Concert

Law

Stair Encyclopaedia, Criminal Law, paragraphs 129-142; Gordon, 4th Ed Vol 1 *Criminal Law* chapter 5, particularly 5.01-5.29; Hume, Commentaries on the Law of Crimes (4th ed Bell) vol i at 266.

1. Two or more accused persons may have contributed in varying degrees to the commission of the offence charged. But where several accused persons have engaged in the same criminal conduct, it does not necessarily follow that each of them is guilty of every criminal act that is performed (Macdonald, *Criminal Law*, 5th ed at 6-7). In such situations liability of the several accused depends on proof of participation in a known criminal enterprise.

An accused person may have become a participant as the result of a prior agreement, but concerted action may also occur spontaneously (Stair *Encyclopaedia*). *Donnelly v HM Advocate* [2007] HCJAC 59, 2007 SCCR 577 and the later case of *Miller v HM Advocate* [2021] HCJAC 30, 2022 JC 33 demonstrate how important it is that trial judges should give clear directions on concert, and in particular be clear as to what evidence may support a conclusion that parties were acting in concert and what may not, as well as whether there is evidence available to point to planned or spontaneous concert (see below).

The forms of art and part guilt

2. At 5.05, the current editors of Gordon, *Criminal Law,* explain

> "… to be convicted art and part, an accused person must have participated in some way in the offence and shared a common purpose with the primary actor/s."

At 5.06 it is stated:

> "Participation covers both the provision of some sort of assistance to a principal offender and a contribution to a joint enterprise."

Stair Memorial Encyclopaedia chapter "Criminal Law" at paragraph 131:

> "Art and part liability or accession may arise in a number of different ways. A person may procure or instigate the commission of a crime which he does not wish to commit himself; he may give advice or material assistance to the perpetrator; or he may play a role in the commission of the crime itself. In each of these cases he may be guilty art and part of the offence in question."

The most common situation encountered involves a number of people participating in the commission of the crime. As Lord Patrick explained in *HM Advocate v Lappen* 1956 SLT 109 at 110 (charge to the jury):

> "... if a number of men form a common plan whereby some are to commit the actual seizure of the property, and some according to the plan are to keep watch, and some according to the plan are to help carry away the loot, and some according to the plan are to help to dispose of the loot, then, although the actual robbery may only have been committed by one or two of them, every one is guilty of the robbery, because they joined together in a common plan to commit the robbery"

Actions such as keeping lookout, deterring bystanders from assisting the victim of an assault, or even increasing a victim's fear by their presence can justify conviction art and part. As Hume put it, Commentaries on the Law of Crimes (4th ed Bell) vol i at 266:

> "In general, all such behaviour as tends to impede, disconcert or intimidate the sufferer in his defence is as decisive against any one as the striking of a severe blow or the doing of a direct injury to the person."

Presence alone will not attract art and part liability, *HM Advocate v Kerr and Ors* (1872) 2 Couper 334. It is useful to read the report which suggests that there are situations in which presence *would* attract art and part liability. illustrations are seen in Hume's example; see also *Vogan v HM Advocate* 2003 SCCR 564, *Gay v HM Advocate* [2015] HCJAC 125, 2016 SCCR 87. In *Douglas v HM Advocate* [2020] HCJAC 23, 2020 JC 279, at paragraph [34], buttressed by Hume ii at 264, the court recognised the possibility of a wholly innocent bystander who does nothing to assist an offender with nothing else to support their being art and part before explaining:

> "...It is different where there is evidence of a prior agreement to commit the offence and that the accused was party to that prior agreement. Then, any

> degree of participation is sufficient to make the accused responsible for what the other party or parties do, provided that it does not go beyond the extent of what was agreed. Where what has been planned is an act of violence, simple presence while others actually inflict the violence can readily be inferred to be participation in the assault, whether by providing moral support to the actual assailants, by being available to provide more active support should it be required, and by intimidating the victim."

A person can be guilty art and part by supplying materials to be used in the commission of the crime in the knowledge of their proposed use Hume vol i, 1276-1277. This extends to supplying information in the knowledge it is for an unlawful purpose, such as the whereabouts of an intended victim of an assassination.

A person who procures or contracts another to commit a crime is guilty art and part by counsel and instigation.

3. 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/she/they played, provided that the crime is within the scope of the common criminal purpose and whether or not the concert is antecedent or spontaneous (*McKinnon & Ors v HM Advocate* 2003 JC 29 (court of five judges), at paragraph [27]). What was said in *McKinnon* in those paragraphs was endorsed by a bench of 7 judges in *Gardiner v HM Advocate* [2024] HCJAC 44, 2024 JC 114 at paragraphs [27] to [28].

4. The nature and scope of a common criminal purpose should be determined on an objective basis. In the case of an individual accused, the question is what was foreseeable as liable to happen, and hence what was or was not obvious. (*McKinnon* at paragraphs [22] and [29]). In the event of breaking into domestic premises in the middle of the night, it must be in the contemplation of the parties to that enterprise that violence may be required and used against the occupant who would be expected to be present (*Shepherd v HM Advocate* 2010 SCCR 55). It should be noted that *Shepherd* was a case of assault and robbery. How this principle might apply in a case of murder would require careful consideration by the trial judge in light of the particular circumstances.

Again, what was said in *McKinnon* at paragraph [28] was correct to this point as confirmed in *Gardiner* at paragraph [29]:

> "…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" ([*McKinnon* at paragraph [28]).”

Whilst both *McKinnon* and *Gardiner* were murder cases, the references from them above appear to be of general application in concert cases.

5. So, in short, even if the violence libelled in the charge is committed by some person other than the accused, the latter may be held responsible for the consequences. Such responsibility will depend upon proof that the accused shared the common criminal purpose and participated by some means or other in its implementation.

6. If two or more accused are proved to have acted in concert, the evidence against each is evidence against all. Before it can be determined whether or not two or more accused acted in concert, the evidence relating to each of them must be considered separately. Provided that the available evidence is sufficient for the purpose and the matter is put in issue, the culpability of each accused should be separately assessed (*Malone v HM Advocate* 1988 SCCR 498; *Johnston v HM Advocate* 1998 SLT 788). It is therefore possible to find that one accused acted in concert with another although the latter did not act in concert with the former (*Low v HM Advocate* 1994 SLT 277).

7. Where the criminal act libelled is that of one or two persons and it cannot be affirmed which, it is essential to a verdict against either of them that the jury under sufficient direction finds both to have acted in concert (*Docherty v HM Advocate* 1945 JC 89).

8. The trial judge must leave issues of fact in relation to the application of the principle of concert to the jury. This is so even where the issue of concert is not directly disputed by the accused, but neither is it conceded by him (*Hobbins v HM Advocate* 1997 SLT 428).

9. Although our law does not recognise a defence of “dissociation”, evidence of “dissociation” by a participant in the preparation of a crime in contemplation will be highly relevant in any decision as to whether he can be held to be in concert with

those who proceed to commit it (*MacNeill v HM Advocate* 1986 JC 146, 159 (opinion of the court)).

10. Where the only evidence against the accused is that the accused had been a member of a group of persons, pursuing a common criminal purpose in terms of the alleged offence it is important that the judge should indicate precisely how the jury are entitled to approach the evidence. It may be that there is no direct evidence of the accused doing anything specific or any such direct evidence may not be corroborated. The judge should make clear in these circumstances that any conviction could only be on a concert basis (*Fisher v HM Advocate* 2003 GWD 13-411; Appeal Court 14 March 2003 at paragraphs [13] to [15]).

11. In charging the jury on concert, the issue should be dealt with in the following order:

1. Tell the jury that they must first consider what the evidence is which implicates each accused separately, so that they may determine whether there is sufficient evidence against each accused.
2. Then they should consider, and be directed, what they should do if they are satisfied that there is sufficient evidence against each accused.
3. They should then go on to consider the law of concert and its application to the evidence they accept. (Frequently the law is illustrated by the circumstances of an bank robbery.) They jury must be clearly directed on the question whether or not the accused or any combination of them were acting together in furtherance of a common criminal purpose.
4. The jury should be directed what they should do if they do not find it established that the accused were acting in furtherance of a common criminal purpose. That is, that they should convict the accused only is respect of what they are satisfied beyond a reasonable doubt each did (see *Cussick v HM Advocate* 2001 SLT 1316, at paragraph [8]).

12. The appropriateness of trying to apply the concept of concert in cases under section 4(3)(b) of the Misuse of Drugs Act 1971 is to be doubted (*Clark v HM Advocate* 2002 SCCR 675 at paragraph [12]).

13. Where there is sufficient evidence to entitle the jury to convict the accused on the basis of involvement either as actor or art and part, the Crown may present both cases to the jury in the alternative. In these circumstances the trial judge must give

the jury appropriate directions on both alternatives and direct them as to the evidence relevant to each.

14. Earlier versions of this chapter state that:

> "if the Crown seeks conviction on one basis only the trial judge must direct the jury that they could convict the accused only on that basis (*O'Donnell v HM Advocate*, Appeal Court 18 February 2004, at paragraphs [25] and [28]). Accordingly, where there is a confession by the accused which is capable of supporting either case the judge should direct the jury that it is available to them only in support of the basis on which the Crown has put the case to the jury."

There is no report of the case although it is referred to in *O'Donnell v HM Advocate* [2011] HCJAC 84, 2011 SCCR 536, an unsuccessful appeal following an SCCRC reference.

Subsequent developments, not least a requirement on judges to provide juries with a route to verdict, cast serious doubt on the approach previously stated. In current practice in directing on concert, it is necessary to identify what the evidence is against an accused and to direct the jury what they must do if they do not find concert established. Depending on the state of the evidence it will follow that the jury may be bound to acquit or may be left with evidence sufficient to prove responsibility as actor and the jury should be directed accordingly. That is established in *Cussick*; see paragraph [11] above.

An illustration can be seen in *HM Advocate v Igoe* 2010 SCCR 759. Although the Crown case presented to the jury was that the first accused was to be convicted art and part, and that the second accused was the actor who shot and murdered the deceased, there was evidence that the first accused had admitted to shooting the deceased and corroboration elsewhere. Lord Bracadale concluded that there was insufficient evidence to convict the first accused art and part but sufficient to convict him as actor. In these circumstances, he directed the jury that both routes to verdict were available against the first accused. In doing so he founded on Lord Reed's analysis of recent case law in *Johnston v HM Advocate* [2009] HCJAC 38, 2009 JC 227, at paragraph [39], citing numerous cases and dicta of Lord Bingham and Lord Rodger. See also *Gardener v HM Advocate* [2009] HCJAC 92, 2010 SCCR 116 at paragraph [17] where the appeal court found that the Crown had based its case solely on concert but this did not necessarily constrain the sheriff or the jury:

> "Thus if the evidence disclosed an obvious and sufficiently corroborated alternative case (based on individual responsibility) which was reasonably open to the jury, the sheriff might be required to direct the jury on, inter alia, that alternative basis, despite the position adopted by the Crown: cf *Johnston v HM Advocate*, paragraphs [28]–[40]; *Ferguson v HM Advocate*; *Cussick v HM Advocate*, paragraph [8]."

In that case, there was no such obvious and corroborated case and therefore no such obligation on the sheriff.

If a judge is contemplating directing the jury on the basis not contended for by the Crown, it would be appropriate before speeches if possible, and certainly after the Crown speech to alert parties. It can be seen that Lord Bracadale did so in *Igoe*. In *HM Advocate v Eadie & 3*, unreported, in which four accused faced a charge of murder in 2018 and the fourth accused alone faced a charge of murder from 2006, the Crown had signalled that their case on the single accused murder would be based on the proposition he was actor. There appeared to the judge to be an obvious case based on eyewitness evidence, DNA evidence and statements made by the fourth accused for them to conclude that he was not actor but could be art and part. In the event the Crown then decided to present a case on the 2006 charge on the basis of actor failing which art and part. Since the jury acquitted, there was no appeal on that charge.

Where antecedent concert is alleged

15. In some cases, the nature of the weapon unexpectedly produced and the manner of its use may be such that no jury could properly conclude that its use was foreseeable by the other participants. But that issue is ordinarily one of fact and degree to be determined objectively by the jury. Special considerations may apply where some specific weapon or weapons are agreed to be used or are foreseeably to be used in furtherance of the common plan (*Black v HM Advocate* 2006 SLT 685, at paragraph [33]).

16. While weapons may have different characteristics, a knife is not, as a matter of law, different from a baseball bat. Much may depend on the manner in which the particular weapon is used. When knives are commonly used in street violence, the use of a knife in the course of a serious assault involving use of a baseball bat cannot be said to be beyond the scope of a criminal enterprise involving the use of serious violence (*Black*, at paragraph [33]. This will usually be a matter of fact and degree to

be determined objectively by the jury. See also *Donnelly v HM Advocate* at paragraphs [28] and [30]).

The importance of clear/tailored decisions

17. *Rehman v HM Advocate* [2013] HCJAC 172, 2014 SCCR 166, in giving the opinion of the court Lord Justice Clerk Carloway can be seen to be thinking along the lines stipulated a decade later in *Gardiner*. It offers an example of a case where there was no weapon involved but serious and sustained blunt force was applied. He observed that where the appellant *Rehman* accepted kicking the deceased on the head 3-4 times, he was fortunate that the trial judge had not directed the jury that this was murder. At paragraph [55], he explained:

> "… In the context of the defence presented by Rehman, where he had accepted participation in a concerted attack leading to death, the primary issue was not whether what he himself did was itself wickedly reckless, but whether the attack, to which he undoubtedly lent his support, was a murderous one, looked at objectively: *McKinnon v HM Advocate*, LJG (Cullen) at para.22. Once the relevant concert (see infra) is established, there is "no separate question as to whether the individual accused had the necessary criminal intent": paragraph 27…."

The Lord Justice Clerk proceeded to endorse the normal desirability of directing according to the sequence explained in *Cussick*.

Whilst there was evidence apt to demonstrate that both appellants had participated in stamping on the deceased's head, Mr Rehman's co-accused's evidence was such that the following direction was appropriate:

> "… if [the jury] accepted his evidence that he had only delivered one punch (or had a reasonable doubt about that), then they could only convict him, not of culpable homicide, since that would presuppose concert with Rehman, but only of assault. He also directed the jury that if they were not satisfied that he had participated in a murderous attack, then he could not be convicted of murder. These directions were entirely adequate for the particular circumstances of each appellant."

Both were convicted of murder and the convictions sustained.

18. In the case of *Miller* referred to above, the Court observed:

> "There may be many cases based on concert where the relevant issues are straightforward, such as in the case of a group of men going together to rob commercial premises or in the case of a group of men who arm themselves in advance of attending at the house of another in order to assault him. ...In such circumstances it may be that the trial judge or sheriff can adequately direct the jury simply by addressing them as set out in the Jury Manual. However there will be other circumstances in which the evidential basis upon which concert is alleged is far less straightforward or obvious" (per Lord Turnbull at paragraph [59])

In the latter case it is incumbent on the judge to tailor the directions to the specific case providing "clear guidance … as to the route to verdict which [is] available to the jurors." (per Lord Turnbull at paragraph [65]).

The court made it clear that the Crown has a responsibility to provide:

> "clear submissions as to the basis upon which it contends that crimes charged have been established and as to the evidence relied upon for that purpose", reminding judges that they may "seek submissions from the Crown, or the defence, if the relevant speech does not make it plain upon what basis the party is proceeding". (per Lord Turnbull at paragraph [67]).

Concert in murder cases

19. In Gardiner, a bench of 7 judges clarified how concert applies in murder cases. At paragraphs [30] and [31], the Lord Justice General explained that whilst the court in *McKinnon* correctly stated the law at paragraphs [27] to [29] it went wrong thereafter:

> "[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 paragraph [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 paragraph [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 paragraph [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.""

In *Brown v HM Advocate* 1993 SCCR 382, the trial judge, Lord Marnoch, had been entirely correct to withdraw culpable homicide from the jury where the deceased was stabbed in the heart. The jury were correctly told 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.

In explaining why *Brown* was wrongly decided on appeal, the full bench in *Gardiner* stated, at paragraph [36]:

> "**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. [McKinnon] is wrong because 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**." [Emphasis added]

At paragraph [37] the court referred to "*McKinnon* and the cases which followed" and noted that many contain conflicting and irreconcilable statements which should now be resolved with a clear understanding of how concert operates in homicide cases, concluding:

> "… 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."

It followed that the appeal court in *Melvin v HM Advocate* 1984 SLT 365, *Brown*, and *McKinnon* fell to be overruled in part. The dicta of Lord Stott in *Melvin*, Lord Justice General (Hope) in *Brown* and Lord Justice General (Cullen) in *McKinnon* were in error in so far as they postulated an assessment of the intention or recklessness of ancillary actors at the time of the fatal blow, where the attack had been deemed to have been murderous (at paragraphs [38] to [39])

The trial judge in *Melvin* and *Brown* had directed the jury correctly, despite what was determined in the respective appeals. The trial judge in *Gardiner* also directed the jury correctly and her appeal, and that of her co-appellant were refused. The court's explanation of why, may provide a useful practical illustration:

> "[41]. 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."

20. In a case of two or more charged with murder, where an individual accused knows that weapons are being carried for use in order to carry out a common criminal purpose, and these are weapons of such a nature that they can readily be used to kill, it is open to the jury to convict the accused of murder on the basis that it was foreseeable that such weapons were liable to be used with lethal effect (*Gardiner* at paragraphs [28]-[30]) Where both accused arrived at the locus with the joint intention of attacking the complainers and that arming themselves with weapons there was in their contemplation, the question comes to be whether there was evidence entitling the jury to find that it was objectively foreseeable that such violence as was liable to be used carried an obvious risk that life would be taken (*Poole v HM Advocate* [2009] HCJAC 42, 2009 SCCR 577 at paragraph [11]).

21. In a case of antecedent concert in murder, an accused is guilty of murder art and part where:

1. by conduct, for example words or actions, the accused actively associated with a common criminal purpose which is or includes the taking of human life or carries the obvious risk that human life will be taken (*McKinnon*),
2. in the carrying out of that purpose murder is committed by someone else.

22. It may be necessary for the trial judge to leave a verdict of culpable homicide open to the jury, even where the defence have not specifically invited such a disposal, if on the evidence it is open to the jury to conclude that the killing was no more than culpable homicide. A person may have been part of a group who had

acted together in pursuance of a common criminal purpose even though he/she/they had not inflicted any blow on the complainer (*Vogan,* at paragraph [10]; *Touati & Gilfillan v HM Advocate* [2007] HCJAC 73, 2008 JC 214).

Where spontaneous concert is alleged

23. There are various, at times conflicting examples of what directions should be given. There is a useful review of certain cases in Gordon, Criminal Law, vol 1, 4th edition, 2023. **Nevertheless, care is required in considering the text and the cases cited, all pre-dating the 7 judge decision in Gardiner.** As explained at paragraph 16.15 above, in *Gardiner*, the court disapproved dicta in *Melvin*, *Brown* and *McKinnon*, and "the cases which followed." In *Gardiner*, the court was dealing with a very clear case of antecedent concert. Nevertheless, the court appears to be speaking about concert in murder generally. No such distinction was drawn in *Docherty*, which was approved by the full bench at paragraph [31], quoted above. Paragraphs [30]-[31] and [37]-[39] may have the effect of sweeping away many of the pre-*Gardiner* decisions.

In *Docherty*, the general formulation proposed by Lord Moncrieff was, "if people acting in concert have reason to expect that a lethal weapon will be used…" He then proceeded to give examples of circumstances of how this may be demonstrated; if accessories carry arms, or if they know that arms and lethal weapons are being carried by their associates. It may be that many of the reported cases are simply illustrative of the general principle. Accordingly, judges are likely to have to determine an appropriate direction on concert in murder according to the particular circumstances of the case.

One pre-*Gardiner* formulation where spontaneous concert is alleged is that the accused can be convicted art and part of an assault by a co-accused with a knife only if the accused actually knew the co-accused had the knife, and with that knowledge, had continued the joint attack. Such knowledge may be inferred from circumstantial evidence (*Peden v HM Advocate* 2003 SLT 1047). A safe formulation of the appropriate direction was to adopt the wording "You have to be satisfied that [X] knew or must have known that a weapon was being used." That enables the jury to draw inferences about [X's] knowledge from all the evidence, including circumstantial evidence (*McFadden & Spark v HM Advocate* [2009] HCJAC 78, 2009 SCCR 902 at paragraph [41]). It is incorrect to charge the jury that the accused could be convicted if they considered that the accused knew or saw, or ought to have known or seen,

that the co-accused had the knife (*Peden*). Likewise, it is incorrect to charge the jury that the accused could be convicted if the accused knew or had the means of knowing that at the time the co-accused was using the knife (*Dempsey v HM Advocate* 2005 1 JC 252).

Another formulation is that the jury should be told that an accused who did not use a weapon could only be found guilty on an art and part basis if there was sufficient evidence to prove that the accused participated in [or actively associated himself/herself/themselves with] the attack in the knowledge that the weapon was being, or was likely to be used, in the course of it (*McKinnon,* *Herity & McCrory v HM Advocate* [2009] HCJAC 46, 2009 SCCR 590). Such a direction appears to be broadly consistent with *Docherty*, but a little more onerous on the Crown.

Possible form of direction on concert

NB, there are illustrative examples of the application of concert within the ensuing specimens but judges should use them in a discriminating manner i.e. only to the extent they are relevant and helpful in the particular circumstances of the case; *Green v HM Advocate* [2019] HCJAC 76, 2020 JC 90 at paragraph [64].

"This charge is brought against more than one person **OR** The accused here is charged "while acting along with another / others". This raises the issue of joint criminal responsibility.

Normally you are only responsible for your own actions, and not for what somebody else does. But if people act together in committing a crime, each participant can be responsible, not only for what he himself does, but for what everyone else does while committing that crime. That arises if:

1. people knowingly engaged together in committing a crime
2. what happened was done in furtherance of that purpose
3. what happened did not go beyond what was planned by, or reasonably to be anticipated by, those involved.

These examples will give you the sense of this:

- Take a case of bank robbery. There is a man with a gun, a look out, and the driver of the get-away car. Each one has a different function. But if it is proved they were acting together, and holding up the bank teller was part

of their plan, all three are guilty of armed robbery. That is an example of a crime planned in advance.

- Some crimes happen on the spur of the moment. Suppose one person in a group of three picks a fist-fight with someone in the street. If the two others in the group then join in punching the other person, they would also be guilty of assault by punching, after each of them joined in. That is an example of spontaneous involvement.

But it is not always quite as simple as that.

- Suppose three men plan to force open a shed beside a house to steal an expensive motorbike. One does the driving. One is the look-out. One breaks in and steals. All three are guilty of theft by forcing open the shed. That was the common plan, that is what happened, and that is what each anticipated would happen.

But suppose the one who broke into the shed then decided to go into the adjacent house, disturbs the occupier, and lifts a poker and kills him. All three would be guilty of theft by forcing open the shed, but only the poker-man would be guilty of murder. That is because entering the house and using the poker as a weapon went beyond what was planned and was not expected by the others.

- Going back to our street fight, suppose the initial attacker, unknown to the others had a knife, and stabbed the other person. All three would be guilty of assault by punching, but only the first would be guilty of assault by stabbing. That is because using the knife was not expected by the others.

But if the other two saw the knife was being used, or must have known that was being used, and continued punching the other person, they would also be guilty of assault by stabbing, because they had accepted the escalation of violence in the joint criminal purpose. So, an unarmed attacker can be responsible for an attack with a weapon if he/she/they knew or must have known the co-accused was armed and continues his/her/their attack.

These examples give you the flavour of joint criminal responsibility.

To sum up: where there is a planned crime, acts done that are part of the plan are the responsibility of everyone involved, who was party to that plan. Acts that are outwith the plan are the responsibility only of whoever committed them. That has to be

judged by an objective test. Ask yourselves "What was foreseeable as likely to happen?"

Where the crime is spontaneous, acts done that are known, or must have been known to the others, who then continue their participation, are the responsibility of everyone involved. Acts outwith the knowledge of the other participants are the responsibility only of those who committed them.

Here the Crown says the evidence shows there was a joint or common purpose in the committing of this crime, and you can infer each accused's actings came within that. The essence of the Crown's case is this: [*specify*]

The defence say no such conclusion can be drawn. The substance of the defence position is: [*specify*]

In deciding this you should look at the evidence in stages:

1. decide what is the evidence against each accused separately;
2. for those against whom there is sufficient evidence to implicate them, decide first, if there was a common criminal purpose among them, and secondly, if there was, what it was;
3. then, with each accused, decide if the accused was party to that, and if so, to what extent.
4. If the accused you are considering was, then that accused is responsible along with the other participant(s);
5. If the accused you are considering was not, then you could convict that accused only of what that accused did.

So, depending on the degree of an individual accused's criminal responsibility you could convict: both/all of the accused of this charge, or only one/some of them, or an accused only of what the accused did himself/herself/themselves."

In case of three – accused pre-planned attack

"Now, looking at all this in a practical way, what it comes to is this:

Take the case against [*main perpetrator*] [*no 1 accused*]

If you are satisfied [*no 1 accused*] had and used [*weapon*]

you could find [*no 1 accused*] guilty of that, and the consequences of that.

But if you are also satisfied you can infer:

1. all the accused were parties to a planned attack on [*the person named in the charge*]
2. [*no 1 accused*] knew [*no 2 accused*] had [*no 2's weapon*]
3. [*no 1 accused*] knew that weapon was going to be used in the attack you could also find [*no 1 accused*] jointly responsible for its use.

Similarly, if you are also satisfied you can infer

1. all the accused were parties to a planned attack on (the person named in the charge)
2. [*no 1 accused*] knew [*no 3 accused*] had [*no 3's weapon*]
3. [*no 1 accused*] knew that weapon was going to be used in the attack you could also find [*no 1 accused*] jointly responsible for its use."

   [*Then go through the permutations for the involvement of the other accused*]

In case of three – accused spontaneous attack

"Now, looking at all this in a practical way, what it comes to is this:

Take the case against [*main perpetrator*] [*no 1 accused*]

If you are satisfied [*no 1 accused*] had and used [*weapon*] you could find [*no 1 accused*] guilty of that, and the consequences of that.

But if you are also satisfied you can infer

1. [*no 1 accused*] knew, or must have known [*no 2 accused*] was wielding [*no 2's weapon*]
2. [*no 1 accused*] then continued in his/her/their own part of the attack you could also find [*no 1 accused*] jointly responsible for its use.

Similarly, if you are also satisfied you can infer

1. [*no 1 accused*] knew, or must have known, [*no 3 accused*] was wielding [*no 3's weapon*]

2. [*no 1 accused*] then continued in his/her/their own part of the attack you could also find [*no 1 accused*] jointly responsible for its use."

[*Then go through the permutations for the involvement of the other accused*]

Antecedent concert in murder

"If you are satisfied that:

1. those involved were acting together with the joint purpose of committing this crime
2. their purpose involved killing [*Name the deceased*], or at least the use of serious violence carrying an obvious or foreseeable risk that he/she/they would be killed
3. in carrying it out one of the accused killed the deceased

Then each of the other accused would be guilty of murder if they each actively associated themselves with that joint purpose, by word or action.

[Where appropriate] If an accused participated in a less serious common criminal purpose and had no reason to anticipate the use of serious violence in course of which [*Name the deceased*] died, you could only convict that accused of assault irrespective of whether you find any other accused guilty of murder."

Spontaneous concert in murder

NB Judges will need to tailor appropriate directions in light of the particular circumstances of the case and in light of the full bench decision in *Gardiner*.

"If you are satisfied that:

1. there was a joint attack on [*Name the deceased*]
2. one of the accused/[*or participants*] used a knife on (the person named in the charge), intending to kill that person, or with the wicked recklessness needed for murder
3. the other accused knew, or must have known, that the knife was being used, and continued their attack on (the person named in the charge)

You could find not only the knife-user, but also the others, guilty of murder.

[*OR*]

if people acting in concert have reason to expect that a lethal weapon will be used and, in this case, it is suggested that…. from the evidence [*specify*] it is open to you to infer that they must have foreseen that a weapon may be used to cause serious injury. If you do so conclude in the case of a particular accused, the appropriate verdict would be guilty of murder.

[*OR, alternatively*]

in a situation where each of the accused was in possession of a potentially lethal weapon but did not know that one of them had, and used, a knife (such a weapon), the nature of the attack was murderous, and each of the accused was in possession of and openly used a weapon which could be lethal, even though they did not know that one of them had, and used, a knife.

You could find not only the knife-user, but also the others, guilty of murder.

[Where appropriate]

[**Judges should take care to tailor this part of the direction in line with the evidence on an assessment of Gardiner and giving some consideration to the approach of parties. In particular, care should be taken where there are multiple causes of death or, perhaps, where more than one injury contributed to the death**.]

What it comes to is this. Where the crime is spontaneous, acts done that are known, or must have been known to the others who then continue their participation, are the responsibility of everyone involved. Acts outwith the knowledge of the other participants are the responsibility only of those who committed them.

So, if an accused was part of the assault by [e.g. kicking and punching] but had no reason to anticipate [e.g. use of a knife or other weapons] and stopped or disassociated themselves, you could convict that accused of no more than assault irrespective of whether you find any other accused guilty of murder."

[Where appropriate]

If you thought the inflicter of the fatal blow lacked the intent or wicked recklessness needed for murder, you could convict that person only of culpable homicide.

In that event, those whom you consider, knew, must have known or for whom it was foreseeable that [*Name the deceased*] would be killed then each of those accused

would be guilty of culpable homicide if they actively associated themselves with the joint purpose by word or by action."

[Where appropriate]

If an accused participated in a less serious common criminal purpose and had no reason to anticipate the use of serious violence in course of which [*Name the deceased*] died, you could convict that accused of no more than assault irrespective of whether you find any other accused guilty of culpable homicide."