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(subject to editorial corrections)\**

*Delivered: 26/09/2017*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

AARON WALLACE AND CHRISTOPHER FRANCIS KERR

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Before: Morgan LCJ, Weir LJ and Deeny J

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**MORGAN LCJ (delivering the judgment of the Court)**

[1] On 10 April 2013 each appellant pleaded guilty to the murder of Michael McIlveen on 8 May 2006. Each was sentenced to life imprisonment. Wallace was given a minimum term of eight years and Kerr a minimum term of nine years. On 19 May 2016 Wallace applied for leave to appeal his conviction and on 20 June 2016 an extension of time for leave to appeal was granted. On 18 November 2016 Kerr applied for leave to appeal. Each contends that as a result of the decision in R v Jogee [2016] 2 WLR 681 the convictions are unsafe and the appeals ought to be allowed. Mr Harvey QC and Mr Devine appeared for Wallace and Mr O'Donoghue QC and Mr Devine for Kerr. Mr McCollum QC and Mr Connor QC appeared for the prosecution. We are grateful to all counsel for their helpful oral and written submissions.

[2] The factual basis of the pleas of guilty were reduced to writing and set out by the learned trial judge at paragraph 11 of his judgement:

“The defendants entered their pleas of guilty on the basis of facts agreed between the prosecution and each defendant. The agreed facts were that Wallace was 18 years old and Kerr 19 years old at the time of the commission of the offence on 6 May 2006. In the course of that evening a group of protestant male and female youths including Wallace and Kerr gathered in the vicinity of the swimming pool at Seven Towers

Leisure Centre, Ballymena. Wallace and Kerr had consumed alcohol in the course of the day. A group that comprised three catholic youths including Michael McIlveen walked into the area where the group of protestant youths had gathered. At least one of the catholic youths, Michael McIlveen, was known to members of the group of protestant youths. A member of the group of protestant youths challenged the catholic youths to a fight. Following a short period during which comments were directed towards the catholic youths, the catholic youths began to make their way away from the swimming pool area up an incline towards Trostan Avenue. At some point two of the youths including Michael McIlveen began to run as they were followed by a group of protestant youths. That group included Moon and Wallace and Kerr. The route took the youths along Tardree Grove into Glenshesk Drive. Kerr broke away from the chasing group to go to his grandmother's house where he retrieved a baseball bat that was in his bedroom. He then left the home and made his way across an adjoining field through Glenravel Drive. Wallace had ceased following and was returning in the direction of the cinema when he passed the principal prosecution witness going in the opposite direction. The witness asked Wallace where the others had gone and Wallace pointed the witness in the direction of Cameron's car park. The witness then walked off in that direction.

A short time later Wallace turned and went back towards the car park. He had seen Kerr coming out of his grandmother's house carrying a baseball bat. He then went down Granville Drive heading towards Chrissie Graham's hut which is at the bottom of an alleyway. At the entrance to the alleyway Moon took the baseball bat from Kerr and then ran up the alleyway followed by Kerr and others. Wallace also went up the alley in the direction of Graham's. It was not possible to see what was happening outside Graham's house where a fight was going on between one of the protestant group and Michael McIlveen. On arrival at the scene of the fight Moon immediately struck Michael McIlveen on the head with the baseball bat, felled him and struck him while he was

lying on the ground. Michael McIlveen's death was due to injuries suffered by him solely as a consequence of the blows issued by Moon with the baseball bat. The prosecution evidence was that Michael McIlveen was kicked by other members of the group of protestant youths including Wallace and Kerr. There is no evidence that any kick administered was causative in any way of the death of Michael McIlveen or caused any serious injury.

Following the conclusion of the attack on Michael McIlveen a gate in the alleyway was then damaged by some members of the group of protestant youths. At some point during this period the baseball bat was passed from Moon to another member of the group. The evidence of the chief prosecution witness was to be that Wallace was the first to leave. The group dispersed when a number of local female residents came out and shouted at the group and they all dispersed. The baseball bat was returned to Kerr who then hid the baseball bat in shrubbery in Tardree Grove. Some members of the group reassembled back in the area of the swimming pool. They went and bought some Chinese food. Thereafter Kerr and Wallace went to a local park. They then went to Wallace's home for a short period before Kerr returned to his grandmother's house at approximately 1.30 am. On his way back from Wallace's house Kerr retrieved the baseball bat from the shrubbery and placed it back in his bedroom. Wallace and Kerr handed themselves into police later that evening.

The prosecution and defence agreed that Wallace and Kerr fell to be sentenced as secondary parties on the basis of joint enterprise to the murder of Michael McIlveen. Wallace accepted that he saw Kerr in possession of a baseball bat and consequently he foresaw that the bat could be used by another to inflict serious bodily injury. With that foresight he proceeded to the area of the alleyway where he knew that a fight may take place. He continued to participate in the joint venture by his continued presence. Kerr accepted that at the time that he fetched the baseball bat and brought it to the scene of

the confrontation in the alleyway, he foresaw that the bat could be used by another to inflict serious bodily injury. With that foresight he proceeded to the area of the alleyway where he knew that fight might take place. Further, Kerr accepted that when Moon took the baseball bat from him he foresaw that Moon might inflict serious bodily injury. He continued to participate in the joint venture by his continued presence and by the concealment of the baseball bat in the aftermath of the attack.

In the course of an earlier trial Moon accepted through his plea that he acted as principal in the murder of Michael McIlveen by inflicting fatal injuries in circumstances where he intended only to cause serious bodily injury not death. The prosecution accepted his plea on that basis. It was accepted by the prosecution and the defence that Wallace and Kerr played a secondary role in the murder of Michael McIlveen.”

## **The law**

[3] In R v Chan Wing-Sui [1985] AC 168 the three appellants went, each armed with a knife, to a flat used by a prostitute, where her husband was habitually present. The prosecution's case was that they planned to rob her husband. In written statements they admitted going to the flat to get money from him, which they said that he owed to one of them. The husband was stabbed to death and his wife was slashed across the head. The appellants were all convicted of murder and wounding with intent to cause grievous bodily harm. The appellants appealed to the Privy Council. It is not necessary to examine the ruling in detail other than to note that the judgement asserted the principle whereby a secondary party is criminally liable for acts by the primary offender of the type which the former foresees but does not necessarily intend.

[4] That principle was further established by the decision of the House of Lords in R v Powell and R v English [1999] 1 AC 1 where the House held that it was sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm. It was the principle that liability for murder could be established by foreseeability rather than intent that was considered and rejected by the Supreme Court in R v Jogee. The approach of the court was set out in the following passages between paragraphs [94] and [98] of the judgment.

“94 If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

95 ... If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.

96 ... As the Court of Appeal held in R v Reid (Barry) 62 Cr App R 109, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result....

98 ... The tendency which has developed in the application of the rule in the Chan Wing-Siu case to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least...”

[5] The Supreme Court then went on to examine the consequences in respect of convictions which had been arrived at years beforehand.

“100 The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in the Chan Wing-Siu case and in R v Powell ; R v English. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence. An example is R v Ramsden [1972] Crim LR 547, where a defendant who had been convicted of dangerous driving, before R v Gosney [1971] 2 QB 674 had held that fault was a necessary ingredient of the offence, was refused leave to appeal out of time after that latter decision had been published. The court observed that alarming consequences would flow from permitting the general re-opening of old cases on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal had been based. No doubt otherwise everyone convicted of dangerous driving over a period of several years could have advanced the same application. Likewise in R v Mitchell [1977] 1 WLR 753, 757 Geoffrey Lane LJ re-stated the principle thus:

‘It should be clearly understood, and this court wants to make it even more abundantly clear, that the fact that there

has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction.'

For more recent statements of the same rule see R v Hawkins [1997] 1 Cr App R 234 (Lord Bingham CJ) and R v Cottrell [2007] 1 WLR 3262 (Sir Igor Judge P) together with the cases reviewed in R v R [2007] 1 Cr App R 10. As R v Cottrell decides, the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal: see in particular para 58."

[6] Jogee was considered by the English Court of Appeal in R v Johnson and others [2016] EWCA Crim 1613. The court approved a passage in the judgement of Murray CJ in the Supreme Court of Ireland in CC v Ireland [2006] 4 IR 88 stating that in a criminal prosecution where the state relies in good faith on the statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution on any grounds that may be open to him or her before the case reaches finality on appeal or otherwise then the final decision on the case must be deemed to be and remain lawful notwithstanding any subsequent ruling that the statute is unconstitutional other than for wholly exceptional reasons related to some fundamental unfairness. The Court of Appeal noted that this passage had been cited with approval by Lord Hope and Lord Rodger in Cadder v HM Lord Advocate [2010] 1 WLR 2601.

[7] Where an appeal was out of time an applicant for exceptional leave to appeal had to demonstrate that the substantial injustice would be done. That was a high threshold as the court described in paragraph [21]:

"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 a 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...."

It was only where that high threshold was met having regard to wider considerations in respect of the finality of decisions that consideration of the safety of the conviction would arise. Where the threshold was reached it was likely to be difficult to conclude that the conviction remained safe.

[8] Where the appeal was brought in time the court was only concerned with the safety of the conviction. It did not follow, however, that because there was a misdirection of law that the conviction was thereby rendered unsafe. That much is clear from the observations at paragraph [100] of Jogee.

### **The issues in this appeal**

[9] It is common case that the injuries which caused the death of Michael McIlveen were inflicted by Moon when he struck the deceased on the head with a baseball bat given to him by Kerr. The relevant facts in relation to Kerr are as follows:

- (i) Kerr was one of a number of Protestant youths who encountered three Catholic youths including the deceased in the vicinity of the swimming pool at Seven Towers Leisure Centre Ballymena on 6 May 2006.
- (ii) A member of the group of Protestant youths challenged the Catholic youths to a fight.
- (iii) Shortly thereafter two Catholic youths including the deceased began to run and they were chased by a group of Protestant youths including Kerr.
- (iv) Kerr broke away from the chasing group to go to his grandmother's house to retrieve a baseball bat.
- (v) Having retrieved the baseball bat he then made his way across an adjoining field to meet up with other members of his group.
- (vi) Moon took the baseball bat from Kerr and ran towards the deceased who was engaged in a fight with another Protestant youth.
- (vii) Kerr and others ran up the alleyway following him.
- (viii) On arrival at the scene Moon struck the deceased on the head with the baseball bat, felled him and struck him while he was lying on the ground. Kerr kicked the deceased although there was no evidence that any kick was causative of the death or serious injury.
- (ix) Kerr subsequently retrieved the baseball bat and hid it.



- (x) Kerr accepted that when he fetched the baseball bat and brought it to the scene of the confrontation in the alleyway he foresaw that the bat could be used by another to inflict serious bodily injury.
- (xi) With that foresight he proceeded to the area of the alleyway where he knew the fight might take place.
- (xii) Kerr also accepted that when Moon took the baseball bat from him he foresaw that Moon might inflict serious bodily injury.

[10] In respect of Wallace the following matters were admitted:

- (i) Wallace was one of a number of Protestant youths who encountered three Catholic youths including the deceased in the vicinity of the swimming pool at Seven Towers Leisure Centre Ballymena on 6 May 2006.
- (ii) A member of the group of Protestant youths challenged the Catholic youths to a fight.
- (iii) Shortly thereafter two Catholic youths including the deceased began to run and they were chased by a group of Protestant youths including Wallace.
- (iv) Wallace gave up the chase and started making his way back in the direction of the cinema.
- (v) Wallace saw Kerr coming out of his grandmother's house carrying the baseball bat and turned round to make his way to the scene of the confrontation.
- (vi) Moon took the baseball bat from Kerr and ran towards the deceased who was engaged in a fight with another Protestant youth.
- (vii) Wallace and others ran up the alleyway following him.
- (viii) On arrival at the scene Moon struck the deceased on the head with a baseball bat, felled him and struck him while he was lying on the ground. Wallace kicked the deceased although there was no evidence that any kick was causative of the death or serious injury.
- (ix) Wallace accepted that he saw Kerr in possession of the baseball bat and consequently foresaw that the bat could be used by another to inflict serious bodily injury.

- (x) With that foresight he proceeded to the area of the alleyway where he knew that a fight may take place.

[11] These facts demonstrate, therefore, that each appellant was aware that one of the group of youths of which they were members had suggested a fight at the Leisure Centre. The chasing of the deceased and the other youth shortly thereafter could only have been in pursuit of that objective. Each had participated in the chase. The diversion by Kerr to obtain the baseball bat has to be seen in the context that he had been part of a group of youths chasing others in order to assault them. This was an offensive rather than a defensive action. Similarly the decision by Wallace to return to the scene of the confrontation was consequent upon him seeing Kerr with the baseball bat and recognising its potential use.

[12] Each appellant was aware that Moon had the baseball bat when they followed him up the alleyway in the direction of the deceased. Each recognised that the baseball bat was a dangerous weapon which if used could cause serious bodily harm. The pursuit of the deceased up the alleyway could only have been for the same purpose as the initial chase, that is to assault the deceased. In our view the inference that each appellant participated in a joint attack upon the deceased intending that Moon could use the baseball bat to inflict serious bodily injury in that attack is overwhelming.

### **Conclusion**

[13] We consider that this is a plain case where exceptional leave to appeal out of time should not be given. In any event we are satisfied that the convictions in these cases are safe. Leave to appeal is refused in each case.