

Principals and Accessories after *Jogee*

The best way in to understanding the state of the law on principals and accessories¹ after the UKSC's decision in *Jogee* [2016] UKSC 8 is by considering a number of different hypothetical examples:

(1) A and B go to C's house, intending to kill him. A stabs C to death while B watches.

A is obviously guilty of murder as a principal. The UKSC in *Jogee* seems to think (para [1]) that B will be guilty of murder as an accessory, on the basis that he has intentionally encouraged or assisted A to commit murder. The better view is that B is guilty of murder as a principal – both A and B planned to kill C, and they did kill C; the issue of who actually struck the killing blow is irrelevant. This way of being found guilty of a crime as a principal was referred to as ‘the plain vanilla version of joint enterprise’ by Lord Hoffmann in *Brown, Isaac v The State* (PC, 2003, unreported), at [13], and seems to have been somewhat forgotten by the UKSC in *Jogee* in favour of trying to bring all cases which were formerly referred to as ‘joint enterprise’ cases under the normal principles as to when someone will be held to have committed an offence as an accessory.

(2) A and B go to C's house. C is A's girlfriend. A has agreed with B that B can watch A have sex with C. A and B further agree that if C is unwilling to have sex with A in front of B, then A will force C to have sex with him. C is unwilling, so A forces C to have sex with him while B watches.

A is obviously guilty of rape. Again, the UKSC in *Jogee* seems to think that B will be guilty of rape as an accessory (paras [92]) as it was part of A and B's plan that if certain conditions obtained, A would commit rape and this is enough to establish that B intentionally encouraged or assisted A to commit rape (para [78]). By the argument that we used in (1), it might be thought that we could simply charge B with rape as a principal and leave the law on accessories out of it. However, the definition of rape (Sexual Offences Act 2003, s 1) – which is focussed on what the defendant *did* (as opposed to, as with murder, what the defendant *brought about*), and makes it clear that only people with penises can be guilty of rape as principals – might make it difficult to charge B (who did not penetrate C, and might have been a woman) with rape as a principal. Given these complications, the most reliable analysis might be that B is guilty of rape as an accessory. However, note that in *R v Cogan and Leak* [1976] QB 217, the CA thought (controversially) that a man (D) who encouraged another man to have sex with D's wife, knowing that the sex would be non-consensual ‘could have been indicted [for rape] as a principal offender’.

(3) A and B plan to rob a bank; the plan is that B will hand a note to the cashier saying that there is a bomb in the bank that he will explode unless he is given £50,000. (There is in fact no bomb.) While A and B are walking to the bank, A shows B a sawn-off shotgun that he is carrying under his coat and says to B, smiling, ‘Just in case there are any problems...’. B is horrified and tells A to put the gun away and that there is to be no violence under *any* circumstances. In the bank, A gets impatient when the cashier hesitates over acting on B's note, draws out the shotgun and threatens to start killing people unless the cashier does what she is told. A then kills a security guard who has reacted to A's actions by drawing his own gun. A and B flee the bank empty-handed.

¹ ‘Accessories’ are alternatively known in the criminal law as ‘accomplices’ or ‘secondary parties’. I have stuck with ‘accessory’ in this note as this seemed the preferred usage in *Jogee*.

A is obviously guilty of murder. What is B guilty of (apart from attempted robbery, obviously)? We have moved here out of the ‘plain vanilla’ form of joint enterprise liability and into the territory of what came to be known as the ‘parasitic accessory liability’ form of joint enterprise liability, or ‘PAL’ for short – the case where A and B embark on committing crime X, and then in the course of that enterprise, A goes off piste and commits crime Y. Under the modern form of PAL, B could be held to have committed crime Y as an accessory if B foresaw that A might commit crime Y in the course of A and B’s attempting to commit crime X. The effect of *Jogee* is to sweep away PAL, and to insist that the *only* way of finding B guilty of murder here is to find that B intentionally encouraged or assisted A to commit murder. It will not be possible to do this as B made it clear that he set his face against A using any violence in the course of the bank robbery at any time – so this case is very different from (1) or (2), where the crime that A committed was part of A and B’s plan, either as the main point of the plan or as a contingency should the initial plan go wrong.

However, the UKSC in *Jogee* also makes it clear that B’s not being guilty of murder is not the end of the story. They make it clear that in this case, B *might* be guilty of *manslaughter*: paras [27], [96]. The authorities cited in para [96] make it clear that the UKSC thought that the form of manslaughter that B might be guilty of is *constructive* manslaughter – under which B can be convicted if his committing an unlawful and dangerous act causes another’s death. The difficulty with finding B guilty of constructive manslaughter here is the issue of causation – can we really say that B’s robbing the bank caused the death of the security guard where A deliberately, voluntarily, and unreasonably chose to kill the security guard? It is this difficulty that caused the House of Lords in *R v Kennedy (No 2)* [2008] 1 AC 269 to hold that a drug dealer who had supplied the drugs that caused someone to suffer a fatal overdose could not be found guilty of constructive manslaughter, as the decision of the drug addict to take the drugs will have broken the chain of causation between the unlawful supply and the addict’s death. *Kennedy* was not cited in *Jogee*. Instead the UKSC said that B *would* be guilty of constructive manslaughter unless A’s act ‘was so removed from what [A and B] had agreed as not to be regarded as a consequence of it’ (para [27]) or, alternatively, A’s act amounted to ‘some overwhelming supervening act...which nobody in [B’s] shoes could have contemplated might happen and is of such a character as to relegate [B’s] acts to history’ (para [97]). By these standards, it looks like B *is* guilty of constructive manslaughter – but it should also be noted that by those standards, the drug dealer in *Kennedy* should also have been guilty of constructive manslaughter.

(4) The same facts as (3), except that when A sees the security guard going for his gun, A knocks it out of his hands, and starts beating the guard with the butt of A’s sawn-off shotgun. The security guard survives the attack but is very severely injured.

A is obviously guilty of causing GBH with intent (OAPA, s 18). But B seems not to be guilty of anything other than attempted robbery here. The sweeping aside of PAL means that we cannot find B guilty of causing GBH with intent on the basis that B foresaw that A might commit an offence like that as part of the bank robbery. And B never encouraged or assisted A to use violence on the security guard, let alone intended to encourage or assist A to do this. And unlike with (3) – where the UKSC consoled itself that even if its decision in *Jogee* meant that B could not be guilty of murder, he would still be guilty of manslaughter – there is no lesser offence to fall back on if B cannot be found guilty of causing GBH with intent alongside A. So as a result of the decision in *Jogee*, B does not have to accept any criminal responsibility for what A did, even though it was a foreseen consequence of B’s decision to rob a bank with A.

(5) A tells B that A’s girlfriend has been cheating on him with C. B tells A, ‘You to have to sort C out’ and hands A a baseball bat. A uses the baseball bat to beat C to death, when B’s intention in giving A the baseball bat was merely that A should break C’s legs. A will obviously be guilty of murder. The UKSC made it clear in *Jogee* that B will be guilty of murder as well, as an accessory (paras [70], [90], [98]). This is as a result (as it has also been in all of the previous situations, at least so far as the UKSC is concerned) of the application of the ordinary principles laid down in *Jogee* as to when someone can be found to have committed a crime as an accessory. Under those principles, four conditions need to be satisfied:

(i) *First condition*: ‘D2 [must have] encouraged or assisted the commission of the offence by D1’ (para [8]).

(ii) *Second condition*: D2 must have acted with ‘an intention to assist or encourage the commission of the crime’ (para [9]).

(iii) *Third condition*: D2 must have had ‘knowledge of any existing facts necessary for [D1’s conduct] to be criminal’ (para [9]).

(iv) *Fourth condition*: ‘If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent’ (para [10]). ‘Where the offence charged does not require mens rea, the only mens rea required of [D2] is that he intended to encourage or assist the perpetrator to do the prohibited act, with knowledge of any facts and circumstances necessary for it to be a prohibited act’ (para [90]).

While the outcome of situation (5) will turn on the application of the *fourth condition*, it is worth spending some time on the *second condition*, because it is absolutely crucial to your ability correctly to apply *Jogee* to determine whether a given defendant was guilty of an offence as an accessory. Para [9] says that such a defendant must have acted with ‘an intention to assist or encourage’ but elsewhere *Jogee* refers to a D2 being held liable for an offence as an accessory because D2 ‘intentionally assist[ed] or encourage[d] D1 to commit that offence’ (para [14]) or because D2 gave ‘intentional assistance or encouragement to D1 to commit an offence’ (paras [10], [95]). This looser language (which we have also used above at the top of page 2, as looser language is always so much easier to use) is unfortunate because when we refer to D2 as having ‘intentionally’ assisted or encouraged D1 to commit an offence, we could mean one of two things:

(a) D2 intentionally did the thing that had the effect of assisting or encouraging D1 to commit an offence.

(b) When D2 did the thing that had the effect of assisting or encouraging D1 to commit an offence, D2 acted with an intent to help or encourage D1 to do whatever it was that resulted in D1 committing a crime.

It is abundantly clear from *Jogee* (especially the language of para [9]) that the *second condition* can *only* be satisfied by showing that (b) is true. For example, suppose that you have broken into a store at night and a policeman is approaching the corner where the store is located: if he gets to the corner, he will see the store is being burglarised and arrest you. But the policeman is distracted and detained by my asking him directions to the nearest cinema where I have arranged to meet a date, and you get away before the policeman continues on his way. In this situation I have assisted you to commit burglary and I intentionally did the thing that helped you steal from the store (after all, I wasn’t acting as an automaton in asking the policeman for directions), but it would be completely *wrong* to suggest I could as a result be held to have committed burglary as an accessory. The reason for this is that (b) (and therefore the *second condition* for being held to have committed a crime as an accessory) is not satisfied. When I asked the policeman for directions, I did *not* act with the intention (aim or purpose) of helping you steal from the store – my only aim or purpose was to get to my date on time.

But what if I could *foresee* that asking the policeman for directions might help you make a clean getaway? (Maybe I was walking in the opposite direction to the policeman and had passed the corner where the store was located and saw you breaking into it – and as a result could foresee that if I detained or distracted the policeman in any way, that might be helpful to you.) The UKSC in *Jogee* is clear (paras [66], [83]) that foresight on D2's part that D2's actions will encourage or assist D1 to commit a crime can be 'powerful evidence' of an intent on D2's part to encourage or assist D1 to do whatever it was that resulted in his committing that crime, but it is only evidence – 'Foresight may be good evidence of intention but it is not synonymous with it' (para [73]). And here the fact that I foresaw that my asking the policeman for directions might distract and detain him for long enough to allow you to make a clean getaway does *not* establish that when I was asking for directions, I intended to help you make that clean getaway. My *only* intention in asking for those directions was to get to my date on time – nothing else was on my mind.

Insisting that the *second condition* will *only* be satisfied if D2 acted with the intent to help or encourage D1 to do whatever it was that resulted in D1 committing a crime is consistent with the UKSC's getting rid of PAL in *Jogee* – if foresight that your partner in crime might commit some other crime is not enough (on its own) to make you guilty of that other crime as an accessory, foresight that the person you are helping or egging on to act in a particular way might commit a particular crime as a result of your assistance or encouragement shouldn't be enough (on its own) to make you guilty of that crime as an accessory. Insisting that the *second condition* will *only* be satisfied if (b), above, is made out is also consistent with the statements elsewhere in *Jogee* (paras [10], [90]) that a defendant can be held to have committed a crime as an accessory even though he had *no intention that that crime be committed*. For example, suppose that you are married and you regularly moan to me about how miserable your marriage is, and how impossible the idea of divorce is for one reason or another. Eventually, I give you a recipe for cyanide, telling you 'Look, if you want to get out of your marriage, this is one way of doing it.' You then use the recipe to poison and kill your partner. I will be guilty of murder as an accessory because when I gave you the recipe, I acted with the intent of helping you to poison your partner. But note that I didn't care whether or not you *actually* poisoned your partner – when I gave you the recipe, my intent was *not* that you should kill your partner but to give you the option of killing your partner. Whether you exercised the option was not something I cared about.

With all that cleared up, let's now return to situation (5) and apply the four conditions set out above to see why the UKSC in *Jogee* thought that B would be guilty of murder as an accessory in that situation. The first condition is satisfied: B's supplying the baseball bat to A assisted A to kill C. The second condition is satisfied: when B supplied the baseball bat to A, B intended to help A to beat C up – the thing that resulted in A killing C. The third condition is satisfied because it is not actually relevant here (murder is murder: there are no special conditions that have to be satisfied for intentionally killing someone to be criminal). The fourth condition is one that needs most careful handling here. When B supplied A with the baseball bat, B intended to help A break C's legs, not to help A kill C. But if B intended to help A break C's legs, B intended that when A beat C up, A should act with the intent of causing C to suffer GBH – which is a sufficient mens rea for murder. So the fourth condition is satisfied: murder can be committed with an intent to cause GBH and B had an intent that A should act with that intent.

(6) A visits B and spends two hours screaming and ranting about how his girlfriend has been cheating on him with C. A then says to B, 'Okay, I have to go – can I borrow your baseball bat?' B hands over the bat without a further word. A then uses the baseball bat to break C's legs.

A is obviously guilty of causing GBH with intent (OAPA, s 18). Is B guilty of the same offence as an accessory? Let's apply our four conditions to find out.

First condition: B's giving A the baseball bat helped A commit the offence of causing GBH with intent.

Second condition: when B gave A the baseball bat, did B intend to help A beat C up? B clearly must have foreseen that if he gave A the baseball bat, that might be bad news for C. But foresight and intention are not synonymous, so we have to ask – is it a fair inference from what we know about what must have been going through B's head at the time B handed over the baseball bat that B intended to help A beat C up when B gave A the baseball bat? B did not know for certain that A would use the baseball bat on C when B handed it over, but if B was happy to help A beat C up in the event that A wanted to use the baseball bat on C, then that would be enough to establish that B had the intent needed for the second condition to be satisfied – he intended to help A if A wanted to be helped. I think most juries would probably find that B *was* happy to help here, and that the second condition is therefore satisfied.

Third condition: not relevant here – there are no special circumstances that made A's breaking C's legs criminal that we would have to be satisfied B knew about when handing over the baseball bat.

Fourth condition: to be guilty of causing GBH with intent, you normally have to have an intent to cause GBH. (The other type of intent that will satisfy this offence is not relevant here.) When B handed over the baseball bat, did B intend to help A beat C up with an intent to cause GBH? Again, I think a jury would probably find that the answer is 'yes' – if B was happy to help A beat C up in the event that A wanted to use the baseball bat on C, B must have *also* been happy to help A beat C up in the event that A wanted to use the baseball bat on C in order to inflict some really serious bodily harm on A as most people who hurt other people with baseball bats do so with an intent to cause really serious bodily harm, and B must have appreciated it when he handed the baseball bat over.

So all four conditions are very likely to be satisfied in this case, and B will very likely be found to have committed the offence of causing GBH with intent as an accessory.