25 Bedford Row Crime Group Bulletin

Joint Enterprise – a brief guide to the new approach

Introduction:

1. This is a practical guide designed to assist solicitors, and prospective applicants, on the impact and consequences of *R v Jogee* [2016] UKSC 8.[1] It attempts to state, in a 'nutshell', the principles outlined by the court, and to advise as to logistical steps that may be taken in light of the judgment.

2. The Supreme Court decided:

- The courts had, in previous decisions, taken 'a wrong turn'.
- Foresight is simply evidence, for the jury to consider, of intent to encourage or assist, which is the required mental element for secondary liability.

The Old Law:

3. Until the judgment hand-down in *Jogee* on 18 February 2016, the law on accessorial liability was considered to be as follows:

- Two people set out to commit an offence (Offence A)
- In the course of it, one of them commits a different offence (Offence B)
- The second person is guilty as an accessory to Offence B if he foresaw it as a possibility, but did not necessarily intend it.[2]

4. These principles were derived primarily from the Privy Council case of *Chan Wing-Siu*[3] and applied in a number of cases both in the Court of Appeal and the Supreme Court / House of Lords.

The new approach :

5. The Supreme Court concluded that *Chan Wing-Siu* and *Powell and English*[4] both 'took a wrong turn'. Consequently, the court reversed its previous statement of principle for the following reasons:

- The court had now benefited from a fuller analysis of the law of secondary liability than on previous occasions.[5]

[1] Joined with *Ruddock (Appellant) v The Queen (Respondent) (Jamaica)* [2016] UKPC 7
[2] *Jogee* [62]
[3] [1985] AC 168
[4] [1999] 1 AC 1
[5] [80]

- The present law is not well established, nor working satisfactorily. It remains a 'continuing source of difficulty'.[6]

- Secondary liability remains an important part of the common law. Any wrong turn should, therefore, be corrected.[7]

- The adoption of foresight as the mental element for secondary parties in murder cases 'is a serious and anomalous departure of the basic rule', which has over-extended the law of murder, and reduced the law of manslaughter.[8]

- There is now a problematic anomaly that an accessory has a lower mental threshold for guilt than the principal.[9]

- Secondary liability is a common law doctrine. Consequently, since the doctrine has been unduly widened by the courts, it is right for the courts to correct the error.[10]

Restatement of principles:

6. The court outlined a number of key principles to assist in future cases:

- The requisite conduct element is that the accessory has encouraged or assisted the principal in the commission of an offence.[11]
- The mental element is an intention to assist or encourage the commission of the offence. This requires knowledge of the existence of any facts necessary for it to be criminal.

- The question to be asked is did the accessory intend to encourage or assist the principal to commit the crime, acting with the requisite mental element?

- If a crime requires a particular intent, then (whether conditionally, or not) the accessory must intend to assist the principal to act with such intent.[12]

- Association between principal and accessory may or may not involve assistance or encouragement – it is fact contingent.[13]

- The prosecution does not have to show that the accessory's encouragement or assistance had a positive effect on the principal's conduct, or on the outcome.[14]

- In certain cases, it will be important to remind juries of the difference between intention and desire.[15] It may also be necessary to alert juries to the fact that

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intention to assist and intention that the crime should be committed may be conditional. The court gives the example of where armed robbers storm a bank hoping it will not be necessary to use their guns, but intending to use the weapons to do grievous bodily harm only if they meet resistance.[16]

- Juries will have to continue to decide, where necessary, whether the accessory expressly or tacitly agreed to a plan, in which the principal went as far as he did, by committing the further crime.[17] It will also be a question of fact as to whether the principal's actions were within the scope of the plan to which the accessory gave his assent and intentional support.[18]

- Importantly, the court said that 'liability as an aider or abettor […] depends on proof of intentional assistance or encouragement, conditional or otherwise'. It does not necessarily depend on there being some kind of agreement.[19] Therefore, where spontaneous agreement breaks out among a group, the evidence may be too nebulous for a jury to decide that there was an agreement (whether tacit or not).

- However, where the defendant joins a group which he realises is out to cause serious injury, the jury are entitled to infer that he intended to encourage or assist in the intentional infliction of serious harm, or that he intends that serious harm should happen. Where this occurs, and the principal acts with intent to cause serious harm and death results, both principal and accessory will be guilty of murder.[20]

- If a person is party to a violent attack on another and that person does not have an intention to assist in causing the death / really serious harm to the victim, then if the violence escalates and the victim dies, the person will be guilty of unlawful and dangerous act manslaughter rather than murder. The defendant, in these circumstances, must encourage or assist an unlawful act which all sober and reasonable people would realise carries the risk of some harm. This is an objective test.[21]

- Where there is an overwhelming supervening act by the perpetrator, which nobody in the defendant's position might have contemplated, then no criminal liability will be incurred.[22]

- Aside from overwhelming supervening acts, there will no longer be occasion to consider the principle of 'fundamental departure'. The relevant test is simply whether the accessory intentionally encouraged, or assisted with, the crime. Knowledge, misunderstandings or ignorance of weapons carried by the principal constitutes evidence of the accessory's intention, but nothing more.[23]

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- Where the offence charged does not have a *mens rea* requirement, the only *mens rea* required of the accessory is that he intended, with knowledge of any facts and circumstances necessary, to encourage or assist the perpetrator to do the prohibited act.[24]

Past Convictions:

7. The court clearly states that the effect of its judgment 'is not to render invalid all convictions which were arrived at over many years'.[25] The court clarifies that:

- Where a conviction has arisen by faithfully applying the law as it stood, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time.

- The Court of Appeal has power to grant leave, but will only do so if substantial injustice can be demonstrated.

- Exceptional leave to appeal will not be granted simply because the law applied at trial has now been declared to have been mistaken.

- The same principles must govern the decision of the Criminal Cases Review Commission when considering whether to refer a conviction to the Court of Appeal.

The Appeals decided:

8. Jogee was convicted together with a co-defendant, Hirsi, at Nottingham Crown Court in March 2012 of the murder of a man named Fyfe at a house in Leicester. Shortly before 2.30am on 10 June 2011, Fyfe was stabbed by Hirsi. The prosecution's case was that, during the early hours of the morning, Jogee was outside the house shouting encouragement at Hirsi to do something to the victim. After a short altercation, during which time Jogee threatened to smash a bottle over the victim's head, Fyfe was fatally stabbed. The prosecution adduced evidence that Jogee was aware that Hirsi had a knife.

Held: the jury's verdict meant that it was sure, at the very least, that Jogee knew that Hirsi had a knife and appreciated that he might use it to cause really serious harm. Both defendants were intent on violence. There was a case for Jogee to answer on murder. At a minimum, he was party to a violent "adventure" carrying the "plain objective risk of some harm to a person which resulted in death". He was guilty of at least manslaughter.

The court invited written submissions on the question of whether to quash the murder conviction and order a retrial, alternatively, to substitute a manslaughter conviction.

9. Ruddock was convicted at Montego Bay Circuit Court, Jamaica, in January 2010. The appeal was from the Court of Appeal, Jamaica.

A co-defendant, Hudson, pleaded guilty to the murder of a man named Robinson. The prosecution's case was that the murder occurred while the deceased was robbed of his car.

[24] [99]
[25] [100]

Evidence was given by a police officer that Ruddock, when interviewed, admitted that he had tied Robinson's hands and feet. Hudson had then cut the deceased's throat.

Held: the conviction for murder had to be quashed. The case had been left to the jury on the basis that there was a "real ***possibility*** that the other defendant might have a particular intention" (*Chan Wing-Siu*). The prosecution therefore conceded that the appeal had to be allowed. Written submissions were invited as to ultimate disposal of the appeal.

Advice as to Logistical Steps:

- The starting point in relation any potential application for exceptional leave is to revisit and, or, obtain copies of the trial advice and (where applicable) grounds of appeal against conviction. This will, hopefully, crystallise the relevant factual and legal issues in the case.

- In seeking to establish a basis for arguing "substantial injustice", it is crucial to "target" the safety of the conviction. Mere application of the old law will be insufficient. The objective must be to demonstrate that on analysis of the facts, it was wrong, unfair and unjust for the applicant to be held liable for murder. A combination of factual and legal argument is what will be required. There will be cases of "substantial injustice" – each must aim to qualify on an exceptional basis.

- Should it be thought that there are arguable grounds, if feasible, a transcript of the summing up needs to be obtained from the relevant court. Only then will the true merit of the proposed application be capable of assessment and demonstration. Clearly, there are funding issues here, since the transcript will need to be paid for. Obviously, if there are no funds, the application will have to be submitted without reference to the transcript (to be avoided, if possible).

- Note: there is a protocol to be followed where a new legal team advances grounds not identified by the trial team.[26] For obvious reasons, this will be flexibly applied, but please be aware of the need to have in mind correspondence with the previous lawyers – judgement will have to be exercised as to the requirement for this in the given case.

- Remember: any application will necessarily be out of time. Justification will need to be given, though the test for the court (as to extension of time) is the merits of the case.

- In relation to applications for an extension of time where a substantial injustice would otherwise be done, note, of importance: *R v R (Amer)* [2006] EWCA Crim 1974. It was held that the Registrar of Criminal Appeals should refer the case directly to the full court, so that the merits can be considered (with representation as necessary) and a decision made whether or not there has been substantial injustice.[27] It is important to have this case in mind, though, with regard to joint enterprise applications, not all cases (by any means) are likely to be referred.

[26] McCook [2014] EWCA Crim 734
[27] R v R [2006] EWCA Crim 1974 [40]

- All applications need to be accompanied by form NG. This has provision for funding requests. Such requests will have to be substantiated by a note from counsel or solicitors / applicant's letter. Funding will be sparingly granted, but where there is true merit in the "substantial injustice" argument, funding may well be available – again, the merits of the case will dictate whether or not this is granted.

- For applicants, it is best to contact trial solicitors where advice is wanted. If this is not practical, contact other solicitors. Whatever your own thoughts as to possible success, it must be worth alerting solicitors to your interest in appealing- your case might be stronger than you suspect.

- **Finally:** by way of logistical step, feel free to make contact with 25 Bedford Row. We are in a position to give guidance, advice and representation on all relevant aspects, in seeking to establish substantial injustice, and in working to obtain exceptional leave.

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