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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF A REFERENCE BY THE CRIMINAL CASES REVIEW COMMISSION

THE KING

v

JAMES ALEXANDER SMITH

Mr Taylor KC with Mr Halleron (instructed by Madden & Finucane Solicitors) for the Appellant
Mr McCollum KC with Mr McDowell KC (instructed by the Public Prosecution Service) for the Respondent

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Before: Keegan LCJ, Treacy LJ, Fowler J

KEEGAN LCJ ***(delivering the judgment of the court)***

Introduction

[1] This is a reference from the Criminal Cases Review Commission ("the CCRC") under section 10(1) of the Criminal Appeal Act 1995 seeking a review of the appellant's convictions in respect of one count of murder, one count of attempted murder and two counts of possession of a firearm with intent to endanger life. The appellant was convicted on 22 March 2013 at Downpatrick Crown Court before His Honour Judge David Smyth KC ("the judge") and was sentenced to life imprisonment with a minimum term of 21 years. His co-accused Peter Greer was also convicted of similar offences.

[2] The CCRC has referred these convictions on the following grounds:

(i) There has been a change in the law in relation to the liability of secondary parties brought about by the judgment of the Supreme Court in *R v Jogee*

[2016] UKSC 8, the scope of which was further clarified by the Court of Appeal in *R v Johnson and others* [2016] EWCA Crim 1613.

(ii) The cases of *R v White (Lindsay)* [2017] NICA 49 and *R v Wallace and Kerr* [2017] NICA 57 indicate that the Northern Ireland Court of Appeal will follow *R v Johnson*.

(iii) As a result of the change in the law, there is a real possibility that the Northern Ireland Court of Appeal will conclude that it would be a substantial injustice not to quash Mr Smith's convictions and that his convictions are unsafe.

Factual background

[3] What follows is a summary of the evidence. At approximately 12:15 on 13 May 2011 two men wearing balaclavas, one armed with a handgun and one armed with a shotgun entered 6 Hazelbrook Avenue, Bangor. Two males named Duncan Morrison and Stephen Ritchie were present in the house. The male with the handgun fired three shots hitting Duncan Morrison twice and Stephen Ritchie once. Duncan Morrison died at the scene.

[4] Following this violent incident the two masked men made their getaway in a silver Honda Civic car which had been stolen in March 2011 in a creeper burglary that occurred in West Belfast. This car was driven by a third person. It was later found burnt out at the Somme Centre, just off the carriageway between Bangor and Newtownards.

[5] At the same time a Volkswagen Golf similar to the one owned by the co-accused Greer, was seen parked at the Somme Centre. It was the prosecution case that the men in the Honda Civic had transferred to the Golf. Also, the case was made that a combination of CCTV and ANPR demonstrated that the Golf belonging to Greer had travelled from the Somme Centre to the Belvoir Estate before being stopped at Ormeau Avenue.

[6] The appellant, Smith, was arrested in the Golf 50 minutes after the shooting on Ormeau Avenue in Belfast. The car key of the Honda Civic which had been burnt out was found inside the Golf as were a number of items of clothing including a pair of gloves in the passenger footwell containing the appellant's DNA. A purple baseball hat was also found in the car from which on DNA analysis Smith could not be excluded as a significant contributor to a mixed profile.

[7] Smith later admitted wearing the purple baseball hat whilst messing around in Greer's car. A single particle of cartridge discharge residue was also found on one of the gloves. Smith initially maintained that the owner of the car was "my mate Pete" and that he had only just borrowed the car. Subsequently, he accepted at

interview that it was Greer's car and that he got into the car a short time before he was apprehended.

[8] The prosecution produced evidence which it said was indicative of a 'dry run' having been made covering the same route the previous day on 12 May 2011. We will not detail all of the evidence in relation to this claim for present purposes. However, we highlight the following salient facts.

[9] The evidence demonstrated that Greer left his home at Mountcollyer Avenue at 10:54 in his Golf and returned at 11:05 having picked up a passenger. The Golf was then driven to the murder scene arriving at 11:41. It was driven back to Mountcollyer Avenue at 12:26 at which stage Greer and his passenger went into Greer's house. The passenger wore a hooded top and light-coloured tracksuit bottoms. Later that evening a Golf was seen at Academy Street near to Smith's flat at St Anne's Square. Greer arrived home with a passenger who wore light coloured tracksuit bottoms and, on this occasion, a purple baseball hat. The passenger emerged from Greer's house with a holdall which he put into the boot of a Honda Civic parked up the street. Further sightings were then made via CCTV and ANPR of a Golf and Civic.

[10] On the day of the murder and attempted murder Greer left his home in his Golf at 10:46. Five minutes later a silver Golf was seen at Academy Street, then Milltown Road then Belvoir Road. The Honda Civic was seen on ANPR north of the Somme Centre heading towards Bangor and Hazelbrook Avenue at 12:06.

[11] The prosecution case against the appellant (and his co-accused) was based on circumstantial evidence. It was said that this was a joint enterprise. It was also understood without any objection being made that the prosecution could not ascribe particular roles to either the appellant or his co-accused.

[12] The appellant was represented at trial by Mr Arthur Harvey KC and Mr Michael Duffy. He did not give evidence.

[13] At trial the prosecution relied upon the following matters in making its case against the appellant:

(a) Photographic evidence relating to 12 May (several sightings of a VW Golf, some accepted by the defence to be Mr Greer's car and some not; CCTV of individuals which was substantially challenged by the defence).

(b) The sighting of a VW Golf in Academy Street alleged to be Mr Smith being collected by Mr Greer.

(c) The timing of the journey from the Somme Heritage Centre to Ormeau Avenue where the appellant was stopped which left only five minutes for the handover to the appellant.

(d) A change of top in the vehicle the appellant was driving.

(e) The key for the Honda Civic used in the attack being found in the VW Golf.

(f) One particle of CDR found on the glove from the passenger footwell of the Golf. The major DNA profile obtained from the glove matched that of the appellant.

(g) Selective answers in the police interviews and lies about where he was living; the claim that his account of innocently collecting the VW Golf was inherently improbable.

(h) Adverse inferences from a failure to give evidence at trial.

Previous court proceedings

[14] The Crown Court trial commenced on 26 February 2013 before His Honour Judge Smyth KC sitting with a jury. On 22 March 2013 the jury returned unanimous verdicts of guilty on all counts in respect of both the appellant and his co-accused. They were both sentenced to life imprisonment for the murder.

[15] On 10 May 2013 the judge fixed the appellant's life sentence tariff at 21 years, and he further imposed an indeterminate custodial sentence for the remaining offences also with a minimum custodial period of 21 years. The co-accused's life sentence tariff was fixed at 20 years and an indeterminate custodial sentence was passed for the remaining offences with a minimum period of 20 years.

[16] Both parties lodged notices of appeal in respect of their convictions. The appellant lodged his appeal on 24 April 2013. Horner J granted leave to appeal on 6 February 2014 on one ground, namely, that Crown counsel had invited the jury to identify the appellants in the dock and the trial judge should have issued a warning to the jury about the approach it should take to such evidence and what weight if any should be given to it.

[17] On 25 November 2014 the Court of Appeal dismissed both appeals. The judgment was delivered by Girvan LJ and is reported at [2014] NICA 84. In that appeal the appellant who was represented by Mr Brendan Kelly KC sought to rely on four grounds which are set out at para [40] of the judgment of the court as follows:

> "[40] Mr Kelly in his submissions sought to rely on four grounds of appeal. The first ground of appeal was that the trial judge failed to properly direct the jury in the light of what Crown counsel said in his closing speech in relation to the identification of the appellants as being the

> potential gunmen involved directly in the shooting. The second ground of appeal related to the question of the finding of a single CDR particle on a glove connected to Smith. Thirdly, counsel further relied on what was alleged to have been an error by the judge in giving the Lucas direction in the case. Fourthly, it was alleged that the trial judge erred in his directions in relation to adverse inferences."

[18] As to the manner in which the prosecution presented the case and its explanation of the roles of those involved the Court of Appeal found as follows:

> "[45] While it could be argued that it might have been better *ex abundanti cautela* for the judge to have advised the jury not to speculate about whether the appellants were the actual gunmen in the light of the way Crown counsel had put the point, the judge may very well have concluded that rather than remind the jury of Crown counsel's words it was preferable to state the matter in the clear and blunt terms which he used. It must be remembered that the trial judge heard submissions about what should be in his charge and the defence did not requisition the judge in relation to his charge on this issue. Furthermore, it must be borne in mind that after Crown counsel's speech defence counsel had a full opportunity to address the issue in the closing speeches. No transcript was sought or provided of the defence speeches or of the appellants' counsels' submissions to the judge in respect of his charge."

[19] The Court of Appeal concluded that the circumstantial evidence against each appellant was "very strong" and was in no doubt as to the safety of the convictions. Para [49] contains the core reasoning of the court as follows:

> "[49] We rejected the application to adduce additional evidence. Mr Kelly accepted that there was a high threshold for the introduction of fresh evidence. The appellant could not in fact proffer any reasonable explanation for the failure to adduce the evidence at trial. The appellant was represented by very experienced counsel and solicitors at the trial. They effectively cross-examined Anne Irwin who accepted that the CDR was very weak support for the Crown case. The appellants' representatives may well have considered that nothing was to be gained by adducing any further expert evidence on the topic such as that proffered by Mr Boyce.

> His categorisation of the evidence as "insignificant" is in any event a value judgement on the extent of the relevance of the evidence which was a matter for the jury. The evidence would not in itself have offered a ground for allowing the appeal nor even if accepted, would it call into question the safety of the conviction in the light of the rest of the strong circumstantial case. The judge in his charge reminded the jury of Ms Irwin's evidence that the particle provided very weak support for contact with a cartridge source such as found at [the property in] Hazelbrook Avenue, and he reminded the jury that she also referred to the means of secondary transfer. Both the Crown and the judge in his charge made clear the limitations of the evidence."

[20] In 2016 the co-accused, Greer, lodged a second application. This application invited the Court of Appeal to consider the impact of *Jogee* on the safety of the convictions. Smith did not lodge an application at this time. On 25 October 2016 the Court of Appeal declined to reopen his appeal, concluding that the proper approach was to make an application to the CCRC. The judgment, *R v Skinner & Ors* is reported at [2016] NICA 40 and was delivered by Gillen LJ.

[21] Within paras [56]-[81] of *R v Skinner* the guiding legal principles are set out. These principles require repetition in this case as a reminder of the law which applies to re-opening of appeals. We start with para [59] which explains the rule found in *R v Pinfold* [1988] QB 462 as follows:

> "[59] The conventional wisdom has always been that if an appeal is unsuccessful (either because leave is refused or leave is granted and the appeal is dismissed), there is usually no opportunity for a further appeal even if the point to be argued is that new or fresh evidence has arisen. Two caveats to that rule were acknowledged in *R v Pinfold* [1988] QB 462 ("Pinfold") namely:
>
> (a) Where the appeal has been abandoned, the court may in exceptional circumstances treat the abandonment as a nullity (See Medway [1976] QB 779).
>
> (b) If the dismissal of the first appeal involved some procedural defect which led to injustice for the appellant, the court may treat the dismissal as a nullity.

[22] The above approach has been adopted by leading textbooks such as Blackstone's "Criminal Practice" 2023 Edition at D26.10, Archbold "Criminal Pleading Evidence and Practice" 2023 Edition at para 7.37 and "Criminal Procedure (Northern Ireland)" 2nd Edition by Valentine at paras 15.150-15.152. We need say no more given the stable legal landscape that pertains. Suffice to say that the approach is obviously informed by the need for legal certainty. In addition, an alternative remedy exists by virtue of the CCRC route, provided by the Criminal Appeal Act 1995.

[23] Notwithstanding the approach to appeals we have just discussed *R v Skinner* also referred to two cases where appeals were re-opened by way of exception as follows. In *R v Maughan (Re-hearing of Appeal)* [2004] NICA 21 an application for leave to appeal against conviction was re-heard on the ground that the Court of Appeal had misapprehended evidence adduced during the trial. In *R v Walsh* [2007] NICA 4 due to a misunderstanding, unopposed new evidence for the appellant had not been considered by the court. In those circumstances the court did permit the case to be re-opened.

[24] Subsequently, in *Christopher Boughton-Fox v Regina* [2014] EWCA Crim 227 the Court of Appeal in England & Wales considered not only the case of *R v Walsh* but also a subsequent English case of *R v Barry Jones Strettle* [2013] EWCA Crim 1385. Refusing leave to appeal, the court advocated a restrictive approach stating that it would take exceptional circumstances to entertain a second application for an appeal against conviction (other than by reference to the CCRC) where a first application for leave has been refused or an appeal against conviction has been dismissed.

[25] Para [12] of *R v Strettle* encapsulates the position as follows:

> "[12] In our judgment the proper course is for the CCRC to be seen as, almost invariably, the only route whereby an appeal might be re-opened. We say the 'almost invariably' never to exclude every possible circumstance, but we believe that the examples given by Lord Lane CJ are far more to the point than those which include cases such as this."

[26] A further case of *R v Yassain* [2015] 3 WLR 1571 was referenced in *R v Skinner*. In that case the Court of Appeal in England &Wales had mistakenly accepted the proposition that the defendant had been sentenced on a count of kidnapping notwithstanding that in the taking of the verdicts there had been no conviction of him on this count. Subsequently it emerged that in fact he had been convicted by the jury on such a count, but the transcribers of the trial proceedings had simply omitted to record the guilty verdict. The Court of Appeal permitted the re-opening of the appeal and set aside the earlier order on the ground that there had been a defect in procedure which might have led to a real injustice. The Court accepted that the Criminal Division of the Court of Appeal was vested, like the Civil Division, with a

residual discretion to avoid real injustice to ensure public confidence in the administration of justice.

[27] At para [40] of the judgment Lord Thomas CJ issued a cautionary note as to the limits of this jurisdiction as follows:

> "[40] The fact that both (the Criminal Division and the Civil Division of the Court of Appeal) have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way by the Criminal Division as it would be by the Civil Division. For example, in a criminal case there will often be three interests that have to be considered – that of the State, that of the defendant and that of the victim or alleged victim of the crime, even though the victim is not a party to the proceedings under the common law approach … There is the strongest public interest in finality and the jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission."

[28] From the above discussion of the law it is clear that there is a high threshold required to re-open an appeal. In addition, the CCRC procedure is designed to prevent miscarriages of justice.

[29] Returning to the chronology of the instant case, the appellant lodged an application with the CCRC on 15 November 2019. The CCRC referred his case to the Court of Appeal on 22 August 2022 on one of nine grounds advanced, namely the change in the law brought about by *Jogee*.

The CCRC reference

[30] The CCRC was established under section 8 of the Criminal Appeal Act 1995 ("the 1995 Act"). Under section 10(1) of the 1995 Act the CCRC may at any time refer a conviction on indictment in Northern Ireland to the Court of Appeal. Such a reference shall be treated for all purposes as an appeal by the person convicted under section 1 of the Criminal Appeal (Northern Ireland) Act 1980.

[31] The requirements which govern a reference are covered under section 13 of the 1995 Act. A reference in respect of a conviction can only be made under section 10 if:

(a) the Commission consider there is a real possibility that it would not be upheld were the reference to be made;

(b) the Commission so consider because of an argument or evidence not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it;

(c) an appeal against the conviction has been determined or leave to appeal against it has been refused.

[32] However, nothing stated at (b) or (c) above prevents the CCRC making a reference if it appears that there are exceptional circumstances which justify making it.

[33] Further provisions in respect of references are provided at section 14 of the 1995 Act to include:

(a) A conviction may be referred under section 10 either after an application has been made by or on behalf of the person to whom it relates or without an application having been so made (s14(1)).

(b) In considering whether to make a reference under section 10 the Commission shall have regard to:

(i) Any application or representations made to the Commission by or on behalf of the person to whom it relates;

(ii) Any other representations made to the Commission in relation to it; and

(iii) Any other matters which appear to the Commission to be relevant (s14(2)).

(c) Where the Commission make a reference under section 10 they shall:

(i) Give to the Court of Appeal a statement of reasons for making the reference; and

(ii) send a copy of the statement to every person who appears to the Commission to be likely to be a party to any proceedings on the appeal arising from the reference (s14(4)).

(e) Subject to subsection (4B), where a reference under section 10 is treated as an appeal against any conviction the appeal may not be on any ground which is not related to any reason given by the Commission for making the reference (s14(4A)).

(f) The Court of Appeal may give leave for an appeal on a ground not related to any reason given by the Commission for making the reference (s14(4B)).

[34] In this case the appellant seeks to rely upon the *Jogee* grounds of challenge. He also raises additional grounds of appeal some related to *Jogee* and some free standing grounds. Allied to that, he seeks to adduce fresh evidence before this court having been refused before the first Court of Appeal.

The Jogee decision

[35] In *R v Jogee* [2016] UKSC 8 the legal point at issue concerned the mental element of intent which must be proved when a defendant is accused of being a secondary party to a crime. The question of law was whether the common law took a wrong turn in two preceding cases, *Chan Wing-Siu v The Queen* [1985] 1 AC 168 and *Regina v Powell and English* [1999] 1 AC 1 as regards the doctrine of parasitic accessory liability.

[36] The unanimous decision of the Supreme Court was that the cases *Chan Wing-Siu* and *Powell and English* did take a wrong turn. Contrary to those earlier authorities the correct rule is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage, which is the proper mental element for establishing secondary liability. It is a question for the jury in every case whether the intention to assist or encourage is shown.

[37] In its decision the Supreme Court brought the mental element of the secondary party back into broad parity with what is required of the principal. The correction is also consistent with the provision made by Parliament when it created (by the Serious Crime Act 2007) new offences of intentionally encouraging or assisting the commission of a crime, and provided that a person is not to be taken to have had that intention merely because of foreseeability.

[38] The court summarised the essential principles applicable to all cases in paras [8]-[12], [14]-[16] and [88]–[92]. At para [88] the court stated:

> "In some cases, the prosecution may not be able to prove whether a defendant was principal or accessory, but it is sufficient to be able to prove that he participated in the crime in one way or another."

[39] At paras [89] and [90] the Supreme Court found that in cases of alleged secondary participation there are likely to be two issues. The first issue is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1.

[40] At para [100] the court was clear that this necessary correction to the wrong turn taken by the law did not mean that every person convicted in the past as a

secondary party, where the law as stated in *Chan Wing-Siu* was applied, will have suffered an unsafe conviction. Those whose convictions are outside the time limit for appealing would require the exceptional leave of the Court of Appeal to challenge them out of time. It is for that court to enquire whether substantial injustice would occur in any particular case. The same rules apply where the CCRC is asked to consider referring a case to the Court of Appeal (see *Cottrell and Fletcher* [2007] EWCA Crim 2016 para [58]).

[41] Soon after the *Jogee* decision the Court of Appeal in England and Wales considered six appeals in *Johnson & Others* [2016] EWCA Crim 1613. In these cases, reliance was placed on this change of the law. The court found that the decision in any appeal must be fact sensitive and the fact that a jury was correctly directed in accordance with the then prevailing law does not automatically render the verdict unsafe. The court also held that an appellant who asserts that he suffered a "substantial injustice" as a result of being tried under the "old law" faces a high threshold. The court reiterated at para [12] what was said in *Jogee* at para [100] as set out above.

[42] In determining whether there has been a "substantial injustice" the court identified at paras [18]–[21] the relevant considerations to be taken into account which includes the court having regard to the strength of the case advanced that the change in the law would, in fact, have made a difference.

This case

[43] On 22 August 2022 the CCRC made the decision to refer the convictions in this case on the grounds outlined above at para [2]. The CCRC report expands upon the reasons for the reference as follows:

(i) For a reference to be made on the basis of a *Jogee* misdirection, in line with *Johnson* there must be a) a real possibility that the court would find a sufficiently strong case that the change in law would in fact have made a difference and b) a real possibility that the court would find the conviction is unsafe.

(ii) Given the points set out at paras [99] to [103] they were satisfied that notwithstanding the fact that the Northern Ireland Court of Appeal ("NICA") retains inherent jurisdiction to depart from *Johnson*, there is nothing to suggest that the NICA might do so.

(iii) *Jogee* has no application to a defendant who is a principal and the CCRC considered that there was no evidence to place the appellant in this role despite it being left open to the jury to convict him on that basis.

(iv) The initial direction given by the trial judge as to when a secondary party is guilty of murder was *Jogee* compliant.

(v) The direction to the jury as to when a secondary party would be guilty of attempted murder was not *Jogee* compliant.

(vi) The conflicting directions may have caused confusion in the minds of the jury particularly because the judge concluded this part of the direction by referring to, "the attempted murder of Stephen Ritchie as well as the murder of Duncan Morrison" thereby conflating the two sets of directions.

(vii) No written instructions followed to the jury and the CCRC were of the view that it is not possible for a lay jury in such a complex case to be able to discern without assistance the difference between contemplation, urged on the one hand and intent on the other.

(viii) The fact the judge stated in relation to the required mental element for secondary participation in attempted murder that, "Counsel accepts that this will not give you any difficulty" may have been understood by the jury to mean that this element was satisfied on the evidence.

(ix) In addition, the direction that the difference between murder and attempted murder was "not … of great significance" may have further confused the jury as to the required mental element for secondary participation given the *Jogee* non-compliant direction already given in relation to attempt.

(x) The directions in respect of the firearms offences were *Jogee* compliant but in themselves insufficient to remedy the confusion likely to have been caused by the preceding part of the charge.

(xi) Taken as a whole the charge to the jury was fundamentally defective as it contained elements which are not *Jogee* compliant in addition to those that are. Taken together with the references to "contemplation" in the prosecution closing speech this was likely to have left the jury confused as to what tests they had to apply in order to convict.

(xii) The defects may have infected all of the verdicts including those related to the firearms charges as the directions in relation to the firearms charges effectively invited the jury to convict if they convicted of murder which was itself the subject of inadequate directions.

(xiii) There is a real possibility that the NICA will therefore find a sufficiently strong case in regard to all the convictions that, had the jury charge been *Jogee* compliant in its entirety and expressed in clear and consistent terms, taking into account the weaknesses in the prosecution case and its largely circumstantial nature, this would have made a difference to the verdicts.

(xiv) There is therefore a real possibility the NICA would find that the convictions are unsafe.

The arguments of the parties

[44] The appellant has filed a comprehensive skeleton argument split into two parts. Part 1 contains the appellant's submissions in respect of the *Jogee* ground (along with two further grounds of appeal relating to a misdirection in respect of the hindsight presentation and the prosecution case left to the jury on an incoherent basis). Part 2 contains the arguments in respect of a number of additional grounds of appeal which the CCRC decided against including within their reference which relate to the provision of fresh evidence.

[45] After eliciting agreement of the parties this court made clear at a case management review hearing that it would consider the *Jogee* grounds before determining anything further.

[46] These grounds of appeal are described as follows:

Ground 1: The prosecution case against the appellant was left to the jury on an incoherent basis.

Ground 2 The judge misdirected the jury as to the correct approach to the Hindsight evidence.

Ground 3 The judge misdirected the jury regarding joint enterprise - the *Jogee* ground.

[47] In a nutshell the appellant submits that due to the purported vague and incoherent way in which the prosecution put its case, it is not possible to identify with certainty the basis upon which the jury convicted him. It is argued there was insufficient evidence for the jury to have convicted him as principal, although there is a real danger that they may have done so on an impermissible basis. The submissions in respect of the *Jogee* ground are made on the basis that the jury have convicted the appellant having considered he was a secondary party.

[48] In support of these points the appellant's argument found in written submissions was developed to encompass the following points;

(a) The effect of the trial judge's misdirections on secondary party joint enterprise caused the jury to convict on an impermissible pre-*Jogee* approach.

(b) These defects resulted in an unfair trial and unsafe convictions causing the appellant to suffer a substantial injustice.

(c) The Court of Appeal cannot safely conclude that the jury would inevitably have convicted the appellant if they had been given post-*Jogee* directions on joint enterprise.

(d) There is a real danger that if the jury did convict on the basis that the appellant was involved in the joint enterprise as a secondary party that they may have concluded that whilst he may have foreseen that whilst the principal might fire the gun, the appellant did not intend the occupants to be killed or caused grievous bodily harm. Rather, he instead intended an alternative such as to scare the occupants or cause damage to the property or lesser injury than GBH. The respondent's assertion that that "the intention from the outset was plainly to kill" is not supported by the evidence.

(e) The prosecution closing speech was based on the pre-*Jogee* law on joint enterprise.

(f) No issue is taken with the trial judge's direction to the jury in respect of murder which was *Jogee* compliant.

(g) This direction was however confused and undermined by the direction in respect of attempted murder that followed immediately after which was not *Jogee* compliant.

(h) This confusion was exacerbated by the judge's directions in relation to the firearms offences. Whilst these directions were *Jogee* compliant, they are contrary to the directions given in relation to attempted murder and were therefore likely to have led to further confusion as to the correct approach.

(i) The jury were essentially directed that if they found the appellant guilty as a secondary party of involvement in the plan to commit the offences against the victims, this was sufficient to satisfy the elements of the firearms offences. If the convictions in respect of murder and attempted murder are unsafe due to flawed directions, it follows that the conviction in respect of the firearms offences must also be unsafe.

(j) The fact that some of the directions are *Jogee* compliant does not save the conviction when such directions are tainted by numerous interlinked misdirections. The appellant adopts the CCRC conclusions at paras [125] and [126].

[49] In response to these arguments the respondent submitted the following:

(a) The appellant must demonstrate that a substantial injustice would be done and in considering that question the court should have regard to the strength of the case advanced that the change in the law in *Jogee* would, in fact, have made a difference.

(b) This case is not a parasitic accessory liability case and the CCRC have fallen into error in considering that *Jogee* has any impact upon this case.

(c) This was a carefully planned and well organised assassination in which the appellant played a significant role. This was not an enterprise in which those involved would have been unaware of its aim. No other crime was intended.

(d) The prosecution did not identify the appellants' roles in this joint enterprise, nor did they seek to confine their possible role. There is no requirement for the prosecution to do so. Only the ingredients of the offence must be proven.

(e) The Court of Appeal set out the correct approach when dealing with circumstantial evidence in *R v Kincaid* [2009] NICA 67 at para [22].

(f) The prosecution had to prove beyond reasonable doubt in respect of the principal charge of murder that (1) Duncan Morrison was unlawfully killed, (2) that the principal acted with intent to kill or cause grievous bodily harm and (3) that the appellant (at least) intentionally encouraged or assisted the principal to act with that intent.

(g) The jury were directed in accordance with *Jogee* in relation to the most serious charge of murder which would have been their main focus. The court would therefore be entitled to conclude that there was no misdirection even in light of *Jogee*.

(h) In the alternative it is submitted that no substantial injustice would be done on the particular facts of this case.

(i) A direction was given consistent with the common law as understood before *Jogee* in relation to attempted murder and in respect of the firearms charges the mental element was described as knowledge of what was going to happen.

(j) The respondent's submissions in relation to the additional grounds outside of the CCRC reference can be found at paras 100 to 139.

[50] We permitted Mr Taylor to address us on background and context in hearing this reference on the basis that two of his appeal points inform the *Jogee* appeal. First the submission was made that the prosecution case was left to the jury in an incoherent manner. Allied to this, the claim is made the judge misdirected the jury on circumstantial evidence, a point which is said has far reaching effect in law. The second substantive point is that the judge is said to have misdirected the jury as to the Hindsight presentation of CCTV evidence. We viewed some extracts from the Hindsight presentation and were referred to some of the photographic evidence in order to assess this latter point.

Discussion

[51] We begin with an examination of the alleged misdirection of the judge. It is claimed that this misdirection was fuelled by the confusing way in which the prosecution presented this case. In this regard it is important to note that the previous Court of Appeal specifically found no issue with the prosecution closing read as a whole. In its previous judgment, at [40] to [46], the Court of Appeal examined how the prosecution case had been presented. Girvan LJ said, at [43]:

> "[43] The Crown's case was presented on the basis that the prosecution could not and did not propose to prove that the appellants played any particular role in the murderous attack. It was the Crown's case that the evidence clearly established their active and willing participation in the joint enterprise involving the murder and attempted murder. On a fair reading of Crown counsel's closing speech the Crown did not resile from that approach to the case. The Crown was making clear that it did not say that either appellant was one or other of the gunmen who fired the shots. It was making clear that it was unable to prove that either defendant was one of the gunmen. The inability of the prosecution to identify the defendant's role was emphasised."

[52] We have also been referred to extracts of the prosecution speech which is claimed are misleading. This is not an entirely new argument as the original Court of Appeal commented upon the prosecution closing in its judgment in 2014. The appellant has raised further points in this appeal. We have considered the speech as a whole. The prosecution accepts that there are points of emphasis that are not entirely appropriate. However, flaws in the prosecution speech cannot be determinative on its own.

[53] The defence closing must also be examined as it brings balance to the case and stresses the defence point of view. As expected, Mr Harvey pointed to inconsistencies, weakness in evidence and the fact that this was a circumstantial case.

[54] The prosecution and defence speeches are of course only part of the picture. The litmus test in any appeal of this nature is whether the judge's charge was such as to lead the jury into error. Again, we are cognisant of the fact that the original Court of Appeal examined the charge and at [44] recorded no issue.

[55] We have also examined the judge's charge. Having done so we highlight some parts of particular relevance to the issues that arise in this appeal as follows. In relation to secondary liability the judge said this:

> "A secondary party is guilty of murder if he is aware of a common plan either to kill another or at the very least to cause really serious bodily harm to another, and with that knowledge, with that knowledge, deliberately does an act to assist or to encourage or to facilitate that common plan with the intention either that somebody should be killed or at the very least caused really serious bodily harm. So, you must be sure that an accused both did such an act and also did that act with the required intention."

[56] In relation to attempted murder, he continued:

> "A secondary party is guilty of attempted murder – and it is in the circumstances of this case – if he does an act designed to facilitate, assist, or encourage the principal to do that act and that at the time he did the act it was within his contemplation that the principal might well kill. Counsel accept that this will not give you any difficulty. The difference between murder and attempted murder in this case is not going to be of great significance since it is accepted that if an accused did an act intended to encourage, to assist or facilitate the common plan, the discharge of a weapon to kill, then that accused will be guilty of the attempted murder of Stephen Ritchie as well as the murder of Duncan Morrison."

[57] In respect of the possession of the firearms, he said:

> "The second matter is that it has to be proved beyond reasonable doubt that he had the required intention and that is to endanger life with the firearm. Counsel accept that if either of the accused knew what was going to happen in 6 Hazelbrook Avenue on Friday 13 May 2011, and if you are satisfied that either of the accused did an act intended to facilitate, assist, or encourage that common plan, discharge of a weapon to kill, the accused would have been guilty of the murder of Duncan Morrison and the attempted murder of Stephen Ritchie."

[58] The judge also referenced defence submissions as follows:

> "As Mr Harvey described, it is the primary facts that matters, that an accused played a part, (inaudible) that in playing that part he was seeking to encourage, to assist,

> facilitate what was happening, that assistance or encouragement, that act of assistance or encouragement was given when he contemplated at the time of providing it, that assassination, killing or at the very least discharge of firearms in an attempt to cause really serious injury was contemplated by it."

[59] Finally, he summarised the prosecution case as follows:

> "So, the prosecution don't ascribe any role to either of the accused. They accept that they cannot identify any role played, and that there is no identification in this case. They invite you to look at the evidence as a whole; as you will do. They say that if you do that … you will be satisfied that some role was played to assist or encourage the murder, with the essential knowledge and intention for you to convict."

[60] On an overall appraisal of the charge we do not consider that it misled the jury as to the core aspects of this case. Improvements can invariably be made in most if not all cases that we see on appeal. Matters may have been expressed in a different or better way. However, there simply is no fatal flaw in this case that gives us cause for concern about the charge as a whole.

[61] The critique of the judge has been undertaken with the benefit of hindsight, divorced from the cut and thrust of a criminal case and without the perspective of the lawyers who actually conducted the case and decided on strategy. The appellate court will not allow artificial or academic arguments to blind it to the factual reality of a case. In every criminal case of this nature a holistic overview must be taken.

[62] To our mind the prosecution case that roles could not be attributed was clear and is permissible in law. This was not an identification case as the prosecution say however many strands of evidence had to be explained by the judge for the jury to decide guilt or otherwise of the defendant.

[63] With these general observations made we turn to the specific question of *Jogee* compliance. All parties agree that the direction given by the trial judge in relation to when a secondary party is guilty of murder and the directions in respect of the firearms offences were *Jogee* compliant. Where the parties disagree is in relation to the direction in respect of attempted murder and how that could have impacted and potentially confused the jury in light of the other directions given. Issue is also taken with the relevant extracts of the prosecution closing speech on joint enterprise. The court will therefore focus on these aspects and whether such arguments meet the substantial injustice threshold which flows from the decision in *Jogee.*

[64] Of undoubted relevance to the court's deliberations is the Court of Appeal's conclusion in the previous appeal brought by the appellant in respect of his convictions back in 2014 in which the court concluded that the circumstantial evidence against each appellant was very strong and there was no doubt as to the safety of the convictions. This is particularly relevant in light of the fact that the CCRC took into account, "the weaknesses in the prosecution case and its largely circumstantial nature."

[65] In his written and oral argument Mr Taylor submits that the judge should have directed the jury that before they could rely on an alleged primary fact as part of the circumstantial evidence, they have to be sure (beyond reasonable doubt) of that fact. Before dealing with the substance of this argument we note that the point was not raised in the notice of appeal. Mr Taylor maintained that reference in the skeleton argument is enough, but it is not. We are surprised to say the least that such an argument is raised in so casual a way. However, we are bound to deal with the point, not least to clarify a misunderstanding as to the law and we do so as follows by reference to the approach adopted in this case.

[66] The judge deals with circumstantial evidence in his charge and provides an almost verbatim direction from the relevant Northern Ireland bench book specimen direction on circumstantial evidence. Nowhere in the Northern Ireland specimen direction does it require the judge to tell the jury they must be sure beyond reasonable doubt of each of the primary facts before they can be regarded as part of the circumstantial case.

[67] The judge concludes his direction on circumstantial evidence with these words:

> "You don't have to be satisfied beyond a reasonable doubt in relation to each and every piece of evidence. Some might be weak, some flimsy – that's different from factually making a misrepresentation, what the evidence is - some may be less than compelling, but what you have to be sure about is that in relation to an individual accused - that you look at them, and I have said, separately - that there exists no other reasonable explanation other than they are guilty."

[68] We have also considered the England & Wales Compendium section on circumstantial evidence. This direction makes it clear that the risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt. None of this is surprising.

[69] The seminal decision of *McGreevy v DPP* [1973] 1 All ER 503 although of some vintage remains good law and serves as a reminder that circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty?

[70] In answering this question the jury is required to examine each strand of the circumstantial evidence relied upon by the prosecution, decide which they accept and which they do not, and decide what fair and reasonable conclusions they can draw from the evidence they accept. They must not speculate. It is for the jury to weigh up the evidence and decide whether they are sure of the defendant's guilt.

[71] In *R v Robinson* [2021] NICA 65 this court restated the principles as follows from paras [7]-[9]:

> "[7] The seminal decision in relation to circumstantial evidence is a decision of the House of Lords in *McGreevy v DPP* [1973] 1 All ER 503. There, this well-known passage from Lord Morris is found:
>
> > 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So, also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or maybe so they could not say that they

were satisfied of guilt beyond all reasonable doubt.

In my view, it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the prosecution case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond reasonable doubt.'"

[8] In this jurisdiction, the Court of Appeal has set out the correct approach when dealing with circumstantial evidence in *R v Kincaid* [2009] NICA 67 particularly at paragraph [22] as follows:

"The case against the appellant depended on circumstantial evidence. While that evidence is different from direct or expert evidence it can be no less compelling and often more so. The classic approach to circumstantial evidence is to be found in the well know passage from the judgment of Pollock CB in *R v Exall* 1866 4 F& F:

'What the jury has to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable or otherwise ... Thus, it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of

> guilt, that is, with as much certainty as human affairs can require or admit of. Consider, therefore, here all the circumstances clearly proved.'
>
> [9] The above analogy has been reiterated in our courts on numerous occasions. In *R v Meehan & Ors* [1991] 6 NIJB Hutton LCJ also said:
>
> > 'Mr Weir QC criticised the approach of the trial judge as set out in this passage and submitted that each strand of the Crown case must be tested individually, and that if it is not of sufficient strength, it should not be incorporated into the rope… We reject this submission. It is, of course, clear that each piece of evidence in the Crown case must be carefully considered by the trial judge but it is also clear law, as stated by Pollock CB, that a piece of evidence can constitute a strand in the Crown case, even if as an individual strand it may lack strength, and that, when woven together with other strands, it may constitute a case of great strength.'"

[72] The England & Wales specimen direction example makes no mention of being sure on the each of the facts placed before the jury – it is a matter for the jury what weight they attach to the evidence. This approach has recently been approved in the England & Wales Court of Appeal so far as we can see for example in *Abdirizak Hussein Abdi v R* [2022] EWCA Crim 315. We find no reason to depart from that practice in Northern Ireland.

[73] We are also influenced by the fact that there was no requisition in relation to the judge's directions relative to the case now being made. The absence of a requisition whilst not determinative in itself is an indicator that experienced counsel did not see any need to raise an issue with the judge's charge.

[74] Mr Taylor's further submission was that there should have been written directions in case of this nature. We are not convinced that the absence of written directions is fatal to the case. Although written directions may assist there was no requirement at the time to provide them. This practice has developed in the criminal courts in more recent times. An omission such as this simply cannot not invalidate a conviction from the past when the practice was not commonplace.

[75] In addition, having read with care the passages of the judge's charge which relate to the Hindsight evidence, we cannot accept Mr Taylors criticisms of how the

judge addressed this issue. We consider that the judge alerted the jury to the caution they should apply to this evidence. We do not accept the argument that an expert analysis was essential. We remind ourselves that experienced defence counsel was present to represent Smith and could have objected or obtained such evidence on behalf of the defence. In addition, we note that the explanatory evidence of Detective Constable Beattie was admitted by consent. Overall, we think that the judge's directions cannot be said to have misled the jury.

[76] Returning to the *Jogee* ground, which the court has made clear is its main focus, the first question for the court to consider in light of the respondent's argument at para 29(ii) is whether or not this is a parasitic accessory liability case and therefore one to which *Jogee* relates.

[77] The prosecution argues that it is not and that the CCRC has fallen into error as this was a well organised assassination in which the intention from the outset was to kill. There was no question of it being another crime "gone wrong." The appellant did not contend that he was involved in another plan than went awry. The shooting was not 'crime B' for the purposes of *Jogee* it was the specific purpose of the plan and therefore 'crime A.'

[78] Having considered the competing arguments we are of the view that the prosecution case is much more compelling. To our mind this is not on the face of it a case to which *Jogee* properly applies. It follows that the CCRC has erred in relation to the primary focus of this reference. In agreement with the prosecution submission, we think that the CCRC reliance on cases such as *R v Dreszer* [2018] EWCA Crim 454 and *R v Crilly* [2018] 4 WLR 114 is erroneous. These cases involved clear parasitic accessory liability and involved more serious crimes committed in the course of other criminal activity. By contrast this was a case involving a pre-planned assassination.

[79] There can be no question that persons who are together responsible for a crime are all guilty of it, whether as principals or secondary parties. Sometimes it is not possible to determine exactly whose hand performed the vital act, but this does not matter providing that it is proved that each defendant either did it himself or intentionally assisted or encouraged it. As the Supreme Court said in the cases it examined the *Jogee* cases do not affect that basic rule at all.

[80] What *Jogee* was dealing with was a narrower issue concerning secondary parties who have been engaged with one or more persons, others in a criminal venture to commit crime A, but in doing so the principal commits a second crime, crime B. In many of the reported cases crime B is murder committed in the course of some other criminal venture, but the rule of law is not confined to cases of homicide, or indeed to cases of violence. The question is: what is the mental element which the law requires of the secondary party?

[81] This narrower area of secondary responsibility has sometimes been labelled "joint enterprise", but this is to misuse that expression as the Supreme Court plainly said. To speak of a joint enterprise is simply to say that two or more people were engaged in a crime together. That, however, does not identify what mental element must be shown in the secondary party. The particular, narrower area of secondary responsibility here in question – where crime B is committed during the course of crime A - has been, in the past, more precisely labelled "parasitic accessory liability."

[82] Notwithstanding the above discussion we have also carefully considered the application of *Jogee* principles as follows. The direction on the murder charge and the firearms charges were *Jogee* compliant. That is plainly stated by the CCRC and was accepted in argument by Mr Taylor. Therefore, the complaint focusses on the attempted murder direction which does not comply. So far as the attempted murder charge is concerned, we agree with Mr McCollum that the gravamen of the complaint is limited to the fact that that the judge used the word "contemplation" rather than "knowledge." This is an admitted error. However, to assess the effect of it the charge must be considered as a whole and in context.

[83] In conducting this exercise it is also important not to lose sight of the defence case. The defence statement at para [2] states:

> "The defendant refers to the account stated in his interview and therefore does not accept playing any part whatsoever in this alleged offence."

Logically, it follows that the jury plainly rejected that assertion and concluded as they were entitled to do that he had participated in the common plan with the necessary intent.

[84] To our mind the jury were entitled to convict Smith as a secondary party on the basis of assisting in the common plan to assassinate two men. Once the jury concluded on the "very strong" circumstantial case that he participated in that plan it would have been perverse for the jury to conclude that he did not have the necessary intent.

[85] If the jury had followed the judge's *Jogee* compliant direction on the murder charge, which would have been the central focus of their deliberations, the jury must have concluded that the appellant had the necessary intent for murder. If he had the necessary knowledge/intent for murder, how could he not have had the necessary knowledge/intent for attempted murder? Overall, we do not think that by virtue of the mistaken language on the attempted murder charge that the entire charge is fatally flawed.

[86] In any event, if the court were of the view that *Jogee* applied to the facts of this case then it is for the appellant to show that a substantial injustice would otherwise

occur. In this regard para [100] of *Jogee* provides a guide along with paras [18] and [21] of *Johnson & Others* as follows:

> "In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult…"

[87] There should be no ambiguity as to the test if *Jogee* applies. The test is that the court must be satisfied that a substantial injustice arises considering the facts of a particular case. The facts of this case are particularly stark and must dictate the outcome. The crime was a crime of planned violence which involved the use of weapons. The inference of participation with an intention to cause really serious harm is very strong. Put simply, in this case, if it is a *Jogee* case, we are entirely satisfied that no substantial injustice arises by virtue of the change in the law.

[88] If no substantial injustice arises thus far what remains is an attempt to re-open an appeal which has already been determined by the Court of Appeal. That court was entirely satisfied as to the safety of the convictions. The circumstances in which such an appeal will be entertained are heavily circumscribed as we have discussed above. If pursued, we will consider the remaining application for leave to appeal on paper or orally after counsel has had an opportunity to consult and consider our ruling on the CCRC reference.

Conclusion

[89] Accordingly, for the reasons we have given, we dismiss the reference.