APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 44
HCA/2024/104/XC
HCA/2024/300/XC

Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Malcolm
Lord Pentland
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTES OF APPEAL AGAINST CONVICTION

by

(1) MARIA ELENA GARDINER and (2) MICHAEL ANDERSON

Appellants

against

HIS MAJESTY'S ADVOCATE

Respondent

First Appellant: Jackson KC, Deans, Reid; John Pryde & Co (for MSM Solicitors, Glasgow)
Second Appellant: Graham KC, Culross; Collins and Co (for Virgil Crawford Solicitors, Stirling)
Respondent: The Lord Advocate (Bain KC), MacIntosh AD, Blair AD; the Crown Agent

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29 October 2024

Introduction

[1] On 24 January 2024, in the High Court at Glasgow, Maria Gardiner, Michael Anderson and James Houston were found guilty of the murder of Brian Maley and of assaulting the deceased's partner, Lynsey Patterson. Each was sentenced to imprisonment for life with a punishment part of 18 years.

[2] The appeal concerns the law of concert in homicide cases; specifically whether a jury can return a verdict of murder against one accused and, in respect of the same act, a verdict of culpable homicide against another. The appellants maintain that the judge misdirected the jury by telling them that they could not convict one accused of murder and the others of culpable homicide.

[3] Ms Gardiner has an appeal against sentence.

The crimes

[4] Mr Anderson suspected that the deceased had stolen drugs and/or money from him. He enlisted Mr Houston to assist him in recovering those items. Text messages between Mr Anderson and Mr Houston on 6 February 2022 showed that their joint intention was to "sort out" the deceased.

[5] Ms Gardiner was Mr Houston's partner. Late on 7 February 2022, they both went to Mr Anderson's flat in Govan. They discovered from the internet that the deceased's flat was in Springburn. They devised a plan to go there, "sort out" the deceased and "give him a doing" or "a beating". It was anticipated that Ms Patterson would be at the deceased's address.

[6] Early on the morning of 8 February 2022, the appellants and Mr Houston set off for Springburn. Ms Gardiner and Mr Houston left their phones at home. They took

Mr Anderson's toolbox, which contained at least a hammer, a file, a blowtorch and other tools, including a chisel. The toolbox was mostly carried by Mr Houston, but on one occasion by Ms Gardiner. There was conflicting evidence about what happened when they arrived at the flat. Ms Patterson, who had died prior to the trial diet and whose evidence was taken under section 259 of the Criminal Procedure (Scotland) Act 1995, said that the deceased was attacked by Mr Houston. Mr Anderson straddled her and hit her over the head with a gin bottle. She was not aware of the presence of Ms Gardiner until she saw her leaving. That was inconsistent with her initial 999 call in which she was recorded as saying that "three people ran in and stabbed him". Mr Houston testified that the deceased was attacked by Mr Anderson and Ms Patterson was attacked by Ms Gardiner.

[7] At all events, the deceased was assaulted by no less than five different weapons, including a hammer, a knife and a blowtorch. It was not clear where the knife had come from. The deceased suffered 86 different sites of injury, 36 of which were inflicted by a sharp implement. The attack lasted about 17 minutes. The fatal injury was a penetrating stab wound to the right arm. The deceased suffered such severe and rapid blood loss that he died at the scene.

[8] The assailants returned to Govan. *En route*, Ms Gardiner threw away her jacket, which contained latex gloves in a pocket, and a Stanley knife. The murder weapon was not found. Mr Anderson had left his mobile at the deceased's address. It was recovered with small spots of the deceased's blood adhering to it; suggesting close proximity to the attack. In both conversations with a witness and texts sent from another phone, Mr Anderson appeared to accept responsibility for the death. He did not testify.

The issue

[9] The issue was whether all three co-accused were responsible for the death on the basis of concert. The trial judge provided the jury with the standard definitions of murder and culpable homicide; explaining that either verdict was open to them in relation to the principal actor, depending upon the quality of the stabbing. On concert, he said:

> "If you were to be satisfied that, first, the accused were acting together with a common purpose; secondly that their common purpose either involved killing [the deceased], or was liable to involve the use of a type and level of violence on him as to create an obvious or foreseeable risk that [the deceased] would be killed; and, thirdly, that in carrying out that common purpose, one of the accused actually killed [the deceased], wickedly intending to kill him or acting with the wicked recklessness needed for murder, then each of the accused who by their words or actions actively associated themselves with that common purpose would be guilty of murder by virtue of the principle of concert.
>
> … [A] few moments ago you heard me talk about culpable homicide. How could that arise on the evidence in this trial? … [T]he issue of culpable homicide could arise … only if you were to conclude that the person who stabbed [the deceased] in the arm did so deliberately, but without either the wicked intention to kill him or wicked recklessness as to whether he lived or died. That is an issue of fact for you.
>
> If you were to come to the conclusion that the person who stabbed [the deceased] in the arm did so deliberately but without either wicked intention to kill him or wicked recklessness as to whether he lived or died, then each accused who by their words or actions actively associated themselves with a common purpose in which such an injury was intended or was objectively foreseeable would be guilty, applying the principle of concert, only of the less serious crime of culpable homicide.
>
> […]
>
> If you consider that the Crown has proved that an identifiable accused stabbed [the deceased], what then is the position of the two co-accused?
>
> If you also found … that there was a common plan with which either or both of the other two accused actively associated, and in which the use of a weapon to inflict such an injury on [the deceased] was included or was foreseeable as being liable to happen, then each accused who by their words or actions actively associated themselves with such a plan or common purpose could also be guilty by application of the principle of concert of the same crime as the accused who actually inflicted the fatal stab wound that killed [the deceased].

> If, however, you were not satisfied that a particular accused actively associated themselves with such a common purpose - and by that I mean a common purpose that included the use of a weapon to inflict such an injury on [the deceased], or in which the infliction of such an injury was objectively likely - then you could not find that accused guilty of either murder or of culpable homicide. If they're not party to such a common purpose, you could not find them guilty of either murder or culpable homicide. In that situation, you could find that accused person guilty only of what they themselves are proved to have done, together with any non-fatal elements of the pre-planned assault on [the deceased] with which they actively associated themselves by their words or actions…
>
> […]
>
> "You will need, therefore, to look at the evidence in stages. First decide what is the evidence against each accused separately. Secondly, if there's sufficient to implicate the accused, decide if there was a common criminal purpose among them and, if there was, what that common purpose was; and thirdly, with each accused, decide if that accused was party to that common criminal purpose and, if so, to what extent."

Submissions

Second Appellant

[10] The second appellant addressed the court first. Founding upon *McKinnon* v *HM Advocate* 2003 JC 29, the second appellant submitted that the law of concert permitted different verdicts, of murder and culpable homicide, to be competently delivered in respect of separate co-accused. The trial judge erred in removing the discretion, which was vested in the jury, to convict the principal actor of murder and the ancillary actors of culpable homicide.

[11] In the second appellant's written Case and Argument, it was accepted that, although the principal actor's guilt was to be established by examining his own criminal intent (*McKinnon* v *HM Advocate* at para [28]), that of the ancillary actors was to be established by reference to the common plan and whether homicide was within the scope or purpose of that plan (*ibid*). This was an objective rather than subjective test. It was open to the jury to conclude that certain risks were not foreseeable by the ancillary actors, who should therefore

have either been acquitted or convicted of culpable homicide (*ibid* para [30]). This could arise if the jury concluded that it was not obvious to the ancillary actors that weapons were being carried or that they might be used.

[12] The ancillary actors were guilty of murder if they associated themselves with a common purpose, which either included the taking of a human life or carried such an obvious risk. If this were not established, the ancillary actors could be convicted of culpable homicide, notwithstanding that another person was guilty of murder. There was no rule that the jury must convict the co-accused of the same crime as the principal actor. That was a matter for the discretion of the jury (*ibid* para [31]). A single stab wound could still result in different verdicts against different accused (*Hopkinson* v *HM Advocate* 2009 SCCR 225 at paras [20] to [25]). Care should be taken before removing a possible alternative verdict from the jury (*Brown* v *HM Advocate* 1993 SCCR 382 at 391).

[13] In oral submissions, a different approach appeared to be advanced. The starting point ought to be to look at the definitions of murder and culpable homicide and then determine the *mens rea* of each accused at the time of the attack in order to assess their individual levels of culpability. This would eliminate the illogicality described in *Carey* v *HM Advocate* 2016 SCCR 148 (at para [29]). Murder required wicked intent to kill or wicked recklessness (*Drury* v *HM Advocate* 2001 SLT 1013). An accused may be found guilty of murder on an art and part basis where a reasonable person would have foreseen "an obvious risk of life being taken" (*McKinnon* v *HM Advocate* at para [31]; *Poole* v *HM Advocate* 2009 SCCR 577; *Black* v *HM Advocate* 2006 SCCR 103 at para [33]). The directions to the jury were erroneous because they provided an "all or nothing" approach to the ancillary actors. The court in *McKinnon* had made considerable efforts to analyse the law on concert from the time

of Hume through to *Docherty* v *HM Advocate* 1945 JC 89. There was no illogicality in its reasoning.

[14] In this case there was a common criminal purpose involving three people going from one area of Glasgow to another and carrying a toolbox containing items which could be used as weapons. Injury was in contemplation, but not necessarily serious injury. Culpable homicide should have remained an option.

First appellant

[15] In the first appellant's Case and Argument, it was accepted that, in line with *McKinnon* v *HM Advocate*, if the relevant concert were established, there was no separate question of *mens rea* on the part of the ancillary actors. The principal actor's guilt was to be established according to his or her *mens rea*, but that of the ancillary actors was to be ascertained by reference to the common criminal purpose and whether homicide was within its scope. That scope was determined objectively according to what was foreseeable as likely to happen. If it was not foreseeable that the deceased might suffer serious injury, an ancillary actor should either be acquitted or convicted of culpable homicide, even if the principal actor was guilty of murder. It had, according to counsel, for many years been a practice for guilty pleas to both murder and culpable homicide to be negotiated in concerted attack cases.

[16] The idea that there was no requirement for the ancillary actor to appreciate the risk of serious injury did not sit well with the definition of murder (*Drury* v *HM Advocate* (at para [11]) and *HM Advocate* v *Purcell* 2008 JC 131 (at para [16]); cf *Poole* v *HM Advocate* 2009 SCCR 577 at para [11])). The court should take the opportunity to affirm that the *mens rea* of each accused at the time of the attack required to be assessed. They could only be found guilty of murder if they had the requisite intention for murder at that time (see *Brown* v *HM*

Advocate 1993 SCCR 382 at 391). It was unfair and unjust to ignore the *mens rea* of the ancillary actors.

[16] The trial judge had misunderstood *McKinnon* and therefore misdirected the jury in so far as he said that culpable homicide only arose in determining the guilt of the principal actor. In relation to Ms Gardiner, culpable homicide could arise if the jury were not satisfied that she knew that the principal actor was carrying a weapon to be used to kill the deceased. This was open to the jury, since there was no evidence that she had assaulted the deceased. The Crown's position had been that it had been either Mr Anderson or Mr Houston who had delivered the fatal blow. There was no evidence that Ms Gardiner knew that potentially lethal weapons were in the toolbox. "Great caution" was required before the alternative verdict was withdrawn (*Brown* v *HM Advocate* at 391; *Hopkinson* v *HM Advocate* at paras [20] to [23]).

Crown

[17] The Lord Advocate provided a detailed written Case and Argument. Chronologically this first set out the views of the Institutional Writers. These were summarised as being that art and part guilt extended to all participants in a common purpose for objectively foreseeable acts within the scope of that purpose. As a generality, there was no basis for different homicide verdicts (MacKenzie: *Matters Criminal* 246 and 252; Hume: *Commentaries* (4th ed) I. 264 *et seq*; Burnett: *Criminal Law* (5th ed) 2, 7; Alison: *Principles* 60-67 and 523).

[18] In the pre *McKinnon* cases, the directions in *HM Advocate* v *McGuiness* 1937 JC 37 (transcript of charge at 372) were that, if a number of men were acting with a common criminal purpose to inflict "serious injury", it did not matter that one used a knife and the others only fists. *Docherty* v *HM Advocate* 1945 JC 89 (at 95-96) was to a similar effect, where

the persons acting in concert had reason to believe that a lethal weapon would be used. All would be guilty of murder. If they only anticipated minor violence, they would not be guilty. An objective test was to be applied (see also *Crosbie* v *HM Advocate*, unreported, 21 January 1946 (reported on another point 1946 JC 79); *Harris* v *HM Advocate*, unreported, 9 September 1950; *HM Advocate* v *Miller and Denovan*, reported in a note to *Parr* v *HM Advocate* 1991 JC 39 at 48; *Boyne* v *HM Advocate* 1980 SLT 56 at 59). In short, culpable homicide was not generally open to a jury where the ancillary actors were found to have acted in concert with a murderous actor.

[19] The situation altered with *Melvin* v *HM Advocate* 1984 SCCR 113 in which the jury, unbidden, convicted one accused of murder and another of culpable homicide. The person who was convicted of murder appealed on the basis that the two contrasting verdicts involved a "logical inconsistency". The appeal was refused. There was no reference to authority and the case was said to be unusual. *Melvin* was followed in *Malone* v *HM Advocate* 1988 SCCR 498 before the high watermark of differentiated verdicts was reached in *Brown* v *HM Advocate* 1993 SCCR 382. In *Brown*, the trial judge had withdrawn culpable homicide where two accused had attacked the deceased with a knife and a metal bar; the death being caused with murderous intent by stabbing. The court posed a question of what evidence there had been that the accused with the bar was acting with the same degree of recklessness. This wrongly introduced subjective *mens rea* rather than focusing on the objective test of foreseeability within the scope of the common purpose. No authority was cited for this departure from well-established principles. A different opinion was delivered in *Codona* v *HM Advocate* 1996 SCCR 300 (at 317) which saw a return to foreseeability within the scope of the common criminal plan.

[20] In *Mathieson* v *HM Advocate* 1996 SCCR 388, the trial judge followed *Brown* in directing the jury (at 393) that, in a concerted attack, they should look to see whether the ancillary actors had the requisite state of mind to constitute murder. He directed the jury that they could convict the principal actor of murder but the ancillary actors of culpable homicide (cf *Kabalu* v *HM Advocate* 1999 SCCR 348; ccf *Coleman* v *HM Advocate* 1999 SCCR 87).

[21] *McKinnon* v *HM Advocate* had involved a more comprehensive analysis of the law than the earlier authorities. The court held (at para [22]) that guilt in concert cases was determined in an objective manner. It corrected *Brown* by stating that it was not necessary to look at what each accused contemplated at the time of the attack, but it erred in holding (at para [23]) that different verdicts were possible in concert situations. The court restricted that possibility to cases in which what was in contemplation by the accessory was only "relatively minor" injury; the risk of death being obvious when serious injury was within the plan. Where *McKinnon* diverged from the established law was in the statement (at para [30]) that, when a person is in concert with others but serious injury was not foreseeable, he or she might be acquitted or convicted of a "lesser crime than murder" "according to the part played by him or her". The part played in the ultimate killing was irrelevant. *McKinnon* went on to state correctly (at para [31]) that, where a person knows that weapons are to be used, he may be convicted of murder, but earlier it had said (para [31]) that much will depend on whether he or she had been reckless "as to the consequences of proceeding". That conflicts with the court's earlier statement (at para [27]) that no separate question of criminal intent arose, once concert were established. The court was correct (at para [32]) in outlining how art and part guilt operated, but immediately erred in saying that a verdict of culpable homicide was available if the ancillary actors participated in "some less serious common

criminal purpose". That was the illogicality identified in *Carey* v *HM Advocate* (at para [29]). The appeal in *McKinnon* failed because, in the circumstances, where the accused participated in an attack knowing that knives were liable to be used, an inference of guilt was "virtually inevitable" (para [41]).

[22] Several, but not all, subsequent cases followed *McKinnon* to one degree or another (eg *Peden* v *HM Advocate* 2003 SCCR 605; *Docherty* v *HM Advocate* 2003 SCCR 772; *Dempsey* v *HM Advocate* 2005 1 JC 252; cf *Black* v *HM Advocate* 2006 SCCR 103; *Cameron* v *HM Advocate* 2008 SCCR 669; ccf *Touati* v *HM Advocate* 2008 JC 215 at para [28]; *Hopkinson* v *HM Advocate* 2009 SCCR 225 at para [22]; *Poole* v *HM Advocate* 2009 SCCR 577; *Scott* v *HM Advocate* [2011] HCJAC 27; *Stewart* v *HM Advocate* 2012 SCCR 728; and *Paterson* v *HM Advocate* 2014 SCCR 217.

[23] In *Parfinowski* v *HM Advocate* 2014 SCCR 30, it was said (at para [22]), in accordance with *Melvin, Malone* and *Brown*, that the jury were entitled to assess the relative degree of recklessness in a concert case and that there was no logical inconsistency in different verdicts. It was said that the *mens rea* of the participants could differ. In *Carey* v *HM Advocate*, the court reverted to *Docherty* and correctly said (at para [26]) that a verdict of culpable homicide in concert with a murderous actor was "inconsistent with the principle of art and part guilt" because "if the co-accused did not associate himself, judged objectively, with the use of lethal force, he could not be convicted of any form of homicide (see "illogicality" at para [29]; see also *Green* v *HM Advocate* 2020 JC 90 at para [65]).

[24] In summary, an accused will be art and part in murder where: (a) he was a participant in a common criminal purpose; (b) the infliction of a fatal injury was objectively foreseeable as part of that purpose, and (c) the act is committed in pursuance of that purpose by another participant. The application of concert does not involve any assessment of the

intention of the individual participants in a common purpose. There is no room for one participant in a joint attack to be convicted of culpable homicide while the actor in the fatal blow is convicted of murder. Exceptions may arise in relation to the operation of diminished responsibility or provocation. The trial judge was correct to direct the jury that any accused found to be art and part in the attack which had led to the fatal blow was guilty of the same crime as the actor.

[25] The Crown drew attention to the law in other jurisdictions. No purpose would be served by examining the position in England and Wales because of the different definition of murder (but see *R* v *Jogee* [2017] AC 387 disapproving, at para 94, *Chan Wing Siu* v *R* [1985] AC 168). Differentiated homicide verdicts were competent (*ibid* at para 95). Canada had a requirement that accessories had to be a "significant contributing cause" to the homicide (*R* v *Strathdee* 2021 SCC 40 at para 4; *R* v *Pickton* 2010 SCC 32 at para 65). Subjective *mens rea* was needed for murder (*Hunt* v *R* 2019 QCCA 1431 at para 24). In Australia, *Jogee* has not been followed. If a party to a joint criminal enterprise foresaw, but did not agree to, a crime in the course of that enterprise, he was liable for it if he continued to participate (*Miller* v *The Queen* [2016] HCA 30 at para 4). Manslaughter was an option which should be left open to the jury even if one accused is guilty of murder (*Gilbert* v *R* [2000] HCA 15; *Nguyen* v *The Queen* [2013] HCA 32). Ireland had focused on the intention of the individual, rather than foreseeability (*DPP* v *Kelly* [2016] IECA 404 at para 46; *DPP* v *MB* [2024] IECA 33 at para 45). Differentiated verdicts were therefore permissible (*DPP* v *Gibney* [2016] IESC 107).

[26] Applying the correct principles to these appellants, this was a case of antecedent concert. The situations in which the court had considered differentiated verdicts to be competent involved, with the exception of *Hopkinson*, spontaneous concert (see *Parfinowski* at para [22]). The deceased having been found to have been murdered, if either appellant

associated themselves with a plan in which the use of lethal weapons was foreseeable, the inference relative to murder in concert was "virtually inevitable" (*McKinnon* at para [41]) and the jury would be bound to convict (*Green* at para [65]). There was no evidential basis for concluding that the appellants, whilst in concert, had reason to anticipate only a minor injury.

Decision

[27] *McKinnon* v *HM Advocate* 2003 JC 29 is a Full Bench (5 judge) decision, much of which is flawless. Thus, in determining the guilt of the principal actor (whether identified or not) what must be determined is his criminal intent. That is normally inferred from all the relevant circumstances; the question being whether he (wickedly) intended to kill the deceased or acted in such a wickedly reckless manner that he cared not whether the deceased lived or died.

[28] In relation to concert, the Lord Justice General (Cullen), delivering the opinion of the court, said:

> "[27] It is, of course, well established that, where a number of persons act together in pursuance of a common criminal purpose, each of them is criminally responsible for a crime which is committed in pursuance of that purpose, regardless of the part which he or she played, provided that the crime is within the scope of that common criminal purpose. This holds good whether the concert is antecedent or spontaneous. The submissions in the present appeal have raised the question of the relationship between concert and *mens rea* [criminal intent]. …[I]f the relevant concert is established, there is no separate question as to whether the individual accused had the necessary criminal intent which is required for the finding of guilt of that crime. In short, he or she is responsible for that crime in the same way as if he or she had personally committed it."

That is entirely correct. The principal actor's guilt depends upon his intent. That of any ancillary actor depends, not upon his or her intent at the time of the act, but:

> "on whether he or she acted in pursuance of a common criminal purpose along with the actor and, if so, whether it was within the scope of that purpose, as inferred from all the relevant circumstances" (*ibid* at para [28]).

[29] The guilt of the ancillary actors does not then depend on his or her individual criminal intent (*ibid*). The scope of the common criminal purpose is to be discerned on an objective basis; that is to say by determining what was foreseeable as liable to happen (*ibid* para [29]). *McKinnon* became derailed when, despite those clear statements, it went on to say that, even although a murder was committed in pursuance of a common criminal purpose to which an ancillary accused was a party, he or she would not be guilty of murder but acquitted or convicted of a lesser crime (presumably assault or culpable homicide) if "it was not foreseeable that the victim might sustain serious injury" (*ibid* para [30]). If serious injury was not foreseeable as part of the common plan, then the ancillary actors cannot be convicted of any form of homicide because they would not be engaged in a common criminal purpose which had, as a foreseeable consequence, serious injury. The principal actor would be guilty of murder but the accessories would, at most, be guilty of assault (cf para [32]). Where, as here, there is only one cause of death, and that is (as it was) deemed murderous, the ancillary actors could not be convicted of culpable homicide. Once it is recognised that they were not engaged in a common criminal purpose, in which serious injury was foreseeable, they drop out of the homicide equation entirely.

[30] A sound starting point for an examination of art and part guilt in homicide cases is the *locus classicus*: *Docherty* v *HM Advocate* 1945 JC 89. Lord Moncrieff said this (at 95-96):

> "It is true that if people acting in concert have reason to expect that a lethal weapon will be used – and their expectation may be demonstrated by various circumstances, as, for example, if they themselves are carrying arms or if they know that arms and lethal weapons are being carried by their associates – they may then under the law with regard to concert each one of them become guilty of murder if the weapon is used with fatal results by one of them. In view of their assumed expectation that it might be used, and of their having joined together in an act of violence apt to be

> completed by its use, they will be assumed in law to have authorised the use of the fatal weapon, and so to have incurred personal responsibility for using it. If, on the other hand, they had no reason so to expect that any one among them would resort to any such act of violence, the mere fact that they were associated in minor violence will not be conclusive against them; and the lethal act, as being unexpected, will not be ascribed to a joint purpose so as to make others than the principal actor responsible for the act."

There is no requirement to search for the intentions of the ancillary actors at the time of the killing. The task is an objective analysis of what they ought to have anticipated would be likely to happen in the course of an attack in which they participated. Thus, if they had no reason to expect the use of serious violence, they would not be art and part in the homicide.

[31] The trial judge in *Melvin* v *HM Advocate* 1984 SCCR 113 (Lord Wylie) was correct, if unsuccessful, to direct the jury that, if they were not satisfied that the co-accused was acting in concert in a homicidal attack, they could only convict him of assault and robbery. He did not suggest that the lesser verdict of culpable homicide was available where the death was deemed murderous. On appeal, Lord Cameron prefaced his conclusions (at 117) by stating that it was "not necessarily to be assumed that the [culpable homicide] verdict … is sound", although since it had not been appealed, it was so assumed. This is an indicator that he considered that the verdict against the co-accused was illogical, but that was not to say that the verdict of murder against the appellant was similarly flawed. Lord Cameron's subsequent reasoning is phrased in guarded terms. He does not treat the case as one of antecedent (or perhaps any) concert, albeit that the accused were charged on that basis. Lord Avonside was even more cautious in referring (at 118) to the facts being "very special" and in which there were striking differences in the conduct of the accused.

[32] Lord Stott does suggest (at 118) that the actings of one accused may be murderous

> "without it being a necessary corollary that the acting of another who is acting art and part in the homicide must be taken to infer the same degree of recklessness".

This is illogical. If, as the Crown in this appeal submitted, *Melvin* is where the direction of the law altered, it did so upon a very flimsy foundation and without reference to any authority. It may be that court was influenced by a submission by the Advocate depute that it was open to the jury to consider the precise degree of participation by each accused in determining whether their conduct was murderous. That would be correct only if, as may have been the case, concert at the time of the murderous blows, was not proved.

[33] Concern about the correctness of *Melvin* was expressed with some force in *Malone* v *HM Advocate* 1988 SCCR 498. This was another case in which, on one view, the jury had done precisely what they had been directed not to do; convict one person of murder and the other of culpable homicide in respect of what was a concerted attack by punching and kicking in a car park. In recording that the court had "found it a little difficult" to understand the verdict, the Lord Justice General (Emslie) said (at 508):

> "Where two are charged with murder in concert there is no doubt no logical inconsistency between a verdict of guilty of murder against one and a verdict of guilty of culpable homicide against the other where there is no evidence of a deliberate and concerted intention to kill and the case does not involve any antecedent intention to carry out the crime of assault and robbery. If the evidence permits it a jury are entitled to assess the relative degree of recklessness attributable to each accused (see *Melvin* v *HM Advocate*). But if a distinction is to be made in a case involving a joint assault causing death it could normally reasonably be justified only if, on the evidence, as Lord Avonside pointed out in *Melvin*, there were striking differences in the relevant conduct of each of the assailants."

[34] If the seeds of misunderstanding were sown by this (and it is far from clear that they were), their crop was well and truly ready for harvest with the advent of *Brown* v *HM Advocate* 1993 SCCR 382. This involved a concerted attack on the deceased; death being caused by a stab wound to the heart. The trial judge (Lord Marnoch) withdrew culpable homicide from the jury upon the entirely understandable basis that the stab wound, which had divided the deceased' fourth rib on the left side and tracked upwards into the heart, a

distance of 11.6cms (about 4½"), could only be regarded as murderous. The jury were directed that whether they should convict of murder depended on whether they were satisfied that death or serious injury was foreseeably within the scope of the common criminal purpose. That was correct.

[35] Nevertheless, the court determined on appeal that the trial judge had been in error. In stating (at 391) that the alternative verdict should only be withdrawn "with great caution", the Lord Justice General (Hope) said that the correct approach was normally to leave it to the jury to decide whether the necessary degree of wicked recklessness had been established. Although whoever had carried out the stabbing was guilty of murder, the question remained: "what about the other party to the attack?" The jury had to decide whether he or she also had "the same degree of wicked recklessness". The Lord Justice General then said that the jury would have to be satisfied that the other person knew or anticipated that a knife would be used. He continued (at 392):

> "On the other hand, if all that was in contemplation was to use weapons to inflict serious injury, there was room for the view that this was a case of culpable homicide, since the murderous act went beyond the joint purpose and there was no evidence to show which of the two assailants used the knife. The evidence other than that relating to the force and depth of the stab wound was not such as to exclude the possibility that one of the accused had acted with a greater degree of wicked recklessness than was in the reasonable contemplation of the other at the time of the assault. It appears that this point was overlooked by the trial judge when he said that whoever did the stabbing was guilty of the crime of murder. In any event there was here a question of fact which should have been left to the jury to decide."

[36] This is both confusing and wrong. It is confusing because, if what was in contemplation in the common criminal plan was to use weapons to inflict serious injury, and the ultimate attack is deemed murderous, all those participating in that plan would be guilty of murder. It is wrong because once it is decided that the stab wound was murderous (as indeed it must have been) the state of the ancillary actor's intention at the time of the blow, in

terms of recklessness, is beside the point in a concerted attack. At the risk of repetition, once the principal actor (whether identified or not) is found to have murdered the deceased, the guilt of the accessories is determined in accordance with the principles of concert; whether they participated in a common criminal purpose which had, within its scope, the use of violence to cause serious injury. If it were otherwise, the well-established principles of concert would be irretrievably undermined.

[37] *Brown* foreshadowed *McKinnon* and the cases which followed. Many of these contain conflicting or irreconcilable statements which should now be resolved with a clear understanding of how concert operates in homicide cases. In short, where the principal actor, that is he or she whose blows killed the deceased, is guilty of murder, the ancillary actors are either guilty of murder art and part because of their participation in a plan which foresaw the use of serious violence, or they are guilty of assault or nothing at all. They cannot be guilty of culpable homicide if they were not part of the plan to cause serious injury.

[38] It follows that the *dicta* of Lord Stott in *Melvin*, the Lord Justice General (Hope) in *Brown* and the Lord Justice General (Cullen) in *McKinnon* are in error in so far as they postulate an assessment of the intention or recklessness of ancillary actors at the time of the fatal blow, where the attack has been deemed to be murderous. Lord Wylie's and Lord Marnoch's directions in *Melvin* and *Brown* were correct as were the trial judge's charge in this case. On that basis, the appeals against conviction are refused.

[39] The Crown have postulated the existence of exceptions where provocation or diminished responsibility are involved. These may require to be addressed in due course, should they arise in the future.

[40] This was a case of antecedent concert. It involved pre-planning in the form of deciding to seek out the deceased in his own home and to "give him a doing", involving the use of a variety of tools which could cause serious injury. In that state of the evidence, where the ultimate blow, seen in the context of 86 wounds in total, must be seen as murderous, the appellants were participating in a common criminal plan in which serious injury was objectively foreseeable. The consequence is that they too were inevitably guilty of murder. This is not because of what they may have intended at the time of the murderous blow, but by operation of the principles of concert.

Sentence

[41] In deciding that Ms Gardiner should be the subject of the same punishment part as her co-accused, the trial judge relied on *Andonov* v *HM Advocate* 2013 SCCR 245 (at para [15]) whereby, generally, those who take part in a contract killing by performing various roles will "normally fall to be regarded as equally responsible for the outcome." This was, according to the judge, equally applicable to all forms of antecedent concert in murder (*Rauf* v *HM Advocate* 2020 SCCR 47). The judge saw nothing in the individual circumstances of the three accused to justify any distinction in sentence. Ms Gardiner's record was more extensive than those of the co-accused. Her role, as described by her to a witness, was to "take care" of the deceased's partner. She had helped to carry the toolbox. After the event she had disposed of clothing, gloves and a knife.

[42] The first appellant submitted that the trial judge erred in sentencing her to the same punishment part as her co-accused. A materially subsidiary role played by one of several accused ought to be taken into account (*Cosgrove* v *HM Advocate* 2008 JC 102 at paras [9] to [13]; *Armstrong* v *HM Advocate* 2021 JC 227 at para [24]). The judge had misunderstood

Andonov v *HM Advocate* and *Rauf* v *HM Advocate*. In each case the respective roles of the co-accused were not relevant because these were cases of antecedent conduct. The first appellant had not assaulted the deceased. There was no evidence that she had a role in planning the attack.

[43] The question is whether there has been a miscarriage of justice because, upon the principle of comparative justice, Ms Gardiner's punishment part should be seen as excessive. That principle is that those who have been convicted of the same offence should normally receive the same sentence (*Armstrong* v *HM Advocate* 2021 JC 227, LJG (Carloway), delivering the opinion of the court, at para [24], citing *Thomas* v *HM Advocate* [2014] HCJAC 66 at para [14]; *Rauf* v *HM Advocate* 2020 SCCR 47, LJC (Lady Dorrian), delivering the opinion of the court, at para [19]). There can, of course, be differences as a result of personal circumstances, including previous convictions or, more pertinent in this case, the roles played by each accused in the attack (*Cosgrove* v *HM Advocate* 2008 JC 102, Lord Macfadyen, delivering the opinion of the court, at para [9]). It is correct to say that *Andonov* v *HM Advocate* 2013 SCCR 245 is readily distinguishable as it involved a contract killing.

[44] The main feature which is founded upon is a lack of evidence that Ms Gardiner attacked the deceased. In this case, that is a relatively weak submission given that her purpose, which she appears to have fulfilled, was to take the deceased's partner out of the picture, presumably so that she could not go to the deceased's assistance in his time of obvious need. It is equally weak in a situation in which Ms Gardiner was involved in the plotting, on the day before the attack, and her willing participation in the attack with objects from a toolbox which she had helped to carry. In these circumstances, the trial judge was entitled to take the view that no distinction should be made between the accused in this premeditated attack and brutal killing. The appeal against sentence is refused.