

Judicial Communications Office

5 May 2023

COURT DISMISSES CRIMINAL CASES REVIEW COMMISSION REFERENCE RELATING TO JOINT ENTERPRISE MURDER

Summary of Judgment

The Court of Appeal¹ today dismissed a reference by the Criminal Cases Review Commission seeking a review of James Alexander Smith's ("the applicant") convictions in respect of the murder of Duncan Morrison, the attempted murder of Stephen Ritchie and two counts of possession of a firearm with intent to endanger life.

The offences were committed on 13 May 2011 when two men wearing balaclavas entered a house in Bangor shooting the two men present. The attackers made their getaway in a Honda Civic driven by a third person which had been stolen in March 2011 and was later found burnt out at the Somme Centre in Newtownards. A VW Golf similar to the one owned by the applicant the applicant's co-accused, Peter Greer, was seen parked at the Somme Centre. It was the prosecution case that the men in the Civic had transferred to the Golf which was recorded on CCTV and ANPR travelling from the Somme Centre to the Ormeau Road in Belfast. The applicant was arrested in the Golf and the keys of the Civic were found inside the car as well as items of clothing which contained the applicant's DNA and a single particle of cartridge discharge residue. The prosecution was based on circumstantial evidence, and it was argued this was a case of joint enterprise. The applicant did not give evidence at his trial and was convicted on 22 March 2013 at Downpatrick Crown Court and sentenced to life imprisonment with a minimum term of 21 years' imprisonment. His co-accused Peter Greer was also convicted of similar offences and sentenced to a minimum term of 20 years.

The applicant lodged an application to the Criminal Cases Review Commission ("CCRC") in 2019 which referred the conviction to the Court of Appeal on the ground of change in the law in relation to the liability of secondary parties brought about by the judgment of the Supreme Court in *Jogee*², the scope of which was further clarified in *R v Johnston*³ (two later cases in this jurisdiction indicated that the NI Court of Appeal will follow *R v Johnston*). The CCRC submitted that as a result of the change in the law there was a real possibility that the NI Court of Appeal would conclude that it would be a substantial injustice not to quash the applicant's convictions and that his convictions are unsafe.

The UKSC Decision of Jogee

In *R v Jogee* the legal issue was the mental element of intent which must be proved when a defendant is accused of being a secondary party to a crime. The unanimous decision in *Jogee* was that the preceding cases on this issue had taken a wrong turn and that the correct rule is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage,

¹ Lady Chief Justice (delivering the judgment), Lord Justice Treacy and Mr Justice Fowler

² *R v Jogee* [2016] UKSC 8

³ *R v Johnston and others* [2016] EWCA Crim 1613

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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. The decision brought the mental element of the secondary party back into broad parity with what is required of the principal. The correction was 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.

Soon after the *Jogee* decision the Court of Appeal in England and Wales considered six appeals in *R v Johnston* and others. In those cases reliance was placed on the 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 applicant who asserts that he suffered a “substantial injustice” as a result of being tried under the “old law” faces a high threshold. In determining whether there has been a “substantial injustice” the court identified the relevant considerations to be taken into account which include the court having regard to the strength of the case advanced that the change in the law would, in fact, have made a difference.

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

Consideration

The court dealt firstly with the alleged misdirection by the judge which it was claimed was fuelled by the confusing way in which the prosecution presented this case. It noted that the previous Court of Appeal hearing found no issue with the prosecution closing read as a whole or with the judge’s charge. The court said that on appraisal of the judge’s charge it did not consider it to have misled the jury as to the core aspects of this case and there was simply no fatal flaw in this case that gave it cause for concern about the charge as a whole:

“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.”

The court then turned to the specific question of *Jogee* compliance. All parties agreed 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 disagreed was 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 was also taken with the relevant extracts of the prosecution closing speech on joint enterprise. The court therefore said it would focus on these aspects and whether such arguments met the substantial injustice threshold.

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The Court of Appeal in the previous appeal brought by the applicant in 2014 concluded that the circumstantial evidence against the applicant and his co-accused was very strong and there was no doubt as to the safety of the convictions. The court said this was particularly relevant in light of the fact that the CCRC took into account “the weaknesses in the prosecution case and its largely circumstantial nature.” Counsel for the applicant submitted that the trial judge should have directed the jury that before they could rely on an alleged primary fact as part of the circumstantial evidence, they had to be sure (beyond reasonable doubt) of that fact. This point was not raised in the notice of appeal. The court noted that the trial judge dealt with circumstantial evidence in his charge and provided an almost verbatim direction from the 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.”

The court then referred to the decision of *McGreevy v DPP* [1973] 1 All ER 503 which it said 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?” 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.

The court also referred to the England & Wales specimen direction on circumstantial evidence and said it 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. The court said this approach has recently been approved in the England & Wales Court of Appeal and it could see no reason to depart from that practice in Northern Ireland. The court was also influenced by the fact that there was no requisition in relation to the judge’s directions relative to the case now being made. It considered that the trial judge alerted the jury to the caution they should apply to the evidence in the case and concluded that the judge’s directions could not be said to have misled the jury.

Returning to the *Jogee* ground, which the court made clear was its main focus, the first question was whether or not this was a parasitic accessory liability case and therefore one to which *Jogee* relates. The prosecution argued it was not and that the CCRC had fallen into error as this was a well organised assassination in which the intention from the outset was to kill and there was no question of it being another crime “gone wrong”. The court was of the view that this was not on the face of it a case to which *Jogee* applies and that the CCRC had erred in relation to the primary focus of this reference. It said that in contrast to the cases relied on by the CCRC, this was a case involving a pre-planned assassination. This flowed from the fact that 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 in *Jogee* cases does not affect that basic rule at all. 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

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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?"

The court said this narrower area of secondary responsibility has sometimes been labelled "joint enterprise", but this was 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". The court said that even if this was a *Jogee* case the direction on the murder charge and the firearms charges were *Jogee* compliant. Therefore, the complaint focussed on the attempted murder direction in which the judge used the word "contemplation" rather than "knowledge". The court said this was an admitted error however it was essential to consider the charge as a whole and in context:

"To our mind the jury were entitled to convict [the applicant] as a secondary party of murder 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. 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 applicant 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."

The court went on to say that, in any event, if it was of the view that *Jogee* applied to the facts of this case then it was for the applicant to show that a substantial injustice would otherwise occur:

"There should be no ambiguity as to the test to be applied 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 law. 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 as requested after counsel has had an opportunity to consult and consider our ruling on the CCRC reference."

Conclusion

The court dismissed the reference.

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NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://www.judiciaryni.uk/>).

ENDS

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