Neutral Citation Number: **[2019] EWCA 198 (Crim)**

Case No: 20180699B5; 201804537B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE UPON TYNE
His Honour Judge Hodson
T20077355

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/02/2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE NICOL
and
SIR BRIAN KEITH
(sitting as an Additional Judge of the Court of Appeal)

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Between :

JORDAN TOWERS **ANTHONY STEWART HAWKES**	**Appellants**
- and -	
THE QUEEN	**Respondent**

- -
- -

Henry Blaxland QC (instructed by **Birnberg Peirce & Partners**) for Jordan Towers
John McGuinness QC (instructed by **Crown Prosecution Service**) for the Crown

Hearing date : 29 January 2019

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Approved Judgment

Sir Brian Leveson P :

1. On 31 October 2007, in the Crown Court at Newcastle upon Tyne before His Honour Judge Hodson (the Recorder of Newcastle) and a jury, Jordan Towers, Anthony Stewart Hawkes and Dean Curtis were convicted of murder and wounding with intent contrary to s. 18 of the Offences Against the Person Act 1861. As Towers and Hawkes were aged under 18 at the date of the offence, they were sentenced on count 1 to be detained at Her Majesty's pleasure, with a minimum term of 13 years less 185 days spent on remand for Towers and 16 years for Hawkes. Curtis was sentenced to life imprisonment with a minimum term of 17 years less 185 days spent on remand. No separate penalty was imposed for the offence of wounding with intent.

2. Towers sought leave to appeal against conviction on the grounds that the judge's direction in relation to the murder was inadequate and that he wrongly rejected a submission that there was no case to answer in relation to the offence of wounding with intent. These applications were refused both by the single judge and the full court (Latham LJ, Grigson and MacDuff JJ): see [2008] EWCA Crim 2194.

3. By a decision of 3 July 2018, pursuant to s. 9 of the Criminal Appeal Act 1995 ("the 1995 Act"), the Criminal Cases Review Commission ("CCRC") referred to this Court both the murder conviction of Towers (but not that for wounding with intent) on the basis of the change of law brought about by the judgment of the Supreme Court in *R v Jogee*, *Ruddock v The Queen* [2016] UKSC 8 ("*Jogee*") and the clarification given by this Court in *R v Johnson* [2016] EWCA Crim 1613 ("*Johnson*"). In addition, the sentence of Hawkes was also referred on the basis that the trial judge failed to give credit for the relevant number of remand days. The latter appeal, requiring the court to give credit for time spent on remand, is unopposed.

4. In addition, having reviewed the papers, Henry Blaxland QC on behalf of Towers seeks leave to appeal against his conviction for both offences on a further ground namely that the judge erred in not giving a specific direction that the jury were not to draw an adverse inference from his decision not to give evidence, pursuant to s. 35 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). During the hearing, it was overlooked that, in relation to the offence of wounding with intent, there had been a final determination of this court and no notice specifying that the conviction for this offence was to be treated as referred: see s. 9(4) of the 1995 Act.

The Facts

5. On 19 May 2007, Kevin Charles Johnson (aged 22 at the time) was fatally stabbed outside his home in Partick Road, Sunderland, after an altercation with three young men who had been behaving rowdily in the street: it was not in issue that the young men were Towers (then aged 16), Hawkes (then aged 17) and Curtis (then aged 19). The fatal wound was inflicted by either Hawkes or Curtis.

6. In a second incident five minutes later, Jamie Thompson encountered the same three youths on a nearby street, Greenwood Road, and was stabbed in the chest by Hawkes. The injury was not life-threatening but required hospital treatment and two stitches.

7. It was not in dispute that Towers, Curtis and Hawkes all had weapons with them at the time these offences were committed. Towers admitted to the police, without prompting,

that he had been carrying a knife and that he had discarded it later during the evening after the incident. He led police to where he had left the knife which was subsequently excluded as the murder weapon (which was never found). Hawkes admitted that he had been carrying a Stanley knife and Curtis admitted carrying a screwdriver.

8. Towers admitted that he had thrown some punches at Mr Johnson and had picked up a broken paving slab (also described as a rock or brick) and thrown it at him but none had connected and he denied participation in the stabbing (which appears to have occurred before the slab was thrown). In relation to Mr Thompson, it was contended that there was no evidence of him abusing, threatening or attacking him, or even of him encouraging others to attack him.

9. The prosecution case was advanced on the basis that murder would be established if the fatal injury was inflicted with each of the three intending to cause Mr Johnson really serious harm or, alternatively, on the basis that they had foresight that serious bodily injury could be inflicted (following *R v Powell and English* [1999] 1 AC 1). The count of wounding with intent, however, was always put only on the basis of shared intent to cause grievous bodily harm.

10. In the light of the argument that the facts satisfy the test of substantial injustice set out in *Jogee* (and so do not fall foul of s. 16C(1) of the Criminal Appeal Act 1968 (as inserted by s. 42 of the Criminal Justice and Immigration Act 2008), it is necessary to set out in some detail the relevant evidence.

11. Kevin Johnson and his partner, Adele Brett, were in their bedroom when they heard rowdiness and male voices shouting in the street. Johnson went downstairs and Ms Brett stayed in the bedroom. The noise continued and Mr Johnson went outside. She followed and, from her gatepost, saw two youths attacking Johnson while a third (Towers) was in the middle of the street, 15 to 20 feet away. The altercation was occurring on the opposite corner of the street. She shouted that she was calling the police and went back inside to do so. When she returned, she saw the three youths running away and her neighbour, Marsha Newby, was with Mr Johnson who had been severely wounded.

12. The evidence of Ms Newby was important. She was in her home on Partick Street when she heard Mr Johnson (whose voice she recognised) shouting. She saw one youth standing by her gate looking across the road towards Johnson's house. The youth said, "Come outside. Get outside you daft cunt." Johnson then exited his front door. The male was beckoning to Johnson, saying, "Come on out here." It was when Mr Johnson said that he did not want to fight his opponents all at once but was prepared to do so one at a time that Ms Newby realised that there were two youths in addition to the one she had seen first. The first youth continued to "entice" Johnson to come around the corner towards them. Then the youths formed a semi-circle around him, around two feet away. Johnson was standing in front of the second youth, who made a motion with his left hand from his chest to its full extent outwards three times. The first youth closed in behind Johnson while the third closed in behind the second. The third youth, whom she described as taller than the other two, stayed some four feet away from Johnson. Ms Newby thought that one of the youths was carrying a knife but could not see.

13. Two of the youths continued to strike Mr Johnson, who fell backwards. The third youth, who was in the middle of the road, picked up a paving slab, held it at head height and

threw it at Mr Johnson; it is unclear whether the slab missed or struck him on the legs. This third youth (said to be Towers) went further into the road, away from the other two, then back towards them. Ms Newby saw that when Ms Brett came outside for the second time, the three youths were walking away, laughing. The third male was at all times further from Johnson than the others, who were "taking the lead".

14. Amanda Taggart, who was with her sister, Chelsea Taggart, saw three youths coming from Pennywell Road, in the vicinity of Partick Road. There were two in front and the third, described as taller than the other two, came running across the road and caught up with the other two. A serious argument ensued which she thought was initiated by the third youth. She thought she heard one of the other two say, "What are you playing at? What have you done?" The third youth pushed at one of the others. She heard someone say, "You daft cunt. You stupid idiot."

15. Chelsea Taggart also described a third, taller youth catching up with the other two and arguing with them. The first youth said something like, "What you done that for?" The second youth said, "Just stop there. Just wait there." The first youth then said "No, I'm gone" and walked off. She described the first youth as shocked and angry and the second as more calm. The third youth was also angry: "he was saying, 'Stop there' and like he made it sound like if they've done something, what they done."

16. Mr Thompson described being on Greenwood Road and seeing three males walking towards him. He said:

> "There were three males. I stayed on the same side of the road. One of the three crossed over. The two remaining talked to each other. The one who crossed came close to my face. I tried to carry on walking. He asked if I had a cigarette. I told him I didn't have one. They were in my face. The first was just behind them and the second male was just there. He was taller than the third male and taller than the first male…They came up to us. One of them said, 'Are you Jamie?'…I said that I was Jamie. And it was the second male that said that. They clearly wanted a fight. The second and third male wanted a fight. They were shouting. They were jumping about and slinging their arms about…They came further up to me and I stopped. And then I got stabbed. It was male 2 [not disputed to be Hawkes] that stabbed me…he done it quick. He pulled what I thought was a screwdriver out of his coat whilst the other one was slinging his arms about…I seen a movement across his chest and I was stabbed instantly. I didn't see the screwdriver afterwards…I ran away and looked back and they were standing laughing and shouting. He said, 'I'll punch your head in'. All three were laughing. They were all shouting stuff…"

Without demur, Judge Hodson invited the jury to conclude that the first male was Towers.

17. There was evidence of a further incident at 1.45 that morning at a Shell petrol station when three youths were standing on the forecourt. Two of the three (said to be Hawkes and Curtis) were aggressive and threatening. The third (Towers) stood away from them

and after the threats asked for some crisps, proffering a £1 coin. The other two then threw a brick at a window which cracked.

18. In the event, Mr Johnson was stabbed four times: there were two minor wounds to his back, a cut to his arm and the fatal stab wound through his chest to his heart with a blade which had a sharp edge and a blunt edge. Forensic examination found no blood on Towers' clothing and excluded as the murder weapon the knife which he admitted carrying.

19. The prosecution also adduced evidence of Towers' reaction to the events of that night. He denied involvement and told his sister that the other two were responsible. Towers' mother described a conversation between Towers and Curtis at her home, the morning after the incident:

> "…Jordan said, 'There's a man who has been stabbed in Pennywell and he's dead'. This is when Dean was there. Dean said, 'Why aye man' and started laughing. I didn't approve of that. Jordan said, 'I don't think it's fucking funny. A man has been stabbed and that family must be going through hell.' And Dean said, 'Shut up, you're schizing us out'. Dean stayed for five minutes and left. And Jordan said he wasn't going to hang out with Dean in the future."

20. There was also substantial evidence of police interviews of Towers. In his first interview, he provided a prepared statement admitting that he had been with others (whom he did not identify) in an incident outside Mr Johnson's house. They offered him a fight as he had shouted at them. He further admitted that he swung punches at Johnson and picked up and threw a paving slab at him, both of which he said had missed. He walked away and did not know that Johnson had been stabbed until he saw blood on his clothing. He did not see the stabbing and had nothing to do with it. As for the second incident, he said that Mr Thompson had offered him drugs and that he had argued with him but not touched him.

21. In his second interview, he said, in relation to the stabbing of Mr Johnson: "I was there, I've slung a brick, it's missed, I've slung a couple of punches, they've missed"; "I had a knife but I didn't use it, disposed of it, smashed it in half"; "I didn't use any knife mate…yous can gan and get it…but you'll see it hasn't been…inserted in anyone"; and "Aye, so I thought, play with fire, you get burnt, mate, that's the way life is, so I thought I'm having nowt to do with this".

22. In the next interview, when asked about having a knife with him, he said: "Doesn't mean I want to use it, does it?...It's all for front…It's for intimidation reasons, not 'cause I'm going to use it". In the final, fourth interview, when pressed as to why he stayed with the others over a period of some hours if, as he claimed, he wanted to distance himself from the offences, he said that he wanted to distance himself from the crimes but not from the others: "I wanted to be there, but I didn't want to be there when the trouble…it's no crime who you knock about with".

23. At the close of the prosecution evidence an application was made on behalf of Towers to remove the count of wounding with intent from the jury on the basis that there was no evidence of participation. Judge Hodson decided that, given the previous attack on

Mr Johnson, it could be inferred that Towers' conversation with Thompson was a ploy to launch a joint attack upon him.

24. The trial then continued. The judge having correctly followed the procedure set out in s. 35 of the 1994 Act in relation to warning of the risk of adverse inferences, Towers elected not to give evidence. Both Hawkes and Curtis did, the relevance of what they said being that they blamed each other but both exculpated Towers. Hawkes did not know that Towers had a knife and was "100% certain" that Towers had not stabbed Mr Johnson. He admitted that he had stabbed Mr Thompson but said that it was using a knife passed to him by Curtis and he had not intended really serious harm. Curtis said that Hawkes had approached Johnson from behind and stabbed him, admitting to him that he had done so. He did not know whether Towers was carrying a weapon. As to the attack on Mr Thompson, he said that he saw Hawkes running at him and there was "a punch, a bit of a ruffle about" but did not know that he had been stabbed and did not goad Hawkes into carrying it out.

25. A route to verdict was discussed and provided to the jury. In relation to the count of murder in respect of Towers it was as follows:

> "(5) Having concluded that this Defendant did not inflict the fatal stab wound, are you sure that he joined in unlawfully in the attack on Kevin Johnson before the fatal stab wound was inflicted? If your answer to that is yes, you go on to question 6. If your answer to that question is no, the Defendant is not guilty of murder and not guilty of manslaughter.
>
> (6) Are you sure that this Defendant knew that the perpetrator had a knife? If you are sure of that, you go to question 7. If you are not sure, that Defendant is not guilty of murder or manslaughter.
>
> (7) Are you sure that this Defendant shared the perpetrator's intention either to kill or cause really serious bodily harm with the knife? If your answer to that question is yes, he is guilty of murder. If your answer to that question is no, you go to question 8.
>
> (8) Are you sure that this Defendant realised that the perpetrator might use the knife with an intention either to kill or cause really serious bodily harm, but nevertheless took part in the attack?
>
> If your answer to that is yes, that Defendant is guilty of murder. If your answer to that question is no, then that defendant is not guilty of either murder or manslaughter. But that Defendant would be guilty of manslaughter if you were sure that he participated in the attack and that he realised that the perpetrator might use the knife with the intention of causing some harm, not serious harm, but some harm which is short of really serious bodily harm."

26. The route to verdict on the count of wounding with intent in relation to Towers and Curtis (Hawkes having admitted inflicting the wound) was different and included no element which reflected *R v Powell, R v English.* It was in these terms:

> "…firstly, are you sure that the Defendant whose case you are considering shared Hawkes's intention to commit the offence either of wounding with intent or the lesser offence of unlawful wounding? If you are sure, go onto question 2. If you are not sure, that particular Defendant is not guilty of either wounding with intent or unlawful wounding.
>
> The second question is, are you sure that the Defendant took some part, however great or small, in committing it? If yes, then that Defendant is guilty of the particular offence that you have decided that Hawkes committed – either the Section 18 or the Section 20 [of the 1861 Act]. If you are not sure, then the verdict is not guilty."

27. On 31 October 2007, the jury unanimously found all three defendants guilty both of murder and wounding with intent.

The 2008 Appeal

28. Towers applied to this Court for leave to appeal against conviction on both counts and against sentence. In relation to the count of murder, it was submitted that the jury ought to have been directed that, if the only evidence of active participation came after the fatal stabbing, it could not have been causative of death and therefore could not have rendered him guilty of either murder or manslaughter by joint enterprise. In relation to the count of wounding with intent, it was submitted that the judge had been wrong to reject the submission of no case to answer, that the inference that the conversation was a ploy was unsafe. As we have recounted, leave was refused both by the single judge and the full court.

29. Giving the judgment of the full court, in relation to the convictions, Grigson J made it clear that question 5 of the relevant route to verdict answered the submission in relation to murder, having asked the jury whether Towers "joined in unlawfully in the attack on Kevin Johnson before the fatal stab wound was inflicted". He said:

> "15. …It may well have been better had the learned judge dealt with it explicitly at the first opportunity. But, in our view, given the judge's summing-up, not only of those final directions but also of Mr Nolan's submissions to the jury, the jury cannot have been left in any doubt as to the point that the whole defence of Mr Nolan's client rested on the proposition that his participation took place after the fatal wound was inflicted.
>
> 16. Lastly, we would add that, as it seems to us, the evidence of Marsha Newby did provide material which the jury could find amounted to participation before the wounds were inflicted."

30. As to the submission in relation to the count of wounding with intent, he said (at [10]):

> "As it seems to us, it was an inference which the jury were entitled to draw, given what had happened earlier, when Towers had joined in the attack on Johnson. It is our view that the judge was right to reject the submission, it was a matter of fact for the jury."

The CCRC Reference

31. Having analysed the trial, the CCRC found that, on the basis of the route to verdict, the jury must have concluded in relation to the charge of murder:

    i) The principal intentionally inflicted really serious harm on Johnson, and not acting in self-defence;

    ii) Towers joined unlawfully in the attack before the fatal wound was inflicted;

    iii) Towers knew the principal had a knife; and

    iv) He either shared the principal's intention to kill or cause really serious harm, or realised that the principal might use the knife with an intention to kill or cause really serious harm and nevertheless took part in the attack.

32. As for the count of wounding with intent, the CCRC found that the jury must have concluded the following:

    i) Hawkes inflicted the wound on Thompson intentionally and unlawfully (on his own admission);

    ii) Hawkes intended to cause really serious harm;

    iii) Towers "shared Tony Hawkes' intention to commit the offence either of wounding with intent or the lesser offence of unlawful wounding" (in the words of the route to verdict); and

    iv) Towers took some part in the commission of the offence (and in the view of the CCRC, this could only mean that he had stopped Thompson as a ploy to detain him, as he had no other factual involvement).

33. The CCRC noted a lack of clarity in the language of the route to verdict but concluded that, on reading the summing up as a whole, Towers could only have been convicted of wounding with intent if the jury concluded that he shared Hawkes' intention to inflict grievous bodily harm.

34. The CCRC considered the following facts to have emerged from the trial as "largely undisputed":

    i) Towers was part of the group that provoked a fight with Mr Johnson;

    ii) On his own admission he was drunk and threw some early punches and a paving slab;

iii) The paving slab was thrown towards Johnson, though it was unclear whether it hit him and whether it was before or after the fatal injury was inflicted;

iv) Towers was standing off during the struggle in which Johnson was stabbed;

v) The stabbing of Johnson had been unexpected or unwelcome to at least one person in the party;

vi) All the defendants had weapons;

vii) Towers had stopped Thompson in the street and engaged with him, intending (with Hawkes and Curtis) that he be caused really serious harm; and

viii) Towers remained in the group for some hours after the first two incidents and was with them during the third.

35. The CCRC then turned to analyse the likelihood that a direction based on the new law would have made a difference at trial. It concluded that the argument that the change in the law would have led to a different verdict was sufficiently strong to refer the case, relying on seven evidential arguments which, in its view, "significantly weakened" the safety of the inference of requisite intention on the part of Towers. These were:

i) The attack on Mr Johnson was an unplanned outbreak of disorder/violence caused by a chance encounter rather than part of a prior criminal venture where associated serious violence, "if necessary" or "if it came to it", was inherently likely.

ii) The joint enterprise from which it arose was "nebulous" and may not have amounted to more than a general intention to be "looking for trouble" or to engage in a fight, albeit while carrying weapons.

iii) Towers' own actions amounted merely to involvement in an unarmed scuffle and drunkenly throwing a brick; at the time of the fatal attack he was standing away, watching.

iv) "Given the nature of the evidence against Mr Towers and the facts of the case" it is likely that foresight rather than personal or shared intention to commit really serious harm was central to his conviction.

v) In the view of the CCRC, "none" of the evidence which established Towers' participation in the incident, namely the evidence of Ms Brett and Ms Newby and accounts about the throwing of the pavement slab, suggested an intention to encourage or assist others to use their weapons against Mr Johnson.

vi) The evidence of the Taggart sisters suggested that either Towers or a second member of the party was angry with the principal and challenged him about what happened. If it was Towers, it was good evidence that he did not have the requisite intention. If it was another of the pair who fought Johnson, "it speaks even more to how unexpectedly the knife had *in fact* been produced and used by the principal" (emphasis from the CCRC).

vii) The incident at the Shell petrol station demonstrated that Towers stayed with the others while they committed very serious offences and had a high tolerance of their behaviour, but "did not appear to commit or encourage any offences himself". There was "no inevitable connection between his association and any involvement in committing or encouraging any criminal conduct".

36. This conclusion was reached despite acknowledging that the jury found at a minimum that Towers participated in a joint enterprise involving unlawful violence, realising that his co-defendants were armed and that really serious harm might result. It was also acknowledged that, on the basis of *Johnson* at [21], such circumstances lead to a strong inference of participation with intent to cause really serious harm.

37. Further, the CCRC addressed the fact that Towers was himself carrying a knife. It was concluded that in the "highly unusual circumstances" of the present case the possession of the knife could not be taken as evidence of either a generalised intention to commit really serious harm or intention to encourage really serious harm in relation to Mr Johnson. These circumstances were Towers telling the police about the knife, his explanation for carrying it, his discarding it and leading the police to it, coupled with the fact that it remained in his pocket throughout the incidents and did not feature in the case at all.

38. As to the finding in relation to the count of wounding with intent, the CCRC said:

> "The CCRC has concluded that the conviction…does not preclude referral on count 1 if the arguments on count 1 remain strong enough to meet the test for referral. On balance, the CCRC has also concluded that the intention the jury found in [the count of wounding with intent] cannot inevitably be read back to [the count of murder]: there is no formal evidential overlap between the two counts, the facts were different, the *mens rea* requirements were different, and the jury were directed to consider the counts separately. Mr Towers also gave very different accounts of the two incidents in his police interview, expressing some sympathy for Kevin Johnson and his family but considerable animus towards Jamie Thompson who he suggested was a 'smack head' and a 'druggie' who had tried to sell them drugs, and 'deserved a smack'. It is therefore entirely possible for a jury to find that his actions and intentions were different in the various counts."

39. Finally, the CCRC considered whether, as required by *Johnson*, there is a real possibility that this Court would find that substantial injustice has been done. As part of this, it pointed to its analysis (set out above) to the likelihood of a direction on the new law making a difference. Further, it considered Towers' liability for other offences which is also part of the assessment laid down in *Johnson*. In its view, if Towers' conviction for murder were quashed, he would "inevitably" be guilty of manslaughter, in addition to liability for violent disorder and possession of an offensive weapon; further, he would remain guilty of wounding Mr Thompson with intent to cause grievous bodily harm. However, it considered that in light of the unique stigma of a conviction for murder, Towers' youth and the approach of this Court in *R v Ordu* [2017]

EWCA Crim 4, if the conviction for murder is no longer legally sustainable it would be a substantial injustice to uphold it.

The Effect of Jogee and Johnson

40. Mr Blaxland for Towers sought to minimise the difference between the "substantial injustice test" laid down by the Court in *Johnson* and the conventional test of safety, pointing specifically to the judgment at [23] and to the fact that in *Johnson* it had not been explained whether the expression "whether the change in the law would have made a difference" imputed a different test to that laid down in *R v Davis* [2001] 1 Cr App R 8 as adapted from *Stirland v DPP* [1944] AC 315. In this vein, he submitted that it was because all but one of the applicants in the conjoined appeals in *Johnson* had been convicted of murder that the primary consideration in *Johnson* was the difference the misdirection would have made.

41. Mr Blaxland recognised that in *Johnson* at [21], the court identified the test that it "will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference" and that the court was introducing a higher test than that required for safety by using the expression "substantial injustice". In his submission, however, it did not follow from the judgment, that by using the term "would" rather than "might" or "could" in that passage the court was indicating the need for a rigorous approach in the analysis of the inferences to be drawn.

42. He also submitted that in change of law cases the primary consideration is in many cases not the safety of conviction but the impact of the conviction for the appellant, citing cases where appeals against conviction were dismissed based on considerations of the administration of justice, such as *Johnson* at [15] and *R v Ramsden* [1972] Crim LR 547. From this he pointed to another factor other than safety which he submitted was relevant, namely the impact on the appellant, citing *R v Mitchell* [1977] 1 WLR 753.

43. Turning to the evidence itself, Mr Blaxland adopted the CCRC's basis for referral but added an eighth factor and submitted that it was relevant to the other seven: that is the relevance of Towers' youth. He submitted that it is now accepted that the developmental level of children and young people needs to be taken into account for the purposes of trial and sentence. In that regard, he cited the Sentencing Council's Guideline on Sentencing Children and Young People and the Crown Court Compendium.

44. To the evidence of Towers' participation, and specifically his continued association with Hawkes and Curtis after the attack on Johnson and his involvement in the incident with Mr Thompson, Mr Blaxland submitted that this could be explained by his susceptibility to peer pressure and the pre-eminence in young people of the need to avoid exclusion, and that foresight that an event may occur may not be enough to overcome such pulls even if the young person concerned does not intend those events to happen. Mr Blaxland also drew attention to the omission in the summing-up to refer to the relevance of Towers' age when considering the mental element.

45. On behalf of the Crown, John McGuinness QC challenged Mr Blaxland's characterisation of the legal test. He submitted that the substantial injustice test was not that identified in *Stirland*, i.e. whether, but for the misdirection, the only proper and

reasonable verdict would have been guilty. Such a construction would erode the test of "substantial injustice" to a conventional one of safety. The use of the term "would" in *Johnson* was deliberate. He relied on the fact that in *Mitchell* the Court was "convinced" that the defendant had not committed an offence, and on the analysis of *Johnson* in *R v Crilly* [2018] EWCA Crim 168.

46. In relation to the evidence, Mr McGuinness submitted that the arguments advanced by the CCRC did not provide any answer to the facts that the jury must have found that (a) Towers joined in an unlawful assault before Johnson was fatally stabbed, (b) he did so in the knowledge that the principal was armed with a knife and (c) he shared the principal's intention to use the knife to kill or cause really serious harm or at least realised the principal might use the knife with that intention. He highlighted that, in *Jogee*, all three factors were considered relevant to whether the misdirection would have made any difference to the jury's verdict: see [11], [98] and [94] respectively.

47. Mr McGuinness responded to the seven features relied upon by the CCRC in this way:

i) It was not accurate to describe the attack as unplanned given that Johnson was goaded into leaving his house.

ii) The joint enterprise could only be described as "nebulous" insofar as no particular victim or encounter was in mind, but, as the CCRC acknowledged, it could be inferred that the group had a general intention to be looking for trouble or for a fight, in circumstances in which (to the knowledge of Towers) he and, at least, the youth who inflicted the fatal stab and the other wounds (if not both others) were armed with knives or a similar weapon.

iii) To describe Towers' involvement as being "merely in an unarmed scuffle and drunkenly throwing a brick" ignored the effect of his presence and encouragement, his participation in an assault on Johnson before the stabbing, his knowledge that at least one of the others was armed and at least his realisation of the possibility of the knife being used with the requisite intent.

iv) The claim that the jury had likely convicted Towers on the basis of foresight rather than intention was speculative. The primary case advanced by the prosecution was that it was the intention of all three youths to inflict grievous bodily harm and the jury were asked to consider intention before turning to foresight in the alternative.

v) The claim that none of the evidence showing Towers' participation demonstrated such intention was also speculative, particularly considering that all were armed and looking for an altercation, that Towers had been prepared to throw a paving slab at Mr Johnson and, furthermore, the three picked out a second victim (in respect of whom, on the verdict of the jury, Towers also intended serious bodily injury) within minutes of the attack on Mr Johnson.

vi) The evidence did not establish who was arguing with whom. In any event, even if the argument was correctly understood and accepted at face value by the jury, the impact of such evidence favouring Towers is diminished by the fact that within minutes of this conversation all three were party to the attack with the intention of inflicting grievous bodily harm to Mr Thompson.

vii) Mr McGuinness accepted that Towers was not violent during the Shell petrol station incident, though he had chosen to remain with the others. In any case the trial judge correctly directed the jury not to attach undue weight to the incident. The evidence was, in Mr McGuinness's words, "at best, neutral".

48. Turning to Mr Blaxland's argument based on Tower's youth, he submitted that the Guideline issued by the Sentencing Council concerned sentence. Mr Blaxland had also cited the current Crown Court Compendium although the version in existence in October 2007 was significantly differently worded and only included a direction applicable to *doli incapax*. In relation to the possibility of his having submitted to peer pressure, Mr McGuinness responded that there was no evidence that this was or might have been the case: Towers did not give evidence.

49. As for the treatment by the CCRC of the fact that Towers was carrying a knife, Mr McGuinness commented that this treatment of his explanation for carrying it was generously uncritical. Second, his explanations suggested that it was normal practice to carry a knife, which was somewhat at odds with another claim that he only carried it on the night of the incidents. Finally, these inconsistencies could not be explored as Towers did not give evidence.

50. Finally, dealing with the conviction for the attack on Mr Thompson, Mr McGuinness accepted that, on its own, it could not preclude the making of a reference but maintained that it was a relevant factor in the *Jogee* assessment. Furthermore, in relation to the stigma of a murder conviction, referring to *Johnson* at [17]-[28], he argued that the contention advanced by Mr Blaxland was not accepted. The wider considerations of that case justified the more exacting test of substantial injustice.

51. In response in connection with Mr McGuinness' submissions on youth, Mr Blaxland argued that the court should take into account the extent to which a defendant did not receive a procedural protection which it was later thought to have enjoyed: see *R v King* [2000] 2 Cr App R 391.

Discussion

52. The effect of *Jogee* is explained in a number of the authorities which have since followed: see, in particular, *Johnson* (at [3]-[6]). However, given that this is a reference from the CCRC, it is appropriate to rehearse the present position. Thus, in *Jogee*, Lord Hughes and Lord Toulson JJSC (with whom Lord Neuberger of Abbotsbury PSC, Lord Thomas of Cwmgiedd CJ and Baroness Hale of Richmond DPSC agreed), set out the basic principles which, in cases of "parasitic accessory liability", required the accessory to have intention and not mere foresight that the principal would act with the intention requisite for the offence:

> "89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.

> 90. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1 (as stated in para 10 above). If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent… In cases of concerted physical attack there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least and D2 having the intention himself that such harm be caused. In such cases it may be simpler, and will generally be perfectly safe, to direct the jury (as suggested in *R v Smith (Wesley)* and *R v Reid*) that the Crown must prove that D2 intended that the victim should suffer grievous bodily harm at least. However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent…"

53. The judgment goes on:

> "94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.
>
> 95. In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But, as we have said, liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder."

54. After addressing the circumstances in which D2 would instead be guilty of manslaughter (which need not be reproduced), Lord Hughes and Lord Toulson JJSC added (at [98]):

> "What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows

what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in the *Chan Wing-Siu* case to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

55. The issue of previous convictions was then addressed (at [100]):

> "…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."

56. In *Johnson*, this court (Lord Thomas CJ, Sir Brian Leveson P and Hallett LJ) examined six applications for exceptional leave to appeal against convictions for murder out of time (except for the third case which was brought in time and was an appeal against conviction for wounding with intent to do grievous bodily harm). For appeals brought within time, it was emphasised that the test remains safety of conviction (see [7]-[9]).

57. The Court then explained the position in relation to applications for exceptional leave. Although, by virtue of s. 9(2) of the 1995 Act, the reference of a conviction by the CCRC is to be treated for all purposes as an appeal against conviction under s. 1 of the Criminal Appeal Act 1968 ("the 1968 Act"), in relation to cases consequent upon a change of law, it is to be treated on the same basis as if it was an application for exceptional leave. This is a consequence of s. 16C(1) of the 1968 Act (as inserted by s. 42 of the Criminal Justice and Immigration Act 2008) which is in these terms:

> "(2) Notwithstanding anything in section 2, 13 or 16 of this Act,
> the Court of Appeal may dismiss the appeal if—

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

58. As to these cases, in *Johnson* the court made it clear (at [18]):

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

59. The substantial injustice test was described as a "high threshold" (at [20]). As to the application of the test, the judgment went on (at [21]):

> "In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was

> guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice."

60. As to the relationship between the test in these cases and the general test for safety of a conviction, it was said at [23]:

> "…the task of the court is first to determine whether there may have been a substantial injustice which involves the wider considerations to which we have referred. Having said that, if the threshold required to justify exceptional leave to appeal is reached, it is likely to be difficult to conclude that the conviction remains safe."

61. It is thus clear that the substantial injustice test is a distinct one from that of safety, and one which brings with it a considerably higher threshold to justify interference with the conviction: this is also clear from the analysis in *Ordu* (at [26]) which identifies "an obvious difference between the two exercises which give rise to the two tests". The passage in *Johnson* cited above merely confirms that if the substantial injustice test is satisfied, it is very likely that the test of safety, due to its lower threshold, would be satisfied. That the same considerations will often be relevant to both tests does not make the two tests the same. This approach is confirmed by *R v Crilly* [2018] 2 Cr App R 12 at [36].

62. Mr Blaxland's argument is that the substantial injustice test is met unless, assuming the trial had been free from legal error, "the only proper and reasonable verdict would have been one of guilty" (see *Davis* at [56]). That situation, however, was premised on legal error or a failure, at the time, to comply either with the existing law or the law as reflecting the UK's obligations under Article 6. That is not the position here. The direction on joint enterprise complied with the law expounded in *R v Powell, R v English* which was changed in *Jogee*. Change of law cases, not dependent on a failure to comply with the law at the time of the trial, are approached differently.

63. That difference is underlined not only by the authorities but also by the fact that s. 16C(1) of the 1968 Act specifically permits the court to dismiss a reference by the CCRC if it would not think it appropriate to grant an application for an extension of time within which to seek leave to appeal on the ground of the development in the law. This provision was necessary because otherwise an application for leave to appeal out of time in a change of law case would not otherwise be assessed in the same way if there had been an appeal and the case came back to the court through the CCRC. If Mr Blaxland was correct, there would be no difference.

64. Against that background it is necessary to consider the evidence in this case and, in particular, the competing submissions advanced by the CCRC and Mr Blaxland on the one hand and Mr McGuinness on the other. The starting point is the clear conclusion from the jury that Towers was involved in a joint enterprise to use unlawful force on Mr Johnson, knowing that both he and the principal (or, more likely, both the other two given that it is unknown who used the knife) had weapons and that, at least, he foresaw the possibility of the infliction of really serious harm. To this can be added the throwing

of the paving slab after the stabbing and the attack on Mr Thompson for which the jury found him to have the requisite intent.

65. Dealing with the points specifically advanced by the CCRC, as to the question of premeditation, we accept that this attack was not planned in advance but, as Mr McGuinness submits, it was not entirely the consequence of an entirely fortuitous encounter. The three youths were clearly looking for trouble and it is undeniable that Mr Johnson was goaded and encouraged to leave his house and become involved in a confrontation with the three.

66. This also deals with the suggestion that the joint enterprise was 'nebulous'. We accept Mr McGuinness's submission that it would be misleading to call the joint enterprise "nebulous". Although no particular victim or specific encounter appeared to have been contemplated, the start of the incident demonstrated a deliberate effort to seek out trouble in which Towers was involved. He was one of those who formed the semicircle around Mr Johnson. Although he stepped away, his behaviour thereafter was not, in any sense, to distance himself from the joint attack: indeed, he lifted a paving slab up high in the air (to head height if not higher) and threw it at Mr Johnson in circumstances which itself could properly have led to the conclusion that he intended to hit him and cause grievous bodily harm. The fact that this was after the fatal attack may be relevant to the issue of causation; it does not detract from the inference of continued involvement in an attack with that intention.

67. Pursuing the inferences that can be drawn from what happened after the attack, considerable reliance is placed on the evidence of the Taggart sisters although it is uncertain who expressed dissent, to what that dissent related and the extent to which it is undermined by the finding of the jury that the two who did not inflict the fatal blow knew about the knife and had foresight of the possibility of its use to cause grievous bodily harm. More significant, however, is the fact that the conversation was followed by the attack on Mr Thompson in respect of which the jury found that Towers intended that he suffer grievous bodily harm. Finally, on this issue, there was evidence of the youths laughing after both attacks (and, in particular, of Towers laughing after the second attack); that also undermines the inference of behaviour outside the joint enterprise.

68. For the sake of completeness, we do not find it helpful to consider how the jury 'must' or 'might' have reached its conclusion: either way, that would be speculative. Similarly, although we agree that the incident at the Shell Petrol Station does provide some distance between Towers and the other two, it is difficult to see how it can adversely have affected his case: as Mr McGuinness submitted, it is likely to have been neutral. What it does not do, however, is undermine the critical finding of intention to cause grievous bodily harm to Mr Thompson.

69. Further, whereas we accept entirely that, of his own volition, Towers admitted possession of a knife, did not produce it during the incidents and revealed its whereabouts, that was all part of the evidence for the jury to consider in relation to the attack on Mr Thompson as much as the attack on Mr Johnson. His explanation that he carried the knife to intimidate others ("so no trouble comes my way") does not deal with any of the youths actively seeking 'trouble' and we also note the inconsistency between his explanation that it was normal practice to carry the knife and his other claim that he had only carried it on that night.

70. We turn to the additional factor that Mr Blaxland sought to add, namely the relevance of Towers' youth. It may well have been open to argument that Towers was driven to behave as he did because he is susceptible to peer pressure and had an adolescent concern to avoid exclusion but, as Mr McGuinness pointed out, there was absolutely no evidence from Towers to that effect. Had he given evidence, he might have been able to explain these and other features of his behaviour but that was not how the case was conducted. Neither the Crown Court Compendium nor the Guideline on Sentencing Children and Young People take the place of evidence: rather, respectively, they provide assistance to the judge when directing the jury as to issues that have been raised or when deciding sentence following conviction.

71. Standing back, the following features are, in our judgment, determinative. First, Towers involved himself in a joint enterprise knowing that he and his co-adventurers were armed. Second, he took part in, or associated himself with, the attack (however ineffectually) by lifting and throwing a paving slab at Mr Johnson when two others were or had been attacking him. Third, he went on, with the intention of causing grievous bodily harm, to involve himself in the attack on Thompson (whether by attracting his attention, encouraging or otherwise): the fact that Towers might have had animus to Mr Thompson does not undermine the intention found by the jury to have been proved in an attack so soon after that on Johnson.

72. For these reasons, we reject the proposition that the test of substantial injustice is satisfied. Following *Johnson*, in circumstances in which 'crime A' was itself a crime of violence where the principal was known to be armed combined with involvement, very shortly thereafter, in a further attack with a proved intention to cause grievous bodily harm, we are satisfied that Towers has not been the victim of a substantial injustice as a result of the change in the law. As *Jogee* makes clear (at [100]), the error identified in the law of joint enterprise was one of legal principle: it does not follow that it will have been important on the facts to the outcome of a trial or the safety of a conviction.

Adverse inferences

73. Mr Blaxland seeks leave to add this further ground of appeal which he submitted affected the convictions both for murder and wounding with intent. Without deciding whether there is any jurisdiction in relation to the second of these counts, we deal with the application on its merits.

74. As required by s. 35(2) of the 1994 Act, when Towers' defence case started, the judge asked whether he understood that the jury could draw an adverse inference from his failure to give evidence or answer questions. The solicitor's note of proceedings recorded that counsel informed the court that he had advised Towers several times in relation to this issue and that Towers understood. It was not suggested that, for any reason, an application had been made or rejected to the effect that no such warning was appropriate in this case.

75. As a result, when he came to sum up the case, the judge directed the jury as follows:

> "The next direction, ladies and gentlemen, is your approach to the fact that the defendant Towers has not given evidence. The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must

> not assume that he is guilty because he has not given evidence. That is absolutely crucial ladies and gentlemen. Mr Nolan [counsel for Towers] has stressed it and has dealt with the reasons why he didn't give evidence. The fact that he has not given evidence proves nothing one way or the other. It does nothing at all to establish his guilt.
>
> On the other hand, however, it does mean that there is no evidence from this defendant to undermine, contradict or explain the evidence that has been put before you by the prosecution."

76. Later in the summing up, reference was made to the prosecution argument in these terms:

> "[Towers] played perhaps a greater part in this than might at first be apparent. And the reason that he has not given evidence is that because he knew he would be asked questions for which there was no answer."

77. At the conclusion of the summing up, counsel for Towers asked the judge to summarise the reasons given by the defence as to why Towers had not given evidence. The exchange went as follows:

> "The Recorder: The note that I have of those specific reasons, correct me if I'm wrong. Firstly, the obligation is on the Crown to prove its case. There are not many issues of fact so there could only have been a few questions to be asked of him. He was caught in the cross-fire between the two other defendants and he knows for certain that one of the others is a killer. And he is 16.
>
> Crown Counsel: That's right and he is currently in prison with them as friends and associates.
>
> …
>
> Counsel for Towers: I think I added that their families and associates live almost a matter of yards away.
>
> The Recorder: You did. You have got those specific reasons now, ladies and gentlemen, and I give them the force of a direction."

78. Hence the judge did not direct the jury in relation to drawing an adverse inference; rather, his exchange with counsel was clearly aimed at limiting the impact on Towers of his failure to give evidence. Mr Blaxland informed the court that trial counsel had explained to him that the judge agreed that, given his youth and the nature of the allegations, reliance on the advice given by those representing him at the police station was appropriate so as to avoid a direction inviting an adverse inference.

79. In Mr Blaxland's submission, the reminder of the defence submissions was not sufficient to counter the prosecution's invitation to the jury to draw an inference from the failure to give evidence. Rather, he submitted that the trial judge should have given

a specific direction and the failure to do so rendered the conviction unsafe. In the alternative Mr Blaxland submitted that the failure was relevant to the *Jogee* appeal.

80. Mr McGuinness submitted that although the direction given was not in the terms of the specimen direction, the direction that was given was not defective in such a way as affected the safety of the conviction. Rather, the reasons which counsel had advanced for Towers not giving evidence (which it is not suggested were adduced in evidence but rather contained in counsel's speech) were, in his submission, favourable to Towers.

81. Where the requirements of s. 35 of the 1994 Act are fulfilled (which obviously are in the present case), s. 35(3) allows that:

> "… the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

82. No such inference, however, need be drawn. If the trial judge considers that in all the circumstances no proper inference is capable of being drawn by the jury, the judge must so direct them; it is otherwise for the jury to decide whether to draw any inference: see *R v Cowan* [1996] QB 373 at 380. Indeed, it is this discretion which the trial judge elected to exercise in the present case after accepting defence submissions.

83. The then current specimen direction was as follows:

> "The defendant has not given evidence in this case. That does, of course, mean that there is no evidence from him to undermine, contradict or explain the prosecution case and that is a matter you may take into account. However, in this case, I direct you not to hold his failure to give evidence against him. This means that it cannot, by itself, provide any additional support for the prosecution case."

84. It is important to note that, having decided as he had, the requirement on the trial judge was not to direct the jury as to how they should approach any inferences which appear proper, but to direct the jury not to draw any inferences whatsoever. In *R v McGarry* [1999] 1 WLR 1500, dealing with s. 34 of the 1994 Act, the matter was put by Hutchison LJ in this way (at 1506):

> "… in those cases where the judge has ruled that there is no evidence on which a jury could properly conclude that the defendant had failed to mention any fact relied on in his defence, and that therefore no question arises of leaving the possibility of drawing inferences to the jury, he should specifically direct them that they should not draw any adverse inference from the defendant's silence…The common law rule requiring that juries should receive a direction against holding an accused's silence after caution against him plainly recognises that a jury, without such guidance, may treat silence as probative of guilt. The jury should not, therefore, in the class of case we are discussing, be left in some no-man's-land between the common law principle

> and the statutory exception, without any guide to tell them how to regard the defendant's silence. Still less should they be directed in terms which leave it open to them to draw adverse inferences."

85. We do not consider that the directions give rise to an arguable ground of appeal bearing in mind the specimen direction and the principles laid down in *McGarry.* Although mention was made of the prosecution's invitation to draw inferences, the trial judge did not endorse that submission in any way. Rather, the specific direction (prior to a reminder of the prosecution submission) was forceful and comprehensive. Furthermore, at the conclusion of the summing up, ignoring the fact that the reasons were not based on evidence, the jury were provided with the reasons advanced why Towers himself had not given evidence. Significantly, the judge then gave these reasons "the force of a direction", having provided the jury at the start of his summing up with the standard direction that they must "loyally follow the directions of law" that he provides.

86. In the circumstances, taken as a whole, the summing up could not have left the jury in any doubt that no proper inferences could be drawn from Towers' silence. The irregularity in the direction, to the extent that there was any, cannot be taken to have affected the safety of the convictions; neither does it impact on the ground based on *Jogee*. The application to add the further ground to the appeal is refused.

Hawkes' Sentence Appeal

87. The reference in relation to Hawkes is limited to credit for the number of days that Hawkes spent on remand prior to sentence. Although the Crown Court record indicates that Judge Hodson made a direction under s. 240(3) of the Criminal Justice Act 2003 (since repealed) that 169 days spent on remand was the number of days in relation to which the direction was given, as required by s. 240(5) of the Act, the sentencing remarks do not make such a direction nor satisfy those requirements. Following the appeal to the Court of Appeal, its order (dated 31 July 2008) assumed that 169 days would count towards sentence (presumably relying on the information in the Crown Court record). What is also clear is that the judge did not suggest that it was just in all the circumstances not to make a direction in relation to time spent on remand (as would be mandated by s. 240(4)(b) of the 2003 Act).

88. At the time of the review of Hawkes' tariff on 6 March 2017, Davis J calculated the number of days that Hawkes was arrested and remanded in custody prior to sentence as 185 days from which was to be deducted the custodial portion of a detention and training order of 4 months (i.e. 62 days). If the time spent serving a detention and training order (imposed some five days after his arrest for murder) is not to be discounted, the number of days to be deducted would be 123. Having said that, however, it is unclear from s. 240(4)(a) and s. 240(10) whether serving a period in detention and training (as opposed to a term of imprisonment or detention under s. 91 or 96 of the Powers of Criminal Courts (Sentencing) Act 2000 or s. 227 or s. 228 of the 2003 Act) falls to be deducted.

89. For the sake of the disposal of this appeal, it is unnecessary to resolve this issue on the basis that we have little doubt that, whether as a matter of law or in the exercise of his discretion, the judge would not have been prepared to discount from the sentence for murder the days spent serving a sentence imposed for offences committed prior to that

offence and sentenced prior to his trial. It may be that, in reaching the figure of 169 days noted in the Crown Court record, he made some (but not complete) allowance for this sentence. In the event, in accordance with the view of the CCRC, we believe that the most appropriate reduction to make (and the fairest to Hawkes) is that recorded by the Crown Court and reproduced in the order of the Court of Appeal. We thus allow this reference and order that the minimum term to be served by Hawkes is 16 years less 169 days spent on remand. To that extent, this appeal succeeds.

Conclusion

90. In the circumstances, the reference by the CCRC in relation to Towers fails and his appeal against conviction is dismissed. His application for leave to add the further ground advanced by Mr Blaxland also fails. The reference in relation to Hawkes succeeds to the extent that, in the calculation of his minimum term, he is to be given credit for 169 days spent on remand.

91. It is appropriate to conclude this judgment by recognising the debt that we owe to the CCRC. Their consideration of these cases has, as always, been thorough and detailed. The fact that, following examination with the benefit of submissions on behalf of the Crown, in relation to Towers, it has not prevailed does not diminish the importance of its work either in general or, indeed, in this case.