R v Faisal Fiaz

APPLICATION TO THE SUPREME COURT OF THE UNITED KINGDOM FOR PERMISSION TO APPEAL ON QUESTIONS OF GENERAL PUBLIC IMPORTANCE AND STATUTORY INTERPETATION

Application

1. This is an application to set aside (1) a refusal of leave to appeal convictions and sentence and to adduce fresh evidence and (2) refusing permission to appeal to the Supreme Court of the United Kingdom (UKSC), both made by the Court of Appeal (Criminal Division) (CACD) and for permission to appeal to be granted on questions of general public importance and statutory interpretation.

Chronology of proceedings

2. The victim was stabbed to death by Mohammed Hammad Hussain (MHH) on 15 July 2020. The Applicant was only 19 at the time. The Applicant was convicted of murder and conspiracy to rob as a party to a "joint enterprise" on 15 February 2021 before His Honour Judge Burbidge KC sitting at Worcester Crown Court. He was therefore convicted of being both complicit and a co-conspirator, without differentiation, hence this appeal.
3. The Applicant was sentenced to a mandatory life sentence pursuant to schedule 21 to the Sentencing Act with a minimum term of 23 years (reduced by days on remand). The starting point for a crime where a knife is taken to the scene is 25 years. The result is a minimum term longer than he had been alive. Application for leave to appeal convictions and sentence was refused by the full CACD on 16 June 2023.[1] Application for permission to appeal to the UKSC on questions of general public importance was refused on 31 July 2023.

Narrative of the facts

4. The Applicant and two others, Adam Carpenter (AC) and MHH, travelled to Redditch to 'snatch' cannabis from a young musician who was selling during lockdown. AC and MHH went into the premises. AC to open the door, giving MHH access. As MHH entered, the victim produced a baseball bat and MHH produced a large knife. They fought and the victim died from stab wounds. This Applicant's phone was used in advance (by him or MHH) to send a text "shall I send him in". This was consistent with the cannabis 'snatch'. There was no evidence the Applicant knew MHH had a knife. It was presumed because it was big. He was not present at the scene inside the premises but waiting in the back of the car some distance away and out of view. The fourth co-accused Saddam Hussain (MHH's older brother) was convicted of being complicit by a series of phone

[1] *Hussain and others* [2023] EWCA Crim 697.

calls. The Applicant remained with his co-accused after the event, including when MHH was put on a plane. He did not give evidence. His case was that he was a mere passenger. The jury were directed they could convict on the basis that this was a planned robbery (not a snatch) in which all intended at least really serious bodily harm or alternatively it was an intentional violent attack. All three were convicted of murder. MHH remains at large. The Applicant sought leave to appeal his conviction for murder on the grounds that the conviction was ***unsafe*** because:

i. The findings that the conduct amounted to complicity in murder was incorrect because the conduct did not in fact assist or encourage the crime. The trial judge should have allowed a submission of no case to answer.
ii. The findings wrongly interpret the Accessories and Abettors Act 1861 to allow for liability without causation or conduct contributing to the crime.
iii. The findings wrongly interpret the decision in *R v Jogee [2016] UKSC 8* that the use of "assist or encourage" allows for liability without causation or conduct contributing to the crime.
iv. The findings wrongly interpret the decision in *R v Jogee [2016] UKSC 8* by effectively deciding that knowledge of a knife can be presumed.

5. The Applicant also sought to adduce fresh evidence that MHH had a traumatic brain injury which made his behaviour unpredictable that was relevant to the jury's consideration of overwhelming supervening acts (OSA) and created a real possibility that the verdict would have differed.
6. The Applicant also sought leave to appeal against sentence on two bases: That where it is known the defendant had not taken a knife (even though a knife was taken) there could be a lower starting point and the life sentence with such a high minimum term for someone it is known did not contribute to the killing is cruel and unusual contrary to the Bill of Rights 1689 and / or grossly disproportionate, violating article 3 ECHR.
7. All the above arguments were firmly rejected by the Court of Appeal which held that there is no jurisdiction to appeal to the UKSC and the Applicant was simply dissatisfied with the outcome and had no arguable grounds appeal.

Statutory frameworks

8. The relevant statutory frameworks are:
   i. Right of Appeal to UKSC – meaning of 'on an appeal' – Section 33 Criminal Appeal Act 1968 and Article 6 ECHR.
   ii. Safety – meaning of 'unsafe' - Section 1 Criminal Appeal Act 1968
   iii. Complicity as opposed to conspiracy – meaning of 'Aid, abet, counsel and procure' – Section 8 Accessory and Abettors Act 1861

iv. Complicity as opposed to conspiracy – meaning of 'assist or encourage' - *R v Jogee [2016] UKSC 8 and Article 7 ECHR.*
v. Fresh evidence – meaning of 'receive' - Section 23 Criminal Appeal Act 1968
vi. Sentencing – meaning of 'cruel and unusual' in Bill of Rights 1689 and grossly disproportionate Article 3 ECHR and meaning of knife 'taken to the scene in Schedule 21 of the Sentencing Act.

Submissions on Jurisdiction

9. The Court of Appeal held that the UKSC is 'functus' once there is a refusal of leave to appeal and this does not violate the Applicant's Convention rights. This follows precedent in *Garwood*[2] and *Dunn*[3].Those cases decided that the permission process only applies to cases "on appeal" and a refusal means there is no appeal on foot and that it is a legitimate function of the administration of justice to limit the work of the UKSC. No issue is, or was, taken with that general principle but, it is submitted, that the orders refusing leave to appeal and refusing permission to appeal to the UKSC should be set aside and the issues determined by the UKSC, as if leave had been granted. It is submitted that the UKSC has power to review decisions of the CACD if there has been an improper refusal of leave / permission. Clarifying this framework is, of itself, a question of general public importance.
10. Here, it is submitted that the Court of Appeal refusal of leave/ permission is open to review by UKSC for the following reasons:
    i. It arises from an unlawful barrier to access to the UKSC created by the CACD through its approach to 'joint enterprise' cases achieved in three ways:
        (a) Reducing the assessment of "safety" under the Criminal Appeal Act 1968 to factual grounds, contrary to *R v Derek Bentley (deceased)* (*Bentley*)[4] and *R v Jogee (Jogee)*.[5]
        (b) Over application of the principle of finality, violating Articles 3, 6 and 7 of the European Convention on Human Rights (ECHR) .
        (c) Erroneously lowering the conduct element and removing causation in complicity law, wrongly interpreting the Accessory and Abettors Act 1861. It is and was argued, relying on scholarship by Professor Dyson,[6] that being 'more than merely

[2] *Garwood and others* [2017] 1 Cr App R. 30.
[3] *R v Dunn* [2010] EWCA Crim 1823
[4] *R v Derek Bentley (deceased)* [2001] 1 Cr App R 21.
[5] *R v Jogee* [2017] AC 387.
[6] Oxford University Faculty of law and Director of the Institute for European and Comparative Law; Dyson, M. (2022). The Contribution of Complicity. *The Journal of Criminal Law*, *86*(6), 389–419.

present' means the jury should be directed to convict only where the accused makes a 'significant contribution' to the crime otherwise complicity law becomes inchoate and that knowledge of robbery / violence was wrongly presumed.

ii. It raises an issue of 'cruel and unusual punishment' under the Bill of Rights 1689 which is a Constitutional instrument. In no other area of criminal law is someone punished for making no significant, or even measurable, contribution to a crime; and in all other areas of criminal law, sentences are proportionate to the factual findings.

Submissions on appeal - safety

11. This is an opportunity for the UKSC to define the 'safety' test in the Criminal Appeal Act 1968 (as amended) as a question of law. Concerns have been raised about the CACD creating a "higher test" by the Justice Committee,[7] and by the APPG on Miscarriages of Justice[8] and the safety test is currently the subject of a Law Commission review.[9]
12. It is submitted that the CACD is usurping the function of the jury by their approach to reviewing convictions in "joint enterprise.[10] The consequence is 'over-criminalising' secondary parties by developing too wide a scope of liability, a ground of appeal in *Jogee* never clearly answered. The loss of differentiation between complicity and inchoate offences has been achieved by lowering the conduct element too far and removing the necessary element of causation.
13. In refusing leave to appeal in this Applicant's matter, the CACD reduces complicity to a question of fact and not law – intention, knowledge, conduct are all undefined and causation is absent. This is supported by the absence of engagement in the scholarship presented on complicity. While findings of fact are quintessentially a matter for a jury, the CACD approach is overly reluctant to interfere with a jury verdict, refusing to engage in arguments on material irregularity and requiring conclusive rather than arguable fresh evidence.
14. This was an in-time application but 'out of time' appeals are relevant given the Court of Appeal interpretation of "substantial injustice" for out of time appeals requires an applicant to prove they would not have been convicted, a bar which has proved virtually insurmountable.[11] In time appeals

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[7] Justice - Second Special Report
Joint enterprise: follow-up: Government Response to the Committee's Fourth Report of Session 2014-15 paras 21 and 27 > https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/1047/104702.htm>

[8] Westminster Commission on Miscarriages of Justice, *In the Interest of Justice: an inquiry into the Criminal Cases Review Commission* (5 March 2021)< https://appgmiscarriagesofjustice.files.wordpress.com/2021/03/westminster-commission-on-miscarriages-of-justice-in-the-interests-of-justice.pdf>

[9] Law Commission issues paper < https://www.lawcom.gov.uk/views-sought-on-criminal-appeals-process/#:~:text=In%20its%20issues%20paper%2C%20the,Commission%20until%2031%20October%202023.>

[10] *Pendleton* [2002] 1 WLR 72, paras 16 and 17

[11] *R v Johnson and others* [2016] WLR 560; *R v Towers* [2019] EWCA Crim 198; *R (on the application of Davies) v CCRC* [2018] EWHC 3080 (Admin); *R. v Dreszer (Kamil)*[2019] Crim LR 624; *Cunliffe v CCRC* [2019] EWHC 926

in 'joint enterprise' murder are also usually refused.[12] More generally, permissions to appeal have also reduced (believed to be from 565 in 1997 to 63 in 2021) which suggests either too much weight is given to finality generally or that the assessment of the need for finality in 'joint enterprise' cases suffers from overreach.

15. It is submitted that 'safety' should be defined to include misdirection of law. This would be consistent with the decision in *Bentley* where his conviction for complicity in murder was quashed once it was revealed his jury had been wrongly directed. The Criminal Cases Review Commission (CCRC) test of 'real risk' is pertinent because the application of 'substantial injustice' in pre-*Jogee* appeals has neutered the pathways for the CCRC to refer.

Submissions on appeal - complicity

16. As Lord Toulson observed extrajudicially in 2013, "the law on complicity is an old problem which continues to give rise to frequent appeals, particularly in cases of murder.[13] In *Jogee*, the UKSC acknowledged that complicity law had taken a 'wrong turn', expunged parasitic accessorial liability and restored the correct mens rea for accessorial liability as intention. The UKSC has also held that there is a minimum threshold for conduct and causation / contribution in *The Financial Conduct Authority (Appellant) v Arch* [2021] UKSC 1.
17. However, since then, the Court of Appeal has made a further error of law by developing complicity in such a way as to impose life imprisonment with a minimum term measured in decades on a person who makes no measurable contribution to the crime – language such as 'more than merely' present or 'force of numbers' is insufficiently precise for convictions to be safe.
18. The consequence of the CACD decision in this case is that all logical alternatives have been removed, too wide a scope of liability is created and jury's function without safe frameworks, thus convicting those who carry no culpability or responsibility for the crime. The CACD has achieved this by wrongly interpreting the statutory language of 'aid, abet, counsel or procure' and / or by wrongly interpreting the use of 'assist or encourage' in *Jogee*, where the UKSC was merely providing ordinary language, not removing the foundations of liability.
19. It is submitted that a proper legal direction was not given because the jury should have been directed to consider whether the Applicant made a significant contribution to the murder in which

(Admin); *R v Mitchell (Laura)* [2018] EWCA Crim 2687; *R v Crilly* [2018] 4 WLR 114; *R v Grant -Murray and others* [2017] EWCA Crim 1228

[12] *R v Smith (James Alexander)* [2023] NICA 31; *R v V* [2022] EWCA Crim 1690; *R v Grant (Tony Lee)* [2022] 1 Cr App R 20; *R v Lanning* [2021] EWCA Crim 450; *R v CN*; [2020] EWCA Crim 1028; *R v N* [202] 4 WLR 64; *R v Johnson – Haynes* [2019] 4 WLR 133; *R v Daley* [2019] EWCA Crim 627; *R v Hussain (Imran)* 2019] EWCA Crim 666; *R v Rowe* [2022] EWCA Crim 27

[13] Toulson., R. in 'Sir Michael Foster, Professor Williams and complicity in murder' in Dennis Baker and Jeremy Horder (eds) The Sanctity of Life and the Criminal Law: The legacy of Glanville Williams (Cambridge, CUP, 2013.

he was alleged to have been complicit. This appeal is a suitable vehicle to consider these arguments because the Applicant was charged with being complicit in murder and a co-conspirator in robbery.

20. The CACD failed to follow relevant precedent on causation and contribution instead preferring their own approach in decision in *R v Rowe and others*.[14] The Applicant relied on the scholarship of Professor Dyson.[15] He expresses the correct approach to "how we express, and label, the wrongs within participation including what the wrong in complicity is (and how participants are labelled), the limits in what one can do through another or intend another can do, the causal claims we make in complicity and the differences between forms of complicity". Without a significant contribution, an accomplice is not meaningfully involved in the principal's crime. It was submitted in the Court of Appeal that *Rowe* fails to follow the correct trajectory and is part of the departure from the foundations of complicity law in relation to conduct, causation and contribution. The academic material was mentioned in the judgment, but the issues raised were not subject to any reasoned engagement by the Court of Appeal. The refusal in the Applicant's case suggests that the Court of Appeal is following a path that deliberately lowers the conduct element and removes the causation element to widen the 'net' that *Jogee* closed on mens rea. This combined with all the refusals on post *Jogee* appeals suggests that the Court of Appeal is removing legal frameworks in favour of simplistic tests for juries which fail the test of safety.
21. On the facts the text message went no further than evidence to support an attempt to snatch cannabis (not murder) and this Applicant remained in the rear of the car some distance away. Whilst it was not necessary for the prosecution to prove that in fact caused MHH to commit the crime, it was nonetheless necessary to prove that his conduct had made a measurable contribution to the crime in order to be safely proved as complicit. Without that, the trial judge failed to explain to the jury what was meant by a defendant being 'more than merely present'.
22. The Court of Appeal agreed that it was important not to treat an omission to act as necessarily being evidence of complicity but found that 'the jury were entitled to view this Applicant's action in remaining in or near the car as evidence of his intentional assistance or encouragement' (at [76]). The current approach therefore fails to make it clear that there must be some nexus between the alleged acts of assistance and encouragement and the principal's commission of the crime.
23. The trial judge directed the jury that 'if an accused was *deliberately present at the scene and by his presence either assisted or encouraged* or did participate intending to, he would be guilty of the particular crime alleged. …'. It is submitted that, without further guidance on the (level of)

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[14] [2022] EWCA Crim 27.

[15] Dyson, M. (2022). The Contribution of Complicity. *The Journal of Criminal Law*, *86*(6), 389–419.

contribution made by the accessory's action towards the principal's commission of the offence, the jury has no tool to distinguish between an accessory who was merely present and one who by his presence had assisted or encouraged, limb 2 of *Galbraith*[16] becomes redundant and convictions become impossible to appeal. The consequences are 'cruel and unusual' punishment / a grossly disproportionate outcome.

24. *Jogee* did not specify, or set a minimum threshold for, what counts as participation by way of assistance or encouragement. The issue is treated as one of fact and degree for the jury. As with the overwhelming supervening act (OSA) principle, such guidance as can be found in the case law predominantly speaks to what is not required rather than what is. In the words of *Jogee* at [12]: 'Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on [the principal offender's] conduct or on the outcome'. Clearly, this does away with the need to prove a causal link (in the 'but for' sense) between the accessory's conduct and the commission of the principal offence. However, the case law accepts that there must be some connection. Indeed, this is implicit in the very language of 'assistance or encouragement' – these words require a reference object, something or someone that is in fact assisted or encouraged. Yet the courts have never been able to describe that link clearly or to say what needs to be proven to show that it was there. The decision in this case does not even insist on proving this connection beyond proof that there was assistance or encouragement.
25. *Jogee* may have been a restatement of law, but their Lordships were not tasked and did not choose in that case to illuminate the nature of the connection or clarify whether it involves (a rebuttable presumption of) a lesser degree of causality than 'but for' causation as some of the pre-*Jogee* case law has suggested. Nor did the Supreme Court elaborate on what the concepts of assistance or encouragement entail either quantitatively or qualitatively. This case provides an opportunity to do so.
26. The Court of Appeal presumed that the pre-*Jogee* case law remains authoritative on these points. In [82], it cited [132-134] from *Rowe* [2022] EWCA Crim 27 (which in turn had relied on the decisions in *Calhaem* [1985] QB 808 and *Stringer* [2011] EWCA Crim 1396) which had held 'that the accessory's conduct must be "relevant" to the offence of the principal, and, in that sense, there must be a "connecting link"'. *Stringer* (at [50]) has suggested that complicity may be based on the accessory having made a **material contribution** to the principal's commission of the offence: '[i]f D provides assistance or encouragement to P ... there is good policy reason for treating D's conduct as materially contributing to the commission of the offence, and therefore justifying D's

[16] [1981] 1 WLR 1039.

punishment as a person responsible for the commission of the offence, whether or not P would have acted in the same way ..'.

27. In *this* application, the CACD confirmed the position taken in *Rowe* that submissions to the effect that, although the accessory's encouragement of the principal need not have caused the offence, the accessory must nonetheless have had some effect on the events, are 'unarguable' (at [82]). Qualms about the open-endedness of this approach arise in instances such as those exemplified by Fiaz's case whose participation in murder seems to have consisted largely in having been around the principal offender and present in the vicinity at the time he committed the offence. In the court's words: 'the jury were entitled to view *Fiaz's action in remaining in or near the car* as evidence of his intentional assistance or encouragement' (at [76], emphasis added). This assertion betrays the fundamental problem with the CACD approach which focuses on the accessory's conduct rather than his contribution to the principal's commission of the offence. Our proposed test of a significant contribution is a measure that should tighten the *conduct* element in complicity as *Jogee* envisaged greater care in *fault*. The argument also rationalises OSA under a two-part approach that putting the accessory's contribution at the centre of his liability: As Dyson puts it; 'a jury would first have to decide what level of contribution the assistance or encouragement of the accomplice had made, and would then have to decide whether that had persisted to the point when the principal committed the offence' (at [58]).The Court of Appeal insistence in *Grant*;[17] and *Rowe*[18] that OSA is not to 'be viewed through the lens of causation [81]) is flawed and has a disproportionate and dramatic effect as set out in the application leaving no minimum threshold for the conduct element. The court's lack of enthusiasm for refining the *actus reus* of complicity is an issue that needs to be considered by the UKSC, particularly given the consequential blurring with inchoate offences under ss. 44-46 of the Serious Crime Act 2007, otherwise the *actus reus* of accessorial liability is over-reaching and because intention alone does not furnish guilt. [19]
28. It is also submitted that the CACD has misconstrued *R v Calhaem* [1985] QB 808 where it was recognised that there must be a connecting link between D's assistance or encouragement and principal's act(s). The danger of the decision in this application is that the exercise of complicity law becomes a moral or political question rather than legal liability. It is therefore necessary for the UKSC to give opinion on the operation of conduct and causation / contribution elements.
29. If Parliament had intended such wide liability, it would not have carefully chosen the wording of the 1861 Act and would not have enacted separate inchoate liability in 1997. Without a contribution

[17] [2021] EWCA Crim 1243 at [31]-[32]
[18] at [139]
[19] Note - arguments herein taken, in part, from a forthcoming case note in the Crim LR by Dr Beatrice Krebs.

threshold there are no safeguards, and every case will be left for jury opinion. The current situation offends the principle of legality and violates Article 7 ECHR[20] because there has been so great a "read down" that the meaning given to the statutory provisions of the 1861 Act no longer reflects the legal meaning of the provisions as to when a person is complicit in another person's crime. Legal meaning has been constructed by erroneous interpretation. As Dicey might have put it – the interpretation is against the function and spirit of legality. Section 3 Human Rights Act 1998 requires such a strong presumption thus connecting complicity law with safety test.[21]

Submissions on appeal – knowledge (complicity and conspiracy)

30. By maintaining the conviction of this Applicant, the Court of Appeal has presumed knowledge that MHH would kill because his knife was big. In *Jogee*, the UKSC expressly disavowed this approach. Knowledge of a knife may be evidence of intention, but knowledge is subjective and must be proved. Here it was presumed.

Submissions -Refusal to accept the fresh evidence denies a fair retrial.

31. The Court of Appeal wrongly refused to accept the fresh evidence going to the principal offender's unpredictability. Article 6 (1) of the European Convention on Human Rights (ECHR) protects the right to a fair hearing, which, it is submitted includes access to justice by a retrial. It is submitted that such an important issue going directly to the issues in the trial and trounces finality.

Submissions -Cruel and unusual / grossly disproportionate sentence

32. The consequence of this decision of the CACD is a life sentence with a minimum term of decades in length where the Applicants has made no significant or measurable contribution to another's crime. It is grossly disproportionate and cruel and unusual punishment and risks the lives of all young people in the country who make poor decisions with their friends but do not cause or contribute to the consequence. It creates liability for murder from absent or minimum conduct with maximum punishment, removing them from society in prison conditions potentially for longer than they have been alive. The option within the legislative schedule to impose lesser punishment whatever the starting point is simply not being used in this context.

33. The meaning of cruel and unusual in the 1689 Bill of Rights is opaque but has been considered in the jurisprudence of the Supreme Court of the United States relating to the Eighth amendment on gross disproportionality.[22] Accepting it is usual for a life sentence to follow for murder, the point

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[20] *R v Secretary of State for the Home Department, ex parte Simms* [1999] UKHL 33

[21] *HM Treasury v Ahmed* [2010] UKSC 2.

[22] See, for example Professor Megan J. Ryan Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That are Both Cruel and Unusual <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1455&context=law_faculty>

here is that liability has been defined so widely that it is 'cruel and unusual' to sentence a person to life imprisonment with a massive minimum term when they make no significant or even measurable contribution to a crime, here where waiting in a car and loaning / using phones where the phone usage by each applicant does not contribute to the killing.

34. Finally, it remains the applicants' submission that where it is known that they did not individually take a knife to the scene, the Sentencing Act should be read to enable a lower starting point. The same arguments apply in relation to cruel and unusual punishment and gross disproportionality.
35. It is submitted that the questions of general public importance are therefore as follows:
    i. Can the UKSC review the Court of Appeal refusals of eave / permission?
    ii. Can the UKSC review the Court of Appeal approach to 'safety' in the Criminal Appeal Act 1968?
    iii. Are the refusals incompatible with Articles 3, 6 and 7 of the ECHR and/or the Bill of Rights Act 1689?
    iv. Does the interpretation of the Accessories and Abettors Act 1861 make complicity law inchoate?
    v. Is the judgment of the Court of Appeal on causation inconsistent with the decision in *Jogee* and / or *The Financial Conduct Authority (Appellant) v Arch* [2021] UKSC 1.
    vi. Do the provisions of the Sentencing Act need to be restricted when it is known that a convicted person did not take a knife to the scene?
36. These are issues of general public importance because 'safety' affects all cases and 'complicity' affects large groups of people, particularly children and young adults now at risk of a murder conviction despite not being present and not causing nor making any significant or even measurable contribution to a crime.
37. The practical reality is that knowledge, intention, and conduct elements carry no legal tests at trial and causation is absent. The consequences are conviction and a life sentence for persons who make no measurable contribution to the crime. It is submitted that these are questions of general public importance which should be considered by the UKSC, at least de bene esse.
38. Accordingly, permission to appeal to the Supreme Court of the United Kingdom is sought.

Felicity Gerry KC, Libertas Chambers and Umar Shahzad,
Libertas Chambers,
17 August 2023.