IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
WC2A 2LL

ON APPEAL FROM THE CROWN COURT AT WARWICK

(HIS HONOUR JUDGE LOCKHART KC) [T20227154]

Case No 2023/01972/B2, 2023/02032/B2 & 2023/02799/B2
[2025] EWCA Crim 255

Tuesday 21 January 2025

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE CUTTS DBE

MR JUSTICE SHELDON

R E X

- v -

CALLUM AYRE
SAMUEL HENNEBERRY
CARL TOMLINSON

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr J Bartfeld KC appeared on behalf of the Appellant Callum Ayre
Mr D Bentley KC appeared on behalf of the Applicant Samuel Henneberry
Miss C Davies KC appeared on behalf of the Applicant Carl Tomlinson

Mr H Sandhu KC appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 21 January 2025

LORD JUSTICE HOLROYDE:

1. On the night of 12 July 2022 a Ford Mondeo car was driven into collision with a group of four pedestrians. One of the group, Andrew Flamson, was killed. Another, Damien Corbett sustained severe, life-changing injuries. Levi Barton (the son of Flamson) and a fourth person, whom we shall call "V", suffered relatively minor injuries.

2. After a trial before His Honour Judge Lockhart KC and a jury, Callum Ayre, Samuel Henneberry and Carl Tomlinson were convicted of the manslaughter of Flamson; inflicting grievous bodily harm on Corbett; and assault occasioning actual bodily harm to both Barton and V.

3. Ayre now appeals against his convictions by leave of the full court. Henneberry and Tomlison renew their applications for an extension of time in which to apply for leave to appeal against conviction. Their grounds of appeal raise issues as to whether they should have been able to rely on an overwhelming supervening act ("OSA") as a defence to the charges.

4. V is not yet an adult. In the Crown Court, and at the leave hearing before the full court, an order was made pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999 prohibiting the publication of anything which would identify V. Those orders remain in force. We therefore make it clear that the order prohibits publication of the name, address, school, or any information, including pictures of or including this person calculated to lead to the identification of V as being involved in these proceedings.

5. We summarise the relevant facts. For convenience, and meaning no disrespect, we shall for the most part refer to persons by their surnames only.

6. The prosecution alleged that Flamson dealt in cannabis and that one of Henneberry's sons was in debt to Flamson for cannabis supplied. The debt is said to have given rise to tension.

7. On the night of 12 July 2022, Flamson had been drinking. He, Corbett, Barton and V walked to Westminster Road, the street where Henneberry lived. Henneberry was inside his house, together with Ayre, Tomlinson and two others, Ashley Donald and Carlton Rollason. There was an exchange of words between the two groups, during which Henneberry was carrying a wooden pole. Flamson threw something towards the house. Henneberry was heard to say to Barton and V (the two youngest members of the other group): "We know what you two look like. You little pricks are getting it".

8. CCTV footage showed that this exchange ended at 22.53.41, when Flamson and his companions walked away. Less than a minute later, Donald walked from the house to the Mondeo. Ten seconds later, he was joined by Tomlinson. Twelve seconds after that, Ayre came out of the house. Initially he was unarmed, but he returned to the house and then went towards the car carrying a baseball bat. Two seconds after that, Henneberry also went to the car, carrying the wooden pole. Finally, Rollason joined them.

9. Donald manoeuvred the car so that it was facing in the direction in which Flamson and his group had gone. The other four men got into the car. Donald drove. Ayre was the front seat passenger. The others sat in the back, with Tomlinson in the middle. The car set off with its headlights illuminated, travelling at a comparatively slow speed in the direction which Flamson and his group had taken.

10. A short distance from the house, Donald turned into Western Link Road. The manner in which he made the turn suggested that those in the car had just spotted the other group walking

further along that road. Donald turned off the car's lights, speeded up and drove at the group, hitting Flamson and Corbett. Henneberry opened one of the rear doors, which would have given him a view of the injured men. The Mondo then returned to Westminster Road, where Henneberry, Tomlinson and Rollason went into the house. Henneberry was still carrying his wooden pole.

11. Donald, together with Ayre, drove to nearby Albany Road. They emptied the car of its contents. Ayre threw away the baseball bath which he had been carrying. Thereafter, Ayre collected a petrol can. He had covered his face and Donald had put on a hat. They inspected the damage which had been sustained by the Mondeo in the collision with the pedestrians. They then drove off, leaving the petrol can behind. They later abandoned the car in a car park and walked back to Albany Road, where Donald retrieved the petrol can.

12. Meanwhile, Tomlinson had cycled from the house in Westminster Road to Western Link Road, where he would have seen the emergency services in attendance. He then returned to the house.

13. Donald and Ayre then drove to the Westminster Road house in a different car. The collected Henneberry and went to a nearby McDonald's for refreshments.

14. A police investigation began. Henneberry initially gave a false account that the Mondeo had been sold several days before the incident. He, Ayre and Tomlinson told lies when interviewed under caution after their arrests. Donald departed the country and did not return until about two months later.

15. The five accused were charged on an indictment containing 11 counts. Each of the counts was against all five accused jointly. Many of the counts were alternatives, reflecting differing

levels of intention. Count 1 alleged the murder of Flamson, Count 2 alleged the manslaughter of Flamson. Count 3 alleged the attempted murder of Corbett; count 4, causing grievous bodily harm with intent to Corbett. Count 5 alleged the attempted murder of V; and count 6, causing grievous bodily harm with intent to V. Counts 7 and 8 similarly charged attempted murder and attempting to cause grievous bodily harm with intent in relation to Barton. Count 9 charged maliciously inflicting grievous bodily harm on Corbett. Counts 10 and 11 charged assault occasioning actual bodily harm to Barton and V respectively.

16. At the conclusion of the prosecution evidence, submissions of no case to answer were made. They were rejected by the judge. We shall say more about this shortly.

17. Each of the accused gave evidence. Donald said that it was not he who had steered the car at the other group. Tomlinson, he said, had seized the steering wheel and had directed the car.

18. At the conclusion of all the evidence, the judge discussed with counsel his proposed directions to the jury. Submissions were made on behalf of the defendants, not all of which were accepted by the judge. Again, we shall return to this shortly.

19. The jury convicted Ayre, Henneberry and Tomlinson on count 2 (manslaughter of Flamson), count 9 (maliciously inflicting grievous bodily on Corbett), and counts 10 and 11 (assault occasioning actual bodily harm to V and Barton). The jury convicted Donald of count 1 (murder of Flamson), count 4 (causing grievous bodily harm with intent to Corbett, and counts 6 and 8 (attempting to cause grievous bodily harm with intent against the two youngest victims). The jury acquitted Rollason of all counts.

20. Four grounds of appeal have been advanced by Mr Bartfeld KC on behalf of Ayre, which have been adopted by Mr Bentley KC and Miss Davies KC on behalf of Henneberry and

Tomlinson in support of their renewed applications. The first two grounds of appeal relate to the judge's ruling on the submissions of no case to answer. The remaining grounds of appeal relate to the directions of law which the judge gave to the jury. For convenience, we shall from hereon refer to all three as "the appellants".

21. Before addressing the grounds of appeal, it is convenient to refer to two important cases. In *R v Jogee* [2016] UKSC 8, Lord Hughes and Lord Toulson gave the judgment with which the other Justices agreed. They held that where a person is accused as a secondary offender, the prosecution must prove that he intentionally encouraged or assisted the commission of the offence by the principal, and intended to assist or encourage the principal to act with the particular intent required by the crime. At [12] the judgment continued as follows:

> "Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome … Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it."

22. Their Lordships went on to reflect on the development of the doctrine of parasitic accessorial liability and held that the law, in particular in the cases of *R v Chan Wing-Siu* in 1985 and *R v English and Powell* in 1999, had taken a wrong turn in treating foresight of the principal's crime as sufficient *mens rea* for the offence of encouraging or assisting.

23. Restating the correct principles, their Lordships said this at [96] to [98]:

> "96. If a person is a party to a violent attack on another, without

> an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results …
>
> 97. The qualification to this (recognised in *Wesley Smith*, *Anderson* and *Morris* and *Reid*) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> 98. This type of case apart, there will normally be no occasion to consider the concept of 'fundamental departure' as derived from English. 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 *Chan Wing-Siu* 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."

24. In *R v Grant* [2021] EWCA Crim 1243, the facts were that a car had been driven into two pedestrians, killing one of them. A defendant Khan was alleged to have been the driver, Grant the front seat passenger. Grant's case was that Khan had departed from an agreed plan to attack the victims on foot. He contended that a defence of OSA should have been left to the jury. This court refused his renewed application for leave to appeal against conviction. Having

considered [12], [96] and [97] of *Jogee*, the court said that it was clear from *Jogee* at [12] that the concept of OSA was not to be viewed through the lens of causation; rather, it is encouragement and assistance that count. Fulford LJ, giving the judgment of the court, went on to say this:

> "34. As it seems to us, the Supreme Court in these paragraphs in *Jogee* significantly limited the circumstances in which a jury will need to consider the possibility that there had been a departure from the agreed plan. Although paragraph 98 is not expressed in absolute terms (viz. '(t)his type of case apart, there will **normally** be **no occasion** to consider the concept of "**fundamental** departure"' (our emphasis)), the only situation expressly contemplated by the Supreme Court, therefore, is when the limited circumstances described in these three paragraphs arise. …"

25. Later in the judgment, Fulford LJ rejected the criticism which had been made of the decision of the trial judge, and went on to say this:

> "38. … On a charge of murder, if the accessory intentionally assisted or encouraged the perpetrator and intended that the perpetrator should cause grievous bodily harm with intent, he or she will have satisfied the elements of the offence of murder. The precise manner in which the victim happens to be killed and whether the perpetrator intended to kill as opposed to inflict really serious harm are by the way, so long as the encouragement or assistance of the accessory has not been 'relegated to history' as set out above. Save perhaps for exceptional circumstances which are not readily easy to envisage, there will be no need to direct the jury on the concept of OSA simply because the fatal injuries were inflicted using an entirely different kind of weapon or method of killing than that originally contemplated and/or the perpetrator intended to kill rather than to inflict really serious harm.
>
> 39. In all the circumstances we are unpersuaded that the judge erred in not giving an OSA direction. We stress, however, that this conclusion and the explanation for it as set out above are not intended to undermine the need, in the right case, to direct the jury in accordance with the concluding part of paragraph 12 of *Jogee* whenever there is a sustainable basis for contending that the encouragement or assistance previously provided by the accessory had lost material connection with what occurred …"

26. Returning to the present case, submissions of no case to answer were made as follows. Ayre made submissions in relation to count 1 (murder), count 2 (manslaughter), and counts 3, 5 and 7 (attempted murder). Henneberry, Tomlinson and Rollason, accepting that the decision in *Grant* meant that they could not successfully make a submission of no case to answer on count 1, confined their submissions to counts 3, 5 and 7.

27. The submissions made on behalf of Ayre were summarised by the judge in these terms:

> "It is the submission of Callum Ayre that this defence [OSA] is available to him on the counts submitted upon. It is said that the evidence is such that the court should rule that not only should this defence be left to the jury but, moreover, the material available is such that the court should act to stop the case because it is submitted that the prosecution cannot lead evidence which would mean that a properly directed jury could find that it did not apply."

The judge then referred to the decisions in *Jogee* and *Grant*. He summarised the effect of *Jogee* at [97] and [98] as being:

> "… where P commits the offence in a manner different to that which D intended it is only when P's act amounts to 'some overwhelming supervening act … which nobody in the defendant's shoes could have contemplated might happen and is of such character as to relegate his acts to history' will D not be liable for it."

The judge went on to say that mere escalation of violence by P from what D intended will not be sufficient to allow the defence to apply; nor would P's use of a weapon, of which D was unaware; and nor would mere escalation of *mens rea*, such as if P kills with intent to kill, when D intended P to carry out only intentional grievous bodily harm.

28. As to the submissions on behalf of Henneberry and Tomlinson, the judge summarised them as follows. They submitted that there was insufficient evidence from which the jury could properly infer that either defendant provided encouragement, sharing an intent to kill. The judge noted the distinction drawn by counsel between the *mens rea* required for murder, as against that required for attempted murder.

29. In his ruling, the judge emphasised that in *Jogee* the Supreme Court had focused on the issue of intent. The judge said:

> "A secondary party [D] is not to be convicted unless he holds the requisite intent alongside and contemporaneously with the principal and he does an act to cause, assist, support or encourage [P] in the execution of that intent.
>
> It, of course, matters not that the intent of [P] may be greater provided [D] intends that which will make him guilty of the offence charged. This … is the effect of *R v Grant*. …"

30. The judge then rejected the submission that the defence of OSA arose in this case. He noted that only a minute or so before the car ran the pedestrians down, Ayre had been part of the incident in which the threats were made to "get" the other group, and Ayre had then got into the car, armed with a bat capable of causing really serious injury or death, and had set off with the others to hunt the Flamson group. The judge said that the conduct of Ayre could in no way be said to have faded to the point of mere background; it was a current and contemporaneous encouragement of Donald. Plainly, that encouragement being so close in time and space had not spent all possible force; it was current and not historical. He went on:

> "I am clear that the use of a car as a weapon was not an act on behalf of Mr Donald which nobody in the defendants' shoes could have contemplated might happen."

The judge therefore concluded that it would be wrong to withdraw the case from the jury on count 1.

31. As to the counts of attempted murder, the judge found that it was open to the jury to find that for the others in the car it was not an unanticipated manoeuvre by Donald, but rather the anticipated culmination of events which had begun on Western Link Road with the switching off of the lights and the car's increasing speed.

32. Later in the trial, having heard submissions, the judge, as we have noted, gave a ruling as to how the jury would be directed. He addressed submissions on behalf of the accused to the effect that the prosecution case had changed in the course of the trial from an initial allegation of a joint plan at the outset to use sticks, but then developing, to an eventual allegation made in cross-examination of the accused of a new and different joint plan to drive the car into the other group with intent to kill. The judge rejected that defence argument. He held that there had been no significant change in the way the case was put such as would entitle the accused to assert that they could only be convicted if the jury were sure that they intended to kill with a car.

33. The judge went on to direct the jury in accordance with that ruling. He provided them with a detailed and clear route to verdict.

34. In their very helpful written and oral submissions to this court, counsel pursue the following four grounds of appeal:

> (1) The judge erred in law in ruling, on a submission of no case to answer, that the principle of OSA was not applicable to the facts of this case;

(2) The judge erred in law and fact in rejecting the submission of no case to answer;

(3) The judge erred in law in refusing to leave the issue of OSA to the jury; and

(4) The judge erred in law and fact in refusing to direct the jury to acquit if they were unsure that a secondary party had joined a plan to use the car as a weapon.

35. Mr Bartfeld, leading on these issues, effectively reiterates the points which had been made to the judge. He says in particular that cases such as *Grant* have wrongly narrowed that which the Supreme Court intended when giving judgment in *Jogee*. He argues that, viewing the judgment overall, the Supreme Court in *Jogee* were aiming to narrow the scope of secondary liability. He points out in his submissions that once the car speeded up, the passengers were not able physically to withdraw from any new agreement. He argued that it is not possible to encourage something which has not been foreseen.

36. Challenging the decision of this court in *Grant*, Mr Bartfeld submits that effectively it has had the effect of rendering the defence of OSA something which is largely theoretical and almost never exists in practice. He submits that as a matter of general principle, judges should be slow to withdraw from juries any reasonable defences; but, he argues, the effect of *Grant* is to make it common for judges to do so where issues of OSA are raised.

37. In support of these arguments, Mr Bartfeld invites our attention to some of the earlier cases which were mentioned by their Lordships in *Jogee*. He argues that they cover circumstances such as arose in this case. He also invites our attention to the use in the case of *R v Kennedy (No 2)* [2007] UKHL 38 of the phrase "necessary linkage" between the relevant actions of (in

that case) the accused and the deceased.

38. In the present case, Mr Bartfeld submits that the appellants were not acting in concert with Donald at the time when Donald appears to have formed an intention to kill. He goes on to submit that so far as necessary the decision of this court in *Grant* can in any event be distinguished on its facts. His primary theme, however, was that *Grant* and other decisions of this court have taken the law away from what was intended by the Supreme Court in *Jogee*, with, he suggests, resultant great difficulty for practitioners and judges in knowing where the line is to be drawn and when the defence should be left to a jury.

39. Mr Bentley and Miss Davies acknowledge that initially no application to renew their applications for leave to appeal were made, because of a view that *Grant* was firmly against them. Perfectly properly, they now seek to argue a different approach and to ally themselves with Mr Bartfeld's submissions. Mr Bentley suggests that on the facts of the case the judge's approach to the directions led to the unacceptable result that manslaughter verdicts were returned which made "no sense". Mr Bentley submits that this is not a case of escalation of an agreed plan. He, too, refers to factual differences between the circumstances in *Grant* and the circumstances here, and he relies on the use by Fulford LJ of the phrase "lost material connection" at [39] of *Grant*. That, submits Mr Bentley, is the position here.

40. Miss Davies adopts a similar approach. She suggests that on the facts of this case the turning off of the car lights, the speeding up and the steering into collision with the pedestrians were all solely the responsibility of the driver, acting pursuant to what she submits was very clearly a separate plan of his own. What was missing from the judge's directions, she argues, was any explanation to the jury that if they found the defence of overwhelming supervening act to apply, or if they felt that it reasonably may apply, the appellants were entitled to be acquitted of all the charges which they faced.

41. These submissions are resisted by Mr Sandhu KC on behalf of the respondent. He defends the manner in which the case was presented at trial, which he says always involved an allegation of a developing or evolving plan. In any event, he submits, there was here a sequence of events taking place over a very short period of time. The events started with an explicit threat of violence uttered by Henneberry when brandishing his wooden pole. Within a very short time Donald had manoeuvred the car so that it was facing in the direction in which the other group had gone. Each of the other accused chose to get into that car and to travel with him on what was plainly a search for the other group. Mr Sandhu submits that the jury were plainly entitled to conclude that there was a shared intention by those in the car to use unlawful force against the Flamson group and a shared intention to encourage one another. He argues that the fact that in the end it was the car and not the wooden weapons which inflicted death and injury does not negate that intention.

42. As to the acquittal of Rollason, on which the appellants rely, Mr Sandhu submits that there was a factual basis which would enable the jury to distinguish his position from that of the other accused.

43. Mr Sandhu's overall submission is that the driving of the car into collision with the pedestrians was not an unexpected development and that the defence of OSA did not arise. It occurred as a result of the encouragement given by the others. Mr Sandhu emphasises that only about one and a half minutes passed between the accused entering the car – two of them armed with weapons, and all intent on unlawful force – and the collision with the victims.

44. We are grateful to all counsel for their very helpful submissions. Reflecting upon them, we have reached the following conclusions.

45. We emphasise two features of the passages which we have cited from *Jogee*. First, the important questions are whether the secondary offender intentionally assisted or encouraged the principal's crime, and whether he intended to assist or encourage the principal to act with the particular intent required by the crime. Secondly, it is not necessary to prove that the secondary party encouraged or assisted the principal to commit the crime in a particular way. Taking those two points together, we respectfully agree with the court in *Grant* that the Supreme Court in *Jogee* significantly limited the circumstances in which it will be appropriate for a jury to consider whether they have departed from an agreed plan. Cases in which there is sufficient evidence for the judge properly to leave such an issue to the jury will, we anticipate, therefore be rare.

46. In the present case, we have no doubt that the judge was correct to reject the submissions of no case to answer. In his commendably thorough analysis he directed himself correctly in law. For the reasons which he gave, the issue of OSA did not arise. On the evidence adduced by the prosecution, the jury would be entitled to find that the accused set off in the car with a shared plan to confront the other group. The threat "you are getting it", followed seconds later by the accused getting into the car, two of them carrying weapons, and pursuing the other group, plainly pointed to such a plan. The jury would obviously be entitled to reject the suggestion on behalf of the appellants that weapons were being carried purely for self-defence. If the jury were satisfied that such a plan existed, it would then be for the jury to decide whether the parties to that plan also shared an intention to attack the other group with intent to kill, or to attack the other group with intent to cause really serious injury, or at least with a shared intention to commit an assault which all sober and reasonable people would realise carried the risk of some harm.

47. It is, in our view, impossible to argue that no such findings were open to the jury if they were considering the position immediately before the car turned into Western Link Road.

Indeed, in the course of oral submissions it was realistically accepted by counsel that if those in the car had jumped out and attacked their victims using fists, feet and wooden weapons, and if death had resulted, the jury would have been in a position properly to return verdicts of murder or manslaughter.

48. Is it then possible to argue that in the seconds which elapsed between the car turning into Western Link Road and driving at the pedestrians, Donald – or (if the jury so found) Tomlinson – acted in a way which relegated to history the earlier actions of the others, and destroyed "all material connection" between the earlier planned violence and the running down of the victims? It is, in our view, clear that the answer to that question must be in the negative. The joint intention to use unlawful violence against the other group was still continuing, and it was put into effect by Donald acting in a way which resulted in death.

49. We would add that even if we had taken a different view of the application of the principles stated in *Jogee* to the evidence in this case, the judge would still have been correct to reject a submission of no case to answer. We find it difficult to think of any circumstances in which a judge could properly rule not only that the defence of OSA arose, but also that it was of such strength that no reasonable jury could properly reject it. We have no doubt that the judge could not have so ruled on the evidence in this case.

50. It follows that we also conclude that the judge was correct not to leave the defence of OSA to the jury. As is clear from *R v Tas* [2018] EWCA Crim 2603 at [41], it was for the judge to decide whether the evidence was sufficient for the issue to be left. In our judgment, he reached the correct decision. The submissions relying on a suggested change in the way the case was advanced by the prosecution do not assist the appellants. In this regard we respectfully agree with the observation of the single judge in his written reasons for refusing leave to appeal:

> "It further follows that the ingenious attempts in these proposed appeals to build on the Crown's (asserted) shift from advancing a case of a plan that 'developed', as opened, to a case of a plan that 'changed' – so as, as it is asserted, to amount to a 'new' plan – lead nowhere. These narrowly linguistic points do not meet the substance of the matter. Indeed, on analysis, they are in effect an attempt to reintroduce the now discredited notion of 'fundamental departure' by the back door when it cannot be done by the front door."

51. As to ground 4, it seems to us that the appellants' argument is misconceived. The jury had to decide whether the accused intended to encourage or assist Donald – or (if they so found) Tomlinson – to commit a crime, not whether there had been a specific plan to use the car as a weapon. The route to verdict, carefully crafted by the judge, correctly took the jury through the questions which they had to consider. In our view the sequence of questions provided appropriate protection to the appellants against being convicted in circumstances where the evidence did not support a conviction.

52. In the submissions to this court much emphasis was placed by the appellants on the verdicts returned by the jury overall, including those in relation to Donald and Rollason. We are not persuaded that they assist the appellants' argument that the judge directed the jury incorrectly. The jury had to apply the judge's directions of law to the facts as they found them to be, including the inferences which the jury felt it right to draw about the intentions of each of the appellants. In relation to each of the three appellants, the verdicts which were returned were properly open to the jury. It is not, in our view, possible to argue backwards from the verdicts in order to conclude, as Mr Bartfeld asks us to do, that if they had been permitted to consider OSA, the jury would have acquitted on all counts. Nor are the appellants assisted by seeking to rely on the jury's decision to acquit Rollason, who was the last to join the group in the Mondeo and was not armed.

53. Given that leave to appeal was granted to Ayre by the full court, and that the points argued

before us are common to all three, we think it right to grant Henneberry and Tomlinson leave to appeal. For the reasons we have given, however, we dismiss all three appeals.

(Mr Bartfeld invited the court to certify five questions
for consideration by the Supreme Court)

LORD JUSTICE HOLROYDE:

54. In his written submissions Mr Bartfeld KC very helpfully indicated that if the appeal were unsuccessful he would invite this court to certify questions for consideration by the Supreme Court. That application has now been made and developed orally. We are invited to certify and indeed to give leave to appeal on the following questions (or appropriate variations of them):

1. Can the decision of the Court of Appeal in *Grant* at [38] be reconciled with the principles established in *Jogee* at [97]?

2. If these decisions cannot be reconciled, why and to what extent did the Court of Appeal fall into error?

3. Given the different consequences of causation and remoteness as rationale for secondary liability, which is the proper basis for the OSA doctrine?

4. What is the proper test to be applied by a trial judge in deciding whether the issue of OSA should be left for the jury to consider?

5. What factors ought particularly to be drawn to the attention of the jury when considering OSA?

55. In inviting the court to certify those questions, Mr Bartfeld made clear that he would not oppose any amendment of them which this court might feel appropriate. His submissions were supported by Mr Bentley KC and Miss Davies KC, and opposed by Mr Sandhu KC.

56. We decline to certify the suggested, or any other, points. Our decision in this case, like the decisions of the trial judge, does not raise any new point of law. It applies the principles stated in *Jogee* to the facts of this case. We do not see any inconsistency between the decisions in *Jogee* and *Grant*. But even if we did, all that needs to be said is that the decision of the Supreme Court is binding on this court.

57. *Jogee* makes clear the approach to be adopted, and we see no basis for inviting further consideration of a debate about causation and remoteness.

58. Finally, the short answer to the last suggested question is that everything will depend on the evidence in a particular case.
