

Report from Professor William Wilson on recent developments in *R v Jogee*

You have heard a lot from me this year about the case of *Jogee*, in which the Supreme Court decided that the law relating to joint enterprise liability was contrary to principle. There has been a considerable reaction from the professions and the academic world about this case, most of it positive. However now that the dust is settling it may be useful to identify some of the areas where there is still uncertainty about what changes *Jogee* has wrought. A number of commentators have mentioned, for example, that the change may be more apparent than real. Let me explain in connection with joint enterprise liability for murder. Before *Jogee* to be guilty as an accessory to murder the prosecution had to show that the secondary party intended to assist or encourage the principal to commit murder, that is to kill with the intention to kill or cause serious injury. So, in an example given in the case of *Gamble v NCB*, a person who supplies a gun to another who then uses it to commit murder will only be guilty of murder as accessory if they intended, by that act of supply, to assist or encourage the commission of murder. This 'intention' does not require them to desire that this offence be committed. It would be enough for the supplier to know for sure that this is what is intended. This standard basis for liability did not apply in cases of joint enterprise, that is, in cases where, unlike our gun supplier, the parties involved were part of a gang bent on committing an offence. In cases of joint enterprise, for example a burglary, all parties to the joint enterprise were not only guilty of burglary but also any other crime committed by any of them which they contemplated one of their number might commit. It was not necessary for them to intend that offence to be committed. So if A, B and C decide that B and C will commit the burglary and A will dispose of the proceeds and in the course of that burglary C kills V, a householder, with a gun supplied by D and which A and B knew he was carrying A and B will be complicit in the murder simply upon proof that they contemplated that C might kill someone in the course of the burglary with the mens rea for murder. The fact that A and B knew that C was carrying the gun would be strong evidence of this contemplation (*Powell*). D, on the other hand, because he is not part of the joint enterprise would only be guilty of murder if he knew for sure one of the parties would kill with the mens rea for murder. The fact that he knew the gun was to be carried and so contemplated its murderous use would not be enough to incriminate him as an accessory.

The importance of *Jogee* is that it abolishes the rule that as a matter of law, in joint enterprise cases, the basis of liability is contemplation rather than intention. Post *Jogee* the prosecution will only succeed with a conviction for murder of A and B if, in addition to knowing that C had the gun, A and B intended C to use it to kill or cause serious injury or to do so if it became necessary. In other words the fault element in joint enterprise liability is the same as for accessoryship generally. The prosecution have to prove the same fault element for D, A and B.

So what is the concern that the change is more apparent than real? Simply put, *Jogee* changes what used to be a rule of law to a rule of evidence. If A and B contemplate that C may use the gun to kill V and yet carried on with the burglary this does not mean that A and B are guilty of murder as matter of law. However it is evidence from which the jury may infer that A and B intended C to use the gun or intended it if it became necessary. It is very important therefore for trial judges to direct the jury properly to ensure that it understands that it is looking for intention rather than mere contemplation. Otherwise the practical effect of *Jogee* will be marginal. How would such a direction look? In *Woollin* the House of Lords said that a jury, if not sure that D desired the consequence for its own sake, could still infer the requisite intention if it was foreseen as virtually certain. In the case of accessoryship there is however a qualification, namely the case of conditional intention. It is very unlikely that the parties to a joint enterprise will agree all the contingencies in advance but it may well be that it is agreed and understood by them that if worse comes to worse one of their number will use murderous force to effect the plan or to escape. This conditional intention suffices for liability in cases of joint enterprise. It would have been more satisfactory if the Supreme Court had made clear how exactly the jury could infer intention of either sorts from contemplation. Exactly what degree of foresight provides good evidence of intention? D Ormerod and K Laird Criminal Law Review 'Jogee: not the end of a legal saga but the start of one?' 2016 *Crim. L.R. 539

As applied to our burglary case the jury might be given a jury direction something like this if *Woollin* is to be applied, as it should be applied, to cases of joint enterprise: - 'members of the jury for A and B to be guilty of murder as accessories you must be sure that they intended C to kill V or intended C to cause V serious injury or to do so if it became necessary. If you think that they knew C was likely to use the gun in these circumstances and yet carried on regardless then this might mean that they approved this possible outcome and so intended it. But you will have to be sure that this was indeed their intention. Contemplation alone is not enough but obviously the greater level of risk the defendant foresaw the more likely it is that he actually intended it to happen. On the other hand, you have been told that they knew C had the gun but did not approve its potential use. If you think that this may have been the case then you must acquit of murder as accessories unless you feel sure that, whatever they may have desired, they still knew it was virtually certain that V would use the gun in this way if it became necessary. If you are not sure that they had this knowledge or intention but you are sure that they contemplated the possibility that this gun might be put to murderous use then you should bring in a verdict of manslaughter rather than murder. See W Wilson and D Ormerod, "Simply harsh to fairly simple: joint enterprise reform" Crim. L.R. 2015, 1, 3-27.

The second uncertainty concerns those hundreds of defendants who have been convicted of murder under the old law of joint enterprise. Are they all to have their conviction reviewed? The Supreme Court warned that a defendant convicted under the old law could not expect to have their conviction reviewed unless there had

been a 'substantial injustice.' Such an injustice would only have occurred in those cases where on the facts it is likely that the jury would have reached a manslaughter decision or less if they had been directed properly. In many, perhaps the majority, of cases it will have convicted even under the new rules for the reasons explained above. "The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in Chan Wing-Siu and in Powell and English. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken..." (paragraph 100).

Nevertheless we can expect the Criminal Cases Review Commission to refer convictions to the Court of Appeal in many such cases over the next few years. So a lot more work for our beleaguered judges is in prospect!

I am leaving the best till last. Instead of quashing Jogee's conviction the Supreme Court, as they were bound to given the seriousness of the case and the undeniable participation of Jogee in the attack which resulted in the killing, ordered a retrial. That retrial occurred last week at Nottingham Crown Court. The case for the prosecution was that the principal, Mohammed Hirsi had fatally stabbed a police officer after an altercation and Jogee had encouraged the attack by 'egging him on'. The jury found Jogee not guilty of murder but guilty of manslaughter. As the trial judge explained, this meant that the jury found that Jogee did not intend Hirsi to kill or cause serious injury to the police officer but did intend him to launch the attack and cause him some injury, albeit not serious injury. His life term was replaced by a sentence of 12 years. This verdict and the reasons for it is likely to set the basic template for cases such as this when, as violent arguments involving multiple parties are wont to, the argument escalates into murderous violence.