



**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT CHELMSFORD**  
**HIS HONOUR JUDGE MORGAN**  
**Ind. No. T 20217198**

Neutral Citation Number: [2023] EWCA Crim 1454

Case Nos: 202201957 B1 / 202202752 B1  
202202037 B1/202202739 B1

Date: 04.12.2023

**Before :**

**LADY JUSTICE ANDREWS**  
**MRS JUSTICE MCGOWAN**  
and  
**SIR NIGEL DAVIS**

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**Between :**

**(1) JADEN DRAKE**  
**(2) IGORS ANDERSONS**

**Appellants**

**- and -**

**THE KING**

**Respondent**

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Adam Davis KC for the First Appellant  
Michael Bromley-Martin KC for the Second Appellant  
Andrew Jackson and Azza Brown (instructed by the Crown Prosecution Service) for the  
Respondent

Hearing date: 27 October 2023  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 4.12.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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## **Mrs Justice McGowan:**

### **Introduction**

1. On 31<sup>st</sup> May 2022 Jaden Drake, (then aged 24) and Igors Andersons, (then aged 19), were convicted of murder following a trial by a jury before His Honour Judge Morgan, sitting with a jury in the Crown Court at Chelmsford. A third man, Fraser Cheung, was acquitted by the jury.
2. On 12<sup>th</sup> August 2022 the two appellants were sentenced by HHJ Morgan. Jaden Drake was sentenced to life imprisonment with a specified minimum term of 20 years, less 269 days already served. Igors Andersons was sentenced to custody for life with a specified minimum term of 18 years, less 269 days already served.
3. Representation before this court is the same as in the court below. Igors Andersons is represented by Mr Michael Bromley-Martin KC, and Jaden Drake by Mr Adam Davis KC. The prosecution is represented by Mr Andrew Jackson leading Miss Azza Brown. We are grateful to all counsel for their assistance in this matter.
4. Each appellant appeals against conviction and sentence by leave of the Full Court. Leave to appeal conviction was granted on one ground only, namely the judge's refusal to leave the partial defence of loss of control to the jury. The application for leave to appeal by Jaden Drake on another ground is not renewed.

### **The Factual History**

5. At around 5.30 on the afternoon of 8 November 2021 a 24 year old man named Christian Patru was stabbed to death in a ground floor flat which he was renting in Harlow, Essex. Shortly before this, his upstairs neighbour heard an argument which appeared to be coming from downstairs. She initially heard an unfamiliar voice which she attributed to a black male asking, "Where are the keys, bro?" She thought that Christian Patru responded that he did not have the keys. After around 10 minutes, during which the argument escalated and she could hear shouting and banging, the neighbour decided to contact the landlord. She looked out of the window and saw Christian Patru in the garden with blood on his hands. He was clutching his hand and then his upper arm. She saw a man running past Christian Patru and exit the premises by jumping over the back gate. Christian Patru then went back indoors. She heard him shout, "Ambulance, help." After calling the landlord, she called the emergency services. That call was timed at 5.38 pm. Prior to that, she had heard Christian Patru calling out to her from the downstairs flat but she was too scared to leave her room to go and assist him. By the time she made the emergency call she could no longer hear any noise from downstairs.
6. When the police arrived at the building shortly before 6 pm an officer found Christian Patru lying in a pool of blood face down on the floor of the hallway. There was no sign of a pulse. When he was turned over the source of the bleeding was identified as a stab wound to the side of his neck which had severed his carotid artery. This would have rapidly proved fatal. Attempts to resuscitate him, understandably, proved fruitless.
7. The evidence of the pathologist was that the deceased had suffered three stab wounds to his back as well as the fatal stab wound to his neck and incised wounds to his chin and the right forearm as well as some cuts and bruises to his head, neck and legs. It was the

opinion of the pathologist that the same weapon could have inflicted the four stab wounds.

8. The prosecution case was that the appellants and Fraser Cheung, had attended the home address of Christian Patru as part of a joint plan to deal with an issue relating to the supply of drugs, with the common intention that he would be, at the very least, seriously harmed. The prosecution could not definitively state who was responsible for the fatal wound but its case was one of joint responsibility for his death.
9. On the afternoon of the killing all three defendants had met by prior arrangement at a barber's shop in Harlow around an hour before going to the flat. Jaden Drake was in contact by phone with Igers Andersons at 17.25 pm, by which time he had already arrived at the flat.
10. There was scientific evidence indicating that the appellants and Fraser Cheung were all present in the same room as the victim at the time of the stabbing. Christian Patru's blood was found on their clothing and shoes. There was also evidence that Jaden Drake was in contact with Fraser Cheung on his mobile telephone at around the time of the making of the 999 call. This is consistent with Jaden Drake being the man that the neighbour saw running through the back garden and jumping over the gate after Christian Patru was stabbed. CCTV evidence captured Fraser Cheung and Igers Andersons walking away from the address at around 17.32. Fraser Cheung then made several calls to arrange for a taxi to go from the road where Jaden Drake's girlfriend lived to Harlow Railway Station.
11. The prosecution also adduced evidence that all three defendants travelled to Bournemouth via Southampton in the aftermath of the stabbing albeit that Jaden Drake travelled there ahead of Igers Andersons and Fraser Cheung. Jaden Drake removed the SIM from his mobile phone and replaced it. The three men stayed in Bournemouth with an associate of Jaden Drake's until they were arrested on 20 November 2021. Jaden Drake ran away when the police arrived and was apprehended after a chase.
12. The appellants answered "no comment" to all questions when interviewed. Jaden Drake gave a prepared statement in which he blamed Igers Andersons for inflicting the fatal wound.

### **The Trial**

13. The defence statement served on behalf of Jaden Drake said the following about the killing (emphasis added);

*"Mr Patru asked where the keys were and Mr Andersons said that he thought he had lost them. This led to Mr Patru losing his temper. Mr Patru became violent and grabbed Mr Andersons, hitting him in the stomach.*

*Mr Patru then picked up a knife.*

*The defendant told both of them to calm down.*

*Mr Chung sat there and said and did nothing.*

*Mr Patru poked Mr Andersons with the knife saying 'You best go get my keys'. The defendant believes that this must have been quite a hard poke and it may have caused Mr Andersons some injury.*

*Mr Andersons then grabbed Mr Patru and he moved his leg up. As he did that the knife dropped to the floor. **Both went to pick up the knife. Mr Andersons got there first and there was a struggle with it. Mr Andersons stabbed Mr Patru with the knife.....***

*The defendant did not know what Mr Andersons would do next, nor whether or not Mr Patru was still alive.”*

14. Igors Andersons served a defence statement in which he described the events in the following terms, (emphasis added);

*“ 6. ....The Deceased’s behaviour was erratic; he looked like he was under the influence of drugs.*

*7. This argument developed into a physical one with the Deceased using a knife to threaten the Defendant. The Deceased pinned the Defendant against the wall and proceeded to poke him with the knife. The Defendant was terrified and in fear for his life. The Deceased let go of the Defendant but, still armed with the knife, paced menacingly and silently around the room, never much further than 1- 2 metres from the Defendant. The Deceased then put down the knife and attacked the Defendant, throwing him around, bear-hugging him and punching him. **The Defendant feared that the deceased would again pick up the knife and attack him with it.***

*8. As soon as he could, the Defendant picked up the knife to stop the Deceased from using it against him again. The Deceased then began pulling at the Defendant’s wrists causing their hands to move in every direction. Although the Defendant cannot remember causing the wounds, it must be that the wounds were caused during this part of the struggle. **The Defendant did not intend to stab the Deceased, he only did not want the Deceased to have the knife and to be in a position to stab him.”***

15. At trial, all three defendants admitted their presence at the deceased's address between around 5.30 and 5.36 that afternoon but denied that there had been any joint agreement to kill him or to cause him any really serious harm. Each gave broadly consistent accounts of the deceased being the aggressor and of his using a kitchen knife to prod Igors Andersons before Igors Andersons picked up the knife and stabbed the deceased. All denied that any one of them had taken a knife to the flat.
16. It was clear from his defence statement that the case for Igors Andersons was that he acted in the heat of the moment in lawful self-defence. If that was, or might have been correct, then he would be not guilty of murder. Importantly, it would also contradict the prosecution case that there was some form of agreement, however short-lived, between the appellants that serious injury would be caused to Christian Patru.
17. Jaden Drake’s evidence was that he, Jaden Drake, had been staying at Christian Patru's flat for around three to four months. He was involved in the supply of cannabis. Igors Andersons was his runner. Fraser Cheung, who was also a friend of Igors Andersons, had travelled to Harlow from Cheshunt that afternoon after telling his girlfriend that Igors Andersons was "in massive shit with Bobby (Jaden Drake's nickname) and needs my help ASAP like it could be bad".

18. Igors Andersons was later to explain this exchange by saying that they had fallen out over some cannabis which Igors Andersons had lost. He claimed that they had resolved their differences. They met up with Fraser Cheung at around 4.20 pm. At that point, they all decided to go to Christian Patru's address intending merely to socialise. Igors Andersons arrived at the address slightly after the other two because he stopped off en route to buy some food.
19. The only evidence about what happened inside the room where Christian Patru was stabbed came from the three defendants. All three men gave evidence that Christian Patru was the instigator of an argument about some keys to the back garden gate which Igors Andersons had lost. They said that the neighbour was mistaken in her evidence that it was another man, who, on the evidence, could only have been Jaden Drake, who was demanding those keys from Christian Patru.
20. Jaden Drake's account in his evidence, though not in his prepared written statement, was that as soon as Igors Andersons arrived the deceased asked him where the keys were and Igors Andersons said he had lost them. Christian Patru got angry, grabbed Igors Andersons by the collar and punched him in the stomach. He then picked up a kitchen knife and started to poke Igors Andersons in the legs and chest with it, demanding that he should find the keys. Igors Andersons became emotional and looked as if he was about to cry. He grabbed Christian Patru and the knife fell to the floor. Igors Andersons picked up the knife and there was then a tussle in which Christian Patru was trying to get the knife from Igors Andersons.
21. Jaden Drake said he then saw Igors Andersons reach "over to his back" and stab Christian Patru in the back. There was blood all over Christian Patru's body and dripping on to the floor. At that point Jaden Drake dropped his food and ran out of the address. As he left, he made eye contact with Igors Andersons who looked as if he did not seem to know what he was doing which made Jaden Drake very scared.
22. He was cross-examined on behalf of Igors Andersons to the effect that Christian Patru had been aggressive to Igors Andersons, that they had struggled over the knife and that Igors Andersons had picked up the knife as a "means to defend himself". In answer to prosecution counsel he repeated that Igors Andersons had looked as if "he didn't know what he was doing". He gave evidence that Igors Andersons had picked up the knife that Christian Patru had dropped or put down and in angry, low, deep tone said, "What now?", to Christian Patru. Jaden Drake also said he feared that Igors Andersons might stab him. He left in fear for his own life.
23. After the killing he travelled to Bournemouth. He did not return because he was scared. He invited Fraser Cheung to join him in Bournemouth, and was not expecting him to bring Igors Andersons with him. He did not know what became of the knife. Although Jaden Drake had been photographed with a knife and had been arrested four months earlier with a knife which he was using in connection with his drug dealing, Jaden Drake said he was not carrying a knife at the time and he had not assisted or encouraged Igors Andersons to use a knife.
24. Igors Andersons gave evidence that Christian Patru became very angry when he told him he had lost the keys. He thought Christian Patru was high on drugs. This was consistent with the forensic toxicologist's report that Christian Patru had ingested a substantial

quantity of cocaine and cannabis shortly before he died. Igors Andersons gave evidence that Christian Patru was a bully and had been violent towards him in the past

25. On this occasion, Igors Andersons said he was backed up against a wall, Christian Patru came closer, was looking into his eyes and poking him in the legs with the kitchen knife. He said he thought Christian Patru might use more force and might stab him with the knife. He said he did not know what to do, he was in shock and he was really scared.
26. After poking Igors Andersons with the knife, Christian Patru put it down on the TV table. Igors Andersons said he picked it up intending to keep it away from him. Christian Patru then grabbed his wrists. Igors Andersons thought he was trying to take the knife back from him and there was a struggle.
27. Igors Andersons's evidence was that he was scared. He feared that if he took it "*off me this time he would make sure that he would hurt me seriously, so he would hurt me again*".

*"I couldn't really do anything and then he grabbed me by my wrists and then he looks at me, I look him in the eyes and he looks non-responsive. His eyes are like black. His eyeballs are like massive and I'm telling him to calm down several times, trying to get through to him and he's not responding. He's not saying anything and at this point I didn't know what to do. I was really scared and so at this point we both stopped talking, not saying anything, and then he starts pulling me and pushing me around the room whilst still grabbing me by my wrists whilst I still had the knife in my right hand. And I don't really remember much of what was happening in the tussle whilst he was pulling me and pushing me around. It's not really in my memory, but what happened was the bit after that that I do remember, it was like I just - it was like I just awoke, it was like my eyes started seeing again. It was like I became conscious again and I see - the first thing I see is my knife in my right hand and I see blood on the floor."*

28. He said he could not remember stabbing him, but he "*felt like he woke up and he was conscious again*". He said he had "*a blank in my memory*". One has to bear in mind that English is not his first language, he is Latvian by nationality and had been in this country for four years. He said he had the knife in his right hand and he could see that Christian Patru was bleeding from his left shoulder. He knew that Christian Patru was injured but he did not realise how seriously. Igors Andersons accepted that he must have stabbed him but could not remember inflicting the wounds.
29. Christian Patru went out into the garden, and Igors Andersons and Fraser Cheung exited the property through the front door. Igors Andersons was still carrying the knife which he subsequently said he hid in some woods. He went to Bournemouth with Fraser Cheung because he felt he had nowhere else to go.
30. Fraser Cheung's account was broadly consistent with the account given by Igors Andersons. He, too, said that Igors Andersons had picked up the knife after Christian Patru put it down either on the TV table or the top of the fridge. He could not remember which. He gave evidence that Igors Andersons seemed to be frightened by Christian Patru's behaviour.

## Ruling on Loss of Control

31. At the end of all the evidence the judge heard argument on whether the defence of loss of control should be left to the jury. He gave an ex tempore ruling at the end of the submissions. He later handed down a written ruling.
32. In his oral ruling he set out the three stage test required by the statute. In dealing with the first part of that test, 'was there sufficient evidence to leave the matter to the jury?', the judge found that the material said to support the defence of loss of control came from Jaden Drake, when he said that Igors Andersons looked emotional and as though he was going to cry, and further, that he looked as though he did not know what he was doing.
33. The judge went on to say that what was important was the evidence of Igors Andersons himself. He set out Igors Andersons' account of being jabbed in the legs and of being frightened. He went on to deal with his evidence of picking up the knife, not with the intention of using it but to prevent Christian Patru from using it again. He described Igors Andersons' account of a struggle between the two men and the stabbing, which the judge characterised as being said to be in self-defence.
34. He found that the evidence of Igors Andersons was not sufficient to meet the first part of the test. He said it was important to consider the evidence of a defendant himself as to his intention at the time and whether, as a result of what has happened, they have lost their self-control. He reached the conclusion that, "*(t)hat is evidence absent in this case from the defendant himself*". He found that it did not raise a sufficient case and that it was not assisted by the evidence of Jaden Drake.
35. Having found that there was no sufficient evidence to leave the issue of loss of control to the jury, the judge dealt briefly with the second and third parts of the test. In dealing with the "qualifying trigger" he said that the picking up of the knife by the appellant was done to prevent a further attack on him and that the injuries which he caused were said to be in lawful self-defence. He did not accept Mr Bromley-Martin's submission that Igors Andersons had "lost his control by excessive self-defence."
36. At a later date the judge gave a written ruling. He referred to the principles laid down in *R v Dawes [2013] EWCA Crim 322* and *R v Gurpinar [2015] EWCA Crim 178*. He first set out the evidence of Igors Andersons, and his conclusion that there was no sufficient evidence from Igors Andersons that he had lost his self-control. "*There is no evidence from the defendant Igors Andersons that he in fact lost control. He asserts that he 'awoke and was conscious again,' and that he couldn't recall how he had inflicted the injuries. It is insufficient simply for a defendant to assert he lost control, if indeed that is what Igors Andersons was trying to state in this case.*" He found that the picking up and the keeping of the knife were deliberate acts based on rational decisions.
37. He then went on to consider the evidence of Jaden Drake and found that it also was not sufficient to support the assertion that Igors Andersons had lost his self-control. He described his evidence as "*an entirely subjective comment by a co-defendant*".
38. The judge nonetheless went on to consider whether there was a "qualifying trigger" of a nature that would satisfy the second stage of the test. He found that there was no such trigger because after the knife had been used by the deceased, it had been put down and Igors Andersons had made the choice to pick it up. In his written ruling he spoke of actual

serious violence but went on to say that “*the threat had been reduced by the putting down of the knife*”.

39. Having dealt with the first two elements he referred very briefly to the third element of the test. In summary he found that a sober person of 18 would not have reacted to the things done by Christian Patru by killing him.

### Ground of Appeal

40. Mr Bromley-Martin submits that the judge was in error in reaching those conclusions. He argues that the judge applied the wrong test and made several errors of law. He argues that it was wrong to characterise the evidence of Jaden Drake as “subjective comment” and submits that there was sufficient evidence to oblige the judge to leave loss of control to the jury. In particular he relies on the account that when Christian Patru was jabbing Igors Andersons in the legs and chest he “looked emotional at that point, it looked as though he was going to cry,” and that when Igors Andersons looked at him after stabbing Christian Patru, “it looked like Igors Andersons didn’t know what he was doing.”
41. He argues that the evidence of Igors Andersons’ character is such that, barring self-defence, there may be no explanation for his actions other than that he lost his self-control. Further, he relies on the fact that Igors Andersons inflicted several wounds, the extent of which, barring self-defence, may only be explained by his having lost his self-control. There was evidence that Igors Andersons had no convictions and was described as mild and quiet.
42. Mr Bromley-Martin describes a tension between self-defence and loss of control. He makes the very broad submission that an accused person would be deterred from raising loss of control because to do so would be to concede that the force used was excessive and would thereby damage his case on lawful self-defence.
43. He is also critical of the judge’s oral ruling on “qualifying trigger”. He submits that, when considering the jabbing by Christian Patru, the judge mistakenly thought that the test was the use of serious violence rather than the fear of serious violence. In his written ruling the judge said the jabbing with the knife had not caused any, or any serious, damage.
44. Mr. Davis supports those submissions on behalf of Jaden Drake.

### Statutory Framework

45. The old common law partial defence of provocation was abolished by **s.56 of the Coroners and Justice Act 2009 (“the Act”)**. The statutory test for the new partial defence of loss of control is set out in ss 54 and 55 of the Act. It may be instructive also to look at the Explanatory Notes published by the Ministry of Justice.

#### **Section 54 Partial defence to murder: loss of control**

*(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—*

*(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,*



*(b) the loss of self-control had a qualifying trigger, and  
(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.*

*(2) For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.*

*(3) In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.*

*(4) Subsection (1) does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge.*

*(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.*

***(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.***

*(7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter.*

### **Section 55 Meaning of "qualifying trigger"**

*(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.*

*(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.*

*(4) This subsection applies if D's loss of self-control was attributable to a thing or things done or said (or both) which— (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged.*

*(5) This subsection applies if D's loss of self-control was attributable to a combination of the matters mentioned in subsections (3) and (4).*

*(6) In determining whether a loss of self-control had a qualifying trigger—*

*(a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence;*

*(b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence;*

*(c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.*

*(7) In this section references to "D" and "V" are to be construed in accordance with section 54.*

### ***Explanatory notes to the legislation.***

"340. Subsection (5) clarifies where the burden of proof lies in murder cases where the partial defence is raised. If sufficient evidence of the partial defence is raised, the burden of disproving the defence beyond reasonable doubt rests with the prosecution. It is supplemented by subsection (6) which confirms that for the

purposes of subsection (5) the evidence will be sufficient to raise an issue as to the defence where a jury, properly directed, could reasonably conclude that the partial defence might apply. It will be a matter of law, and therefore for a judge to decide, whether sufficient evidence has been raised to leave the partial defence to the jury. ....Where there is sufficient evidence for the issue to be considered by the jury, the burden will be on the prosecution to disprove it. This is the same burden of proof as other defences, including self-defence.

...

342. *Subsection (8)* provides that even if one party to a killing is found not guilty of murder on the grounds of the partial defence of loss of self-control, this does not affect the position of any other person who may be liable for murder in respect of the killing.”

### Discussion

46. The proper approach was set out by Lord Judge CJ in *R v Clinton [2012] EWCA Crim 2*. The court is required to make “*a common sense judgment based on an analysis of all the evidence*”, (emphasis added).
47. The court must take a stricter approach than under the previous law. In *Gurpinar* Lord Thomas CJ described the role of the judge as being required to “*undertake a much more rigorous evaluation of the evidence*” in deciding whether the defence can properly be left to the jury.
48. All three components of the defence need to be established. If one is absent the defence cannot be left to the jury. If there is no, or no sufficient, evidence of loss of control then the presence of a qualifying trigger will not suffice, *Clinton*.
49. All the principles arising from the earlier authorities were distilled by Davis LJ in *R v Goodwin [2018] EWCA Crim 2287* which sets out very clearly the principles to be applied in a series of propositions. It does not appear that the court in this case was referred to *Goodwin*. That is regrettable, as it is likely that the judge would have found the guidance given in *Goodwin* of considerable assistance. Any judge faced with an exercise of this nature would do well to follow it.
50. In that case Davis LJ set out a non-exhaustive list of factors a trial judge should bear in mind when evaluating whether loss of control ought to be left to the jury:
- (1) The required opinion is to be formed as a common-sense judgment based on an analysis of all the evidence.
  - (2) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether or not the issue had been expressly advanced as part of the defence case at trial.
  - (3) The appellate court will give due weight to the evaluation (“the opinion”) of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. As has been said, the appellate court “will not readily interfere with that judgment”.
  - (4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether the decision was

within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a "yes" or "no" matter.

(5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be "sufficient" to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.

(6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.

(7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.

(8) The statutory defence of loss of control is significantly different from and more restrictive than the previous defence of provocation which it has entirely superseded.

(9) Perhaps in consequence of all the foregoing, "a much more rigorous evaluation" on the part of the trial judge is called for than might have been the case under the previous law of provocation.

(10) The statutory components of the defence are to be appraised sequentially and separately.

(11) And not least, each case is to be assessed by reference to its own particular facts and circumstances.

51. Davis LJ stated that whilst it will not necessarily be decisive for the issue that a defendant does not in his evidence positively assert a loss of control, it is a powerful point against the issue arising.
52. It is clear from the line of authorities since *Gurpinar* that sufficient evidence can arise from all or any part of the evidence, even if not foreshadowed by the accused in interview or the defence statement, and even if not given in evidence by the accused himself. *Gurpinar* also requires the judge to "*undertake a rigorous evaluation of the evidence against those components (the three parts of the test) and set out the conclusion in a reasoned ruling*". It is likely to be easier to demonstrate that such a rigorous evaluation has occurred if the judge delivers one single reasoned ruling. In an appropriate case the result of the application could be communicated orally, with the reasons to follow later in writing. Taking that course also avoids any risk of inconsistency of expression.
53. An accused may not necessarily be able to articulate his conduct as arising from a loss of control but those who conduct his defence can. It may only arise in the course of evidence and it could arise from the prosecution case or from the evidence of a witness, including a co-accused. We do not think that the judge's observations about the "subjective comment" of a co-accused should be viewed as being decisive. An eye witness to a killing is likely to be subjective in their account. As Lord Judge CJ observed in *Clinton*, a jury might accept an interpretation of the evidence most favourable to the accused. The court should not reject disputed evidence which a jury might well choose to believe. If

there is no sufficient evidence the issue must not be left to the jury. If there is evidence capable of supporting the defence then the matter should be left, even if that evidence is disputed by the prosecution or would not be accepted by the judge. The exercise, however rigorous, is as gatekeeper not as tribunal of fact.

54. The term loss of control is not defined in the statute. A careful analysis of the evidence is required. Terms such as “I lost it”, “I don’t know what happened but the next thing I knew”, “red mist”, may be an accused’s best efforts to describe something which on further analysis might amount to a loss of control. These are common phrases in the accounts of persons charged with murder arising out of a fast moving incident. They might be the foundation of sufficient evidence for the question of loss of control being left to the jury. Without more, however, they do not necessarily in themselves provide sufficient evidence of loss of control for the purposes of the statutory provisions.
55. An assertion of loss of control is not sufficient evidence, ***R v Tabarhosseini [2022] EWCA Crim 850***. Such words may equally describe a loss of temper or rage. Moreover an inability to recall the detail of an incident which was obviously traumatic does not, without more, establish a sufficient evidential basis for the issue to go to the jury.
56. The ferocity of an attack is simply one part of the evidence. A frenzied or ferocious attack might be the product of fury or a desperate desire for revenge. The nature of the attack is relevant but not determinative.
57. We do not accept the submission that an accused person is prevented or deterred from raising the issue of loss of control before the trial by the fear that it would be a concession that the force used cannot have been in lawful self-defence because it must necessarily be excessive. That does not follow inevitably, as each case is always dependent on its own facts. As was said by Lord Judge CJ in ***Dawes*** at [59],

*“The loss of control defence is not self-defence, but there will often be a factual overlap between them. It will be argued on the defendant’s behalf that the violence which resulted in the death of the deceased was, on grounds of self-defence, not unlawful. This defence is now governed by s.76 of the Criminal Justice and Immigration Act 2008. In the context of violence used by the defendant there are obvious differences between the two defences and they should not be elided. These are summarised in Smith and Hogan, 13th Edition, at p 135. (Now in the 16<sup>th</sup> Edition at page 553 et seq). The circumstances in which the defendant, who has lost control of himself, will nevertheless be able to argue that he used reasonable force in response to the violence he feared, or to which he was subjected, are likely to be limited. But even if the defendant may have lost his self-control, provided his violent response in self-defence was not unreasonable in the circumstances, he would be entitled to rely on self-defence as a complete defence. S.55(3) is focussed on the defendant’s fear of serious violence. We underline the distinction between the terms of the qualifying trigger in the context of loss of control with self-defence, which is concerned with the threat of violence in any form. Obviously, if the defendant genuinely fears serious violence then, in the context of self-defence, his own response may legitimately be more extreme. Weighing these considerations, it is likely that in the forensic process those acting for the defendant will advance self-defence as a complete answer to the murder charge, and on occasions,*

*make little or nothing of the defendant's response in the context of the loss of control defence. As we have already indicated, the decision taken on forensic grounds (whether the judge believes it to be wise or not) is not binding on the judge and, provided the statutory conditions obtain, loss of control should be left to the jury. Almost always, we suggest, the practical course, if the defence is to be left, is to leave it for the consideration of the jury after it has rejected self-defence."*

58. If all three parts of the statutory test are made out an accused who uses excessive force would still be entitled to have the partial defence of loss of control left to the jury.
59. Raising the defence does not automatically lead to a conviction for manslaughter. Sufficient evidence to raise the issue is required by s.54(5). If that is available then the evidential burden shifts to the prosecution to disprove it to the criminal standard. It follows that a jury can sensibly be asked to consider both self-defence, as a full defence, and loss of control, as a partial defence. It requires a considered and careful approach to the directions required. The jury must be directed to consider self-defence first, and only if they reject that, to go on to consider loss of control.
60. In this case, each of the three defendants gave a similar, potentially credible, but disputed account, that the deceased was the initial aggressor and that he used a knife which was to hand in his flat. The appellant gave an account that, having been jabbed by the deceased, the deceased put down the knife. The appellant then picked up the knife to prevent any further use of it by the deceased. The deceased continued to behave as the aggressor and began to struggle with the appellant, the appellant believing that to be an attempt to take back the knife with the intention of using it again. In the course of the ensuing struggle the appellant stabbed the deceased. One of the stab wounds "divided the left common carotid artery" and was rapidly fatal.
61. The prosecution had to disprove the defence case that the deceased was, and continued to be, the aggressor. The jury was bound to consider the accounts given by the witnesses to the incident and the nature of the injuries. They had to decide the questions, did the applicant honestly fear an attack? and was the force he used reasonable in the circumstances, as he believed them to be? The evidence of the measure of the force used was to be found in the medical evidence. The evidence of the appellant's belief came from his, and his co-accused's, evidence.
62. If there had been sufficient evidence of a loss of control so that that alternative was left to the jury, that would not have been a concession that the defence used was excessive.
63. The very brief summary of the evidence above sets out the case for the appellant. His own account was of being scared, becoming "awake" and "conscious" again. Jaden Drake described him as looking as though he was going to cry, being emotional and leaving Jaden Drake not knowing what he was going to do next.
64. Accepting all the defence evidence at its highest, including the character evidence, it does not amount to any sufficient evidence upon which the jury should have been asked to consider a loss of control. The picking up of the knife was a deliberate and rational act. The struggle that followed, on the accused's account, meant that he was acting to defend himself. The fact that he could not remember how the blows were struck or that he used the expressions 'woke up' or 'became conscious' do not meet the test of sufficiency.

Jaden Drake's description does not strengthen the position. That Igors Andersons looked scared and about to cry adds no weight. Nor does the description that he looked as though he did not know what he was doing. His case that he acted instinctively, in the heat of the moment to protect himself never reached the level of sufficiently showing that he lost control of himself to the standard now required by the statutory test.

65. The judge was correct to reject the submission that he should leave the issue to the jury. Mr Davis recognises that if Igors Andersons fails there is no other independent argument on behalf of Jaden Drake.
66. The appeals against conviction are refused.

### Sentence

67. The judge was bound to consider the provisions of *Schedule 21 of the Sentencing Act 2020* in setting the minimum term that each appellant had to serve before being entitled to apply for release.
68. He found that the case was properly categorised as falling into paragraph 4(1). That sets the appropriate starting point for the sentence at 25 years if a knife is taken to the scene with the intention of committing any offence, and the knife is in fact used to commit the murder.
69. The prosecution case was that the appellants had taken a knife to the scene. They said that there was an irresistible inference that Jaden Drake had carried the knife to the scene. Further that there was an irresistible inference that Igors Andersons must have been aware of the knife, shared Jaden Drake's intention that it should be used to commit an offence and in fact, went on to use that knife to kill Christian Patru.
70. The prosecution's case that Jaden Darke took the knife to the premises was based on his previous history. He had been convicted of possession of a knife on two previous occasions and had been photographed holding a type of hunting knife not long before the murder. He also had convictions for drugs and other offences but apart from one offence of battery nothing for any offences of violence. They submitted that the friendship between the two appellants and their joint purpose in going to see Christian Patru gave rise to the irresistible inference that Igors Andersons would have been aware of the knife and joined in its possession.
71. Both the appellants were involved in drug dealing with the deceased and the killing had arisen, at least in part, out of an argument, over a small amount of cannabis.
72. The defence submitted that all the evidence established that the knife was in the premises and the deceased had been the first to pick it up and use it as a weapon. It was further submitted that the acquittal of Fraser Cheung meant that the judge was bound to find that the three accused had not held a joint plan involving the taking of the knife with the joint intention of using it to commit an offence.
73. Despite the submissions of the prosecution and the defence, the judge reached the finding that he was sure, to the criminal standard, on all the evidence that it was Igors Andersons who had taken the knife to the scene with the intention of committing an offence.. Earlier on that day Igors Andersons was seen on CCTV footage hiding something in the

waistband of his trousers. He denied it was a knife and said it was a bag of cannabis that he was going to deliver.

74. The judge found that he could not be sure that the accused had gone to the premises intending to kill. He found that Jaden Drake had entered the premises first and had been the one to start the argument in the course of which Igors Andersons had used the knife to stab and kill the deceased.
75. Having selected the starting point of 25 years. He considered factors that would aggravate the sentence. He found that the killing was connected with drug dealing, he found marginal planning in the meeting before the killing and that Jaden Drake's previous convictions, particularly relating to knives, were all of some aggravating effect.
76. He found some marginal mitigation for both in the absence of an intention to kill and for Igors Andersons in his age and lack of convictions. Given the reduction that was bound to be made to reflect Igors Andersons' age the judge felt it appropriate to also reduce Jaden Drake's sentence to avoid too great a disparity.
77. It is not possible to discern how far above the 25 year starting point the aggravating features increased the sentence but there must then have been a very significant reduction. The judge passed a sentence of 20 years' imprisonment on Jaden Darke and 18 years' custody on Igors Andersons.

### **Submissions**

78. Both Mr Bromley-Martin and Mr Davis repeat the submissions made in writing that the judge was wrong to find that either one of the two appellants took the knife to the scene. They submit that the starting point should not have been 25 years. Accordingly, they argue the sentences are manifestly excessive.
79. Mr Davis argues that Jaden Drake is still relatively young but that, significantly the judge had directed the jury in his legal directions that Jaden Drake was a secondary party and not a joint principal. In any event he submits he was not the one who wielded the knife.
80. Mr Jackson pointed out that the prosecution had always put their case on the basis that the two were joint principals. He argues that the judge was entitled to reject his submissions and the evidence given by all the accused and reach his own findings.

### **Discussion**

81. The judge was required to be sure to the criminal standard on the issue of whether either accused brought the knife to the scene.
82. The knife was never recovered. Igors Andersons identified the place he said he had hidden it, but that was during the trial, about eight months after the murder. It was not in the place he indicated, unsurprisingly perhaps, given the passage of time.
83. The medical evidence was that the injuries could have been caused by the same weapon which had a single cutting edge. The deepest injury was approximately 10cm deep.
84. All three accused gave evidence that the knife used was a kitchen knife which had been at the scene when they arrived. They all spoke of Christian Patru as the person who was

angry with Igors Andersons for losing some drugs. It did not seem to be disputed that Igor Andersons had lost some cannabis, in the sense that his parents had found it and disposed of it and that was cannabis belonging to Christian Patru.

85. This court is always extremely reluctant to disturb a finding of fact by a judge who has conducted the trial. It is, however, very difficult to discern the basis upon which the judge reached his conclusion about the knife. He was entitled to reject the submission that Fraser Cheung's acquittal was determinative. The jury could quite properly have been sure of the participation of the first two defendants but not sure about his involvement.
86. Whether the proved disposition of Jaden Drake to carry knives would have been sufficient to establish his taking the knife to the scene is not a matter which we need to resolve. The judge was not sure that Jaden Drake had taken the knife on this occasion. It appears, therefore, that the evidence that Igors Andersons was seen to put something into his trousers earlier in the day must have been the basis for the judge's conclusions.
87. We are unpersuaded that that is a sufficient foundation for a conclusion which has the effect of increasing the starting point for assessing the appropriate sentence from 15 to 25 years. We take the view that there was no sufficient evidential basis for the finding that Igors Andersons took the knife to the scene. The judge did not find that Jaden Drake had taken it there. There had never been even an assertion that the acquitted defendant had taken it there. We also take account of the judge then making what was a very substantial reduction from somewhere above the 25 year starting point to terms of 20 and 18 respectively, based on the age of the younger defendant.
88. Accordingly, the appropriate starting point was 15 years. There was bound to be an increase from that point to reflect that this was a murder, which involved the use of a knife, albeit not brought to the scene, committed in connection with drug dealing. Jaden Drake's convictions for carrying knives aggravated his position. Igors Andersons had no convictions and was only 18 years of age at the time of the murder.
89. Balancing those factors, we take the view that the appropriate sentences, the least terms commensurate with the nature of the offending and the statutory requirements, are 17 years in the case of Jaden Drake and 15 years in the case of Igors Andersons.
90. Accordingly the appeals against sentence are allowed. We quash the original sentences and impose a sentence of imprisonment for life in the case of Jaden Drake with a minimum term of 17 years, less 269 days served. In the case of Igors Andersons we impose a sentence of custody for life with a minimum term of 15 years less 269 days served.
91. To that extent these appeals are allowed.