A WRONG TURN

R v JOGEE and RUDDOCK[1]

JOINT ENTERPRISE AND THE LIABLLITY OF SECONDARY PARTIES

A WRONG TURN

It is not often that the highest court in the land pronounces that it got the law wrong but that was the recognition made last week by the Supreme Court when handing down its judgment in the appeals of Jogee and Ruddock. The submission on behalf of the Respondents that if a wrong turn had been made, then as we had all lived with it for so long it should be left to Parliament to put it right ,was roundly dismissed.

And what is the wrong?

It is a wrong that has meant that for over thirty years judges, lawyers and juries alike, both here and in other common law jurisdictions, have been saddled with a legal principle that placed individuals in peril of being convicted of a crime (as many must have been) not because they intended to commit it but because they merely foresaw that it might possibly be committed by someone else with whom they were engaged in a criminal joint enterprise.

This wrong turn resulted in a secondary party being convicted of murder when his state of mind was less culpable than the killer's. Whereas the person causing death had to intend to kill or cause really serious injury, the secondary party was equally guilty, not because he shared that common purpose with the killer, but merely because he foresaw that death or really serious injury might possibly occur.

How has it happened? How has the wrong been righted? Where to now for those convicted where directions of law were wrong?

THE GOOD LAW

The established law of being an accessory required a "conduct" element and a "mental" element for parasitic accessory liability to be proved. The requisite "conduct" was that the defendant must have encouraged or assisted the crime committed by the principal. As for the "mental" element, the requirement was that when encouraging or assisting, the defendant must have intended to encourage and assist ***the commission of the crime committed by the principal***.

Importantly, this called for proof of knowledge on the accessory's part of those facts necessary for the conduct to amount to a crime. The mental element may not necessarily be specific to a particular offence. Thus, it may be to encourage or assist a range of offences like an act of terrorism which might take various forms. As long

[1] (2016)UKSC 8 and (2016) UKSC 7

as D1 commits an offence within one of the forms that D2 intended to encourage or assist then the latter is equally guilty.

Therefore, applying this established approach, to be an accessory to murder, D2 must have intended to encourage and assist D1 to kill with the necessary intent. Presence at the scene with D1 and or association with him ***may*** be very relevant to the issue of whether D2 was in fact assisting or encouraging but they are not necessarily of themselves proof that he was. It all depends on the facts. If the intent was proved, it was not necessary to go on to prove that the conduct did in fact have any positive effect on D1 or the outcome. If the defendants were strangers and D2 saw that D1 was armed but did not know that D1 was profoundly deaf it is no defence for D2 to say "Yes, you may have proved I encouraged him by shouting "Hit him" because I wanted him to be seriously injured but he could not hear me".

This well-established and sound principle of law can be traced back to the mid- 17th century.

As this author is proud to point out, it was a former resident of 25 Bedford Row, Baron Garrow who re-affirmed the principle in 1831 in **R v Collison**. He said that if two men went out at night to steal apples, as they had in that case, and one of them when challenged by the landowner killed him with a bludgeon that he had been carrying, then his partner in the crime of theft could not be guilty of murder if the killer acted on impulse without proof that his partner was in concert with him in the killing. Baron Garrow was endorsing and emphasising the importance of proving a common purpose.

Over a century later the principle was alive and well. Even if two defendants went out armed, both intending to use weapons to overcome resistance or avoid arrest, they may not share a joint intention or common purpose to kill or inflict serious injury. If the principal with that intent used his weapon and killed he would be guilty of murder but if the other took part in an unlawful attack but without that same intent then he would only be guilty of manslaughter. **R v Smith (Wesley) 1963 1 WLR 1200**.

So, by reference to well-established principles developed by case law over the centuries, the routes to conviction for someone acting as an accessory were readily identifiable.

THE ERROR SETS IN

Then, in 1985 the Privy Council decided the case of ***Chang Win-Sui v The Queen (1985) 1 AC*** later developed by the House of Lords in **R v Powell** and **R v English (1999) 1 AC 1** and all went wrong.

A criminal joint enterprise would now result in a conviction of the secondary party even if the parties engaged in the joint criminal enterprise did not share a common purpose or joint intention to commit the crime in question.

If two people set out to commit a crime (crime A) and in the course of that joint enterprise one of them (D1) committed a different crime (crime B) the second person (D2) was guilty as an accessory to crime B ***if he had foreseen the possibility that D1 might act as he in fact did***. Such foresight on D2's part as he continued in the enterprise to commit crime A was enough to bring him within the scope of criminal liability for crime B ***whether he intended crime B to be committed or not***.

This new principle, and it was new, became known in some circles as "parasitic accessory liability". Others over the years who have seen it give rise to injustice have been less neutral in their description.

Sir Robin Cooke delivering the judgment of the Board in **Chang** said that in the typical case of acting as an accessory the same or the same type of offence is actually intended by all the parties acting in concert. So far so good.

However, he went on to say "***The case*** (for the Crown) ***must depend rather on the wider principle whereby a secondary party is criminally liable for the acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is in no doubt. It turns on contemplation or, putting the same idea in other words, authorisation which may be express but is more usually implied. It meets the case of a crime possibly foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight***.

Sir Robin Cooke had something to say about public policy too.
"***What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potential murderous weapons are to be carried and in the event they are used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment only too likely to have been optimistic."***

Eleven years later in **R v Powell** and **R v English** the above principles were developed. Lord Hutton referred to "a strong line of authority" that participation in a joint criminal enterprise ***with foresight or contemplation*** of an act ***as a possible*** incident of that enterprise, is sufficient to impose criminal liability for that act carried out by another participant in the enterprise.

So there it was. A principle whose existence was said to be "in no doubt" and bolstered by "a strong line of authority" was said to support what in truth was a new approach.

EXPOSING THE ERROR

As the President observed in the recent appeals, there was no doubt that Chang Win-Sui laid down a ***new*** principle relying on four cases cited in argument. However, one of those cases was in a different context, another did not address the question of what is necessary to establish joint liability, and specifically whether what is

required was an intention to assist or mere foresight of what D1 may do, and the other two adopted an entirely orthodox approach to the law on the facts.

As for the House of Lords in **Powell** and **English** the court had placed much reliance on what had been said by the trial judge in the summing-up to the jury in **Wesley-Smith.** However, the unlawful killing to which it was said the defendant had been party in that case was manslaughter and not murder. The question in that case was whether having been acquitted of murder the defendant could be convicted of manslaughter. Lord Hutton cited part of the judgment in **Wesley-Smith** but not the critical part which emphasised that one can only be guilty of murder if killing or inflicting grievous bodily harm was intended. **Wesley-Smith** was authority for the proposition of law that if the only intention of the defendant was to unlawfully harm then he could not guilty of murder but would be guilty of manslaughter.

The Court of Appeal in **Powell** and **English** had praised the summing-up in that case as a correct statement of the law. In fact, far from supporting the principle in **Chang Win-Sui** as contended, **Wesley-Smith** was an authority that went entirely the other way.

Furthermore, there were other authorities that did not support the new principle. One of them (**<u>Reid</u>**) was in fact cited in argument in **Powell** and **English** but did not get a mention in the court's judgments even though that case was a reserved judgment given by a strong Court of Appeal and which made it clear that a secondary party to murder could not be convicted of murder unless he had the requisite murderous intent.

Added to the above, was the failure in the **Chang Win-Sui** and **Powell** and **English** cases to give any consideration to the fundamental policy question whether, and if so why, it was necessary and appropriate to reclassify as murder conduct that in law had previously amounted to manslaughter. Such discussions would have involved, among other things, questions about fair labelling and fair discrimination in sentencing. There was no apparent evidence, said the Supreme Court, that prior to **Chang Win-Sui** the law had failed to provide the public with adequate protection.

In **Powell** and **English** the court emphasised that the criminal law system exists to control crime and that a prime function of that system must be to deal justly with those who join in with others in criminal enterprises. While recognising that foresight and intention were not synonymous and that at first sight there was substance in the argument that it was anomalous that a lesser form of culpability was required in the case of a secondary party involved in a criminal enterprise, it was, said the court, justified by practical and policy considerations.

So apart from the fact that **Chang Win-Sui** had been decided and followed at the highest level, there was nothing to commend it. The Supreme Court concluded that the decision was reached on an incomplete and, in some respects erroneous reading of the previous case law, coupled with generalised and questionable policy arguments.

THE GOOD LAW RETURNS

The old common law is now reaffirmed and we can return to the sound legal principles which, but for an inglorious period when it was abandoned, has served both justice and the public interest for well over three hundred years.

Foresight of what might happen is no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule.

The wrong turn had resulted erroneously in an over-extension of the law of murder and a reduction of the law of manslaughter.

EXPOSING AN IRONY

As the Supreme Court was to identify, while the common law was steering a determined but erroneous course, Parliament had already passed legislation relevant to inchoate crimes by providing that foresight did not provide sufficient mens rea for a secondary party to be found guilty of the full offence at common law.

Inchoate criminal liability was legislated for in the Serious Crime Act 2007. Section 44 provides that an offence is committed by a person who (i) does an act capable of encouraging or assisting the commission of an offence and (ii) he intends to encourage or assist its commission. However, he is not to be taken to have intended to encourage or assist the commission of an offence "….***merely because such encouragement or assistance was a foreseeable consequence of his act.***"

So Parliament had made it clear that foresight was not sufficient for proving the offence of encouraging or assisting another to commit crime, whereas under the **Chang Win-Sui** principle, if that other person went on to commit the full offence, such foresight was enough to render the secondary party guilty of the full offence at common law.

AVOIDING FUTURE WRONG TURNS –THE CORRECT APPROACH

The Supreme Court has helpfully identified the correct approach in future cases:-

1. Was the defendant in fact a participant? Did he assist or encourage the commission of the crime? It may take many forms and may include providing support by contributing to the force of numbers in a hostile confrontation.

2. Did the defendant intend to encourage or assist the principal with whatever mental element the offence requires of the principal?

3. If the crime requires a particular intent then the secondary party must intend to encourage or assist with the same intent.

4. Thus, if the defendant encourages the principal to take another's bicycle without the owner's permission and return it after use but the principal keeps it, the latter will be guilty of theft but as the secondary party did not intend to permanently deprive the owner of his bike he will be guilty of the lesser offence of unauthorised taking.

5. In the case of concerted physical attack where there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least, and D2 having the intention himself that such harm be caused, then to follow the **Wesley-Smith** and **Reid** approach will be safe. The Crown must prove that D2 intended that the victim should suffer grievous bodily harm at least.

6. If the encouragement or assistance is given some time before the crime is committed and at a time when it is not clear to D2 what D1 may or may not decide to do, then a jury must be directed that it must be proved that D2 intended to encourage or assist D1 with the requisite criminal intent.

7. Such a direction would, for example, fit the case where D2 supplies D1 with a weapon where D1 has no lawful reason for possessing it, intending to help D1 by giving him the means to commit a crime or one of a range of crimes but having no further interest in what D1 does or whether he in fact uses the weapon at all.

8. In such a case it will be important when directing a jury to remind them of the difference between intention and desire.

9. In the case of a prior joint criminal venture it may be necessary to direct a jury that the secondary party's intention to assist and indeed his intention that the crime should be committed, may be conditional. A group of young men which faces down a rival group may hope that the rivals will slink quietly away but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

10. In deciding whether D2 shared a common purpose or common intent with D1 (the two are the same) it would be appropriate to adopt the time-honoured direction that the jury must be sure that D1's act was within the scope of the joint venture, that is, to be sure that D2 expressly or tacitly agreed to a plan which included D1 going as far a he did and committing Crime B if the occasion arose.

11. It is not necessary, particularly in a case of a spontaneous outbreak of multi-handed violence, for the jury to be sure that there was some form of express or tacit agreement. What has to be proved is not the existence of an agreement between the defendants but that if D2 joins in he appreciated that the group is out to cause serious injury. From this fact, if proved, a jury may infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that it should happen if necessary.

12. If D2 is party to a violent attack on another without an intent to assist or encourage causing death or really serious harm but the violence escalates resulting in death, D2 will be not guilty of murder but guilty of manslaughter.

13. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another and death in fact results. The test is objective.

14. However, it is possible for death to be caused by some overwhelming supervening event by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.

15. What matters is whether D2 encouraged or assisted the crime with the requisite intent. He does not have to encourage or assist a particular way of committing it, although he may sometimes do so.

16. The previous focus on what D2 knew about the weapon D1 was carrying should give way to an examination of whether D2 intended to assist in the crime charged.

17. Knowledge or ignorance that weapons generally or a particular weapon is carried by D1 will be evidence going to what the intention of D2 was and may be irresistible evidence one way or the other; but it is evidence and no more.

18. Where the offence does not require mens rea, the only mens rea required of the secondary party is that he intended to encourage or assist the perpetrator to do the prohibited act with knowledge of any facts and circumstances for it to be a prohibited act.

REMEDYING EXISTING WRONGS - APPEALS

The Supreme Court made it clear that putting the law right is not to render all convictions, which were arrived at over many years by a faithful application of the wrong principles, invalid. The error identified does not necessarily mean that it was important on the facts to the outcome of the trial or to the safety of the conviction.

Furthermore, where a conviction has been arrived at by faithfully applying the law as it stood at the time it can only be set aside by seeking exceptional leave to appeal out of time to the Court of Appeal. If substantial injustice can be demonstrated, leave may be granted but it will not be simply because the law applied has now been declared to have been wrong. This also applies to those cases where, if the true position in law had been appreciated, the defendant could have been charged with a different offence.

The Court of Appeal has been sensitive to the alarming consequences that might flow from permitting the general re-opening of old cases on the ground that a decision of a court had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal was based. (**Ramsden (1972) Crim LR 547**).

There has been recent widespread publicity given to the likelihood that the appeal floodgates will now open; the reality is that the Supreme Court by emphasising Ramsden and subsequent similar cases has already sought to raise the barriers.

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