Neutral Citation Number: [2019] EWHC 926 (Admin)

Case No: CO/1651/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2019

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)

MR JUSTICE WILLIAM DAVIS

- -

Between :

JORDAN CUNLIFFE	**Claimant**
- and -	
CRIMINAL CASES REVIEW COMMISSION	**Defendant**

- -
- -

Pete Weatherby QC (instructed by Irvine Thanvi Natas, London) for the Claimant
Sarah Clover (instructed by Criminal Cases Review Commission, Birmingham) for the Defendant

Hearing dates: 7 March 2019

- -

Approved Judgment

Sir Brian Leveson P :

1. This is the judgment of the court.

2. On the evening of 10 August 2007, Mr Garry Newlove went out of his house in Warrington in order to remonstrate with a group of young men who were causing damage to vehicles in the street. He was attacked by the group. He went to the ground. He was punched and kicked. One of the blows, which could have been a punch or a kick, caused a tear of a major artery in his neck close to his brain. This led to catastrophic brain damage. Mr Newlove died two days later in hospital.

3. Between 13 November 2007 and 16 January 2008, in the Crown Court at Chester before Andrew Smith J and a jury, five young men stood trial for Mr Newlove's murder. Stephen Sorton, Adam Swellings and Jordan Cunliffe were convicted of murder; the other two were acquitted. Jordan Cunliffe was 16 at the date of sentence. He was sentenced to custody for life with a minimum term of 12 years.

4. Sorton and Swellings pursued unsuccessful appeals (see [2009] EWCA Crim 3249). Jordan Cunliffe applied unsuccessfully for leave to appeal out of time against his conviction (based on fresh evidence and the failure to provide a tailored good character direction): [2010] EWCA Crim 2483. An appeal against sentence was technically successful in that he should have been sentenced to detention at Her Majesty's Pleasure subject to a minimum term rather than custody for life. The Court of Appeal substituted such a sentence but did not alter the minimum term.

5. In August 2014, Jordan Cunliffe applied to the Criminal Cases Review Commission ("CCRC") seeking a referral of his case to the Court of Appeal (Criminal Division) pursuant to s. 9 of the Criminal Appeal Act 1995. The grounds of the application related to the visual disability to which he was subject at the time of the attack on Mr Newlove. In August 2015, further submissions were made to the CCRC based on the decision in *R v Childs and Price* [2015] EWCA Crim 665: these submissions concerned the issue whether proper directions were given in respect of a defendant whose participation in the joint enterprise began only after the fatal blow was struck. Finally, in February 2016, the Supreme Court handed down its decision in *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2017] AC 387 ("*Jogee"*). In the light of that decision, further submissions were made to the CCRC concerning the directions on joint enterprise given at trial.

6. On 2 June 2017 the CCRC made a provisional decision that it would not refer Jordan Cunliffe's conviction to the Court of Appeal. Submissions were made on his behalf in respect of that provisional decision. In October, the CCRC made a second provisional decision in the same terms. After further representations, on 12 January 2018, the CCRC made its final decision not to refer the conviction.

7. With leave of the single judge, Jordan Cunliffe now applies for judicial review of the decision of the CCRC. His application is made on three grounds. First, it is argued that the statutory test has been misapplied. Second, the decision of the CCRC was irrational and unreasonable in the *Wednesbury* sense because, having concluded in its decision that there must be a real possibility that a different direction on the issue of joint enterprise might have made a difference at trial, it nonetheless went on to decide that there was not a real possibility that the Court of Appeal would find that it would have

done so. Third, it is argued that the decision of the CCRC was irrational and unreasonable in relation to the participation of Jordan Cunliffe at the time that the fatal blow was struck. No other ground is pursued. The detailed submissions in relation to visual disability are no longer pursued as a separate ground but the impact of this disability is said to be relevant to the other issues that fall to be considered.

The Trial

8. The prosecution case at trial was that Jordan Cunliffe intended to inflict really serious injury as part of a joint enterprise with four other young males, all of whom were concerned in a joint attack on the victim who had done no more than intervene and seek to prevent loutish behaviour damaging cars parked in the street.

9. The material on which the prosecution relied consisted of several different strands of evidence. The first strand was the eyewitness evidence from Tracey Cassidy and Zoe Newlove (Mr Newlove's daughter). Ms Cassidy was in her bedroom at 10.30 pm when she saw a group of youths surround a man (who was Mr Newlove) and begin to punch him. Mr Newlove staggered but did not fall over. She ran down to the road where some youths were still present. She described one of them pulling their leg back from Mr Newlove as if he had kicked a football. She assumed that he had kicked Mr Newlove but did not see the kick. A little later she saw the same youth again and noticed that he had no shoes on.

10. Ms Cassidy later attended eight Viper identification procedures. In four cases she identified innocent volunteers as having been involved in the attack. However, in one procedure she identified Jordan Cunliffe whom she described as the youth she saw pulling his leg back. Significantly, in interview and at trial (but not in the interim), Jordan Cunliffe's case was that he was not wearing shoes.

11. Ms Cassidy accepted that her evidence was in some ways different from statements she gave to police. In her first witness statement she referred to seeing the kick from her bedroom. Her explanation before the jury was that this statement was signed in the early morning. She was at the time concerned about her children. At that time, she explained that she was in such a state that she would have signed anything.

12. Zoe Newlove saw the group form a semicircle around her father and saw the first punches. After her father went to ground he curled up and put his hands over his head (though the evidence of Thomas Sherrington, another eyewitness, was that he had been "completely inert" when he fell). The group then started to kick him, including the youth who first hit him. They kicked him on his head, shoulders and body, like kicking a football, and laughed as they did so. When the youths were backing away, she grabbed one of them whom she thought had been kicking her father. There was evidence that this was Jordan Cunliffe.

13. Two girls, Natalie Domville and Nicole Bate, who were friends of Jordan Cunliffe and the other defendants also gave eyewitness evidence. Both girls said that Jordan Cunliffe was with the others standing around Mr Newlove. Natalie Domville said that she saw only one person, Adam Swellings, strike Mr Newlove. Nicole Bate said that Swellings and Stephen Sorton had struck blows. Another friend of the defendants, Ashley Roberts said he saw Mr Newlove pull back and kick someone whom he believed to be Jordan

Cunliffe. Mr Newlove ended up on the ground and Jordan Cunliffe and other defendants were near Mr Newlove.

14. The second limb relied upon by the prosecution came from two individuals who gave evidence of what Jordan Cunliffe said shortly after the incident. First, Jack Chisnall asserted that he had met Jordan Cunliffe, who was with Sorton, on Station Road very shortly after the attack on Mr Newlove. Mr Chisnall said that Jordan Cunliffe had said "we have just battered the fuck out of this fellow, he's lay there on the floor and all of his mates say he's fucking dead". Ian Gerraghty gave evidence in similar terms but it was Jack Chisnall who had told him that the name of the person who said this was Jordan Cunliffe. Second, Sian Lloyd-Jones said that Jordan and Gareth Cunliffe both ran over to her and said that they had beaten someone at the end of the road. She identified Jordan Cunliffe at a Viper identification procedure. In her first police interview she had said that only Gareth Cunliffe had spoken to her and had said that he had just hit a man and he thought he was dead.

15. The third limb of the prosecution case was evidence that the defendants were involved in a number of other assaults in the week before and on the night of the attack on Mr Newlove. This was said to be evidence of their propensity to act violently together and, in particular, against someone who had remonstrated with them.

16. The two incidents most relevant to Jordan Cunliffe both took place on 3 August 2007, a week before the assault on Mr Newlove. The first involved Philip Harrison. He said that he had had a quarrel with Sorton or Bate the day before the incident. The following day the two came to his house and then they all went to the bench area in Parkfield. Bate asked him for a telephone number and while he looked for it someone punched him on the mouth. He backed away but Jordan and Gareth Cunliffe, Bate and Sorton all ran towards him. He fell to the floor and curled up while they kicked him, though Gareth Cunliffe told them to get off him. Norman Penson, a 10-year-old boy, said that he saw Sorton hit Harrison and then saw Jordan Cunliffe, Bate, Sorton and possibly Gareth Cunliffe chase after Harrison.

17. The second incident involved Stephen Ormerod. He was a man in a similar position to Mr Newlove i.e. a householder who went out into the street from his home when he became aware of a disturbance outside. Mr Ormerod had parked his company van outside his house. At around 10.00 pm after hearing a noise he went outside and noticed that the van's wing mirror had been kicked off. He saw a group of youths walking up the road and approached them. They said they were looking for "Phil". He walked back to his house while they shouted abuse at him and called him a "faggot".

18. At around 10.45 pm Mr Ormerod heard another disturbance and saw John Rotherham, a neighbour, arguing with the same group of youths. He went outside again. One of the youths swung a punch at Mr Ormerod, who swung back but then fell to the floor. Two of the youths kicked him on the forehead and elbow, laughing. The description of the attackers he gave to police did not match either Jordan Cunliffe or Gareth Cunliffe. However, Norman Penson and his mother saw an incident involving a man going to the floor and being kicked. They said that Jordan Cunliffe was involved in this.

19. The fourth limb of the prosecution case came from the pathologist and forensic scientist. The pathologist, Dr Johnson, explained that the cause of death was traumatic basal sub-arachnoid haemorrhage and rupture of the left intracranial vertebral artery,

caused by a "blow of considerable force" to the neck. Mr Newlove had suffered many other injuries including injuries to his arms and hands consistent with Mr Newlove having drawn up his arms to protect his head and face. None of these other injuries contributed to the death.

20. As for what caused the blow, Dr Johnson concluded that the underlying bruising indicated a kick. It was possible that it was caused by a heavy punch but he explained that he had never come across such bruising resulting from a single punch. He agreed that the tear and bruising could have been accounted for by one kick only.

21. Dr Johnson said that in the majority of cases involving this sort of injury, the victim "goes down and doesn't respond"; in his opinion, therefore, Zoe Newlove's evidence (that after he went to ground her father had curled up and put his hands over his head) suggested that the fatal blow was inflicted after this time. This was however only a guide; in his summing up the trial judge told the jury to be cautious before drawing any conclusion from this and reminded them of the evidence of Mr Sherrington.

22. The forensic scientist, Margaret Irwin, gave evidence that there was no connection between on the one hand Jordan Cunliffe's clothing and on the other Mr Newlove or glass from the damaged mini-digger. She did find blood on Jordan Cunliffe's t-shirt, some of which matched Sorton and some of which matched Zoe Newlove. The absence of blood on his footwear did not show that he had not kicked Mr Newlove.

23. The final limb of evidence that ultimately supported the case advanced by the prosecution (albeit subject to the need for caution given the self-interest involved) came from what was said by other defendants in the course of their evidence. Three of the defendants referred to Jordan Cunliffe's involvement in the incident with Mr Newlove. Sorton said that, at a point when Mr Newlove was still conscious and moving around on the ground, Jordan Cunliffe had delivered a single kick to Mr Newlove. Swellings said that Jordan Cunliffe was present at the initial confrontation with Mr Newlove. According to him Mr Newlove shouted in Jordan Cunliffe's face. So far as he was concerned it was obvious that Jordan Cunliffe and the others were going to fight Mr Newlove. The group was egging on Mr Newlove and encouraged Swellings to hit Mr Newlove. Bate said he saw Sorton and Swellings hit Mr Newlove and then saw Sorton, Swellings, Jordan and Gareth Cunliffe around Mr Newlove on the ground. He said that he saw no further blow struck to Mr Newlove.

24. Jordan Cunliffe's case was that he had not been with the group that attacked Mr Newlove. When he gave evidence, he explained that he was partially sighted. He said that he had hung back from the rest of the group after buying some chips that evening and stopped in an alleyway to relieve himself. When he caught up with the rest of the group he saw people standing around Mr Newlove, who was already on the ground. A woman on the street (assumed to be Zoe Newlove) took hold of him and said something about her father being hurt and having stopped breathing; she let him go and he ran away.

25. He said that he later met with Swellings, Bate, his brother and others. He denied being involved in any assault on Station Road North, being involved in any of the other incidents alleged by the prosecution and having made the admissions relied upon by the prosecution. Jordan Cunliffe gave the same account throughout the investigation except in relation to his footwear. At interview he said he had no shoes on when arrested. His

draft and unsigned defence case statement asserted that he was wearing trainers walking along Station Road North. However, his position at trial was that he was not wearing trainers by the end of the incident. This, as we have noted, corresponded with the description given by Tracey Cassidy.

26. Mr Clearkin, a consultant opthalmic surgeon, produced a report on Jordan Cunliffe's eyesight, which was read to the court by agreement. Mr Clearkin tested Jordan Cunliffe's eyes around two months after the attack on Mr Newlove. His report confirmed that Cunliffe suffered from keratoconus, a visual disability so severe that he needed a corneal transplant. At the time of the attack he had 1/60 vision in both eyes, a level well below that at which blindness is certified. It meant that he could not wear contact lenses or glasses to correct his vision and his vision was "severely reduced". In his evidence Jordan Cunliffe said that he could not distinguish the men from the women in the jury box in court. On the other hand, he accepted that he was capable of playing football with his friends.

The Judge's Directions

27. There was no direct evidence as to who had delivered the fatal blow to Mr Newlove. The judge's directions in respect of joint enterprise came at an early stage of his summing up. The judge said this:

> "… the prosecution case is that all of the defendants committed the murder of Garry Newlove together. It is therefore important that you understand that in order to be guilty of murder a person does not himself have to do what causes the victim's death. A person can be guilty of murder if he is….in a joint enterprise with a person who actually causes the victim's death by murdering him, that's to say who unlawfully caused the victim's death intending to kill or to do really serious injury. …
>
> The essence of joint responsibility for a criminal offence is that each defendant shares an intention to commit it and takes some part…to do so…. In a case like this the person would have to have taken part in the attack on Garry Newlove either by actually using violence himself or…by being there and deliberately encouraging those using violence intending to encourage the attack and actually encouraging it.
>
> …. What then is the state of mind that makes a person guilty of murder in these circumstances? A person would be guilty in these circumstances if …. either he intended that Garry Newlove should suffer really serious injury or he realised that one of the attackers might intend to do Garry Newlove really serious injury and might in fact do him really serious injury if not kill him.
>
> If a defendant did intend or realise that then you would find that defendant guilty of murder provided that the defendant realised that one of the attackers might do the sort of thing that caused Garry Newlove's death. …"

28. At the conclusion of the summing up the judge returned to the issue of joint enterprise. He provided the jury with a written route to verdict in these terms (as corrected during the summing up):

> "(1) Are you sure that whoever did what caused Garry Newlove's death intended when he did the fatal act to cause him really serious injury, if not to kill him? If yes, go to question (2). If no, go to question (5).
>
> (2) Are you sure that D either inflicted an injury that caused Garry Newlove's death himself or was party to a joint enterprise to assault Garry Newlove, as a result of which assault he died? If yes, go to question (3). If no, D is not guilty."

[Pausing there, it is important to emphasise that the judge directed the jury that the defendant whose case they were considering had to have been party to the joint enterprise with the person who inflicted the fatal injury at the time when that injury was inflicted.] Continuing the route to verdict:

> "(3) Are you sure that either (a) D intended that one of those assaulting Garry Newlove should cause him (at least) really serious injury, or (b) D realised that one of those assaulting Garry Newlove might intend to do him really serious injury and might in fact do him really serious injury (if not kill him)? If yes, go to question 4. If no, go to question 5.
>
> (4) Are you sure that D realised that one of those assaulting Garry Newlove might cause him really serious injury (if not kill him) by doing the sort of act that did in fact cause his death or some act not fundamentally different therefrom? (E.g. if you are sure that Garry Newlove was killed by kicking, are you sure that D realised that someone attacking Garry Newlove might cause him really serious injury (if not kill him) by kicking him or doing something to him that was not fundamentally different from kicking him.) If yes, D is guilty of murder. If no, go to question 5.
>
> (5) Are you sure that whoever [*sic*] Garry Newlove's death was caused by an unlawful violent act (i.e. that an unlawful violent act was a substantial cause of his death)? If yes, go to question 6. If no, D is not guilty.
>
> (6) Are you sure that D either inflicted an injury that caused Garry Newlove's death himself or was party to a joint enterprise to assault Garry Newlove, as a result of which assault he died? If yes, D is not guilty of murder but guilty of manslaughter. If no, D is not guilty."

29. In retirement the jury asked for clarification of the meaning of (a) and (b) in question 3. In relation to (b) the judge said this:

> "…whilst (the defendant) might not actually have intended that Garry Newlove should be done really serious injury in the assault to which (the defendant) was party, he was aware that there was a real possibility not simply that the victim might be caused really serious injury but also that another person assaulting Garry Newlove whom (the defendant) was assisting or encouraging, that other person might intend to inflict really serious harm and inflict it with that intention. That's to say…(the defendant) realised that one of those assaulting Garry Newlove might intend to do him really serious injury and might in fact do him really serious injury…what you must ask is whether you're sure that the defendant did actually have the necessary intention or realisation. It is not a question of what the (defendant) should have appreciated if he had thought about it or what should have been obvious to him…"

30. There was no challenge to the way in which the judge directed the jury which was clearly in accordance with the law at the time.

The CCRC decision

31. The decision addressed various issues originally raised on behalf of Cunliffe. It is only necessary to set out the elements of the CCRC decision which are challenged, namely those relating to the *Jogee* issue and the question whether or not Cunliffe joined the joint enterprise before the fatal blow was struck. Thus, having analysed the trial, the CCRC found that, on the basis of the route to verdict and the evidence, the jury must have concluded that they were sure of the following:

> a. Whoever committed the fatal act intended to cause Mr Newlove really serious harm.
>
> b. Jordan Cunliffe either inflicted an injury which caused Mr Newlove's death or was a secondary party to a joint enterprise to assault him as a result of which he died (the CCRC considered the former to be "highly unlikely on the evidence" and the latter "much more likely").
>
> c. Jordan Cunliffe was a party to the joint enterprise at a time when the fatal injury was inflicted.
>
> d. Jordan Cunliffe either intended that one of those assaulting Mr Newlove would cause him really serious injury or realised that they might intend to cause him really serious injury and might in fact do so.
>
> e. The fatal act was not fundamentally different from the act which Jordan Cunliffe realised might cause really serious harm, either because of its nature, or how or why it was done, or for any other reason decided by the jury.

> f. Jordan Cunliffe's account that he was not with the group that attacked Mr Newlove was not true, and not even possibly true, and he participated in the joint enterprise to assault at the time that the fatal blow was struck.
>
> g. There was either a common intention to cause really serious harm or a realisation that it might be inflicted, as inferred from the actions they concluded Jordan Cunliffe had taken, the bad character evidence, his admissions or all three (the CCRC considered that this inference was "likely" to have been made, considering "the spontaneous nature of the enterprise, and the fact that no assailant was armed").

32. In the view of the CCRC, it was "impossible to say with any more certainty" what factual conclusions the jury reached, "given that the evidence in the case had all the inconsistencies one would expect of a fast-moving and confusing incident".

33. The CCRC then turned to consider the strength of the argument that the new direction would in fact have made a difference. It is necessary to set out the relevant paragraphs in full, as they are a particular target of attack in this application:

> "88. There was evidence from which a personal intention to cause really serious harm could be inferred, particularly if the jury concluded that Mr Cunliffe had joined in with a kick during the fatal assault, and had 'bragged' in the terms alleged immediately afterwards. On the other hand, it is also possible that the jury concluded that Mr Cunliffe was part of a group, and offered some encouragement to the assault, realising that really serious harm was a possibility. In the CCRC's view, the bad character evidence in particular was capable of pointing in two directions – both towards murder via a propensity to act violently in a group in which violence, including kicks with shod feet, was a real possibility, and towards manslaughter, in that all the previous incidents, although violent and unpleasant, did not involve serious harm.
>
> 89. In these circumstances, although the CCRC concludes that there must be a real possibility that the correct direction *might* have made a difference, it is unable to conclude that there is a real possibility that there is a sufficiently strong argument that it *would* do so, as required by ***R v Johnson*** [emphasis in the original]."

34. The CCRC also provided a provisional view on Jordan Cunliffe's age and disability. It agreed that if the evidential threshold for substantial injustice was reached, the issues would weigh in his favour for a referral. However, it considered that the issues were "tangential" to the positive defence run at trial that Jordan Cunliffe was simply not present and noted that Jordan Cunliffe's account was disbelieved. Hence in its view the Court of Appeal "would be less inclined to find a substantial injustice in these circumstances".

35. Further submissions were made on Jordan Cunliffe's behalf to the effect that the CCRC had set the bar too high by asking whether a *Jogee* direction would have made a difference. The CCRC in response maintained that it had applied the appropriate test given the judgment of the Court of Appeal in *R v Johnson (Lewis) and other cases* [2016] EWCA Crim 1613, [2017] 4 WLR 104. ("*Johnson and others*"). However, it went on to conclude that, even adopting a lower threshold as suggested by those representing Jordan Cunliffe, the case should not be referred to the Court of Appeal. The CCRC expressed itself as follows:

> "126. In the CCRC's view, it remains impossible to say with any certainty whether the jury convicted on the basis of foresight or intention. However, there was more than enough evidence for the jury to have reasonably inferred an intention to commit really serious harm by Cunliffe, depending what they made of the evidence, if they concluded that he had kicked Mr Newlove while he was on the ground, after a concerted attack – particularly given his post event admissions.
>
> 127. In light of all the evidence, the CCRC cannot say [that] there is a sufficiently strong case that Mr Cunliffe would not have been convicted of murder if the law had been explained to the jury as set out in *R v Jogee*."

36. In relation to the proposition that the principles in *R v Childs and Price* applied to the facts of Jordan Cunliffe's case and that his case should be referred on that ground alone, the CCRC declined to refer on three grounds:

> a. The argument was not new since it was a point available to be argued at trial. The judgment in *Childs and Price* established no new principles.
>
> b. The jury had been directed in clear terms that a secondary party had to be part of the joint enterprise at the point at which the fatal blow was struck. This was dealt with under question 2 of the route to verdict.
>
> c. There were factual differences between *Childs and Price* and Jordan Cunliffe's case. In the former case the evidence of the first blow being the fatal blow was clear and unequivocal. In the instant case it was not possible to say when the fatal blow was struck albeit that a preponderance of the evidence indicated that it was a kick delivered when Mr Newlove was on the ground. Moreover, there was evidence placing Jordan Cunliffe as part of the joint enterprise before any blow was struck whereas that did not apply in *Childs and Price*.

37. Further submissions were made to the CCRC in respect of these conclusions. None went to the first two matters relied on by the CCRC as grounds for not referring the case. In any event the CCRC disagreed with the general proposition put forward on behalf of Jordan Cunliffe, namely, that homicide cannot be proved in a spontaneous incident where it is possible that the fatal blow was struck before the defendant joined

in since this failed to allow for a defendant encouraging without any physical participation.

38. The challenge to this decision mounted by Pete Weatherby QC on behalf of Jordan Cunliffe has been put on three grounds. These are:

    i) The CCRC elided the test of substantial injustice which is required to be met in out of time appeals based on a change of law (*Johnson and others)* and the issue of safety.

    ii) Insofar as the CCRC concluded that there was sufficient evidence to justify the conclusion that Jordan Cunliffe did have the intention as required by *Jogee* this conclusion was speculative and not justified on the evidence.

    iii) The facts of this case were comparable to those in *Childs and Price*. The case should have been referred on this ground alone.

The Legal Framework

39. The CCRC cannot refer a case to the Court of Appeal unless the test set out in s. 13(1)(a) of the Criminal Appeal Act 1995 which is that:

> "the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made…"

40. In the context of challenges to decisions of the CCRC, the application of this test has been considered on many occasions but the most comprehensive discussion of the meaning and effect of s. 13(1)(a) remains that of Lord Bingham CJ (as he then was) in *R (Pearson) v CCRC* [2000] 1 Cr App R 141 which is in these terms (at 149F-150A):

> "The "real possibility" test prescribed in section 13(1)(a) of the 1995 Act as the threshold which the Commission must judge to be crossed before a conviction may be referred to the Court of Appeal is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant's prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not…The judgment required of the

> Commission is a very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take."

41. In the context of an out of time appeal where the issue is whether a direction on joint enterprise given on the basis of the law as it was prior to *Jogee*, the Court of Appeal will consider whether a substantial injustice would be done to the appellant were he not to be granted leave to appeal: see *R v Johnson and other cases*. The most recent discussion of this principle is to be found in *R v Towers and Hawkes* [2019] EWCA Crim 198 (at [52] to [63]) which was a case referred to the Court of Appeal by the CCRC and specifically concerned the question whether a *Jogee* direction would have affected the outcome. It is sufficient to identify the approach (at [57]):

> "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."

42. Having reviewed *R v Johnson and others* in some detail, the judgment goes on:

> 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.

43. The proper approach to be taken by the CCRC in cases where the concept of "substantial injustice" falls to be considered has already been the subject of a decision of this court: *R(Davies) v CCRC* [2018] EWHC 3080 (Admin). In that case, the view of the CCRC was summarised by Irwin LJ (at [31]):

> "The letter [from the CCRC] noted that the CCRC cannot refer a case to the Court unless there is a "real possibility that the Court of Appeal will quash the conviction". The CCRC noted that their task is the application of a "predictive test". It followed therefore that for a reference to be made in a case such as this, there must be "a real possibility that the Court of Appeal would find that a substantial injustice has been done" (reflecting the decision in *Johnson*) and "a real possibility that the Court of Appeal would find that the conviction is unsafe"."

44. Using that approach, the conclusion of the CCRC was set out at [35] that "any argument that a post-*Jogee* direction would in fact have made a difference to your case is not sufficiently strong to raise a real possibility that the Court would conclude that a substantial injustice has been done".

45. The argument of the claimant in *Davies* was very similar to the one put forward on behalf of Jordan Cunliffe. Insofar as there is any difference in approach it is of no consequence. The conclusion of this court was clear. Irwin LJ (with whom Kerr J agreed) said (at [59]):

> "In my view, there is nothing in the criticism of the approach taken to the law by the Commission. Since their task is to predict a real possibility of a successful appeal, they are bound to do so from the starting point of examining the legal approach which will be taken by the Court to the case in hand. Hence, the requirement that there should be demonstrated that "substantial injustice" before such an appeal should be permitted to progress, was bound to be incorporated into the thinking of the Commission. Implicit in some of the submissions from Ms Gerry was the idea that Johnson was wrongly decided, with the result that the "high threshold" was too high. The need for "substantial injustice" has been laid down in long-standing authority, and has been explicitly approved by the Supreme Court in *Jogee* and the Court of Appeal in *Johnson*. It can be no part of the role of the Commission to take a different view, and proceed as if that test was misguided."

46. We entirely agree with that conclusion. It defeats the argument that the CCRC in this case adopted an erroneous approach in law.

47. Mr Weatherby argued that the Divisional Court in *Davies* added a gloss to the discussion in relation to *Johnson* when it said (at [61]):

> "Of course, it would amount to substantial injustice if a wrongful murder conviction were to stand. In this case the issue is whether the argument that the conviction was unsafe is clear and powerful, rather than something more technical, narrow or theoretical."

He invited our attention to the use of the word "wrongful" and submitted that this supported his argument that the CCRC should have considered the issue of safety. We

do not agree. The passage relied on follows the clear conclusion that the CCRC was bound to apply the test of "substantial injustice" and, in no sense, does it derogate from that conclusion.

The Decision

48. Was the decision of the CCRC that there was no real possibility that the Court of Appeal would find a substantial injustice on the facts of this case unreasonable or irrational in the *Wednesbury* sense? It is important to underline that this Court is not retaking the decision or exercising the judgment that falls to the CCRC afresh. Suffice to say that we are entirely satisfied that there was no error of law in the decision. The CCRC was entitled to take account, in particular, of the nature of the defence run at trial (which was roundly rejected by the jury), the evidence of eye witnesses as to Jordan Cunliffe's proximity to the attack on Mr Newlove, the evidence of the witnesses who gave an account of incriminating remarks made by Jordan Cunliffe immediately after the incident and the evidence of Jordan Cunliffe's association on an earlier occasion with similar episodes of violence.

49. Taking all those matters into account, it is clear that the conclusion that no substantial injustice could be demonstrated was fully open to the CCRC. One matter of particular significance is that the nature of the act which was intended to cause really serious harm and which in due course led to Mr Newlove's death was overwhelmingly likely to have been a kick with a shod foot. The circumstances of the attack on Mr Newlove and the nature of Jordan Cunliffe's participation in the attack (even taken at its lowest) indicate very strongly that, had the jury considered whether, at the time of the attack, he intended that others should cause really serious harm, it would have found that this was exactly what he intended.

50. Mr Weatherby argued that the CCRC went beyond the facts which the jury must have found and entered into the evidential arena. By that, he meant that the decision relied on matters which the jury could have found which was an approach which was impermissible. He relied on the passage at para. 126 of the decision (set out above) and, in particular, on the words that "… there was more than enough evidence for the jury to have reasonably inferred an intention to commit really serious harm by Cunliffe, depending on what they made of the evidence". He argued that this observation demonstrated a speculative approach by the CCRC.

51. We do not accept this proposition. In any case of group violence in the street, determining the intention of a participant in that violence almost always will be a matter of inference. In reaching its conclusion, the CCRC was not engaging in speculation. It identified the available evidence and then considered whether a direction in relation to joint enterprise in accordance with *Jogee* would have made a difference. In this case, that exercise was bound to involve consideration of the proper inferences to be drawn from all the circumstances as to the intention of of the proper inference to be drawn as to the intention of Jordan Cunliffe. The words "depending on what they made of the evidence" must plainly be read in that context.

52. The *Wednesbury* question applies equally to the second proposition put by Mr Weatherby, namely that the jury properly directed could not have been sure that Jordan Cunliffe was party to the joint enterprise at the point at which the fatal blow was

administered. It is instructive to consider the facts in *Childs and Price* in order to assess the argument that this case is on all fours with that.

53. The victim was killed as the consequence of a short-lasting fight in a retail park much of which was captured on CCTV. Both Childs and Price were convicted of murder. The undisputed medical evidence was that only one of the blows (most of which were punches) would or could have caused the fatal brain injury. Childs and the victim were remonstrating when Childs suddenly landed the first punch. Price then arrived at the scene "within around 1 second", pulled the victim away and began to punch and kick him. The victim collapsed, entirely unconscious, and the whole fight lasted little more than 15 seconds. The court (Davis LJ, Stewart and Lewis JJ) considered that there was no direct evidence or other evidence from which it could be safely inferred that there was a joint enterprise before Price joined the fight. The joint enterprise having been formed after what could have been the fatal punch, Price's conviction for murder was unsafe.

54. The facts here were very different. Jordan Cunliffe's case was that he was not present at any stage of the attack on Mr Newlove. Thus, the issue raised in *Childs and Price* did not arise on his case. On the prosecution case he was present throughout and, so the prosecution said, party to the joint enterprise throughout. Even if the first blow struck (probably by Sorton) was the fatal blow, there was ample evidence on which to conclude that Jordan Cunliffe was party to the joint enterprise at that stage.

55. Mr Weatherby submitted that there was nothing in the evidence to show that Jordan Cunliffe was a participant at the time of the fatal blow. This submission is untenable. The witnesses Domville and Bate placed him with the group at the outset. Tracey Cassidy and Zoe Newlove described the actions of the group of which Jordan Cunliffe was a part. The evidence as a whole showed that he was participating throughout the incident involving Mr Newlove.

56. The challenge to the CCRC's decision in relation to this aspect of the case fails before consideration of the evidence. First, as the CCRC noted, the issue could have been raised in the trial and was not. This may have been because of the nature of Jordan Cunliffe's defence but that would not have prevented the point being argued irrespective of his case on the facts. Second, the judge's direction to the jury made it perfectly clear that a defendant could not be convicted unless he were proved to be party to the joint enterprise when the fatal blow was struck.

Conclusion

57. In the light of the analysis above, this claim for judicial review must be dismissed.