Neutral Citation Number: [2008] EWCA Crim 1342

Case No: 2005/6686/C3, 2006/0193/C3
2006/0178/C3, 2006/0067/C3,
2006/0068/C3 AND 2006/0529/C3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BIRMINGHAM CROWN COURT
Mr Justice Mitting

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2008

Before :

LORD JUSTICE MOSES
MR JUSTICE OPENSHAW
and
HIS HONOUR JUDGE ROBERTS, QC

- -

Between :

Dean Martin Smith	**First Appellant**
Carl George Spencer	**Second Appellant**
William Melvin Carter	**Third Appellant**
Leonard James Wilkins	**Fourth Appellant**
Jamal Sky Parchment	**Fifth Appellant**
Michael Anthony Christie	**Sixth Appellant**
- and -	
The Queen	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr J Lynch QC and **Mr A Taylor-Camara** for the **First Appellant**, **Mr M Bishop QC** and **Mr R Lallie** for the **Second Appellant**, **Mr A S Webster QC** and **Mr O Daneshyar** for the **Third Appellant**, **Mr M Topolski QC** and **Mr M Huseyin** for the **Fourth Appellant**, **Ms A Weekes QC** and **Mr M Jackson** for the **Fifth Appellant** and **Mr P O'Connor QC** and **Mr P Wilcock** for the **Sixth Appellant**
Mr A Barker QC and **Mr A Lockhart** (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing dates: 6th – 9th May 2008

- -

Judgment

Lord Justice Moses :

Introduction

1. At about 3.37 a.m. on 20 November 2004 eleven men attempted to enter Premonitions nightclub in the middle of Birmingham. Two were armed with loaded pistols. They did not attempt to enter via the main entrance but went down an alleyway off the main street, Bristol Street, and tried to enter via a fire door. The doormen managed to prevent them doing so. As they were rebuffed, one of the group fired a single live round, threats were uttered and the group shepherded back out into Bristol Street, followed by doormen.

2. At about one and a half minutes after the eleven men had first arrived thirteen shots were fired in Bristol Street killing one of the doormen and injuring three others. All the group then escaped in the four cars in which they arrived.

3. The feature of the evidence in this appeal which is central to the arguments advanced is that the prosecution could not prove who fired the shots. But these six appellants, only one of whom, Parchment, gave evidence, were convicted over one year later on 2 December 2005 at Birmingham Crown Court of murder and attempted murder. The essential issue in the appeal is whether the prosecution could attribute to those who were convicted liability for the murder of the doorman and the attempted murder of three others as participating in those offences. Each appellant advanced particular reasons why the verdicts in their case were unsafe but common to all these appellants, save Dean Smith, was the submission that the evidence adduced by the prosecution was insufficient to establish criminal liability for the murder and attempted murders.

Facts

4. It is necessary to outline some of the facts on the basis of which the Crown were able to contend that all those who had attempted to enter Premonitions were guilty of murder and attempted murder. Four cars could be associated with the arrival of the eleven at Premonitions and the escape from the scene after the firing of the handguns. They were a Toyota MR2, admittedly driven by Parchment that night; a Ford Mondeo, a Golf, attributed to Smith and allegedly purchased by him under an assumed name and a BMW bought by Wilkins in early November 2004 which he had tried to sell two days after the murder. Three of these cars, the Toyota, Golf and Mondeo could be seen on CCTV, earlier that night in Aston and from there going to Walsall, and then back to Aston and on to Birmingham City centre. Telephone records of mobiles associated with Christie and Parchment linked those two appellants to the journeys made by the three vehicles. Wilkins's BMW appears to have joined the other vehicles at about the time they were parked, just before 3 a.m. in the car park of a nightclub, the Custard Factory.

5. The sequence of events involving four nightclubs in the City centre is of significance in this appeal. Prior to the attempt to enter Premonitions, the group, acting together, had tried but failed to enter the Custard Factory but had gained entry shortly after to the Air nightclub. CCTV shows some of them pushing their way into the Air nightclub but foiled by doormen who turned the lights on and turned off the music. They then drove in convoy to Essex Street, all four vehicles parking facing the same direction. Leaving the vehicles, the group walked the short distance to the Radius

nightclub. CCTV shows some of them trying to force their way in, pushing and shoving. After a minute or so, during which some of them stood by the fire exit, they approached the Premonitions nightclub via the alleyway to which we have already referred. The purpose and nature of this course of conduct is of importance. It demonstrates that a cohesive group was intent upon entering a nightclub as a group in circumstances in which each must have expected that they would meet resistance and was likely to become embroiled in a confrontation. Amongst that group were at least two carrying the handguns to which we have already referred.

6. Although the make of one of the nine millimetre pistols could not be identified the material found at the scene of the murder could be compared with other fired material from unsolved shooting incidents in the Birmingham area. This established that the two pistols had been used on fourteen other occasions between 22 February 2003 and 2 October 2004. During three previous incidents, two in 2003 and one in 2004, they had been used together. Thus, this was the fourth occasion when they had been used in conjunction. Whoever had used these pistols had been able to hide them between the occasions when they were fired. Accordingly, amongst the group acting with a unified purpose to gain admission to a nightclub, two of their number had gained access to pistols which had been previously used in combination.

7. CCTV showed some of the group of eleven in Bristol Street, clearly intent on reaching Premonitions nightclub by means of the alleyway and deliberately avoiding the well-signed public entrance. The events at the fire exit from Premonitions nightclub are not only shown on CCTV but described by a number of those seeking to exclude those who sought to force their way into the club.

8. Adeel Aftab, on duty at the foyer, saw the group arriving. During the course of its attempt to push their way in, resisted by six or seven door staff, he noticed one man put his hand by his groin; an attempt, as the jury were entitled to infer, to demonstrate that he was armed. There were insults, pushing and shoving. One of the doormen, David Nwolisa, spoke of a man he identified as Ringo (the appellant Spencer) as gesturing towards the doorman saying "just cool", in an aggressive or warning manner.

9. The doormen succeeded in preventing the group from entering. As it retreated down the alleyway, one of their number fired a shot. It was not possible to tell whether that was an accident, or whether the pistol was deliberately fired. The Crown relied upon it to show the absence of any reaction by any member of the group to suggest that that member was surprised by the firing of the gun. Nor, so the prosecution submitted, was there any attempt by any member of that group to disassociate himself from the group in consequence of what was asserted, on behalf of some defendants, to be an unexpected and spontaneous shot fired by a member of the gang who unknown to the others was carrying a loaded weapon.

10. The sequence of events after the doormen successfully resisted entry into Premonitions nightclub took place over a short period. It was but about one and a half minutes from the time when the group left the alleyway to the murder. But that period was said by some of the defendants to be of significance because it did demonstrate the absence of participation by certain members of the group who appeared merely to be leaving the side alley and returning to the cars parked in Essex Street.

11. One of the doormen, Hincion, heard a warning shout from those still in the club "It's Milly. Do not go outside." Milly, it was suggested, was a name used to refer to the appellant Carter. The CCTV shows some of the group in Bristol Street. Hincion heard a man say "Go on, move off". In response, one of two in the group who had gone into the road shouted "Smoke 'em. Make 'em know it's real". Hincion says that the group all joined together so that their clothes touched. He heard a firing sound, saw orange sparks and felt something hit him. The group around those who fired numbered some six or seven. Others also heard the words "Smoke 'em. Smoke 'em. Show 'em the tings are real". Another witness, Richard Williams, said that there were three or four shouting those words. He also heard the voice of one shouting "pop them".

12. David Nwolisa, one of the doormen, described seven or eight in the group on the pavement and another two in the road when those words were shouted. Just before the firing he realised something was going to happen because the group on the pavement covered their mouths with bandanas and confronted the approaching doorman, walking backwards. Another doorman describes six on the pavement and two, as he put it, "at the top of the road". He described those on the pavement as egging each other on and the shots, as others described, not fired as a fusillade but consecutively. A further doorman, Christopher Edwards, accepted that the group on the pavement, associated with those who fired the pistols, was smaller than those who had sought to enter the nightclub; he did not know where the others had gone. That the group surrounding those who fired the gun was smaller was confirmed by another doorman, David Layton.

13. There was further support for the conclusion that the group most closely associated with those firing the pistols was smaller than the eleven who had attempted to enter the club from evidence of police officers who witnessed the shooting from the region of the junction with Essex Street. Acting Sergeant Halliday saw a group of five or six men within touching distance of each other amongst who were those who fired the pistols. He accepted that there were two groups associated but with a distinct gap between them. PC Evans, his colleague, described the group amongst whom were those who fired the shots as numbering six, with two other men who had run to the corner of Essex Street looking back. Another witness, Richard Williams, appears to be describing the same two calling out to the rest of the group "Come on".

14. As we have said, thirteen shots were fired. It is surprising that only one of the unfortunate doormen was killed.

15. After the shooting all of the group returned to the cars parked in Essex Street. They can be seen leaving together and then dispersing. As we have said, Wilkins attempted to sell the BMW. The Golf said to have been obtained by Smith had residue of propellant consistent with material fired from the pistols. The Toyota driven by Parchment had been observed speeding on occasions before the murder but not after. It was found much later, on 27 April 2005, in a garage. It had plainly not been used for some time. Within the passenger door pocket was found one particle of propellant material. The reference to that discovery is the subject of one of the grounds of appeal on behalf of Parchment.

The Prosecution's Case

16. The significant feature of the evidence is that the prosecution was unable to prove which of the group, or, indeed, how many, fired the guns or shot Ishfaq Ahmed, the doorman. It was not suggested that whoever shot Ishfaq Ahmed had any intention other than to kill him. The prosecution, accordingly, advanced their case on two alternative bases.

17. The first basis depended on proof that a particular defendant helped or encouraged the man who fired the murderous shot to kill. As the judge directed the jury:-

> "Any man present at the scene, present at the shooting, who knew that the killer had a loaded handgun on him or available to him and *helped or encouraged him to fire it with intent to kill or to cause really serious bodily harm* would be guilty of murder."

18. The second basis depended on the proposition that the defendant in question assisted or encouraged the gunman to commit an offence other than murder and, while doing so, knew that there was a real possibility that the killer may commit murder. The other offence identified was possession of a handgun and ammunition suitable for use in a public place and further, of attempting to enter Premonitions nightclub as a trespasser whilst in possession of a firearm. Assisting or encouraging to commit either or both of those offences in the knowledge that there was a real possibility that they might kill and that the gunman might kill with intent to kill or to cause really serious harm by firing the loaded handgun would render the defendant in question guilty of murder. No legal error was identified or advanced by any defendant as to those alternative bases on which the case against each defendant was left by the judge to the jury. The essential distinction between these two bases lies in the different joint venture which each basis identifies. Under the first basis the joint venture is the firing of the shot with intent to kill or to cause really serious bodily harm. Under the second basis the joint venture is the commission of an offence other than murder, possession of a handgun and ammunition suitable for use in a public place. Both of the ways the prosecution put their case have one factual proposition in common. Both rely on the prosecution establishing that a defendant knew that the gunman was armed before he fired. But under the first basis the prosecution suggested that the firing of one of the guns in the alleyway, after the group was turned away from the Premonitions nightclub, might itself establish that anyone who remained in the alleyway or remained in close company with those who fired guns in the moments thereafter could be found to have actively encouraged or participated in the firing of the gun. We shall have comments upon that approach shortly.

19. The three other counts in the indictment alleging attempted murder arising out of the shots which struck three other doormen, Nwolisa, Killeen and Hincion, were advanced on the same alternative bases.

20. Under the first basis, the prosecution proffered as examples of support and encouragement the evidence of the words spoken just before the gunman fired, such as "show 'em the tings", "show 'em the tings are real" and "smoke 'em", gathering around the gunmen as they prepared to fire and covering their faces as gestures of support just before the shots were fired. In addition, it was suggested that if by prior

agreement they sought to assist the gunmen to escape in one of the four cars that too would provide evidence of active participation in the joint venture to fire a handgun and kill.

21. Such examples were also relied upon to establish active participation and encouragement under the second basis.

22. But we should observe, at this stage, that apart from the appellant Smith, there is no evidence against any individual defendant that he spoke words of encouragement, covered his face, or gathered around the gunmen immediately before the shots were fired. In the case of Smith there was evidence from the doorman Nwolisa that he was one of two in the road who shouted out "smoke 'em" immediately before the shots were fired. Analysis of the adequacy of the prosecution's case against any particular defendant must, therefore, focus upon the absence of evidence of particular participation save in relation to Smith.

Adequacy of the Evidence: The Group as an Armed Gang

23. The appellants Carter, Spencer, Christie and Wilkins all contend that there was no case to answer. In particular they point out that there is no evidence that any one of them, by words or conduct in the alleyway or thereafter, actively encouraged the gunmen to fire. As Mr Topolski QC emphasised, on behalf of Wilkins, there was no evidence identifying who it was who formed part of the smaller group surrounding the gunmen. In consequence there was no evidence to disprove that his client or any of the other appellants, for that matter, apart from Smith, was not one of the smaller group further down the road shouting "come on" to the others. The evidence from some of the witnesses of the separation of the group was said to provide the foundation of positive evidence to disassociate unidentified defendants from those who were actively participating in the shooting. Once it is recognised that no one could identify those surrounding the gunmen, let alone the gunmen, the necessary evidence of active participation was lacking.

24. Under the first basis on which the prosecution advanced their case, these submissions have force. No one could say which of the appellants covered his face, shouted out encouragement or crowded round the gunmen other than the appellant Smith. In those circumstances the evidence of encouragement and participation on which the Crown rely was not evidence against any of the other defendants. Indeed, in summarising the case on behalf of the prosecution, it was suggested that the judge failed sufficiently to point out that apart from Smith there was no sufficient evidence of the active participation or encouragement of any of the defendants.

25. We agree that there was little evidence against any of these defendants, apart from Smith, in relation to the act of shooting with intention to kill. If the joint venture is identified as being that of firing a handgun with intent to kill or to cause really serious bodily harm there was a striking absence of evidence to establish who it was who shouted encouragement, covered their faces or gathered around the gunmen.

26. The prosecution had suggested and persisted in contending that the failure of any defendant to disperse once a handgun was fired in the alleyway was sufficient evidence of participation. We have considerable reservation as to whether a failure to disperse at that stage bears the weight which the prosecution seeks to place upon it.

There was little opportunity for dispersing in the alleyway. Thereafter, it appears that some of the group did move away towards the car and they were hardly likely to leave the area by any other means of transport than that in which they had come.

27. However, there is a far stronger and more reliable basis on which the jury was entitled to found their conclusion of guilt. Absent the evidence of active encouragement to fire, the more sound and realistic basis upon which the prosecution could advance its case lay in the second basis to which we have already referred. There was, in our view, ample evidence to establish that the group was, to the knowledge of each person which joined it, an armed gang ready and willing to shoot to kill during any confrontation which might arise.

28. The evidence in support of that approach lies in the history of the movement and behaviour of the group from the outset. It is plain from the evidence of the movement of the cars, both before and after those cars were joined by Wilkins's BMW, that the group was acting together with the joint purpose of forcing their way into a nightclub in the centre of Birmingham. The jury was entitled to infer that each of those who joined the group was aware of that joint purpose: their cohesion was confirmed by the evidence of the contact between mobile telephones used by members of the group. The behaviour of the group from their attempt to enter The Custard Factory onwards shows that they were prepared to face confrontation; the behaviour of the group was not benign but, on the contrary, hostile. It is in that context that the carrying of at least two handguns with ammunition, which had been used in the past together in gang activity and then successfully hidden away available for future use, with ammunition, takes on an added significance. The jury was entitled to reject a suggestion that anyone who voluntarily joined the group on that hostile expedition would have been unaware that guns and ammunition were being carried. After all, what would have been the point of concealing the fact that guns and ammunition were available for the benefit of the group from those who had voluntarily joined it. One of the very purposes of the group, so the jury would be entitled to infer, was to vaunt its power and ability to overcome resistance and to triumph in any confrontation. The purpose of carrying guns, in such a context, so the jury would be entitled to infer, was not to kill any particular victim but rather to add to the force and power of the group as a gang and to assist it in carrying out its plain purpose of forcing its way into a nightclub and overcoming resistance to that objective.

29. Those circumstances provide an ample foundation for the jury to conclude that the purpose and behaviour of the group was to act as a gang armed to overcome resistance and to achieve its objective. Once it is recognised that the jury was entitled, from the history of the behaviour of the group, to infer that it was an armed gang with a common objective to be achieved with the aid of loaded handguns, if necessary, there was no difficulty for the prosecution in proving the active participation of anyone who chose to join that group. Once it was proved that any defendant had voluntarily joined the group then the necessary *mens rea* could be established by proving that the particular defendant joined the group in the knowledge that members of it were armed with loaded handguns and must, in the almost inevitable confrontation once they tried to enter a nightclub without paying, have realised the possibility that one of the handguns would be fired with intent to kill.

30. Consequently, it does not avail any of these appellants to demonstrate the absence of evidence that he shouted encouragement, covered up or gathered around the gunmen.

Criminal liability was established by showing voluntary participation in what the jury was entitled to conclude was armed gang activity. Proof of guilt could be established by identifying any particular defendant as being present, voluntarily, in that gang activity. In those circumstances we reject the submissions of each of these appellants in so far as they were based upon the accurate proposition that it could not be shown as against any one of them that they had shouted encouragement, covered their faces, or gathered around the gunmen.

31. Furthermore, we reject the submission, made, for example on behalf of Wilkins and Spencer, that they were entitled to be acquitted because for all the jury could tell they formed part of the group further down Bristol Road amongst whom at least one shouted "come on". That evidence would have assisted any defendant if it was realistic to regard the firing of the handguns as being spontaneous activity. If the jury had taken that view, then any one who could not be shown to have actively participated in the spontaneous act of firing the handgun would have been entitled to have been acquitted. This, we should emphasise, would not be a case of withdrawal or disassociation from a joint enterprise. On the contrary, unless the prosecution could establish that the firing of the gun was not spontaneous, the absence of evidence of active participation in that act would entitle a defendant to be acquitted whether he positively disassociated or withdrew or not. A defendant would be not guilty if he did not know that another member of the gang had immediately available to him a loaded handgun which he might use with intent to kill or to cause really serious bodily harm. The judge properly directed the jury that a member of the group to which the gunman belonged who did not realise "until too late" that the killer was armed would not be guilty.

32. We stress, therefore, that in the state of the evidence as it was against all but Smith the prosecution could not succeed unless the jury were sure that the firing of the guns was not spontaneous but was rather part of the gang activity which any voluntary participant in that gang activity must have realised might occur.

33. We emphasise that aspect of the evidence because the appellant Carter contended that the evidence that the two groups separated, as some of the witnesses describe, in Bristol Street, was evidence of disassociation or withdrawal. It was contended, on Carter's behalf, by Mr Webster QC that in his case the judge had failed adequately to direct the jury as to the possibility that his client might have withdrawn or disassociated himself from the gang activity.

34. The judge confined himself to directing the jury:-

> "Nor would anyone be guilty of murder who realised what was about to happen but disassociated himself from it by running away or calling on others to leave."

35. The prosecution suggested that this was a generous direction to the jury. One who hitherto had participated in a joint venture to inflict unlawful violence must demonstrate withdrawal from such a joint enterprise (see, e.g., *R v Brice* [2004] 2Cr App R 35 and *R v O'Flaherty, Ryan and Toussaint* [2004] 2 Cr App R 20). The evidence of the separation of the group on the pavement in Bristol Street with some further away, shouting "come on" was, so the prosecution suggested, insufficient

evidence of withdrawal to justify a conclusion by the jury that any one member of the group may have withdrawn from his previous participation.

36. In our judgement, the combination of the generous direction (with directions) as to active participation and encouragement was sufficient to exclude any real possibility that the jury might have convicted a defendant notwithstanding that he might have withdrawn or disassociated himself from the shooting in the sense identified by the judge, namely, by running away or calling on others to leave. It is plain, in the light of that direction, that the jury was sure that each of the appellants which it convicted had known of the presence of an armed handgun and had participated in the gang activity of forcing themselves into a nightclub in the realisation that the handgun might be fired with intent to kill in the likely event of a confrontation. There is no basis for the fear, expressed, for example, on behalf of Carter or Wilkins, that the jury overlooked the possibility that a defendant may have been part of the group further down Bristol Street at the junction with Essex Street. Such a conclusion would not have availed any such defendant.

37. Our view of the factual conclusion which the jury was entitled to draw also demonstrates why it would have been inappropriate to leave manslaughter to the jury. Spencer renewed his application for leave to appeal on the ground that the judge should have left manslaughter to the jury as an alternative to count 1, notwithstanding the absence of any such suggestion by counsel at the time. The Crown's case throughout had been that the objective was forcibly to enter a nightclub in the knowledge that guns were carried and in the realisation that they might be used to kill if required. In those circumstances there was no evidential basis to leave an alternative of manslaughter.

38. For those reasons we reject the grounds of appeal founded upon the contention that there was insufficient evidence to leave to the jury or, as suggested by Spencer and Carter, that the conviction was contrary to the weight of the evidence. There was evidence on which the jury was entitled to convict of not merely group but armed gang activity. Carrying loaded handguns was a feature of that gang activity of which, the jury was entitled to conclude, each voluntary participant was aware. The jury was entitled to conclude that each of those participants must have realised that confrontation was likely to take place and that in the course of that confrontation one or more of the loaded handguns might be used to kill. In those circumstances each of those voluntary participants bore a criminal responsibility for the murder and attempted murders.

Evidence of Membership of the Johnson Crew

39. In support of the contention that the activity of the group was that of a gang intent on forcing its way into a nightclub the prosecution intended to call evidence that the appellants were members of a gang known as the Johnson Crew. The notoriety of the Johnson Crew in the region of Birmingham led the judge to rule that questions should be asked of the jury panel to ensure that no member, either personally or through family and friends, had been directly affected by the activities of that gang.

40. The defence sought to exclude such evidence because of the notoriety of that gang. As it turned out no witness gave evidence to prove that any defendant was a member of the Johnson Crew or that the activity was that of that particular gang. Smith bore a

tattoo on his chest with the initials JC but, in interview, although he admitted that the initials stood for the Johnson Crew, denied any affiliation to or involvement in the gang.

41. In his summing up, the judge directed the jury that there was no evidence that any of the defendants other than Smith belonged to the Johnson Crew and no evidence that the shooting was a result of Johnson Crew activity. He directed the jury that the "Johnson Crew issue" was irrelevant and should be put to one side.

42. In relation to Smith, he directed the jury that the tattoo with the initials JC was capable of demonstrating a propensity to participate in gang activities. In relation to the appellant Wilkins he reminded the jury of the admission, on behalf of the prosecution, that Wilkins was not known to be associated with or to be a member of the Johnson Crew.

43. These different consequences of the failed intention to call evidence in relation to membership of the Johnson Crew form the basis of a ground of appeal on behalf of all the appellants and particular submissions on behalf of Smith and Wilkins. It was argued on behalf of all the appellants that the judge ought not to have allowed reference to the Johnson Crew at all, in the light of the prejudicial effect that would have on the jury. That such an effect was foreseeable is demonstrated by the precautions the judge took in questioning the jury panel.

44. In our judgement the reasons given by the judge for admitting the evidence amply justify his conclusion to allow the Crown to open the allegation that at least some of the defendants belonged to the Johnson Crew. As we have already said, the Crown's case was that the behaviour of the group was that of an armed gang ready to face confrontation in pursuing its aim to force their way into a nightclub. In those circumstances, membership of the Johnson Crew had probative value for the same reasons as voluntary presence as a member of the group was probative of knowledge of the presence of guns and realisation that they might be used with intent to kill. Moreover, the judge was entitled to foresee that even if the prosecution did not open their assertions as to membership of that gang there was likely to be a mention of the Johnson Crew, not least because some of the defendants might wish to assert that they were not members. We take the view that the judge was entitled to permit the prosecution to open their allegations as to membership of the Johnson Crew and in those circumstances to take precautions to alleviate any prejudice caused by mention of that gang.

45. Further, in the case of Smith the judge was entitled to deploy his tattoo as evidence of propensity. It was some evidence of allegiance to a gang in the context of the prosecution's allegations that the events of that night were a demonstration of a gang in pursuit of a united objective.

46. As we have said, Wilkins had the advantage of a prosecution admission that he was not associated with the Johnson Crew. The judge, therefore, had the difficult task of affording Wilkins the opportunity to rely upon that admission in the context of his direction to the jury, from which other defendants were entitled to benefit, that there was no evidence they belonged to the Johnson Crew or that the events were the consequence of Johnson Crew activity. The judge did remind the jury that Wilkins was not known to be associated with or to be a member of the Johnson Crew but

made no further comment about it. This triggers criticism from Mr Topolski QC on behalf of Wilkins. He complains that the judge failed to give adequate directions as to the significance of this fact which provided positive evidence to disassociate Wilkins with the course of events on that night. It will be recalled that Wilkins had joined the other three cars later than the others. That fact, coupled with the positive evidence that he was not associated with the Johnson Crew should have prompted the judge to give a stronger direction to the jury so as to distinguish his case from that of the others. After all, in the absence of any evidence to associate him with active participation in the act of firing a handgun his conviction could only be supported on the basis of his voluntary presence in the activity of an armed gang on that night.

47. The judge was, it is true, faced with a difficulty, not unusual, where the cases of the defendants differed and the emphasis of one fact in favour of one would be likely to be detrimental to the arguments of another. In our judgement he achieved a correct balance between the conflicting interests of those who were not proved to be members of the Johnson Crew and Wilkins, of whom it could be positively asserted that he was not. There is, in our view, no substance in the criticism of the judge in that respect.

48. Smith's appeal depended on establishing that the judge was wrong to permit the prosecution to open allegations relating to the Johnson Crew and on his complaint as to the deployment of the tattoo as evidence of propensity to participation in gang activity. Since we have dismissed both those grounds in his case, his appeal is dismissed.

Evidence of Identification

49. Although he did not give evidence, Carter's primary case was that the suspect shown in the CCTV which was alleged by the prosecution to be him (suspect 2) was in fact a man called Reuben Moore. There was evidence, in the nature of evidence of association and contact between mobile telephones, that Reuben Moore was present. In support of that contention, the appellant Carter relied upon the inadequacy of the identification evidence and an application to adduce fresh evidence that the person known as suspect 2, shown in stills from the CCTV film, was Reuben Moore.

50. An earlier constitution of the court had ordered that the evidence of an anonymous witness that suspect 2 was Reuben Moore should be investigated by the Criminal Cases Review Commission. The witness did not want to be identified and feared for his life should his true identify be revealed.

51. We received a report from the Commission and permitted the appellant Carter to call the witness *de bene esse*, preserving his anonymity. The prosecution objected to that anonymity but it was unnecessary for us to give any ruling as to whether the claim for anonymity was justified. Furthermore, to seek to allay the witness's fears we permitted that part of the case on behalf of Carter to be advanced separately from the other grounds on behalf of all appellants. The other appellants were unaware of this process at the time.

52. We heard the evidence of the witness who repeated his assertion that the suspect known as suspect 2 in still photographs from the CCTV was Reuben Moore. The witness accepted that he had been to the offices of the solicitors acting for Carter on 22 September 2005 and seen a number of photographs. He was at the solicitors'

office for the purposes of preparation of other evidence he was due to give at trial, in support of Carter, for the purpose of establishing that Carter was not and could not have been associated with the Johnson Crew because of the place where he lived. At that meeting he said that he did see a photograph of someone whom the prosecution was alleging was Carter. At the time he realised that it was not Carter but Reuben Moore. The witness told us that he never mentioned that at the time. He was unable to say why.

53. That failure by the witness to point out to the solicitors what was obviously material to the defence of Carter would alone have justified our refusal to admit this evidence; neither in evidence-in-chief nor in cross-examination was this witness able to offer any explanation as to why he failed to mention that important fact at the time or why he chose to remain silent until Carter was convicted.

54. Sensibly, Mr Webster QC on behalf of Carter did not seek to dispute the material contained in the Commission's report. That material provides other grounds for disbelieving the witness. It had been intended that the witness should give evidence that Carter lived in an area deemed to be the territory of a rival gang and not that of the Johnson Crew. By the time the Commission came to interview him the witness was asserting that Carter was a member of the Johnson Crew and that he did not know where Carter lived. In those circumstances his initial preparation of the report can only be explained as a deliberate attempt to deceive the court. Further, the Commission's report provides ample foundation for the belief that the witness is much more familiar with another defendant than he was prepared to admit.

55. These factors, as well as his inability to engage with the thrust of the questions, led us to the clear conclusion that the witness was not capable of belief and that his evidence should not be admitted. In those circumstances we refuse permission to Carter to adduce this fresh evidence. We refuse his application to appeal on this ground without making any further reference to the justification for preserving the witness's anonymity. The witness played no further part in the appeal after we had heard his evidence on the first day. His evidence did not in any way affect the other grounds of the appeal either in relation to Carter or to the other appellants.

56. Mr Webster also contends that the quality of the identification evidence of Carter as a member of the group was poor. No witness purported to identify him as being present in the street at the time of the shooting and although doormen who might have been expected to be able to identify him attended identification parades, they did not pick him out. The evidence which did identify him as present emerged in part from the evidence of police officers who purported to identify him from CCTV footage. Those police witnesses had difficulty in explaining how it was they had come to identify Carter. DC Colley purported to identify him from his gait although he made no mention of that in any of his statements. He did refer to Carter as being, on one occasion, pigeon-toed, and there was a still photograph taken from a CCTV showing the suspect standing in that fashion. DC Hooton spoke of what he described as prominent cheekbones. He also referred to the way he walked. DC Kolar spoke of bone structure and Sergeant Smith of prominent cheekbones and a fairly longish face with a square jaw.

57. The jury had the opportunity of assessing the strength of those features by which the police witnesses sought to justify their identification with the CCTV films and stills

abstracted from those recordings. Apart from the one photograph in which the suspect is standing pigeon-toed, we tend to agree that the basis upon which the police witnesses sought to recognise the appellant was slim. It found no support in the expert evidence of facial mapping from Dr Bowie. His support for the contention that suspect 2 was the appellant Carter was at the lowest possible level; it amounted to no more than that he could not be eliminated and that there were some similarities of features. But the expert accepted that the image quality was not great and permitted him "only to scratch the surface of getting at identification".

58. But the evidence of Carter's presence in the gang in its attempt to force its way into a nightclub did not depend alone upon the recognition of the police officers. Although Carter had refused to answer questions he had made a statement in which he accepted presence in the alleyway at the time when a shot was fired and threats to kill were uttered. This presence was confirmed by evidence that a voice coming from behind the doorman Hincion, who was at the front of the group of doormen at the time the first shot was fired, shouted "it's Milly, don't go outside". There was evidence that the appellant Carter was known as Milly. The combination of this evidence and the appellant's own admission provides sufficient evidence of his presence as part of the group. For the reasons we have given, presence as part of an armed gang acting in a way likely to provoke confrontation did, in the circumstances of this case, when coupled with proof of knowledge that the gang was armed, provide sufficient evidence of participation in the murder.

59. Mr Webster, on behalf of Carter, supports his contentions as to the inadequacies of the recognition evidence by referring to the failure of the judge properly to collate and identify the weaknesses in that evidence. We shall consider further the way that the judge dealt with the evidence from police officers of recognition from CCTV photographs in relation to Christie's appeal. But we should say, at this stage, that the judge's summing up was a model of how directions to the jury in cases of this sort should be structured. He dealt with the essential facts in chronological order, irrespective of their source. Thus, the judge gave a chronological history of events by reference not only to the evidence called by the prosecution but also to Parchment's own evidence. In relation to each defendant the judge summarised the case against him and the case on his behalf. It is true that he did not emphasise those features of the recognition evidence which cast doubt on its accuracy. But in the case of Carter he did refer to the arguments advanced by Mr Webster to suggest that suspect 2 was not Carter but was Reuben Moore. In the context of a carefully crafted summing up we do not think that the failure of the judge to refer to the inadequacies of the recognition evidence renders the verdict against Carter unsafe.

60. Carter additionally relies upon the absence of any photograph or identification of him after the first shot was fired in the alleyway to demonstrate that he had disassociated himself or withdrawn from the joint enterprise. We have already dealt with the argument that the directions to the jury as to withdrawal or disassociation were inadequate. But we should emphasise that there was no evidence that he had withdrawn. His statement to that effect, whilst confirming his presence, was not evidence of his withdrawal. In those circumstances, in the light of our view as to the evidence of his presence, we reach the conclusion that the verdicts against him were not unsafe and we dismiss his appeal.

61. The appellant Spencer also relies upon the absence of adequate evidence of recognition. Two doormen purported to recognise Spencer by reference to one of his nicknames, "Ringo". But both of them, Nwolisa and Hincion, thought that they had seen him in Birmingham approximately seven months before at a time when he could not have been there. Three officers purported to recognise him but their basis of recognition was said to be inadequate. DS Smith purported merely to recognise him because he hunched his shoulders, although such a pose was said to be hardly significant in the light of the cold to be expected that night on the streets of Birmingham. He was unable otherwise to explain how he came to recognise Mr Spencer, notwithstanding his limited association with him at the time of arrest. DC Bevan purported to identify him on the basis of a 20-30 minute meeting many years before in 1991. DC McCormack identified another defendant, Wilkins. He did not identify this appellant although he had known him the longest. Of fifteen police officers who viewed the videos, twelve failed to identify Spencer. Dr Bowie could not reach any conclusion as to similarity save in respect of the most general of features. He found, on the basis of those general characteristics of sex, age and race, but not skin tone or facial geometry, only limited support for the conclusion that the suspect, known as suspect 1, and this appellant were one and the same.

62. The appellant Spencer could be identified as present on the CCTV recordings since he was wearing a white hat throughout. He was identified by two doormen, Nwolisa and Hincion, as well as by reference to a leather jacket which was similar to one shown in the recordings. As we saw from still photographs ourselves, on the jacket could be discerned both zipped breast pockets and a "logo". That evidence of clothing coupled with the evidence of the doormen and the police officers' recognition provide a sufficient basis upon which the jury was entitled to convict. In those circumstances we reject his appeal.

Recognition from CCTV and Code D

63. The appellant Christie also relied upon inadequacies of identification. His appeal, advanced by Mr O'Connor QC, to whom we are particularly indebted for his clear and forceful submissions, highlights an important argument in relation to the process of recognition adopted by the police officers when viewing CCTV film. This argument is of relevance to other appellants besides Christie. Only one police officer purported to recognise him from facial features. The only identification evidence against Christie and thus the only evidence on which a conviction could be based rested upon the evidence of one police officer, WPC Smith, who purported to recognise the appellant Christie from viewings of the CCTV, particularly on 27 January 2005, although there was a further viewing on the 1 and 2 of November 2005.

64. WPC Smith had met Christie, for the purposes of supervision under licence, on seven occasions. She had had a good opportunity to observe his facial features. But when it came to identifying him from the CCTV recording it is plain that her evidence was susceptible to effective challenge. She claimed that outside The Custard Factory nightclub she was able to identify Christie from his face. She said she could see his eyes, nose, mouth and ears, as well as the shape of his face. It was pointed out to her that that was not possible since his face was shaded by the cap he was wearing. It is apparent from our view of the relevant photographs that it would not have been possible for anyone to see his eyes. Indeed, the witness was driven to assert that she could recognise him only by:-

> "The stature, the clothing, it's everything, it's not one particular thing, it's the whole really."

65. In so far as the witness, WPC Smith, purported to identify this appellant by his face we accept that her evidence of recognition was insufficient and inadequate. This highlights the importance of the primary submission advanced by Mr O'Connor. This rested on what he asserted to be breaches of Code D. Code D contains the code of practice for the identification of a person by police officers. By D.28:-

> "Nothing in this Code inhibits showing films or photographs…to police officers for the purposes of recognition and tracing suspects. However, when such material is shown to potential witnesses, including police officers, see *Note 3a* to obtain identification evidence, which should be shown on an individual basis to avoid any possibility of collusion, and, as far as possible, the showing should follow the principles for video identification…if the suspect is not known, see Annex E."

Under Note 3a a Police officer is subject to the same principles and procedures as a civilian witness save in relation to responsibility for supervision and direction. Under Annex E:-

> "D11. Whether or not an identification is made, a record should be kept of the showing of photographs on forms provided for the purpose. This will include anything said by the witness about any identification or the conduct of the procedure…"

66. There was some controversy as to whether Code D has specific application to the process undertaken in this, as in many other cases, when police officers are asked to view CCTV records in the hope that they might pick out someone of whom they have previous experience. The introduction to the code at D1 provides:-

> "1.1 This code of practice concerns principal methods used by the police *to identify people in connection with the investigation of offences…*(our emphasis)
>
> 1.2 Identification by witnesses arises, e.g., if the offender is seen committing the crime and the witness is given an opportunity to identify the suspect in a video identification, identification parade or similar procedure…"

67. A police officer asked to view a CCTV is not in the same shoes as a witness asked to identify someone he has seen committing a crime. But, as the prosecution accepted, safeguards which the code is designed to put in place are equally important in cases where a police officer is asked to see whether he can recognise anyone in a CCTV recording. The mischief is that a police officer may merely assert that he recognised someone without any objective means of testing the accuracy of such an assertion. Whether or not Code D applies, there must be in place some record which assists in gauging the reliability of the assertion. In cases such as these, there is no possibility

of comparing the initial observation of a witness, as recorded in a contemporaneous note of description or absence of description, who purports to make a subsequent identification. The police officer can hardly be asked to record his recollection of a description of a particular suspect before he has picked that suspect out from the CCTV recording.

68. Absent any such check as would be available had a witness described the commission of an offence and recollected his description of the offender, it is important that the police officer's initial reactions to the recording are set out and available for scrutiny. Thus if the police officer fails to recognise anyone on first viewing but does so subsequently those circumstances should be noted. The words that officer uses by way of recognition may also be of importance. If an officer fails to pick anybody else out that also should be recorded, as should any words of doubt. Furthermore, it is necessary that if recognition takes place a record is made of what it is about the image that is said to have triggered the recognition.

69. Absent any such record, it will not be possible to assess the reliability of the recognition. We were told that a protocol is being prepared for such cases. With the increasing use of CCTV recognition it is vital that a protocol is prepared which provides the safeguard of measuring the recognition against an objective standard of assessment. Only by such means can there be any assurance that the officer is not merely asserting that which he wishes and hopes, however subconsciously, to achieve, namely the recognition of a guilty participant.

70. In the instant case the only contemporary record was of the identification by WPC Smith on 27 January 2005. There was no record of what was said or of any failure to recognise the suspect in other images. Nor was any record of what features or aspect led the officer to make the recognition. The difficulties in which that placed the witness were obvious. During cross-examination she was unable to give any convincing explanation as to how it was she came to recognise Christie from the images.

71. Had the evidence been that of Smith alone we would have agreed with the submission that the procedure by which her recognition was achieved was inadequate and that her recognition was, accordingly, unsafe. We would have reached that conclusion notwithstanding the admission at trial that the identification procedure was properly conducted.

72. Moreover, in summing up the evidence of identification to the jury the judge made no reference to the inadequacies of the procedure and the record of recognition. The judge ought to have directed the jury that by reason of the inadequacies of the procedure there was no objective standard or record against which to measure the reliability of WPC Smith's mere assertion. Nor did the judge identify the inadequacies revealed in her cross-examination, although he did refer to the cross-examination by defence counsel.

73. Had the evidence been confined to that of WPC Smith's recognition we would have found the jury's conclusion that Christie was present unsafe. However the evidence was not so confined. There was evidence of a particular jacket, identified by WPC Smith, with the word "Athletics" on it. This jacket can be seen by anyone who looks at stills taken from the CCTV record. Furthermore, there was compelling evidence of

phone calls between Christie and Wilkins which followed the course of the cars, both in Aston, Walsall and the centre of the city, at times appropriate to the progress of the gang as it neared and entered the centre of Birmingham. This was, too, compelling evidence of the presence of Christie as part of the gang. It was strong evidence that he was part of the convoy approaching the nightclubs into which the gang attempted to enter. The coincidence of time and place revealed by those mobile telephone records is powerful evidence to support Christie's participation.

Bad Character

74. Added to the evidence of clothing and mobile telephone records was said to be the evidence of propensity stemming from his convictions on 25 July 1997 for attempted murder on 21 January 1996 with firearms, including a handgun, possession of five firearms with intent to endanger life on the same date and conspiracy to rob between 20 October 1995 and 12 February 1996.

75. There is now no dispute but that the convictions were admissible pursuant to s.101(1)(d) and 103(1)(a) of the Criminal Justice Act 2003. As the judge pointed out in his ruling of 3 November 2005 the evidence demonstrated the likelihood that Christie had knowledge of the carrying of guns and an intention they should be discharged with lethal intent. This is not now in dispute.

76. But the question arises as to whether the convictions were admissible to prove the presence of Christie at the scene, as part of the group. By the time the judge directed the jury it is clear that he was of the view that the convictions were capable of supporting the evidence that he was present as part of the group. He directed the jury that those convictions would assist in resolving the question:-

> "Was he part of the group at the scene of the shooting?"

Yet at the time the judge gave his ruling he held that the evidence of propensity did not support the identification of Christie by WPC Smith on the CCTV footage. His reasoning appears to have been that if a member of the public identified someone with such previous convictions, that might support the identification whereas, as the judge somewhat cryptically commented:-

> "No such consideration can apply here, when Sarah Smith's knowledge of Christie arises from her duty as a policewoman to keep an eye on him after his release from the prison for the very offences that it has sought to admit."

The judge however continued:-

> "But it (the conviction) does, in my view, provide very limited support to the proposition that he was a part of a group which was in fact armed with the means to commit and willing to commit very serious acts of violence. The presence of a man with his previous convictions in such a group is, in my view, capable of being regarded by a jury as more than just a coincidence."

77. There may, as Mr O'Connor suggests, be a conflict between the view taken by the judge at the time of the ruling and his directions to the jury. But it matters not. We are of the view that the appellant Christie's previous convictions were capable of supporting not only the proposition that he had knowledge of the carrying of guns with the intention that they should be discharged but also they were capable of supporting the proposition that he was present as part of the group at the scene of the shooting. In the context of the behaviour of the group in pursuit of the shared objective of forcing their way into a nightclub whilst members of the group carried loaded handguns Christie's previous convictions did make it more likely that he was a member of such a group with such a shared objective. The direction to the jury was, in our view, correct.

78. Christie further complains that the judge permitted evidence to be adduced that he had with him, at the time of his arrest in February 2005, a bullet-proof vest. In our view, as the judge ruled, the possession of such equipment showed a continuing involvement with firearms. Since the judge had already ruled as to the admission of the previous convictions this evidence merely went to support the evidence of propensity to be associated with those who were armed; it provided additional light on the propensity exhibited by the previous conviction. The judge was entitled to take this view and, accordingly, this cannot amount to a ground for concluding that the verdict was unsafe.

79. No additional ground was advanced on behalf of Christie and in those circumstances his appeal is dismissed.

80. Wilkins was the other appellant who raised questions, in his grounds of appeal, as to whether there was sufficient evidence of his presence. These were, sensibly, not pursued with vigour by Mr Topolski QC on his behalf at the hearing. There was, as he was compelled to recognise, ample evidence on the basis of which the jury could conclude that he had arrived to join the convoy of the three other motorcars in his BMW J261 MCT. He admitted owning that car in interview and that no one had used it at the relevant time. That registration mark partially matched that of the BMW seen on CCTV entering Bristol Street near Premonitions just before the events which led to the shooting. The only other BMW which could have matched the partial letters and digits was, so the evidence proved, off the road at the time and was of a different colour. After the group left the Air nightclub and before its arrival at Premonitions Christie's mobile phone called a mobile telephone associated with Wilkins via a cell-site antenna at New Street Station. Two days after the shooting Wilkins advertised the BMW for sale. There was ample evidence on the basis of which the jury could be sure that at the time of the shooting Wilkins was part of the group. For the reasons we have already given that itself provides evidence on the basis of which the jury was entitled to convict him of active participation in the pursuit of the gang's shared objective, armed with handguns capable of assisting in that aim. We will turn later to the discreet ground which he advances.

Further grounds on behalf of Parchment and Wilkins

81. Parchment raises the admissibility of the evidence of the history of the two handguns used in the murder. We have already explained the relevance of the previous incidents at which handguns were used, particularly the three occasions when they were used at the same time, and their relevance in establishing that they were

weapons available to be used as part of the activity of a gang and the fact that they were hidden when not required. The evidence was never adduced for the purposes of linking any particular defendant to possession of those guns, save in relation to the residue from one of the handguns fired, found in the Golf associated with Smith. The evidence in relation to the history of the two handguns, one of which, we recall, could not be identified with any precision, did support the proposition that the activity of the group was the activity of a gang acting with a common purpose and ready to use loaded handguns to which the gang had access. Where a defendant could not have had access to those handguns at the time they had previously been fired, the judge made that clear in his directions.

82. Miss Weekes QC advanced a further ground in relation to a particle of propellant material found in the Toyota MR2 driven around the city that night by Parchment. One primer particle had been found in the passenger door pocket of that vehicle recovered in a garage on 27 April 2005. There was no evidence that the vehicle had been used after the events on 20 November 2004, despite evidence of its use, shown in speed cameras, prior to that date. There was some dispute as to whether the vehicle was hidden as opposed to being merely stored in the garage but it was seen in a poor condition on 29 March 2005 and appeared abandoned on 27 April when the particle was recovered. There was, as Miss Weekes points out, no evidence as to how the particle came to be in the car and she suggested that it was plausible that someone else might have broken into the garage and caused the deposit of the particle after the car had been left there.

83. More significantly, there was no evidence to link the residue which contained lead, barium, antimony and silicone with a gun used at the scene of the murder. On the contrary, the residue was different to that found in the Golf and with a higher proportion of zinc than of copper, suggesting it had been fired from a blank or converted blank-firing weapon. Thus the prosecution cold not establish that it was fired from a gun used on the night of the murder.

84. The judge directed the jury:-

> "The particle of firearm residue in the MR2 suggests at least some proximity of *the* guns, albeit not those proved to have fired live rounds in the incident at Premonitions." (our emphasis)

The addition of the article *the* is clearly mistaken, as the second part of the sentence makes clear. But it raises the question as to whether the evidence should have been admitted at all. As we have said, the prosecution could only identify one of the two handguns as being a Beretta 9mm pistol. The other was an unknown 9mm pistol. Nor could the prosecution say precisely how many guns had been used. But the association of a particle from a fired handgun with a car driven by Parchment which had not been seen being used after the event was relevant as associating Parchment with the presence of handguns. It went to his knowledge of the carriage and use of firearms at the time of the murder. We reject that ground of appeal.

85. Parchment had also sought leave to appeal on the basis of information a member of his family had learned from a juror. Directions given by a previous constitution of the court precluded any further argument in relation to that communication. Suffice it to

say that the directions given to the jury, which, it was feared, might have lost their effect by the time the verdicts were delivered, afford no basis for any complaint. The judge properly guided the jury as to the need to bring any concerns about fellow jurors to the attention of the judge. He was under no obligation to repeat that direction. For those reasons Parchment's appeal is dismissed.

86. As we have recalled, in interview Wilkins denied being present or taking his car to the scene. But, as Mr Topolski QC, who was not counsel at the trial, successfully demonstrated, his interview contained inherent and obvious inconsistencies as to whether he owned the car at the relevant time. It was plain he was lying and making little effort to give accurate answers.

87. The essential ground, advanced with compelling force by Mr Topolski, was that the judge failed to give any direction as to how the jury should approach such obvious lies. As he suggests, there were two possible conclusions to be drawn once the jury was satisfied that his BMW was at the scene. Either he had lent the car, contrary to what he told the police, or he was himself present. The judge gave no direction as to the possible conclusion to be drawn that he had lent the car to someone else but was too frightened to say. Indeed that possibility had been put to him during the course of interview although he denied, in response, that he was frightened.

88. The crucial complaint advanced is that the jury was not directed as to the dangers of assuming guilt if it was satisfied that he was present. Mr Topolski argued that this was a case which was a paradigm for which a Lucas direction should be given, namely that the jury should not rely upon the lie about his presence as necessarily proving guilt (*Lucas* 73 Cr App R 159). There were, as Mr Topolski points out, many reasons why the lie might have been told of which the jury should have been advised, such as the wish to protect others, because he was frightened, because he was guilty of a lesser crime, or because he wished to disassociate himself from events for which he was not responsible. The judge gave no warning whatever about the lie nor any caution as to the danger of assuming guilt from a false denial of presence.

89. The omission, so it is argued, is all the more surprising in the light of the fact that the judge did give a Lucas direction in the case of another defendant. Further, in his reasons for acceding to a submission of no case to answer in relation to a defendant Taylor, he accepted that a lie by that defendant at the time was not supporting evidence "of the strongest".

90. The omission is puzzling particularly because leading counsel at the time did not suggest that a Lucas direction should be given and cannot now recall as to why he adopted that approach.

91. The answer seems to us to lie in the way in which the case was put against Wilkins and the response by those defending him at the time. The case against Wilkins did depend upon establishing his presence. The Crown did not suggest that there was evidence associating Wilkins with any particular activity by which it could be inferred he had encouraged the gunman to shoot and kill. He was not identified at the scene of the shooting at all. The case against Wilkins was that, like the others who could not be associated with shouting encouragement, covering their faces or gathering around the gunmen, presence as part of the gang activity of forcing their way into a nightclub would itself be evidence of participation. Once Wilkins was shown to be present and

engaged in that activity of the gang, that itself was evidence on the basis of which the jury was entitled to infer both the necessary participation and knowledge of the presence of handguns and ammunition. Thus the factual issue between prosecution and defence was essentially whether the prosecution could prove the presence of Wilkins in the course of the gang's attempts to enter a nightclub armed with loaded handguns. It is true that counsel for Wilkins did argue that even if he was present it did not show that he was criminally responsible but the essential choice the jury had to make hinged upon proof of his presence.

92. In that context it is not surprising that counsel for the defence did not seek a Lucas direction. Of course, that is not dispositive. If a Lucas direction ought to have been given, the fact that defending counsel did not take the point at the time will not excuse the omission. But in our view, in the context of the particular issue and the facts of the case, the failure to give a direction was not incorrect; it does not render the verdict unsafe. Had the judge given a direction it would merely have given undue emphasis to the prosecution's contention that Wilkins's denial of presence was a lie. Any warning given by the judge would have had to be prefaced by the direction that it was for the jury to decide whether Wilkins was lying about his presence. Further, in the factual context of this appeal once the jury was satisfied that Wilkins was present it was entitled, for the reasons given, to conclude that that presence established the necessary participation and criminal responsibility.

93. Any discussion as to the significance of the lie would have diverted the jury from the essential factual issue it had to resolve. The prosecution did not rely upon the fact of the lie as tending to establish guilt. This is demonstrated by the summary of the prosecution case as outlined to the jury by the judge. The prosecution did not suggest that any inference could be drawn from the fact of lying about presence; on the contrary, its case was that if, contrary to the defendant's denial he was present, that fact, in the particular circumstances of the case, was a fact from which the jury could infer guilt. The question for the jury was not, accordingly, whether the defendant had lied or not but rather whether he was present or not. For the judge, accordingly, to have raised the question of the lie and inferences to be drawn from it would have been merely to confuse, and to trigger the possibility, which did not otherwise exist, of their using the lie as probative of guilt. The judge, just as defence counsel, was entitled to take the view that there was no real danger that the telling of the lie would be deployed by the jury as a separate and distinct ground for concluding that he was guilty. The basis for such a conclusion was the defendant's presence, not his lie about his presence. In so concluding, we have sought to follow the guidance identified in *R v Burge & Pegg* [1966] 1 Cr App R 163 in the discussion of this court in relation to the fourth category at pages 173-4. It was the evidence of presence that, in the circumstances, was evidence on which the jury could act to conclude guilt, not the evidence of a lie about such presence.

94. In those circumstances we conclude that the judge was entitled to take the view that a Lucas direction was unnecessary. Failure to give such a direction did not render this verdict unsafe and, accordingly, Wilkins's appeal is also dismissed.

95. All the appeals against conviction are dismissed. This case provides a salutary example of how those who choose to join an armed gang cannot escape convictions for murder by avoiding identification as the men who fired or as those who assisted at the moment the guns were fired. They share criminal responsibility for murder

because they chose to form part of a gang prepared to meet confrontation with loaded guns.

Appeal Against Sentence

96. We turn to the appeal against sentence made, with the leave of the single judge, by the appellants Dean Smith, Jamal Parchment, William Carter and Carl Spencer. Each was sentenced to life imprisonment for murder on count 1 (custody for life in the case of Dean Smith), with a minimum term of thirty years (less the time served in custody on remand). Each received fifteen years imprisonment concurrent (detention in the case of Smith) for the three counts of attempted murder.

97. The judge in the course of his sentencing remarks said that they had gone onto the streets, with the others, as an armed gang, knowing, realising and content that the guns might be used if the need arose. When challenged by the doormen, each of whom was only doing his job, at least two guns were produced, thirteen shots were fired, one doorman was killed and three were injured. They had demonstrated what he called contempt for the life of others. He accepted that it could not be proved against any of them that they had fired the fatal shot, but that factor – if it had any mitigating force at all - was counterbalanced by the number of shots fired and the fact that it was by mere chance that there were not more casualties or fatalities. He considered whether to make any reduction on account of Smith's age (he was only 19 at the time of the murder) but he declined to do so on the grounds that there was evidence that he was very close to the gunmen and was encouraging him to fire. The judge therefore concluded that he was as ruthless as his older co-defendants and was equally responsible and answerable for what followed. He therefore took thirty years as the starting point and saw no reason in respect of any defendant to vary it.

98. Counsel all accept that the judge was right to take a starting point of thirty years but they argue that the minimum term imposed was excessive. They take three main points. It is said that since it could not be proved that any of the defendants had actually fired either of the guns, each defendant was only a secondary party to the murder and therefore some reduction should have been made from the starting point. There are two answers to that point. The first is that there were a number of aggravating factors which would have justified going above the starting point of thirty years: two guns were used, thirteen shots were fired, in a busy street, three other men were injured and – as the judge said – it was a matter of chance how many doormen, or passers-by were killed or injured. Secondly, although there maybe some cases where it is plainly mitigation that the appellant was only the secondary party (and a number of examples were cited to us) in gang-land shootings of this kind, when many defendants go armed and mob-handed, it is seldom that the gunmen can be identified and even if they are is it is not always clear that the men with the guns are the most culpable or most prominent in the gang, indeed this is often not the case. The criminality here is acting together, as a pack; in our judgement in these circumstances each is fully responsible for the acts of the others and it is no mitigation at all to say that it cannot be proved who had the gun and pulled the trigger.

99. It is argued next that they did not go out that night intending to kill and in this sense the murder was unpremeditated. This may be so but, as we have already said, the criminality here is going out armed, knowing and intending – or at least realising – that the guns would be used if the need arose. This was not spontaneous violence at

all, it was plainly contemplated and foreseen that a situation might arise when the guns would be discharged; it cannot in our judgement be said that the use of fatal force here was in any real sense unpremeditated. This is not a mitigating factor which would justify a reduction in the starting point. We reject this ground of appeal also and with it the appeal of Carter.

100. The next point concerns the age of the appellants Smith and Parchment. Smith was only 19 and a half at the time of the murder. He had a number of previous convictions for robbery, possessing a knife, for assault and for offences of dishonesty. He had previously served an 8 month detention and training order. Parchment was only 21; he had a previous conviction for conspiracy to rob for which he had been sentenced to 6 years detention in a Young Offenders Institution.

101. The sentencing of very young men convicted of murder is a subject which has been before this court on several occasions; it is not helpful to give examples since each offence necessarily depends on its own facts but general guidance was given in Judge LJ in R v Peters and others [2005] 2 Cr App R (S) 627:

> "It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence. Schedule 21 underlines this principle. Although the passage of an eighteenth or twenty-first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an 18th or 21st birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity. … Therefore, in relation to offenders aged up to 21 or even 22 years, the determination of the minimum term in accordance with the legislative framework in Sch.21 needs to be approached with an acute sense of how inevitably imprecise the statutory criteria may sometimes be to issues of culpability, and ultimately to "seriousness" as envisaged in s.269 itself.
>
> The first stage in the process nevertheless remains the prescribed statutory starting point. This ensures consistency of approach, and appropriate adherence to the relevant legislative provisions. Schedule 21 does not envisage a moveable starting point, upwards or downwards, from the dates fixed by reference to the offender's 18th or 21st birthdays. Nor does it provide a mathematical scale, starting at 12 years' for the eighteen year old offender, moving upwards to 13 years' for the 19 year old, through to 14 years' for the 20 year old, culminating in 15 years' for the 21 year old. The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be

> appropriate. One way in which the judge may check that the discount is proportionate would be for him to consider it in the context of the overall statutory framework, as if Sch.21 envisaged a flexible starting point for offenders between 18 and 21. This would have the advantage of linking the mitigation which would normally arise from the offender's relative youth with the statutory provisions which apply to an offender a year or two older, or younger, and would contribute to a desirable level of sentencing consistency. Due allowance should then be made for the relevant aggravating and mitigating features to produce the final determination of the minimum term, and thereafter the judge should explain the reasons for the determination in open court."

102. Although this was a terrible offence, a minimum term of 30 years upon such young men must seem to offer no prospect of release for the rest of their lives. We think that the judge should have made a significant reduction on account of the comparative youth of these offenders compared to the others (who were aged between 30 and 38). Accordingly, for this reason, we will reduce the minimum term in the case of Dean Smith to one of 25 years. Jamal Parchment had a serious previous conviction (to which we have already referred) and he was 21, but we think that he is entitled to some reduction on account of his youth; we reduce the sentence upon him to 27 years. Each will have credit for the time spent in custody on remand.

103. Mr Bishop QC, on behalf of Carl Spencer makes a different point. He says that at the age of 38, Spencer may die in prison before he had served 30 years. In our judgement, when Parliament made the age of an offender a possible mitigating circumstance in Schedule 21 of the Criminal Justice Act 2003, it did not have in mind that it would be a mitigating circumstance that the offender was 38. Spencer has been convicted of a grave crime and now he must pay the penalty. His appeal against sentence is dismissed.

104. In so far as complaint is made that the sentence of 15 years upon the charge of attempted murder was excessive, it suffices to say that in our judgement it was not and these appeals also are dismissed.