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Not Really a *Jogee* Case (but Then Neither Was *Jogee* ...)

R v Smith (James Alexander) [2023] NICA 31

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Keywords

Accessory liability, attempt, complicity, CCRC, joint enterprise, murder

Facts

The appeal in *Smith* was based on a reference from the Criminal Cases Review Commission (CCRC) under s. 10(1) Part II of the Criminal Appeal Act 1995. The appellant and another man had been convicted for joint enterprise murder, attempted murder, and possession of a firearm with intent to endanger life. Their convictions resulted from an incident in which two masked gunmen had attacked two men inside a property, killing one of them and injuring the other. The gunmen had fled the scene in a stolen car driven by a third person. This car was later found burnt-out. The appellant was arrested in another car less than an hour after the shooting, with the key to the burnt-out car found in this, the second car. This car, which resembled the car owned by his co-defendant, also contained some clothes, including a pair of gloves on which was found the appellant's DNA as well as one particle of cartridge discharge residue.

The case against the appellant and his co-defendant was largely circumstantial and based on DNA, CCTV and ANPR evidence. The prosecution claimed that they had been involved in the attack, although they could not ascribe a particular role to either of them.

The appellant and his co-defendant unsuccessfully appealed against their convictions. In 2016, the co-defendant sought further leave to appeal on the basis that the court ought to consider the impact of the decision in *Jogee* [2016] UKSC 8 (which had changed the mental element to be proved against an accessory from foresight to intention) on the safety of his conviction. The Court of Appeal for Northern Ireland (NICA) declined to reopen the appeal (reported in *Skinner and Others* [2016] NICA 40) as the proper course was to apply to the CCRC.

The appellant subsequently lodged an application with the CCRC which, after a period of investigation, referred his conviction to NICA. The CCRC's Statement of Reasons explained that whilst the jury directions on secondary liability for the murder charge and the firearms offences were *Jogee*-compliant, the directions regarding secondary liability for attempted murder were not (because the trial judge had referred to 'contemplation' rather than 'knowledge'). The CCRC considered that the conflicting directions, in the absence of written guidance, might have confused the jury as to what tests they had to apply in order to convict. The CCRC also raised concerns about the circumstantial nature of the prosecution case. It concluded that there was a real possibility that the court would find a sufficiently strong case that the change in law would in fact have made a difference and a real possibility that the court would find the conviction to be unsafe.

Held, dismissing the CCRC reference, that on an overall appraisal of the charge the jury had not been misled as to the core aspects of this case. The prosecution case that roles could not be attributed was clear and permissible in law (at [62]).

The absence of written directions was not fatal to the case. Although written directions might assist there was no requirement at the time to provide them. This practice had developed in the criminal courts in more recent times. An omission such as this simply could not invalidate a conviction from the past when the practice was not commonplace (at [74]).

This was not a case to which *Jogee* properly applied. The CCRC had erred in relation to its primary focus of the reference. The cases relied on by the CCRC [Dreszer [2018] EWCA Crim 454 and *Crilly* [2018] 4 WLR 114] involved clear parasitic accessory liability and more serious crimes committed in the course of other criminal activity. By contrast this was a case involving a pre-planned assassination (at [78]).

Jogee dealt with a narrower issue concerning secondary parties who had been engaged with others in a criminal venture to commit crime A, but in doing so the principal had committed a second crime, crime B (at [80]). This narrower area of secondary responsibility had sometimes been labelled ‘joint enterprise’, but this was to misuse that expression. To speak of a joint enterprise was simply to say that two or more people were engaged in a crime together. The narrower area of secondary responsibility here in question had been more precisely labelled ‘parasitic accessory liability’ (at [81]).

The gravamen of the complaint (regarding the attempted murder direction) was limited to the judge’s use of the word ‘contemplation’ rather than ‘knowledge’. This was an admitted error (at [82]). However, the mistaken language did not render the summing up fatally flawed. If the jury had followed the judge’s *Jogee*-compliant direction on the murder charge, which would have been the central focus of their deliberations, the jury must have concluded that the appellant had had the necessary intent for murder. If he had had the necessary knowledge/intent for murder, how could he not have had the necessary knowledge/intent for attempted murder? (at [85]).

In any event, if *Jogee* applied to the facts of this case then it was for the appellant to show that a substantial injustice had occurred (at [86]). The crime was a crime of planned violence involving the use of weapons. The inference of participation with an intention to cause really serious harm was very strong. The court was entirely satisfied that no substantial injustice had arisen by virtue of the change in the law (at [87]).

Commentary

This was the first CCRC referral of a historic joint enterprise conviction from Northern Ireland since the law was held to have taken a ‘wrong turn’ in *Jogee*. Four points can be made about the decision:

First, it confirms that whilst NICA retains jurisdiction to depart from decisions by the Court of Appeal for England and Wales, the court is content to follow the lead of the English court, specifically its hard-nosed approach towards proving substantial injustice (more of which below) which severely limits an appellant’s chances to succeed with an out of time appeal based on a change of law.

Secondly, it shows that there is still much confusion about the kind of cases to which *Jogee* applies. NICA is surely correct that the present case is not ‘truly a *Jogee* case’ ([2023] NICA 86 at [1]) if such is defined as requiring a crime A/crime B fact pattern. But then, neither was *Jogee*! There only really was one incident of violence in *Jogee*, and it would be contrived to separate this out into an assault (crime A) followed by murder (crime B), although the facts might just about be amenable to such an analysis: after the initial altercation there was a brief respite in the hostilities during which the victim went upstairs and changed out of his work clothes whilst the principal offender went into the kitchen to fetch the knife with which the victim was subsequently killed. In any event, the case against *Jogee* was not presented as involving a crime A/crime B scenario, and PAL should not have been engaged.

Jogee not really being a ‘*Jogee* case’ was always liable to cause confusion. In fairness to the CCRC, the law of PAL had over time started to infiltrate the law of accessory liability, to the extent that juries were routinely left with instructions that would have allowed them to convict on either basis (intention or foresight). *Jogee* itself is an example of this development. Therefore, and

in the absence of juries giving reasons for their verdict, distinguishing cases that have been affected by the ‘wrong turn’ in law from those that have not is not as straightforward as the Court of Appeal makes it out to be.

Thirdly, the court is right to stress that the continued usage of joint enterprise language is unhelpful and possibly positively detrimental in that it helps perpetuating the impression that *Jogee* has a wider scope of application than it has. It would certainly be preferable to avoid this term altogether and replace it by the more precise terminology of joint perpetration, accessory liability, and parasitic accessory liability respectively. Such an approach would even work in cases such as the present where the prosecution cannot ascribe a particular role to the parties involved, since the jury will need to be sure that the parties, at the very least, meet the requirements of accessory liability.

Finally, whilst the court is adamant that *Jogee* does not apply to the present case since it did not involve a PAL scenario, it still seeks to cover all its bases by exploring the impact of the decision in *Jogee* on the case had it been within *Jogee*’s scope of application. In doing so, the court (uncritically) reiterates that an appellant who asserts that he has suffered a substantial injustice by having been tried under the old law (of PAL) faces a high threshold. Following the approach in *Johnson* [2016] EWCA Crim 1613 (which NICA adopts), for appeals to succeed which are based on a *Jogee* misdirection and which are brought more than 28 days after conviction (see s. 18(2) of the Criminal Appeals Act 1968), there must not just be a real possibility that the court would find the conviction is unsafe; there must also be a real possibility that the court would find a sufficiently strong case that the change in law would in fact have made a difference. This is the test by which appellants in change of law cases are to demonstrate that they have suffered a ‘substantial injustice’, a hurdle, contrived by judges, that convicted defendants need to overcome before granting an extension of time will even be considered by the court. Like its English counterpart, the Northern Irish court did not consider any of the criticisms that have been levelled against this additional requirement (which the Supreme Court in *Jogee* explained was necessary to ensure finality and certainty in litigation, and to prevent the courts from being flooded with appeals whenever the law had taken a ‘wrong turn’ and needed a course-correction). Given that the court, in contrast to the CCRC, considered the case against the appellant to be ‘very strong’ (at [84] and [87]), the question of whether ‘the possibility of obtaining a safe conviction for manslaughter prevented an unsafe murder conviction from constituting a substantial injustice’ (see Elaine Freer, ‘The “substantial injustice” test for reinterpretation of law appeals: a substantial injustice of its own?’’, Arch Rev 2022, 7–9) did not arise. Yet concerns remain that the court’s uncompromising approach to establishing substantial injustice in *Jogee*-type appeals (whatever they may be) has led to a position that it is for the appellant to show that a misdirection *would* have made a difference – a possibility that it *might* have done so no longer suffices for the conviction to be unsafe. This is problematic in view of the fact that, in *Jogee*, the Supreme Court acknowledged that the law *had* taken a wrong turn and that, if it was not put back on the right path, injustices *might* result. Given that a legislative framework exists that tells judges precisely what steps need to be taken in such circumstances it is eminently questionable that a judge-made test makes it more likely that injustices *might* endure. In the face of an increasing chorus of criticism, the test needs justifying, not simply repeating.

Beatrice Krebs