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JOGEE – HOW OSA WORKS

By Felicity Gerry QC and Dr Beatrice Krebs – March 2021

On the 28th of January 2021, we delivered a webinar on the law on complicity and how the UK Supreme Court decision in *R v Jogee* [2016] UKSC 8 works. Famously, the court recognized that lowering *mens rea* to foresight in crime A/Crime B type cases was an error of law, and their Lordships expunged parasitic accessorial liability, restoring the *mens rea* of intention to assist or encourage for liability of those complicit in another's crime. Infamously, their Lordships set the bar high for those affected by that three decade error of law, but our webinar considered the effect of their Lordships decision on trials post *Jogee* and in particular, the operation of the preserved principle of 'overwhelming supervening act'.

In November 2020 at Preston Crown Court, Felicity successfully defended a driver who was acquitted of both murder and manslaughter. The prosecution case was that there was a shared intention for an attack. The defence case was that there was a drop off for a drug deal, and the subsequent stabbing was an unknown consequence, not contemplated by the driver and certainly unintended. It is thought to be the first trial where the jury were directed on the principle of an overwhelming supervening act (OSA). Since then, Felicity has defended a trial where a group planned a robbery, the principal offender took a knife to the scene and killed the householder. The prosecution put their case on the basis of a conspiracy to rob and a shared intention to attack. The trial judge left two routes to verdict based on a conditional intentional agreement or shared intention. The matter is the subject of an appeal on issues which include the use of inferences to infer knowledge and what it means to be 'more than merely present' for those accused of involvement who were not in fact present at a stabbing. It seems that the complexities of complicity law remain. This article seeks to explain why the overwhelming

supervening act principle is a useful tool to enable judges to filter out cases where the allegations are too remote, and why this should be raised more often in criminal trials.[1]

The decision in *Jogee* to put an end to parasitic accessorial liability (PAL) should not have made it easier to convict accomplices, but it is concerning if it has indeed taken four years for OSA to be applied. The proper application of *Jogee* not only allows for clear directions on knowledge and OSA and mixed verdicts but also allows judges to sort out the correct approach at half time.

The prosecution case

The phrase "joint enterprise" should generally now be avoided. Precision in the alleged mode of complicity ought to be key: *Jogee* was highly critical of the expression 'joint enterprise liability', with the UKSC emphasizing it was not a legal term of art and had a propensity to be misunderstood 'to be a form of guilt by association or of guilt by simple presence without more'.[2] Yet it does still appear in a prosecutor's lexicon. Putting a case on the basis that accused persons were 'obviously in it together' is also improper. It is a narrative not applicable since the abolition of constructive liability for murder in 1967. The modern law looks for subjectivity. In the context of liability as an accessory, their Lordships in *Jogee* were very clear that the prosecution must prove knowledge of the 'essential facts' *and* acts which demonstrate an intention to assist or encourage that crime. In murder this means the word intention may arise three times but not in exactly the same context – intentional (in the sense of deliberate) conduct, an intention to assist or encourage a known crime and, in murder, that is a crime where a principal intends to kill or cause really serious harm. Post *Jogee*, it remains possible to put a case on the basis that the accused acted as joint principal offenders, although (with the exception of *Murder on the Orient Express*) that can be hard to prove. In *Regina v Dean Malcolm Lewis, James Marshall-Gunn* [2017] EWCA Crim 1734 this led to a successful submission of no case to answer and a failed appeal against that terminating ruling. Without doubt, it remains permissible post-*Jogee* to put cases on the basis of a shared intention, but such an approach requires precision: individuals who act pursuant to a shared intention (that the crime be committed) can still take on different roles, and the prosecution ought to make it

[1] Note – a version of this article is to be published in Counsel Magazine.

[2] Jogee at [77].

clear, whenever possible, whether it is alleged that an individual acted with a shared intention to commit the crime or acted with a shared intention to assist or encourage others to commit the crime (*R v CN* [2020] EWCA Crim 1028). Post *Jogee* 'shared intention' appears to be the liability of choice for prosecutors who, instead of seeking a crime A / crime B scenario, seek to prove that everyone was 'in it together' and the purpose was violence. In drug deals, robberies and burglaries 'gone wrong' this is often unhelpful. An imprecise approach has repercussions for the prosecution. It means that CPS statistics will be skewed, as charges for murder that should not have been pursued for some accused persons are being recorded as 'failures'. It is a worrying background to what will no doubt later be claimed to be a 'problem' with the criminal justice system. Meanwhile approaching every case as a 'shared intention' case risks the liberty of those wrongly accused of murder, particularly in cases where juries are invited to draw inferences from scant evidence. The real issue is often knowledge, as an individual cannot intend to assist or encourage an offence they do not know about. To even form the intention to assist or encourage one needs to know about the principal offence. Knowledge is either an element of complicity which the prosecution must prove, or knowledge of the essential facts is essential to proof of intention. Either way it is key and must be left to the jury. In cases where the perpetrator remains unknown, this means s/he must have been one of the group. In *Bassett (Jordan)* [2020] EWCA Crim 1376 it was acknowledged that proof must be of sufficient strength to rebut other possibilities, such as panic, and, if not, there is no case to answer. In *Johnson* [2016] EWCA Crim 1613, despite the rather harsh interpretation of the substantial injustice test and the high hurdle it imposes on anyone who would wish to challenge their PAL conviction, the Court of Appeal at least re-emphasised the need for prosecutors to be precise. It is no longer acceptable to take a 'wait and see' approach.

Understanding Foresight

In *Jogee,* their Lordships restored foresight to its proper role as possible evidence of intention. It is the use of foresight or contemplation that may have caused more recent confusion, as Leveson LJ recently sought to explain in *Tas* [2018] EWCA Crim 2603. It is no longer acceptable to leave a case to a jury on the basis that there was a common purpose to assault or rob (crime A) and it was foreseen that a co-defendant would use a knife / cause really serious harm or death (crime B). This would be to restore parasitic accessorial liability expunged by the UK Supreme Court in *Jogee.* For liability to follow, an alleged accessory must *know* the

essential facts of the crime to come, it is not enough that he 'must have known'.[3] Their Lordships in *Jogee* also specifically preserved the principle of overwhelming supervening act (OSA) as a break in the causative link and /or a question of remoteness. It 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*.[4] Causation is not normally needed to establish liability as an accessory (save in cases of procuring), and perhaps it is best to think about OSA as a remoteness principle. As a test for remoteness, it gives power to judges to stop cases at half time, where, because of the superseding act it would no longer be appropriate to attribute the fatal outcome to the defendant.

In cases where someone is not a direct participant or somehow 'on the periphery', the likely issues are (a) knowledge or (b) that the further events were a surprise as opposed to a reasonable escalation. In those cases that get past half time OSA is a serious consideration to be left to the jury. The language of putting oneself in the shoes of the accused and considering whether his / her acts are made so insignificant by a subsequent act or event as to relegate these to history is the UK Supreme Court's best effort to frame a test for overwhelming supervening acts in ordinary language for trial judges to use in directing juries. For example, OSA may well be key issue in a stabbing where only one person uses a weapon and the events take place outside a car or a property and the alleged accessory is not in fact present. This is not to take the trial in Preston as a precedent but merely to highlight the importance of the trial judge's decision to factor into his 'route to verdict' both knowledge and OSA. In *Tas*, the Court of Appeal decided convictions were safe in a 'shared intention' manslaughter when OSA was not left, but in the Preston matter OSA was relevant to a potential drug deal 'gone wrong'. This is a practical example of how their Lordships in *Jogee* put a brake on expansive liability as a matter of law and how judges can make decisions about which cases to leave to a jury. After expunging parasitic accessorial liability, the UK Supreme Court gave trial judges the power to control which cases are left to the jury and how juries can safely consider evidence through the framework of conduct, knowledge, intention in relation to the alleged crime, and the additional step of considering, the aforementioned notwithstanding, whether the actual events on the day may constitute an OSA. Sometimes there is sufficient proof and sometimes there is not, it behoves prosecutors not to overcharge and defence counsel to challenge routine use of 'shared

[3] See also *National Coal Board v Gamble* [1959] 1 QB 11 and *Johnson v Youden [1950]* 1 KB 544.

[4] *Jogee* [2016] UKSC 8, [2017] AC 387 at [97-98].

intention' as a basis for liability. For defence representatives, it is worth keeping the following in mind:

a. Is there evidence that takes the events beyond crime A or does the principal offender's conduct amount to an overwhelming supervening act?
b. Can it be said that a defendant is 'more than merely' present or has 'more than merely' associated? There is a very tired example used to explain to juries that a 'lookout' may be complicit. What it does not do is consider the connection of the alleged lookout to the crime – did s/he truly move to a point where looking out in fact assisted? Cases can be particularly badly put where prosecutions lack precision on roles, including with alternative narratives based on one interpretation of text messages.
c. Is the evidence of sufficient strength to exclude the realistic possibility that the defendant was not an accessory to an attack (*Bassett* [2020] EWCA Crim 1376)?
d. Is the evidence consistent with unexpected conduct by the principal rather than pre-planned complicity?
e. Was the defendant present but not participating at all, or alternatively, was he complicit (but not a conspirator) in another crime – in particular what evidence amounts to complicity in crime A or the further allegation of manslaughter or murder? Their Lordships in *Jogee* made it plain that accessorial liability only flows for the specific alleged crime.
f. When should particulars be requested, and how should directions be framed so as not to drive juries to an unsafe conclusion and thus create as many problems post-*Jogee* as it was supposed to solve?
g. Their Lordships made efforts in *Jogee* to confine expansive liability. Does the case incorrectly allow for an objective 'must have known/ contemplated' basis?
h. Has the prosecution incorrectly characterised the background circumstances using tropes in order to draw improper inferences with no safe foundation?

This list is not exhaustive but sets out some issues which ought to be raised and ought to cause the prosecution to be properly and helpfully precise and give the trial judge a window to consider 'no case to answer'.