**Accessories and Joint Enterprise: *R v Jogee* (Appellant) Supreme Court decision**

**Commentary**

**by**

**Berenice Mulvanny, Criminal Law barrister at 3PB**

5 April 2016

A long awaited judgment from the Supreme Court in ***R v Jogee (Appellant) Supreme Court 2016 UKSC 8*** has cleared away 30 years of complex case law over the meaning and application of joint enterprise. The decision has provoked widespread interest and media coverage. In conjoined appeals, the Supreme Court and the Privy Council fundamentally restated the principles concerning the liability of secondary parties.

From an analysis of the 37-page unanimous judgment authored by Lords Hughes and Toulson, the principles concerning the liability of secondary parties are:

*It was an error equating foresight with intent to assist, rather than treating the first as only evidence of the second. The correct rule is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage, which is the proper mental element for establishing secondary liability. It is a question for the Jury in every case whether the intention to assist or encourage is shown. This brings the mental element of the secondary party back into broad parity with what is required of the principal.*

It has always been the case that persons who are together responsible for a crime are all guilty of it, whether they themselves 'forged the document, fired the gun or stabbed the victim'. Sometimes it is not possible to determine exactly whose hand performed the vital, and often in these cases, fatal act. This does not matter providing that the Jury is sure that each defendant either did it himself or intentionally assisted or encouraged the principle to do it. The judgment in ***Jogee*** does not change this basic and long established rule.

The appellant Ameen Jogee was convicted at Nottingham Crown Court of the murder of Paul Fyfe. Mr Fyfe was the boyfriend of Naomi Reid and was stabbed to death in the hallway of her home in the early hours of 10 June 2011 by the appellant's co-defendant, Mohammed Hirsi. Hirsi was also convicted of murder. Jogee was outside of the address with a bottle shouting to Hirsi to do something to Fyfe and at one stage came to the door and threatened to smash the bottle over Fyfe's head. The fatal stabbing was done by Hirsi with a knife taken from the kitchen.

The Jury was directed that the appellant was guilty of murder if he took part in the attack on Mr Fyfe and realised that it was possible that Hirsi might use the knife with intent to cause serious harm (i.e. murderous intent).

The Supreme Court found that, as a matter of principle, the error had occurred when allowing foresight of the offence committed by a principle to be sufficient mens rea in itself for the liability of the accessory for that offence. Under what was known as parasitic accessory liability (PAL), knowing an offence was going to occur or realising that it was possible was enough to establish mens rea for an accessory. Thankfully the PAL approach is now no longer to be applied. The accessory's liability for offences committed by a principal is to be based on ordinary principles of secondary liability.

The Judgment also commented on the question of the accessory's knowledge or otherwise of a weapon being carried by the principal; a scenario often found in the criminal courts. The accessory must have knowledge of any 'existing facts necessary' for the principal's conduct or intended conduct to be criminal. The accessory's knowledge or ignorance that the principal is carrying a weapon can be evidence going as to his intention, which may be irresistible evidence one way or the other. However, the focus must be on the intention of the accessory and not the knowledge of weapons.

So far so good. However, the court was concerned with a narrower issue concerning secondary parties who have been acting with one or more others in a criminal venture to commit crime A, but in doing so the principal commits a second crime, crime B. In many of the reported cases crime B is murder committed in the course of some other violent criminal venture. The question is: what is the mental element which the law requires of the secondary party?

Remembering that the mental element for secondary liability is intention to assist or encourage the crime, where this encouragement or assistance is given to a specific crime or to a range of crimes, one of which is committed, mens rea will be established. Similarly it will matter not whether the encouragement or assistance involves a prior agreement between the parties, or takes the form of spontaneously joining in a criminal enterprise-either can establish mens rea.

In most cases it will be common sense to enquire whether the principal and secondary party shared a common criminal purpose, for often this will demonstrate the secondary party's intention to assist.

Accordingly, if the Jury are satisfied that there was an agreed common purpose to commit crime A, and if it is also satisfied that the accessory must have foreseen that, in the course of committing crime A, the principal might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that the accessory had the necessary conditional intent that crime B should be committed. In other words that the crime actually committed was within the scope of the more general plan to which the accessory gave his assent and intentional support. This will be a question of fact for the Jury in all the circumstances.

In cases where there is no agreement in advance, intention can still be inferred. Where the accessory 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 the principal acts with intent to cause serious bodily injury and death results, the principal and accessory will each be guilty of murder. There should be no issue of whether the principal's crime was fundamentally different from what the accessory intended or foresaw. Where the principal commits the offence in a manner different to that which the accessory intended, then only where that amounts to:

"Some overwhelming supervening act by the principal which nobody in the accessory's shoes could have contemplated might happen and is of such a character as to regulate his acts to history [Will the accessory not be liable for it]".

An example is perhaps where the principal deliberately changed the intended victim of the offence. Remembering, of course, that where, on the basis of lack of intent, the accessory is not liable for the offence actually committed by the principle, that does not mean that the accessory will escape liability altogether. In the context of murder he will be liable for manslaughter. A person who joins in a crime which any reasonable person would realise involves a risk of harm, and death results, is guilty at least of manslaughter.

In ***Jogee*** it was argued on his behalf that he ought not to have been convicted of either murder or manslaughter and that his conviction should simply be quashed. However it could be said that on the evidence and the Jury's verdict he was unquestionably guilty at least of manslaughter, and there was evidence on which the Jury could have found him guilty of murder if a proper direction had been given. The court will ask for written submissions from both parties whether there should be a re-trial for murder or whether the conviction for murder should be replaced by a conviction for manslaughter.

The media would have us believe there is about to be an onslaught of successful appeals for all of those wrongfully convicted under the old approach of parasitic accessory liability. Although it is clear that a change in the common law such as this raises the possibility of appeals out of time from those convicted under the erroneous approach, this does not mean that the Court of Appeal will necessarily be overturning convictions. As the court notes:

"*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".*

Nor does it necessarily mean that the Court of Appeal will have to deal with hundreds of appeals. As we all know the Court of Appeal is not bound to grant leave out of time simply because the law applied has now been declared to have been mistaken. The House of Lords reversed the definition of recklessness after 25 years (***G [2003] UKHL 50***) and the flood gates did not open and the world did not come to an end.

**About the author**

Berenice Mulvanny is a criminal law barrister (Call: 2009) who advises on the full range of criminal work from sexual offences, violence and drugs to dishonesty offences and fraud. She appears predominantly in the Crown Courts the Western Circuit, Thames Valley and London. She also regularly appears in the Immigration tribunal covering all areas of immigration and asylum law and has also appeared in a number of Courts Martials.

To read her full profile please see: http://www.3pb.co.uk/profile/Berenice-Mulvanny/group/crime