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End of an Era: Court of Appeal gives Final Judgment on the Contemplation Principle in Cases of Murder by Joint Enterprise

R v Okello & Rahman [2015] EWCA Crim 1971, Court of Appeal

Murder, Joint Enterprise, Weapons

One afternoon in December 2013, Donald McNichol (DM), 54, was using a computer at Stockwell Community Centre in South London. He got into an argument with Mamunoor Rahman (MR), 18, after DM complained that MR was making too much noise. The row escalated quickly and MR punched DM, who returned the blow. MR's older brother, Monsur Rahman (R), 19, and other men in the centre including Daniel Okello (O), 20, and Ibrahim Ford (IF), 17, then attacked DM with punches. At one point, MR threw or brought down a chair on DM's head, at which point he collapsed to the floor and the men fled. DM was taken to King's College Hospital and placed into a medically-induced coma, but died two weeks later of a vertebral artery defect which led to 'traumatic subarachnoid haemorrhage' (bleeding in the brain). Dr Jerreat, the pathologist, was unable to choose between whether the fatal blow had been caused by a punch or by the chair.

MR pleaded guilty to manslaughter but the Crown decided to pursue a charge against him of murder, along with murder charges against O, R and IF. They all appeared before His Honour Judge Bevan QC and a jury at the Central Criminal Court in September 2014. For O and R it was argued that there was a 'qualitative difference' between the use of fists and the use of a chair. The Crown conceded that if the use of the chair was qualitatively different from the use of a fist, then the jury could not be sure that the chair did not cause the fatal injury and MR would be solely responsible. On this point, HHJ Bevan QC decided that there was a case to answer in regard to O and R on the basis of joint enterprise, and that whether the use of a chair was qualitatively different from the use of fists was a jury matter. In his opinion, neither fists nor a chair were 'inherently lethal unlike a knife or a gun', but both were 'capable of causing serious injury'.

MR, O and R were convicted of murder while IF was convicted of manslaughter. O and R appealed against conviction, submitting that the throwing or bringing down of a heavy wooden chair on the head of the victim was of a fundamentally different nature from punching that person. It was submitted that the use of a wooden chair was 'obviously much more dangerous' than using fists, which therefore took MR's attack on DM outside of the scope of the joint enterprise.

HELD, DISMISSING THE APPEAL, the trial judge was 'clearly correct' in leaving the issue to the jury (at [38]). Giving the judgment of the Court of Appeal, Lloyd Jones LJ said that the question as to whether the use of a chair as a weapon was 'qualitatively different' from a fist was *prima facie* a question of fact for the jury, following *R v Mendez & Thompson* [2010] EWCA Crim 516, [2011] QB 876 (at [32]). That difference lay not only in the 'nature of the instrument... but in the nature of the harm it can inflict, that is, its dangerousness' (at [34]).

In the present case, the trial judge had been 'right to take into account... the nature of the injury caused' (at [35]). DM died from a haemorrhage, caused by a 'vertebral artery defect', in turn caused by a 'sharp upward and sideways rotation of the head' (at [29]). At the time of his death, two weeks after the incident at the community centre, DM had 'two residual injuries', each of which left bruising. The pathologist, Dr Jerreat, was unable to choose which blow, represented by the two residual bruises, had caused that sudden rotational movement (at [30]). The bruises could have been caused by a fist, or by a chair, and it was impossible to say which in fact had been the cause.

That supported the view that there was 'no significant qualitative difference between the use of a fist and use of a chair' (at [35]). It also supported the view that 'the type of injury inflicted may reasonably have been within the contemplation of the participants regardless of the precise means of infliction' (at [35]).

In the present case, ‘it was open to the jury reasonably to conclude’ that it was ‘a joint attack on a common victim by irrational individuals each intending severally to inflict serious harm by any means at their disposal and giving no thought to the means by which the others will individually commit similar offences on the same person’ (at [36]). It was ‘open to the jury to conclude that the use of a chair and the use of a fist to inflict the injuries were not qualitatively different’ (at [37]).

Commentary

Okello & Rahman marks the end of an era, one which began on 21 June 1984 with *Chan Wing-Siu & Others v R* [1985] AC 168, a decision of the Privy Council, and ended on 18 February 2016, when the Supreme Court handed down its judgment in *R v Jogee* [2016] UKSC 8 (unusually, the Supreme Court was simultaneously sitting as the Privy Council to decide the appeal in *Ruddock v R* [2016] UKPC 7).

In its judgment, the Supreme Court unanimously held that the courts took a ‘wrong turn’ by introducing the ‘contemplation’ principle into cases of accessory or joint enterprise liability. The ‘contemplation’ principle has its origin in *Chan Wing-Siu & Others*, in which Sir Robin Cooke said that a ‘secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend’ (at 175). The ‘contemplation’ principle has been a cornerstone of accessory and joint enterprise liability ever since, including in *Okello & Rahman*, but it is no longer good law. In *Jogee*, Lord Hughes and Lord Toulson (with whom Lord Neuberger, Lady Hale and Lord Thomas agreed) said that where two defendants, D1 and D2, embark on a criminal enterprise to commit crime A, in the course of which D1 commits a different (and usually more serious) crime B, then:

The rule in *Chan Wing-Siu* makes guilty those who foresee crime B but never intended it or wanted it to happen. There can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such intent, not conclusive of it. (*Jogee*; *Ruddock* at [66])

This means that *Chan Wing-Siu & Others* has been overruled (*Jogee*; *Ruddock* at [79] and [87]), as has every subsequent case decided on the basis of the ‘contemplation’ principle, including two House of Lords’ decisions (*R v Powell & Daniels*; *R v English* [1999] 1 AC 1 and *R v Rahman & Others* [2008] UKHL 45, [2009] 1 AC 129) along with dozens of Privy Council and Court of Appeal rulings, including several cited in the present case (*R v Greatrex* [1999] 1 Cr App R 126, *R v Uddin* [1999] QB 431 and *R v Mendez & Thompson* [2010] EWCA Crim 516, [2011] QB 876).

In *Jogee*; *Ruddock*, the Supreme Court restated the law as follows:

If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances. (*Jogee*; *Ruddock* at [94])

In cases where there is a more or less spontaneous outbreak of multi-handed violence, the evidence may be too nebulous for the jury to find that there was some form of agreement, express or tacit. But . . . liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder (*Jogee*; *Ruddock* at [95]).

If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results (*Jogee*; *Ruddock* at [96]).

As far as the use of weapons is concerned, Lord Hughes and Lord Toulson said this:

The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more (Jogee; Ruddock at [98]).

Thus, in the post-Jogee; Ruddock landscape, the focus has shifted. In a case like *Okello & Rahman*, we are less concerned with the accomplices' 'knowledge or ignorance' of the principal's possession of a weapon (in the present case, the chair) and more concerned with their intention to assist in 'the intentional infliction of grievous bodily harm at least'.

Does this focus-shifting render the appellants' convictions in the present case unsafe? The answer is potentially yes, although it is not an automatic consequence of the Supreme Court's judgment. As Lord Hughes and Lord Toulson said:

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 in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, 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 have been mistaken. (Jogee; Ruddock at [100]).

In the present case, there was 'a more or less spontaneous outbreak of multi-handed violence', which means that the appellants' liability 'depends on proof of intentional assistance or encouragement, conditional or otherwise'. If such an intent can be proven against one or both appellant, then he would be a murderer (Jogee; Ruddock at [95]) but if not he would be guilty of manslaughter (Jogee; Ruddock at [96]). These are questions for a jury to answer. Given that the appeal was dismissed on the basis of the law as it was before the decision of the Supreme Court in Jogee, the unsuccessful appellants may well apply to the Criminal Cases Review Commission to seek a referral back to the Court of Appeal.

Tony Storey