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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2021/00625/B4, 2021/00723/B4  
2021/01061/B4



[2023] EWCA Crim 1100

Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Monday 31<sup>st</sup> July 2023

**B e f o r e :**

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

**MRS JUSTICE FARBEY DBE**

**MR JUSTICE COTTER**

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**R E X**

**- v -**

**MOHAMMED SADDAM HUSSAIN**  
**FAISAL FIAZ**

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**Mr B Bhatia KC and Mr M McCarthy** appeared on behalf of the Applicant Mohammed Hussain  
**Dr F Gerry KC and Mr U Shahzad** appeared on behalf of the Applicant Faisal Fiaz

**Mr M Burrows KC** appeared on behalf of the Crown

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**J U D G M E N T**  
**(Approved)**

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Monday 31<sup>st</sup> July 2023

**LORD JUSTICE HOLROYDE:**

1. On 15<sup>th</sup> February 2021, the applicants were convicted of murder and sentenced to life imprisonment.
2. On 16<sup>th</sup> June 2023, this court handed down its judgment refusing an application by Hussain for leave to appeal against his conviction, and applications by Fiaz for leave to appeal against his conviction, leave to adduce fresh evidence, leave to vary his grounds of appeal to add a further ground, and leave to appeal against his sentence.
3. Both applicants now apply for this court to certify that our decisions involved 11 questions of law of general public importance and to grant leave to appeal to the Supreme Court.
4. We have directed written submissions in response by the respondent, and we have directed this oral hearing to ensure that all points which any party wished us to consider had been made.
5. The first of the suggested questions is as follows:

"Is the Criminal Appeal Act 1968 preventing appeal to the Supreme Court of the United Kingdom on points of law of general public importance (when leave to appeal has been refused by the Court of Appeal) incompatible with the Human Rights Act 1998 and the Bill of Rights Act 1689?"

The remaining ten questions, which overlap with one another in a number of respects, criticise the decisions refusing the applications for leave. The questions reflect the argument advanced in writing in the joint grounds for the present applications, to the effect that the law

was misinterpreted in those decisions, thereby “wrongly widening complicity liability to those who do not in fact assist or encourage and thus carry no culpability or responsibility for the crime”.

6. It is submitted that the effect of our decisions is to make submissions of no case to answer otiose, to offend against the principle of legality, to make it impossible for members of the public in group situations to understand where criminal liability begins and ends, and improperly to widen the ambit of joint criminal liability. It is submitted that Fiaz's sentence of life imprisonment with a long minimum term was grossly disproportionate to his alleged criminal conduct and constitutes cruel and unusual punishment.

7. We begin by considering the statutory provisions and case law relevant to the first proposed question. Each of the applications for leave to appeal was made to this court pursuant to Part I of the Criminal Appeal Act 1968. They were referred to the full court by the Registrar and were considered at a lengthy hearing at which all parties were represented. By section 33(1) of the 1986 Act, as amended, an appeal lies to the Supreme Court at the instance of a defendant "from any decision of the Court of Appeal on an appeal to that court under Part I of this Act". By section 33(2):

"The appeal lies only with the leave of the Court of Appeal or the Supreme Court; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court."

8. In *R v Garwood and Others* [2017] EWCA Crim 59, the effect of those statutory provisions was considered by a constitution of this court comprising the Lord Chief Justice, the President of the Queen's Bench Division and the Vice-President of the Court of Appeal,

Criminal Division. The court's decision at [7] could not be clearer in its terms:

"... The phrase 'decision of the Court of Appeal on an appeal' clearly refers to the determination of an appeal which has been pursued with leave (whether from the trial judge or the Court of Appeal) and determined on its merits."

9. In *R v Dunn* [2010] EWCA Crim 1823, [2010] 2 Cr App R 30, this court addressed the submission that section 33(2) was incompatible with rights under Articles 6 and 14 of the European Convention on Human Rights. It did so in the context of a refusal to certify a point of law of general public importance following its dismissal of an appeal against conviction. The appellant in that case accepted, having regard to *Delcourt v Belgium* (1979-80) 1 EHRR 355, that there would be compliance with Article 6 if there were no right of appeal to the Supreme Court at all; but he submitted that a right of appeal had been provided and that it must be compliant with Article 6. At [22] the court rejected the suggestion, implicit in the appellant's submissions, that in deciding whether to certify, this court may be influenced by an oblique motive, namely the wish to avoid the Supreme Court considering the case and possibly overruling the decision of the Court of Appeal. It held that:

"... in deciding whether or not to certify the court is not sitting on an appeal against its own decision. It is not determining any criminal charge. It is merely assessing whether its decision contains an important point of law. The well informed and rational observer would conclude that the court which reached the decision in the first place is in the best possible position to decide whether a point of law of general public importance was involved in it."

At [29] the court in that case accepted the submission of counsel for the respondent that the Strasbourg case law established the following five principles:

"(i) Article 6(1) does not itself guarantee a right of appeal.

(ii) Where there is a right of appeal, the application of Article 6 to the proceedings before the appeal courts depends on the special feature of the proceedings in the domestic legal order.

(iii) Any limitation on the right of appeal must pursue a legitimate legal aim and not infringe the very essence of the right of access to a court.

(iv) In this context, the fair administration of justice is a legitimate aim.

(v) Access to the final court of appeal may be more limited than is the case with a first tier court of appeal."

The court held that section 33(2) pursues a legitimate aim, a filtering mechanism being essential to avoid the Supreme Court becoming clogged with hopeless cases; reflects a coherent and proportionate approach to second appeals; and does not deny the essence of an applicant's access to the Supreme Court. The court also rejected the submissions based on Article 14, and so refused to certify any point of law of general public importance.

10. We find it surprising that counsel for the applicants did not mention either the case of *Garwood* or the case of *Dunn* in their joint written grounds. Nor were they mentioned in a later written response on behalf of Fiaz to the submissions on behalf of the respondent, which did refer to those cases. Dr Gerry KC, on behalf of Fiaz, suggested to us that the only omission from the joint grounds was the failure to cite the two cases in a footnote.

11. We disagree. The decisions in those two cases, in our view, present insuperable obstacles to the present applications. As *Garwood* makes clear, the plain words of the 1968 Act have the effect that this court may only certify a point of law of general importance if that point was involved in a decision on an appeal for which leave had been given. As a matter of statutory interpretation, this court has no power to certify a point of law which was involved in a decision refusing leave to appeal. In the present case, accordingly, we have no power to

do what the applicants ask us to do.

12. One of the arguments advanced on behalf of the applicants, in an endeavour to escape the consequences of that decision, is the contention that the relevant provisions of the Criminal Appeal Act 1968 are incompatible with their human rights, in particular under Article 6. That argument failed in *R v Dunn*, and must for the same reasons fail here. As we have said, the applicants' submissions were heard and considered at a lengthy oral hearing of their applications for leave to appeal. They were rejected for reasons explained in a written judgment. There was no breach of any of the applicants' Convention rights. The applicants are dissatisfied with our decisions, but that does not entitle them to a further right of appeal.

13. The applicants advanced two further arguments to the effect that the court is not bound by statute and authority to conclude that it has no power to certify points of law. The arguments were based upon references to the Bill of Rights Act 1689 and to the Accessories and Abettors Act 1861. We are not persuaded that it is possible to argue that either of those provisions permits the court to depart from the law clearly laid down by Parliament in the Criminal Appeal Act 1968.

14. For those reasons this court cannot answer the first proposed question in the affirmative. This court has no power to certify points of law of general public importance involved in a decision refusing leave to appeal, and in particular these decisions refusing leave to appeal. That is dispositive of the present applications.

15. In any event, even if this court had power to certify all or any of the remaining ten proposed questions, the applicants' submissions would fail on their merits. In reaching the decisions refusing leave, the court applied established principles, including in particular those stated by the Supreme Court in *R v Jogee* [2016] UKSC 8 to the facts and circumstances of

the case. It did not, as is now suggested, widen secondary criminal liability, thereby wrongly bringing the applicants within its ambit. Rather, it rejected submissions on behalf of the applicants which were aimed at narrowing secondary criminal liability. The fact-specific application of established principles did not involve any of the suggested points of law of general public importance.

16. We do not think it necessary to address each of the ten proposed questions in detail. Questions 2, 3 and 4 are all based on the premise that our decisions departed from and were inconsistent with the principles stated in *Jogee*. We do not accept that premise.

17. Questions 5 to 10 are all based on the premise that our decisions altered the boundaries of joint criminal responsibility by "removing any significant or even measurable contribution". Again, we do not accept the premise. As [84] of our judgment made clear, and consistently with *Jogee*, a secondary party must be proved to have assisted or encouraged the principal to commit the crime or type of crime which the principal in fact committed. The suggested need for a measurable contribution is no more than a restatement of that requirement.

18. Question 11 appears to overlook section 322(4) of the Sentencing Act 2020, which requires the court to have regard to the general principles set out in Schedule 21 to that Act, and paragraph 8 of that Schedule, which permits the court to specify a minimum term of any length "whatever the starting point".

19. These applications therefore fail and are refused.



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