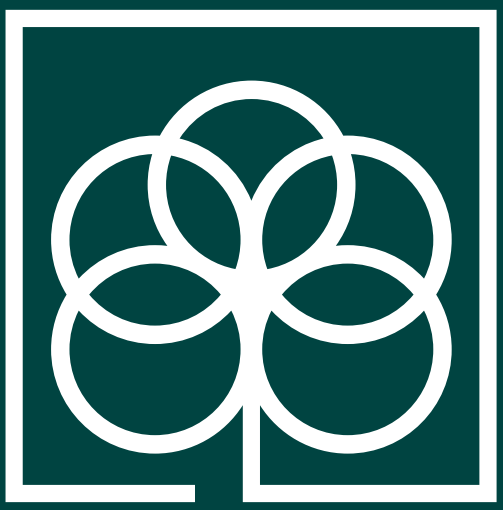

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Richard Holland discusses R v Jogee

Much ink has been spilled regarding the Supreme Court's decision in R v Jogee; Ruddock v The Queen [2016] UKSC 8, and as Crown Courts across the land seek to apply the decision to overrule 30 years of legal interpretation, it is likely there will be much more to consider in the coming months. This article seeks to explain the court's decision, and pose some questions for the future.

On 18 February 2016, in a unanimous ruling, the Supreme Court overruled the line of authority starting with Chan Wing-Siu [1985] AC 168, and held that the Crown Court, Court of Appeal and House of Lords had been applying the law wrongly for the past 30 years.

The issue under discussion was the principle of secondary liability – that is, when is a Defendant guilty of acts done by another person?

The basics

The Court affirmed the uncontroversial situations where a Defendant can be guilty of the acts done by other people (Jogee paras 8-12; 14-16):

1. Where the Defendant intends to lend assistance to a co-accused, with or without some agreement between the parties beforehand;

2. Where the Defendant and co-accused agree to help each other accomplish a crime;

3. Where a Defendant encourages a crime to be commissioned by another person, even if they do not lend direct assistance in it themselves;

Subject to some significant intervening act occurring to make any encouragement or assistance essentially a nullity, in those situations the secondary Defendant will be just as guilty as the "principal" – the person who actually does the acts of the crime in question.

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The question for the court was slightly different, however. What about those situations where things have gone beyond what was agreed, intended or understood should happen during a joint venture? This doctrine ("parasitic secondary liability") began with the case of Chan Wing-Siu.

Chan Wing-Siu – the start of the wrong turn

In Chan Wing-Siu, the Defendants arrived, armed with knives, at the address of a prostitute. It was common ground that they intended to rob her husband to get money from him that each said that he owed them. During the course of the robbery, the husband was stabbed to death.

On appeal, the Appellants complained at the trial judge's direction that each of the participants was guilty if it was proved that each had in their contemplation that a knife might be used by one of his fellow robbers to inflict serious bodily injury. Their appeal was dismissed. Sir Robin Cooke, giving the judgment of the court, held (at 175):

In a typical case of aiding and abetting, the same or the same type of offence is intended by all the parties acting in concert…

[But] the case [here] 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… 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 liability lies in participating in the venture with that foresight

The decision in Chan Win-Siu was subsequently affirmed by the House of Lords case of Powell and English [1997] UKHL 45. Notwithstanding the pedigree of the court and the longstanding nature of the doctrine of parasitic secondary liability, as the Court in Jogee held, the court in Chan Wing-Siu took a wrong turning for a number of reasons.

<u>No support from authority</u>

The first was that the decision was unsupported by previous authority. The court in Chan Wing-Siu referred only to two English cases in support – Davies v DPP [1954] AC 378, and Anderson and Morris.

However, Davies was not support for a doctrine of secondary liability. The Court was considering whether the jury ought to have been given an accomplice warning - a direction to the jury to treat an accomplice's evidence with caution on account of him having a potential motivation to minimise his own involvement - about a witness. The witness, who admitted to being part of a fight between two groups of boys, gave evidence that the Defendant had told him afterwards that he had been the one during the playground brawl to stab the victim.

Lord Simmonds, who gave the ruling of the court dismissing the appeal, held that a group intent on common assault could not be held to be liable for the murderous actions of one of their group with a knife unless there was evidence the rest of the group contemplated an attack with a knife by one of their number. As there was no evidence the witness did know about the knife, there was no need for an accomplice warning.

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At no point, however, did Lord Simmonds state that a knowledge of the knife to show a witness was an accomplice (and therefore the Jury needed to be warned about considering their evidence cautiously) was the same as saying knowledge of the knife and contemplation of its use would constitute the mens rea for murder.

As for Anderson and Morris, the court had gone no further than affirm that if a co-adventurer had departed completely from what had been tacitly agreed (e.g. that instead of burgling a premises together, one of the accused had burnt the property down instead), the other adventurer would not be liable for the unauthorised act. The court did not address the question of joint responsibility, or whether it was intention or foresight that rendered D2 guilty of D1's acts

Wrong in formulation

The second is that the decision was wrong in formulation. Sir Robin Cooke elided contemplation with authorisation. But plainly the two concepts are distinct: "one may contemplate that something will be done by another without authorising him to do it" (Jogee, para 49).

Later authorities, such as Powell and English stated that intention and foreseeability were in effect the same thing. Plainly that cannot be correct – one can foresee something might happen without wanting it to happen or being resigned to it happening – and indeed that is the divide, at least as far as mens rea is concerned, between murder (intending to kill or cause really serious harm) and manslaughter (being reckless as to whether someone might be killed or seriously harmed). Both involve foreseeing something happening, but the attitude as a result of that foresight draws an important distinction.

Wrong in principle

The third reason is that the Chan Wing-Siu decision was wrong in principle. As the court in Jogee observed (at para 74), the policy reasons for what was (although the court in Chan Wing-Siu did not appear to realise it) a significant change in the law, were dealt with in two sentences. It was said that a Defendant who knew their criminal associate carried potentially murderous weapons, and nonetheless continued on a venture where those weapons were then used by the associate with intent to cause really serious harm or to kill, should not be able to escape the consequences of their actions.

But, as the Court in Jogee acknowledged, first this was a simplification of what the Defendant had intentionally lent himself (for example, in Reid, the Defendant intended to cause someone a fright by going to their house with two associates – the two associates then used weapons to beat the victim to death), and second, especially in cases of murder, was not strictly accurate. On the facts postulated "he would be guilty of homicide in the form of manslaughter, which carries a potential sentence of life imprisonment" (Jogee, para 74).

Other reasons in support of the doctrine, as elucidated in Powell and English, were also disapproved of by the court. Giving effective protection to the public from gangs might be a noble aim, but there was no evidence that prior to the development of the doctrine espoused in Chan Wing-Siu that the public had insufficient protection. Equally, while a secondary party who plots a robbery but is not at the scene might sometimes have had more time to think about their actions than a principal who goes there with weapons and stabs someone, that is not true in all situations. The principal chose whether to go armed – and the secondary party, such a young person in a bar who chooses to help their friend in a bar fight, does not generally have a lot of time to think about the consequences of their assistance (Jogee para 76).

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Is this the end of foreseeability?

Post-Jogee, a Defendant can no longer be convicted of the offences of another simply because they foresaw that a co-accused might act as they eventually did.

In cases where a co-accused kills someone, the Prosecution must prove the secondary Defendant intended that the victim suffer really serious harm. However, foreseeability will remain an important factor:

First, foreseeability is still potentially strong evidence that the Defendant intended that their co-accused to act that way; together with other evidence, it may be decisive in the Prosecution making the jury sure that what was foreseen was also what was intended;

Second, while a Defendant might not desire a foreseen outcome, if it is understood, even as a last resort or under certain conditions, that an outcome should happen, then a Defendant will be guilty of a co-accused's actions if that outcome then results. So, for example, if two Defendants plan a robbery, and agree (even tacitly) that lethal force should be avoided if at all possible, but if necessary should be used if the Defendants are backed into a corner, if one Defendant used lethal force intending at least really serious harm during the robbery, the other Defendant would be guilty of murder. Foreseeability will again be an important evidential tool for the Prosecution to prove the existence of a tacit understanding or agreement.

Third, even if neither of the above apply, if a Defendant foresaw their co-accused might kill or seriously harm someone, but carried on with the venture regardless intending only to cause some harm, and then the victim died, the Defendant would be guilty of manslaughter.

What about an appeal?

Jogee represents a hugely significant change in the law. The inevitable question of those convicted pre-Jogee for the actions of their co-accused during a venture must be – can I appeal?

Perhaps inevitably, the court in Jogee were anxious to dampen down on the prospects of opening a floodgate of appeals. Lord Neuberger observed (at para 100):

The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down by Chan Wing-Siu and in Powell and English…

A [historic] conviction…can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time.

It appears from his Lordship's remarks that any potential Appellant with a conviction from some time ago will therefore need to show two things:

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1. That the equating of foresight with intent to assist, rather than treating foresight as merely evidence of an intent to assist "will have been important on the facts of the outcome of the trial" (para 100). If it was a peripheral point, or there was ample other evidence to demonstrate intent to assist, any appeal is likely to fail and the conviction be declared safe;

2. That there has been demonstrable "substantial injustice" – and not just from the fact the law has now been corrected – to justify exceptional leave to appeal out of time. Just the law changing is not enough.

It is submitted, however, that substantial injustice might be demonstrable from the length of sentence imposed being substantially different had the law been applied correctly, or that there was little other evidence of an intention to assist, or the age of the Defendant at the time of conviction. Plainly each case will need to be considered carefully on the facts.

Conclusion

The decision in Jogee has corrected a substantial injustice for future Defendants accused of a crime where the acts were perpetuated by their co-accused. Foreseeability will remain an important factor in such cases, but only as evidence of intention – not as the mens rea itself.

While the floodgates are not open to appeals from historic convictions, each case will turn on its own facts. We will need to watch with interest the progress of any Jogee-related appeals to see how tight the floodgate is.