

KILLING THE PARASITE

R v Jogee [2016] UKSC 8; *Ruddock v The Queen* [2016] UKPC 7

18 February 2016

(Lord Neuberger (President), Lady Hale (Deputy President), Lord Hughes, Lord Toulson, Lord Thomas)

2016 has been a good year for the criminal law in the Supreme Court. In *Taylor*¹ and now *Jogee; Ruddock* the Supreme Court has made genuine and relevant fault on the part of the defendant central to the question of his/her guilt.

In *Jogee* the Supreme Court tackled what has been commonly, and imprecisely, termed “joint enterprise”² (the Court was also sitting as the Privy Council to deal with the appeal of *Ruddock* from Jamaica on the same topic). “Joint enterprise” has passed into common usage and as such is a term much used but little understood. At its broadest it denotes the principle by which two or more defendants are all guilty of an offence despite not all taking part in the offence in the same way:

- 1) D1 and D2 each, with the requisite fault element of the offence, perform at least part of the conduct aspect of the offence, making them joint principals.
- 2) D2 assists, encourages or procures D1 to commit offence X/a particular type of offence, making D2 secondarily liable for the offence committed by D1 – this is basic accessorial liability (BAL).

- 3) D1 and D2 set off intending to commit an offence together making them sometimes joint principals and sometimes principal and secondary parties respectively – this is common purpose liability (CPL)
- 4) D1 and D2 are jointly involved in, or at least set off to commit, offence A, during the course of which D1 commits offence B. D2 is guilty of offence B if s/he foresaw the possibility that D1 might³ commit crime B and continued to participate in crime A – this is “parasitic accessorial liability”⁴ (PAL),

PAL was the variant of joint enterprise which was before the Court and its scope was broad indeed. Nothing beyond D2’s involvement in crime A was required for D2 to be guilty of crime B, save that D2 contemplated the possibility that D1 might do it, or something like it.⁵ D2 could go from being guilty of affray to being guilty of murder simply through foresight that D1 might do something to cause someone’s death with the intention to at least cause grievous bodily harm. D1, however, must actually wield the knife and strike the fatal blow whilst intending to kill or cause grievous bodily harm. The differences in both conduct and culpability which led to guilty verdicts for D1 and D2 were stark and criticism of the doctrine has grown in recent years.⁶

Parasitic accessorial liability is dead, long live secondary liability

In *Jogee* the Supreme Court killed off PAL, stating that all secondary liability is governed by the same principles:

- 1) D2 must assist or encourage D1 in the commission of offence X;

- 2) D2 must know any necessary facts which gives D1's conduct or intended conduct its criminal character;⁷ and
- 3) with that knowledge, D2 must intend to assist or encourage D1 to commit offence X, with the requisite mental fault element for that offence.⁸

D2 is equally liable if it is a type of offence, rather than a specific offence, which s/he assists or encourages D1 to commit.⁹

The principles can adapt to differing circumstances, so that if there is an agreement between D1 and D2 it might be express or tacit¹⁰ and arise in spontaneous group violence as easily as in planned criminal activity.¹¹ It may be that offence X is one which may or may not happen in the course of a planned activity. For example, D1 and D2 commit an armed bank robbery together during which D1 shoots and kills a security guard, intending to at least cause him grievous bodily harm (offence X here being the murder of the security guard). D2 is secondarily liable for the murder if s/he intended that if anyone did cause them trouble during the robbery, the weapons they carried should be used to with the intent to at least do grievous bodily harm. That intent can perfectly well co-exist with a desire to commit the robbery without having to use the weapons. The Court termed this "conditional intent" and emphasised that intention is not synonymous with desire.¹²

If D1 goes beyond what D1 knew and intended to assist, that does not necessarily mean that D2 escapes conviction, as a lesser offence might still have been committed. In the paradigm case of murder this will usually mean D2 is guilty of manslaughter, specifically unlawful and dangerous act manslaughter.¹³

D2's foresight of what D1 might do is relegated to its proper place as evidence from which D2's knowledge and intention might be inferred by the jury.¹⁴ Mental fault is no longer sufficient alone for a guilty verdict as D2 needs to act to assist or encourage D1 with the requisite knowledge and intent.

This return to the foundational principles of secondary liability was the solution urged upon the Court by Jøgee and supported by Ruddock.¹⁵ Although the principles now restated by the Court appear uncontroversial, and when one reads the judgment in *Jøgee* it all seems rather clear and straightforward, it should be remembered that since the Privy Council's statement of the principles of PAL in *Chan Wing-Siu*¹⁶ in 1984, there has been precious little judicial derogation from it, despite opportunities at all levels including the House of Lords and Supreme Court.¹⁷ Instead, BAL was overtaken by PAL such that the principles of PAL, in which foresight blurred into intention, led to a watering down of the requirements for secondary liability.¹⁸ It should be noted that the fault is not to be laid solely at the door of the judiciary; the great Professor J.C. Smith was in favour of PAL.¹⁹

The Supreme Court's analysis of the route to PAL

The Supreme Court puts the start of PAL down to the decision of the Privy Council in *Chan Wing-Siu*²⁰ where Sir Robin Cook stated that:²¹

Th[is] case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in 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 foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

To determine how Sir Robin came to make this pronouncement, conflating contemplation with authorisation and leaving D2 guilty for the actions of D1 which s/he might only have foreseen as a vague possibility and done nothing to intentionally bring about, the Court set out to examine the history of secondary liability. The judgment traces BAL back to into the 17th and 18th centuries and follows its development up to *Chan Wing-Siu* and beyond,²² leading to the distillation of the principles of secondary liability given above.

Secondary liability is a common law doctrine (albeit one that was made statutory in the Accessories and Abettors Act 1861 s.8²³) by which D2 is liable for an offence actually committed by D1. Traditionally the terminology was that D2 “aid, abet, counsel or procure”, modernised by the Law Commission into assist or encourage.²⁴ The Law Commission also mentions procuring, but the Supreme Court disregards that mode of participation. There is, however, no reason why the same principles of secondary liability could not apply to procuring.

The essence of secondary liability

The Court correctly identifies that it has never been a requirement that D2 caused D1's conduct, but there has always had to be sufficient connection between D1's offence and D2's conduct for D2 to be secondarily liable.²⁵ Lord Toulson had previously argued that a "broad theory of causation", beyond mere "but for" causation, was a proper explanation of secondary liability²⁶ and some of the Supreme Court in *Gnango* appeared to be attracted to this idea.²⁷ For *Jogee* it was argued before the Court that the proper justification for D2's criminal liability for D1's offence is not causation but a sufficient connection to the offence, together with sufficient mental culpability; in essence intentional participation in D1's criminal activity in the knowledge of what that criminal activity is. These submissions were accepted by the Court,²⁸ albeit that the Court only expressly refers to assistance and encouragement as modes of participation.

The Court notes that D2 must intend to assist D1 to act with the mental element necessary for the offence, but in passing accepts that D2 and D1 need not have a common or shared intent that the final offence be committed, as in the situation where D2 supplies arms to D1 but is indifferent to whether D1 actually goes on to use them.²⁹ It is unfortunate that this is the only point in the judgment which refers to the fact that D1 and D2 might not share a common intention as more detailed analysis of this would have assisted in understanding the development of PAL, which, it is submitted, grew out of CPL rather than normal BAL cases. It is also important to understand that not all secondary liability cases involve agreement between D1 and

D2, tacit or express; that is only one strand of secondary liability. Examination of CPL will therefore assist in understanding the different modes of secondary participation.

Common purpose liability

It is a mistake to see CPL as simply a branch of BAL as the CPL cases do not necessarily involve secondary liability. Historically the cases commonly involve riot³⁰ or poaching,³¹ which could involve D1 and D2 as joint principals, or as principal and secondary participants. Reported cases tend to deal with what happened when, for instance, a constable or gamekeeper was killed by D1 during the poaching or rioting: both D1 and D2 were guilty for the killing of a constable or gamekeeper by D1 if they shared an intention “to resist all opposers”³² or similar: as Alderson B put it in *Macklin*,

it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent.³³

Thus the secondary liability arose out of the primary liability and the intention in relation to that. As a result, there grew the idea that further evidence of aiding or abetting was not required, as noted by Toulson LJ (as he then was) in *Mendez and Thompson*:

Although some distinguished scholars consider that joint enterprise liability [PAL] differs doctrinally from ordinary principles of secondary criminal liability, we incline to the view that joint venture liability is an aspect of them, as it is put in Smith and Hogan's Criminal Law; 12th ed (2008), 207: "The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look for further evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements of aiding and abetting. Frequently it will be acts of encouragement which provide the evidence of the common purpose. It is simply necessary to apply the ordinary principles of secondary liability to the joint enterprise."³⁴

This is a misunderstanding of CPL which is what PAL really was; there *does* need to be further evidence of assisting and encouraging if D1 is going beyond the original common purpose. To be liable under CPL the scope of the common purpose must first be determined. If D1 goes beyond the common purpose, D2 is not, without more, responsible for D1's offending. Determining the scope of the common purpose is thus crucial, but not always easy to do evidentially.

The Supreme Court relies upon Foster to say that the scope of the common intention was determined objectively in the 18th century.³⁵ There is much support for this argument. It had been a rule of *law* into the nineteenth century that D was taken to intend the natural and probable consequences of his actions,³⁶ softened to a rebuttable presumption of *evidence* by the mid-twentieth century,³⁷ the principle only finally excised from the law by s.8 of the Criminal Justice Act 1968. However, the Court's

failure to consider CPL and BAL separately causes problems here as Foster is not discussing CPL but instead D2 counselling D1 to offend. In the CPL cases there is no objective assessment of natural and probable consequences of D1 or D2's actions, just an assessment of what their common purpose was by looking at what they had agreed.³⁸ The 1913 case of *Pridmore*³⁹ shows the approach. While Pridmore and Ironmonger were out poaching in Titchmarsh Wood on a December night, they were surprised by gamekeepers. One of the defendants shot and wounded one of the gamekeepers. Both were charged with attempted murder. The jury could not determine who fired the shot but found both men guilty as they were agreed that the intention was "to prevent arrest at all costs, even to the extent of murder". On Pridmore's appeal, the Court of Criminal Appeal pointed to all the circumstantial evidence which supported the jury's conclusion and approved the judge's direction to the jury which focused not on what the probable results of being confronted by a gamekeeper would be but whether "both [defendants] must have realised that resistance at all costs was likely to happen".

If the actions of D1 went beyond the purpose which was common with D2, D2 was not, without more, criminally responsible. As Alderson B continued in *Macklin*

Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done.

Of course the common purpose might change and it would be necessary to look at the evidence to determine what D2 had agreed to, even if only tacitly. It is when dealing

with this aspect of CPL, determining the final extent of D1 and D2's common purpose, that the cases used language which was later to form the basis of PAL, but that language was taken out of context, leading to a misreading of these cases. In *Davies* the House of Lords discussed what evidence there was upon which a jury could conclude that a witness was an accomplice and stated:

I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of a knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault.⁴⁰ (emphasis added)

In *Smith (Wesley)* when discussing a conviction for manslaughter, not murder, (prior to *Church*⁴¹ laying down the principles of unlawful act manslaughter)

It must have been clearly within the contemplation of a man like Smith who, to use one expression, had almost gone berserk himself to have left the public-house only to get bricks to tear up the joint, that if the bar tender did his duty to quell the disturbance and picked up the night stick, anyone whom he knew had a knife in his possession, like Atkinson, might use it on the barman, as Atkinson did. By no stretch of imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case.⁴² (emphasis added)

In *Betty* the trial judge explained how far removed D1's actions were from the common purpose:

if two men attack a third without any intention of killing in the mind of either of them, and, as the fight develops, one or other conceives in his mind an intention to kill and does kill, of course, that does not make the other man guilty of murder, because he never contemplated that was going to be done, he did not intend it, and, in fact, did not do the act of killing.⁴³ (emphasis added)

In *Anderson and Morris* Lord Parker stated

It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.⁴⁴ (emphasis added)

Davies, *Anderson and Morris* (which considered *Betty* and *Smith*) and *Smith* were referred to in argument in *Chan Wing-Siu* and all had in fact involved an evidential consideration of what was within the common purpose, but all of them could be used, shorn of that context, to argue that contemplation of a circumstance was enough to bring that consequence within the common purpose. The Australian cases relied upon by the Privy Council in *Chan Wing-Siu* (*Johns*⁴⁵ and *Miller*⁴⁶) had gone further than the English cases and arguably already begun to create PAL by stating that

contemplation of an event makes D2 secondarily liable for it. It is significantly easier to see how Sir Robin reached his conclusions when seen in this context.

Once PAL took firm hold in *Chan Wing-Siu* it was extended beyond its CPL roots to bring BAL down to its level in cases such as *Rook*⁴⁷ and *Reardon*.⁴⁸

The Supreme Court's analysis of PAL

The Supreme Court's analysis of the development of PAL touches on *Betty* and *Anderson and Morris*, not to explain CPL, but to establish (1) that where D1's actions are "an overwhelming supervening event" no liability for murder attaches to D2 but (2) that D2 may still be liable for manslaughter in that circumstance.⁴⁹

The first of the Court's points is accurate and explains how, as PAL developed and its scope became clear, D2's lack of knowledge of D1's weapon was elevated to a defence of fundamental difference, as in *English*⁵⁰ where D1 and D2 attacked V with wooden posts, then D1 pulled out a knife and stabbed V to death, D2's conviction for V's murder was quashed as the knife was more dangerous than the wooden posts. Now that PAL has gone, the focus on the specific weapon used or precisely how dangerous it was, can be put in its proper place, which is part of the evidence for the jury to consider in determining what they are sure D2 knew and intended to assist or encourage.⁵¹

The second point is more complicated. All the parties in *Jogee* agreed that manslaughter would be an available alternative if D2 were acquitted of the murder

carried out by D1 and the Court firmly concludes that manslaughter is an option available to the jury in such cases.⁵² However, the authorities were not in agreement about this, in particular the House of Lords in *Powell; English* was firmly against it⁵³ and Professor J.C. Smith certainly did not favour this option.⁵⁴ However, it is submitted that the Court is surely right, relying on the cases of *Church*⁵⁵ and *Newbury*⁵⁶ for the concept of unlawful and dangerous act manslaughter as an alternative to murder. In relation to offending short of murder, if D2 has committed a lesser offence, then the fact that s/he is not guilty of D1's more serious offence does not absolve him/her of liability for the lesser offence. This is still true if D2 is a secondary party to offence X (by counselling it, for instance) but the person counselled (D1) goes on to commit more serious offence Y.⁵⁷

The Court noted that there were serious problems with the basis of *Chan Wing-Siu*: its reliance on previous cases was misconceived and mistaken, taking arguments out of context and ignoring the factual backdrops of the cases it relied upon. The elision of contemplation and authorisation was simply wrong.⁵⁸ (Although when CPL is considered the decision and its reasoning can at least be understood, if not condoned.) Having established that lesser alternatives would be available for D2, the public policy arguments fall away, finally killed off by the need for "fair labelling of offending and fair discrimination in sentencing".⁵⁹ The Court bore in mind that PAL after over 30 years was not working satisfactorily and had in fact become controversial causing continual problems at trial and appellate levels. Beyond the practical problems, the Court accepted that foresight is too low a level of mental fault, particularly when D1 generally must have a significantly higher level of fault, and

should only be used as evidence from a jury could infer D2's intention to assist what s/he had foreseen. This is particularly stark in murder.⁶⁰

The Court notes that the academic problems with the principle were noted from soon after the decision in *Chan Wing-Siu* (by Lord Lane in the Court of Appeal in *Wakely*⁶¹, by Prof. Smith in his commentary thereon and by Lords Steyn, Hutton and Mustill in *Powell; English*). Unfortunately, these concerns were not enough to divert the law from its PAL course. The Supreme Court stated that it had had the "benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability on past occasions"⁶² covering both the history and the impact of PAL, but that is not enough, it is submitted, to explain why PAL lasted so long.

Why did Prof. Smith welcome PAL?

Prof. Smith saw PAL as bringing a welcome subjective approach to the area of criminal liability

Far from extending the law as stated by Foster and his successors, the Privy Council [in *Chan Wing-Siu*] were narrowing it by substituting a subjective for an objective test.⁶³

In that he was echoing what Sir Robin himself declared in *Chan Wing-Siu*.⁶⁴ The decision in *Chan Wing-Siu* was not, however, novel thought Prof. Smith:

It would be quite wrong to suppose that parasitic accessory liability--liability for a crime not intentionally assisted or encouraged by A but merely foreseen by him--is a recent development in the law, an innovation by the Privy Council in *Chan Wing-Siu*. The rule imposing liability for offences committed in the course of committing the offence assisted or encouraged seems to be almost as old as the law of aiding and abetting itself.⁶⁵

It was Prof. Smith's criticism of Lord Lane's sensible judgment in *Wakely* (which focused on the need for the jury to find that D1's actions were within the agreement between D1 and D2, express or tacit, rather than merely foreseen by D2) which led to Lord Lane changing tack in *Hyde*⁶⁶ and following *Chan Wing-Siu* more closely, despite the fact that *Chan Wing-Siu* was a Privy Council rather than a House of Lords decision.

Unfortunately, it is submitted, Prof. Smith was wrong. PAL was a pernicious theory which was not of ancient pedigree, but rather was an erroneous tangent. Had there previously been an objective assessment of the scope of the common purpose, Prof. Smith and Sir Robin would have been right that *Chan Wing-Siu* narrowed liability, but there had not, as discussed above. The fact is that Prof. Smith appeared to be entirely in favour of PAL for policy reasons. Analysed very well by Andrew Simester this boils down to D2's position being normatively changed by the commission of offence A, making mere foresight sufficient for criminal liability for offence B.⁶⁷ This does not, it is submitted, justify the PAL low level of mental fault, such that suspicion alone made a person guilty of murder. This was in reality no more than constructive liability which thankfully disappeared with the abolition of the felony murder rule,

although at least the felony murder rule required D2 to be committing a serious offence rather than a minor one to make him/her guilty of D1's murder of V,⁶⁸ the poachers committing a misdemeanour in Titchmarsh Wood had not been caught by this overly harsh rule. Prof. Smith coolly conceded that

It may be that the law is too harsh and, if so, it could be modified so as to require intention (or even purpose) on the part of the accessory that, in the event which has occurred, the principal should act as he did. Indeed, there is no decision preventing the House of Lords from taking this step.⁶⁹

Unfortunately the House of Lords did not take that step and it is submitted that Prof. Smith's influential support for PAL extended its life.

Was it the place of the Supreme Court and Privy Council to so radically change the law?

The Court was firmly of the view that it was, noting that

the doctrine of secondary liability is a common law doctrine... and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.⁷⁰

It did take comfort though, from the wording of s.44 of the Serious Crime Act 2007 which covers D encouraging or assisting the commission of an offence and requires from D an *intention* to encourage and assist, specifically noting in s.44(2) that D

cannot be taken to have that intent just because he foresaw the encouragement or assistance as the consequence of his act.⁷¹

This is surely correct. When the courts have created an error in the law, particularly one which is due to a mistake by the appellate judiciary, it is for the courts to correct it as soon as possible.

The effect of Jogee and Ruddock

Appeals from those convicted under PAL/BAL under PAL principles

Jogee has successfully killed off PAL and made secondary liability both simple and principled. The Court accepts that it is “reversing a statement of principle”⁷² by so doing, noting that

It would not be satisfactory for this court simply to disapprove the *Chan Wing-Siu* principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles.⁷³

Although it does not at any stage use the term “declaratory theory”⁷⁴ it is nonetheless adhering to it, for it accepts that there is a potential impact on those convicted under PAL over the preceding 32 years, because the law, although “faithfully” applied, was “mistaken”. That is not to say that all those convicted under PAL will be entitled to have their cases reopened by means of an appeal out of time to the Court of

Appeal (Criminal Division). Indeed, the Court is keen to state that, just as it and the Court of Appeal have stated repeatedly over the years, the fact that the law has been corrected does not mean that the courts will entertain out of time appeals based simply on the new old law.⁷⁵ The principle for dealing with applications is this:

The court has power to grant such leave [to appeal out of time], and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to be mistaken.

The Court was also keen to emphasise that

the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal.⁷⁶

The desire to stem the feared flood of applications is understandable when one considers the creaking criminal appeal system,⁷⁷ although there is an immediate feeling of concern generated by the need for “substantial injustice” rather than mere common or garden injustice. On reflection, however, there is some cause for optimism. There is doubtless injustice in having been convicted under a law which was wrong and it may well be that if a case does get in front of the Court of Appeal, an appeal would be allowed, but that is not a foregone conclusion. When the Supreme Court’s predecessor last changed the criminal law in this way (to make it no longer possible to charge indecent assault for sexual intercourse with a child under 16 when the offence of unlawful sexual intercourse was time barred⁷⁸), when an appeal did

reach the Court of Appeal, it was allowed.⁷⁹ That was a conviction, though, which was obtained by an abuse of the process of the court and the conviction was inevitably unsafe.⁸⁰ That the PAL principles were relied upon does not mean that conviction would not have followed a jury direction consistent with the restated principles of secondary liability, thus the conviction might not be unsafe. The Supreme Court has attempted to close the door on appeals based on the injustice of the application of mistaken law (whether it succeeds will be a different matter) but it has certainly not closed the door on appeals where D2 would not have been convicted under the restated principles. There will doubtless be a lot of applications for leave to appeal out of time, and applications to the Criminal Cases Review Commission, but it will be interesting to see how many of them reach the Court of Appeal.

Intent

Although the case does not mention *Woollin*⁸¹, the firm comments it makes about foresight of consequences being “evidence from which a jury can infer the presence of a requisite intention”⁸² must surely bolster the Court of Appeal (Criminal Division)’s understanding of Lord Steyn’s judgment in *Woollin* in *Matthews and Alleyne*⁸³, that evidence, even of a virtually certain consequence which the defendant foresaw is still only evidence from which a jury can find intent rather than being within the legal definition of intent.

Outside England and Wales

It is important not to forget that this was not just a domestic appeal; the Privy Council has also ruled and the effect on Commonwealth jurisdictions will, it is hoped, be great. The Court rightly notes that the Australian case of *Johns*⁸⁴ was heavily relied upon in *Chan Wing-Siu* and the courts in Australia have been bound by the Australian High Court decision of *McAuliffe*⁸⁵ which adopted *Chan Wing-Siu*, most recently in the South Australian' Court of Criminal Appeal's decision *Spilios*⁸⁶. Although this article has criticised some of the Court's analysis of how PAL developed and continued, the Court's reasoned disposal of PAL is generally excellent and the conclusion is, it is submitted, extremely welcome in spirit and substance. It is hoped that the High Court of Australia in particular bears *Jogee* in mind when next it considers PAL (or "extended common purpose liability" as it is there referred to).

In the domestic context it is submitted that the judgment in *Jogee* sets a high standard for judicial approach, thinking and writing which it is hoped the courts continue to strive for.

I am indebted to the other counsel for *Jogee* (Felicity Gerry QC, Adam Wagner and Diarmuid Laffan) as well as Dr Matthew Dyson for the work put into preparing materials for the Supreme Court, many of which have been drawn upon to prepare this case note.

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¹ *R v Taylor (Jack)* [2016] UKSC 5.

² The Law Commission must accept some responsibility for this misuse of the term (Law Commission, “Assisting and Encouraging Crime”, Law Com. No.131 (HMSO, 1993) paras. 1.13 and 1.14, criticised in J.C. Smith, “Smith & Hogan Criminal Law” (9th edn, Butterworths, 1999) pp140-1. However the most recent edition (14th edn, 2015) prefers the Law Commission’s narrow use of the term (239-240) despite the broader uses of the term elsewhere (e.g. *R v ABCD* [2010] EWCA Crim 1622, [9]).

³ In *Gnango* [2011] UKSC 59; [2012] 1 AC 827 it was affirmed that D2 need only foresee what D1 *might* do rather than what he *will* do.

⁴ An inelegant but accurate term coined by Prof. J.C. Smith in “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453.

⁵ D2 need not foresee the precise offence which D1 commits, only the type: *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350, HL which extended the decision of the Court of Appeal in *R v Bainbridge* [1960] 1 QB 129.

⁶ For example, W. Wilson and D. Ormerod, “Simply harsh to fairly simple: joint enterprise reform” [2015] Crim LR 3; B. Crewe, A. Liebling, N. Padfield and G. Virgo, “Joint enterprise: the implications of an unfair and unclear law” [2015] Crim LR 252; M. Dyson, “Might alone does not make right: justifying secondary liability” [2015] Crim LR 967; G. Virgo, “Joint Enterprise Liability is Dead: Long Live Accessorial Liability” [2012] Crim LR 850; M. Dyson, “More appealing joint enterprise” [2010] C.L.J. 425 and C.M.V. Clarkson, “Complicity, Powell and manslaughter” [1998] Crim LR 556.

⁷ [2016] UKSC 8, [9] following *Johnson v Youden* [1950] 1 K.B. 544, DC and *National Coal Board v Gamble* [1959] 1 QB 11, DC.

⁸ [2016] UKSC 8, [8] – [16], [88] – [97].

⁹ *DPP for Northern Ireland v Maxwell* [1978] 1 WLR 1350, HL remains good law on this: [2016] UKSC 8, [14] – [16].

¹⁰ [2016] UKSC 8, [92].

¹¹ [2016] UKSC 8, [95].

¹² [2016] UKSC 8, [91] and [92].

¹³ [2016] UKSC 8, [90] and [96].

¹⁴ [2016] UKSC 8, [92] to [95].

¹⁵ The author was junior counsel for Jogee. See summary of submissions to the Court at C Sjölin and F Gerry QC, “Joint Enterprise – Guilty by Association” Criminal Bar Quarterly Winter 2015 (4), 9 and “Joint Enterprise – Guilt by Association? What will the Supreme Court do later this month?” (online) <http://blogs.ntu.ac.uk/nlsblog/joint-enterprise-guilt-by-association-what-will-the-supreme-court-do-later-this-month/> (accessed 29 March 2016).

¹⁶ *R v Chan Wing-Siu* [1985] AC 168, PC.

¹⁷ *R v Powell*; *R v English* [1999] 1 AC 1, HL; *Gnango* [2011] UKSC 59; [2012] 1 AC 827.

¹⁸ See the summary of the law in D. Ormerod, “Smith & Hogan Criminal Law (14th edn OUP, 2015) p213-237 and Hughes LJ’s summary in *R v ABCD* [2010] EWCA Crim 1622 at [9] and [10]. In *R v Gnango* [2011] UKSC 59; [2012] 1 AC 827 the Supreme Court failed to properly separate out the principles and analyse BAL properly.

¹⁹ See J.C. Smith, “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453.

²⁰ *R v Chan Wing-Siu* [1985] AC 168, PC.

²¹ *R v Chan Wing-Siu* [1985] AC 168, PC, 175.

²² [2016] UKSC 8, [18] – [35] for the law prior to *Chan Wing-Siu*, [36] – [59] for *Chan Wing-Siu* and beyond.

²³ A similar provision in s.44 Magistrates’ Courts Act 1980 covers summary offences.

²⁴ Law Commission, “Participating in Crime”, Law Com. No.305 (HMSO, 2007) para 2.21, [2016] UKSC 8, [6].

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- ²⁵ [2016] UKSC 8, [12] – [13] in which the example of highway men who part company some time before a robbery is used to explain that the man who left the group early on is not a secondary participant in the later robbery by the two remaining (*Hyde* (1672) as referred to in M. Foster, “Crown Law” (3rd edn, 1809), 354). Hale gives more details noting that a fourth man left only just before the robbery meaning that he was still criminally responsible liable for the robbery (M Hale, “The History of the Pleas of the Crown” (Nutt & Gosling, 1736) 536-7.
- ²⁶ *R v Mendez and Thompson* [2011] QB 876, CA (Crim Div), [18] – [23], *R v Stringer* [2011] EWCA Crim 1396, [47] – [54], R. Toulson “Sir Michael Foster, Professor Williams and complicity in murder” in Dennis Baker and Jeremy Horder (eds) *The Sanctity of Life and the Criminal Law: The legacy of Glanville Williams* (CUP 2015).
- ²⁷ *R v Gnango* [2011] UKSC 59; [2012] 1 AC 827, see Lord Clarke in particular, but also Lord Dyson.
- ²⁸ [2016] UKSC 8, [7] and [8].
- ²⁹ [2016] UKSC 8, [10].
- ³⁰ For example, *R v Wilkes* (1839) 9 Carrington and Payne 437; 173 ER 901.
- ³¹ For example, *R v Skeet* (1866) Foster and Finlayson 931; 176 ER 854.
- ³² *R v Tyler and Price* (1838) 8 Carrington and Payne 616; 173 ER 643.
- ³³ *R v Macklin* (1838) 2 Lewin 225; 168 ER 1136.
- ³⁴ *R v Mendez and Thompson* [2011] QB 876, CA (Crim Div), [17].
- ³⁵ [2016] UKSC 8, [19] – [21] citing M. Foster, “Crown Law” (3rd edn, 1809), 369-370.
- ³⁶ See for example *R v Dixon* (1814) 3 Maule and Selwyn 11; 105 ER 516 and W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-1769), vol 4, 200.
- ³⁷ See discussion in and conclusion of *DPP v Smith* [1961] AC 290, HL.
- ³⁸ An analysis performed by Dr Matthew Dyson of Trinity College Cambridge identified roughly thirty reported cases on common intention or purpose between 1810 and 1960 and these cases display no objective assessment of the parties’ common purpose – all turned on the parties’ subjective agreement, tacit or express. This formed part of the document submitted on behalf of Jogee to the Supreme Court at their invitation (“Submissions on Foundations of Liability for Secondary Parties on behalf of Ameen Jogee”).
- ³⁹ *R v Pridmore* (1913) 8 Cr App R 198. The Court used the case of *R v Spraggett* [1960] Crim LR 840 as an example at [2016] UKSC 8, [25].
- ⁴⁰ *Davies v DPP* [1954] AC 378, HL, 401.
- ⁴¹ *R v Church* [1966] 1 QB 59, CCA.
- ⁴² *R v Smith (Wesley)* [1963] 1 WLR 1200, CCA, 1206.
- ⁴³ *R v Betty (Carol)* (1964) 48 Cr App R 6, CCA, 10.
- ⁴⁴ *R v Anderson and Morris* [1966] 2 QB 110, CCA, 120.
- ⁴⁵ *Johns v The Queen* [1980] HCA 3; (1980) CLR 10.
- ⁴⁶ *Miller v The Queen* (1980) 55 ALJR 23.
- ⁴⁷ *R v Rook* [1993] 1 WLR 1005, CA (Crim Div).
- ⁴⁸ *R v Reardon* [1999] Crim LR 392, CA (Crim Div).
- ⁴⁹ [2016] UKSC 8, [27] – [35]. The term “overwhelming supervening event” can be traced back to *Anderson; Morris*.
- ⁵⁰ *Powell; English* [1999] 1 AC 1, HL.
- ⁵¹ [2016] UKSC 8, [58], [59] and [98].
- ⁵² [2016] UKSC 8, [96] and [97].
- ⁵³ *Powell; English, Uddin* [1998] 2 All ER 744, *Dunbar* [1988] Crim LR 693 and *Anderson and Morris* (1966) 50 Cr App R 216 all point away from manslaughter being open as an alternative for D2 on a charge of murder by D1. However, *Betty* (1963) 48 Cr App R 6 and *Reid* (1975) 62 Cr App R 109 suggest the opposite.
- ⁵⁴ See the discussion in J.C. Smith, “Smith & Hogan Criminal Law” (10th edn, Butterworths, 2002) pp164-5 which suggests that Prof. Smith was of the view that D2 is liable for D1’s offence or nothing.
- ⁵⁵ *R v Church* [1966] 1 QB 59, CCA.
- ⁵⁶ *DPP v Newbury* [1977] AC 500, HL.
- ⁵⁷ See C.M.V. Clarkson, “Complicity, Powell and manslaughter” [1998] Crim LR 556.
- ⁵⁸ [2016] UKSC 8, [61] – [72].
- ⁵⁹ [2016] UKSC 8, [74] – [75].
- ⁶⁰ [2016] UKSC 8, [81], [82], [83] and [84].
- ⁶¹ *R v Wakely* [1990] Crim LR 119, CA (Crim Div), commentary by Prof. Smith.
- ⁶² [2016] UKSC 8, [61] and [80]. As well as the Foundations document (146 pages long) the Court also had extensive materials provided on behalf of Jogee on the human rights aspect of the appeal (not

mentioned in the judgment) and by the interveners (“Joint Enterprise Not Guilty by Association” and “Just for Kids Law”).

⁶³ J.C. Smith, “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 457.

⁶⁴ [1985] AC 168, PC, at pp176 and 177.

⁶⁵ J.C. Smith, “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 457.

⁶⁶ *R v Hyde* [1991] 1 QB 134, CA (Crim Div).

⁶⁷ A. Simester, “The mental element in complicity” (2006) 122 LQR 578.

⁶⁸ The felony murder rule being the rule which made all parties to a felony guilty of murder if one of their number killed during the course of the felony.

⁶⁹ J.C. Smith, “Criminal Liability of accessories: law and law reform (1997) 113 LQR 453, 465.

⁷⁰ [2016] UKSC 8, [85] and see also [82].

⁷¹ [2016] UKSC 8, [86].

⁷² [2016] UKSC 8, [79].

⁷³ [2016] UKSC 8, [87].

⁷⁴ A classic explanation is seen in *Willis & Co. v Baddeley* [1892] 2 QB 324 CA, 326: “There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable”. For a defence of the theory see Allan Beever, “The Declaratory Theory of Law” (2013) 33(3) O.J.L.S. 421.

⁷⁵ See for instance *R v Mitchell* (1977) 65 Cr App R 185 CA(Crim Div), p189 quoted in [2016] UKSC 8, [100].

⁷⁶ [2016] UKSC 8, [100].

⁷⁷ Prof. Spencer’s article is sadly as true now as it was a decade ago: J.R. Spencer, “Does our present criminal appeal system make sense?” [2006] Crim LR 677.

⁷⁸ *R v J* [2004] UKHL 42; [2005] 1 AC 562.

⁷⁹ As in the case of *Caley-Knowles* [2006] EWCA Crim Div 1611; [2007] 1 Cr App R 13.

⁸⁰ The Court of Appeal “shall allow an appeal against conviction if they think that the conviction is unsafe” (s.2(1) Criminal Appeal Act 1968 as amended).

⁸¹ *R v Woollin* [1999] 1 AC 82, HL.

⁸² [2016] UKSC 8, [83] and see also [40], [66], [73] and [86].

⁸³ *R v Matthew and Alleyne* [2003] EWCA Crim 192; [2003] 2 Cr App R 30.

⁸⁴ *Johns v The Queen* [1980] HCA 3; (1980) 143 CLR 108.

⁸⁵ *McAuliffe v R* (1995) 183 CLR 108, HCA.

⁸⁶ *R v Spillios* [2016] SASFC 6. There is currently an application for leave for this case to go to the Australian High Court (the highest Australian court).