Neutral Citation Number: [2010] EWCA Crim 2975

Case No: 2009/02890/D4, 2009/02942/D4
& 2009/02892/D4

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT READING
HER HONOUR JUDGE ZOE SMITH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2010

Before :

LORD JUSTICE THOMAS
MRS JUSTICE RAFFERTY DBE
and
MR JUSTICE BEAN

- - - - - - - - - - - - - - - - - - - -

Between :

Regina	**Respondent**
- and -	
Nicholas Andreas Olu	**Appellant**
Leon Tony Wilson	**Applicant**
David Brooks	**Applicant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr R Carey-Hughes QC and **Mr D George** for the **Appellant Olu**
Miss S Riggs for the **Applicant Wilson**
Mr R Fortune QC and **Miss A Khan** for the **Applicant Brooks**; they did not appear at the trial
Mr I Acheson for the **Respondent**

Hearing dates: 16 and 26 July 2010

Judgment
As Approved by the Court

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Lord Justice Thomas:

1. In the early hours of Friday, 2 May 2008 at about 3.54 a.m. Robert Spence aged 17 and Emmanuel Connor aged 22 were stabbed in the St Mary's Butts area of Reading. Robert Spence died as a result of 14 stab wounds, one of which penetrated his heart. Connor had multiple wounds but survived. The appellant Olu and the applicants Brooks and Wilson, together with Carlton Miles and Jemal Powell were tried for the murder of Robert Spence and the attempted murder of Emmanuel Connor at the Crown Court at Reading before Her Honour Judge Zoe Smith between 16 February 2009 and 14 April 2009. Olu, Brooks and Wilson were convicted on both counts. Each was sentenced to life imprisonment for the murder, Olu and Wilson being given minimum terms of 20 years and Brooks of 22 years, each less time on remand. They were given concurrent life sentences for attempted murder.

2. There are two primary issues before the court:

   i) The admission by the judge of bad character evidence relating to a caution received by Olu for the possession of a knife and the directions given by the judge on his character. The single judge gave leave to appeal.

   ii) The way in which the Crown had conducted disclosure. It was contended on behalf of Olu, Wilson and Brooks that this had been so deficient that the trial had not been fair and the conviction unsafe. The single judge referred this issue to the Full Court

   There are other issues to which we turn at paragraph 84 and following on which renewed applications were advanced.

Factual background

3. The deceased, Connor, and his friends Hinge, Stoute, Lessey, Spence and Holder had been out for the evening in Reading on Thursday, 1 May 2008. At about 23:30 pm they went to Club Mango in the centre of Reading; they were there till about 3:30 am. It is convenient to refer to these as the Reading group.

4. At about 00:22 am another group, most of whom came from Bristol, also went to the Club Mango. These comprised Olu, Brooks, Wilson, Miles and Powell. It is convenient to refer to these as the Bristol group. They remained there till 3:30 am. There was no evidence of any friction between the Reading and Bristol groups at Club Mango.

5. One of the Reading group, Hinge, was rowdy and ejected by a bouncer. After being ejected Hinge tried to return and had what can be described as an altercation with the bouncers at the club, particularly Husbands and Thomas. A little while later they all moved to the St Mary's Butts area of Reading. This is a town centre area with a number of fast food and other outlets where people gather late into the night. When the Reading group and the two bouncers, Husbands and Thomas, were in St Mary's Butts, there was a confrontation between Husbands and Thomas on the one side and Hinge on the other. This occurred when Hinge opened the door of a car in which Husbands was sitting near to Burger King. Husbands got out and a fight ensued between Husbands and Thomas and Hinge, Lessey and Stoute. Thomas hit Stoute on

the head with a bottle. Other fights broke out but at that stage it appeared the Bristol group were not involved.

6. The Bristol group arrived in St Mary's Butts in two cars, a silver BMW containing Olu, Wilson, Brooks, Miles and Powell and a Honda containing Gardner and Campbell. The prosecution case was that five of the Bristol group who were in the silver BMW (not Gardner and Campbell who had gone to a fast food shop – Perfect Fried Chicken) had for some reason become annoyed with the Reading group. When the five arrived at St Mary's Butts, those in the silver BMW got out, went over to where a melee was occurring, returned to the silver BMW and armed themselves with knives, including what was described as a large sword and attacked the Reading group. The prosecution account was that they walked shoulder to shoulder and aggressively. Spence and Connor were stabbed. The five then got into their BMW and drove away.

7. After Olu had surrendered himself to the police later in May 2008, charges were authorised against Brooks and Wilson as well as against the two who were acquitted.

8. The prosecution case relied on:

   i) Emmanuel Connor who described five men, two who were dark skinned and three light skinned advancing down St Mary's Butts, each had a knife – one was a Samurai sword, one a butterfly knife and the others small lock knives. They marched in shoulder to shoulder formation. He backed off. He had tried to help the deceased who was being stabbed by four or five men, but he was stabbed too. There was some inconsistency in the accounts he gave.

   ii) Spence and Holder of the Reading group who gave similar evidence of about five men approaching; one had a sword. Although others in the Reading group, Hinge, Stoute, Lessey gave evidence they said nothing material which was evidence in respect of the Bristol Group.

   iii) Richardson who had known one of the Reading group and had been at Club Mango, where he had had nothing alcoholic to drink. He then went to St Mary's Butts and saw the fights we have described at paragraph 5. He saw Marsden (one of the Reading group who was very drunk) stagger off towards a group of people near a phone box. One of them told him to go away; he did not and he was hit by one of the group who again told him to go away. One of Stoute's friends ran over to help Marsden. The group went to their cars; in a line of 4 to 6 the group went to where Stoute was; Stoute backed away. He saw one had a sword and that the others had knives. He saw them stab at Stoute who had fallen to the ground. Connor went to help him. He fell to the ground. Connor and Stoute then managed to move away and get into a taxi. He then heard a person shout "Bevels, we have some trouble". Bevilles was later identified to him as the deceased. The deceased punched the man with the sword; he next saw him get off the ground covered in blood and get into a taxi. The group then went back to the Silver BMW and drove away. He had met one of the group who had attacked Stoute before and had been told by him he came from Bristol. He described the man with the sword as dressed in white; he had participated in the stabbing; he had "cane-row" plaited hair. On

22 May 2008, he identified Olu as having been part of the group that had been involved in the attack, but he could not say what part he had played in it.

iv) Tani who had seen five black men get out of a BMW shouting "Do you want to fight. Come on then"; they approached another group who had been involved in a fight. He saw one of them with a knife who then stabbed a person who was moving back; in his statement he said that two had knives. The five then ran back to the BMW and drove away.

v) Braham who saw three of the out of town men get knives – one was a knife with a two foot blade and others had knives, but there were discrepancies between his evidence and his previous statements to which we refer at paragraph 26.

vi) CCTV evidence of the area and of those in it at the time; the quality was poor and subject to some distortion and obscuration. Mr Laws of Kalagate Imagery Bureau was employed by the prosecution to provide his opinion on what could be derived from the images; he produced a draft and then a final report.

vii) On a long view CCTV a man in white could be seen coming down St Mary's Butts to the area outside Burger King. It showed him making 6 stabbing motions and then going back up St Mary's Butts. An image from the camera at Broad Street Mill showed that he was walking with others. Evidence was given by Mr Laws to the effect that they had similarities to the others who had arrived earlier at the Club Mango and of being the 7 who arrived together.

viii) The long view camera also showed a group of five males backing off towards the area where the Silver BMW and Honda were parked. At the same time it showed the deceased getting into a taxi.

ix) Another CCTV camera showed the group of five get into the silver BMW and drive away.

x) There was no forensic evidence to link any of the Bristol group to the stabbings, but there was blood from the group in the BMW.

9. As to Olu, the case against him was based on him being part of the group and on the evidence of Richardson who had identified a man in white with a cane row plaited hair style; that was said by the Crown to be Olu. He was the only one of the five defendants to give evidence; his evidence was that he had been wearing a white shirt, cream trousers and white shoes. He had driven the silver BMW to St Mary's Butts for the others to buy food. He had seen fighting and had been cut in the lip by a man who had hit him with a knuckleduster; he had run away and had later seen him and had a fight with him. That man was the man in white. He had been to hospital to be treated for the injuries. They had all left in the BMW. He relied on eyewitness accounts of persons in the Bar Iguana.

10. In the case of Wilson, it was admitted that he was present in St Mary's Butts and that the BMW was his car. It was the prosecution case that he was part of the group with knives which they had obtained from his car and following the attack had gone back to it; it was said that he could be identified from his height and clothing as one of

those who was part of the group. His account given in a statement to the police was that he had gone there to buy food and had not been involved in any fighting. He had a previous conviction for possession of a bladed article in 1996. The judge declined to admit that conviction. There was no evidence of identification against him save in the most general terms.

11. The case against Brooks was based on the fact he arrived at Club Mango wearing a distinctive jacket. It was the case against him that that was the person next to the man in white in St Mary's Butts. Brooks' blood was found in the BMW. He had two previous convictions for possession of bladed articles which the judge admitted under the bad character provisions of the Criminal Justice Act 2003 (the CJA 2003). He denied he had been involved in the attack.

12. Olu surrendered to the police on 20 May 2008 and was sent for trial on 24 May 2008; a trial date was then fixed for February 2009. There were pre-trial hearings on 2 June, 16 July, 14 August and 7 October 2008. As we have set out above, charges were authorised against Wilson, Brooks, Powell and Miles in May 2008, but they were not arrested and charged until much later. They were sent for trial on 16 October 2008. Brooks surrendered to the police on 16 October 2008 and was sent for trial on 17 October 2008. The Crown sought on 27 October 2008 and obtained an order that they all be tried together on the date fixed for the trial of Olu. There were then further pre-trial hearings on 19 November, 16 December 2008, 9 and 12 January and 12 February 2009.

13. It is evident that the time for the preparation of the defence case for Wilson, Brooks, Miles and Powell required the service by the Crown of papers promptly. In these circumstances, it was likely that difficulties would arise in relation to disclosure and, as we set out below, they did.

14. The trial started on 16 February 2009, with the first witness, Emmanuel Connor giving evidence on 19 February 2009.

15. On 20 March 2009, the judge admitted bad character evidence in respect of Olu, Miles, Wilson and Brooks. She also ruled there was a case to answer.

16. Olu gave evidence, but the other appellants did not. On 31 March 2009, the judge began her summing up

DISCLOSURE

17. We take this ground first as it was relied upon by all, though both at trial and on the appeal it was Wilson's counsel (Miss Levitt QC and Miss Riggs at the trial and Miss Riggs on the appeal) who took the lead in advancing the argument.

The course of disclosure in the proceedings

18. The prosecution were ordered to serve the papers by 19 November 2008; they served the first part on 18 November 2008. As was to be expected, not everything was then served, though the bulk of statements and exhibits were. Some witness statements taken in November and December were served on 21 January 2009 and others taken in the summer of 2008 were served on 28 January 2009.

19. There were served:

i) On 14 November 2008, a 107 page schedule of non-sensitive and unused material (MG6C) with all entries marked to indicate that they were not disclosable. There were items such as police officers' pocket books in which initial accounts of witnesses were recorded which were plainly disclosable; many were disclosed in due course. By way of illustration, we were shown the documentation in relation to the handing over of the jacket Wilson was wearing which though it plainly assisted the defence was included in the schedule. Further MG6Cs in similar format were served on 11 December 2008 and 21 January 2009.

ii) Also on 14 November 2008, a 900 page unpainted bundle of unused witness statements. Further unused witness statements were served on 21 January 2009. It is clear from the examples we were shown that this caused the defence considerable difficulties.

20. At the pre-trial hearing on 12 January 2009, the defence served on the prosecution a request for material. This was not answered until 28 January 2009.

21. At the start of the trial on 16 February 2009, issues between the defence and the Crown over disclosure had not been resolved. There was served a further request and Miss Levitt QC asked that a proper review be undertaken.

22. There followed what we were told were requests made almost on a daily basis for disclosure. On 19 February 2009, the prosecution provided a schedule of witnesses who had attended the identification parade and the initial witness accounts and other material relating to individual witnesses.

23. On 20 February 2009, the previous convictions of the deceased were served.

24. After further requests made by Miss Levitt QC and a submission that the disclosure officer did not understand his duties, there was a discussion between counsel as to matters which had not been disclosed; these related to a large number of issues including Kalagate (which we deal with separately at paragraph 38 below) and forensic reports relating to blood. It appears that specific criticism was directed at the disclosure officer who was said not only not to understand his duties, but also to be obstructive.

25. As a result, a schedule of police officers' note books was served and on 2 March 2009 a further MG6C listing the note books. The defence countered with their own schedule of matters that had not been disclosed. In response a further document was provided about interviews with witnesses; this concluded with a statement that a number of documents including witness statements had not been listed. This was the subject of further criticism to the effect that this confirmed the view that the disclosure officer did not understand his duties.

26. On 4 March 2009, Braham (to whom we have referred at paragraph 8.v)) gave evidence; there were differences between his oral evidence and what he had said earlier. During the course of his evidence, a request was made for notes of all the interviews that he had had with the police; this resulted on 5 March 2009, after

Braham had given his evidence, in copies being provided of entries in notebooks that had been described in the MG6C as not disclosable; typed copies were provided on 6 March 2009.

27. On 6 March 2009, after counsel for Wilson had served a skeleton argument in support of a further application for disclosure, counsel for the Crown accepted that the disclosure in respect of Braham had not been adequate as one of the officer's notes of a prior interview had not been disclosed; he undertook to conduct a further review and make sure that there was nothing further that was disclosable. More requests were then served by the defence including a detailed request on 10 March 2009. The Crown gave assurances that this would be dealt with. Criticisms were again made of the disclosure officer's response as not merely being unhelpful, but being obstructive in seeking to put further requirements in the way such as seeking reasons why police officers' notebooks in relation to interviews with witnesses were required.

28. On 17 March 2009, Braham was recalled and further cross examined, but for tactical reasons Miss Levitt QC did not cross examine on the further information provided. The issue of disclosure was then raised before the judge. We were told that the judge observed that there was no application under s.8 of the CPIA and she could not say whether disclosure had been properly made

29. After the judge had ruled there was a case to answer in respect of Olu, Wilson and Brooks on 20 March 2009, a further application was made for disclosure supported by a s.8 application; it was submitted that the result of the failures which we have outlined and in particular the failure to consider what was listed on the MG6C and to list it properly, was that there could be no fair trial. The judge ruled against the submission.

30. A further s.8 application was made on behalf of Wilson; the response of the Crown was an application to the judge in chambers after which it was ruled that there was nothing to disclose. There is nothing, in our judgment, in relation to the suggestion that the judge did not consider the s.8 applications properly.

31. At the end of the hearing that day, counsel for Wilson provided a yet further list setting out what it said was lacking. It included a point on the MG6C served in November 2008 which had described item M32 in the following terms:

> "DC 1750 Middlecote says N60 William Barnwell says while he was still at [Royal Berkshire Hospital] on 2nd May he overheard 7-8 males talking about a knife"

The further description of this document provided on about 20 March 2009 in response to the further list was:

> "7-8 males at [hospital]: "we gotta get our story straight … was it a long knife".2pm 2/5 v group giving sig wit"

This document was sought on the basis that Connor who was in hospital might have been visited by the Reading group or that a conversation might have related to the evidence which Richardson or others had given. Disclosure was rejected by the Crown. An *ex parte* application

was made to the judge on 23 March 2009. Following that application, counsel for the Crown said in open court that if this document had related to the victim group, it would have been disclosable, but it did not. The police had reviewed the recordings of the CCTV cameras at the hospital, but the cameras did not record the area where the conversation had taken place. The judge ruled that there was nothing in the document that would indicate that the person who was attending the hospital knew who the group were. There was nothing else which indicated that the conversation related to the incident in St Mary's Butts. Disclosure would not be ordered.

32. A further application was made that same day, 23 March 2009, to the judge that the Crown's failure to provide disclosure of unused material by listing it on a schedule and describing it with sufficient particularity rendered the trial unfair and amounted to a breach of Article 6.

33. The judge ruled against this. She reviewed the matters we have summarised above. She rightly found that the documents relating to Braham should have been disclosed earlier, but she observed he could have been cross examined about it on recall. She made clear that there had been a full review in relation to the lack of particularisation in the MG6C by the Crown and she had insisted on a review and on particularisation. Although she accepted that the process of disclosure had in some respects been deficient, it had not resulted in any unfairness or any breach of the Article 6 rights of the defendants.

The submissions made by the defence

34. As had been submitted to the trial judge, it was submitted to us by Miss Riggs on behalf not only of Wilson, but on this issue on behalf of Olu and Brooks, that the way in which the MG6C had been prepared was in breach of the Criminal Procedure Investigation Act 1996 and the Attorney-General's Guidelines on disclosure. In submissions that were characterised by immense diligence, hard work and meticulous attention to detail, Miss Riggs submitted that the officer who had prepared the MG6C plainly had no understanding of his duties – he had not undertaken a proper view and plainly did not know what should be disclosed; he failed to keep disclosure under review. She illustrated this by detailed references to the history of disclosure on various issues including Braham's previous statements.

35. It was very difficult for the defence to prepare properly for the case, if disclosure was not carried out properly and what was disclosable made available to the defence before the trial started. Defence advocates could not consider the way in which the case should be conducted without disclosure being completed prior to the trial, quite apart from the difficulties caused by having to deal with pre-trial disclosure issues during a trial rather than concentrating on the conduct of the trial. Furthermore, if the disclosable material in respect of a witness was not available when he was called, that might put a defendant at a considerable disadvantage which could not be cured by recalling the witness; what had happened as regards Braham illustrated this.

36. It was submitted that the judge had been wrong in her ruling in relation to the overheard conversation at the Royal Berkshire Hospital, referred to at paragraph 31; there was evidence to suggest that Hinge, Spence and Ashley went to the Hospital and

although (as the Crown contended) Stoute was at a hospital in Oxford, the group were communicating with each other. If the information had been disclosed before the trial or even during the prosecution case, then the witnesses could have been cross examined about it, as it gave rise to the clear inference that there had been collusion. If the statements were examined carefully, it could be seen there was a strong argument that the Reading group, Richardson and possibly others had colluded. The position remained at the time of the appeal that the appellants had not received some of the accounts given by the witnesses; they still remained to be disclosed; what was said to be missing was set out in a schedule provided to us.

37. The result, in her submission, was that the trial had been unfair and the convictions were unsafe.

The report of Mr Laws of Kalagate

38. The report of Mr Laws of Kalagate was served on 16 December 2008 and in colour on 20 January 2009. A draft report with different conclusions as to the persons identified was served on 7 January 2009. A disclosure schedule in relation to Kalagate was served on 12 February 2009; it contained only the material sent to Kalagate by the police. The defence were subsequently told that Kalagate had no working papers or notes; there were no notes of instructions or of conversations with the police.

39. The final report identified one of the figures to be Wilson who in the draft report had been identified as Powell. It was contended by the defence that this was as a result of a conversation with the police on 12 December 2008 of which there was no adequate note, though it was covered in a statement made by a police officer served on 19 February 2009.

40. On 2 March 2009, the judge heard a *voire dire* on the admissibility of the evidence of Mr Laws of Kalagate; it was submitted on behalf of Wilson that Mr Laws had failed to comply with his duties under Crim PR 33.3 and with the CPS Guidance as he had not recorded his instructions and the information on which he relied, particularly the oral briefings. The judge ruled it admissible.

Our general conclusion

41. We have no doubt that the way in which those in the Thames Valley Area dealt with disclosure in this case was not in accordance with the statutory regime. The question for us is whether that affected the fairness of the trial or the safety of the conviction.

42. This was a case where what was in issue was not pre-existing documentation taken by the police into their possession or material covered by PII or third party or overseas disclosure where difficult issues can arise. This case concerned disclosure of investigative material which was almost entirely in the possession of a single large police force and experts instructed by the Crown. Despite the volume of such material that a modern investigation generates and records, difficulties should not have arisen if the relevant issues had been identified and disclosure carried out in accordance with the CPIA and the Guidelines in a “thinking manner” and not a box ticking exercise.

43. It is evident that the practice in the Thames Valley Area was to supply all the unused non sensitive material to the CPS at the same time as the schedule was served on the

defence; all unused statements were not listed in the schedule but simply served irrespective of whether these met the disclosure test. This practice has been abandoned and those in the Thames Valley Area now operate in accordance with the statutory regime.

44. It is self evident that those who dealt with the matter dealt with it without taking fully into account the proper approach to disclosure in relation to investigative material. The current disclosure regime will not work in practice in such a case unless the disclosure officer is directed by the Crown prosecutor as to what is likely to be most relevant and important so that the officer approaches the matter through the exercise of judgment and not simply as a schedule completing exercise. It is the task of a CPS lawyer to identify the issues in the case and for the police officer who is not trained in that skill to act under the guidance of the CPS. This did not happen in this case.

45. In this case, it was obvious that the most relevant documents would relate to:

i) All contacts, conversations and draft statements from those who were eyewitnesses in St Mary's Butts to what happened; what a witness says when first seen, even informally, in a case which depends on eyewitness evidence, is often the most reliable. Thus it was important that all of these notes and statements were obtained (where available) and scheduled at the outset. It is no excuse to say that there were many other witnesses who were interviewed, including those dealing with sightings of the BMW on motorway cameras. Once scheduled, it would have been a pointless exercise and a waste of police resources to go through each note of contact with the eyewitnesses (as opposed to the other witnesses) to decide whether it did or did not undermine the prosecution case or whether it assisted or did not assist the defence. All the statements in relation to the eyewitnesses should have been obtained, scheduled and disclosed as unused material so that the defence could determine whether such notes, records or statements assisted or did not assist. For one reason or another, this was not done and earlier statements and police notebooks were not obtained in proper time. A statement from a CPS lawyer explains the failure on the basis that he was not alerted to the fact that notebooks might contain accounts of initial conversations. This explanation, however, demonstrates that there was not in place a system for proper direction of disclosure and making sure that disclosure was carried out on a "thinking" basis by all those involved having a proper understanding of what was relevant.

ii) The documents relating to Kalagate. It is of great importance, bearing in mind the role experts play in the criminal justice system and their duty to the court, that there is full disclosure at the outset of the information provided to the expert and the expert's working papers.

46. We also recognise that a failure to disclose the material documentation prior to a trial has two adverse consequences for the defence. Without proper disclosure a defence advocate cannot plan how the trial is to be conducted and what to put to the witnesses called by the Crown. Secondly, disclosure during the trial distracts a defence advocate from the proper and expeditious conduct of a trial. Experience shows it inevitable that there may be some late disclosure, but late disclosure on the scale that occurred in this case is unacceptable.

47. However the defence themselves in some part contributed to the problem by the late service of defence statements – for example that of Brooks (which we accept was served) was not served until 11 February 2009. We say in part only because it seems to us clear what the issues were and what material held by the Crown was disclosable.

48. It is essential that if, as was apparent in this case, there are difficulties, the judge is closely involved in their resolution. In civil litigation, prior to the Woolf reforms which resulted in the Civil Procedure Rules 1999 it had become a practice to send long schedules which dissected the adequacy of disclosure and sought further disclosure; it was sometimes done for tactical reasons in the hope something might turn up given the test in *Peruvian Guano* or for the purpose of distracting the other party from the conduct of his case or putting him to unacceptable expense.

49. It is to guard against any development of these practices in the criminal courts that a judge, as the judge in this case did, takes a close interest in any problems relating to disclosure which may arise. The judge must ensure that the Crown performs its duties, but must also prevent opportunities arising for abuses of the kind we have described to develop. The role of the judge is therefore central. The judge will have a clear view of the issues and be astute to see that disclosure in respect of the issues is properly carried out and abusive requests or procedures do not develop. This is a task that is pre-eminently within that element of judgement that must be accorded to a trial judge. This court will therefore not interfere with decisions reached within the recognised ambit of that judgement.

50. In the present case, we are entirely satisfied that the judge took a firm grip on the issues of disclosure, exercised a proper control over the issue and took all the requisite action to deal with what had gone wrong. We are satisfied that she dealt with the issue in a way that was fair, and subject to the issue relating to document M32 which we discuss in the next paragraphs, the failings in disclosure did not result in an unfair trial, any breach of Article 6 or affect the safety of the conviction. In respect of Kalagate, we accept that the way in which the Crown dealt with disclosure was not satisfactory; nor was it satisfactory that no notes were made, particularly in relation to conversations with the police. However, Mr Laws was fully cross-examined and the deficiencies put to him. There was, in the result, again no unfairness. By the time of the appeal, the Crown were well aware of what the appellants contended had not been disclosed; the references to what it is said should have been further documents were served on the Crown; these references were to conversations or accounts in respect of which it was contended there must be a written record. We would observe that even though procedures often require notes to be made, this is not always done. We were assured that all relevant documents had been disclosed. There is therefore no substance in this general ground of appeal.

Document M32 and the issue of collusion

51. We have given detailed consideration to the document relating to the conversation at the Royal Berkshire Hospital to which we have referred at paragraph 31 which had been the subject of the application to the judge on 23 March 2009. We have taken into account other documents to which we were referred including a note in a police officer's book referring to overhearing a conversation at the hospital about coming "tooled up". We have done so because it was argued that this was the basis for

showing there might have been a strong inference of collusion between members of the Reading group, Richardson and possibly other witnesses.

52. We are satisfied that there is nothing material in document M32 and the judge was correct in concluding that there was nothing to identify the group whose conversation had been over heard. Provision of this document would have been no more than a response to the type of speculative fishing expedition that so bedevilled disclosure in civil proceedings prior to 1999. On the information before us and taking into account document M32, we cannot conclude that the inconsistencies in the statements relied on by the appellants (particularly those relating to the descriptions of the knives) read with document M32 relating to the conversation at the Royal Berkshire Hospital gives rise to a case of collusion amongst the witnesses who were called to give evidence from the Reading group either among themselves or involving Richardson and other witnesses. In reaching this view, we have not taken into account the Crown's submission in relation to the nature of the wound suffered by Connor or what caused it; we have relied on the documents to which our attention was drawn.

53. In any event, as we have set out at paragraph 19.i), the MG6C served in November identified document M32. If it had been thought that it was of importance, the issue could have been taken up far earlier than it was; we do not accept the argument that its alleged significance only became apparent when further information was supplied on about 20 March 2009. The Crown was not at fault. Moreover there is nothing at all to show that they were in breach of their continuing duties to investigate and to disclose.

54. In the result, on the information before us, we cannot conclude that there was any unfairness in this respect that renders the conviction unsafe.

ISSUE 2: THE ADMISSION OF OLU'S CAUTION FOR POSSESSION OF A KNIFE

(1) The caution

55. In 2006, Olu was the driver and sole occupant of a car which was stopped by the police. A flick knife was found and he was taken to the police station. He signed the form for a caution, admitting possession of an offensive weapon.

(2) The admission of the evidence by the judge.

56. At the PCMH on 12 January 2009, just over a month prior to the trial, the Crown was granted an extension of time until 23 January 2009 within which to make an application to serve bad character evidence. An application was served on 22 January 2009 in which the Crown sought to adduce the evidence of the admission contained in the caution on the basis that it was admissible to show that on an earlier occasion Olu had possession of a flick knife. The notice indicated that further supporting evidence of the convictions was being sought and would be served when available.

57. It is not clear when that was served. Prior to the application being heard by the judge on 20 March 2009, we were told that counsel on behalf of Olu made clear that they did not accept that the caution proved the underlying offence. When the application

was heard, it was opposed on behalf of Olu on a number of grounds including that Olu denied he had committed the offence for which he had been cautioned. His case was that, as he did not know the knife was in the car, he was not guilty of possession of an offensive weapon; he had signed the admission and accepted a caution as he had been told that, if he did so, he would not have to go into a cell, he would not need a solicitor and he could be on his way. At the time, he had not appreciated the significance of what he had agreed to do by admitting the offence and signing the caution.

58. In a ruling given on 20 March 2009, the judge admitted the evidence on the basis that it showed a propensity to commit offences of the kind charged and made it more likely than not that he committed the offence. She added that the caution was relevant to show that in the past he had carried a knife in a public place. She dealt with the dispute in these terms

> "In Mr Olu's case, it is accepted that he did sign a caution in 2006. It is said that he did so when a knife was found in the car and it was submitted that there would be introduced satellite litigation because he states that the knife was not his. However, clearly he did admit it at the time or otherwise he would not have been provided with a caution."

(3) The evidence called in respect of the caution

59. When Olu gave evidence he denied possession of the flick knife in 2006 and gave the explanation we have summarised above as to why he had admitted the offence. The Crown called no evidence to contradict his account. They relied solely on the caution and did not call any evidence to explain the circumstances in which a police officer had accepted the admission and administered a caution.

60. Olu gave evidence about being a family man, a semi-professional footballer and the community work he did. He called two character witnesses both of whom were police officers.

(4) The directions to the jury

61. Before the judge summed up, she was invited by counsel on behalf of Olu to give a good character direction on the basis of his positive good character which would only be blemished if the jury found he had committed the offence in 2006. In the alternative, the judge was asked to give a more limited direction, particularly as he had given evidence and his credibility was in issue; if the offence in 2006 was proved, it had to be seen in the context of his otherwise good character. The judge declined.

62. In her summing up, the judge directed the jury that before they could consider the contention of the Crown that Olu's admission that he had carried a knife in a public place in 2006 was relevant, they had to be sure that he had committed the offence in 2006. If they were not sure they should ignore it. It was only if they were sure that they should consider:

> "whether that fact does establish such a tendency to possess a knife in a public place. When considering that matter bear in

> mind it is but one single occasion. If you do find it does, however, establish a tendency, then it is for you to resolve how far that helps you resolve the question as to whether he had a knife with him on this occasion"

The judge then went on to give a direction in the usual form as to the context in which the jury should treat the offence committed in 2006. She reminded the jury briefly of Olu's background and summarised the evidence of the character witnesses called on his behalf. She did no go beyond that and give any form of good character direction.

(5) The matters in issue

63. The matters raised before us were:

    i) The right to challenge the admission contained in the caution.

    ii) The basis on which the evidence was admitted, its admissibility and its relevance.

    iii) The need for a good character direction.

(i) The right to challenge the admission contained in the caution and proof of the offence in 2006.

64. The judge accepted that Olu could challenge the admission contained in the caution and that it was for the jury to be sure that he had committed the offence in 2006. In the light of the overall submissions, we asked the parties for assistance on whether an admission made in a caution could be challenged and, if so, the course the judge should then take; we are particularly indebted to Mr George, Olu's junior counsel, for his assistance.

65. No direct authority could be found. However, it is clear, as a matter of principle, that evidence of the commission of a previous offence contained in an admission, which is relied on as reprehensible conduct, can be challenged.

    i) It is clear that the amendments made to the Criminal Procedure Act 1865 and to the Police and Criminal Evidence Act 1984 (PACE) enable a defendant to adduce evidence to show that he was not guilty of an offence of which he had been convicted:

        a) The CJA 2003 by schedule 36 part 5, paragraph 79 amended s.6(1) of the Criminal Procedure Act 1865 to read:

        > "If, upon a witness being lawfully questioned as to whether he has been convicted of any felony or misdemeanour … he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; …"

        b) The CJA (Schedule 36, part 5, paragraph 85) also amended s.74 of the Police and Criminal Evidence Act so that it reads:

"(1) In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom ...shall be admissible in evidence for the purpose of proving, that that person committed that offence, where evidence of his having done so is admissible, whether or not any other evidence of his having committed that offence is given.

(2) In any proceedings in which by virtue of this section a person other than the accused is proved to have been convicted of an offence by or before any court in the United Kingdom..., he shall be taken to have committed that offence unless the contrary is proved.

(3) In any proceedings where evidence is admissible of the fact that the accused has committed an offence, …, if the accused is proved to have been convicted of the offence ... by or before any court in the United Kingdom.....he shall be taken to have committed that offence unless the contrary is proved.

(4) Nothing in this section shall prejudice –

(a) the admissibility in evidence of any conviction which would be admissible apart from this section; or

(b) the operation of any enactment whereby a conviction or a finding of fact in any proceedings is for the purposes of any other proceedings made conclusive evidence of any fact."

c) In *O'Dowd* [2009] EWCA Crim 905, the appellant sought to establish that he was not guilty of the offence of which he had been convicted – see paragraph 55 of that judgment.

ii) In any event, a caution has a status that is quite different to a conviction; if a conviction can be challenged, so can an admission contained in a caution. The origins and use of cautions are described in *R v Durham Constabulary* [2005] 1 WLR 1184 and in *Jones v Whalley* [2006] UKHL 41 at paragraph 6; the second was a case where the issue was whether a subsequent private prosecution should be stayed where a caution had been given for the offence. A caution is a process for dealing with less serious offenders simply and quickly by diverting them from unnecessary appearance in the criminal courts; an explanation has to be given of its consequences. It has been made clear that it was quite distinct from a conviction. The difference is underlined by provisions of s.49 and schedule 10 of the Criminal Justice Act which provide

that all cautions are spent at the time they are given; transitional provisions had the effect of making the caution given to Olu in 2006 a spent caution.

iii) In the course of his judgment in the Divisional Court in *Jones v Whalley*, [2005] EWHC 931, Sedley LJ (with whom Beatson J agreed) pointed out at paragraph 9:

> "It is not the case … that the record of a caution administered to an adult is a criminal conviction for any purpose at all. No doubt it may be placed among the defendant's antecedents if on some future occasion he is convicted; but that is probably all. If it was sought to introduce the caution as evidence of guilt on a subsequent private prosecution for the same offence (assuming that such a prosecution is not an abuse) it seems to me overwhelmingly likely that the court would exclude it, whether under section 78 of the Police and Criminal Evidence Act 1984 or at common law as an admission obtained by means of an inducement. "

iv) Penalty notices are different again – they are not an admission of guilt and do not in any way affect the good character of the person who accepts one see *R v Gore & Maher* [2009] EWCA Crim 1424; *R v Hamer* [2010] EWCA Crim 2053.

66. Thus it seems clear that if a person wishes to challenge the admission contained in the caution he has accepted, it is permissible for him to do so, just as it is permissible to challenge a conviction. However, it is necessary that any defendant who challenges the conviction or caution must give notice of this under Crim PR 35.3(4)(b). Although the wording does not expressly cover this eventuality, it is plainly within the scope of the rule. This was not done at the trial by Olu, but the failure, though regrettable, has not caused any unfairness to the Crown.

(ii) *The admissibility and relevance of the offence in 2006*

67. It was submitted by Mr Carey-Hughes QC in his eloquent and clear argument on behalf of Olu:

i) The judge was wrong to have held that the admitted possession of an offensive weapon in 2006 showed a propensity to commit murder or attempted murder; if it was admissible it could only have been admissible to have shown that it was more likely that he had a knife when he went out on the night of the stabbing, an issue between the parties.

ii) The offence was disputed; the fact that it was disputed would open up satellite litigation.

iii) The admission of the offence was made when he was offered and accepted a caution. There was a likelihood that Olu was induced to admit it in such circumstances.

iv) It had little probative weight as he was a 30 year old man with no other offences recorded against him.

v) In all the circumstances it was unfair to admit it.

68. As we have set out above, although it may not have been clear in the initial ruling whether the evidence was admitted to show a propensity to commit the offences charged or a tendency to posses a knife in a public place, the direction to the jury was given on the basis that it showed a tendency to possess a knife in a public place. We shall consider it on that basis.

69. In our judgment the admission contained in the caution was admissible on that basis. It is clear that the judge considered the date on which the admission was made and took into account the fact that it was only made two years before the murder with which Olu was charged.

70. However it was contended that the ruling did not set out the extent to which the judge took into account the very different status of a caution to a conviction and the proportionality of admitting a caution in relation to the charge of murder and the effect it might well have. It was also submitted that the judge did not take into account the fact that the admission was said to have been brought about by an inducement and that the Crown was not intending to call any evidence to prove the circumstances in which the admission was made was otherwise than alleged by Olu.

71. Where the Crown is relying on an admission of bad character evidenced by acceptance of a caution and the Crown seeks to adduce that as evidence of bad character in a trial for murder where, as in this case, it is likely to have a significant impact on the trial for murder, the court must in our view carefully consider the exercise of the discretion under s.101(3).

72. We accept the submission that there is a very considerable difference not only between a caution and a conviction for the reasons given in the authorities to which we have referred, but there is also a very considerable difference between an admission contained in a caution without legal advice having been given and an admission made in a caution after legal advice or before a court by a plea. In such circumstances, the giving of legal advice or the formality of a court appearance will have made clear to the person the consequences of his admission. The processes that lead to a caution can differ widely between police area and police area; a court would be shutting its eyes to reality if it assumed that, where a person was not legally represented, the consequences of admitting an offence and accepting a caution were fully explained to a person in a manner that he understood the serious adverse consequences that would follow and what he was giving up by not exercising his right to legal advice - namely that what he was admitting would give him a criminal record, that the caution would be maintained on his PNC record for very many years and that it would be used against his interests in certain circumstances.

73. However:

i) Evidence of an admission of possession of a knife in Olu's car was relevant for the reasons we have given.

ii) Olu was able to give evidence that he was simply told that if he admitted the offence he would not have to be put in a cell or go to court; the jury would be able to assess that evidence and decide if he had been induced to make the admission.

iii) That evidence would not be contradicted as the Crown did not intend to call evidence to prove that the defendant when accepting a caution had had the consequences fully explained to him.

74. In the circumstances, it was in our view within that area of discretion accorded to a trial judge to exercise her discretion under s.101(3) to admit the evidence. It may be that another judge would have taken a different view, but that is not the test. It was within her discretion to have done so, as she was entitled to take the view that in the circumstances we have set out the jury would be able to decide whether the admission in the caution was true or whether it had been secured by an inducement. If they decided it was secured by an inducement, they were to ignore it. If they decided it was not, then they could take it into account as relevant for the reasons we have given.

(iii) The direction on character

75. It was next submitted by Mr Carey-Hughes QC on behalf of Olu that the judge had to approach the giving of the direction on good character on an alternative basis; if the jury accepted Olu's evidence and found that he did not have the knife in the car in 2006, then he was entitled to a full good character direction. If they found that he did, then the judge should have given him at least a qualified good character direction.

76. If a person adduces evidence that goes before the jury as a result of which the jury is invited to conclude that he had not committed an offence in respect of which he had received a caution, then one eventuality is, as we have explained, that the jury might accept that he had not done so. If he has no other matters recorded against him, he is in that circumstance a man of good character.

77. It was nonetheless contended by the Crown that even if the jury accepted that he had not been in possession of the knife in 2006, then that finding would not have purged the caution from his record. The judge therefore had a discretion as to whether or not to give a limited good character direction in accordance with the principles set out in *R v Aziz* [1996] AC 41 and *R v David Martin* [2000] 2 Cr App 42. It was contended that the caution was not purged from his record. In *Doncaster* [2008] EWCA Crim 5, on a trial for cheating the public revenue, evidence was admitted under the bad character provisions of the CJA 2003 of previous Revenue investigations where the defendant accepted he had lied and failed to make proper disclosure. The court upheld the giving of a limited good character direction as being within the limited discretion of the judge. The court observed at paragraph 42:

> "where bad character is admitted under the 2003 Act on the grounds that it is relevant both to propensity and credibility, it would make no sense for the judge to give a standard good character direction, stating its relevance to propensity and credibility in precisely the opposite direction. As for Mr Germain's reliance on *Aziz*, we would comment as follows. First, this precedes the 2003 Act with its abolition of the

> common law in relation to bad character and its replacement in terms of its own provisions as to bad character. Although there is no similar abolition of the common law rules as to good character, it is difficult to think that the new law (as to bad character) has no impact for the old law (as to good character)."

78. We accept that where the admission of an offence resulting in a caution is not challenged, a judge has a discretion to be exercised in accordance with the principles summarised by Rix LJ at paragraph 57 of *R v Gray* [2004] EWCA Crim 1074. However, in this case if the jury found, as they were asked to consider, that he had not committed the offence in 2006, then it must have followed that the admission and caution were secured by an inducement of the kind identified by Sedley LJ. It would follow that he had nothing recorded against him and he had made an admission on which no reliance could be placed. The caution was in that event of no probative value even if it remained on his record.

79. In those circumstances, we do not consider it would be right in accordance with the accepted principles or be in any way fair to withhold a direction as to good character as applicable in that eventuality.

80. It was contended by the Crown that the judge had done sufficient to cover that eventuality within the discretion open to her. She had reminded the jury of the evidence he had adduced of his good character and told the jury not to hold the caution against him if they accepted his account.

81. Although we accept that the judge did direct the jury in the way the Crown submitted, it did not go far enough. The judge gave a full direction as to the way in which they should approach their task, if they determined he had been in possession of a knife in 2006. In a case such as this where the only conclusion on the evidence was that he was either a man of bad character in that he had committed a knife crime or of positive good character who had committed no crimes (and that was an issue for the jury), the jury should have been told that in the event that they accepted his evidence as to what had happened in 2006, then he was a man of good character and how they were to treat the evidence in the light of that finding. Put simply, it cannot be right that if they found he had been in possession of the knife and therefore accepted the only evidence of bad character they should be told how to take account of his bad character in a manner adverse to him without being told if they came to the opposite conclusion and was therefore was a man of good character how to take account of his good character in his favour.

(iv) Our conclusion

82. There are many cases which point to the importance of a direction on good character and the real prospect that a failure to give it may be of such significance that it renders the conviction unsafe. Each case must depend on the circumstances.

83. In the circumstances of the present case, we have had to consider whether the absence of a direction of the kind to which we have referred renders the conviction unsafe. We have summarised the case against Olu at paragraph 9; it was by far the strongest case. The jury would have had ample opportunity to consider the case against him; it was clear from the judge's directions that if the jury accepted his evidence, they

should not hold the admission in 2006 against him. She reminded them of his otherwise good character by saying, "bear in mind it is but one single occasion"; they must have had that in mind if they accepted his evidence in respect of the admission in 2006. Although the judge should have gone further, as we have set out, we do not consider her failure to do so in the particular circumstances of the case affected the safety of the conviction.

The other issues raised on the appeal

84. In respect of each appellant it was submitted that the judge had wrongly rejected the submission of no case to answer. The single judge refused leave.

85. In the case of Olu, this submission was limited to the charge of attempted murder; it was submitted that there was no evidence sufficient to make him a party to the attempted killing, as he did not have the requisite foresight. We do not agree; given the evidence as to the nature of the weapons used and the evidence of the group's advance to the scene, it was open to the jury to be satisfied that he realised that one of those in the group might use it with intent to kill.

86. As regards Wilson, the judge rightly rejected the submission of no case. In a very careful ruling, she took account of the poor quality of the CCTV evidence to which we have referred and the fact that there was nothing on the CCTV on which the Crown relied which specifically identified Wilson. However, there was sufficient evidence; the BMW was accepted to be his; there was clear evidence that the group that carried out the attack went to that car to get knives, returned to that car which was empty and that car then drove off.

87. As regards Brooks, the judge took into account similar considerations in relation to the CCTV. He was with others of the Bristol group when they went to Club Mango and he was wearing a distinctive jacket. The jury were entitled to consider whether that the person shown on the CCTV as part of the group advancing down St Mary's Butts was that same person. His blood was found in the BMW.

88. Trial counsel for Brooks submitted grounds in respect of Brooks in relation to the admission of bad character evidence and the directions on this on which the Single Judge refused leave. This ground was not renewed. A point was raised by counsel who represented Brooks on the appeal in relation to a breach of Code D in failing to hold an identity parade and the need for a *Forbes* direction. In the light of the fact that it was decided for good reason by trial counsel not to raise the issue with the judge, it cannot form a ground of appeal

Application in relation to sentence

89. Each appellant appealed against the minimum term imposed. The single judge refused leave on the basis that there could be no proper criticism of the minimum term imposed by the judge for the murder in the light of the fact that the appellants had knives in the car. She had correctly taken into account the necessary increase in the minimum term to reflect the additional conviction for attempted murder.

Conclusion

90. The appeal of Olu is dismissed and the applications of Wilson and Brooks are refused.