Neutral Citation Number: [2023] EWCA Crim 341

Case No: 202103576 B2
202103586 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
HHJ Laird KC
T20207546

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/03/2023

Before:

LADY JUSTICE THIRLWALL
MR JUSTICE PICKEN
and
THE RECORDER OF PRESTON
(sitting as a judge of the Court of Appeal Criminal Division)

- -

Between:

(1) ABDIRAHMAN DIRIE **Appellants**
(2) MUSTAFA OMAR

- and –

REX **Respondent**

- -
- -

S CSOKA KC and **N ROSS** (instructed by **Central Chambers Law Solicitors**) for the **First Appellant**
J DEIN KC and **K A ROWAN** (instructed by **Reeds Solicitors**) for the **Second Appellant**
A DARLOW KC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 09.02.2023

- -

Approved Judgment

This judgment was handed down remotely at 11am on 30 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

.....

Lady Justice Thirlwall :

Introduction

1. This is the judgment of the court to which we have all contributed.

2. These are appeals against conviction brought with the leave of the single judge by Abdirahman Dirie (22) and Mustafa Omar (23). They were each convicted of Murder, Perverting the Course of Justice and Arson, after a trial at the Crown Court sitting at Birmingham before HHJ Laird KC. A further Defendant was convicted of the same three counts. Two other Defendants were convicted of those three counts and of a further count of arson.

3. The murder took place on 15 May 2018. The victim was Abdul-Rahman Abu-Baker. He had been at a barbeque with friends, at Stratford Place in Highgate, Birmingham. He left just before 23:00 on a quad bike. As he did so he was fatally shot.

4. Before the shooting, four cars and a number of men had been together in Hams Road, a short drive from Stratford Place. Three men had arrived on foot in possession of a petrol can.

5. One of the cars (a Volkswagen) left Hams Road, to reconnoitre the location in preparation for the shooting. Ultimately two of the cars (a Ford Kuga and an Audi) parked near Stratford Place and the Volkswagen parked within sight of the barbeque. The fourth car (a Mercedes) had been damaged and was abandoned nearby. It was the Crown's case that a phone call was made from the Volkswagen indicating that the barbeque was ending. The Volkswagen then joined the Ford Kuga and the Audi. By 22:49 the three vehicles were travelling in convoy.

6. As the victim drove towards the vehicles, he was fatally shot by an occupant of the Kuga. Mr Rahman later died from his injuries.

7. The Ford Kuga was driven back to Hams Road and set alight (Count 3). As the car burned, three men were seen to run from the scene, one of whom discarded a dark top as he ran. It was the Crown's case that this was Omar. A taxi was called to nearby Bowyer Road and the taxi driver recalled picking up three or four men. A shotgun cartridge and pellets were later recovered from the Kuga. Next to the car a black and red 'Marksman' glove was found which contained a mixed profile of DNA from at least four contributors.

8. The Audi was taken to a different location and also set alight (Count 4).

9. Count 2 (perverting the course of justice) reflected the setting alight of the cars as an attempt to destroy evidence.

10. The abandoned Mercedes was found the next day. Within the car were two *"Motor Balaklava"* boxes upon which were found Omar's fingerprints. A black balaclava was also found in the car. A pair of 'Marksman' gloves in the same style and size as the single glove found near the Ford were found in the Mercedes. It was the Crown's case that this car had been used to store items for the attack.

11. On the following day at 12:34 four men arrived on foot at Hams Road. The Crown's case was that Omar was one of the men who returned to pick up the top discarded after the shooting.

12. Omar was arrested on 5 August 2020 and Dirie on 18 August 2020. Neither made any comment in interview.

The case against Dirie

13. As part of its case against Dirie, the Crown relied upon the attribution to him of a phone with a number ending 7708. This phone had been used by him to contact his social worker, his mother, and his father in May 2018. It also shared common contacts with a phone (LH/1) seized from him on 17 May 2018. Those common contacts included a number ending 3472 which was the most contacted for both 7708 and LH/1. There was a period between 16 and 20 May 2018 when it was agreed the phone was not in Dirie's possession. During that time the phone did not contact the 3472 number.

14. This attribution was not accepted by the defence. They relied on the fact that it was out of Dirie's possession between 16 and 20 May 2018 and that the phone was consistently used to book taxis in the name of *"Adam"* to and from an address with which Dirie had, they said, no connection.

15. The Crown claimed that the usage of the 7708 phone on 15 and 16 May 2018 was capable of establishing that whoever held the phone at the time was a party to the murder. This is a matter to which we will return in more detail, but the Crown relied, in particular, upon a contact and an attempted contact between the 7708 phone and, on the Crown's case, Omar Elmi, a co-defendant also convicted at trial, at 19:37 and 23:14 on 15 May 2018. In addition, there were two attempted contacts in the early hours of 16 May 2018 with another phone (8802) which it was accepted was being used by someone involved in the murder. The Crown asserted that these calls and attempted calls were made at a time when Elmi and the user of the 8802 phone would have been pre-occupied with the shooting, the disposal of the vehicles and their getaway such that it was inconceivable that these calls were for an innocent purpose. They also relied upon the timing of some of these calls in relation to others made by Elmi to phones clearly, the Crown said, involved in the shooting.

16. The Crown also relied on DNA in the single glove found near the Ford Kuga. A profile matching Dirie's DNA was amongst those found within the glove. It was conceded at trial that a component of the DNA must have originated from Dirie. According to the forensic scientist, Mr Mallon, who gave evidence, its presence was consistent with him having worn the glove at some point, the DNA being present on the inside of the glove within the finger/s and on the palm. The expert could not establish when or in which order the contributors had deposited their DNA.

The case against Omar

17. The Crown relied on his possession of a phone ending 1831 which was in regular use around the time of the shooting and was in contact with the phone ending 8802. The Crown also relied on Omar's fingerprints on the boxes recovered from the Mercedes. Omar was said by the Crown to be one of those returning to Hams Road on 16 May to

retrieve the item of clothing. This contention was given some support from an imagery expert based upon video footage.

The trial

18. On 17 August 2021, during the trial and within the custody area of the Court building, Dirie handed some papers to Omar. These were said to be a document entitled *"Defence Case Statement"* and a further page with the title *"Endorsement"*. Both documents were dated and signed that day. In the *"Defence Case Statement"* Dirie apparently denied any knowledge that a shooting had taken place until 2019. Accordingly, the document said, he had not participated in the shooting *"as part of a shared intention or joint enterprise"*.

19. The document then contained three admissions. The first was that Dirie had set fire to the interior of the Ford Kuga. The second was in relation to the 1831 phone which the Crown attributed to Omar. In the document Dirie said that he accepted the attribution of the 1831 phone *"at all material times…including at the time of the shooting"*. At other times, according to the document, he and Omar had joint use of the 1831 phone for the purposes of drug dealing. The final admission was that he had bought the balaclava boxes upon which Omar's fingerprints were found. He said that he had taken them to Omar's address and handed them to an unknown male at Adderley Park (which adjoins Hams Road).

20. On 7 and 8 September 2021 Dirie's counsel (then Mr Bhatia KC) submitted that there was no case to answer. During the course of argument, in answer to a question from the judge he conceded that there was sufficient evidence for a jury to conclude that the person using the 7708 phone on 15 and 16 May 2018 was a party to the murder. However, he submitted that there was insufficient evidence for a jury to be sure that the 7708 phone was being used by Dirie. He also submitted that, given the lack of evidence as to when or in what order the elements of the mixed DNA profile had been deposited, this was not sufficient evidence upon which a conviction could be founded.

21. Also, on 8 September 2021 Omar's Counsel (then Mr Webster KC) served a written application under s.76A of the Police and Criminal Evidence Act 1984 ("PACE") to adduce the documents allegedly handed to Omar by Dirie on 17 August 2021.

22. On 9 September 2021 the judge rejected Dirie's submission of no case to answer. Dirie's legal team then notified the Court that they believed themselves to be professionally embarrassed. On 10 September 2021 they told the Court that they had been instructed not to oppose Omar's application to adduce the documents and then withdrew from the case.

23. The judge allowed an adjournment of the trial to enable the instruction of a new legal team. Mr Csoka KC was instructed, and the trial resumed on 16 September 2021. Mr Csoka opposed Omar's application to adduce the documents.

24. A voir dire was held during which Omar gave evidence. He produced the documents and gave his account of Dirie handing them to him. CCTV of the custody area was played showing Dirie signing papers and giving them to Omar. Omar confirmed in evidence the account given in the documents of the attribution of the 1831 phone and the balaclava boxes. Dirie did not give evidence in the voir dire.

25. On 21 September 2021 the judge found that the documents did contain confessions by Dirie. He also found that Omar had proved on the balance of probabilities that the documents had not been obtained in consequence of anything said or done which was likely, to render any confession unreliable. There was, he ruled, no basis to exclude them under s.76A of PACE. However, he then held that, pursuant to s.133 of the Criminal Justice Act 2003 ("the CJA"), the documents had to be produced before the Jury. Omar could give evidence and produce the documents. The judge ended his ruling by saying that, if his interpretation of s.133 of the CJA was wrong, he would have exercised his discretion under s.126 of the CJA to exclude the evidence because, without the evidence of where they came from, they would lack sufficient probative value to justify their admission in evidence. Omar did not give evidence before the jury and the documents were not placed before them.

The Grounds of Appeal

26. By this appeal Mr Csoka argued on behalf of Dirie that the concession made by Mr Bhatia that there was sufficient evidence to establish that the user of the 7708 phone was a party to the murder was wrongly made. His submission was that the judge was wrong to reject the submission of no case to answer as the inferences to be drawn from the circumstantial evidence were insufficient for the case to be left to the jury.

27. Mr Dein KC, now instructed on behalf of Omar, argued that, once the documents were produced in the voir dire, the judge was wrong to conclude that s.133 of the CJA required that they be produced again before the jury. He further submitted that s.126 of the CJA has no application where material is *"*ruled admissible under s.76A PACE*"*. It follows, he contended, that the judge would have had no power to exclude the documents. He submitted that documents were highly relevant to key issues in the case and their exclusion rendered the trial unfair and the conviction unsafe.

Dirie's appeal

28. We turn, against this background, to Dirie's appeal. This turns on whether or not Mr Bhatia was right to have made the concession to which we have referred since if he was, Mr Csoka accepted that the appeal must fail.

29. We have received detailed and comprehensive submissions in writing from Mr Csoka and Mr Ross, supplemented by helpful oral submissions by Mr Csoka. We are also grateful for the written and oral submissions made by Ms Darlow. We will not deal with every argument but will focus on those which are necessary to the determination of the appeal.

30. Mr Csoka highlighted that the judge concluded in his ruling that the evidence concerning DNA found on the 'Marksman' glove recovered in Hams Road was insufficient by itself to enable the jury to be sure of Dirie's guilt because Mr Mallon could not say when the DNA attributed to Dirie was deposited in the glove. Mr Csoka also submitted that the judge decided that the possibility of secondary transfer could not be ruled out. Accordingly, Mr Csoka submitted, the presence of Dirie's DNA in the glove and its location, by themselves, were insufficient for a jury properly directed to properly convict Dirie.

31. The judge put the matter as follows at [14]:

> "It is accepted by the defence that the jury could properly conclude that the inside of the glove bore traces of the DNA of [Dirie]. The live issues for the jury therefore are (a) when and how the DNA was deposited inside the glove (b) when, how and by whom the glove was left in Hams Road. When considering these issues, it must be recognised that (1) from the scientific evidence alone it cannot be determined how or when the DNA was deposited inside the glove (2) there is no direct evidence of how, when and by whom the glove was left in Hams Road. However, the evidence relating to the glove is not the totality of the evidence and when considering these [and other] issues, the jury is entitled to look at all of the evidence including the evidence relating to the 7708 phone."

32. We would add that there was before the court expert evidence that the position of the DNA within the glove was consistent with the glove being worn. During argument before us, Mr Csoka accepted that if the DNA had been left as a result of the glove being worn, that was unlikely to be the result of secondary transfer (a topic briefly touched upon by the judge at [15(b)]).

33. The judge went on, under the heading *"7708 Phone"*, to say this at [15]:

> "It is accepted by the defence that the evidence in relation to the 7708 number (a) proves [Dirie] used it to call his social worker on 22nd May (b) the jury is entitled to infer that [Dirie] used it to call his mother and father on 22nd and 23rd May (c) the jury is entitled to conclude that the person who used the 7708 number on 15th /16th May was a party to the murder. The live issues in relation to the 7708 number are (a) is there sufficient evidence from which the jury could infer that [Dirie] was using it on 15th/16th May? (b) if not, what is the significance [of] the use of the phone by him on 22nd/23rd May?"

34. It is issue (a) which is important in the present context. The judge dealt with this as follows:

> "can the prosecution prove it was [Dirie] using it on 15th/16th May 2018? The evidence upon which the prosecution relies is summarised in para 6(3) of this ruling. The jury will of course be properly reminded of the weaknesses in the evidence and in particular (i) the concession that [Dirie] was not in possession of the phone between 16th-20th May 2018 (ii) the phone was habitually used to call a taxi firm, the name given was usually 'Adam' and that [Dirie] has no provable connection to Herrick Road. However, taking into account all of the evidence the jury would in my judgement be entitled to infer that [Dirie] was the user of the 7708 phone on 15th/16th May. If that is right, the application in relation to count 1 will fail, because it is conceded on behalf of [Dirie] that the jury would be entitled to safely conclude that the user of the phone at that time was a party to the murder."

35. Mr Bhatia has explained, when asked during the McCook process, for the purposes of this appeal, that he made the concession which he did for strategic reasons during the course of argument in response to a point raised by the judge. He added, however, that he would not have made the concession had he continued to act for Dirie by the time that closing speeches were being made to the jury - although in the event by that stage Mr Bhatia had been replaced by Mr Csoka.

36. As we have previously indicated, it was Mr Csoka's submission before us that the concession ought not to have been made since the 7708 phone did not have sufficient connections to the offences for it to be reasonable to infer beyond speculation and to the criminal standard that the user was involved in the murder.

37. We cannot accept this submission. On the contrary, we consider that the evidence amply supported the concession which was made by Mr Bhatia.

38. Whilst it is true that Dirie may not have been the only user of the 7708 phone, Mr Csoka rightly accepted during the course of submissions that whether he was at any given time using that phone was a matter which it was for the jury to determine. This applies to both issues (a) and (b) as identified by the judge in his ruling at [15], although we repeat that for present purposes it is issue (a) which is what matters.

39. As to that, the evidence which was contained in the sequence of events document deployed by the Crown before the jury is important. It shows very clearly that the 7708 phone both received and made calls in the lead-up to, and in the hours after, the murder took place, which would have enabled the jury to be sure that Dirie himself was a party to the murder, not merely that he was in contact with others who were.

40. Specifically, at line 98 of the sequence of events document there is a voice call to the 7708 phone (on the Crown's case, therefore, to Dirie) from (again on the Crown's case) Elmi at 19:37 on 15 May 2018 lasting 38 seconds. This is followed at lines 101 and 104 by calls from Elmi to co-defendants also convicted at trial, Abdirahman Yusuf, at 19:40 and at 19:41 to Fahmi Daahir respectively. These calls were followed (at lines 122 to 129) by further contact between Elmi and Daahir between 19:54 and 20:05 and (at line 149) by attempted contact at 20:31 between another number (ending 3472) being used (on the Crown's case) by somebody involved in the murder and the 7708 number. It was shortly after this, at 21:19, Ms Darlow KC pointed out, that a group was seen walking on Gowan Road (line 203) and, at 21:30, that the vehicles and the walking group converged in Hams Road (line 223).

41. The shooting took place at 22:53 and the Kuga was set alight at 22:59. Shortly afterwards, at 23:14 (line 536), the sequence of events shows that there was a voice call forward from Elmi to the 7708 number. As Ms Darlow submitted, this was at a critical time, the shooting having occurred, the Kuga having been set alight and those involved being in the process of dispersing from the scene.

42. This was not the end of the contact involving the 7708 number since there was further contact in the early hours of 16 May 2018 at a time, on the Crown's case, when steps were being taken to dispose of evidence including the three vehicles. Thus, at 01:54 (line 664) and again at 01:55 (line 665), the sequence of events shows two calls, neither of which connected, from the 7708 number to a number ending 8802 associated, again on the Crown's case, with one of ringleaders involved in the shooting.

43. Thereafter, the 7708 number is seen to have called a number ending 1564 at 1:56.13 (line 666), connecting for 8 minutes, before there is then a further call from the 7708 number to the same (1564) number at 2:04 (line 668). The 1564 number, which Ms Darlow pointed out was in contact fifteen times with the 7708 number and others over the course of 15 and 16 May 2018, then called the 7708 number at 02:18 (line 675). Just two minutes later, at 02:30 (line 678), the 7708 number called Elmi in a voice call forward.

44. Still, this was not the end of the 7708 number's involvement since later (line 691), at 12:27 on 16 May 2018, it received a text message from a number ending 4094, there being eleven instances of contact between the 4094 number and, on the Crown's case, other relevant numbers including with Elmi and Daahir. The contact at 12:27, Ms Darlow explained, was at a point when a group of males were seen to return to collect [Omar's] discarded jacket.

45. What the exchanges clearly demonstrate is that the jury would have been entitled to conclude that whoever was using the 7708 phone on the evening of 15 May 2018 and in the early hours of 16 May 2018 up to and including the text message at 12:27 that day was involved in the murder. The fact that (as the Crown accepted at trial) Dirie could not have been using the 7708 phone thereafter on 16 May 2018 and, indeed, in the period up to and including 20 May 2018 is irrelevant.

46. Mr Csoka observed that young people are frequently in touch with each other for social reasons, including late at night. We agree with Ms Darlow, however, that it is somewhat implausible that a party or parties to a murder would be making contact or trying to make contact in the immediate lead-up to that murder, and in its relatively immediate aftermath, for merely social reasons. At a minimum, given the timings of these exchanges or attempted exchanges, it was legitimate for the jury to consider whether this was merely social contact (as the defence were saying) or that the user of the 7708 phone was a party to the murder (as argued by the Crown).

47. It was open to the jury, specifically, to conclude, so that they could be sure, that the contact was not social but was related to the murder which was about to happen or had just happened. It was, likewise, for the jury to decide, as Mr Csoka accepted, whether Dirie was the user of the 7708 phone at the relevant times. If the jury were sure that he was, then, it was open to them to decide that they were also sure that his usage of the phone 7708 phone on the night of 15 May 2018/16 May 2018 was because he was also involved in the murder.

48. The jury, therefore, were entitled to reach the conclusion which Mr Bhatia conceded was open to them. It follows that Mr Bhatia was right to make the concession and it further follows that the judge was also right to reject the submission of no case to answer.

49. Dirie's appeal must, accordingly, be dismissed.

Omar's appeal

50. There is a single ground of appeal upon which leave has been given: the "Confession Document" made by Dirie was only permitted to be admitted in evidence at trial if Omar gave oral evidence before the jury.

51. We have received detailed and comprehensive submissions in writing from Mr Dein and Ms Rowan, developed in helpful oral submissions by Mr Dein. As before, we will not deal with every argument but will focus on those which are necessary to the determination of the appeal. We have had the benefit of written and oral submissions from Ms Darlow for which we are grateful. We have also read and been assisted by the original advice on appeal drafted by Mr Webster, trial counsel.

52. The document, one page in length, headed "endorsement" was produced by Dirie's then trial lawyers to make it plain that he was taking the course of producing the other document, headed "defence case statement" against their advice. The latter document contained a confession by Dirie that he had set fire to the Kuga. It also contained the information set out at paragraph 18 above, which assisted Omar.

53. Omar sought to put before the jury that defence case statement, referred to at trial and in argument before us as the "confession document", notwithstanding that it was headed "defence case statement". Dirie objected, as did the Crown. Given that it contained a confession, the judge approached it as such. There is no complaint about that from any quarter.

54. The starting point for admissibility of what has been described as the "confession document" was section 118 (5) of the CJA which preserves the common law rule in respect of the admissibility of confessions in criminal proceedings.

55. Omar relied on section 76A of PACE in support of his submission that the document was admissible in evidence.

56. Section 76A reads, so far as is relevant:

> "Confessions may be given in evidence for co-accused
>
> (1) In any proceedings a confession made by an accused person may be given in evidence for another person charged in the same proceedings (a co-accused) in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
>
> (2) If, in any proceedings where a co-accused proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—
>
> (a) by oppression of the person who made it; or
>
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,
>
> the court shall not allow the confession to be given in evidence for the co-accused except in so far as it is proved to the court on the balance of probabilities that the confession (notwithstanding that it may be true) was not so obtained.

> (3) Before allowing a confession made by an accused person to be given in evidence for a co-accused in any proceedings, the court may of its own motion require the fact that the confession was not obtained as mentioned in subsection (2) above to be proved in the proceedings on the balance of probabilities.
>
> …"

57. We note the use, throughout the section of the phrase "given in evidence" rather than the more usual "adduced" or "relied on". The language seems to suggest that what is envisaged throughout the section is that a person will give oral evidence about the confession. Nothing turns on that in this case.

58. As we have said, Omar gave evidence on the voir dire of the circumstances in which he had received the document from Dirie in the custody area at court. There was CCTV footage which showed him receiving papers from Dirie. Omar was cross-examined on behalf of Dirie and by counsel for the Crown on the basis that the confession argument had been obtained by oppression and that the circumstances in which Omar had come to be in possession of the document rendered its contents unreliable.

59. The judge found on the evidence that:

> 1. The document was prepared by Dirie's lawyers on his instructions.
>
> 2. The instructions were given in the absence of Omar.
>
> 3. The lawyers advised Dirie of the possible consequences of making such an admission and he was advised against service of the document.
>
> 4. Dirie signed the document and the endorsement on 17 August.

He went on to find that, according to Omar:

> i) Dirie signed the document voluntarily and handed it to Omar for the purpose of his giving it to his legal team.
>
> ii) Omar did not exert any pressure or coercion on Dirie either when they were sharing a cell or when Dirie signed the document.

He noted that there was no evidence before the court that Dirie was pressured, coerced into the giving of his instructions or into signing the document, or that the document was not voluntarily given to Omar.

60. He concluded that:

> "on the available evidence the confession is a voluntary statement given freely to Omar for use by Omar in these proceedings [and] on the balance of probabilities … the confession was not obtained in consequence of anything said or

> done, likely, in the circumstances existing at the time, to render unreliable any confession made by him in consequence thereof."

61. Having given a provisional ruling that the document was admissible, the judge sought further submissions on how the document was to be adduced in evidence. Having heard the submissions, he gave a final ruling the following day, encompassing his decision on that issue. He summarised the submission of Omar's counsel that there were two permissible ways that this could be achieved:

> i) if Omar produced the document when giving evidence and explained the circumstances in which it had come into his possession; or
>
> ii) the document could be placed in evidence via section 76A of PACE or section 133 of the CJA.

62. The judge concluded that section 76A rendered the document admissible, but that did not have the effect of putting the document before the jury "without a witness producing it in evidence".

63. The judge set out the terms of section 133:

> "Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing either-
> a) the document, or
> b) (whether or not the document exists) a copy of the document or the material part of it,
> authenticated in whatever way the court may prove."

64. He concluded that the effect of section 133 was that the document may be proved by a witness producing it in evidence or it being put before the jury by agreement. He said that section 133 did not have the effect of permitting the document simply to be placed before the jury without more.

65. As we noted earlier in the judgment, the judge said that, were he wrong in his view as to the effect of section 133, he would have exercised his discretion under section 126 of the CJA to exclude the document: "The reason being, that the document, absent any evidence before the jury about (a) what the document is (b) who drafted it and why (c) whether it was genuine or a forgery (d) in what circumstances it had come into the possession of Omar's defence team, would lack sufficient probative value to justify its admission in evidence."

Submissions on behalf of Omar

66. It was Mr Dein's principal submission before us that section 133 was complied with when the document was produced (and therefore proved) by Omar during the voir dire. Once proved it was in evidence for all purposes, and it was not necessary to produce it again, he submitted. This argument was not run before the trial judge but, he submits, it should have been, not least because it is correct. It would be unfair for this court to shut it out.

67. Even if, which he did not accept, his principal submission was wrong, Mr Dein submitted that it was unfair and oppressive to require, in effect, Omar to give evidence in order to put the document before the jury. The judge having ruled it admissible (and having made findings about the absence of oppression), the document could and should have been placed before the jury.

68. Ms Darlow did not accept that there had been no pressure put on Dirie and pointed to a number of inconsistencies between the endorsement, which made it clear that he was providing the document freely and without pressure, and the confession document/defence case statement which made numerous references to the danger he believed himself to be in. She also pointed out the stark differences between the contents of this document and the defence case statement, which had been lodged with the court on 16 August 2021, the day before the "confession document" was apparently handed to Omar. That document contained no confessions and said nothing to assist Omar. She acknowledged, when asked by the court, that for the purposes of this appeal she had to accept the judge's findings on the evidence he had heard. She submitted that all of those issues would need to be considered by a jury considering the reliability of the confession document, including the questions which the judge had considered on the question of admissibility.

69. In support of her submission, Ms Darlow drew our attention during the hearing of the appeal to the decision of this court in **R v Mustaq [2005]** UKHL 25, a decision about section 76(2) of PACE in respect of a confession by the defendant, relied on by the prosecution in circumstances where it was alleged that it had been obtained by oppression and cross-examination to that effect took place. The defendant did not give evidence. The judge, correctly, directed the jury that in considering whether or not the confession was reliable they could take account of what had been said in cross-examination about the circumstances in which the confession had been obtained. He did not go on to tell them that, if they were not satisfied that the confession had been given voluntarily, they should ignore it. The House of Lords made it plain that this was correct. Questions of admissibility of evidence are for the judge, questions of the weight to be given to such evidence are for the jury – who are permitted to take account of the circumstances in which the confession was obtained. Where, as in that case, there was no evidence of oppression (the defendant not having given evidence) "there was no need for the judge to give any direction on what the jury should do if they found that there was, or might have been, oppression" [para 36]. "There was no evidence whatever of oppression, or of any other improper means, for the prosecution to disprove or for the jury to consider. The direction to the jury as to what they might do if they found that the confession had been obtained by oppression or any other improper means was, accordingly, unnecessary, and unduly favourable to the appellant. In those circumstances, the fact that the judge did not go further in his direction cannot possibly affect the fairness of the appellant's trial or the safety of his conviction." Given that they had been taken by surprise by the late reliance on the judgment, Mr Dein and Ms Rowan, at our invitation, produced a note dealing with the case, for which we are grateful.

70. The decision in **Mustaq** predated the coming into effect of section 76A of PACE but the approach to be taken when considering section 76A is, we think, the same. In short, the judge decided admissibility. The question of weight would be for the jury. The

House of Lords did not specifically consider how the evidence was to go before the jury, they simply observed that it would be led by the prosecution.

71. It does not follow that because a document is admissible it goes before the jury automatically. Whilst there may be circumstances where a document may be put before a jury by agreement, there was no agreement here. Without an agreement, it is not clear what the jury could have been told about the document in the absence of any witness.

72. Mr Dein submitted that junior counsel could have produced it. At trial there was a suggestion that junior counsel might give evidence for that purpose. That, however, was not pursued, no doubt because counsel could go no further than explain the circumstances in which he had received the document. He could not assist about how Omar came to have it (although the CCTV footage showed Dirie handing sheets of paper consistent with the documents to him – but there is no information as to how that came about) nor could he assist about the circumstances in which it had been written. These were all matters relevant to the jury's assessment of the contents of the document, were it to be before them, none of which counsel could help about.

73. We reject Mr Dein's submission that section 133 was complied with when the document was produced by Omar during the voir dire. A voir dire, or a trial on the voir dire, sometimes referred to as a trial within a trial, is the procedure used, amongst other things, to establish whether, for example, a piece of evidence is admissible. If the judge considers it inadmissible, that is (usually) the last that is heard of it. It does not form part of the evidence in the trial before the jury. Where, as here, the judge hears evidence, considers submissions, and rules that the evidence (documentary or otherwise) is admissible, then, it is open to the party who wishes to rely on the evidence to put it in evidence or, to adopt the language of section 76A, "to give it in evidence". But it does not follow from the fact that a document has been considered and ruled to be admissible, that it has therefore been admitted into evidence.

74. We repeat the relevant passage of section 133, for ease;
"Where a statement in a document is admissible as evidence in criminal proceedings, the statement may be proved by producing [either]-
a) the document …,

75. In this case, someone had to produce the document before the jury. As we have already said, when the Crown seek to put a record of a confession in evidence, after a ruling on admissibility, a police officer goes into the witness box and produces the document. The extent to which he is cross-examined is a matter for each of the parties. The jury decides what weight to give to the document in the light of the evidence they hear, including (where relevant) from the defendant.

76. Mr Dein complains that the effect of the judge's ruling was that, should Omar wish to rely on the confession document, he had to go into the witness box. This was, he submits, unfair, particularly where, as here, the maker of the document was sitting in the dock. The position of the maker of the document does not, in our view, add anything. Dirie was now objecting to the document being produced. He did not give evidence on the voir dire or at trial. There was no basis upon which he could be required to give evidence to assist Omar and there was no unfairness to Omar in that situation.

77. It was not part of Omar's case, as argued by trial counsel, that there was any other witness who might have produced the document. In those circumstances, the judge was correct to rule that unless Omar produced the document in evidence it could not go before the jury. Whether or not to give evidence himself was a matter for Omar. He knew that, if he did not give evidence, the judge would be entitled to direct the jury about the adverse inferences, if any, that could be drawn from his failure to give his account. He also knew that Dirie's document would not go before the jury unless he, Omar, produced it. There was nothing unfair about this. Omar had the right not to give evidence, which he chose to exercise.

78. A similar argument about unfairness was run by the appellant in **Mustaq.** The House of Lords rejected any suggestion of unfairness where the defendant had chosen not to give evidence about the circumstances in which his confession had been obtained (or about anything else).

79. We are satisfied that the judge was right in his conclusions about the way in which the document could go before the jury. In those circumstances, we express no view on the applicability of section 126 of the CJA to section 76A or the judge's observations on it. That important question should be considered in a case where it is a necessary part of the appeal against conviction.

80. Both appeals are dismissed.