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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2016

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION

- -

Between:

Regina	**Respondent**
- and -	
Lewis Johnson	**Appellants/**
Asher Johnson	**applicants**
Jerome Green	
Reece Garwood	
Tyler Winston Burton	
Nicholas Terrelonge	
Queba Moises	
John Derek Hore	
Javed Ruhel Miah	
Mohammed Sajjaad Hussain	
Fahim Khan	
Rubel Miah	
Michael Hall	

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Oliver S P Blunt QC, Alexia Power and **Hannah Burton** for the **Appellant Lewis Johnson**
S Bennett-Jenkins QC (who did not appear at the trial) for the **Appellant Asher Johnson**
S Forshaw QC for the **Applicant Garwood**
J Wood QC for the **Applicant Burton**
A Lakha QC for the **Applicant Terrelonge**
I Mahmood for the **Applicant Moises**
Nigel Power QC for the **Applicant Hore**
Michael Turner QC (who did not appear at the trial) for the **Appellant J Miah**
Michael Wolkind QC (who did not appear at the trial) for the **Applicant Hussain**
David Hislop QC (who did not appear at the trial) **and Piers Marquis** for the **Applicant Khan**
Jo Sidhu QC for the **Appellant R Miah**
Christopher Sallon QC (who did not appear at the trial) for the **Applicant Hall**

John McGuinness QC and Duncan Atkinson QC (who did not appear at the trials) for the **Respondent**, together with **Jacob Hallam** on the **Appeal of Terrelonge and Burton**

Tim Moloney QC and **Jude Bunting** for the Intervener, **Joint Enterprise: Not Guilty by Association**

Hearing dates: 21- 22 June and 29-30 June 2016

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Approved Judgment

Lord Thomas of Cwmgiedd, CJ, Sir Brian Leveson PQBD and Hallett LJ, V-P:

I GENERAL APPROACH

Introduction

1. This group of cases are not connected save for the need to consider, individually for each case, the impact on convictions (mainly, but not entirely, for murder) of the decision of the Supreme Court on 18 February 2016 in *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] 2 WLR 681 ("*Jogee*") in relation to the issue of joint enterprise as a consequence of the reversal of the pre-existing law laid down in *Chan Wing-Siu v The Queen* [1985] AC 168 and *R v Powell, R v English* [1999] 1 AC 1.

2. Had the change of law identified in *Jogee* been set out in statute (as opposed to judicial decision of the Supreme Court), there would be no question of re-visiting any such convictions: the new law would apply only prospectively. On the basis that the Supreme Court identifies the law both prospectively and retrospectively, however, review requires consideration of the concept of safe conviction as well as the impact of late (out of time) appeals in circumstances where it is not suggested that judges at trial did not faithfully follow the law as then articulated by the House of Lords but whose directions, as a consequence of *Jogee*, no longer comply with what the present common law dictates.

The scope of the decision in Jogee

3. In approaching appeals in respect of convictions prior to the decision in *Jogee* consideration has to be given to the extent to which the verdict could only properly be interpreted in accordance with the common law principles of joint enterprise (two or more people setting out to commit an offence, crime A, or intending to encourage or assist in the commission of that offence) rather than parasitic accessory liability. As *Jogee* explains (at [2]), the latter arose (following *Chan Wing-Siu v The Queen* and *R v Powell, R v English*) where, in the course of that joint enterprise to commit crime A, one of the co-adventurers D1, commits another offence, crime B: the others involved in the original joint enterprise were guilty as an accessory to crime B if they or any of them had foreseen the possibility that D1 might act as he did. As Lord Hughes and Lord Toulson go on to explain, the law, as then formulated, was that:

> "D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether he intended it or not."

4. In that context, for murder, the law also required consideration of whether a weapon used to cause death was "fundamentally different" from any weapon of which D2 had knowledge although, in *Powell & English*, Lord Hutton added that if the contemplated weapon was "different to, but as dangerous as" the weapon used, D2 should not escape conviction if he foresaw that the different weapon might be used to kill (or, presumably, cause serious bodily injury): see [1999] 1 AC at 30. The effect of *Jogee*, however, is that save when death is caused by some overwhelming supervening act,

relegating what had gone before to history, there would "normally" be no occasion to consider the concept of "fundamental departure". Lord Hughes and Lord Toulson observed (at [98]):

> "What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. ... If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least ... Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

5. Thus, by focussing on intention (or conditional intention, that is to say, in circumstances in which D2 expressly or tacitly agreed to a plan to commit crime A which included a common purpose or common intent, if it came to it, to commit crime B), the knowledge of a weapon (being a critical ingredient of parasitic accessory liability under *Chan Wing-Siu v The Queen* and *R v Powell, R v English*) remains highly material in relation to the inference of intention. After *Jogee*, however, even if the facts of any individual case raise concern as to the safety of a conviction for murder, a conviction for manslaughter does not depend on knowledge of the weapon. The test (articulated at [96]) is put in this way:

> "If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v Church* [1965] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective. As the Court of Appeal held in *Reid*, 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. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these."

6. In considering the effect of the decision in *Jogee* on prior convictions it is necessary to distinguish between appeals brought within the time limit of 28 days specified in s.18(2) of Criminal Appeal Act 1968 and those brought outside that time.

Appeals against conviction brought within time

7. Appeals against conviction brought in time must be judged in accordance with the well-established statutory requirement identified in s.2(1) of the Criminal Appeal Act 1968: it is not sufficient only for there to have been some misdirection or error in the conduct of the trial. What is critical is that the verdict is thereby rendered unsafe. Indeed, s. 2(2) emphasises that position by underlining that the court shall allow the appeal if they "think that the conviction is unsafe" but "shall dismiss such an appeal in any other case". Thus, the decision in any case must be fact sensitive: a misdirection of law which was not, in reality, in relation to a true (or real) issue in the trial, does not thereby (and certainly not necessarily) render a conviction unsafe. That much was made clear in the series of appeals that followed *R v Preddy* [1996] AC 115 which also modified previously understood common law. In *R v Graham & other cases* [1997] 1 Cr App R 302, Lord Bingham CJ put the matter in this way:

> "If the court is satisfied, despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe."

8. That a successful appeal will not necessarily follow from a conviction based on the pre-*Jogee* law was also emphasised by the Supreme Court which made it clear that the approach applies to convictions however recently determined. Thus, in *Jogee*, Lord Hughes and Lord Toulson said (at [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 *Chan Wing-Siu* and in *Powell and 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."

9. Thus, even in relation to in time appeals, the fact that the jury was correctly directed in accordance with the then prevailing law does not automatically render the verdict unsafe. In that regard, the appeal of Moises is a clear example of a case where the application for leave to appeal on grounds based on the decision in *Jogee* was brought within the requisite time period but it did not follow that the conviction was unsafe.

Applications for exceptional leave

10. In relation to appeals brought out of time, leave is required and an extra hurdle is introduced into the process. In some cases, the court could have an inherent power to limit the retrospective nature of its decisions (see *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 and the cases cited at [58], [61] and [100] to [103]). Indeed, in that case, the decision generally to allow those being questioned access to legal advice was specifically limited when applying the law of Scotland by the

principle of legal certainty such that it was made clear that cases which had been finally determined (without such access having been granted) should not be re-opened.

11. The Supreme Court in *Jogee* did not consider it appropriate to go that far. It approved the practice of the Court of Appeal of England and Wales which Lord Bingham described in *Hawkins* [1997] I Cr App R 234 at 240 of eschewing undue technicality and asking whether any substantial injustice had been done.

12. The judgment in *Jogee* set out the position in a passage (at [100]) following that set out at 8 above in these terms:

> "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 *Ramsden* [1972] Crim LR 547, where a defendant who had been convicted of dangerous driving, before *Gosney* (1971) 55 Cr App R 502 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 *Mitchell* [2007] 1 WLR 753, 757 (1977) 65 Cr App R 185, 189, 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.'"

13. As Lord Toulson and Lord Hughes made clear, the position has been repeated and emphasised in more recent decisions: see *Hawkins* to which we have referred and *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2007] 1 WLR 3262 (Sir Igor Judge P) together with the cases reviewed in *R v R* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150.

14. Furthermore, the Criminal Cases Review Commission must make its assessment of alleged miscarriages of justice in the light of the approach of this court. Thus, s.16C(1) of the Criminal Appeal Act 1968 (inserted by s.42 of the Criminal Justice and Immigration Act 2008) applies the provision to appeals following a reference by the Criminal Cases Review Commission and goes on:

> "(2) Notwithstanding anything in section 2, 13 or 16 of this Act, the Court of Appeal may dismiss the appeal if—
>
> (a) the only ground for allowing it would be that there has been a development in the law since the date of the conviction, verdict or finding that is the subject of the appeal, and
>
> (b) the condition in subsection (3) is met.
>
> (3) The condition in this subsection is that if—
>
> (a) the reference had not been made, but
>
> (b) the appellant had made (and had been entitled to make) an application for an extension of time within which to seek leave to appeal on the ground of the development in the law,
>
> the Court would not think it appropriate to grant the application by exercising the power conferred by section 18(3)."

15. Thus, for convictions not brought in time (including second appeals brought through the Criminal Cases Review Commission) it is necessary to identify the considerations the court will take into account in determining whether there has been a substantial injustice. This has been the subject of argument in the present cases. The applicants submitted that we should look at each case and, in particular, at the merits of each case, extending time where the application of the law set out in *Jogee* might have made a difference to the verdict.

16. The case, at its highest, was argued in written submissions by Tim Moloney QC and Jude Bunting on behalf of the interveners Joint Enterprise: Not Guilty by Association ("JENGbA"), a non-profit organisation comprised of families where a member is in custody in a case where it is said that the law of joint enterprise was central to the conviction. Guilt by association was, of course, never enough to justify a conviction for murder (nor, indeed, in relation to any other criminal offence) but the arguments advanced include the temperance of public policy in favour of finality because of the unique nature of the mandatory sentence for murder with its lifelong consequences, along with the qualitative and quantitative differences in sentences for murder and manslaughter: such an approach, it is said, is consistent with public and academic opinion.

17. It is thus argued that the authorities suggest that it is sufficient to justify exceptional leave to appeal to have suffered some adverse consequences as a result of a conviction

that has subsequently been found to be "based on an error of law" and that adverse consequences including the stigma of a conviction for murder based upon a direction of law, although accurate at the time, does not now represent the law.

18. In our view, as was accepted, the fact that there has been a change in the law brought about by correcting the wrong turning in *Chan Wing-Siu* and *R v Powell, R v English* is plainly, in itself, insufficient. As the Supreme Court stated at paragraph 100, a long line of authority clearly establishes that if a person was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would otherwise be done. The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important.

19. It is important to emphasise that the Supreme Court expressly approved the approach taken by this court in *Cottrell*. At paragraph 43 of that case, this court referred to the judgment of Murray CJ in the Supreme Court of Ireland in *CC v Ireland* [2006] 4 IR 88.

> "The facts were simple. In June 2004 A pleaded guilty and was convicted of unlawful carnal knowledge contrary to section 1(1) of the Criminal Law Act 1935. In May 2006, in CC v Ireland [2006] 4 IR 66 the Supreme Court declared that section 1(1) was inconsistent with provisions of the Constitution of Ireland. A appealed against his conviction. The argument was simple. His conviction was null. It depended on a law which, because it was inconsistent with the Constitution, did not exist. The High Court agreed. The prosecution appealed. Murray CJ, and the remaining members of the court, conducted a comprehensive analysis of both common law and civil justice systems, which demonstrated the effective universality of the problem. He observed [2006] 4 IR 88, 130, para 85:
>
> > "Absolute retroactivity based solely on the notion of an Act being void ab initio so as to render any previous final judicial decision null would lead the Constitution to have dysfunctional effects in the administration of justice … The application [of such] a principle … in the field of criminal law would render null and of no effect final verdicts or decisions affected by an Act which at the time had been presumed or acknowledged to be constitutional and otherwise had been fairly tried. Such unqualified retroactivity would be a denial of justice to the victims of crime and offend against fundamental and just interests of society."

Addressing the general principle he observed, at p 143, paras 125–126:

> "In a criminal prosecution where the state relies in good faith on a 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 in law be open to him or her, including the constitutionality of the statute, before the case reaches finality on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.
>
> "126. I do not exclude … some extreme feature of an individual case, [which] might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice …"

The prosecution's appeal against the ruling of the High Court was allowed.

> 44. This decision of the Supreme Court was based on the constitutional arrangements which apply in Ireland. Accordingly, the analogy with change of law cases in this country is not complete. That said, the decision provides valuable illumination of the need to emphasise that appeals against conviction in change of law cases involve significant social and public considerations which go well beyond a narrow focus of an individual conviction."

The passages from the judgment of Murray CJ were also cited by Lord Hope in *Cadder* at [60] - [62] and by Lord Rodger at [100] – [102].

20. Thus, it will be for the applicant for exceptional leave to appeal out of time to demonstrate that a substantial injustice would be done. That is a high threshold. For example in *R v Mitchell* the court said at page 357:

> "If we were to refuse him the extension of time in which to appeal against conviction, we should be keeping him in prison, so to speak, when we as a court were convinced that he had not committed an offence. That again is not an attractive proposition, and it is one from which this court resiles. This seems to us therefore to be the very rare case where the court should exercise its undoubted discretion to allow the extension of time and grant leave to appeal against conviction. We wish to make it clear however that this is not to be taken as an invitation to all and sundry who have been convicted of this type of offence to present applications to this court for leave to appeal out of time, because they will not be greeted with very much enthusiasm."

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. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice.

22. We invited submissions on whether it was appropriate for the court to take into account the observations of the judge when sentencing in determining the factual basis for the conviction. In our view, the court should not do so. Its duty is to examine the matters before the jury and the jury's verdict (including the findings of fact that would have been essential to reach such a verdict). Such an approach is consistent with the approach the court took in relation to observations made by judges in life sentence cases when it was their practice to make reports to the Home Secretary for the purposes of the determination of the tariff: see *Jones* [1998] 2 Cr App R 53 and *Dillon* [1997] 2 Cr App R 104.

23. If exceptional leave is granted, the court will then, and only then, consider the question as to whether in the light of the direction given to the jury the conviction is unsafe. It was submitted by Mr Moloney QC that the observations of Hughes LJ at paragraph 40 of *R v R and others* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10 in respect of the practice to be followed in applications for leave to appeal after the reinterpretation of a statute by the House of Lords in *R v Saik* meant that the consideration of substantial injustice should begin with the primary consideration of whether the conviction should now be regarded as unsafe. It is clear from what Hughes LJ said and from the authorities cited, that the task of the court is first to determine whether there may have been a substantial injustice which involves the wider considerations to which we have referred. Having said that, if the threshold required to justify exceptional leave to appeal is reached, it is likely to be difficult to conclude that the conviction remains safe.

Other cases

24. Although in our judgment, the considerations we have set out will govern the large majority of appeals, there are cases where appeals or applications for leave to appeal grounds were pending.

25. One type of case is where an application for leave to appeal was made within 28 days on non-*Jogee* grounds and either granted (as in the appeal of Lewis and Asher Johnson) or refused, but renewed to the Full Court, as in the appeal of Garwood. Subsequently, an application was made to add grounds based on the decision in *Jogee*. It was submitted that exceptional leave was not needed or alternatively leave should readily be granted as these were cases where there had been no finality and thus the considerations of establishing substantial injustice did not arise. In such cases, leave to put forward the new grounds is required. As we have set out above, the

general principle is that where a defendant was properly convicted on the law as it then stood, the court will not grant leave without it being demonstrated that a substantial injustice would be done. The court will therefore generally apply the same principle to applications to put forward new grounds based on the decision in *Jogee*.

26. A second type of case is where the application was made within 28 days on non-*Jogee* grounds, but the issue of leave to appeal not determined by either the Single Judge or the Full Court, as progress in the case was adjourned by the Registrar pending the decision in *Jogee.* An application was then made on *Jogee* grounds.

27. The appeal of Terrelonge and Burton is an illustration of such a case, but with the particular feature that counsel in the case drew the attention of the trial judge to the fact that the Court of Appeal had certified a question for the Supreme Court in the appeal of *Jogee* (see paragraph 72 below). Counsel was therefore, in effect, asking the trial judge to reserve the question as to the correctness of the decision of the Court of Appeal in *Jogee.* In such circumstances, it is just to allow the issue to be argued: see paragraph 84 below.

28. The final scenario is one in which one appellant appealed on *Jogee* grounds in time and a co-defendant (who did not) then seeks to appeal on similar grounds out of time. Given that the appeal in time has to be determined in accordance with the usual principles (unhampered by the need to seek exceptional leave), the potential substantial injustice as between defendants is likely, depending on the circumstances, to require that a co-defendant who seeks leave should be permitted to argue his appeal.

II THE SPECIFIC APPEALS

29. We turn to the individual cases. In some of the applications and appeals, there were applications or appeals against sentence. Save in the first case, where we were asked simply to correct the error of omitting the time spent on remand that was to count against sentence, we have adjourned all issues relating to sentence and other relief.

A. *JOHNSON, JOHNSON, GARWOOD AND GREEN*

30. On 26 July 2013 at the Central Criminal Court before HH Judge Marks QC and a jury the appellants Lewis and Asher Johnson, the applicants Reece Garwood and Jerome Green and a co-accused Courtney Mitchell (who has not sought leave to appeal) were convicted of murder of Thomas Cudjoe (the deceased) on 3 November 2012. The verdicts in respect of the Johnson brothers were by a majority of ten to two. They were all sentenced to life imprisonment with minimum terms for the Johnsons and Garwood of 17 years, for Green of 25 years and for Courtney Mitchell of 18 years.

31. It was not in issue that the actual killing of the deceased was the consequence of his having been stabbed by Green. His defence had been self-defence in the course of defending himself when the deceased produced the knife and, alternatively, loss of control. The jury by their verdict plainly rejected these defences.

32. The appellants Lewis and Asher Johnson originally sought leave to appeal against conviction in August 2013 within the prescribed time on grounds unrelated to the decision in *Jogee* (see paragraphs 45 and 47 below). They were granted leave on those grounds by the single judge. In April and May 2016, they sought leave, out of time, to add to their grounds of appeal a ground based on the decision in *Jogee.* Garwood also applied for leave to appeal in August 2013 on grounds unrelated to *Jogee* (see paragraph 48 below) but was refused leave. He applied within the requisite time to renew that application to this court. He sought leave, out of time, in March 2016 to add a ground based on the decision in *Jogee*.

Background

33. In August 2010, Reice Okosi, a known associate of Asher Johnson, Garwood and Mitchell, was shot and left paralysed. In June 2011, the deceased was tried and acquitted of being responsible for the shooting.

34. On 2nd November 2012, the appellants and their co-accused went to the Bell public house in Ilford. A group of the deceased's friends chose to visit the Bell that same night. The deceased drove them there, but refused to join them for fear of encountering friends of Reice Okosi. CCTV footage showed Asher Johnson and Jerome Green standing outside the Bell, apparently interested in his car and trying to make out the identity of its driver. Inside the Bell they asked Kabi Nathan "Do you know that guy?" Asher Johnson, Green and Mitchell went back outside shortly afterwards and pointed to where the deceased's Ford Focus had been.

35. When the deceased returned to collect his friends at about 03:14, with him in the back of the car were Nicole Allan-Chinamana and Chloe Brown. He parked on the nearby Shell garage forecourt. CCTV showed further interaction between the appellants and Kabi Nathan inside the Bell at about this time, during which Kabi Nathan may have innocently alerted the appellants to the fact that the deceased was outside in the car.

36. What followed was captured on CCTV footage of the two minute period between 03:15, when the first of the attackers arrived at the car and 03:17, when the deceased collapsed and the first 999 call was made. The evidence had been carefully analysed and presented. We have very carefully considered the CCTV and the analysis. What it showed was as follows:

    i) The appellants and their co-accused left the Bell. All but Green walked immediately towards the garage forecourt. Green turned right, made some adjustment to his clothing and then turned to follow them. The group, with Green bringing up the rear, approached the vehicle in what was obviously a planned move.

    ii) At this point Mehal Sudra was sitting behind the driver's seat with the two women. As Garwood headed towards the car, the Johnsons and Mitchell were already surrounding it. The Johnsons moved towards the driver's side as Mitchell moved towards the front passenger side in what was described as a "pincer movement". Asher Johnson tried to pull the driver's door open and the deceased tried to close it but Asher Johnson succeeded. He assaulted the deceased and prevented him from getting out of the car. The two women and Mehal Sudra escaped leaving the deceased in the car. By now Lewis Johnson

had joined his brother in the attack. Green came into view on the camera 18 seconds after the Johnsons and Mitchell had first appeared by the vehicle.

iii) Meanwhile Garwood tried to restrain and attack the deceased from the rear passenger seat. As Green moved towards the driver's side he did something with his hands. He passed between the others and as he reached the driver's front door they moved away – the Johnsons moving to Green's left, and Mitchell to his right. As Green stabbed the deceased, one witness described Garwood repeatedly striking the deceased. Mitchell remained behind Green watching the attack. The Johnsons moved away, almost backing into Kabi Nathan who had arrived to try to stop the attack. Lewis Johnson, pulling his hood tighter around his head, went to the front passenger door, in order to stop an escape from that side. Asher Johnson got closer to his brother and they then both moved away from the vehicle.

iv) Garwood left the car at the same time as the deceased, by now fatally injured, tried to escape. Garwood, the Johnson brothers and Green ran away in the direction of the Bell.

37. The deceased had fourteen stab and slash wounds on his body and several areas of bruising. The two most serious injuries were a stab wound to his lower left chest which had punctured his lung and a stab wound to his right thigh which had severed the femoral artery and vein.

38. Days later the accused were arrested and in interview they all declined to answer any questions put to them.

The prosecution case

39. The prosecution relied principally upon the CCTV footage and the evidence of eye witnesses. Additionally, against Garwood they relied on what was said to be a confession to murder in the form of a letter written by Garwood and sent to Lewis Johnson from Feltham Young Offenders' Institute on 19 March 2013. It read as follows:

> "Anyway what's everyone saying?...
>
> I don't know how you man are so eased back fam I'm fucking stressing for my life!...
>
> Real talk I don't understand you man should be on to Sinester (referring to Green) to hold that down Is like you man want to go to trial! If I was with you man I would be promising him the world Show him that he's the only one that can make man bust case 100%...
>
> I was reading one law book and it say's "Plea to manslaughter by one or more of several co-accused"… Where two or more persons are jointly charged with murder, and – the prosecution regard the evidence as pointing more strongly in the direction of one defendant as the author of the fatal blows, the

> prosecution are at liberty to indicate a willingness to – accept pleas of guilty to manslaughter by the others if the defendant in - question admits his guilt on the murder charge. If he does not do so, then it is open to the Jury to resolve the evidence on the Murder charge against all defendants…
>
> Understand?
>
> I'm showing you man get on to my man because if worse come's to worse and shit hits the van (sic) we are all fucked and I hope and pray every time we get out of this situation but the only way I know 100% is like I said to holla at ya…"

40. The prosecution case was one of joint enterprise. The Johnsons, Garwood, Mitchell and Green had planned a revenge attack on the deceased for shooting their friend Okosi. The prosecution invited the jury to consider whether the appellants and the co-accused would have taken on the deceased who, within certain circles, had a reputation for violence, unless they were utterly confident that at least one of their number would be armed.

41. Although the prosecution referred to the law on joint enterprise as it then stood, pre-*Jogee*, namely that the prosecution only had to prove that each of them knew Green had a knife and realised he "might – not would - use it intentionally to cause really serious injury", their case was that each of the accused in fact planned and participated in an attack knowing a knife would be used with intent to inflict at least really serious injury.

The defence case

42. The defence case was that the events at the petrol station had nothing to do with the shooting of Okosi, but this was a drugs deal that went wrong. It was claimed that the two Johnson brothers and the co-accused Mitchell approached the deceased in his car in the early hours to sell him drugs. The deceased wrongly feared he was about to be attacked and started to kick and punch them. As Asher Johnson sought to defend himself, the deceased reached for and got hold of a knife which was eventually turned on him by Green who used it in self-defence.

Directions on joint enterprise

43. The judge handed the jury a Route to Verdict, as well as written Legal Directions and a Chronology. The first set of seven questions related to the guilt/innocence of Green as the principal. In terms of directions on joint enterprise there were 4 questions framed as follows:

> "Question 1: Are you sure that either before or at some point in time while the incident in the car was in progress, the defendant realised that Jerome Green was in possession of a knife, whether it belonged to Jerome Green or Thomas Cudjoe? If yes, then go to Question 2; if no, find the defendant not guilty of both murder and manslaughter.

> Question 2: Are you sure that following Jerome Green's arrival at the car, the defendant participated or continued to participate in the attack on Cudjoe by Jerome Green, whether by assaulting him, restraining him or blocking his escape or by intentionally encouraging Jerome Green in the attack on Thomas Cudjoe by his continued presence at the scene? If yes, go to Question 3; if no, find the defendant not guilty of both murder and manslaughter.
>
> Question 3: Are you sure that the defendant realised that Jerome Green might use the knife unlawfully, i.e. not in self-defence, to inflict really serious injury to Thomas Cudjoe, either with intent to kill him or to cause really serious bodily harm? If yes, find the defendant guilty of murder; if no, go to Question 4.
>
> Question 4: Are you sure the defendant realised that Jerome Green might use the knife in such a way as to cause some, although not necessarily serious harm to Thomas Cudjoe? If yes, find the defendant not guilty of murder but guilty of manslaughter. If no, find the defendant not guilty of both murder and manslaughter."

Jury note

44. After several days of deliberation, the jury produced a note stating, in part:

> "It may help the jury if you could guide us with the latter part of question 2 over the 'by intentionally encouraging JG in his attack on TC by continued presence at the scene'…."

There followed lengthy discussion between the judge and counsel after which the judge repeated to the jury some of his earlier directions. He placed emphasis on the words "actual participation" and repeated his earlier direction that encouragement of the offence meant:

> "What that envisages, of course, is wilful encouragement of the offence by the principal, the principal being the person who carried out the actual stabbing. And that offence, of course, involves the use by him of a knife for the purpose of causing really serious injury with intent. So it is that which you are required, for these purposes, to have wilfully encouraged".

The submissions on the appeals and applications in relation to conviction

Lewis Johnson and Asher Johnson

45. The appellant Lewis Johnson had been granted leave, as we have set out, to argue the following "non-*Jogee*" grounds of appeal.

i) The judge erred in his direction to the jury on joint enterprise and in response to a jury note, by introducing alternative routes to verdict that had never been the prosecution case and upon which there had been no opportunity for submissions to the jury by the defence and by refusing time for counsel to research the direction given to the jury following the note.

ii) The jury notes, from which an inference could be drawn that the jury was and had been deadlocked in relation to Lewis and Asher Johnson for some time, cast grave doubts in relation to the safety of the majority verdicts delivered by the jury on a Friday afternoon and within 2 hours of an indication that they could not reach majority verdicts, and are suggestive of jury irregularities.

46. Lewis Johnson sought leave to add a third ground, based on the judgment in *Jogee*, that the judge wrongly directed the jury that Lewis Johnson could be convicted of murder on the basis of foresight that Jerome Green might commit murder in accordance with *Chan Wing-Siu v The Queen.*

47. Asher Johnson had been granted leave to advance similar "non-*Jogee* grounds". He too sought leave to add the *Jogee* ground and an additional ground that the judge erred in failing to deal with the issue of withdrawal.

Reece Garwood

48. Reece Garwood renewed his application for leave to appeal conviction on the grounds that the judge erred in admitting the 'prison' letter. It should have been excluded under s.78 of the Police and Criminal Evidence Act 1984 on the ground that its prejudicial effect far outweighed any probative value it might have had. It was not a confession, but simply the expressions of a twenty year old charged with murder speculating about his options. He admitted presence and participation in violence. Nothing in the letter went to the primary issue in his case which was whether he knew any of his co-accused had a knife.

49. He sought leave to add a second ground of appeal based on the judgment in *Jogee* to the effect that the judge misdirected the jury as to the basis on which they could find a secondary party guilty of murder. Had the jury been directed in accordance with the judgment in *Jogee* that 'if a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter', the verdict in Garwood's case may have been different.

Sentence

50. Lewis Johnson, Asher Johnson and Green all applied for an extension of time of approximately 18-20 months and leave to appeal sentence on the basis the judge failed to state that the period that the appellant spent in custody (namely 308 days) should count toward his minimum term of imprisonment. Garwood has leave to appeal on the same point.

Conclusions

(a) Conviction – non Jogee grounds

Lewis and Asher Johnson

51. First, there is nothing in the ground that the judge introduced alternative routes to verdict that had never been the prosecution case. All trial counsel were content with the original directions that the judge gave. After a short discussion on the jury note where counsel for Lewis Johnson and Asher Johnson made submissions to the judge, the judge slightly expanded the direction he gave in response to the jury note. It appears from the transcript that the result of the discussion resulted in a direction which appeared satisfactory to all. In any event the judge did not misdirect the jury or fundamentally alter the way the case had been put. The expanded version was always a possible route to verdict and one of which experienced trial counsel were no doubt aware. If any counsel needed more time to assist the judge on answering the jury note they should have pressed the judge for more time.

52. Second, we do not infer from the jury notes that the jury was deadlocked in relation to Lewis and Asher Johnson. The notes suggest the jury working their way painstakingly through the directions and a considerable body of evidence. Nothing was put before us to suggest anything unsafe about verdicts or any irregularity.

53. Third, we reject the suggestion that the judge erred in failing to deal with the issue of withdrawal. It was not a live issue and the judge's directions on joint enterprise and common purpose were more than adequate.

Garwood

54. The letter sent by Garwood in which he considered the various options in relation to this case was plainly admissible. The question of what weight should be attached to it was a matter for the jury. It was prejudicial only in the sense that it provided some acknowledgment on Garwood's part of his guilt. His counsel had ample opportunity to make the kind of submissions to the jury that she made to us as to his age and the circumstances in which he wrote it.

Jogee grounds

55. We approach the issue by considering the strength of the case that the applicants would not have been convicted of murder if the jury had been directed on the basis of the law as set out in *Jogee*.

56. We infer from the jury's verdicts, that the jury made the following factual findings:

    i) The CCTV footage left no room for doubt. It was a planned attack in which all were involved. The common purpose was to inflict really serious bodily injury on the victim of the kind that caused his death. It is arguable whether this was a parasitic accessory liability case at all.

    ii) The parties had agreed to carry out a criminal venture and each was liable for the acts to which they expressly or impliedly gave their assent namely

infliction of really serious bodily injury or the stabbing to death of the deceased.

iii) All knew of the knife and the intention to use it. We would observe that under the law as explained in *Jogee* it would no longer be necessary to show this, given the common purpose to inflict really serious bodily injury.

57. In this case, given the jury's findings of fact, their verdicts would have been no different post *Jogee.* We refuse leave as we are satisfied that there was no injustice, let alone substantial injustice. The application to add the grounds based on the decision in *Jogee* is therefore refused

Sentence

58. We can deal with the appeal and the applications for leave and extensions of time shortly. Where necessary we grant leave and the extension of time and allow the appeals of each appellant, as he now is, to the extent of ordering that the period of 308 days counts towards his minimum term of imprisonment.

B *BURTON AND TERRELONGE*

59. On 23 April 2015, at the Central Criminal Court before His Honour Judge Gullick and a jury, the applicants Burton and Terrelonge were convicted of the murder of Ashley Latty on 18 May 2014. Terrelonge had earlier pleaded guilty to attempting to cause grievous bodily harm to the deceased. On 27 April 2015, the judge sentenced them both to life imprisonment with a minimum term of 20 years less time spent on remand.

60. Terrelonge and Burton applied for leave to appeal in May 2015 within the requisite time. Their application was not considered by the Single Judge, but referred by the Registrar to the Full Court. In March 2016 both sought to add further grounds to the appeal based on the decision in *Jogee.*

Background

61. At their trial there had been five co-accused. Oppong was acquitted of murder, but pleaded guilty to attempting to cause grievous bodily harm with intent. Dyer and Joseph were also acquitted of murder, but convicted of attempting to cause grievous bodily harm with intent. Agyeman and Carnegie were acquitted of murder and attempting to cause grievous bodily harm. There was another defendant, Penfold, who was not alleged to be involved in the attack; she was acquitted of perverting the course of public justice.

62. The convictions arose out of an incident in the early hours of Sunday 18 May 2014. The deceased attended a party held at the Beaver Centre in Dagenham, Essex. It finished at about 05:30. The deceased was standing outside the venue with some friends when he was set upon by a group of men. A fatal attack followed in which the deceased was kicked, punched and stabbed to death. A post mortem examination revealed five stab wounds: two non-fatal to the back, two to the right side of the chest

and one to the left side of his chest that penetrated the heart. It was not possible for the pathologist to exclude the possibility that there was more than one knife involved.

The prosecution case

63. The prosecution alleged that Terrelonge had a grudge against the deceased, initiated what occurred and recruited others to attack the deceased. This was confirmed to an extent by the evidence of Oppong, Dyer and Terrelonge's cousin, Burton.

64. The prosecution case that each man at the scene was party to a joint enterprise to attack the deceased with a knife depended to a large extent on CCTV footage analysed by Detective Constable Wren, the prosecution's principal witness. The footage showed:

    i) the defendants having been in or very close to Selinas Lane (adjacent to the Beaver Centre) for several minutes (from 05:25:15) and congregating on the short section of roadway leading to the Beaver Centre.

    ii) Terrelonge picked up a bottle which was handed to Carnegie. At 5:30:06 five of the defendants were in line abreast as they turned left and entered the car park to the Beaver centre.

    iii) Terrelonge, Burton, Oppong and Dyer encircled the deceased and began the attack. Joseph and Carnegie were nearby; they and Agyeman joined in. The attack lasted for seventy to eighty seconds during which Terrelonge repeatedly struck the deceased with a bottle and Burton repeatedly assaulted him. One of the group had a knife although the prosecution could not identify which one.

65. Analysis of the deceased's injuries, his clothing and blood spatter at the scene indicated that the fatal stab wounds were inflicted at the beginning of the attack when he was confronted by Terrelonge, Burton, Oppong and Dyer and while he was still wearing a grey jumper around his shoulders. Accordingly, there were four potential knifemen: Terrelonge, Burton, Oppong or Dyer.

66. The CCTV footage showed that Dyer was carrying something in his right hand several seconds after the fatal blow was inflicted. The jury was invited to conclude that it was a knife. Between 05:31:52 and 05:32:49, the defendants left the scene.

The defence case

67. Terrelonge did not give evidence. His case was that there was a single knifeman who was engaged on frolic of his own. He had picked up a bottle and handed it to Carnegie: as far as he was concerned, this was to be an attack with feet, fists or a bottle only; he was unaware of a knife. He used the bottle on the deceased after the fatal wound had been inflicted and he would not have needed to arm himself with a bottle if he knew a knife was to be used. His conduct was properly reflected in his guilty plea to attempting to cause the deceased grievous bodily harm. It was suggested on his behalf that Dyer was the lone knifeman.

68. Burton's case was that he did not know a knife was to be used, he did not at any point see a knife or see that the deceased had been stabbed and was only present to support his cousin, Terrelonge, in a verbal confrontation with the deceased. It then became

what he thought was a fist fight and the only possible weapon he saw was Terrelonge with a bottle. He attempted to take the bottle from Terrelonge and to pull him away.

69. The other defendants gave evidence each denying that they were a party to a knife attack.

Application to discharge

70. At the close of the evidence, Mr Lakha QC, for Terrelonge, supported by counsel for Burton, submitted that the jury should be discharged in respect of the murder charge. They complained that it had never been the prosecution's case that Terrelonge was the knifeman and the prosecution had not placed any emphasis on footage that appeared to show an arm motion by Terrelonge towards the deceased. Yet, the prosecution in cross-examining the co-accused appeared to suggest that Terrelonge was the stabber. Mr Lakha QC complained that this amounted to a *volte face* on the part of the prosecution and undermined Terrelonge's decision not to give evidence based as it was, in part, on the state of the case at that time.

71. The judge rejected the application. He observed in the course of a detailed and careful ruling:

> "The decision by Terrelonge not to give evidence was, no doubt, a carefully considered one taken with the assistance and advice of a very experienced leading and junior counsel. No doubt what was known as having gone before was taken into account. What was to come if the remaining three defendants, or any of them, were to give evidence was in the realms of complete uncertainty but I apprehend was, at least in general terms, predictable."

He also noted that the Crown's position:

> "outlined from day one [of the trial] … was that Terrelonge was a potential candidate as a stabber; the Crown was entitled to explore if, indeed, he was such since he was in the front line of four [attackers]."

Directions on joint enterprise

72. The judge circulated draft directions on the question of secondary participation. During the course of oral submissions, the judge's attention was drawn to the certified question in *Jogee*. Mr Wood QC, for Burton, invited the judge to consider changing his direction from "realised a knife might be used" to "realised a knife would be used". The judge declined to do so. His route to verdict where relevant read:

> "Question 1: Was Ashley Latty in fact murdered….?
>
> Note: Murder is the unlawful killing one person by another, who, at the time of the killing, has an intention to kill the other

person or an intention to do this other person really serious harm.

If you are sure …. go to question 2.

If you are not sure …. return verdicts of not guilty…. on count 1.

Question 2: Was the person who inflicted the fatal blow with the knife any one of the seven Defendants in the dock?

If you are sure…. return a verdict of guilty on count 1 in his case and proceed in relation to the other Defendants to question 3.

If you are not sure ….. proceed in relation all Defendants to question 3.

Question 3: Please now decide as a fact when the fatal blow was inflicted and …. go to question 4.

Question 4: Did the Defendant, whose case you are considering, participate in the attack upon Ashley Latty before the fatal blow was inflicted?.....

If you are sure ….. go to question 5.

If you are not sure…. return a not guilty in his case on count 1.

Question 5: Did the Defendant, whose case you are considering, prior to the attack commencing, know that another Defendant had a knife?

If you are sure …. go to question 6.

If you are not sure ….. return a verdict of not guilty ..on count 1.

Question 6: Did the Defendant whose case you are considering, prior to the attack commencing, realise that a knife might be used in the attack on Ashley Latty?

If you are sure .... please go to question 7.

If you are not sure …. return a verdict of not guilty …. on count 1.

Question 7: Did the Defendant whose case you are considering, prior to the attack commencing, realise that whoever might use the knife in the attack might do so with the intention of killing Ashley Latty or at the least might do so with intention of causing him really serious harm?

If you are sure … return a verdict of guilty on count 1.

If you are not sure …return a verdict of not guilty on count 1."

Application for leave to appeal against conviction

Terrelonge

73. Terrelonge originally sought leave to appeal against conviction on the following grounds:

    i) The judge erred in failing to discharge the jury after the prosecution changed their case against Terrelonge during the cross-examination of Carnegie and Burton and after he had elected not to give evidence.

    ii) Terrelonge's conviction for murder was inconsistent with the evidence.

74. As we have set out, he subsequently sought leave to appeal on the basis that the decision in *Jogee* made the conviction unsafe.

    i) The judge erred in refusing to amend his direction on joint enterprise to reflect the certified question to the Supreme Court; and

    ii) In light of the Supreme Court's ruling in *Jogee*, the trial judge's directions on joint enterprise were flawed.

Burton

75. Burton originally sought leave to appeal against conviction on the following grounds:

    i) The jury's verdicts in respect of Burton and Terrelonge were perverse. It had been suggested to Dyer during cross-examination that he was the knifeman and he was acquitted of murder.

    ii) When cross-examining Burton, the prosecution, for the first time during the trial, sought to assert that Terrelonge was the knifeman. Burton was unable, and could not have been expected, to answer such questions and his defence was tainted beyond redemption.

76. He subsequently sought leave on the basis that in light of the Supreme Court's ruling in *Jogee*, the trial judge's directions on joint enterprise were flawed.

77. Burton's application for leave to appeal sentence on the grounds of disparity has been adjourned.

Conclusions

Non-Jogee grounds

78. First, we deprecate the increasing tendency on the part of some advocates to apply to discharge the jury simply on the basis the prosecution has or may have changed its

position during the case. There is no principle of law or practice that requires the prosecution to stick rigidly to the case as opened, provided of course that a fair trial of the accused is possible and the accused has sufficient notice of the case he has to meet.

79. In this case there was no dramatic change in the prosecution case. The prosecution did not pin their colours to any one mast as to the identity of the stabber. Terrelonge was always one of the four candidates. In any event, we have no doubt experienced Queen's Counsel and junior would have advised Terrelonge on the possibilities of the case against him changing as his co-accused gave evidence. On that basis he took the tactical decision not to give evidence.

80. Second, there was nothing perverse or inconsistent about the verdicts. The test to be applied is a simple one: have the applicants satisfied the burden on them to establish that no reasonable jury applying their minds properly to the facts of the case could arrive at their conclusions? (per *Fanning and others [2016] EWCA Crim 550*). In our view, a reasonable jury could properly distinguish between the men in the dock. The jury was not bound to follow the approach advocated by the prosecution. Here there were differences in the cases and in the evidence against each of the accused. Terrlonge bore the deceased a grudge and recruited the others to attack the deceased. Terrelonge equipped Carnegie with a bottle. Terrelonge's case was that they intended to fight the deceased with fists, feet or a bottle. Burton knew Terrelonge intended a "confrontation" with the deceased. Both Burton and Terrelonge were at the forefront of the attack and both repeatedly assaulted the deceased. Dyer was also there but it is reasonable to assume that when he gave evidence, his account raised a doubt in the minds of the jury whereas Burton did not. Terrelonge did not give evidence.

Jogee grounds

81. We infer from the jury's verdicts, that the jury made the following factual findings:

    i) The real issue in the applicants' case was whether the prosecution had proved that they knew of the presence and the possible use of the knife and participated with that knowledge in the joint enterprise to attack the deceased; both denied knowledge of the presence of a knife. Post *Jogee* it would not be necessary for the prosecution to go that far, but the judge's direction at question 5 required the jury to find such knowledge as part of the route to verdict.

    ii) Accordingly, the jury convicted both Terrelonge and Burton of being party to a common criminal purpose to attack the deceased, knowing one of their number had a knife, and knowing that the knife might be used with the relevant intention.

82. The judge's directions may not have been in accordance with *Jogee* but, on the jury's findings, this court can safely draw the conclusion that the applicants had the necessary conditional intent (at the very least) that the knife would be used with intent to kill or cause grievous bodily harm should the occasion arise. In other words, the use of the knife with intent to kill or cause grievous bodily harm was within the scope of the plan to which they gave their assent and intentional support (see paragraph 94 of *Jogee*). Indeed, the prosecution case could be said to be stronger post-*Jogee*:

knowledge of the precise weapon is no longer required but, if proved, may lead to an inference of intention. Here, the verdicts make it clear that there was a joint enterprise to cause grievous bodily harm.

83. For these reasons, in our judgment, a post *Jogee* direction would not have made a difference to the jury's verdicts; the convictions were and are safe. It therefore follows that the applications must be refused.

84. Although we have reached our conclusion on the basis of the safety of the conviction, it is our view that, although leave would have been required to argue the *Jogee* grounds, it would in the circumstances of the case have been granted if the applicants had shown the conviction was unsafe. That is because, as we have set out at paragraph 27, trial counsel had in fact done what was open to them to reserve the correctness of the law at the trial; it would in those circumstances be unjust to require the applicants to show more than the conviction was unsafe.

C. MOISES

85. On 12 February 2016 the applicant Moises was convicted in the Crown Court at Woolwich, before Mr Recorder Evans QC of wounding Jordan Joseph with intent to do grievous bodily harm (count 1) and having a bladed article in a public place (count 3). He was sentenced to six years' imprisonment on count 1 and six months concurrent on count 3. His co-accused offered guilty pleas and were dealt with separately: Kaba pleaded guilty to affray and possessing an offensive weapon (a belt); Bambgboye pleaded guilty to affray.

86. As this was an application brought within 28 days of conviction on the grounds that the judge misdirected the jury in law in the light of the decision in *Jogee*, we apply the normal principles in relation to safety as set out at paragraphs 7 to 9 above.

Background

87. The convictions arose out of an incident on 17 August 2015. The complainant, Jordan Joseph, was with two male associates (Lamin and Wiggan) in Carphone Warehouse in Streatham, south London. At around 16:20:00, five males entered the shop: two unknown males, the applicant, Kaba and Bambgboye, in that order. The complainant Joseph was then stabbed in his arm and buttocks; he was uncooperative in the police investigation and refused to give evidence at trial.

The prosecution case

88. The prosecution case was that the applicant had stabbed the complainant with the knife intending to cause really serious bodily injury or had participated in a joint attack sharing the common purpose of intending to wound the complainant with the intention of causing him really serious bodily injury. It was a planned knife attack in which the applicant was an active and enthusiastic participant.

89. The case was based primarily on CCTV evidence with a commentary from the case officer, and the evidence of Helen Polymon, a shop assistant. The prosecution identified the applicant on the CCTV entering the Carphone Warehouse behind the

first two males, both of whom were clearly carrying knives; their faces were obscured. The applicant too had an item in his right hand allegedly a knife. Kaba was swinging a belt. Bambgboye had his arm in a cast. The two unknown males who entered the shop first had their faces obscured. Lamin, an associate of the complainant, had a knife and was obviously not with the applicant's group; he could be seen swinging and slashing the knife. The applicant was seen making a stabbing motion in the direction of the complainant's buttocks. The CCTV footage showed he left with a knife. The jury heard that the applicant had two previous convictions for possessing a bladed article in 2009 and 2011.

The defence case

90. The defence case was that the applicant was not involved in the attack and was not part of any joint enterprise to attack the complainant. He acted solely in defence of a friend and was able to disarm an attacker and relieve him of a knife. His case was that he had entered the Carphone Warehouse when he saw Joseph had a knife for the purpose of disarming him and preventing him attacking Bambgoye; Joseph had then stabbed the applicant in the arm, but was able to take the knife off him. He was holding that knife when he left.

Directions on joint enterprise

91. In summing up, Mr Recorder Evans QC gave a number of directions to the jury both orally and in writing. In the Route to Verdict document Question 1 concerned self-defence.

> "Question 2: Are you sure that a) he himself unlawfully wounded Jordan Joseph with the intention of causing him really serious harm?
>
> Or:
>
> "Are you sure that, b) the defendant participated in a joint attack on Jordan Joseph, sharing a common purpose with another or others to unlawfully wound Jordan Joseph with the intention of causing him really serious bodily harm. And that Joseph Jordan was wounded."
>
> Or:
>
> "Are you sure that, c) the defendant participated in the joint attack on Jordan Joseph, sharing a common purpose to unlawfully wound Jordan Joseph and the defendant intended to cause him some harm, less than really serious harm, but realised there was a real risk that another in his group might and did wound Jordan Joseph with the intention of causing him really serious bodily harm.
>
> "So those are the three questions you have to answer. That is where joint enterprise comes in. You have the direction on joint enterprise, particularly in relation to 2 and 3. So intention to

> cause really serious harm. This is another legal direction but I felt it helpful if I put it in at this stage, because I have mentioned intention.
>
> "The prosecution has to make you sure that the defendant in 2a or 2b, that is the question before, or another, 2c, intended to cause Jordan Joseph really serious harm. Naturally, you can reach a conclusion of what the defendant's intention was only by examining the circumstances of the incident. This includes, and this is common sense, ladies and gentlemen, what was done and said at the time; the nature and duration of the attack; the use of any weapon; the nature of the injury or injuries inflicted; and the defendant's behaviour before and immediately afterwards. And you should also, of course, weigh in the balance what the defendant said about his state of mind in the evidence before you".

92. The third basis on which the judge left the case to the jury had not been the prosecution case which we have described above.

93. In relation to the offence of possession of a bladed article the jury were directed they could only convict if they were sure he had a knife with him in the Carphone Warehouse without good reason or lawful authority.

Application for leave to against conviction

94. Moises applies for leave to appeal against conviction on the ground that in the light of the judgment in *Jogee* the judge misdirected the jury in relation to secondary participation.

Conclusion

95. It is plain from the verdict of the jury on the bladed article count that they found that Moises had the knife throughout; it is fanciful to suggest on the evidence that he did not enter the premises with a knife and that the group did not enter the premises as part of a pre-planned attack. The jury also plainly rejected his evidence that he had acted in defence of a friend.

96. Although the judge did leave the case to the jury on a third basis which was a misdirection in the light of the decision in *Jogee,* in truth, on the evidence and the findings of the jury, the case was proved against him as a principal or as an accessory on normal accessory principles. The conviction was safe. The application is refused.

D. HORE

97. On 24 June 2015, in the Crown Court at Liverpool, before the Recorder of Liverpool, HHJ Goldstone QC and a jury, the applicant Hore and his co-accused Kenny, Walmsley and Mello were convicted of the murder of Anthony Duffy (Count 1) on 27 May 2014. Hore was sentenced to imprisonment for life; the period of 21 years, less

time spent on remand, was specified as the minimum term under s.269(2) Criminal Justice Act 2003.

98. Hore applies for an extension of time of 8 months in which to appeal against conviction on grounds based on the decision in *Jogee*. This application has been referred to the court by the Registrar. The applications of Mello and Walmsley to appeal against conviction on grounds unrelated to the decision in *Jogee* were refused by the single judge and have been renewed. As no ground relating to the decision in *Jogee* is raised in these applications, they will be considered separately.

The prosecution case

99. The deceased, Anthony Duffy was a drug dealer. Shortly before his death he asked the applicant Hore to burgle a house and cannabis "farm" at 6 Hall Lane, Walton Vale and steal a crop of cannabis owned by the co-accused Kenny and Walmsley. In an attempt to curry favour, Hore contacted Kenny and Walmsley and told them what the deceased had asked him to do. Kenny and Walmsley decided they would exact revenge. It was the prosecution case that Hore's role was to lure the deceased to a rendezvous on a disused railway (known as the "loop line"), where the deceased thought Hore would hand over the cannabis whereas, in truth, the plan was to attack him.

100. Whilst Hore was with Kenny and Walmsley discussing the arrangements, a call was made to Mello (who was the person who supplied the weapons used in the attack). Telephone evidence showing the frequent contact and the contents of text messages between Hore and the deceased between 26 and 27 May 2014 was placed before the jury.

101. Hore arranged a meeting on the night of 27 May 2014 and gave the deceased directions to the location. The deceased's sister, Julie, drove the deceased to the scene. She knew her brother was going to meet someone called "Horey". Whilst they were en route the deceased was on the phone to "Hore. After one call the deceased said to her "I'm sure he's just said, don't come". He hoped it was not a "stitch up" and called back. After that call the deceased told her to drive on. Telephone evidence showed frequent telephone traffic between Hore's phone and the deceased between 23.12-23.40 and a flurry of contact or attempted contact which ended at 23.46.

102. Meanwhile Hore, Kenny and Walmsley were already at the rendezvous on the loop line. Mello arrived with a plastic bag and left. His co-accused took out a gun and at least one knife from the bag. Walmsley fired the gun once or twice with the silencer fitted.

103. When the deceased and his sister, Ms Duffy, arrived shortly before midnight in the road near the loop line Ms Duffy saw two younger men (Kenny and Walmsley) carrying a bin bag and an older man she assumed was (and later identified as) Hore. One of the young men threw the bags into the back of the car and got in, he pulled something very long out of his inside pocket, which she assumed was a gun and the deceased jumped out of the car and ran away to an adjacent street; the two younger men chased him.

104. The deceased was brought to the ground in the street and stabbed to death in a brutal and sustained knife attack. During the attack one of the assailants was heard to say, "you house-robbing bastard". A 999 call to the emergency services was made at 23.53.

105. Notwithstanding the swift attendance of the emergency services, the deceased died as a result of the multiple stab wounds. The pathologist identified twenty eight wounds to the left side of the face, left upper arm, left hand, left side of the chest, the right shoulder and the left leg as well as from the head to the left side of the lower back.

106. Matching bin bags full of grass cuttings (intended to be taken for cannabis and the proceeds of the burglary) were found nearby. On one of the bags the police identified Hore's fingerprint and a mixed DNA profile which could be that of his co-accused Kenny and Walmsley and one other person.

107. Following the murder, there was contact between Hore and his co-accused Kenny and Walmsley and evidence that they each disposed of their mobile phones. Kenny and Walmsley changed their clothes and booked flights to Amsterdam. They were arrested on 30 May 2014 at Manchester airport.

108. The prosecution suggested the telephone contact between Hore and the deceased and the fact that Hore sent a text message indicated he had plenty of time and opportunity between seeing the weapons and the arrival of the deceased to call the meeting off.

109. Hore was arrested in the morning of 28 May 2016 and made no comment in his earlier police interviews but in a prepared statement he named Kenny and Walmsley as the two men who had chased and attacked the deceased; he did not mention Mello or anyone arriving at the loop line with weapons. In his final interview he told the police that everything had been set up by Kenny and Walmsley, that he did not know what was going on and that when he did he was frightened. In his defence statement he mentioned an Asian man arriving with a gun; the police identified that person as Mello who was arrested and charged.

The defence case

110. The defence case was that Hore was not party to any joint enterprise to cause really serious harm to the deceased; but if he was, he withdrew from it.

111. He admitted presence at the scene of the attack, but claimed the killing of his friend by Kenny and Walmsley, with a weapon supplied by Mello, was something that he never intended, or wanted to happen. He had been asked by the deceased to steal the cannabis, but since it was not his style, he had chosen two other men, his co-accused Kenny and Walmsley, to do it instead. It was an unfortunate co-incidence that they were the very men who owned the crop. He thought that his presence on the evening of the attack was to effect an introduction between the deceased and his co-accused. It was only when they were together and Mello had arrived with the knife and the gun with the silencer that he realised that the situation had got very much more serious. He did the best that he could, in very difficult and potentially dangerous circumstances, to prevent the deceased from coming to the rendezvous.

112. Kenny, Walmsley and Mello denied that they had been involved in the fatal attack accusing Hore of lying to protect himself.

Directions on joint enterprise

113. The judge's directions on joint enterprise began with an explanation that there was no doubt the deceased was murdered: whoever stabbed him intended he should be killed or suffer really serious injury. He continued:

> "whoever was a party to the stabbing of Anthony Duffy either shared the intention of the stabber or foresaw a real risk that Anthony Duffy might be stabbed with that intention. In other words not just the stabber or stabbers but all those who were a party to the stabbing are guilty of murder."

Having set out the elements of joint enterprise as far as Kenny, Walmsley and Mello were concerned, he said in relation to Hore:

> "He of course alone of the four defendants admits his presence at the place where Anthony Duffy was ambushed but denies being part of a plan to inflict any violence on Anthony Duffy, far less to kill him. His case is that he was doing no more than to effect an introduction between Kenny and Walmsley on the one hand and Anthony Duffy on the other hand, who shared a common interest in the cannabis crop at 6 Hull Lane. If you conclude that this is or may be the extent of his involvement then…. you will return a verdict of not guilty.
>
> But there are a number of other potential scenarios for you to consider….. If you reject the account of John Hore as to the limited extent of his role in facilitating the meeting … and are sure that, as he said in his evidence he foresaw when he saw the knife and the gun that Anthony Duffy could have been robbed, badly hurt or killed and he continued thereafter to be instrumental in leading Anthony Duffy to the ambush site then he will be guilty of murder unless he can avail himself of the defence of withdrawal."

114. In relation to withdrawal, the judge directed the jury that the burden was on the prosecution to disprove withdrawal and added:

> "Before the defence of withdrawal can succeed there has to be some evidence that the person concerned… has not only withdrawn from the joint enterprise but also save in exceptional circumstances has communicated his intention to withdraw to those who were part of the plan."

115. The judge equated "withdrawal" with taking "effective steps to withdraw from the joint enterprise by what he said over the phone to Anthony Duffy". In relation to communication of withdrawal, in this case there was no evidence of communication; the judge directed the jury to consider whether exceptional circumstances existed that

prevented his telling Kenny and Walmsley he was withdrawing. The judge emphasised the issue was a matter of fact and degree and suggested the jury focus on the telephone contact after 23:23 the time by which Hore was aware of the weapons at the scene.

116. If the jury accepted Hore was a party to a plan to attack the deceased but withdrew or might have withdrawn from the plan, they were directed then to consider the alternative count of conspiracy to cause grievous bodily harm with intent.

117. The judge provided the jury with written directions to the same effect and a route to verdict. The first of three questions was:

> "Am I sure that, at some state, he was part of a joint enterprise to cause Anthony Duff at least grievous bodily harm with intent to cause GBH. If the answer is No: Verdict not guilty. If the answer is yes, consider question 2."

Questions 2 and 3 were questions on withdrawal.

118. Accordingly, the central issues for the jury in respect of Hore were:

i) Was Hore part of a joint enterprise to cause the deceased at least grievous bodily harm with intent to cause grievous bodily harm?

ii) Had Hore withdrawn from that joint enterprise, before the deceased was attacked?

iii) Was it possible that the circumstances existing at the time when he withdrew from the joint enterprise were such that, because of the exceptional circumstances, it was neither practicable nor reasonable to expect him to communicate his withdrawal from the joint enterprise to those who carried out the attack?

Application for leave to appeal

119. This is a case where the safety of the conviction could not be challenged on the basis of the law as it stood at the time of the conviction; hence Hore was advised against appealing. There is therefore just one ground of the application, namely, that the judge misdirected the jury in relation to the mental element required for a secondary party to murder in the light of the judgment in *Jogee*.

120. It was submitted that the judgment in *Jogee* is of particular relevance to the applicant's case because the question of intent was never posed for the jury in this case. The difference between joint enterprise on foresight and joint enterprise on intention on the facts here was stark. Had the jury been given the post-*Jogee* direction it would, or could, have made a fundamental difference to the verdict in the applicant's case and the murder conviction must therefore be unsafe. There would be a substantial injustice if he was refused exceptional leave and his conviction was upheld.

Conclusion

121. The prosecution case was that when Hore lured the deceased to the meeting he did so "in the certain knowledge of what was to happen to him". By its verdict, the jury clearly rejected his defence both that he was not a party to an enterprise where what was intended at least was grievous bodily harm to the deceased and that he withdrew from the plan.

122. He was convicted therefore of luring the deceased to an isolated place where he was to be attacked with weapons including firearms. In this case the reference to foresight only arose because Hore admitted in his evidence that when the weapons arrived he foresaw that the deceased could have been robbed, badly hurt or killed yet continued to lure the deceased to the scene. This was not, on analysis, a parasitic accessory liability case; the issue was as crystallised in the first question the judge left for the jury

123. It follows that this is not a conviction where there is a case, let alone a strong case, that Hore would not have been convicted of murder under the law as explained in the decision in *Jogee*. The case against him fell clearly within the principles set out in *Jogee*; there was a clear agreement between Hore, Walmsley and Kenny to lure the deceased to the loop line with intent to cause, at least, really serious bodily injury and considerable intentional assistance in carrying out the agreement. We therefore refuse leave.

E MIAH, MIAH, HUSSAIN AND KHAN

124. On 16 September 2014 at the Luton Crown Court before HH Judge Foster, Javed Miah, Rubel Miah, Mohammed Hussain and Fahim Khan were convicted of the murder of Isaac Stone on 25 January 2014 and two counts of possession of an offensive weapon. Rubel Miah and Fahim Khan were also convicted of wounding Shajidur Rahman with intent (as an alternative to a count of attempted murder); Javed Miah and Hussain were acquitted of both the attempted murder and the wounding with intent of Shajidur Rahman.

125. They were all sentenced to life imprisonment with a minimum term of 28 years for Rubel Miah and Fahim Khan, a minimum term of 26 years for Javed Miah and a minimum term of 25 years for Mohammed Hussain.

126. Javed and Rubel Miah lodged an application for leave to appeal against conviction within the requisite period of 28 days on non-*Jogee* grounds (see paragraph 150 below) and were granted leave to appeal. In April 2016, they sought leave to add a further ground based on the decision in *Jogee*. In the same month, April 2016, Khan sought leave to appeal and an extension of time with grounds based on the decision in *Jogee*. Hussain did the same in May 2016.

Background

127. The convictions arose from a fight that occurred at about 18:45 on 25 January 2014 during the course of which Isaac Stone was stabbed to death and another man

Shajidur Rahman received horrific facial injuries including the complete amputation of his nose.

The prosecution case

128. The fight was said to have been triggered by the uploading of a YouTube rap video *"Go missing"* at about midnight on 24 January 2014. It had been directed by the deceased and prominently featured the deceased with Marfuz Ahmed. Some of his friends, including Shajidur Rahman, also appeared in it.

129. The next morning, Saturday 25 January 2014, Javed Miah contacted Glamour Cars in Luton to hire a luxury white Range Rover, saying it was for a birthday. He arrived to pick up the car with Mohammed Hussain and his brother Rubel Miah; Mohammed Hussain signed the hire agreement because he was over twenty one and had a driving licence. At 16:00, they left Glamour cars in the Range Rover which had a tracking device.

130. The tracker information revealed that the vehicle arrived in Bedford shortly before 17:00 and was driven around the area, making a number of stops including to pick up Khan and Hussain. At 17:32 the Range Rover pulled up on Greenhill Street near Habison's Hardware store. Rubel Miah and Khan went into the shop and purchased two meat cleavers; it was the evidence of Khan that Rubel Miah made the purchase when he was present. Khan said the cleavers were bought to cut up blocks of cannabis which he was engaged in selling.

131. Shortly before 18.00 the Range Rover stopped near a McDonald's at Castle Lane. Rubel Miah and Khan got out and made an attempt to find the deceased. CCTV evidence showed Rubel Miah and Khan meeting and speaking to Shajidur Rahman on two occasions. It was Shajidur Rahman's evidence that they said there was no problem with him, but there was a problem with Marfuz Ahmed and the deceased and they wanted to sort it out that night. His evidence was that he thought they wanted a fist fight and asked him to get hold of Marfuz and the deceased to sort it out. Rubel Miah and Khan got back into the Range Rover.

132. The evidence before the court was that the deceased and Marfuz Ahmed had spent that afternoon together, for some of the time driving around the centre of Bedford in the deceased's Corsa car.

133. The Range Rover then dropped Mohammed Hussain off at his home in Maitland Street (an adjoining street to Costin Street where the Miah family lived) at about 18:11. The car followed the road round and parked at one end of Costin Street at 18:14. Within minutes of being dropped off, Mohammed Hussain made two very short calls to Javed Miah. It was the prosecution case that Mohammed Hussain had seen the Corsa driven by the deceased as it passed his house and wished to alert his friends. The deceased arrived in Costin Street from the other end and parked, expecting a confrontation; with him in the car were Shajidur Rahman, Marcus Izwani, Marfuz Ahmed and a man referred to as Zack. Within moments, Mohammed Hussain had left his home armed with a weapon and had cut through an alleyway to join his co-accused in the attack.

134. The group led by Khan and Rubel Miah approached them and four of those in the Corsa got out. Zack appears to have played no part.

135. A fight started. Shajidur Rahman was attacked by Khan who had a weapon in his hand, most probably one of the meat cleavers (wrapped in a blue bag). Khan "hacked" at Shajidur Rahman's face causing several deep and heavy cuts and cutting off his nose. As Shajidur Rahman was under attack, he saw Rubel Miah and another man go for the deceased. Izwani and Marfuz Ahmed ran away when they realised they were outnumbered and weapons were involved.

136. The CCTV cameras picked up Marfuz Ahmed running up the middle of Costin Street past a witness, Mr Islam, and heading for Midland Road. Shajidur Rahman, already injured, staggered in the same direction. The deceased can be seen followed probably by Rizwani. They were being chased by three men and then attacked; at the conclusion of the evidence, the Crown contended that these were Khan, Rubel Miah and Hussain, with Javed Miah standing close by (on the other side of a row of cars). Hussain had something in his hand which appeared to be a bladed weapon; Hussain said it was his phone. In relation to the attack, the deceased was brought to the ground with a series of blows. About ten seconds later a man in a white t-shirt could be seen walking back down the pavement with what appeared to be a blade in his right hand, probably a cleaver. The prosecution case, at the time of the closing speech, was that this was Rubel Miah. He was followed by Mohammed Hussain. As Mohammed Hussain went out of view he passed Shiuly Begum (the Miah brothers' sister) in her dressing gown. Khan had been left with the deceased and was still assaulting him with a weapon covered by a blue plastic carrier bag. The deceased was trying to grab at the bag. Shiuly Begum and Mr Islam tried to restrain Khan but he made a further fifteen to twenty strikes at the deceased using both hands. Ms Begum and Fahim Khan then walked back down Costin Street. Members of the public gathered to assist the deceased.

137. Thato Moleke, the next-door neighbour of the Miah family who lived in Costin Street in had gone into the street when he heard a commotion. He purported to identify during an identification procedure Rubel Miah as having a knife and Javed Miah as shouting in the street. In his evidence he described Rubel as wearing a white t-shirt on which there were blood stains. He saw Javed Miah coming away from the group to go back inside his house. He had his hands on the waist of his jacket as if he was hiding something.

138. Samantha Willis's evidence was that while the victim was lying on the floor, an Asian man in a white t-shirt walked towards the white Range Rover shouting two or three times "I'm going to fucking kill him". He was walking with a bit of a limp and appeared to be putting something down his trousers. The prosecution case was this was Rubel Miah. The engine of the Range Rover was already running and the man she had seen got into it on the driver's side. Just four minutes or so after the fight started it drove off.

139. When the deceased's friends realised he was not with them, they returned and discovered him dying in the street. He was clutching in his hand a blue carrier bag. Paramedics arrived swiftly but could not save him. He had received multiple stab wounds, one of which, a single penetration of his left lung by a narrow bladed knife (not a cleaver), caused his death. A discarded knife was found nearby.

140. The tracking device showed that the Range Rover left Costin Street just four minutes after it had arrived. Its first port of call was Heron Quay, a cul-de-sac by the river. The prosecution said that this was in order to dispose of the weapons.

141. Mr Maruf, the Glamour Cars broker, was surprised to receive a phone call from Javed Miah that evening, just before 20:00 saying that he wanted to return the car. He told him that something had happened. The car was returned by Rubel Miah and Fahim Khan.

142. Examination of the Range Rover revealed plastic packaging from a meat cleaver in the footwell, the same as that used by the store in which the cleavers were bought. The packaging in the footwell bore the fingerprints of Javed and another part of the packaging that of Rubel Miah. A mixed DNA profile found on a meat cleaver handle recovered from the scene (which had been used to attack Shajidur Rahman) was predominantly that of Fahim Khan, but the profile suggested at least three, possibly four, contributors of DNA one of whom could have been Javed Miah. This could have come from direct transfer through handling of the cleaver by him or by secondary transfer through the cleaver coming into contact with a surface which had Javed Miah's DNA on it. The knife was found to have Shajidur Rahman's DNA on it but that may have come from his blood trail.

The defence case and argument on the evidence

143. Each of the four defendants chose to make no comment when they were interviewed although Khan handed in a prepared statement.

144. The defence case at trial was that there had been no planned attack; the meat cleavers had not been purchased to be used as weapons; Mohammed Hussain and Javed Miah were not even aware that they had been purchased at all. The occupants of the Corsa were the aggressors. Any violence in which they were involved was in their self-defence or the defence of a friend.

145. The Miah brothers did not give evidence.

    i) Javed Miah's case involved admitting presence but he claimed he knew nothing of any planned attack and played no part. He was simply standing in the street.

    ii) Rubel Miah's case was that he had not purchased the meat cleavers as weapons, but to cut drugs. The deceased attacked him for no reason and he defended himself, but not with a weapon. He was not the man in the white t-shirt; he was wearing a black hood; the man in the white t-shirt was an unknown person. He was knocked to the floor and repeatedly kicked and punched. He was not in the immediate vicinity nor directly involved in the fight between Shajidur Rahman and Fahim Khan.

146. Mohammed Hussain and Fahim Khan did give evidence.

    i) Hussain admitted being present at the scene but only out of curiosity when he heard the noise of the fight. He knew nothing of any attack and the object seen in his hand was a phone.

ii) Fahim Khan accepted he knew of the hiring the Range Rover, but it was entirely innocent; he had got into the car when it stopped at his house; he followed Rubel Miah into the shop when he bought the cleavers. He admitted injuring Shajidur Rahman but he said he did so in self-defence and in defence of Rubel Miah. He had only grabbed the cleaver from the car when he saw Rahman coming towards him. Having fought off Rahman he was approached by two more men, one of whom was the deceased. He realised they were unarmed and threw the cleaver to the floor. He wrapped the blue plastic bag around his knuckles because he knew they were going to fight. He was just hitting the deceased, there was no weapon. He had nothing in his hand.

Directions on joint enterprise

147. The judge gave the jury one document called "Legal Directions Upon Offence Definition" and another called "Routes to Verdict". During his summing up, he took the jury through the Routes to Verdict in the following terms:

> "First, Count 1, the allegation of the murder of Isaac Stone: Are you sure that someone, whether one of these defendants or somebody else, inflicted the fatal injury unlawfully with the intent to cause death or really serious bodily harm?
>
> "If the answer is yes, proceed to question 2: if the answer is no, all defendants are not guilty of Count 1 and you can proceed to Count 2.
>
> "Question 2: Are you sure that the defendant whose case you are considering inflicted the fatal injury unlawfully with the intent to cause death or really serious bodily harm? If the answer is yes, that defendant is guilty of murder on Count 1 and you need to proceed to question 3 to consider the cases for or against the other three defendants.
>
> "Question 3: Are you sure that the defendant whose case you are considering was part of a planned agreement to attack Isaac Stone unlawfully with the intention of causing death or really serious bodily harm and took some part in it and that the plan or agreement was in existence at the time of the assault and that the defendant whose case you are considering was still part of it and had not withdrawn from it? I refer back to paragraph 6 of the written directions. If the answer is yes, that defendant is guilty of murder on Count 1 and you need to only proceed to question 4 in connection with any other defendants about whom you are not sure on question 3.
>
> Question 4: Are you sure that the defendant whose case you are considering was part of a joint enterprise or agreement to attack Isaac Stone unlawfully and knew that another party to the plan, whether one of these defendants or someone else, was armed with a bladed weapon which he might use with the intent to cause death or really serious harm and that other person in fact

> did so against Isaac Stone and that the plan or agreement was in existence at the time of the assault and that the defendant, whose case you are considering, was still part of it and had not withdrawn from it, I refer back to paragraph 7 of those written legal directions. If the answer is yes then that defendant is guilty of murder on Count 1; if the answer is no and the answer to question 2 and 3 was also no, then the defendant is not guilty of murder on Count 1 and proceed to question 5 to consider the alternative verdict of manslaughter.
>
> Question 5: Are you sure that the defendant whose case you are considering was part of a joint enterprise or agreement to attack Isaac Stone unlawfully and knew that another party to the plan, whether one of these defendants or someone else, was armed with a bladed weapon which he might use to inflict some harm short of really serious bodily harm and that other person did in fact attack Isaac Stone with the bladed weapon which caused his death and that the plan or agreement was in existence at the time of the assault and that the defendant, whose case you are considering, was still part of it and had not withdrawn from it. If the answer is yes, but the answers to questions 2, 3 and 4 were no then the defendant is guilty of manslaughter. If the answer to 2, 3, 4 and 5 were no then the defendant is not guilty to any offence under Count 1."

The jury notes

148. During their deliberations, the jury handed up two notes concerning the correct interpretation of the legal directions on the law of joint enterprise. The judge discussed the correct approach with counsel. Defence counsel invited him to expand the direction he had already given. He declined to do so for fear of confusing the jury. When he answered their questions he was at some pains to make clear that these were answers to the questions and did not supersede the written directions already given. He said:

> "for a defendant to be guilty of murder, assuming you are sure that Isaac Stone was murdered, and if you are not sure that he was the person who inflicted the fatal stab wound, you must be sure that either (i) he participated in a joint plan to attack Isaac Stone or, in the words of the question, to have a fight with Isaac Stone and had not withdrawn from that plan with the intention to kill him or cause him really serious bodily harm, or (ii) he participated in a joint plan to attack Isaac Stone or, in the words of the question, to have a fight with Isaac Stone, and had not withdrawn from that plan, and he knew that another party to the plan was carrying a bladed weapon which that other person might choose with the intention to kill him or cause him really serious bodily harm, and in fact does so. On option I above it is possible for an initial plan to attack Isaac Stone without an intent to cause death or really serious bodily harm to become an attack with that intent on the spur of the moment, but for a

> defendant to be guilty of murder you must be sure that he participated in the plan and had not withdrawn from it, and the intent existed at the time of the fatal assault. On option 2 it is not necessary that the defendant whose case you are considering intended or desired that the other party to the plan would use the bladed weapon with the intention of causing death or really serious bodily harm, provided you are sure that he knew the other party to the plan was carrying a bladed weapon which that other person might use with that intent and did in fact do so."

149. He emphasised that mere knowledge of a plan was not enough. In answer to their third question he directed the jury in clear terms that being party to a plan to fight the deceased or simply present at the scene would not be sufficient to amount to murder. The prosecution had to prove the mental element and participation in the plan.

Appeals and applications to appeal against conviction

Javed Miah and Rubel Miah

150. The appellants have leave to appeal against conviction on the following ground:

> "That the judge's directions to the jury on participation were not sufficiently tailored to the facts of the case. This includes the judge's answers to the jury questions in particular question 3."

They seek leave to add a ground that

> "The judge misdirected the jury in relation to joint enterprise in the light of *Jogee."*

151. Thus, the arguments were as follows.

i) They contended that as the judge had directed the jury on the basis that there were two routes to the verdict, one of which was impermissible in the light of the decision in *Jogee,* the court could not safely conclude that the jury had followed the permissible route.

ii) Javed Miah contended that his acquittal on the charge of attacking Shajidur Rahman showed there cannot have been a concerted plan to attack either Rahman or the deceased. There was no evidence to show that he had a weapon as he was not the man in the white t-shirt. There was no evidence therefore he was a principal and no evidence of any participation by him.

iii) Rubel Miah contended that he was not the man in the white t-shirt; the expert for the prosecution had identified that person as Javed Miah, but that was not the case the prosecution made. The man in the white t-shirt was someone unconnected with them. Rubel Miah was not engaged in the attack on the deceased. He ceased to participate after the attack on Shajidur Rahman.

Fahim Khan

152. Khan sought leave to appeal against his sentence within the prescribed time and was granted leave. He applied in April 2016 for an extension of time of eighteen months in which to apply for leave to appeal against conviction on the one ground that the judge misdirected the jury in relation to joint enterprise in the light of *Jogee*; in support of this grounds, he sought to rely on other criticisms of the summing up which are very similar to those made by Javed and Rubel Miah. He contended that the principals to the killing were the man in the white t-shirt and Hussain. There was no evidence of participation by him. He also seeks leave to appeal on the basis that the ground of appeal on manslaughter was incomplete and inadequate.

Mohammed Hussain

153. Similarly, Hussain applied for leave to appeal against sentence within the prescribed time and was granted leave. He applied in May 2016 for an extension of time of approximately 19 months for leave to appeal against his conviction for murder on the one ground that the judge's directions on joint enterprise were materially inadequate or mistaken. He also seeks leave to rely on the criticisms of the summing up which are very similar to those made by Javed and Rubel Miah.

The appeals against sentence

154. The appeals against sentence of Javed Miah, Fahim Khan and Hussain and the renewed application for leave to appeal against sentence of Rubel Miah have been adjourned.

Conclusions

Non Jogee grounds

155. We reject the assertion that the judge's directions to the jury on participation were not sufficiently tailored to the facts of the case. The judge ensured his original directions in the body of his summing up were circulated between counsel and agreed by them; he did the same in relation to his proposed answers to the jury's questions.

156. Trial counsel did not advance the kind of argument before him that has been advanced before us. This was, no doubt, because they were satisfied that the directions as delivered were sufficiently tailored to the facts of the case. It was a matter for the judge the extent to which, if at all, he wished to expand upon his original directions when the jury sought further help. He was wise to avoid it if at all possible. Having considered the directions as a whole and in context, we reject the criticisms made in respect of all the applicants and appellants.

157. Suggestions were made during the course of argument that the judge should have given a direction on withdrawal. As the Single Judge rightly observed this was not a case where the issue of withdrawal arose.

158. We consider that there is no merit in the application made by Khan to seek leave to appeal on the basis that the direction on manslaughter was inadequate. The judge's direction was sufficient.

Jogee ground

159. Based upon the clear directions of the judge, the objective evidence of hiring by Javed Miah of the Range Rover (together with its use to find the deceased and its return after the murder), the purchase of the meat cleavers by Khan and Rubel Miah, the finger prints of Javed Miah on the wrapping and the inconclusive evidence of his DNA on the cleaver found in Costin Street, together with the CCTV footage, leave, in our view, no room for doubt that the jury made the following factual findings:

i) This was a planned attack to use weapons to inflict serious violence on the deceased in which all were involved. Weapons (in the form of two cleavers) were specifically bought for that purpose. The fact that that Javed Miah and Hussain were acquitted of the attack on Shajidhur Rahman is not surprising in the light of his evidence that the main object of the attack was the deceased.

ii) The common purpose was to inflict serious injury on the deceased of the kind that caused his death; that it was a knife rather than a cleaver that killed the deceased did not matter.

iii) The appellants had agreed to carry out a criminal venture and each was liable for the acts to which they expressly or impliedly gave their assent, namely the death of the deceased, caused by a bladed weapon.

iv) They all went in search of the deceased and then to the scene of the attack. All chased the deceased or otherwise participated in a joint attack upon him: in the light of the judge's answer to the third question posed by the jury (see [149] above) and their verdict, in relation to none of the defendants was he 'simply present' or not participating. All knew that a bladed weapon would be deployed. The suggestion that the person in the white t-shirt was not one of them was fanciful; on the evidence it was Rubel Miah.

160. Given the facts that the jury must have found (including the planning involving the Range Rover and the evidence of joint enterprise to engage in violence with a bladed weapon), we conclude that the conviction was safe on the basis of the route to verdict in the third question. In any event, we conclude that substantial injustice was not demonstrated. These applications should be refused.

F. HALL

161. On 18 September 2007 at the Bradford Crown Court before HH Judge Gullick, the then Recorder of Bradford, the applicant Hall, Laura Mitchell and Henry Ballantyne were convicted of the murder of Andrew Ayres and violent disorder. They were each sentenced to life imprisonment with a minimum term of 13½ years, with concurrent sentences for the violent disorder. Carl Holmes pleaded guilty to murder and was sentenced to life imprisonment with a minimum term of 13½ years. Jason Fawthrop was acquitted.

162. On the basis of the advice of leading trial counsel, no application was made by Hall for leave to appeal against conviction. It was accepted on the application before us that there was no proper basis on which to challenge the conviction on the law as it then stood. His application for leave to appeal against sentence was refused and no

application was made to renew the application. Appeals by the co-defendants Laura Mitchell and Ballantyne were dismissed on 4 November 2008: [2008] EWCA Crim 2552.

The prosecution case

163. At 01:46 on Sunday 28 January 2007 Craig Powell ordered a taxi to collect him and his girlfriend, Claire Francis, his brother Dean and Dean's girlfriend from the King's Head public house, Bradford. When the taxi arrived, probably about two minutes later in the car park, it waited for a few minutes. Michael Hall and his co-accused then came out and took the taxi. The taxi driver realised they were not his fare and asked them to leave. At the same time Craig Powell came out and he, too, asked them to get out. By that time, all concerned had had drunk substantial quantities of alcohol.

164. Laura Mitchell, Hall's girlfriend, became aggressive and started arguing with Claire Francis. Others, including Holmes and Hall and a friend, Carl Wood, at first tried to calm her down. However, as Mitchell continued to be violent, Holmes, Hall and Wood also became violent, in particular towards Craig Powell. The violence involved the use of fists and feet to punch and kick. Laura Mitchell joined them. Claire Francis went to fetch Dean Powell from the public house. Craig Powell slipped but did not fall to the ground. He was repeatedly kicked and punched. Dean Powell and the deceased, Andrew Ayres, came out. Dean Powell pulled one of the attackers away, probably Hall, and Laura Mitchell jumped on Powell's back. He shrugged her off, but then was attacked with kicks and punches by her and her co-defendants. The evidence of John Walsh, an independent witness who had gone into the car park of the King's Head when the taxi arrived, was that Hall, Holmes and Mitchell were engaged in a determined attempt to get both Powell brothers to the ground and were kicking and punching them. It was the prosecution case that the only conceivable purpose was to kick them with shod feet whilst they were on the ground.

165. Although there was a short lull in the violence, it was the prosecution case that there was one single joint enterprise in which there was a common intent to cause serious bodily injury through the use of shod feet or other weapons to the Powell brothers and the deceased so as to teach them a lesson because they had dared to stand up to them.

166. During the lull, the co-accused, including at least Holmes and Wood (although on the evidence neither Hall nor Laura Mitchell) crossed the Halifax Road and went to 8 Buttershaw Lane, home of Jason Fawthrop. Craig Powell, Dean Powell and the deceased walked to the mouth of Buttershaw Lane; it was Craig Powell's evidence that Dean Powell and the deceased were uninjured and that the deceased gave him his jumper to wipe has face as it was covered in blood.

167. The co-accused obtained a knuckleduster, a CS spray canister and what was described as a mace or flail. Accompanied by Henry Ballantyne, Fawthrop and his girlfriend, they returned to the car park. Dean and Craig Powell and the deceased anticipating they were about to be attacked with weapons (as they said they saw a flash of metal), retraced their steps back over the Halifax Road to the King's Head but found themselves locked out. Their evidence was that they were both sprayed with CS gas.

168. A chase ensued. Craig Powell escaped but Dean Powell was caught by three attackers in the car park, including Hall who accepted in his evidence that he grappled with

Dean Powell at this time. He was punched to the face and body, pulled to the ground and kicked. John Walsh identified Hall as a puncher and kicker of the Powells; he said the three men who gave chase to the Powells were shouting "Come on let's have you". He was cut to the top of the head.

169. The deceased was also caught by the group in the car park. He was knocked to the floor where he was kicked. Carl Holmes stamped on his head and upper neck brutally and repeatedly, causing injuries from which he subsequently died in hospital. His injuries were caused by shod feet and not any other weapon. There was no evidence that it was anyone other than Holmes who was engaged in stamping on the deceased's head. There were no injuries to his legs, other than scuff abrasions over the right knee. There were no marks of any significance to the back or chest other than a mark in the region of the left nipple

170. There was, however, evidence that a group were involved in the attack. Some were kicking and hitting a person on the floor and the head of that person was then stamped on: that evidence was given by witnesses who had been in a car which was passing by and which stopped, but the witnesses gave accounts that varied and the evidence that the person on the floor was being kicked by others was not consistent with the pathology evidence to which we have referred. Other witnesses in cars that were passing by (or which stopped) gave evidence.

171. The police were called at 02:02 by Craig Powell and one of the persons in the passing car; the whole incident therefore only lasted a few minutes. The police were on the scene at 02:09.

172. Forensic examination revealed the deceased's blood on Hall's left trainer. The pattern was indicative of an airborne splash rather than a contact stain. Although it was unlikely that this was a contact stain from the deceased at the time of the fatal assault, the prosecution contended that it was open to the jury to conclude that the blood came during close proximity to the attack on the deceased. Bloodstains on Hall's jeans suggested that he had interacted with the Powell brothers when they were injured or bleeding.

173. DNA testing of the knuckleduster revealed the blood of Craig Powell and skin from Dean Powell on its leading edge; the evidence of the forensic scientist was that it had come into forceful contact with Dean Powell because of the impacted skin and also with Craig Powell when he was injured and bleeding. Ballantyne's DNA was on the knuckleduster; it may have come from his blood or from wearing the knuckleduster. Other bloodstains on the clothing of the co-accused also indicated their contact with the Powells.

174. After the deceased had been attacked, the fighting stopped. Hall and his girlfriend, Laura Mitchell, went to 8 Buttershaw Lane from where they left by taxi shortly afterwards.

The defence case

175. Hall, who had made no comment in interview, gave evidence that, with regard to the first phase, as soon as he got out of the taxi, he and Craig Powell started fighting. He did not intend to cause anyone really serious harm and was just punching and not

kicking. He was acting in lawful self-defence. During the lull in the violence, he and Laura Mitchell went back into the carpark to fetch Laura Mitchell's shoes.

176. At that point, that is to say in what was described as the second phase, Dean Powell grabbed Hall and they started fighting; they were grappling with each other. Ballantyne came over and punched Dean Powell causing him to release his grip. He stepped back and Carl Holmes sprayed Dean Powell with gas: he had no prior knowledge anyone had a CS spray or any other weapon. Dean Powell ran off, chased by three or four others including Carl Holmes. He had been at the side of the King's Head all the time; he was not at the front of the pub where the deceased was killed. After being told that everyone had gone to Fawthrop's house, he went towards Buttershaw Lane where he saw Laura Mitchell and then onto Fawthrop's house.

Directions on joint enterprise

177. The judge provided the jury with written directions upon which he elaborated in the course of his summing up. The steps to verdict in relation to Hall were:

> "Question 1: Are you sure that Michael Hall played some unlawful part in the violent episode during the course of which Carl Holmes killed Andrew Ayres? If yes, go on to consider question 2. If no, not guilty of murder.
>
> Question 2: In doing so, was Michael Hall part of a common enterprise with other persons including Carl Holmes, to attack Craig Powell, Dean Powell and Andrew Ayers? If yes, go to consider question 3. If no, then not guilty of murder.
>
> Question 3: Are you sure that at the time of the commission of these acts that caused the death of Andrew Ayres, Michael Hall [was] still party to the common enterprise? If yes, go on to consider question 4. If no, then not guilty of murder.
>
> Question 4: Are you sure that Michael Hall either:
>
> intended that one of the attackers of Andrew Ayres would kill Andrew Ayres intending to kill him; or
>
> realised that one of the attackers might kill Andrew Ayres with intent to kill him? If yes to (a) or (b) then guilty of murder. If no, go on to consider question 5.
>
> Question 5: Are you sure that Michael Hall either:
>
> realised that one of the attackers might kill Andrew Ayers with intent to cause him really serious harm; or
>
> intended that serious harm would be caused to Andrew Ayres; or
>
> realised that one of the attackers might cause really serious bodily harm to Andrew Ayers intending to cause him such

> harm? If no to (a), (b) or (c), then not guilty of murder. If you are all sure that either (a), (b) or (c) has been proved then go on to question 6.
>
> Question 6: What were the acts of Carl Holmes which caused the death of Andrew Ayers? Go on to consider question 7.
>
> Question 7: Did Michael Hall realize that Holmes might do these acts? If yes, then guilty of murder. If no, then go onto question 8.
>
> Question 8: What acts or acts are you sure Michael Hall realised that one of his attackers might do to cause Andrew Ayers really serious harm? Having answered question 8 and noted the act or acts which you are sure, then go on to consider question 9
>
> Question 9: Are you sure that this act or these acts, which Michael Hall realised one his attackers might do, is not or are not of a fundamentally different nature to Holmes' act of stamping which caused the death of Andrew Ayers? If yes, then guilty of murder. If no, then not guilty of murder."

Jury note

178. On 14 September 2007, the jury in retirement asked:

> "From question 8, we have listed eight acts that we think the defendant realised would have caused Andrew Ayers serious harm. In question 9, do all the acts have to be fundamentally the same as stamping, or just some of the acts for us to reach an answer?"

179. The Recorder invited the jury to amend question 9 to read:

> "Are you sure that this act or these acts (if more than one, any of them) is not or are not of a fundamentally different nature?"

Application for leave to appeal against conviction

180. Hall applies for an extension of time of 8 years and 6 months in which to apply for exceptional leave to appeal against conviction on two principal grounds:

i) That the judge misdirected the jury on joint enterprise in the light of the judgment in *Jogee.*

ii) That the judge erred in not leaving manslaughter to the jury as an alternative verdict.

181. It is Hall's case on this appeal that given the question from the jury and the judge's response, the jury convicted Hall on the basis that he realised, rather than intended, that really serious harm would be inflicted by Carl Homes on the deceased. This is

not a case in which the jury could safely have inferred from the evidence that Hall not only realised that others in his group were out to cause serious injury, but that he intended to encourage and assist in the deliberate infliction of serious bodily injury on the deceased and/or had intention that that should happen if necessary. Accordingly, his conviction is unsafe.

Conclusion

182. This is a case where it is accepted that the safety of the conviction could not be challenged on the basis of the law as it stood at the time of the conviction. It is therefore necessary for Hall to demonstrate a substantial injustice would be done. This was not the case of a man who had committed no crime; he had joined in an attack and engaged in inflicting serious violence. It is plain on the facts that he would have been convicted of manslaughter had he not been convicted of murder.

183. We turn to consider the strength of the case advanced by Hall that he would not have been convicted of murder if the law had been explained to the jury as explained in *Jogee*.

184. We see nothing in the point that the judge should have left manslaughter to the jury. No complaint was made at the time and no application for leave made. If the application based on *Jogee* were to succeed, it was accepted that this court should substitute a verdict of manslaughter.

185. The jury's verdicts indicate they made the following findings of fact:

i) There was a single common enterprise; there were not two separate enterprises.

ii) At no stage did Hall act in lawful self-defence.

iii) He participated in the enterprise throughout and had not withdrawn from it at the time fatal injuries were inflicted on the deceased.

iv) Holmes' actions in stamping on the deceased were not a fundamental departure from the enterprise on which they were engaged.

186. The case was opened on the basis Hall joined in a violent attack in which he must have realised one of his fellow attackers might kill or cause Mr Ayres grievous bodily harm with the intent to do so. The transcript of Hall's cross examination makes clear that the prosecution hoped to establish the necessary participation and *mens rea* on his part by proving:

i) He joined in the attack on Craig Powell in the first phase of violence.

ii) He joined in the chase of Craig Powell and the attack on Dean Powell in the second phase of violence, when he knew the others had armed themselves with weapons and he was present when Holmes sprayed the Powells with CS gas.

iii) He joined in the attack on the Powells in the second phase, kicking and punching them and trying to get them to the ground.

iv) It was not the prosecution case that Hall was armed or that they could prove that he was one of those who kicked the deceased on the ground.

187. In the light of the jury's findings which we have set out at paragraph 185 and the evidence that Hall gave, he participated in the second phase of the incident. There was clear evidence that the attack on Dean Powell in that second phase was made by a group that included Hall and Ballantyne and that they were intent on teaching the Powells and the deceased a lesson; on the forensic evidence the knuckleduster must have been used in that attack.

188. At paragraph 94 of the decision in *Jogee* the court concluded:

> "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."

189. In our view, the jury must have concluded on the evidence before them that Hall was, in the second phase of the incident, a party to the common purpose of inflicting unlawful violence on the group that comprised the Powell brothers and the deceased, when the group were shouting "Come on, let's have you". He then inflicted unlawful violence to Dean Powell with Ballantyne and Holmes in the second phase of the incident. He accepted he saw Holmes use a CS canister on the Powell brothers. It is the clear inference from the forensic evidence that the knuckleduster was used in that attack. The jury must by their verdict have concluded that he foresaw that Holmes would attack the third member of the group, the deceased, with intent to cause really serious bodily injury. In the circumstances it would have been open to them to infer that he had the necessary conditional intent now required.

190. Furthermore, we turn to the jury question which proceeded on the premise that there were no fewer than eight acts (which can only have been acts of violence) directed at the deceased which Hall realised would have caused him serious harm. The jury must have concluded that notwithstanding that realisation after the first acts of violence, he continued to be a party to the common enterprise thereafter.

191. Can it therefore be said that there is a sufficiently strong case that the defendant would not have been convicted of murder if the law had been explained to the jury as set out in *Jogee?* We do not consider that there is and therefore we do not consider that a substantial injustice would be done. We refuse leave.