Neutral Citaiton no: [2016] NICA 40 | *Ref:* GIL10068

Judgment: approved by the Court for handing down | *Delivered:* 25/10/16
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

BARRY DAVID SKINNER
MARK KINCAID
BRENDA DOLORES MEEHAN
NIGEL JAMES BROWN
PETER GREET
STEPHEN CHARLES McCAUGHEY

Before: Gillen LJ, Weatherup LJ and O'Hara J

GILLEN LJ (giving the judgment of the court)

Introduction

[1] These are six conjoined applications before this court arising out of the judgment of the United Kingdom Supreme Court (UKSC) in Regina v Jogee [2016] UKSC 8 and the Privy Council in Ruddock v The Queen [2016] UKPC 7 (hereinafter called "R v Jogee" or "the Jogee case"). Five of the applicants have been convicted of the offence of murder and Ms Meehan was convicted of murder but later on appeal that conviction was substituted with a conviction for manslaughter. Each has unsuccessfully appealed their conviction to the Northern Ireland Court of Appeal ("NICA") before the advent of the Jogee judgment.

[2] Each of these cases, whilst couched in terms of an application seeking exceptional leave to appeal to the NICA out of time by demonstrating substantial injustice, is in effect an application to re-open appeals which have already been determined by the NICA.

R v Jogee

[3] Before turning briefly to the facts of the cases of each of these applicants , it is necessary to advert to the recent seminal decision of R v Jogee. Because of the

determination which we have reached in these matters, a brief summary of the decision will suffice at this stage.

[4] The Jogee case overturning in Chan Wing Siu v The Queen [1985] AC 168 and R v Powell and R v English [1999] 1 AC 1 - determined that accessory liability required proof of a conduct element accompanied by the necessary mental element; that the requisite conduct element was that the accessory has assisted or encouraged the commission of the offence by the principal; that the mental element was an intention to assist or encourage the commission of the crime, and that required knowledge of any existing facts necessary for it to be criminal; that if the crime required a particular intent the accessory had to intend to assist or encourage the principal to act with such intent; that foresight was not to be equated with intent to assist. Foresight was evidence from which intent could be inferred. The law had taken a wrong turn when it had equated foresight with intent to assist.

[5] Juries frequently have to consider questions of intent by a process of inference from facts and circumstances proved. Foresight that one accused may well commit a specific crime may be evidence in support of an allegation that another accused had the appropriate intent. This is a matter to be determined by the jury.

[6] We make no apology for rehearsing into the highly relevant contents of paragraph 100 of the judgment in the context of these applications:

> "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. 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 (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.'

For more recent statements of the same rule see Hawkins [1997] 1 Cr App R 234 (Lord Bingham CJ) 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. As Cottrell and Fletcher decides, the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal: see in particular para 58."

The cases before the court

[7] All the defence counsel and prosecution counsel agreed that the application of Brown was to operate as a lead case in these proceedings to deal with all relevant issues arising out of the judgment in in R v Jogee and, more particularly, the circumstances in law in which an appeal may be reopened. Hence at the outset of the hearing all counsel agreed that this hearing was to be confined to the issue as to whether or not this court had power to reopen these appeals. Consequently

Mr Kelly QC, who appeared on behalf of Brown with Mr Toal, made all the submissions on behalf of the applicants in these cases albeit we did offer the opportunity for each counsel on behalf of the remaining applicants to add any supplementary submissions if they wished. In the event no additional submissions were made and the legal issues we have determined on this aspect are therefore applicable to all of the applications. For that reason we trust it is no discourtesy if we do not identify the counsel appearing on behalf of the applicants other than Brown.

[8] Mr McCollum QC appeared on behalf of the prosecution with Mr McDowell QC. Additional counsel represented the Crown in the other applications but once again they were not called upon to add any supplementary material to that advanced by Mr McCollum and accordingly it is unnecessary for us to name those counsel.

[9] The issue in this matter surrounding the right to reopen an appeal does not require a lengthy recitation of the narrative in any of these applications but in order to ensure that a complete picture emerges, we have decided to give a relatively brief summary of the facts of each case.

Nigel James Brown

[10] The factual background to Nigel Brown's conviction is set out in the judgment of the Court of Appeal published on 29 November 2012 under the citation [2012] NICA 52. Brown, along with his co-accused, Gary Taylor, was convicted of the murder of Thomas Devlin ("the deceased") and the attempted murder of Jonathan McKee. They unsuccessfully applied for leave to appeal against these convictions and renewed their applications for leave to appeal before the full Court of Appeal. Their appeals against conviction were dismissed on 29 November 2012. Brown's case was referred to the CCRC which has now halted its enquiry into the case given that the matter is again before this court.

[11] On the evening of 10 August 2005, three youths, including the deceased, aged 15, 17, and 16 were walking along the Somerton Road, Belfast when they were confronted by Brown and Taylor. Brown was carrying a wooden bat and Taylor was carrying a knife. Brown struck one of the youths on the head, shoulders, arms and upper body with the baton. Taylor pursued the deceased and inflicted fatal stab wounds on him.

[12] The Court of Appeal upheld the charge to the jury of the learned trial judge in respect of Brown indicating that "if there was a reasonable possibility that the use of the knife by the second man was the use of a weapon, and an action, which Brown did not foresee as a possibility then he should be acquitted" The respondent in this application accepts that the charge to the jury, whilst a comprehensive and accurate direction on the law as it then stood, is in the context of the Supreme Court's judgment in Jogee a misdirection. However, it is submitted that notwithstanding the

misdirection of law, Brown's conviction for murder is safe because he was present with Taylor with the express purpose and intention of carrying out a murderous attack on the group.

Peter Greer

[13] On 22 March 2013 the applicant Greer and a co-accused Smith were convicted of the murder of Duncan Morrison, the attempted murder of Stephen Ritchie, possession of a shotgun with intent to endanger life and possession of a handgun with intent to endanger life. They were both sentenced to life imprisonment for the murder.

[14] Smith lodged his Notice of Appeal on 24 April 2013; Greer lodged his Notice of Appeal on 8 May 2013. The Court of Appeal handed down judgment on 25 November 2014 ([2014] NICA 84) dismissing all grounds of appeal.

[15] At approximately 12:15pm on 13 May 2011 two men wearing balaclavas, one armed with a handgun and the other with a shotgun, entered 6 Hazelbrook Avenue, Bangor ("the address") and fatally shot Duncan Morrison and wounded Stephen Ritchie.

[16] The two masked men made their getaway in a stolen silver Honda Civic car, driven by a third person, which was later found burnt out at the Somme Centre between Bangor and Newtownards.

[17] The appellant Peter Greer lived at 60 Mountcollyer Avenue, Belfast, and owned a silver Volkswagen Golf. On various dates prior to the murder the two vehicles were observed on CCTV in close proximity. On the day of the murder Greer's car is captured travelling in the direction of Newtownards and soon thereafter the stolen civic is captured travelling from Newtownards to Bangor.

[18] Shortly after the murder at 12:20 pm the Honda Civic is observed shortly before the Somme Centre. At 12:36 Greer's Golf is observed travelling towards Belfast. When stopped by police at 1:08pm on Ormeau Avenue Smith was driving alone in the vehicle. He told police he had borrowed the car 30 minutes earlier from his friend "Pete".

[19] Police found in the car latex gloves and a set of car keys which belonged to the stolen Civic. A forensic examination of the gloves found in the footwell of Greer's Golf for cartridge discharge residue ("CDR") found a single fused particle of lead, barium and antimony on one of the gloves.

[20] A search of Greer's home at 60 Mountcollyer Avenue retrieved, inter alia, a pair of gloves on which forensic examination uncovered five particles of lead, barium and antimony on one glove, and a single particle on the other glove indicating that the first glove had been in contact with the cartridge found at the

murder scene The inside of these gloves were also examined for DNA; the major profile matched that of Peter Greer, and Jamie Smith couldn't be excluded as being a minor contributor.

[21] In police interviews Greer denied any involvement in the murder, did not answer questions about his movements or whereabouts, or that of his car, on either 12 May or 13 May, he did not volunteer an alibi, refused to answer whether he knew James Smith, denied knowing anything about the Honda Civic key found in his car but he did say the latex gloves may have been his. Neither Jamie Peter Greer nor Jamie Smith gave evidence at trial.

[22] During his charge to the jury the learned trial judge dealt with the issue of joint enterprise directing that:

> "A secondary party is guilty of murder if he is aware of a common plan either to kill another or at the very least to cause really serious bodily harm to another, and with that knowledge deliberately does an act to assist or to encourage or to facilitate that common plan with the intention either that somebody should be killed or at the very least caused really serious bodily harm. So you must be sure that an accused both did such an act and also did that act with the required intention.

[23] In its judgment dismissing all the grounds of appeal brought by the two appellants, the NICA rejected the appellants' criticism of the learned trial judge's charge to the jury, found the evidence clearly established their active and willing participation in the joint enterprise involving the murder and attempted murder and concluded that the circumstantial evidence against each appellant was very strong.

Stephen Charles McCaughey

[24] On 18 February 2014 a jury convicted McCaughey of the murder of Philip Strickland (the deceased) and of possessing a firearm. Three other men namely James Seales (JS), Ian Weir (IW) and Jason Weir (JW) were also convicted of these offences.

[25] McCaughey lodged an application for leave to appeal his conviction and on 12 June 2016 the Court of appeal rejected all of his grounds of appeal and refused the renewed application for leave to appeal.

[26] The circumstances of the murder were that a group of men, arriving at different times in three different cars namely a Subaru (containing JW and IW), a Mercedes (containing JS) and a Peugeot (containing McCaughey), had gone to a farmhouse between Comber and Castle Espie to confront the deceased after he had

been observed arriving at the farmhouse in his Citroen Saxo car by JW. The evidence was that IW and JW physically attacked the deceased and then JS, the father of IW and JW shot the deceased with a shotgun. McGaughey's evidence was that thereafter JS instructed JW to put the deceased in the boot of the Citroen Saxo.

[27] McCaughey claimed that JS told him to help JW, but he did not and merely remained standing at the front of his own car. He said he then got into his car, JW got into the Saxo, IW got into the Subaru, JS got into the Mercedes and all four cars exited the yard. The four cars then began to drive along the Ballydrain Road; McCaughey said he was at the rear with the Saxo immediately in front of him. The Saxo then came to a halt and JW got out but appeared to be throwing punches into the car. The Mercedes then reversed back to the Saxo; IW got out with the shotgun, walked to the driver's door of the Saxo and fired a shot into it. McCaughey then said that IW disappeared somewhere, and JS and JW began arguing after JS told him to drive the Saxo again. JW and IW then got into the Mercedes and drove off. McCaughey said he pulled out around the Saxo and drove in the same direction. The Mercedes then stopped and McCaughey stopped too. JW alighted from the Mercedes; walked to McCaughey's car and told McCaughey that they were going back to burn the Saxo. McCaughey claimed he refused to do this. JS then came over and told him to burn the Saxo. McCaughey asserted he did not wish to argue with JS so said nothing and simply climbed over into the passenger seat. JW then entered the driver's seat of the car and drove the two of them back to the Saxo. At the Saxo, McCaughey claimed JW tried to set fire to it while he remained in his own car. They then saw vehicle lights approaching, so JW got back in the driver's seat, reversed back and then drove the two of them to Raffrey. JW alighted from the car at Raffrey and McCaughey drove home. When he returned home, McCaughey asked his mother's boyfriend to act as an alibi for him. The deceased's body was subsequently found at this scene.

[28] In his charge to the jury the learned trial judge posed three questions, agreed by counsel, to the jury:

> (i) If you are not satisfied beyond reasonable doubt that Stephen McCaughey participated in a joint enterprise to attack Philip Strickland, realising that a gun might be used with intent to kill or cause really serious injury, you must find him not guilty of both counts on the indictment.
>
> (ii) When the shotgun was fired on the road are you satisfied beyond reasonable doubt that Stephen McCaughey was participating at that stage in a joint enterprise realising that Philip Strickland might be shot with intent to kill or cause really serious bodily harm? If you are so satisfied you must find him guilty on both counts.

(iii) If you are not satisfied in relation to question 2, are you satisfied beyond reasonable doubt that, when the shot was fired in the yard he was participating in a joint enterprise, realising that Philip Strickland might be shot with intent to cause really serious harm. If you are so satisfied you must find him not guilty of murder but guilty of causing grievous harm with intent and guilty on the second count.

[29] At his original appeal against conviction McCaughey submitted that there was insufficient evidence to draw an inference that he had an intention of causing anyone really serious harm, let alone killing them, and, therefore, there was no evidence of him being part of a joint venture. Furthermore, there was no evidence of his physical participation in the murder at any point and no evidence of his presence encouraging others and intending to encourage others.

[30] In its decision dismissing all grounds of appeal, the Court of Appeal concluded that the trial judge made it clear that if the jury was not satisfied beyond reasonable doubt that this applicant had participated in a joint enterprise to attack Philip Strickland, realising that a gun might be used with intent to kill or cause really serious injury, he was to be found not guilty.

[31] The Court of Appeal further considered the authorities in relation to presence and encouragement as aiding and abetting the principal offence. In this respect the Court determined, in relation to the applicant, that there was ample evidence for the jury to conclude that, at least from the first shot onwards if not before, this applicant had joined in the venture which eventually led to the death of Mr Strickland. He had taken no steps to dissociate himself from the enterprise.

[32] The applicant now argues that the learned trial judge ought to have directed the jury that they could only convict the applicant of murder if they were satisfied that his presence at the scene assisted and encouraged others to commit murder and that the applicant intended by his presence to assist or encourage them to act with murderous intent, not merely that he contemplated murderous intent by the others.

Barry Skinner

[33] On 28 June 2006 Barry Skinner, along with Richard McCartan, was convicted by a judge sitting without a jury of the murder of Alexander McKinley ("the deceased"). He unsuccessfully appealed his conviction and the Court of Appeal judgment was published on 30 January 2008 under the citation [2008] NICA 5.

[34] Mr McKinley was shot by a male person as he sat in his car in East Belfast shortly before 9.00 pm on 7 October 2002 after being contacted on his mobile telephone at 8.48 pm by McCartan's who allegedly was in the same area

[35] Shortly after 8.55 pm a policeman, who knew Skinner, saw him a short distance from the shooting. A witness who had given an account of the shooting described the male person who went to the driver's door of Mr McKinley's car as having very similar physical characteristics to Skinner.

[36] The Crown claimed that telephone call evidence demonstrated that Mr McCartan and Mr Skinner's mobile phones had been used in the Tullycarnet area of Belfast shortly before 6 pm on the evening of the murder and again in the area of the shooting happened shortly after 6.00 pm. It was claimed that Skinner remained in that area until very shortly after the shooting had occurred, and then moved rapidly back to the Tullycarnet area.

[37] It was the prosecution case that an arrangement had been made for Mr McKinley to meet the two accused, with whom he had been friendly, on the evening of 7 October to exchange car registration documents related to a car he had purchased from the accused.

[38] There was evidence of extensive mobile telephone contact on 7 October 2002 and preceding days between Mr McCartan and Mr McKinley. The court heard of extensive mobile telephone contact between Mr McKinley and Mr Skinner during the same period. On 7 October 2002 Mr Skinner rang Mr McCartan at 6.11 pm, and Mr McCartan rang Mr Skinner at 8.55pm, when, according to the prosecution, both men were in the area where the shooting took place.

[39] Mr Skinner, when interviewed, gave an account of his movements on the evening of the murder entirely at odds with Skinner's movements established by the call mapping evidence. Mr Skinner claimed to have lost his mobile telephone at his aunt's house on the day of the shooting.

[40] The learned trial judge accepted that the two men had acted in concert to murder Mr McKinley but was not persuaded that it had been established to the requisite standard that it was Mr Skinner who had actually shot Mr McKinley.

[41] The main issue at the appeal for both appellants was that the trial judge had found them guilty on a basis which the Crown had not relied on in its presentation of the prosecution case i.e. the Crown had asserted that Skinner was the gunman but conceded there were alternatives in that an accused in a joint enterprise could have had a number of roles in a murder. Skinner claimed that he was not given the opportunity to meet what their counsel described as the "alternative case".

[42] However the NICA accepted that the specific role attributed to Mr Skinner of having shot Mr McKinley was additional to his participant as a procurer. The Court considered that, on either basis, he could be convicted of murder and that there was no question of counsel having been deprived of the opportunity to meet an "alternative case".

[43] The applicant's case is that he was not the gunman and there was no evidence that he had foresight of the gunman's actions or that he had knowledge of the gunman's intention or conduct, or that there was evidence that he planned to assist or encourage a killing. It is contended that there was no comment by the trial judge on the test of intent or foreseeability applicable at the time or how that test was applied. The argument advanced is that the applicant is left in the position of not knowing whether he was convicted on a pre-Jogee basis of foreseeability or some other basis.

[44] Counsel for the respondent contended in his skeleton argument that Jogee is not of assistance or application to this case and that there is no substantial, or any, injustice. It is submitted that this case more properly falls into those cases referred to in paragraph 78 of Jogee which notes the long established principle that, where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent and the intention to assist is inherent in the making of the agreement

Brenda Dolores Meehan

[45] Brenda Dolores Meehan was charged together with her husband and son with the murder of James McFadden on 5 May 2007 and assault on Jason Graham thereby occasioning him actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861. She was further charged alone with common assault on Aisling McFadden. The jury found her husband guilty of murder as a primary party and guilty on the section 47 count, found her son guilty of murder as a secondary party and found Ms Meehan guilty of murder as a secondary party, not guilty on the section 47 count and guilty of common assault.

[46] The Meehan family and the McFadden family attended a wedding reception at a hotel in Co Donegal on 5 May 2007. Hostilities broke out between members of the two families. The Meehan family returned home by taxi and then drove in their own vehicle to the vicinity of the McFadden home. The McFaddens returned from the wedding reception in a minibus. When the McFaddens arrived home the Meehans instigated a violent confrontation. Ms Meehan's husband attacked the deceased and he died of a rupture of the heart, consistent with a kicking or stamping on the chest. Ms Meehan was present at the confrontation with a piece of wood she had taken from the car. She denied striking anyone with the piece of wood and the conviction for assaulting Aisling McFadden related to a punch.

[47] The trial judge gave written directions to the jury. The jury was directed on the liability of secondary parties based on knowledge or foresight that the others were going to attack the deceased and when either of them did so they either intended to kill or cause serious bodily injury.

[48] The Court of Appeal considered that the written directions of the trial judge to the jury raised a doubt as to whether the jury asked themselves whether

Ms Meehan knew or foresaw that when her husband attacked the deceased that she knew or foresaw that he had an intention to kill or cause serious bodily injury and the conviction for murder was quashed. However, the Court of Appeal was satisfied that it was clear from the case as a whole that Ms Meehan knew or foresaw that some harm would be caused to the deceased and a conviction for manslaughter was substituted by that court on 23 May 2011.

[49] On the present application it is Ms Meehan's contention that the approach of the initial Court of Appeal, having relied wrongly upon the jury being satisfied beyond reasonable doubt that the Ms Meehan knew or foresaw the nature of the acts carried out by her husband, had resulted in substantial injustice to Ms Meehan despite the substitution of manslaughter for murder.

Mark Frederick Kincaid

[50] Mark Frederick Kincaid was charged together with William George Anderson and Gareth Colin Anderson of the murder of David Hamilton in the early hours of 29 November 2004. Mr Hamilton died in his flat from head injuries, having been struck at least twice with a heavy blunt object or objects, likely to have been inflicted while he was lying on the floor. Other injuries were consistent with him having been kicked or stamped upon as he lay on the floor. He was convicted by a majority verdict or 11 to 1 and his co-accused were convicted unanimously.

[51] The three defendants lived in the vicinity of the deceased's flat. On the afternoon of 28 November the three defendants and others were in the defendant's flat watching a football match. Kincaid's case was that he left the deceased's flat around 4pm and returned to the home he shared with his father. His girlfriend joined him at the house between 7:30 pm and 12:30 am and he was alone in the house for the rest of the night.

[52] Kincaid's left thumb print was found on a piece of broken glass on the floor of the living room in the deceased's flat. The piece of glass had come from a small glass bowl/candle holder which was usually situated on the mantelpiece of the electric fire in the deceased's flat. Prior to the trial Kincaid denied to police that he had ever been in the deceased's flat but at the trial he stated in evidence that he had been in the deceased's flat on one occasion on 7 September 2004 at a birthday party.

[53] Accordingly, Kincaid's defence was that he was not present in the deceased's flat at the time of the murder. The trial judge directed the jury in relation to the liability of those directly involved in the attack on the deceased and in the alternative the criminal liability of those present who by their presence intended to encourage others in the attack. The direction was that if a defendant was present while others attacked the deceased and that defendant intended by his presence to encourage others in that attack and did encourage them by his presence, then he is equally guilty of murder even though he did not strike any blow.

[54] On his initial appeal to the Court of Appeal against conviction Kincaid contended that the case against him should not have been left to the jury. The Court of Appeal, on 15 December 2009, concluded that there was sufficient evidence for the case properly to be put before the jury and that it had not been shown that the conviction was unsafe. On 11 February 2011 an application was made to the Criminal Cases Review Commission which declined to refer the case to the NICA.

[55] On this application Kincaid contends that leave should be granted on the basis that the trial judge ought to have given a specific direction in relation to the liability of Kincaid in the event that the jury concluded that he was present at the time of the attack on the deceased, a direction that would have complied with Jogee.

Guiding principles for the issue in this case

[56] Under Section 1 of the Criminal Appeal (Northern Ireland) Act 1980, a defendant may appeal against his conviction on indictment (i) with the leave of the court; or (ii) if the trial judge grants within 28 days a certificate that the case is fit for appeal. A person convicted of any offence on a non-jury trial may appeal against his conviction without leave or a certificate.

[57] The grounds of appeal are contained in Section 2(1) of the 1980 Act:

> "(1) Subject to the provisions of this Act, the Court of Appeal-
>
> (a) shall allow an appeal against conviction if it thinks that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.
>
> (2) If the Court allows an appeal against conviction it shall quash the conviction."

[58] Whilst the wording of the English legislation namely Criminal Appeal Act 1968 is somewhat different, the gravamen is similar.

[59] The conventional wisdom has always been that if an appeal is unsuccessful (either because leave is refused or leave is granted and the appeal is dismissed), there is usually no opportunity for a further appeal even if the point to be argued is that new or fresh evidence has arisen. Two caveats to that rule were acknowledged in R v Pinfold [1988] QB 462 ("Pinfold") namely:

(a) Where the appeal has been abandoned, the court may in exceptional circumstances treat the abandonment as a nullity (See Medway [1976] QB 779).

(b) If the dismissal of the first appeal involved some procedural defect which led to injustice for the appellant, the court may treat the dismissal as a nullity.

[60] In Pinfold, the applicant had been convicted of murder on the basis of evidence from a prosecution witness. His appeal was dismissed in November 1981. A second application for leave to appeal, relying on fresh evidence from the witness to the effect that his evidence at the trial had been untrue, was raised. Lord Lane CJ said at p. 464:

> "So there is nothing here on the face of it which says in terms that one appeal is all that an appellant is allowed. But, in the view of this court, one must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit or a finality to legal proceedings, sometimes put in a Latin maxim, but that is what it means in English. We have been unable to discover, nor have counsel been able to discover, any situation in which a right of appeal couched in similar terms to that, as being construed as a right to pursue more than open appeal in one case. So far as the Criminal Appeal Act 1968 is concerned, there are perhaps two possible exceptions or apparent exceptions, because that is what they are, to that rule: first of all, where the decision on the original appeal, if I may call it that, can be regarded as a nullity. This is more commonly applied where there has been an application to treat a notice of abandonment as a nullity. The second occasion, which may be simply an example of the first, is where, owing to some defect in the procedure the appellant has on the first appeal being dismissed suffered an injustice, where, for example he has not been notified of the hearing of the appeal or counsel has been able to attend, circumstances such as that."

[61] This is the approach that has been adopted by leading textbooks such as Blackstone's "Criminal Practice" 2016 Edition at D26.10, Archbold "Criminal Pleading Evidence and Practice" at paragraph 7.37 and "Criminal Procedure (Northern Ireland)" 2nd Edition by Valentine at paragraphs 15.150-15.152.

[62] The rationale behind this need for legal certainty is well illustrated in Cadder v Her Majesty's Advocate (Scotland) [2010] UKSC 43. This was a case where the effect of a decision by the Grand Chamber of the European Court of Human Rights, based on the right of a detainee not to incriminate himself and which had been

followed repeatedly by the European Court in subsequent cases, required that a detainee should have access to advice from a lawyer before he was subjected to police questioning unless there were compelling reasons to restrict that right. Accordingly Section 14 of the Criminal Procedure (Scotland) Act 1995 had to be read so as to preclude the admission in evidence of any incriminating answers obtained by the police from a detainee who was subjected to questioning without legal advice. His application to appeal his conviction to the High Court of Justiciary had been refused and he now brought an application to the Supreme Court for special permission to appeal.

[63] In the course of that judgment, both Lord Hope of Craighead and Lord Rodger JSC affirmed that any changes in the relevant legislation or practices would apply only to future cases. The courts declare not only what the law is, but what it has always been.

[64] The court cited with approval at [101] a judgment of Murray CJ in Ireland in A v Governor of Arbour Hill Prison [2006] 4 IR 88 at paragraphs [36]-[38] where Murray CJ said:

> "[36] Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.
>
> [37] Only a narrower approach based on absolute and abstract formalism would suggest that all previous cases should be capable of being re-opened or re-litigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a Court of Appeal should be set aside or, where possible, retried

> in the light of subsequent decisions where such subsequent decisions could be claimed to provide a potential advantage to a party in such a re-trial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be re-opened or the decision set aside.
>
> [38] It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

[65] Parliament has provided an alternative remedy. The Criminal Cases Review Commission (CCRC) was created by the Criminal Appeal Act 1995. Under s. 9, the CCRC may at any time after a conviction on indictment refer a case to the Court of Appeal. For the CCRC to refer a case, there must be a real possibility that the Court of Appeal or Crown Court will quash the original conviction or sentence. The reference will ordinarily only be made in respect of an argument or information not available to the court of first instance or on appeal (s. 13). However, in exceptional circumstances, the CCRC may refer a case without any such development in the proceedings (s. 14).

[66] Where a case is considered by the CCRC, it is for the Commission to decide whether or not to make a reference to the Court of Appeal. If it does, the reference stands as if leave has been granted. It follows that one effect of making such a reference is to pre-empt the decision which might otherwise be made on the merits of the case as to whether substantial injustice is established, so that leave should be granted, or whether leave should be refused in accordance with the ordinary practice of the court. (See R v R and Others [2007] 1 Cr. App. R. 10 at paragraph [41]).

[67] In the event that the case comes before the Court of Appeal as a reference by the Commission, no question of time extension arises. On the other hand, the general practice is that the Commission would not refer cases to the court while it remained open to the applicant to apply to the Court of Appeal for leave to appeal out of time. (See R v Cottrell and R v Fletcher [2007] 1 WLR 3262 at paragraph [14]).

[68] In distinguishing the respective roles of the NICA and the CCRC, the report of the Royal Commission of Criminal Justice (Cm 2263), which was the trigger for the creation of the new body namely the CCRC, repays attention.

[69] At paragraph [71] it states:

> "Although the 1968 Act does not specifically state this, it appears to be a matter of settled law that there can only be one direct appeal against the conviction. We consider that with the need for finality and the existence of the alternative route to re-opening a case via a reference to the Home Secretary, the present position is correct and should be retained. In future, if our recommendations are accepted, the unsuccessful appellant will be able to take his or her case to the new body. We are firmly of the view that once the normal appeal route is exhausted, further applications should be made to that body. Most of these applications will require investigation, but if we accept that a small minority may point clearly to the innocence of the applicant or raise a technical or legal ground which was overlooked at the appeal. Even for those cases we believe that the correct route is via the new body, which will be able to refer them expeditiously to the Court of Appeal."

[70] At Chapter 11.2 the report states:

> "2. In R v Pinfold the Court of Appeal held that it had no jurisdiction to entertain a second application for leave to appeal in the same case even where fresh evidence had emerged since the dismissal of the earlier appeal. The Court of Appeal can only consider such a case again if the Home Secretary uses his powers under Section 17 of the Criminal Appeal Act 1968 to refer to the Court of Appeal, when a case is treated for all purposes as an appeal to the court by the convicted person. The power to refer cases in this way is limited to those tried on indictment."

[71] At paragraph 15 of Chapter 11 the report states:

> "We believe that there are cogent arguments for the Authority to be independent of the Court of Appeal. Their roles are different and, as we have said in the last chapter, we do not think that the Court of Appeal

> is either the most suitable or best qualified body to supervise investigations of this kind. We have recommended in Chapter 10 that the Court of Appeal should be empowered if it thinks fit to refer cases to the authority for investigation and that the authorities should be required to report the outcome of any such investigation to the Court of Appeal. But we do not see the Authority as coming within the court structure. Nor, equally importantly, would it be empowered to take judicial decisions that are properly matters for the Court of Appeal."

[72] In this context two cases determined in the NICA were analysed at length in the instant applications. First, R v Maughan (Re-hearing of Appeal) [2004] NICA 21 ("Maughan"). In this case, an application for leave to appeal against conviction was re-heard on the ground that the Court of Appeal had misapprehended evidence adduced during the trial.

[73] The court at paragraphs [2] and [3] cited R v Pegg (1987 unreported) which invoked the Pinfold exceptions of nullity and the failure of the court to follow the rules or well established practice or where the court was misinformed of some relevant matter. It also invoked R v Daniel [1997] QB 364 which again adverted to the failure of the court to follow the rules or the well-established practice leading to a likelihood that injustice may have been done. There is nothing in this case which offends against the basic principles set out in Pinfold.

[74] The second Northern Ireland case was that of R v Walsh [2007] NICA 4. In this case, due to a misunderstanding unopposed new evidence for the appellant had not been considered by the court. In those circumstances the court did permit the case to be re-opened.

[75] However once again there is nothing in this case that offends against the principle of Pinfold. At paragraphs [30] and [31] Kerr LCJ said:

> "… The legislature is to be presumed to have been aware of the decisions in such cases as Pinfold when passing the 1995 Act and the absence of any express provision confining reconsideration of convictions exclusively to CCRC references may perhaps signify that Parliament intended that the power of the court to relist a case should be preserved. As against that the Commission was established precisely for the purpose of ensuring that miscarriages of justice were corrected and one can recognise the force in the argument that it should be the only body to decide whether a case warrants further consideration.

> [31] We have concluded that the power of the Court of Appeal to relist a case has not been removed by the 1995 Act. The occasion for the exercise of such a power will arise only in the most exceptional circumstances, however. In virtually every conceivable case it is to be expected that where the possibility of an injustice is reasonably apprehended, CCRC will refer the case. If it decides not to refer, however, the circumstances in which a challenge to that decision can be made are necessarily limited …. Where CCRC has been invited to refer a conviction to the Court of Appeal for a second time and has declined, if this court considers that because the rules of well-established practice have not been followed, or the earlier court was misinformed about some relevant matter and, in consequence, if the appeal is not relisted, and injustice is likely to occur, it may have recourse to its inherent power to relist (or effectively, reopen) the appeal."

[76] In Christopher Boughton-Fox v Regina [2014] EWCA Crim. 227 the Court of Appeal in England considered not only the case of Walsh but also a subsequent English case of R v Barry Jones Strettle [2013] EWCA Crim. 1385.

[77] Boughton-Fox, having been convicted on a single count of conspiracy to defraud, had sought leave to appeal against conviction and sentence. Those applications were refused by the Single Judge who characterised them as wholly without merit. The applicant renewed his application for leave to appeal and the full Court of Appeal refused the renewed applications. He made a second application for leave to appeal against conviction in circumstances where the CCRC had upon reference by him, refused to refer the matter back to the Court of Appeal in England.

[78] Refusing leave, the court said:

> "This court does not have jurisdiction, save in the most exceptional circumstances, which do not remotely arise in this case, to entertain a second application for an appeal against conviction (other than by reference to the CCRC) where a first application for leave has been refused or an appeal against conviction has been dismissed."

[79] The court cited with approval the principles of Pinfold and the judgment therein of Lord Lane CJ.

[80] The court observed that the issue had recently been revisited in Strettle's case which had considered both the Pinfold and the Walsh case.

[81] The court cited paragraphs [11] and [12] of the decision in Strettle which had been couched in the following terms:

> "[11] We decline to accept that the jurisdiction is as wide as Mr Maguire contends, or that the Chief Justice of Northern Ireland (*in the Walsh case)* was, in truth, providing any second route of appeal in the event that the CCRC were not prepared to become involved in recommending that this court pursue a further appeal. In our judgment, the CCRC is by far and away in the best position to determine whether an appeal should be referred to this court. It has the power to investigate allegations which otherwise this court might be constrained to require it to investigate, having given leave of what might transpire was a false premise.
>
> [12] In our judgment the proper course is for the CCRC to be seen as, almost invariably, the only route whereby an appeal might be re-opened. We say the 'almost invariably' never to exclude every possible circumstance, but we believe that the examples given by Lord Lane CJ are far more to the point than those which include cases such as this."

[82] Finally, R v Yassain [2015] 3 WLR 1571 - an authority not cited to us - is a case where the Court of Appeal in England had mistakenly accepted the proposition that the defendant had been sentenced on a count of kidnapping notwithstanding that in the taking of the verdicts there had been no conviction of him on this count. Subsequently it emerged that in fact he had been convicted by the jury on such a count but the transcribers of the trial proceedings had simply omitted to record the guilty verdict.

[83] The Court of Appeal permitted the re-opening of the appeal and set aside the earlier order on the ground that there had been a defect in procedure which might have led to a real injustice.

[84] The Court accepted that the Criminal Division of the Court of Appeal was vested, like the Civil Division, with a residual discretion to avoid real injustice in exceptional circumstances and therefore had implicit power to re-open a concluded appeal where it was necessary to do so to achieve the two principal objectives of correcting wrong decisions and ensuring public confidence in the administration of justice.

[85] However, significantly, Lord Thomas of Cwmgiedd CJ, said at paragraph [40]:

> "[40] The fact that both (*the Criminal Division and the Civil Division of the Court of Appeal*) have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way by the Criminal Division as it would be by the Civil Division. For example, in a criminal case there will often be three interests that have to be considered – that of the State, that of the defendant and that of the victim or alleged victim of the crime, even though the victim is not a party to the proceedings under the common law approach … There is the strongest public interest in finality and the jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission."

The submissions of the appellant Brown

[86] In submissions that were slightly more impressive for their ambition than their accomplishments, Mr Kelly made the following points:

(1) This court did have power to hear these applications and, if so, they amounted to an application to extend time for an application for leave to appeal.

(2) The court could re-open the earlier appeal if the court was satisfied that a substantial injustice had occurred.

(3) Counsel relied on paragraph [100] of Jogee (see paragraph 7 above) which indicated that leave may be granted if substantial injustice is demonstrated albeit not simply because the law applied now has been declared to have been mistaken.

(4) The concept of "exceptional leave" was a new development and opened new horizons. It was a new test borne out of public policy with many cases on the Jogee point now waiting in the wings. Counsel invoked the cases of Maughan and Walsh to underline the development of this concept.

(5) In the event that counsel was confined within the Pinfold restraints, the fact that the decision in Jogee arose out of a "wrong turn" in the law

constituted not a change of law but a correction of a misleading path. That constituted a nullity.

(6) Finality as a concept cannot be absolute. One should distinguish between an error or mistake and a change of law.

(7) Jogee does not address cases where there already has been an unsuccessful appeal and therefore does need to be extrapolated to meet this fresh circumstance. It is significant that the court did not assert that the only way forward was through the avenue of the CCRC.

The respondent's contentions

[87] In brief Mr McCollum QC advanced the following contentions.

(1) Pinfold confines the power to re-open appeals.

(2) There is no difference in a correction of law or a change of law. (See Jogee at paragraph [100]).

(3) There is not a single authority to support the proposition that the constraints of Pinfold should be widened.

(4) The courts should be careful not to trespass on the function of the CCRC. It is to this body that the applicant should turn. No injustice is caused by refusing to re-open these cases given the presence of the CCRC. If a case is merely out of time, then an application can be made to the Court of Appeal to extend time. If the appeal has already been completed, then the avenue of remedy is the CCRC.

Conclusion

[88] We have come to the conclusion that this court should not re-open cases which have already been determined by the Court of Appeal absent features which bring them within the general confines of the finality principles as outlined in Pinfold. The appropriate recourse for these applicants in such circumstances is to turn to the CCRC.

[89] We commence our reasoning for this conclusion by respectively endorsing the rationale of Murray CJ in the Arbour Hill Prison case cited in Cottrell's case. There is no authority for the proposition that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have some bearing on previous and finally decided cases, such cases should be re-opened or the decision set aside. To do so would render a legal system uncertain, incoherent and dysfunctional. Such clarification - even where it is correcting a

wrong turn in the law as in Jogee - does not render a nullity any previous decision based on the position as understood prior to that clarification.

[90] Jogee at paragraph [100] unflinchingly asserts that the effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in the previous authorities in Chan Wing Siu and R v Powell and R v English

[91] Where, as in the Jogee cases, there has been no final determination by the Court of Appeal, the conviction can be set aside by seeking exceptional leave to appeal to the Court of Appeal out of time. In those circumstances the court has power to grant such exceptional leave to appeal and may do so if substantial injustice can be demonstrated.

[92] However, if the appeal against conviction is effectively based on a change of law and nothing else, and the conviction was properly returned after a jury trial, it is unlikely that a substantial injustice will have occurred.

[93] The Jogee case of course did not deal specifically with cases, such as the instant applications, where appeals had already been determined adversely to the appellants and applications to reopen were made. Such matters have for years been governed generally by the Pinfold principles.

[94] We do not consider that this is a moment to challenge conventional wisdom. Not one authority was opened to us, including the Northern Ireland cases of Walsh and Maughan, which had done other than cite with approval the general nature of the Pinfold exceptions, that is, that cases will be re-opened only where there is a nullity or a procedural defect.

[95] All of the cases cited to us which have been re-opened after an appeal, have effectively been fitted into that genre of exception. These exceptions will obviously embrace instances of substantial injustice but they are confined within that category.

[96] We recognise, as did the court in Yassain, that there is no algorithmic formula or easy to apply rule for recognising all the circumstances that may fall within the second ground of Pinfold. Perhaps the cases of Maughan and Walsh are sound illustrations of how flexibly that concept can be stretched in appropriate circumstances.

[97] Nonetheless, if the second limb of Pinfold - a defect in procedure - is to be invoked, such a defect is a required desideratum. If this test is performed with integrity, the orthodoxy of the principle will not be punctured.

[98] A fundamental change to this settled principle is neither easily established nor to be lightly inferred absent some solid and persuasive authority. We find no

such unravelling threads in the authorities cited. Jogee's case contains no material to persuade us otherwise.

[99] The maintenance of Pinfold restraints do not elevate finality over injustice. It was the constraints of Pinfold and the determination of the legislature to uphold that principle that led to the discretion- originally exercised by the Home Secretary – being vested in the CCRC in the wake of the Royal Commission on Criminal Justice Report. The formation of the CCRC has closed any potential loophole of injustice in this context.

[100] The CCRC may refer a conviction "at any time". Normal time limits are disapplied in the event of a reference. The commission refers cases where there is a real possibility that the conviction will not be upheld. The Court of Appeal quashes convictions which are unsafe.

[101] In this context it is worth citing the words of Igor Judge P at paragraph [56] of Cottrell:

> "The court and the commission are equally concerned about possible miscarriages of justice, and unsafe convictions. Convictions referred by the commission to the court are frequently quashed, but not always. The differences reflect the conditions which govern the exercise of their respective functions. The commission refers cases where there is 'a real possibility' that the conviction 'would not be upheld': the court quashes convictions which are unsafe. This should not be productive of tension. Both bodies are independently exercising their constitutional responsibilities, and they do so applying different tests. In short, in our judgement, the mutual independences of the commission and the court are not damaged by the application of comity and coherence in relation to change of law cases."

[102] It seems to us inescapable that the proper avenue for these applicants is to consider the option of the CCRC unless they can bring their current applications broadly within the confines of the principles in Pinfold. None of these cases fits that requirement. Outside the general remit of Pinfold, the right to re-open appeals lies beyond the reach of this court. In short we have concluded that the Jogee concept of "exceptional leave "is neither a fresh Pinfold ground nor an additional basis for reopening an appeal.

[103] Accordingly, the applications to reopen these appeals are refuse. These applicants should consider , if they deem it appropriate and if they have not already done so, referring their cases to the CCRC.