we now know, but was not known at trial, is that at 7.30pm on 13 October, Gary Rees left a message for the police to the effect that there was a rumour going about that a Sam Bass was responsible for the attack, and an address was given which was probably Sam Bass' address. At 10.30pm Rees rang again to say that the name Sam Bass was a mistake; the name should have been Sam Allen (sic) who was “holding the bat with the nail in the end”.

25. The other evidence of identification upon which the prosecution purported to rely came from Bilel Khelfa. He, too, was a friend of Louis Colley and Essayas Kassahun. Unfortunately, his identification of the appellant was not independent of Phoebe Henville. When first seen Mr Khelfa, also failed to mention Sam Hallam whom he knew and with whom he had been at school. He added Sam Hallam's name only after Phoebe and others told him that Sam was involved.

26. When first seen on 13 October he described seeing a large group

of youths hanging out near the football pitch outside Godfrey House. He recognised, he said, just two of the attackers. One was Ring-Biong and the other a "skinny white boy" aged 19 to 20 who lived in Murray Grove. He could not recall any other features of this male, save that he was wearing a jacket and a hood. The initial approach, he said, was made to Louis Colley in Bath Street by Ring-Biong and another black youth. A light-skinned Jamaican boy threw the first punch at Colley. When the attack on Colley began he noticed that three or four people had baseball bats. He recalled another white boy. This one was on a silver BMX bike, wearing a grey hooded top, with blondish hair protruding from the hood. This boy (whom he did not say he recognised) was in possession of a baseball bat with a silver screw protruding from the end. The bat was said to be about 15 to 20 inches long, thinner at one end, with some kind of black tape wrapped around it. Bilel Khelfa was the only witness to describe a modified bat of that kind. He was repeatedly pressed, not surprisingly, by the officers for as much information as he could provide. He said nothing about Sam Hallam.

27. Mr Khelfa was re-interviewed by the police on 20 October 2004. By this time Essayas had sadly died. Mr Khelfa had been told by Phoebe Henville that the boy responsible was Sam Hallam. He now said this: "I saw a white boy, who I mentioned in my last statement, with the baseball bat arrive on his bike. I said in my last interview that I recognised the boy but could not remember his name. Since that interview I have been reminded of his name by Phoebe. As soon

as I was reminded of the boy's name I knew that the boy with the bat was Sam Hallam". Unfortunately, this was a significant misrepresentation by the witness of what he had said before. As we have indicated, he had never said he recognised the boy on the bike with the bat, despite being pressed. This was to lead prosecuting counsel unwittingly into error later in the proceedings. Mr Khelfa proffered the explanation that he had revised his account when his friend had died and he had begun to take the incident more seriously. This was despite the fact that he had known all along that his friend was grievously injured and was laying in a coma in hospital. He claimed that what had happened had shocked him and that in his initial interviews he had done what he could to help the police find the attackers of his friend. In his new account he provided a different sequence of events. He claimed that the appellant, whom he had known from school, had been one of those who attacked the deceased. This time he said that the appellant was "virtually standing over him, going to hit him". He also described Ring-Biong as one of the attackers. When he gave this statement he said that he was a hundred per cent positive in his identifications of the appellant and Ring-Biong.

28. At trial the prosecution elicited his account with difficulty. The judge described him as being "deliberately unhelpful" and allowed the prosecution to treat him as a hostile witness. In evidence he said that he had seen Ring-Biong and a white youth approach Louis Colley on bikes. The white youth was wearing a "GAP" jumper. He

could not see his face properly because his hood was up. He said that he and the deceased went forward with Louis when they called Louis over. A third youth punched Louis and there was a bit of fighting. He helped Louis up and they ran to Somerfield. Someone got Louis again and Louis went down to the ground. A group of about ten, which included Ring-Biong, rushed Louis, and another group rushed the deceased in Bath Street. He could not see the deceased, but he could see a group surrounding someone and assumed that it must be the deceased as only he, Louis and the deceased had been there. Both "rushings" were still going on when Ring-Biong chased him away.

29. He said that he did not know anyone in the group which surrounded the deceased. At the time of the initial attack on Louis in Bath Street one of those fighting had a long baseball bat with a nail sticking out at the end. The bat had come from someone's trousers when he (Khelfa), Louis and the deceased were together at the beginning of the incident. The person with the bat was on a bike. He was one of the first two people who had arrived on bikes, wearing a hoodie. He did not see him use the bat. That was the only bat he saw. He was asked again if he knew the person with the bat and said "No". He said that he had not been able to look at his face properly because he was wearing a hoodie. He repeatedly said that he was not sure as to who the person was. He did not recall identifying anyone other than Ring-Biong at the police identification procedure.

30. The judge allowed him to refresh his memory from his police statements. He said that the person with the baseball bat with the protruding nail had been wearing Nike tracksuit bottoms and a hood. He said that he had seen the appellant, a white boy with whom he was at school, two days earlier and he had thought it was him. He identified the appellant in a police identification procedure. When he was asked whether that identification was accurate and what the appellant was doing, he said ".... obviously I don't want to lie in court now". He said that he had only said it was the appellant because the attacker was wearing the same clothes as he had seen the appellant wearing. The appellant was the only white boy he knew. He told the jury that he was not really sure that the attacker was the appellant. He did not see the attacker's face properly.

31. The Crown was given leave to cross-examine Mr Khelfa as a hostile witness. His statement of 20 October was put to him on the basis that he had originally said that the boy on the bike was someone he recognised but could not put a name to. That, as we have indicated, was an error. In summing-up to the jury the judge indicated that Mr Khelfa "agreed with what he had said in the statement". He commented "in his second witness statement, with which he agreed in the witness box ...." This does not appear accurately to record the witness's evidence, as was observed by the Court of Appeal Criminal Division at the original appeal. They declared that on a fair reading of Mr Khelfa's evidence, he persisted in asserting that he did not, in fact, see the face of the young

white male and therefore was unable to identify him as the appellant. In the judgment of the court on that occasion the witness had remained equivocal as to what he did and did not accept in his statement and therefore the judge's comment went a little too far.

32. Cross-examined on behalf of the appellant, Mr Khelfa agreed that during the police interview from which his statement of 13 October had been drawn up, he could not give the name of the person he saw with the bat and he had told police specifically that he had never looked at that person. He said that he did not know who it was until Phoebe told him.

33. Thus, neither identifying witness upon whom reliance was placed in fact provided clear and unequivocal evidence and one, Bifel Khelfa, attempted to play down his purported identification as best he could.

33. We turn to the appellant's alibi. It has to be said that his inability or unwillingness two days later to say where he was at the time of the murder has not exactly helped his cause. He was alerted to the accusations by the two girls on 13 October. When arrested on 20 October 2004 at his home address he told the police that he had been expecting them because he knew what the girls had been saying. He told officers that he had not been present at the incident. He had been playing football with a friend, Timmy Harrington.

34. Timmy Harrington was interviewed by police following that assertion. Mr Harrington denied that the appellant had been with him at the time of the incident. In a statement dated 20 October he maintained that on that date he had worked a night shift. In a second statement, after checks revealed that he had not worked a night shift, he maintained that he was nevertheless sure that he had not been with the appellant.

35. In evidence, Mr Harrington said that on 11 October 2004 he finished work, collected his sister's dog from her house and took it home. He insisted that he had not seen the appellant that night. The appellant was a friend of his. They used to play football together in the evenings, but he denied that he had done so on the 11th. He also denied that the appellant had asked him to say that they had been together on the 11th. He was asked "How clear are you in terms of are you saying definitely not, possibly or what?" He replied "It is possibly I was not".

36. The Crown then applied for, and was granted, leave to treat him as a hostile witness but apparently did not need to cross-examine him to elicit the evidence in accordance with his proof. His statements were put to him to refresh his memory. He insisted that he had not seen the appellant at all in the week prior to 13 October. He was positive that he had not seen the appellant on the 11th and had not played football that night.

38. On his arrest the appellant had had with him two mobile telephones. At least one of them was with him when he was interviewed. We now know that it could have been of assistance to him. However, the appellant exercised his right to silence throughout his interviews on the advice of his legal representative and did not draw attention to the mobile phone. With the benefit of hindsight maintaining his silence was perhaps not in his best interests. He declined to provide even his telephone number, which would not have taken much effort to retrieve.

39. However, eventually, in his final interview, the appellant provided a prepared statement. By that time he was aware that Mr Harrington had denied having been with him. In his prepared statement he denied presence or involvement in the incident. He said that if he had not been with Mr Harrington, he must have been at home babysitting his sister whilst his mother was at bingo, as he usually did on Monday nights. The appellant's case at trial was in accordance with his prepared statement. He remained unsure as to his whereabouts. The Crown did not invite an inference to be drawn from his silence in interview given his age and the fact that he had been legally advised.

40. There was no forensic evidence which implicated the appellant. Nor was there evidence from CCTV or phone cell site analysis which placed the appellant at or near the scene of the incident. A schedule of phone calls was produced to show contact between his co-

accused; it did not include any calls from the appellant. Not one of the other co-accused who stood trial with the appellant implicated him either at trial or in the course of their interviews, and not one of them suggested that he was present at the incident. The appellant was the only one of those to stand trial who claimed that he was not present.

41. The prosecution suggested that the appellant had deliberately concocted a false alibi in relation to Mr Harrington and had lied about having never been arrested. This was said to be the supporting evidence for the identification evidence.

42. The appellant was originally jointly charged in all counts with Scott White, Dwayne Mayers, Bullabeck Ring-Biong, Pellum McCook, Jamie Martin, Danny Martin and Jermaine Makinde. Kennedy Mwesezi was severed from the main indictment following applications by the co-accused. It had been intended that he should be tried separately following the main trial, but in the event the Crown offered no evidence against him.

43. Of the co-accused whose cases on count 1 (murder) were left to the jury, their cases were as follows. White's case was that he had acted alone when he punched Louis Colley, not as part of a group; he had no idea that anyone had a weapon. Mayers' case was that the jury could not be sure of guilt because the sole witness against him (Bissett) was demonstrably unreliable and inconsistent. Ring-Biong's

case was that he had been acting as a peacemaker and had not participated in any violence. The cases for Pellum McCook and Jamie and Danny Martin on count 2 (conspiracy to commit grievous bodily harm) and count 3 (violent disorder) were that they were spectators only and not participants in the violence. Phoebe Henville was described as a "key witness" in each of the cases of McCook and the Martin brothers.

44. At the conclusion of the trial at the Central Criminal Court on 26 October 2005 as we have indicated the appellant was convicted of all three counts: murder, conspiracy to commit grievous bodily harm and violent disorder. White was acquitted of murder by the jury, but convicted on counts 2 and 3. Mayers was acquitted by the jury on all counts. Ring-Biong was convicted on all three counts. McCook and Jamie and Danny Martin were acquitted on count 1 at the direction of the judge, and by the jury on the remaining counts. The judge acceded to a submission of no case to answer on all the counts against Makinde.

45. The appellant was granted leave to appeal against conviction by the full court in October 2006 on the basis that the judge was arguably wrong to have refused to accede to a submission of no case to answer made on his behalf. The appeal was dismissed on 22 March 2007 on the basis that the identification evidence was sufficient coming apparently as it did from two sources, and in any event supported by the fact that the appellant had deliberately put forward

a false alibi.

46. The appellant now appeals against conviction upon a Reference by the Criminal Cases Review Commission ("CCRC")under section 9 of the Criminal Appeal Act 1995. The Commission had a number of general concerns which can be summarised as follows. First: no witness (besides Miss Henville and Mr Khelfa) put the appellant at the scene of the incident. Despite an intensive investigation there was still no evidence to implicate him in the offences. Second, there was no evidence of relevant telephone traffic involving the appellant on the night in question, yet there was in relation to his co-accused. Third, Miss Henville's evidence was potentially unreliable in a number of respects, particularly the location of the attack on the deceased. Fourth, there may have been failings in the police investigation and the approach to disclosure.

47. The CCRC has referred the case to this court principally on the basis of fresh evidence, which it is said raises substantial doubts as to the circumstances and reliability of the identification or recognition of the appellant by the two key Crown witnesses, Miss Henville and Mr Khelfa. In particular the Commission relied upon:

(i) the two police messages which record the receipt of the information from Gary Rees and which were not disclosed to the defence;

(ii) material which was not disclosed to the defence in relation to a police search of the home of an uncharged suspect (a black male named Tyrone Isaacs), named by Ring-Biong in evidence as having been with him at the start of the incident. When Isaacs' home was searched on his arrest on 24 November 2004 police found a mobile telephone that lacked a back, as did the telephone lost by Mr Colley during the incident. They also found a broom handle with a nail protruding from its end.

(iii) Evidence from the appellant's mobile phone which suggested both his and Harrington's memories were at fault and the alibi may not have been dishonest. Post-trial analysis of the appellant's mobile telephone has revealed previously undiscovered material, including photographs of taken on the afternoon of 11 October at the home of the appellant's grandmother, and of the appellant's father (now deceased) at the George and Vulture public house at 18.41. The phone's memory also contains a photograph of Timmy Harrington taken on the afternoon/ evening of 12 October 20024. It is said that these photographs may have provided support for the appellant's contention that he was elsewhere on the night of the incident and provide a credible explanation for his belief that he was with Timmy Harrington.

(iv) Potential fresh evidence from Makinde to the effect

that, as he has always maintained, he saw the appellant standing outside the George and Vulture public house after he (Makinde) left the scene of the incident, that he told the appellant about the incident, and that the appellant told him that he had been at his grandmother's house.

(v) Potential fresh evidence from Mwesezi that the appellant was not present at the incident. Further, his account of the sequence of events might undermine Phoebe Henville's account and suggest that she could not have seen the attack upon the deceased.

48. The appellant now has the benefit of being represented by Mr Henry Blaxland QC and Mr Peter Wilcock QC. They were not trial counsel. Mr Blaxland based his primary submissions on the well-known decision in R v Turnbull [1977] QB 224. Mr Blaxland reminded the court of two important passages of the judgment in Turnbull. The first is at page 229H:

> "When in the judgment of the trial judge the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal, unless there is other evidence which goes to support the correctness of the identification."

The second is at page 220G:

> "Care should be taken when directing the jury about the support for an identification which may be derived from the fact they have rejected an alibi. False alibis may be put forward for many reasons. An accused, for example, who has only his own truthful evidence to rely on, may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions, like any other witness can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other reason for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

49. Mr Blaxland summarised the appeal in this way:

> "This is a case which has some of the familiar ingredients of a miscarriage of justice: flawed identification, flawed alibi, non-disclosure, and failures in the police investigation."

He went further and argued that there is a body of evidence to lead to the conclusion that, as the appellant claimed from the moment he was arrested, he was not present at the scene and is, therefore, innocent of the offences of which he was convicted. Mr Blaxland specifically invited the court to make that plain in this judgment. He relied upon a passage from the judgment of Lord Judge CJ in R v Adams [2011] UKSC 18, [2011] 3 All ER 261 (at paragraph 251) in which the court's powers in this respect are set out. As will become apparent, we were not satisfied it would be appropriate to use that

power on the facts of this case.

50. The appellant's grounds of appeal are as follows. To the extent, if any, that they deviate from the CCRC's reasons for referral they require leave, and we give it. As it seems to us, it is essential in a case such as this, which is exceptional, that Mr Blaxland is allowed to deploy all lines of argument if necessary. In the event, it proved unnecessary.

51. The first ground of appeal upon which Mr Blaxland relied was the weakness of the identification evidence. Most of his oral submissions, and those in writing, rightly focused on the identification by Miss Henville and Mr Khelfa. With the assistance of both Mr Blaxland and Mr Wilcock, we were able to subject their accounts to a focus far more intense than has previously been the case, either at the trial or at the first appeal. We have also had the assistance of the investigations of the CCRC and the Thames Valley Police. Mr Blaxland submitted that on proper analysis the evidence was so manifestly unreliable that the appellant's submission of no case to answer should have been allowed. In essence this was a rerun of the arguments presented to the Court of Appeal on the last occasion. However, Mr Blaxland insisted that he was developing the argument in a way that had not previously been done. He submitted, as we have already accepted, that this is plainly an exceptional case. In any event, he now has the benefit of the fresh evidence, to which we shall come in a moment, which undermines, he argued, the

identification evidence and the evidence said to support it.

52. The second ground of appeal relates to the trial judge's directions. Originally Mr Blaxland made two complaints. First, he argued that the trial judge failed to direct the jury on the need for caution when approaching the evidence of the witness Harrington. This was not a point which we needed to pursue in oral submissions because it became apparent that although Mr Hatton QC for the Crown obtained the judge's leave to treat Harrington as hostile, he never in fact had to do so. Second, Mr Blaxland submitted that the judge wrongly directed the jury about the need for caution when approaching the evidence of the witness Christopher Bissett that the appellant was not at the scene of the crime. This was a point which was not raised in the court below or in this court on the last occasion, or by the Commission. It comes to this. Bissett plainly had a motive to lie about the involvement of others to deflect blame from himself and his family. However, the same argument did not apply to the exculpatory evidence he gave in favour of the appellant. Therefore there was no reason to direct the jury as to the dangers of acting on everything he said, as the judge did. We saw some force in this submission and we shall return to it later.

53. The third ground of appeal relates to the general heading of fresh evidence. First, it is said that fresh evidence is now available from Mwesezi that the appellant was not at the scene of the crime. He has provided a detailed account of the attacks upon Mr

Colley and the deceased. He has named the principal participants as Ring-Biong, White, Dwayne Mayers, Jermaine Makinde and Curtley Swallow. He insists that Sam Hallam was not involved. He has seen stills from CCTV footage on the night in question and can identify some of those present. His account, if accepted, would suggest that Phoebe Henville was not in a position to observe the assault on the deceased, and would lend support to the argument that if she saw anything, it could only have been the attack on Mr Colley.

54. When Mwesezi was discharged from the trial the appellant's defence team sensibly approached his legal team with a view to seeing whether he would give evidence on behalf of the appellant. They were told that he would be advised not to answer any questions because he was due to be tried following the conclusion of the trial of the co-accused. Mr Hatton, on behalf of the Crown, has accepted that this provides a reasonable explanation for the failure to call him at trial: the defence could not do so.

55. The next area of fresh evidence relied upon by Mr Blaxland relates to rumours about the involvement of Sam. The fresh evidence which is available consists of the messages from Gary Rees. The significance is said to be that Gary Rees could have been cross-examined about it. He was, after all, a prosecution witness. He is likely to have said that the information came from Phoebe Henville or Sarah Beattie or one of the others involved. If so, Phoebe Henville or Sarah Beattie could have been cross-examined about it. The

message referring to Sam Bass from Gary Rees was sent shortly after the confrontation with the appellant in the street on 13 October. It is possible, therefore, Mr Blaxland argued, that they originally thought that the appellant was Sam Bass and not Sam Hallam. Further, the impression given at trial was that the rumours circulating were in relation not just to someone called Sam, but specifically to Sam Hallam. In fact, Phoebe Henville went so far as to claim that she had heard it was Sam Hallam who was involved. That was how the judge summarised her evidence to the jury. Mr Blaxland argued that there was a real danger that the rumour was taken by the jury as providing further support for the correctness of the identification. The judge omitted to direct the jury that this was not the case. Mr Blaxland submitted that these messages, had they been available to the defence team at the time, would have corrected this false impression.

56. We are not as confident as Mr Blaxland that the messages would have been deployed by the defence had they been available. There may have been certain dangers, given the contents of the second message. However, we see some force in Mr Blaxland's argument that the material should at least have been available to the defence team so that they could make their tactical decision. It may have been deployed to establish, first, that Sam Hallam was not the rumoured culprit; and second, that there was some further possibility of collusion between the witnesses as to naming the person they thought was responsible. Mr Blaxland further argued that the disclosure could have led to the defence’s establishing a connection between a

person rumoured to be involved in the crime and the theft of mopeds, through the link to the address provided for Sam Bass. Had that been known, Miss Henville could have been cross-examined about what she said about seeing the person on the street causing trouble and that that person was known for "nicking mopeds". As we have indicated, this was not a description which fitted the appellant.

57. Mr Blaxland argued that the defence may then have identified Duncan Mulholland as a person linked to Ring-Biong and known to be involved in the theft of mopeds. That inquiry would have led to consideration of the CCTV stills from the crime location, and that in turn would have led to the identification of a still shown to Mwesezi and analysed by an expert in imagery analysis, Robert Butler. With the benefit of Mr Butler's analysis, it could have been put in cross-examination to Miss Henville and Mr Khelfa that the selected image was not of the appellant but of one Duncan Mulholland.

58. When asked by the Thames Valley Police to examine the CCTV stills Mr Khelfa said of one of the images (Man A) now considered by Mr Butler: "It looks like the appellant, but it isn't him". In Mr Butler's expert opinion his analysis provides moderate support for the proposition that Man A is Duncan Mulholland, but no support for the contention that Man B is the appellant. Man A is just one of the white faces in the crowd. Mr Butler said that one particular difference between Man A and Sam Hallam cast considerable doubt on the possibility that the two were the same.

59. As much as we can see the force of Mr Blaxland's submissions about the deployment of the two messages in the first stage of his argument, this second stage seemed to us to descend into somewhat speculative territory. It is clear from the evidence and from the CCTV images that a number of white youths were present. It was always open to the defence to have them examined by an expert. It was always open to the defence, if they felt sufficiently confident of their ground, to put to the witness: "Look at this image. There is someone who looks like the appellant, but it is not him". It was not clear to us, therefore, the extent to which the defence at trial were precluded from pursuing this line of inquiry by any non-disclosure, nor the extent to which it would necessarily have advanced the appellant's case.

60. Similarly (albeit we understand the argument), we found the written submissions on the fresh evidence available in relation to Tyrone Isaacs less than compelling. He was named as one of those present at the scene. When his home was searched some interesting items were found, namely the broom handle with the nail at the end and the mobile phone. There is no record of any examination of those items and they were returned to him.

61. Two thoughts immediately occur to us. First, the broom handle does not resemble to any great degree the weapons described by the witnesses. Second, it might be thought that only a cursory

examination of both at the time would surely have given at least an impression of whether they were items of interest. This looks to us, at first blush, like an error in record keeping rather than potentially important exhibits being missed.

62. However, we bear in mind that Mr Blaxland sought to persuade us that the defence at trial may have deployed this material at no risk to the appellant in an attempt to establish a possible candidate for the black male originally described by the witnesses, or even simply to “muddy the waters” and raise doubts in the minds of the jury as to the accuracy of the witnesses' accounts. We should add that we did not give Mr Blaxland the opportunity to develop his submissions orally on this ground because it was not necessary, for reasons that are now well known to all.

63. As far as Makinde is concerned, Mr Blaxland, rather boldly in our view, sought to rely upon his statement, although for unexplained reasons he was not in a position to call him. On the limited submissions and material before us we were not satisfied that Makinde's statement met the criteria for admission in this court.

64. Mr Blaxland placed greater faith in the evidence of Mwesezi. This was because he would have confirmed the point that the appellant's defence team was well able to make at trial: that none of the co-accused said that the appellant was present. But, he might also have been able to go further and undermine Miss Henville's

evidence and raise the possibility that she had mistaken the appellant for a youth who looked like him, namely Mulholland. Mwesezi was present at court but again for reasons known to everyone we did not hear from him.

65. Finally, and most importantly, Mr Blaxland placed heavy reliance on the evidence relating to the appellant's mobile phone. Two phones were taken from the appellant on his arrest. For reasons which escape us they do not seem to have been interrogated by either the investigating officers or the defence team. We can understand why cell site evidence in relation to the use of the phones may have been of limited value given the close proximity of the masts, the various scenes, and the homes of those involved. However, given the attachment of young and old to their mobile phones, we cannot understand why someone from either the investigating team or the defence team did not think to examine the phones attributable to the appellant. An analysis of mobile phone evidence played a part in the investigation: see the schedule of calls between the co-accused to which we have already referred.

66. Both the appellant’s phones have both now been examined. One produced no results of any interest. The other, a 3G telephone purchased by the appellant about a week before the incident, did. At the time of the murder it was brand new and state of the art.

67. One reason proffered for the failure to examine the phone was

that in 2004 the Metropolitan Police did not have the technology in-house to examine 3G telephones. However, given our limited knowledge, we would have thought that even a cursory check might have produced some interesting results. Further, it might be thought that the appellant would have alerted his defence team to the fact that he had taken photographs on his new phone in the days before and after the murder which might have jogged his memory and helped establish his whereabouts.

68. We are not aware of what the appellant told his lawyers or what tactical decisions they took. We can proceed only on the basis that the prosecution accept that this is fresh evidence which meets the criteria for admission and receipt by us.

69. We accept that this evidence potentially does three things: it puts the appellant at his grandmother's house in the afternoon of 11 October; it puts him with his father in the George and Vulture public house in the early evening of 11 October; and it puts him with Harrington on 12 October. Thus, although this evidence cannot establish a positive alibi for the night in question, it raises the distinct possibility that both the appellant and his alibi witness were mistaken as to the date they were together. This in turn raises the distinct possibility that the alibi was not a concoction on the part of the appellant to deceive. It was always, in our judgment, a curious feature of this case that a man who had allegedly set about establishing a false alibi in the number of days available to him

before his arrest did an appalling job and failed even to get his alibi witness on side before speaking to the police.

70. Thus there is now before us significant material which was not before the trial judge or this court on the last occasion to the effect that, despite Harrington's confident assertion that he did not see the appellant in the week leading up to 13 October, he did; he saw him on the 12th. Of course, this does not put the appellant in Harrington's company on the 11th.

71. When the hearing began Mr Hatton was prepared to accept that for the most part the fresh evidence upon which the appellant relies meets the criteria for our receiving it. He intended to submit that it did not undermine the safety of the conviction. However, as he heard the arguments develop, as he heard the concerns expressed by Mr Blaxland and the independent concerns expressed by the individual members of this court, he very properly reconsidered his position and took instructions. When we returned after the luncheon adjournment yesterday he announced that the prosecution would no longer oppose the appeal.

72. We have read much of what happened at trial. We wish to state that Mr Hatton has acted with conspicuous propriety and moderation at all times. His decision not to oppose the appeal was in our view just and fair. However, the decision remains ours.

73. Had Mr Hatton made any submissions to the court, he would no doubt have reminded us that the prosecution team was faced with two witnesses who knew the appellant and who put him at the scene of the murder of an innocent young man and participating in the attack upon that young man. The appellant gave a firm alibi to the police, having been alerted just two days after the murder to the possibility that he may be questioned. That alibi was investigated. The evidence suggested to those investigating that the appellant had tried to put forward a false alibi. When it was proved false, he still could not establish his whereabouts, even though it was only a matter of weeks after the incident. The appellant then repeated that alibi at trial, despite knowing of Makinde's assertions in interview that he had seen the appellant outside the George and Vulture some 45 minutes after the events and that the appellant had told Makinde that he had been “at his Nan's”. Yet the George and Vulture was not raised at any time by or on behalf of the appellant; nor was the proposition that he had been “at his Nan's”. Presumably, the appellant was well aware that he had owned a new phone on which he had taken lots of photographs.

74. Further, for whatever reason, be it distress or well-intentioned legal advice, the appellant did not help himself in interview, and it seems he did not help himself in the witness box. This was not a case therefore, in our judgment, in which either the prosecutor or the trial judge could conclude that there was no evidence against him. There was evidence of his involvement for the jury to consider,

whatever criticisms could be made of it. The criticisms went to the credibility and reliability of witnesses. Placing its trust firmly in the jury system, this court has said time and time again that issues of credibility and reliability are primarily the responsibility of a jury and that a judge should be wary of intervening.

75. However, the situation has now changed dramatically. The evidence upon which the prosecution relied to support the identifying witnesses, namely the evidence as to false alibi, has been significantly undermined. Had the trial judge and the court on the last occasion known what we now know, we doubt that they would have reached the conclusions they did.

76. The identification evidence in this case was never very satisfactory. We note that three accused against whom Phoebe Henville was a key witness were acquitted. We have no doubt, therefore, that the jury looked for support of her purported identification, which they could only have found in the statement of the witness Mr Khelfa, which he had disavowed by the time of trial, and in the evidence of Mr Harrington. Given the difficulties facing the prosecution in relation to Mr Khelfa's evidence, in our judgment it must have been the evidence of Mr Harrington which tipped the balance. The jury must have concluded that the appellant was at the scene, knew that he had been at the scene when confronted by Miss Henville and Miss Beattie two days later, and tried to lie his way

out of trouble. However, we are now satisfied that any confidence that the appellant had lied and/or asked Harrington to concoct a false alibi was misplaced.

77. In our judgement the following summary encapsulates this appeal. The case against the appellant depended on the visual identification evidence of two witnesses, neither of whom said anything in his or her initial statements to the police to indicate that they recognised the appellant (whom they knew) or anyone like him at the scene of the crime. Miss Henville's identification of the appellant was prompted by her friend. Mr Khelfa's identification of the appellant was prompted by Miss Henville. Neither was a particularly satisfactory witness. Their various accounts contained numerous internal inconsistencies and contradictions, and were contradicted by other evidence. Mr Khelfa's identification provided little, if any, independent support for Miss Henville's. The new information in relation to the messages from Gary Rees raises the possibility of greater collusion (in the sense of discussion) between the witnesses than the defence team knew at the time. It also potentially puts paid to Miss Henville's assertion that from the outset that there were rumours that Sam Hallam was involved. In any event, the purported recognition or identification of the appellant took place in very difficult circumstances. It amounted to little more than a fleeting glimpse. Thus, even if the witnesses had remained rock solid, consistent with each other and with the evidence of other witnesses, there was scope for a case of mistaken identity. Proper independent

supporting evidence was essential on the facts here.

78. We now know there is the real possibility that the appellant's failed alibi was consistent with faulty recollection and a dysfunctional lifestyle, and that it was not a deliberate lie. The proper support to the Crown’s case has fallen away.

79. Finally, there is the point (not spotted by anyone before these proceedings) that the jury may not have appreciated that they were free to rely upon the potentially exculpatory evidence of Bissett.

80. In our judgment, the cumulative effect of these factors is enough to undermine the safety of these convictions. In those circumstances, it is not necessary to consider further the alleged failures in disclosure in investigation (which to our mind were nowhere near as extensive as Mr Blaxland asserted) nor the so-called positive evidence from witnesses who knew the appellant who say that he was not at the scene of the crime. However compelling they may have been, we doubt they could ever have established, as Mr Blaxland asserted, positive evidence that the appellant was not at the scene, albeit we accept that they may have established that, like so many others, two more witnesses did not see the appellant at the incident.

81. We are indebted to the Criminal Cases Review Commission and the Thames Valley Police for an extremely thorough investigation and analysis of the evidence. We may not agree entirely with each of the

reasons for referring the case to us, but we certainly agree with the reasons in relation to the alibi and to the Rees messages.

82. We conclude by expressing our sympathy to the brother and foster family of the deceased. By all accounts he was a charming young man with a great deal to offer. They have had to cope with their grief at the death of Essayas, the original investigation, the trial, a re-opening of the investigation, and now these proceedings. We hope that they understand that we must all do our job according to law.

83. Accordingly, the result is that the conviction is unsafe and it must be quashed. The appeal is allowed.

84. Mr Hatton, I take it there is no application?

MR HATTON: There is no application.

LADY JUSTICE HALLETT: In which case there will be no retrial.

MR BLAXLAND: I have one application and that is for an extension of the representation order to cover the work carried out by my instructing solicitor. He has also assisted us by attending court. We have a witness whom we proposed to call yesterday and he needed to attend.

(The court conferred)

LADY JUSTICE HALLETT: Yes, we are satisfied that there should be a full representation order for your solicitor, as long as somebody points out that whoever physically prepared the documents, they could have done a better job.

MR BLAXLAND: Yes. I could offer mitigation, but it is probably not the time or the place to do that.

LADY JUSTICE HALLETT: It probably is not, Mr Blaxland. Thank you all very much.
