Neutral Citation Number: **[2018] EWCA Crim 2603**

Case No: 201704088 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
His Honour Judge Leonard QC
T20177036

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2018

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(SIR BRIAN LEVESON)
MR JUSTICE JEREMY BAKER
and
MR JUSTICE GOSS

- -

Between :

ALI TAS	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Michael Ivers QC and **Christopher Bertham** (instructed by the Registrar) for the Appellant
William Boyce QC and **Sarah Przybylska** (instructed by the CPS) for the Respondent

Hearing date : 23 October 2018

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Judgment Approved

Sir Brian Leveson P :

1. On 9th August 2017, in the Central Criminal Court before Judge Leonard QC and a jury, Ali Tas (now aged 22) was convicted of manslaughter, having been acquitted of murder. Co-defendants Mukeh Kawa and Donald Davies were both convicted of murder. On the following day, Tas was sentenced to a term of 90 months' detention in a young offender institution. He now appeals against conviction by leave of the full Court.

The Facts

2. In the early hours of 20 January 2017, Djojo Nsaka (who was just short of 20 years of age) was stabbed and thereafter died outside the Unite Hall of Residence at Middlesex University, Rutherford Way in Wembley where he was a student. His closest friends at university (living with him at the Unite Hall of Residence) were Daniel Tamfuri and Chris Bonda.

3. Death was caused as a result of a stab wound to the chest which punctured the pleural cavity, left lung and heart resulting in shock and haemorrhage. There were some cuts to the fingers (suggestive of defensive injuries) and a deep cut (of 6 cm) to the left bicep that may have been suggestive of the track the knife used to enter the Nsaka's chest. From the depth of incision injuries to the ribs, the pathologist concluded that 'severe force' was required to have caused the injury.

4. In short, the prosecution case was that the appellant had acted as part of a joint enterprise with his co-accused in which Nsaka had been stabbed: the accused had come armed with a knife or knives and had acted very aggressively in their pursuit of Nsaka. The defence case was that Tas neither had in his possession, nor knew of any knife at the scene of the incident: to such extent as he was involved in any violence, he was acting in self-defence.

5. Turning to the details of the incident, on 18 January 2017, Djojo Nsaka, Chris Bonda and Daniel Tamfuri were walking through the university building when a young man walked past, glaring at them angrily. Daniel Tamfuri describes his expression as a "screw-face". Chris Bonda later identified this man as Kawa.

6. Tamfuri was irritated by the facial expression Kawa was alleged to have pulled, causing him to tell one of Kawa's female friends that Kawa should 'humble himself'. This is said to have provoked a visit from Tas and his co-accused (arriving separately) to the Unite Hall on the evening of 19 January 2017. At that stage, Nsaka and his group were out and Tas asked other residents of the halls where Tamfuri was. Different evidence was given as to his demeanour. Some prosecution witnesses accused Tas of asking aggressively, and some asserted that he was quiet and did not get involved in any argument. In any event, an argument developed between Kawa, Davies and Tamfuri's girlfriend ('Demi'); ultimately Kawa, Davies and Tas were asked to leave the premises by security staff.

7. After they left the building, they saw Nsaka and his friends drive by; Tas and his co-accused got into the green Jaguar which Tas drove and went to look for them. They found them on foot not far away from the halls, left the car and approached Nsaka's group.

8. Tas, who Bonda alleged had a beer bottle in one hand, punched Bonda (not using the bottle); Tas denied having a bottle and CCTV supported Tas' account that, at least at some stage, Tamfuri was holding a bottle. In any event, Bonda ran off and was chased by the accused Davies. Bonda asserted that it may have been Davies who had a knife, but in cross-examination he accepted that he had not seen the knife and had only really heard about it from Tamfuri later. Davies then chased Tamfuri away.

9. The Crown alleged that Kawa produced a large knife and then chased and caught Nsaka and stabbed him once to the left side of his chest. Both Kawa and Davies were present during the fatal assault. Kawa's evidence was that Nsaka had produced the knife after he had stopped running and that he, Kawa, was attacked by Nsaka: he wrestled with Nsaka for the knife after it had been knocked to the ground. He managed to obtain a grip on the handle, and Nsaka had a grip on Kawa's hands. The end result was that Nsaka was fatally stabbed.

10. Kawa said he had pushed Nsaka away but did not realise that the knife had entered his body. Davies' evidence was that he saw a struggle, during which Nsaka fell to the ground and Kawa stabbed Nsaka before he got up again. Davies denied taking any part in the assault, however, it was asserted by the prosecution that he too may have had a knife with him on the basis of Bonda's evidence that it was Davies who stabbed at him before Bonda ran away.

11. CCTV covered the incident, but from a distance, and the image quality was poor. It was difficult to determine the order of events and precisely which person was responsible for which activity. However, closer study identified that the following interpretation was not disputed: first, Davies left the appellant's vehicle; Tas then emerged followed by Kawa. What occurred between the groups was indistinct on CCTV. Davies chased Bonda away. Davies returned to the group. All but Tas ran across the road to the left side of the picture. Meanwhile, Tas returned to his vehicle. Kawa chased Nsaka further along the road and back across the road to the right of the picture in the distance. Davies had chased Tamfuri away and had then followed Nsaka and Kawa back across the road, some distance away from Tas, who remained in his vehicle at this point but was following the action. Tas drove his car near to the others (travelling away from the camera), but then on to the left side of the road. The final assault was indistinct on the CCTV. Kawa and Davies then ran to Tas' car (which had effectively followed the chase) and got in. Nsaka stood and then finally collapsed as Tas drove away, with Nsaka on the pavement some distance behind and to the right of the appellant's vehicle.

12. Tas was arrested after he voluntarily surrendered to the police station on 22 January 2017. He replied, 'no comment' to questions during his interviews. He was later identified by Bonda as the person who punched him. He was similarly identified for that reason by Tamfuri and also as the driver of the green Jaguar.

13. As for the defence evidence, Tas gave evidence that he left the scuffle that continued without him and then led to the incident where the fatal injury was caused. He did not seek to use his car as a weapon, but drove a short distance along the road, before his co-accused entered the car and they drove away. He asserted that even if he had been part of an attacking group at first, he had effectively withdrawn from the fight before the fatal injury was caused: he was in his car whilst the fight continued and Nsaka fell to the ground. His co-accused had previously been arrested together with knives.

14. Tas accepted using force in the form of a single punch to Bonda contending that he was acting in self-defence. He denied using, or encouraging the use of, any force on Nsaka. Further, he did not possess a knife, or know that any knives had been brought by either of the other defendants; he did not know that any had been used in the scuffle. His case was that he returned to his vehicle soon after the incident started and before the fatal assault took place. A traffic cone had been thrown by the other group that knocked his hat off, he stooped to pick it up and then re-entered his vehicle. He drove a short distance along the road, and the other two defendants got back into the car and they drove away.

15. During the trial, each of the accused maintained that they had only wanted to talk to the members of the other group and they did not expect any violence, nor were they armed in anticipation of any violence. They each gave evidence that Bonda had started to rummage in his pocket, providing sufficient concern that a weapon may be produced to justify a pre-emptive strike from the appellant in self-defence.

16. The prosecution contended that the attack was pre-planned and carried out in a determined fashion using violence which escalated with Tas moving the car into position to take the three men away from the scene. The defence countered by arguing that, at worst, Tas only envisaged a fist fight and had withdrawn prior to stabbing which he did not foresee.

The Ruling

17. It was submitted on behalf of Tas that, in his case, the judge should direct the jury that if they were not satisfied that he knew that a knife was being carried by a co-defendant and used by him, then he could not be guilty of manslaughter even if he intended to cause Nsaka some harm falling short of really serious harm if the need arose. Michael Ivers QC for Tas argued that if a knife was being hidden and it was then used in what was to have been a fist fight (for example) that could constitute a supervening event (such as would entitle Tas to be acquitted). The prosecution submitted if a defendant takes part in a joint enterprise to do some harm to their victim and the victim dies as a result of the use of a weapon which he did not know was being carried or was to be used in the attack, he was nevertheless guilty of manslaughter

18. The judge agreed with the prosecution and declined to leave the possibility of overwhelming supervening event to the jury. He reviewed the decision of the Supreme Court in *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2017] AC 387, [2016] 1 Cr App R 31 ("*Jogee*") and concluded that the correct interpretation of [98] of that decision was that participation in a joint enterprise to do some harm to the victim who then died as a result of the use of a weapon would render the participant guilty of manslaughter even if death did result from the use of a weapon unknown to him. To decide otherwise, he observed, would result in a different and conflicting direction being given in respect of murder to that which would have to be given on the alternative of manslaughter.

19. In the circumstances, Judge Leonard provided a route to verdict (for each defendant, although we deal only with Tas). He said that the issues for the jury to the appropriate standard of proof were, first, whether Tas either stabbed Nsaka or participated in a joint enterprise in which Nsaka was stabbed; the concept of joint enterprise was fully

explained. If no, acquit; if yes, the second issue was whether Tas had not acted in lawful self-defence (which he also defined). If he was not acting in lawful self-defence, the third question posed was whether either as the stabber or as a participant in the joint enterprise during the course of which Nsaka was stabbed, Tas intended to kill Nsaka or at least cause him really serious bodily harm of the need arose. If the jury had reached this question and answered in the affirmative, Tas was guilty of murder. If the answer to the third question was in the negative, the final issue which fell for decision was whether they were sure that as part of a joint enterprise the accused under consideration intended Nsaka to be caused some harm falling short of really serious bodily harm. If so, the jury were instructed to acquit of murder but convict of manslaughter.

The Appeal

20. Mr Ivers submits that there was evidence before the jury that one or both of the co-defendants had, unknown to Tas, carried a weapon to the scene and then used it aggressively. This was capable of being of a wholly different order to what might have been an anticipated 'punch up' or argument, even if such was pre-planned, and in the circumstances Tas would not then be liable for the fatality which followed that wholly supervening event. He goes on to argue that the effect of the decision in *Jogee*, the ratio of which concerned intention replacing foresight, should not then be to broaden liability for manslaughter so far as to fix liability in the present circumstances. With the opening words of [98] the Supreme Court specifically excluded overwhelming supervening act (which is analysed at [97]) from the approach then adopted. Thus, it was only fair to Tas that the jury have the opportunity of concluding that the use of the knife took events beyond the scope of the joint venture with the result that he had no responsibility for the death.

21. He goes on that the effect of the ruling was that any individual who sets up a potentially violent incident unaware that others intended to use a weapon would always be guilty of manslaughter however far the primary party had departed from what was originally envisaged. This was to be contrasted with *Jogee* which specifically preserved the capacity for overwhelming supervening events to negate liability for an *actus* even if some harm had been intended.

22. Furthermore, Mr Ivers argues that the judge's approach to sentence ("the safest course to adopt is … on the basis that you did not know that one of your co-defendants was carrying a knife") underlines that this was an interpretation capable of applying on the facts and, thus, should have been left for the jury to consider as capable of being a supervening event. This submission, however, ignores the observations in *R v Johnson and other cases* [2016] EWCA Crim 1613, [2017] 1 Cr App R 12 (at [22]) that it is not appropriate for the court to take into account the observations of the judge when sentencing in order to determine the factual basis for the conviction. Rather, the duty of the court is to examine the matters before the jury and the jury's verdict (including the findings of fact that would have been essential to reach such a verdict).

23. For the Crown, referring to the decision in *Jogee* at [97]-[99], Mr Boyce argues that the case removes focus from the weapon used such that intentional assistance in relation to the infliction of grievous bodily harm at least will be answered by reference to whether the assister himself intended grievous bodily harm (at least). By

extension, if the crime is manslaughter then the question is whether the secondary party intended to assist in the intentional infliction of some harm (at least). On that basis, he submits that the instant case falls squarely within the general rule that a person who is party to a violent attack that escalates and results in death is guilty of manslaughter if he intends some harm.

24. Although [98] of *Jogee* does not remove the possibility of overwhelming supervening event, Mr Boyce refers back to the facts and contends that the judge was correct not to leave this possibility to the jury. Tas and his two co-defendants had gone to the accommodation of Tamfuri, whom they perceived to have disrespected Kawa. All three were involved in questioning those at the accommodation about Tamfuri's whereabouts. All three were insistent and aggressive. Davies was making threats of violence towards Tamfuri. Instead of leaving when it became apparent that Tamfuri was not at home, they waited. When they came upon Tamfuri, Nsaka and Bonda returning home, they pursued them by car, driving around the local area to find them. When they did find them, they leapt out of the car and mounted an attack.

25. Mr Boyce goes on to argue that Tas was at the forefront of the attack. According to Bonda he had armed himself with a bottle. He struck Bonda in the face. He was not directly involved in assaulting Nsaka but he positioned his car very close to the assault as it went on in order to provide an escape for Davies and Kawa. He was actively involved at all stages of a joint attack on Nsaka and his friends. He did not, as the grounds suggest "effectively withdraw" from the fight but he continued to act in his assigned role of driver. He repositioned the car for a swift getaway. Had he driven away the position might be different, but he did not.

26. Thus, the use of a knife by Kawa was not an overwhelming act "which nobody in the defendant's shoes could have contemplated might happen". It did not "relegate his acts to history". The appellant joined a group that hunted down the Nsaka's group with remorselessness and determination. There was a clear risk that the violence would escalate to a point at which serious harm may result, regardless of the use of weapons.

Analysis

27. Although it is tempting to start any discussion of the law from the decision in *Jogee*, to understand how this area of joint enterprise liability (as opposed to the move from foresight to intention) has been affected, it is necessary to go to some of the earlier cases and to understand the true extent of the impact of the foresight/intention debate on this area of the law along with the interplay between that decision. In *R v Smith (Wesley)* [1963] 1 WLR 1200, a conviction for manslaughter was challenged when the jury were directed (see page 1205-6):

> "Manslaughter is unlawful killing without an intent to kill or do grievous bodily harm. Anybody who is party to an attack which results in an unlawful killing which results in death is a party to the killing… a person who takes part in or intentionally encourages conduct which results in a criminal offence will not necessarily share the exact guilt of the one who actually strikes the blow. His foresight of the consequences will not necessarily be the same as that of the man who strikes the blow, the

> principal assailant, so that each may have a different form of guilty mind, and that may distinguish their respective criminal liability. Several persons, therefore, present at the death of a man may be guilty of different degrees of crime - one of murder, others of unlawful killing, which is manslaughter. *Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results*."

The emphasis was added in the speech of Lord Toulson and Lord Hughes in *Jogee* at [28].)

28. The direction was held to be "legally unassailable" (page 1207) although it was possible to hypothesise a case where what was done was wholly beyond the defendant's contemplation. That was followed in *R v Betty* 48 Cr App R 6 and restated in *R v Anderson; R v Morris* [1966] 2 QB 110 (which concerned a defence that Anderson was acting outside the common design and produced a knife of which Morris claimed to have had no knowledge). The formulation of Mr Geoffrey Lane QC (then leading counsel for Morris) was adopted (at page 120) to the effect that:

> "… where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act."

29. The court put the point slightly differently and did not adopt Mr Lane's formulation in its entirety. Lord Parker CJ required a test more stringent than going beyond tacit agreement. He said (at 120):

> "It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today …
>
> Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked on as causative factors."

30. In *Reid (Barry)* 62 Cr App R 109, the deceased was shot by members of the IRA. All knew about the weapons being carried but Reid said that he was not an IRA supporter but an innocent spectator with no intention of causing harm. The court (which included Geoffrey Lane LJ) dismissed his appeal against conviction for manslaughter

and distinguished *R v Anderson; R v Morris* on the basis that the latter case was an overwhelming supervening event.

31. Against that background it is worth setting out parts of *Jogee* in rather more extensive form than was cited before us. The starting point concerns the issue of causation which is dealt with at [12] in these terms:

> "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: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. 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."

32. In the context of this case, there is no doubt that there was evidence upon which the jury, properly directed, could conclude that the joint enterprise started with the visit to the Unite Hall and extended into searching for Nsaka's group, which, in the case of Tas, included him returning to his Jaguar motor car and following those with whom he was involved in order that he could (as was the event) collect them to take them away from the scene. In this regard, based on the verdicts of the jury (following the route to verdict that required Tas to have participated in a joint enterprise in which Nsaka was stabbed), there is no doubt but that a continuing joint enterprise was established. In the terms of *Jogee* D2's conduct was not 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.

33. The issue comes down to the use of the knife. Mr Ivers argues that the facts are identical to those in *R v Anderson; R v Morris* which was not overruled in *Jogee.* Lord Toulson and Lord Hughes did, however, make clear in *Jogee* (at [33]):

> "The court in that case [ie *R v Anderson, R v Morris*] did not call into question what had been said in *Wesley Smith*, and Lord Parker noted that it had been approved by the court in *Betty*. The court was not therefore resiling from the general statement that where a person takes part in an unlawful attack which results in death, he will be guilty either of murder or of manslaughter according to whether he had the mens rea for murder. But the court recognised that there could be cases where the actual cause of death was not simply an escalation of a fight but "an overwhelming supervening event". That there

> had been such an event in *Anderson and Morris* may have been a charitable view on the facts, but the principle was endorsed by the court in *Reid* (of which the former Mr Geoffrey Lane QC was a member)."

The issue whether *R v Anderson, R v Morris* was correctly decided did not arise but, in our judgment, by the phrase "charitable view of the facts", it was clear that although the principle was to be recognised, its application in that case was not to be taken as binding in other similar situations.

34. The concept of fundamental difference from the act or acts which the secondary party foresaw was analysed by the House of Lords, based on *R v Powell, R v English* [1999] 1 AC 1, in *R v Rahman* [2009] 1 AC 129, [2009] 1 Cr App R 1, [2008] UKHL 45 which discussed *R v Hyde* [1991] 1 QB 134 itself applying *Chan Wing- Siu v The Queen* [1985] AC 168. Lord Brown of Eaton-under-Heywood sought to summarise the principle in these terms (at [68]):

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B*." (The italicised words are designed to reflect the *English* qualification).

35. The reason for this qualification was that, otherwise, based on *R v Powell, R v English*, B (who in the language of *Jogee* is D2) was at risk of conviction for murder on the basis only of foresight of a possibility that the principal may intentionally kill or cause grievous bodily harm, irrespective of how that might take place. Foresight of a possibility is what *Jogee* concluded was insufficient as a matter of law although the jury could conclude that foresight was evidence from which intent could be inferred. Thus, having referred to a common purpose to commit crime A in circumstances where D2 must have foreseen that, in the course of doing so, D2 might well commit crime B, *Jogee* concluded that it may be justifiable to conclude that crime B was within the scope of the plan to which D2 gave his assent and intentional support.

36. In that regard, Lord Hughes and Lord Toulson went on to discuss both murder and manslaughter in terms:

> "95. In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But, as we have said, liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or

otherwise. If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.

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: *R v Church* [1965] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective. As the Court of Appeal held in *Reid*, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.

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." [Our emphasis]

37. Thus, in underlining the requirement for proof of intention, one of the effects of *Jogee* is to reduce the significance of knowledge of the weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.

38. The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in [96] of *Jogee*, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based on principle and the correct application of *Church* (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self defence.

39. On the facts which must have been found by the jury in this case, Tas took the risk that the others involved in the joint enterprise with him would go further than to inflict 'some harm'. Consistent with the principles identified in the authorities and the modern approach to knowledge of a specific weapon, there is no reason to distinguish the case where the victim is kicked to death or killed with a weapon either that is picked up off the ground or brought by the principal to the scene.

40. What then is left of overwhelming supervening act? It is important not to abbreviate the test articulated above which postulates an act that "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 the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.

41. We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency.

42. This fits with the analysis of the law in *R v Brown* [2017] EWCA Crim 1870_ in which it was held that the trial judge was not obliged to direct the jury that they could only convict the appellant of manslaughter if they were sure that he knew the principal had a knife (see per Hallett LJ at [29]). In that case, the point was made that the judge had effectively directed the jury that if it may have been that the stabbing was the action of the man in the hood alone, then the other defendants would be not guilty: that would be explained on the basis that there would be no joint enterprise. That is consistent with this case where the route to verdict required the jury to be sure, as the first question they had to address, that Tas had participated in a joint enterprise in which Nsaka was stabbed.

43. Both this case and *Brown* can be distinguished from *R v Rafferty* [2007] EWCA Crim 1846 where the secondary party had taken part in beating the victim but then left the principals (in order to obtain money using the victim's debit card) whereupon the principals drowned the victim. Quashing the conviction, this court held that no jury could properly have concluded that the drowning of the deceased was other than a new and intervening act in the chain of events: the court did not suggest that this should not generally be a question for the jury.

44. Furthermore, on the evidence in *Rafferty*, if the defendant had withdrawn from the joint enterprise to assault the deceased, then there had been no relevant joint enterprise still operational. Reverting to the language of *Jogee*, 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.

45. In this case, with the concept of joint enterprise explained in a way that does not attract any criticism, the critical first question left to the jury was (in effect) whether Tas participated in a joint enterprise in which Nsaka was stabbed. In the light of the way in which the law is now expressed, that, in our judgment, was the correct way to put it. This appeal is dismissed.