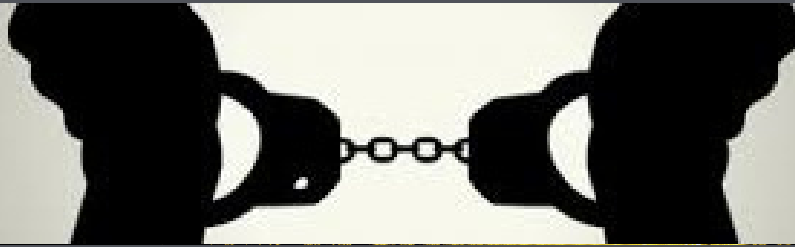


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THE LAW ON COMPLICITY AND HOW *JOGEE* WORKS



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JOINT ENTERPRISE BEFORE *JOGEE*

- Umbrella term that covered three distinct situations
 - **Joint perpetration** [D1 and D2 as joint principal offenders]
 - **Accessory Liability** [D2 as accessory who intentionally assists or encourages the principal offender D1's crime]
 - **Parasitic Accessory Liability (PAL)** (D1 and D2 participate in a joint unlawful venture to commit crime A; D2 foresees, but does not necessarily intend, that D1 might go further and commit a further crime B on the occasion; D2 fully liable for crime B on the basis of his foresight of crime B).

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JOINT ENTERPRISE AFTER *JOGEE*

- Covers two distinct situations:
 - **Joint perpetration** [D1 and D2 as joint principal offenders]
 - **Accessorial Liability** [D2 as accessory who intentionally assists or encourages the principal offender D1's crime]
- [T]he expression "**joint enterprise**" is not a legal term of art... . [I]t unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more." (UKSC in *Jogee* at [77])

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ACCESSORIAL LIABILITY AFTER *JOGEE*

- 'The requisite **conduct element** is that D2 has encouraged or assisted the commission of the offence by D1' (*Jogee* at [8]).
- '**[A]ssociation and presence** are likely to be very relevant evidence on the question of whether assistance or encouragement was provided' (at [11])
- '[T]he **mental element** in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal' (*Jogee* at [9]).
- 'If the crime requires a particular intent, D2 must **intend to assist or encourage** D1 to act with such intent' (*Jogee* at [10]).
- 'There can be no doubt that if D2 continues to participate in crime A with **foresight** that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it **is evidence of such intent (...), not conclusive of it**' (*Jogee* at [66]).

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ASSOCIATION AND PRESENCE

- *R v N* [2019] EWCA Crim 2280
- '(i) mere presence was not enough; (ii) mere presence together with knowledge that others were planning an attack was also *not* enough; but (iii), that **presence plus knowledge of what others intended to do coupled to an intention to assist in an appropriate way** [ie to either lend moral support or contribute to the force of numbers] in the attacks to be perpetrated by those *could* suffice to found **joint enterprise**' (at [14]).

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FORESIGHT AND (CONDITIONAL) INTENT

- ‘There can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such **intent (or, if one likes, of “authorisation”)**, not conclusive of it.’ (*Jogee* at [66])
- If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary **conditional intent** that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support.’ (*Jogee* at [94]),

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FUNDAMENTAL DIFFERENCE RULE

- *R v English* [1999] 1 AC 1; *R v Rahman* [2008] UKHL 45
- If D2 realises (without agreeing to such conduct being used) that D1 may kill or intentionally inflict serious injury, but nevertheless continues to participate with D1 in the venture, that will amount to a sufficient mental element for D2 to be guilty of murder if D1, with the requisite intent, kills in the course of the venture ***unless (i) D1 suddenly produces and uses a weapon of which D2 knows nothing and which is more lethal than any weapon which D2 contemplates that D1 or any other participant may be carrying and (ii) for that reason D1’s act is to be regarded as fundamentally different from anything foreseen by D2.*** (*Rahman* at [68])

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OVERWHELMING SUPERVENING ACTS

- '[T]here may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.' (*Jogee* at [12])
- '[T]he effect of the overwhelming supervening event is that any assistance is spent.' (*Jogee* at [64])
- '[I]t is possible for death to be caused by some overwhelming supervening act 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.' (*Jogee* at [97])
- This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *English*. ' (at [98])

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OVERWHELMING SUPERVENING ACTS

- *R v Tas* [2018] EWCA Crim 2603
 - Lack of knowledge of weapons does not constitute supervening act
 - Distinguishes overwhelming supervening acts from 'mere escalation'
 - Fact-specific issue:
 - Sir Brian Leveson P (at [41]): "[W]hether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency."
- Approach confirmed in *R v Harper* [2019] EWCA Crim 343

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