Court of Appeal (Criminal Division)

Intending to assist in murder: when will the use of a deadly weapon constitute going beyond the confines of an agreed plan?

R v Harper [2019] EWCA Crim 343

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In *R v Harper* [2019] EWCA Crim 343, the appellant and a friend, Cahill, were on a Christmas Eve night out. Apparently the appellant was said to have been out to 'get pissed and cause trouble' and as a result had been asked to leave the pub they were in. They proceeded on to a working men's club where they encountered the victim, Mr Kerry and two others, Mr Frost and Miss Minto. An affray broke out at the club where Harper punched Frost and fought with Minto. When Kerry intervened, Cahill attacked him from the front, while Harper attacked him from behind, attempting to hit him on the back of the head with a glass. After she had been tackled to the ground, Harper continued screaming and kicking out. Meanwhile, Cahill produced a knife and stabbed Kerry which resulted in his death.

Harper was charged and convicted as an accessory to murder on the basis that she assisted or encouraged Cahill in the killing of Kerry. At trial, Harper had admitted behaving badly that night but denied assisting or encouraging Cahill. She argued that she had not intended that Cahill assault the victim let alone cause him serious harm or death. In relation to the attack with the beer glass, Harper argued that she had only intended to throw the contents of the glass over the victim and not to attempt to inflict upon him grievous bodily harm.

Evidence was presented at trial from a prison guard where Harper was purported to have said that she was in for murder and that she had confessed to being complicit in the killing but she was pleading not guilty. This was refuted by counsel for the defence in cross examination but the prison officer maintained her position.

The two grounds of appeal raised by Harper were that the confession evidence presented by the prison officer should not have been admitted at trial and that the judge erred in his direction of the jury in relation to joint enterprise when he said:

> It is Ms Harper's case that she was unaware that Mr Cahill had a knife at the material time. Knowledge or ignorance that Mr Cahill had a particular weapon at the material time will constitute evidence relevant to your determination of whether you can be sure Ms Harper intentionally encouraged and/or assisted Brian Cahill to assault Owen Kerry unlawfully with intent to kill Mr Kerry or cause him really serious bodily injury. (at [26])

It was contended by the appellant that this direction did not give sufficient weight to the importance of her knowledge of the presence of the knife which had constituted an 'overwhelming supervening act by the perpetrator' (at [26]).

With regard to the prison officer's evidence, it was argued that due to her occupation she fell within s. 67(9) of the Police and Criminal Evidence Act 1984 (PACE) as a person 'other than a police officer charged with a duty of investigating offences or charging offenders' and as such, under Code C of the PACE 1984 Codes of Practice she was required to record any unsolicited comments and to provide the appellant with an opportunity to sign this document. Instead, the prison officer made a note of the comments later that day but did not record it on the prison's Intelligence Report System (IRS) until 3 weeks later and then destroyed the hand-written note.

Held, dismissing all grounds of appeal, that the use of the knife by Cahill did not amount to an overwhelming supervening event and was merely a simple escalation of violence. The knowledge of the knife, or lack thereof, is evidence of intention but no more. The jury were entitled to use this to

reach their own conclusions as to whether the appellant had intention to cause harm and the level of such harm. The jury were properly directed and there was no suggestion that the conviction was unsafe.

In relation to the admissibility of the prison officer's confession evidence, PACE 1984 section 67(9) and the related Code C codes of practice 11.13, 11.14 and note 11E referred to investigating officers and although a prison guard could come under the remit of the legislation, the comment was unsolicited and unprompted and therefore the provision did not apply. The defence counsel's failure to challenge the admissibility of the evidence at trial did not hold any weight as incompetent representation is not a ground of appeal unless the conviction is unsafe as a result. The court held that any challenge to the admissibility of the evidence would have been bound to fail so there was no incompetence anyhow.

Commentary

To be liable as an accessory to a crime, contrary to the s.8 of the Accessories and Abettors Act 1861, D2 must assist or encourage D1 in the commission of an offence by D1 and D2 must intend to assist or encourage D1 to act with the requisite mens rea. (See *R v Jogee* [2016] UKSC 8; *Ruddock v The Queen* [2016] UKPC 7 at [8-11]) In *R v Anderson and Morris* [1966] 2 QB 110 it was said that:

> [W]here two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but… if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act. (at [118])

As stated later in the case of *R v Powell and English* [1999] 1 AC 1, 'the secondary party is not liable if the principal's act amounts to an overwhelming supervening event' (at [7]). Although *Powell* did not survive the purge of joint enterprise, enacted by the decision of *R v Jogee*, the principle of an overwhelming supervening act is still of importance in relation to accessorial liability. Lords Hughes and Toulson recognised that 'where two or more parties agree on an illegal course of conduct, the question has often arisen as to the secondary party's liability where the principle has… gone beyond the scope of what was agreed or encouraged' (at [17]). In such cases the prosecution must prove that the consequence was part of a common purpose. However, in its criticism of the doctrine of joint enterprise, their lordships expressed concern of the authorities' alteration of the long established principles of criminal law in relation to foresight, intention and the *mens rea* for murder. In *Chan Wing-Sui* [1985] AC 168 it was suggested that 'a secondary party is liable for acts by the primary offender of a type which the former foresees but does not necessarily intend' (at [175]). The principles set out in *Chan Wing-Sui,* and subsequent joint enterprise cases, were described as being based on 'incomplete, and in some cases erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments' (at [79]). In relation to the role of foresight in joint enterprise cases of murder their lordship stated:

> The *Chan Wing-Siu* principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so… The rule brings the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principle. (at [83-84])

Therefore, in restating the principles of accessorial liability, their lordships in *Jogee* stated that 'the error [in Chan Wing-Sui was to equate foresight with intent to assist… the correct approach is to treat it as evidence of intent' (at [87]). The use of weapons within an agreed plan was considered and the court adopted Professor Glanville Wiliams' analysis that 'the knowledge of the part of one criminal

that his companion is carrying a weapon is strong evidence of a comment intent to use violence, but it is not conclusive.' (Williams G, Criminal Law: The General Part (2nd Edn, Stevens & Sons, 1961) at p.387).

In *Chan Wing-Siu v The Queen* particular focus was placed on the knowledge that a weapon may be used with murderous intent. However, in *Jogee* their lordships criticised the subsequent fixation of the law to concentrate on D's knowledge of the weapon and instead advocated that this should 'give way to an examination as to whether D2 intended to assist in the crime charged' (at [98]) Adding: 'If that crime is murder, then the question is whether he intended to assist in the intentional infliction of grievous bodily harm at least, which question will often… be answered by asking simply whether he himself intended grievous bodily harm at least' (at [98]). The conclusion set out by their lordships was that '[k]nowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence one way or the other, but it is evidence and no more' (at [98]).

This approach was applied in *R v Brown* [2017] EWCA Crim 1870 where Lady Justice Hallett found that, in a case where a man was wounded by a gang attack, the trial judge 'was not obliged to direct the jury that they could only convict a secondary party of either a section 18… or section 20 offence if they were sure that the secondary party knew that the principle had a knife' (at [29]). Sir Brian Leveson, in *Ali Tas v The Queen* [2018] EWCA Crim 2603, in his analysis of *Jogee* suggested that 'in underlining the requirement for proof of intention, one of the effects… is to reduce the significance of knowledge of the weapon so that it impacts as evidence… going to proof of intention, rather than a prerequisite of liability of murder' (at [37]). His conclusion was that it was not necessary to demonstrate that the secondary party was aware of the weapon in order to be liable for murder. Thus in relation to the case of *Harper* the issue was not whether the appellant was aware of the knife used by Cahill, but rather whether she, through her actions, intended to assist and encourage the attack on Kerry and whether by doing so, she had the requisite intention that Kerry suffer serious harm or death. As knowledge of the knife was merely evidence to be considered when evaluating the *mens rea* of the appellant, there was no suggestion that the jury were misdirected and therefore there was no grounds to find that their verdict was unsafe.

In relation to the admission of the confession evidence which was presented by the prison officer, the relevant provisions can be found in Code C of the PACE Codes of Practice:

> 11.13 A record shall be made of any comments made by a suspect, including unsolicited comments, which are outside the context of an interview but which might be relevant to the offence. Any such record must be timed and signed by the maker. When practicable the suspect shall be given the opportunity to read that record and to sign it as correct or to indicate how they consider it inaccurate.
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> 11.14 Any refusal by a person to sign an interview record when asked in accordance with this Code must itself be recorded.

Note 11E adds that significant statements will always be relevant to the offence and must be recorded. Section 67(9) of PACE sets out that 'Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision.' Under s.78(1) of the Act the court may exclude prosecution evidence if it appears, having regard to all the circumstances, including how the evidence was obtained if such an admission would have an adverse effect on the fairness of proceedings. The case of *R v Devani* [2008] 1 Cr App R 4 was relied upon by the appellant. The case concerned the stopping and questioning of a solicitor who had unlawfully taken sealed documents from a prisoner during a prison visit which were subsequently found to contain falsified evidence to be passed to a co-accused. Initially this transgression had been spotted on CCTV by an operations support officer (OSO) in the prison whose role it was to search prison visitors and monitor CCTV for any prohibited items being passed between prisoner and visitor. On seeing the passing of the documents, the OSO sought the assistance of a colleague – also an OSO, and confronted the solicitor questioning her in relation to the passing of the

item. After the second OSO searched for and discovered the documents, a prison officer, who was the team leader in the visits area, was called. The prison officer then further questioned the solicitor.

The question was whether the two OSOs and the prison officer fell within the remit of the PACE codes, including those of relevance in the present case, and in addition, Code C 10.1 regarding the cautioning of a person suspected of an offence. The court held that there was a clear distinction between the powers of an OSO and those of a prison officer. This was due to the additional powers held by prison officers in relation to powers of arrest. An argument was accepted from the OSOs that they did not feel that they were under a duty to investigate offences and would instead pass the matter up to a prison officer. As such, an OSO would not fall within the remit of s.67(9) of PACE but a prison officer could. Sir Brian Leverson, in *Harper*, accepted that although this may be the case, the prison officer in this instance was not actively investigating any offence so no obligation under s.67(9) of the Act had been triggered. Although the prison officer was criticised for her failure to promptly record the comment and in destroying the note, the information she obtained was offered up by the appellant and was neither prompted nor solicited. The court went as far as suggesting that 'it is not suggested that she spoke, let alone asked a question' (at [23]). The suggestion, therefore, is that even if a person's job description were to fall within s.67(9) PACE, in order for the provision to be fully engaged, they must take proactive steps to be involved in the active investigation of an offence. If they do not do this, they cannot be deemed to be in the 'discharge of that duty' under the Act.

Zach Leggett