Joint enterprise, murder and substantial injustice: the first successful appeal post-Jogee (case comment)

Article

Accepted Version

Court of Appeal

Joint enterprise, murder and substantial injustice: the first successful appeal post-*Jogee*

R v Crilly [2018] EWCA Crim 168

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The applicant was a drug addict who supported his habit by burgling houses. In 2005, he was convicted of robbery and murder, after he and two others, Flynn and Gaffney, had broken into the flat of 71-year-old Mr Maduemezia. It was the appellant's case that the group had sought to ascertain that the property was unoccupied by knocking on the door. When no one answered, they had assumed that Mr Maduemezia was out. Upon breaking-in, the men were surprised to find themselves in the presence of the occupier, who, hard of hearing, had not heard their knocks.

The applicant stated that Flynn had demanded money from Mr Maduemezia and pushed him into a chair. The applicant and Gaffney searched the flat. When they returned empty handed, Flynn became furious and punched Mr Maduemezia in the face which caused him to fall onto the floor. The applicant, having helped the victim back up, left the flat and waited for the others outside. They joined him about ten minutes later, carrying a food blender. This they later sold.

A neighbour discovered Mr Maduemezia's body. He had died from a head injury caused by at least one blow of moderate force. Flynn was convicted of murder on the basis that he had inflicted the fatal punch with intent to kill or cause grievous bodily harm. The applicant was found guilty under joint enterprise principles. It was the prosecution's case that he had continued to participate in the robbery when he must have foreseen that Flynn might cause Mr Maduemezia really serious bodily harm with intent.

The applicant did not immediately challenge the safety of his conviction, having been (correctly) advised that, on the law as it then stood, he had no arguable grounds to appeal. After the change of law in *R v Jogee* [2016] UKSC 8, he applied for an

extension of time (of 11 years and 3 months) and for leave to appeal against his murder conviction. To justify an appeal brought out of time, 'substantial injustice' must be demonstrated. Following *R v Johnson and Others* [2017] 1 Cr App R 12; [2016] EWCA Crim 1613 this requires the applicant to show that there is a sufficiently strong case that he would not have been convicted had the law as identified in *Jogee* been applied to his case.

Held, allowing the appeal and quashing the conviction for murder, that 'the case against the applicant was to all intents and purposes a case about his foresight' (at [42]). There were but two factual findings the Court felt could be safely derived from the jury verdicts, namely (1) that he was guilty of robbery (crime A), and that (2) at the very least he foresaw that grievous bodily harm might be caused to the victim of the robbery in which he nonetheless continued to participate (crime B) (at [39]). Whilst foresight may be evidence of intent, the evidence against the applicant was not so strong as to allow for a safe and fair inference that a *Jogee*-compliant jury *would* have found the requisite intent to cause grievous bodily harm (at [42]): as the Court noted, 'he was not accused of intending or foreseeing any violence' (at [40]) when he first entered the victim's flat; 'he was not accused of inflicting the violence' (at [40]) and (although the trial judge's steps to verdict raised this as an alternative to foresight) 'he was not accused of intending to cause grievous bodily harm' (at [40]); there was only a very short time between the discovery of the occupier and the progression from what was supposed to be a burglary to a robbery. The fatal attack was neither sustained nor savage. In fact, it was quite possible that death had been caused by just 'a push and a punch' (at [40]). The evidence thus put the applicant's case 'between the middle to lower end of the *Johnson* spectrum' (at [41]) designed to assist the Court in determining the strength of an inference of participation with intention to cause really serious bodily harm. The Court concluded that *Jogee*-compliant directions would have made a difference; 'substantial injustice' was made out, and the conviction was found to be unsafe ('for very similar reasons' (at [43])).

Commentary

Crilly is the first post-*Jogee* appeal in which an applicant has succeeded in demonstrating substantial injustice and had his murder conviction accordingly vacated. The judgment was not immediately available (so as not to prejudice the

appellant's retrial at Manchester Crown Court at which he pleaded guilty to manslaughter) and its publication had been eagerly awaited. It was hoped that the decision would be indicative of a lowering of the high threshold test as expounded in *R v Johnson and Others* [2017] 1 Cr App R 12; [2016] EWCA Crim 1613 at [21]. At the least it was hoped (in view of the Court's avowed efforts to deter 'totally unmeritorious' applications for leave to appeal, see *R v James* [2018] EWCA 285) the case would provide prospective applicants with further guidance on what is needed to demonstrate 'substantial injustice' in out-of-time appeals. Now that the judgment is in the public domain, it is evident that the Court remains faithful to its approach in *Johnson* and the 'spectrum' test for inferring intention from evidence including foresight. Interestingly though, the Court was prepared to put greater trust in the applicant's version of events than it did in any of the *Johnson* appeals.

None of the accused had carried a weapon, and the Court of Appeal places much emphasis on the fact that the present case involved neither a sustained nor savage attack, with the victim dying quite possibly as the result of just one 'push and a punch' [40]. This put the case fairly low on the *Johnson* spectrum of sample cases, although not quite at the bottom, as the Court acknowledged. The circumstances also set it apart it from other joint enterprise murders, which typically feature weapons, vicious, if not necessarily prolonged, attacks at the hands of several parties and the infliction of multiple injuries in circumstances where some act of violence was anticipated from the outset.

In other words, the outcome in *Crilly* is not so much owed to a softened approach to finding 'substantial injustice' as to the particulars of the case (as the Court felt 'obliged to take them' [41]). Decisive was that the 'most likely' and 'fairest' fact scenario concerned an *unarmed* burglary of a *seemingly unoccupied* flat that had *surprisingly* and *rapidly* 'gone wrong' because the precautions taken did not work in the case of a householder whose hearing was impaired, turning a non-violent, non-dangerous property offence into a robbery and (one-punch) murder. Use of force was limited and of moderate severity.

Much is also made of the fact that the prosecution, in going after Mr Crilly, had nailed its flags rather firmly to the 'foresight' pole of liability. The Court goes to some lengths highlighting the evidence that suggests Mr Crilly had at no point *intended* that

serious harm be caused to the victim. To this effect, it cites extensively from the trial transcript (in particular, from the applicant's cross-examination and the judge's summing up of the evidence given by him). The defence conceded, and the Court duly notes, that the trial judge's steps to verdict left it to the jury to find – within the same step – that the accused *either intended or foresaw* the infliction of grievous bodily harm. However, the tenor of the judgment is such that the most plausible inference to be drawn from the jury's verdict, read against the accusations as advanced at trial, is that they returned the guilty verdict on a theory of foresight.

The holistic view thus taken is consistent with the approach in the *Johnson* appeals where, despite routes to verdict that were often drafted with a clear focus on foresight, the Court of Appeal saw fit to conclude that a properly instructed jury, aware of the evidence as presented at trial, would have found intention. *Crilly* confirms that proving 'substantial injustice' is not about proving that the trial judge's directions to the jury were flawed in light of *Jogee*, but about demonstrating that the accusation was built on foresight all along. Prospective applicants will need to look closely at the prosecution case, as well as the dynamics and nuances of the trial (see *James* [2018] EWCA 285). It will not suffice to focus one's efforts on the trial judge's summing up, the steps to verdict and related jury directions. But *Crilly* suggests that if it can be shown that an applicant's case was *in essence about foresight*, the odd reference to intention might not prove fatal to his case (and *vice versa*, see *Johnson*).

It was anticipated that post-*Jogee* appeals would centre on the notion of 'conditional' intent (as, indeed, was the case in *Burton* and *Hall* [2016] EWCA Crim 1613, for example). Against this background, it is interesting to note that the judgment in *Crilly* does not contain a single mention of *conditional intent*, even though prosecution counsel had submitted that Crilly's was a case where it 'was understood by the participants that if any resistance was offered sufficient force would be used to render him incapable of resistance and that would include force with the intention of causing grievous bodily harm' [34]. The absence of 'conditional intent' language is welcome, for, as I have argued elsewhere (B. Krebs, Accessory liability: persisting in error (2017) CLJ 76 (1) 7-11), the terminology is a red herring. It may of course be reading too much into a decision that did not proceed on the basis of prosecution counsel's take on the facts, but if the avoidance of the term 'conditional intent' was in any sense

deliberate, then this aspect of *Crilly* may well indicate a welcome retreat from one of the more problematic aspects of the decision in *Jogee*.

A final point to note is that the judgment confirms that the same considerations that inform the assessment on substantial injustice inform the decision on the safety of the conviction. The Court speaks to both points separately (as it did in *Johnson*), but deals with the safety issue in the briefest of terms, referring back to its analysis on substantial injustice ('for very similar reasons' [43]). In out-of-time appeals, it all comes down to the strength of the applicant's argument that *Jogee* would have made a difference to the jury's verdict.

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