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Judgment: approved by the Court for handing down | *Delivered:* **9/7/04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

LESLEY ANN GAULT

Before Kerr LCJ, Nicholson LJ and McCollum LJ

SYNOPSIS OF JUDGMENT

KERR LCJ

Introduction

[1] The applicant, Lesley Ann Gault, and Neil Gordon Graham were charged with the murder on 19 May 2000 of Mrs Gault's husband, Paul. After a trial before McLaughlin J and a jury on 20 November 2002 Graham was convicted of murder by unanimous verdict. The jury were unable to reach a verdict in Mrs Gault's case. She was subsequently re-tried before Campbell LJ and a jury between 17 February and 20 March 2003 and convicted by majority verdict. She was sentenced to life imprisonment. The trial judge fixed the period under article 5 (1) of the Life Sentences (Northern Ireland) Order 2001 that must be served by the applicant before she can be considered for release at fifteen years. The applicant now applies for leave to appeal against her conviction. Leave to appeal was refused by the single judge.

Factual background

[2] Graham and the applicant were both employed by the Northern Ireland Fire Service. It is not in dispute that for some two and a half years before May 2000 they were conducting an affair. According to the applicant she told her

husband about the affair on 1 May 2000. As a result their marriage came under strain and she claimed that they planned a weekend away in Enniskillen. They were due to leave on the day that Mr Gault was murdered. That morning he and the applicant had together taken their children to school. This was a rare event because she normally took the children to school alone. After leaving the children at school they then returned to their home at 5 Audley Avenue, Lisburn where the applicant left off her husband at about 9 am. She then departed, returning to the family home at about 11 am. By that time her husband had been murdered. His body was found in the main bedroom of the house. He had been beaten to death.

[3] The applicant was not interviewed by police about the murder until 19 June 2000. She told them that she and her husband had intended to go away for the weekend and their three children were to stay with their paternal grandparents who were to pick them up from school. She said that they had gone together with the children to leave them at their school and had then returned to their home where her husband alighted from the car. He had his own keys to the house and she did not go into the house with him at that stage. Instead she went first to a petrol filling station and then to a bakery and a pharmacy before travelling to her parents' home where she remained until just after 10.30 am.

[4] On her return home, according to her account to the police, the applicant parked her car in the drive and went to the back door. She noticed that it was open and that the glass panel in the door had been broken and there was 'glass all over the ground'. She called out for her husband, she said, but getting no response went next door where she sought the help of a neighbour, John Shaw. He telephoned for police and the emergency services arrived shortly after this. The applicant claimed that she was not permitted to enter the house but some time later she was informed that her husband was dead. She believed that her father told her this.

The prosecution case

[5] The prosecution case against the applicant was that Graham killed Paul Gault and that he was assisted in this by the applicant. It was alleged that Graham could not have carried out the murder in the way that he did without the active and deliberate co-operation of Lesley Gault. That co-operation took two forms. First she supplied information to Graham that was vital to the execution of the murder plan. Secondly she arranged her movements and those of her husband so as to facilitate the killing.

[6] …

The defence case

[7] In broad outline the defence case was that Mrs Gault was not in any way complicit in her husband's murder. If this had been carried out by Graham it was without her assistance. The affair between Graham and her had, she claimed, ended after her husband had been told about it on 1 May. All the knowledge necessary to execute the murder plan could have been acquired by Graham without the participation of the applicant. Moreover, it was quite unnecessary for him to have the amount of information that the prosecution alleged was required for the successful completion of the killing.

Abuse of process

We then deal with the claim that the learned trial judge should have acceded to an application to stay the proceedings. For the reasons given in the judgment we reject that claim, having concluded that the judge adopted the correct approach and reached an unimpeachable conclusion on it.

The application for leave to appeal

[8] For the applicant Mr McCrudden and Mr Mark Mulholland advanced several grounds which may be summarised as follows (although this is not the order in which they were put forward): -

1. The learned trial judge should have acceded to an application to withdraw the case from the jury at the close of the Crown case;

2. The trial judge ought to have excluded evidence of the purported identification of Mrs Gault by Ms Morgan and her mother on the morning of the murder;

3. The judge wrongly decided that a statement made by Suzanne Morgan about her having seen Graham in Audley Avenue on 11 May 2000 was collateral and wrongly refused to permit evidence to be called by the defence on that issue;

4. The judge's charge was unbalanced and did not put the defence case fairly;

5. The judge gave an imperfect *'Lucas'* direction;

6. The judge should not have given a majority verdict charge simultaneously with a *'Watson'* direction;

7. The judge misdirected the jury as to the state of mind necessary to constitute the applicant an accessory to murder.

We consider each of these grounds in turn and, for the reasons given in the judgment, we reject each of the grounds 1 – 6. We then deal with the final ground as follows: -

Misdirection as to the state of mind necessary to constitute the applicant an accessory

[9] Mr McCrudden submitted that the case made by the prosecution throughout was that the applicant had aided and abetted the murder by facilitating the killing of her husband by Graham. The prosecution case was, he said, unequivocal. It was to the effect that she knew and intended that Graham would kill Mr Gault. At no time was any suggestion made that she had engaged with Graham in a joint venture whose purpose was other than murder. On the contrary, the ten points of information and assistance that she is said by the prosecution to have rendered were all directed to making possible the murder of her husband.

[10] The trial judge's charge to the jury on what the prosecution was required to prove was in the following terms: -

> "Now, the prosecution case is that Gordon Graham murdered Paul Gault and that he therefore killed him with intent to kill him or to cause really serious injury. He is then what in law is called the principal, the person who carried out the killing. It is not suggested that Lesley Gault herself physically murdered her husband, but she is said to have aided and abetted Graham Gault [*obviously this should have been Gordon Graham*].
>
> Now in the circumstances of this case if he did not murder her husband then you couldn't say that she aided and abetted him to do something which he did not do, but if you are satisfied beyond reasonable doubt that he did murder Paul Gault then the question is did she aid and abet him to do so.
>
> Now an aider and abettor in murder or, to murder, is never going to have an intention themselves to kill because they are not going to be the killer. The killer will be the principal, but they may hope or desire that the principal does kill. But what needs to be proved by the prosecution is an intention on the part of Lesley Gault to render assistance to Gordon Graham in the realisation that he may kill

> Paul Gault and that he may do so deliberately or intending to cause him really serious injury.
>
> I will just say that again. What needs to be proved by the prosecution is an intention on the part of Lesley Gault to render assistance to Gordon Graham in the realisation that he may kill her husband and do so deliberately or intending to cause him really serious injury. If you're satisfied beyond reasonable doubt that Lesley Gault participated in a joint venture with Gordon Graham, realising that in the course of that venture Gordon Graham might use force with intent to kill or to cause really serious injury to he husband and Graham did so, then she would be guilty of murder. It is important to remember that to realise something may happen is to contemplate it as a real possibility; not just some fanciful chance, but a real possibility is what you have to contemplate."

[11] The template for this section of the charge was subsequently identified by the judge as a passage from paragraph 17-67 of the 2003 edition of *Archbold Criminal Pleading, Evidence and Practice.* The passage is in identical terms in the 2004 edition and is as follows: -

> "The law in relation to the mens rea of accessories has developed considerably in recent years. The development has occurred particularly in the context of offences against the person: see post, §§ 19-23 *et seq*. It is clear now that no additional mental element beyond what is required for a principal is necessary to make a person guilty as an accessory (*Lynch v. DPP for Northern Ireland* [1975] A.C. 653, HL), and that, in one respect, a lesser mental element may suffice for an accessory than for a principal.
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> In *R. v. Powell; R. v. English* [1999] 1 A.C. 1, HL, it was held (following *Chan Wing-Siu v. R.* [1985] A.C. 168, PC), that a secondary party is guilty of murder if he participates in a joint venture realising (but without agreeing thereto) that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does so. The secondary party has lent

himself to the enterprise and, by doing so, he has given assistance and encouragement to the principal in carrying out an enterprise which the secondary party realises may involve murder.

It is submitted that this should be the approach whenever it is alleged that the defendant is guilty as an aider and abettor (i.e. someone who assists the commission of the crime whether by the supply of the instrument by means of which the crime is facilitated or committed, by keeping watch at a distance from the actual commission of the crime, by active encouragement at the scene, or in any other way), whatever the crime alleged. To realise something might happen is to contemplate it as a real not a fanciful possibility: see *R. v. Roberts)* 96 Cr.App.R. 291, CA, post, §19-32. Thus, if A supplies B with a jemmy realising that B may use it for the purposes of burglary, and B so uses it, A will be guilty of burglary, even though he had no idea what premises B intended to burgle. If B also uses it to inflict lethal violence on the occupier of the premises and does so with the intent to kill, A will only be guilty of murder if he contemplated such use of the jemmy as a real possibility.

On the basis of this analysis, it can be seen that it is somewhat misleading to say that the mental element required of an aider and abettor may be a lesser one than that required of the principal. It is by definition a different one; the aider and abettor in murder is never going to have an intention to kill. He may, of course, hope or desire that the principal does kill but what needs to be proved is an intention to render assistance to another in the realisation that that other may kill and do so deliberately or intending to inflict serious injury."

[12] It appears that the judge considered that the enjoinder by the authors of this section that "this should be the approach whenever it is alleged that the defendant is guilty as an aider and abettor" meant that in every instance where an accused was charged as an aider and abettor this course should be followed and that the charge to the jury should be based on this model.

[13] Mr McCrudden made two criticisms of this part of the judge's charge. First he suggested that the judge had failed to identify and explain to the jury

all the necessary ingredients of secondary participation where the accused is alleged to have aided and abetted a crime. Secondly, he claimed that the judge's direction about joint enterprise did not reflect the case made by the prosecution. Rather it introduced a possible basis for guilt that had not featured in the prosecution case and which the applicant had no opportunity to meet.

[14] The first of these arguments rested principally on the case of *R v Bryce* [2004] EWCA Crim 1231 where it was the Crown's case that X had been ordered to kill the deceased by a co-accused and that the defendant had aided and abetted, counselled and procured the murder by having transported X and the gun to a caravan near to the deceased's home so that X could await the opportunity to carry out the killing. The defendant's case was he had been unaware of the plan to murder the deceased, that he had simply given X a lift, and that he had not seen any weapon. Dealing with what was required by way of proof in a situation of secondary participation the Court said: -

> "71. We are of the view that, outside the *Powell and English* situation (violence beyond the level anticipated in the course of a joint criminal enterprise), where a defendant, D, is charged as the secondary party to an offence committed by P in reliance on acts which have assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D in the sense of an intention to assist (and not to hinder or obstruct) P in acts which D knows are steps taken by P towards the commission of the offence. Without such intention the mens rea will be absent whether as a matter of direct intent on the part of D or by way of an intent sufficient for D to be liable on the basis of 'common purpose' or 'joint enterprise'. Thus, the prosecution must prove:
>
> (a) an act done by D which in fact assisted the later commission of the offence,
>
> (b) that D did the act deliberately realising that it was capable of assisting the offence
>
> (c) that D at the time of doing the act contemplated the commission of the offence by A i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and,

(d) that D when doing the act intended to assist A in what he was doing."

[15] Mr McCrudden submitted that the judge had failed to give a direction that dealt adequately with the matters outlined in this passage. In particular he had failed, Mr McCrudden said, to tell the jury that the prosecution had to prove that the acts of assistance alleged to have been rendered by Mrs Gault in fact assisted its later commission; that the assistance was given in the realisation that it was capable of assisting the offence to be committed by Graham; and that at the time that she provided the assistance she intended to assist Graham in what he was doing.

[16] For the Crown Mr Ramsey QC accepted that, for the prosecution to succeed, it had to be proved that (i) Mrs Gault intended to assist Graham; (ii) she did in fact render assistance to him; and (iii) she knew that the help that she was giving was capable of assisting Graham. He submitted that, while these elements may not have been explicitly segregated in this way and articulated in the judge's charge, they could nevertheless be inferred from the overall content and tone of the charge.

[17] If one had been able to say that the judge had confined his directions on this question to the case made by the prosecution, there might well have been considerable force in Mr Ramsey's submission. That case was, as Mr McCrudden has said, straightforward and unambiguous. It was to the effect that she knew that Graham was going to kill her husband. Indeed Mr Ramsey confirmed to this court that this was the case made against the applicant on trial. He said that the 'joint venture' that the Crown alleged Graham and Mrs Gault had embarked on was a plot to murder and nothing else. Mr Ramsey accepted, in answer to questions from the court, that since this was the only case made, if the jury had taken the view that Mrs Gault had engineered merely a confrontation between her husband and Graham but convicted her of murder because they concluded that she had contemplated that death might occur, the verdict would be unsafe.

[18] We consider that Mr Ramsey's concession on this point was properly made. Where a jury has been presented with a clear basis on which the prosecution allege that a particular crime has been committed, generally it will be a material irregularity if they are invited to convict on a case that has never been made.

[19] In *R v Falconer-Atlee* 58 Cr App R 348 where on a charge of theft of a dog, counsel for the Crown opened the case for the prosecution on the basis that the defendant had originally acquired the dog honestly, but subsequently, having become aware that she should not have it, dishonestly decided to appropriate the dog. The judge left this case to the jury but also the

alternative case that the defendant had acquired the dog dishonestly at the outset by switching it for another dog. The Court of Appeal held that the judge had wrongly left to the jury for their consideration the alternative basis of theft as well as that originally opened by the prosecution and quashed the conviction.

[20] So also in *R v Crawford* (2001) unreported, where a judge left to the jury the possibility that the defendant had committed assault by the use of excessive force in ejecting a woman from his home when the Crown had always made the case that he was guilty of a deliberate attack on her, the Court of Appeal held that he had "opened up an alternative basis of conviction which the Crown had never suggested" and quashed the conviction. In that case it is perhaps significant that the court accepted that the appellant had been prejudiced by the way in which the alternative basis for conviction had emerged. Counsel for the appellant had accepted that it would have been open to the Crown to put the matter as the judge did and that there was probably nothing further that he could have put to the complainant in cross examination. But he submitted that he could have required the Crown to put the alternative basis for conviction to the appellant and that he would have dealt with the subject in his final speech. Likewise in the present case Mr McCrudden has submitted that, if he had been aware of an alternative basis on which the applicant might have been convicted, a different tactical approach might have been called for, including a review of whether his client should be called to give evidence.

[21] It is necessary to examine the judge's charge with care to see whether he left to the jury a basis on which they might convict which was different from that which the Crown had made against the applicant. As we have said, it is beyond dispute that the prosecution proceeded on the single basis that Mrs Gault had facilitated the killing of her husband by Graham, knowing that he meant to kill and intending that he should do so. That is not how the judge put the matter to the jury, however. The critical passage appears in the extract quoted above. It is: -

> "If you're satisfied beyond reasonable doubt that Lesley Gault participated in a joint venture with Gordon Graham, realising that in the course of that venture Gordon Graham might use force with intent to kill or to cause really serious injury to he husband and Graham did so, then she would be guilty of murder.

[22] This might be regarded as a classic direction in a case where the principal has gone beyond the expressly agreed terms of a joint venture but has done something that the secondary participant contemplated might happen. But that was not the case that the prosecution had made against the applicant and, as Mr McCrudden has said, it opened up a range of possibilities for the jury

that had not been canvassed in the trial. The formulation employed by the learned trial judge provided the jury with the opportunity to convict Mrs Gault on the basis that she had engineered merely a confrontation between Graham and her husband, not intending that he be killed, but having in contemplation that his death might occur. This was the very scenario that Mr Ramsey accepted would render the verdict unsafe and we are driven to the same conclusion, especially since it is impossible to gainsay Mr McCrudden's claim that, if the defence had been aware of this possible alternative basis for conviction, a different tactical approach to the presentation of Mrs Gault's case might well have been taken.

[23] We will therefore grant leave to appeal against the conviction, allow the appeal and quash the conviction. If they wish to make submissions we will hear counsel on the question of whether a retrial should be ordered.