Joint Enterprise – A new Development?

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A lot has been written about joint enterprise recently, particularly in the context of murder. You may remember the ground-breaking case of Jogee (Study Guide 15.3.5). In this case the Supreme Court decided that to be guilty of murder as a secondary party it was necessary to show not merely that the secondary party contemplated that the principal might commit murder but that he intended the principal to do so, or to do so if the occasion arose. If the prosecution were unable to show such intention but could only show that the secondary party contemplated that the principal might commit murder the correct verdict for the jury would be not murder but manslaughter.

This latter feature of Jogee came up for consideration in the recent case of Tas. In this case the appellant was party to a joint enterprise to attack V. Unknown to him his co-defendant was carrying a knife, which, in the course of the attack, he used to kill V. The key feature in this case was that the appellant did not know of the knife. If he had known of it, and contemplated its use, Jogee tells us that he would be guilty of manslaughter at the very least and of murder if the jury inferred that, by engaging in the attack with this knowledge, he actually intended it to be used if the occasion arose.

The defence came up with the following argument. Since the appellant did not know of the knife the nature of the co-defendant's attack was so far removed from that contemplated that it constituted an 'overwhelming supervening event'. In other words a novus actus interveniens. This was an argument which had been successful in Rafferty (Study Guide 4.4.1). Rafferty was a party to a joint enterprise to beat V. After landing a few kicks and punches on V Rafferty withdrew from the attack and left the scene. His co-attackers eventually dragged V to the sea and there drowned him. The Court of Appeal approved the trial judge's direction to the effect that 'the drowning was so completely different from the injuries for which Rafferty was responsible that it overwhelmed those injuries and destroyed any causal connection between them and the death of V.'

So the question for the Court in Tas was whether, like Rafferty, the use of the unknown knife was an overwhelming supervening act. Its conclusion was that it was not and that the trial judge was right not to leave the issue of causation to the jury. In making its decision the court described an overwhelming supervening act as 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.'

No further guidance was given as to what constitutes an overwhelming supervening act and why the use of an unknown knife was not such an act. Would it have been such an act if the co-defendant had taken out a gun and blown V's head off for example? If so, what is the difference?

It is noteworthy that The Court of Appeal in Wallace, considered in the pre examination update, held that it was a question for the jury as to whether the victim's decision to undergo voluntary euthanasia following a catastrophic acid attack by the accused broke the chain of causation between the attack and the death. It was wrong for the judge to withhold this question from them. The key question, the Court ruled, was whether the acid attack was a significant and substantial cause of death. If such an approach had been adopted in Tas it is hard to see how a jury could have convicted for manslaughter.