SWEET & MAXWELL

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Archbold Review

Cases in Brief

Evidence—sexual history evidence—Youth Justice and Criminal Evidence Act 1999 s.41—concerns as to sexual identity—whether relate to "sexual behaviour"

T [2021] EWCA Crim 318; 25 February 2021

T was convicted of raping the complainant during the course of their now-ended marriage. T applied to ask the complainant if she now identified as lesbian or bisexual, whether she was conflicted or anxious about, or had suffered or feared rejection by others in relation to, her sexual identity and whether she had made false allegations to "justify any change in her sexual identity." T argued that these questions did not relate to an issue of consent (Youth Justice and Criminal Evidence Act 1999 s.41(3)(a)), and an evidential base was provided by references to sexual identity and anxiety in disclosed unused material. The Court of Appeal rejected T's submission that "sexual behaviour" as used in s.41 was confined to actions and conduct and at all events did not extend to what counsel called "internal conflicts about sexuality". Whether it did or did not depended on the circumstances of the case. It may constitute an "experience" and so indeed may be within the ambit of s.41: just as virginity or celibacy may be. The account in *Rook and Ward on the Law on Practice of Sexual Offences* 5th ed. at para.26-146 – that sexual orientation can be suggestive of sexual activity and, if so, was capable of being "sexual behaviour" – was very helpful. Were it not so, as the Crown submitted, it would open up lines of cross-examination almost inevitably potentially humiliating and distressing to a complainant when it was the purpose of the 1999 Act to avoid such a situation arising. The proposed questioning would be a humiliating intrusion into the complainant's privacy and an unwarranted invitation to the jury to engage in prejudicial lesbophobic inferences. The Court of Appeal also doubted the evidential basis and relevance of the questions, and was satisfied that the criterion as to safety of conviction in s.41(2)(b) could not have been made out.

Murder—causation—novus actus interveniens—relevance of knowledge of intent

FIELD [2021] EWCA Crim 380; 18 March 2021

F accepted that for three years, he pretended to be in a genuine and caring relationship with the deceased, PF, a lonely single man whom he had manipulated and "gaslighted" – persistently manipulated and brainwashed, instilling self-doubt, and a diminished sense of perception, identity and self-worth. He had also drugged PF to give the impression he was drinking heavily, and encouraged him to drink once PF had changed his will in F's favour. PF died having drunk 60% alcohol whisky from a bottle left for him by PF (as, F said, only a temptation), and with some traces of a prescription sleeping drug in his body. His defence was that he had not intended to kill PF, was not present at the time and had not caused his death. The prosecution argued that PF's drinking of the alcohol should not be regarded as voluntary because the appellant had deceived him into drinking by not revealing his intention to kill PF. On appeal, F argued that PF's consumption of drink and/or drugs was or could be a voluntary act which broke the chain of causation (*Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269), a proposition that the judge's directions failed to adequately reflect. Dismissing the appeal, the extent to which an undisclosed intention changed the nature of an act depended on the circumstances. As F's counsel conceded, if D assured V, a weak swimmer, that he or she would rescue V if V got into trouble, and on the basis of that assurance V undertook the dangerous swim, that decision would be rendered involuntary by D's private intention not to assist, because

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that intention changed the nature of the act. Whether or not the deceased acted freely and voluntarily, when in a position to make an informed decision, would always depend on a close analysis of the facts of the case. If, in the context of a decision by the deceased, there was a significant deception by the accused that changed the truth or the reality of what was happening, such as materially to increase the dangerous nature of the act, then he or she may be criminally liable for what occurred. That "deception" as to the "nature of the act" may – as in the weak swimmer example – be directly linked to the undisclosed intentions of the accused. In F's case, the undisclosed murderous intention of the appellant substantively changed the nature of the undertaking upon which PF embarked. The jury must have rejected F's account that he was not present when the victim drank a large quantity of whisky which F had supplied. PF, therefore, would have believed that he was drinking in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring. In providing the whisky, he was being encouraged by F to drink, which inevitably would have started to impair his judgement, most particularly as it interacted with the sleeping drug. Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety. The appellant, therefore, manipulated and encouraged PF into a position of grave danger. The appellant's undisclosed homicidal purpose, in these circumstances, changed the nature of the act.

Procedure—Courts Act 2003 s.66—Crown Court judges acting as a district judge (magistrates' court)—analysis—guidance as to; power to vacate guilty plea against wishes of defendant

GOULD AND CONJOINED APPEALS [2021] EWCA Crim 447; 30 March 2021

A three-LJ court presided over by the Vice President considered issues relating to the relationship between the magistrates' courts and the Crown Court, particularly the powers exercisable by Crown Court judges under the Courts Act 2003 s.66. In each case, Crown Court judges sat as district judges under s.66 in order to correct procedural defects. In each case the problems were first noted in the Criminal Appeal Office as are result of applications to appeal for other reasons.

(1) The central issue was how far Crown Court judges could lawfully go to try and alleviate the unfortunate consequences of serious failures by the prosecution in charging criminal offences. The first point was that it was the duty of the prosecution to stop making basic procedural errors.

(2) As a matter of construction, s.66 vested the listed judicial office holders (including judges of the Court of Appeal and Crown Court) with all the powers of a district judge in relation to criminal causes or matters. There were no ticketing or training requirements.

(3) But the powers of magistrates' courts were circumscribed by a statutory scheme which was complex, prescriptive and restrictive. Crown Court judges would often have little experience of procedure in the magistrates' court, their staff less. This was, in itself, a reason for restraint in the exercise of the s.66 powers by Crown Court judges. If the prosecution wished to ask the judge to sit as a district judge to rectify a procedural error it had made, it must be able to provide the necessary procedural assistance. If a judge were unsure about what he or she was asked to do, then the safe course would sometimes be to decline to do it. The prosecution must then take its case to a magistrates' court, even if that occasioned delay. Where the judge was confident about the procedure and his or her powers, s.66 could be used to save time and cost and to rectify earlier procedural failings. The judge must bear in mind that a magistrates' court dealing with an either way offence might have decided that it should not be committed for sentence, and an error leading to the case coming to the Crown Court should not result in a defendant being denied that possible outcome. A Crown Court judge should also be aware of different approaches to sentencing in magistrates' courts, particularly in youth courts, which a defendant should not be deprived of because of procedural failures by the prosecution. It was only in cases where it was quite clear that the case should be dealt with by the Crown Court, or it was only necessary to tie up loose ends and avoid unnecessary hearings in the magistrates' court, that s.66 should be used.

(4) It was not necessary for a judge to "reconstitute" himself or herself, but it was necessary to explain, with reasons, exactly what powers were being exercised and why. The Crown Court judge should consider, where relevant, whether the proposed use of s.66 would create difficulties as to routes of appeal. The judge must be explicit about which sentences were imposed as a district judge and which as a judge of the Crown Court, and that must appear in the order and the records of the magistrates' court.

(5) Drawing from lessons in the instant cases, the court noted that (a) when the magistrates' court had made an order which gave jurisdiction to the Crown Court, by committal for sentence or sending for trial, that was the end of their jurisdiction and they were *functus officio*. The Crown Court judge could not use s.66 make any order which the magistrates' court could no longer make; and (b) there was no power in the Crown Court to quash an irregular order. Where it was plainly bad on its face, however, the Crown Court may hold that nothing has occurred which was capable of conferring any jurisdiction.

(6) The court had a power to direct that a guilty plea be vacated even when the person who entered it did not seek that course, or even opposed it. Such a power, though, must only be exercised sparingly and in the interests of justice. It was unlikely to be appropriately used in order to rescue the prosecution from a muddle of its own making.

Retention of documents—reconsideration of policy on deletion of digital records

WARREN [2021] EWCA Crim 413; 23 March 2021

Having allowed appeals against convictions in 1973 and 1974 on a reference from the CCRC (the Shrewsbury pickets case), the Court observed that the case provided the clearest example of why injustice might result when a routine date was set for the deletion and destruction of the papers that founded criminal proceedings. At the point when the record was extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there was no way of predicting whether something might later emerge that cast material doubt over the result of the case. Given

most, if not all, of the materials in criminal cases were now presented in digital format, with the ability to store them in a compressed format, the Court of Appeal suggested that there should be consideration as to whether the present regimen for retaining and deleting digital files was appropriate, given that the absence of relevant court records could make the task of the court markedly difficult when assessing – which was not an uncommon event – whether an historical conviction was safe. Such a task would involve reconsideration of the HMCTS Record Retention and Disposition Schedule dated 19 August 2020.

Summing up—summing up of defence; appeal—reconsideration before order recorded—duty of counsel to listen to and note summing up—duty to check audio tape if no recollection of point relied on on appeal

SAKIN [2021] EWCA Crim 291]; 3 March 2021 and [2021] EWCA Crim 411; 22 March 2021

(1) On the first listing, the Court of Appeal noted that the judge entirely failed to sum up S's defence. The court expressed surprise that none of the four counsel instructed brought the failure to the judge's attention, and emphasised the importance of the duty of counsel to do so. It was a paramount principle that a defence put by a defendant should be fairly put to the jury by the judge in the summing up. Where a cardinal line of defence was placed before the jury and that found no reflection at any stage in the summing-up, it was in general impossible to say that the conviction was secure. The appeal was allowed and a retrial ordered.

(2) On the second listing the court related that S's counsel, having informally mentioned the result of the appeal to the judge, the judge reviewed the audio file of her summing up and found that she had given an account of S's evidence. The transcript was defective. The court was informed and directed a reconsideration hearing. The court had an implicit power to revise any order before it was recorded as an order of the court (and a much more limited power thereafter): *Yasain* [2015] EWCA Crim 1277, [2016] QB 146; *Gohil* [2018] EWCA Crim 140, [2018] 1 Cr.App.R 30.) The order quashing S's convictions has not been issued and sealed by the Registrar, and had yet to be recorded in the Crown Court. There was no proper basis for any appeal by S on the basis of any failure on the part of the judge to sum up. The court accordingly revised the order, and dismissed the appeal. But for what was a purely fortuitous encounter between defence counsel and the judge, a serious miscarriage of justice would have occurred.

(3) There were lessons to be learnt. One was the importance of accurate transcription. But the transcribers' failure could not absolve counsel who cannot have paid any attention to, let alone made any meaningful notes of, the judge's summing up. It was a core duty of trial advocates to focus on the summing-up at the time that it was given, in discharge of the advocate's overriding duty to the court in the due administration of justice. In particular, it was the advocate's duty to raise promptly with the judge what appeared to be a material error in the summing-up, whether of law or fact. To do so was not inconsistent with the advocate's duty to the client, not least since a failure to raise complaints or suggestions at the time of a summing-up may be regarded on an appeal as relevant to the validity of any later complaints: *Reynolds (Nicholas)* [2019] EWCA Crim 2145, [2020] 1 Cr.App.R 2020. Counsel's earlier acceptance of the incomplete transcript as accurate suggested that they could have had no actual recollection of the summing up of the defence evidence (at least). In the absence of such a recollection and any meaningful notes, it was further to be regretted that counsel did not check the audio files for themselves at least by the time of the full appeal hearing. The position was then compounded at the hearing when the court was told in terms that the transcript was accurate. They ought, at the very least, to have indicated that they had no direct recollection and that they had not themselves checked the accuracy of the transcript. Making all due allowances for the sometimes difficult circumstances in which the publicly funded criminal bar had to operate, there could be no acceptable excuse for what had happened.

SENTENCING CASE

Mitigation; age, mental disorder

BALDWIN [2021] EWCA Crim 417; 23 March 2021

The appellant had pleaded guilty at the magistrates' court to an offence of making threats to kill. She had no previous convictions and was 18 at the time of the offence. She was committed to the Crown Court for sentence and was sentenced to a period of 16 months' detention in a young offender institution. She appealed against the sentence, submitting that insufficient weight was given to her age, immaturity and mental health and that the judge was wrong to conclude that immediate custody was the only option.

Allowing the appeal, the Court of Appeal stated that several factors led to the conclusion that the sentence imposed was wrong in principle and manifestly excessive. First, although correct to conclude that the offence involving a visible weapon indicated higher culpability, the judge erred in not thereafter considering whether any other factor demonstrated lesser culpability. In this case, the psychiatric evidence available should have led the judge to conclude that her responsibility for the offence was substantially reduced by mental disorder and learning disability. Second, the judge made no reference to, and was not referred to, the Sentencing Council Guideline on Sentencing Offenders with Mental Disorders, Developmental Disorders or Neurological Impairments, which came into force on 1 October 2020. Paragraphs 13 and 14, concerning expert evidence, were particularly relevant. There was psychiatric expert evidence in this case, which was not used to assess whether the appellant's mental issues reduced culpability.

Third, the judge did consider the Sentencing Council Overarching Principles in relation to Domestic Violence, which notes that domestic abuse offences are regarded as particularly serious within the criminal justice system. However, this seriousness is not to be considered in a vacuum. In this case, none of the aggravating factors set out in para.9 of the Overarching Principles, through reference to which a judge is to assess the enhanced seriousness of such an offence, applied. The Court at [16] then went on to make specific comments in relation to the relevance of gender when considering offences of this nature.

Fourth, the appellant was 18 at the time of the offence. There was evidence that she was childlike, younger than her chronological age and immature, which should have led to a significant reduction in the starting point adopted. Further, the principle that custody should be a last resort when a defendant is under the age of 18 carries over to an 18-year-old who is particularly immature.

The Court concluded that an immediate custodial sentence was wrong in principle and the length of the sentence manifestly excessive. After considering alternative sentencing options (see [22] of the judgment), the Court quashed the sentence and imposed a 12-month community order with a rehabilitation activity requirement. The Court also gave guidance regarding the approach to be taken where leave to appeal has been granted in a case where there is some prospect that success in the appeal will lead to the release of an appellant who has vulnerabilities such that their position on release will require investigation by the National Probation Service (NPS). In such situations, the appellants' representatives must contact the NPS at the Court of Appeal with a view to appropriate investigations being made in good time before the appeal hearing.

Case in Depth

DPP v M: what weight should be given to the decision of the SCA?

By Riel Karmy-Jones QC and Nicholas Hall, Red Lion Chambers

The recent case of *DDP v M*[1] has been welcomed by victims of modern slavery and their lawyers,[2] and hailed as representing a significant milestone for defendants seeking to rely upon the statutory defence provided in s.45 of the Modern Slavery Act 2015 [MSA 2015], claiming that it solidifies the UK's obligations under Art.10 of the Council of Europe Trafficking Convention [2005]. But whilst *M* might appear to clarify the role of Single Competent Authority [SCA] decisions in criminal proceedings it is highly problematic, giving too much force to what previously would have been considered as inadmissible "opinion" evidence. In our view, it was wrongly decided.

M was a 15-year-old boy who was arrested at a Tooting branch of KFC in May 2019 along with two other boys. All three were searched, and M was found in possession of Class A drugs and a knife. A week after his arrest M was referred to the National Referral Mechanism [NRM] by the local authority and, prior to his trial, the SCA made a positive conclusive grounds decision that M had been recruited, harboured and transported, for the purposes of criminal exploitation.[3] In doing so, the SCA considered: M's behaviour in custody (which had raised no concerns); M's parents' background and the effect on his history on his development; the fact that M had been stabbed in an incident in March 2018 and had subsequently gone missing from home; a social services report in June 2019 that reported that M did not want to return home, but had felt safe when missing because his friends looked after him; his positive behaviour at home and school since being rehoused in local authority care; and police confirmation that M was by reason of his age vulnerable, and had made no financial gain from his gang involvement. The SCA acknowledged that not all children involved in criminality will have been trafficked, but taking all matters into account, decided that M had been targeted by gang members for the purposes of criminal exploitation, and that he was therefore a victim of modern slavery.

At his subsequent trial in the youth court, M's case was that the SCA's conclusive grounds decision was sufficient to show that (a) his presence in Tooting had been facilitated by the other boys with the view to him being exploited; and (b) his offending was a direct consequence of that exploitation.[4] The Prosecution did not agree that the SCA's decision was correct, but the fact of the decision was nonetheless admitted as an agreed fact, and the full minute of the SCA decision adduced. The District Judge concluded that despite M having given no account in interview, nor any evidence at trial, the SCA decision was sufficient to satisfy the evidential burden under s.45 MCA 2015, and M was duly acquitted.

The Crown subsequently appealed to the Divisional Court by way of case stated, arguing that in the absence of any positive account, M had failed to discharge that evidential burden, and that the District Judge had made an error of law in relying on the SCA's decision. That decision, they argued, was opinion evidence and hearsay, so inadmissible in criminal proceedings.

The Divisional Court disagreed, holding that the District Judge had been entitled to admit and rely upon the SCA's findings as evidence that the defendant had been recruited and harboured, and was a victim of criminal exploitation. In the judgment handed down in December 2020, Lady Justice Simler and Mr Justice William Davis stated that:[5]

> The SCA decision-maker had expertise in relation to those issues. The judge was entitled to consider the findings and assess the extent to which they were supported by evidence. Insofar as appropriate, she would have been able to reduce the weight she gave to the findings. However, that is a question of weight rather than admissibility. In fact, the SCA decision was based on a proper evidential foundation and it was not contradicted by other material available to the judge.

The Court also addressed the prosecution concern that if an SCA decision were to be admissible in a trial in relation to the application of the statutory defence in any given case, then this would have significant implications in terms of prosecutorial practice, stating:[6]

1 [2020] EWHC 3422 (Admin).
2 Garden Court Chambers, "High Court significant victory for victims of trafficking and modern slavery in DPP v M" (*Garden Court News*, 15 December 2020) https://www.gardencourtchambers.co.uk/news/high-court-significant-victory-for-victims-of-trafficking-and-modern-slavery-in-dpp-v-m accessed 4 February 2021.
3 At [9].
4 *DPP v M* [2020] EWHC 3422 (Admin), at [59].
5 Lady Justice Simler and Mr Justice William Davis at [54].
6 At [55].

> The weight of a conclusive grounds SCA decision will vary. The prosecutor will be in a position to assess the weight of the decision just as the prosecutor can assess the weight of other evidence relevant to the issue of a defendant's status as a victim of trafficking or exploitation. The decision made by a prosecutor as to whether the defendant has satisfied the evidential burden and, if so, whether the prosecution can disprove the statutory defence will depend on an assessment of all of the available material. As the facts of this case amply demonstrate, a conclusive grounds decision will not be determinative in the criminal context any more than it is in tribunal proceedings.[7]

The Court thus held that a judge in a criminal trial is entitled to consider the findings of the SCA, to assess the extent to which they are supported by other evidence, and that this is a question of weight rather than admissibility. The prosecution can also assess the weight of the decision in their determination of whether they can disprove the statutory defence. The seriousness of the offence committed will be a significant consideration in determining what a reasonable person would have done, particularly in the case where the offender is an adult, who may be likely to have greater appreciation of the consequences of their actions than a child.

Why the Court's Approach is problematic

While it may appear that the court's comments on the weight to be given to the evidence serve to balance the significance of a conclusive grounds decision at trial, its approach flies in the face of long-standing authority and practice. A fundamental principle of criminal trials in the Crown Court is that the ultimate questions of fact are for the jury.[8] Where an SCA decision forms part of the evidence raised, it is likely that the jury would give it significant, and perhaps unwarranted and improper weight, it speaking directly to the issue in the jury's province, namely whether the defendant is or is not a victim of modern slavery.

In order to reach its decision, and to overcome the objection that the SCA's conclusive grounds decision was inadmissible opinion evidence, the Divisional Court found that the SCA's decision was on a par with expert evidence. It concluded that the question of whether a person is a victim of exploitation is a question of fact, i.e. is he/she a victim or not, is often not a simple exercise to determine, but requires an evaluation and contextualisation of information from a variety of sources which "are not necessarily within the knowledge of an ordinary person".[9]

In effect, the Court was saying that as most of us spend our lives oblivious to the complex circumstances at play,[10] and are not familiar with the signs of exploitation, we would be ill-placed to recognise them without a guide to point them out, reasoning that:

> ... expert evidence is admissible when the subject matter is something on which the ordinary person without particular experience in the relevant area could not form a sound judgment without the assistance of a witness with such experience.[11]

Accordingly, it concluded that the "SCA decision-maker had expertise in relation to those issues,"[12] so its decision must be admissible at trial.

The Court in *M* sought to draw an analogy between the decision-maker and the clinical forensic psychiatrists or psychologists often relied upon in criminal trials. Here, however, it must be remembered that while the SCA certainly has both expertise and experience, it is a government body, established by the Home Office to investigate and safeguard victims of trafficking and modern slavery, and there is no specific experience requirement to make an NRM decision. Notwithstanding the relevant expertise of the SCA,[13] the Court in *M* acknowledged that the statutory guidance aimed at the decision-makers within the NRM "is not a substitute for the experience of someone dealing with such decisions regularly",[14] but reasoned that "a person with the necessary expertise can give context to the factors by reference to their wider experience and other cases."[15] This ignores the fact that a decision-maker may well have less practical experience then say a long-standing and experienced police officer who has worked in the field of modern slavery for many years, and whose "opinion" as to the ultimate issue in the case would plainly be inadmissible.

The SCA decision-maker, whose individual details and experience may not be known or recorded on the minutes, also pursues a different agenda and purpose to the criminal court, its thinking around the question of whether the individual is a victim of exploitation being geared solely to the purpose of providing support.[16] Home Office guidance produced for NRM decision-makers, makes it clear that if the SCA "has sufficient evidence to make a positive decision it should do so immediately",[17] and even at the conclusive grounds stage, it is possible for the SCA to make a finding without all available evidence.[18] Thus the decision-maker will not have access to all the evidence, will not hear oral evidence (including that of the defendant) contested and challenged, or examine the factual matrix of the case with the same rigour as a criminal investigation and trial. Rather, the decision-maker will make decisions applying the lower civil standard of proof, usually on the basis of a limited file of material, largely paper summaries which are often poor. The decision itself will frequently contain no information on the decision-maker, his or her 'expertise', or their rationale in reaching the decision. Further, it is only negative conclusive grounds decisions that are ever subjected to a review.[19]

The next problematic issue is the manner in which the SCA's decision would be presented in a criminal trial. As Gross LJ's observed in *S(G)*[20] it is likely that the conclusive grounds deci-

7 In taking this approach the Divisional Court cited with approval the comments of the President of the Immigration and Asylum Chamber in *DC (Albania)*: "Where the CA has made a positive "conclusive grounds" decision, this will point strongly in the appellant's favour in the protection appeal, given the higher standard of proof applied by the CA in coming to that decision. But, again, it will not necessarily be determinative."

8 As the Court of Appeal in *R v DS* concluded: "whether or not a child is in fact a victim of trafficking is a matter the jury is required to consider under s.45(4)(b). This is an issue they will have to consider on all properly admissible evidence".

9 *DPP v M* [2020] EWHC 3422 (Admin), at [45].

10 See Home Office, *Modern Slavery: Statutory Guidance for England and Wales version 2.0* (January 2021) para 3.5, "it is not easy to identify a potential victim – there are many different physical and psychological elements to be considered".

11 *DPP v M* [2020] EWHC 3422 (Admin), at [45].

12 At [54].

13 The statutory guidance refers to decision-makers in the SCA as "trained specialists", but makes no reference to an experience requirement. At [4.13].

14 *DPP v M* [2020] EWHC 3422 (Admin), at [27].

15 At [46].

16 Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2020.

17 Home Office, *Modern Slavery: Statutory Guidance for England and Wales version 2.0* (January 2021), para.14.64.

18 Whilst the SCA must request more information and give parties involved in the case an opportunity to provide more information, they are still able to make a decision in the absence of all the evidence. Ibid, at para.14.89.

19 This is done by a "second pair of eyes" and then a Multi-Agency Assurance Panel. (Home Office, *Modern Slavery: Statutory Guidance for England and Wales version 2.0* (January 2021)).

20 [2018] EWCA Crim 1828, at [68], [69].

sion would be dealt with by way of admissions. Whilst these might be supplemented by the minutes of the decision, as the Court in *M* acknowledged, that document is not prepared with a view to its being used as "expert" evidence.[21] The written decision would not, for example, include the declarations of adherence to the code of conduct for experts, nor would it be clearly set out and argued so as to withstand scrutiny. The Divisional Court in *M* was also silent as to how a prosecutor would in practice challenge a conclusive grounds decision. In reality, they are unlikely to be able to produce an alternative expert report that would be admissible, and the jury is unlikely to hear the decision-maker (who, as indicated above may not be identified) give oral evidence and be cross-examined, leaving the decision, and the basis for it, largely untested. The Crown in *M* was alive to these issues in their arguments.[22] In rejecting its submissions, the Divisional Court failed to consider the practicality of disproving the statutory defence to the criminal standard.

The Court in *M* gave no guidance as to what directions to give to the jury about the SCA's conclusive grounds decision, for example in respect of what weight to give it. In all the circumstances, the Divisional Court's conclusion that once admitted "*a conclusive grounds decision will not be determinative in the criminal context any more than it is in the tribunal proceedings*" is unrealistic.[23]

The admissibility of decisions of the SCA and the Upper Tribunal was also considered by the Court of Appeal in *BTT*.[24] In that case, the Court admitted such decisions as fresh evidence under s.23 of the Criminal Appeal Act 1968; however the CA made it clear that this was not to be taken as determining that these decisions would necessarily be admissible at any trial. Although it briefly considered *M,* the Court sidestepped the issue, deciding that as it had already refused the application for leave to appeal, it did not need to determine whether the decision in *M* was correct.[25]

21 At [53].
22 *DPP v M* [2020] EWHC 3422 (Admin), at [55].
23 *DPP v M* [2020] EWHC 3422 (Admin), at [55].
24 [2021] EWCA Crim 4.
25 See also *R. (on the application of Purvis) v DPP* at [66] (decided in a different context), which confirmed that an appellate court may assess the prospects of a defence succeeding by reference to a record of evidence heard by a tribunal, and the decision of that tribunal, even though that evidence might be inadmissible in the Crown Court. In those circumstances, even where evidence has not been tested, where a decision has been made by a competent authority vested with the responsibility for investigating particular issues, it is "unlikely" that a prosecutor would disregard a concluded decision of such an authority when exercising the prosecutorial discretion.

The Home Office's *Modern Slavery: Statutory Guidance for England and Wales*, 2021[26] provides:

> 17.52 The decision of the SCA as to whether a person had been trafficked for the purposes of exploitation is not binding on the Crown Court or the CPS. Unless there was evidence to contradict it or significant evidence that had not been considered, it is likely that the criminal courts will abide by the decision; see *R v L(C)* [2014] 1 All ER 113 at 28 and *R v VSJ* [2017] 1 WLR 3153 at sect; 20(viii). The decision should be scrutinised by the prosecutor to see the evidence that was available to the SCA, to what extent the evidence has been analysed, weighed and tested by the SCA and to assess the quality of any expert evidence relied upon.
>
> 17.53. A positive Reasonable Grounds or Conclusive Grounds decision may support the suspect/defendant's argument that they have been forced, threatened or deceived into committing the crime(s) for which they are accused. However, a positive decision does not automatically establish the statutory defence is applicable. The other criteria provided by the Act must still be met and, given the different standards of proof required in criminal proceedings, courts are not bound to accept NRM decisions.
>
> 17.54. Conversely, a section 45 defence may be established even if a suspect/defendant has not been referred into the NRM or has had a negative decision.
>
> 17.55. Whilst the NRM and the criminal justice system are distinct and separate processes, a decision by the SCA to recognise a suspect/defendant as a victim of modern slavery may still have a bearing on a criminal case. As such the SCA must update the police, Crown Prosecution Service and the Court hearing the case (if relevant) at the Reasonable Grounds and the Conclusive Grounds stages as soon as a decision is made.

Conclusion

Conclusive grounds decisions are a far cry from the expert reports criminal courts are used to. The absence of an experience requirement to qualify the decision-maker, and the inability of the prosecution to properly challenge the decision, not only undermines the court's approach in *M,* but raises serious concerns of an SCA decision being used to discharge a defendant's evidential burden under s.45. The decision in *M* is clearly wrong, and should be approached with caution pending the outcome of an appeal. The case should certainly not be considered conclusive authority for the proposition that SCA decisions will always be admissible in criminal trials.

26 March 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974794/March_2021_-_Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.1_.pdf.

Editor's Note

We understand that the Crown are seeking leave to appeal this decision to the Supreme Court on point of law.

JRS

Issue 4 25 May 2021

Feature

Reflections on *Jogee*: Overwhelming Supervening Act

By Rudi Fortson QC, Karl Laird, and David Ormerod QC

The Supreme Court's judgment in *Jogee and Ruddock v The Queen*[1] substantially altered the criminal law's approach to secondary liability. However, the judgment left numerous important issues unresolved. In particular, the circumstances in which a secondary party is excused liability on the basis of an overwhelming supervening act ("OSA") of the principal remains unclear. The Court of Appeal recently discussed OSA in *Lanning and Camille*,[2] but it too left important questions unanswered. In this article we examine this concept, which is being encountered with increasing frequency in practice.

The Supreme Court's explanation

In *Jogee*, the Supreme Court – having restated the principles of accessorial liability – discussed the concept of OSA in some detail:

> [96] 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: *R v Church* [1966] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F(J) and E(N)* [2015] 2 Cr.App. R 5. The test is objective. As the Court of Appeal held in *R v Reid (Barry)* 62 Cr App R 109, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.
>
> [97] The qualification to this (recognised in *R v Smith (Wesley)*, [1963] 1 W.L.R 1200; *R v Anderson*; [1966] 2 QB 110; *R v Morris* [1966] 2 QB 110 and *R v Reid* (1976) 62 Cr App.R 109); is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> [98] This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *R v English*. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. [emphasis added]

1 [2016] UKSC 8.
2 [2021] EWCA Crim 450.

Terminology

Confusingly the Supreme Court referred to "overwhelming intervening occurrence" [12]; "overwhelming supervening event" [33] and [64]; and "overwhelming supervening act" [97]. It is submitted that it is the latter expression that is the pertinent one and, in particular, the statement that the OSA was an act "by the perpetrator" ([97]). The correct focus should be on the actions of D1 whom (subject to OSA) D2 had intentionally assisted or encouraged, rather than in respect of an external circumstance (as might be implied by the words "occurrence" and "event", e.g., a bolt of lightning that killed V).

OSA – a matter of causation?

Liability as a secondary party is not founded on the premise that D2 caused the actus reus of the offence in question.[3] However, in *Anderson and Morris*,[4] the Court of Criminal Appeal expressly described the concept of "overwhelming supervening event" as a "matter of causation". Given the language used by that Court, and now the Supreme Court, it is understandable that legal practitioners may seek to apply the OSA concept as one that engages causation principles – an approach that is apt to mislead. Liability as a secondary party is not based on causation. This was explicitly recognised by the House of Lords in *Kennedy (No 2)*[5] and in *Stringer*,[6] in which Toulson LJ stated that what is required is some "connecting link" between D2's conduct and D1's commission of the offence.[7]

"Overwhelming" – what does this mean?

The supervening act must be "overwhelming". But, what does this mean in practice? The observations in *Jogee* that the act must be of such a character "as to relegate [the acts of D2] to history" [97]; or the act has "faded to the point of mere background" or "has been spent of all possible force" [12], may provide some guidance – but not much. In some rare situations, it seems that there is an OSA because the

3 See commentary to *Tas* by K. Laird: [2019] Crim LR 339-343.
4 [1966] 2 QB 110. In *Anderson and Morris*, A. was seen punching V. with M. standing at the latter's back apparently not taking any definite part in the fight. A. fatally stabbed V. with a knife (which M. denied knowing A. had). M was convicted of manslaughter. Lord Parker CJ, giving the judgment of the Court, said: "… 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. … Mr. Caulfield [for the Crown] … points to the fact that it would seem to be illogical that, if two people had formed a common design to do an unlawful act and death resulted by an unforeseen consequence, they should be held, as they would undoubtedly be held, guilty of manslaughter; whereas if one of them in those circumstances had in a moment of passion decided to kill, they would be acquitted altogether. The law, of course, is not completely logical, but there is nothing really illogical in such a result, in that it could well be said as a matter of common sense that in the latter circumstances the death resulted or was caused by the sudden action of the adventurer who decided to kill and killed. Considered as a matter of causation there may well be an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors."
5 [2007] UKHL 38.
6 [2011] EWCA Crim 1396, at [48].
7 A point made by Professor Glanville Williams in "*Finis* for *Novus Actus*" (1989) 48 C.L.J. 391.

acts of D2 cease to have any relevance or material connection with the acts of D1, even if D1's crime is the one that D2 intended. For example, D2 may provide D1 with a jemmy to enable D1 to commit burglary but, in the event, D1 does not use it until two years later (consider *R v Bryce;*[8] and see *Jogee* [12] and the references in that paragraph to "time, place, or circumstances"). Less clear is whether D2, who intentionally assisted or encouraged D1 to commit a crime with the requisite intent specified in *Jogee* ([90] - perhaps D2 even personally having the requisite intent for that crime) is entitled to be acquitted if D1 committed the offence in a manner that D2 had not contemplated or "authorised."[9] Experience indicates that this situation is much more commonly arising in practice, as, for example, where there is a plan between D1 and D2 to assault using fists, but where D1 shoots V. Where the alleged crime is murder or grievous bodily harm with intent, the prosecution may seek to answer D2's OSA plea by contending that D2 remains liable for a mere escalation of violence by D1 (*Tas)*,[10] or that D1's conduct was part of a course of conduct D2 intended (consider *Thabo-Meli*;[11] *Le Brun*;[12] *R v Church)*.[13] Where D1 kills V with murderous intent, and D2 intended that D1 would intentionally kill or cause GBH, in what circumstances can there be an OSA? Does it turn on the nature of D1's acts, and/or on the intent with which D1 carries them out?

What "acts" by D1 will constitute an OSA?

The Supreme Court explained that OSA will apply when "nobody in the defendant's shoes could have contemplated [what] might happen". The cases of *Tas* (manslaughter),[14] *Harper* (murder),[15] and now *Camille*[16] (manslaughter) have had a limiting effect on the application of the OSA principle. Echoing the broader thrust of *Jogee*, the Court of Appeal has rejected the argument that D2's ignorance of the weapon D1 uses to kill can constitute an OSA. The Court stated in *Tas* that it would not accept that:

> if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *R v Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.[17]

Although every case turns on its own facts, it is likely to be rare in practice that D1's use of a weapon (and particularly a knife, following *Tas*) would be sufficient to justify leaving the OSA issue for the jury's consideration.

Tas also alluded to the distinction between an OSA and a "simple escalation" of violence (at [40]) or, a "mere escalation [of violence] which remained part of the joint enterprise" (at [41]) – a distinction referred to in *Jogee* (at [33], [74]). But, when does a "mere" or "simple" escalation of violence become capable of constituting an OSA? If D2 intentionally assisted D1 to cause GBH by beating V, would the shooting of V's kneecaps[18] constitute a "mere" or "simple" escalation of violence, or an OSA?

In *Rafferty*,[19] R and his co-defendants, attacked V. R punched V twice. He then left the scene with V's cash card and headed for an ATM. Meanwhile, the co-defendants continued the attack on V, escalating the violence by kicking him in the head and, finally, drowning him in the sea. R returned to find V dead. The trial judge left to the jury the question whether R was liable in murder, as a joint principal, for causing the death. On appeal against R's conviction for manslaughter (the jury having acquitted R of murder), the Court of Appeal held that R could not be guilty as a principal as he was not a cause of death (drowning) but that R was, at most, a secondary party (at [46]). The court then held that, on the unusual facts of that case, no jury could properly conclude that the drowning was other than of a "fundamentally different nature" (at [50], i.e., an act that is different from kicking, punching and stamping the victim). It is submitted that, post-*Jogee*, such facts should be left to the jury as an OSA. They could not be accurately characterised as a "mere" or "simple" escalation of violence; the question for the jury would be whether anyone in D's shoes could have contemplated V being drowned.

Can D1's "graver" mens rea than that which D2 intended D1 to have amount to an OSA?

Post-*Jogee*, where D2 intentionally assisted or encouraged D1, intending D1 intentionally to cause V GBH but, in the commission of the crime, D1 killed V with an intent to kill, the question arises whether D1's graver intent is capable of constituting an OSA. Although not entirely clear, the Court of Criminal Appeal in *Anderson and Morris* appears to have concluded that the operative OSA in that case, was Anderson's decision to kill.[20] The judgment may also be explained as one that involved an "unauthorised act" by D1 falling outside the scope of an "agreed" venture. However, this may not provide a satisfactory explanation post-*Jogee*, given that the focus should now be on intention and not authorisation or tacit agreement (see below).

The validity of some older authorities is less than clear post-*Jogee*. In *Gamble*,[21] two defendants D2s were acquitted of murder, but convicted of grievous bodily harm, notwithstanding that when they participated in a "punishment shooting" with D1s, they contemplated that violence amounting to grievous bodily harm would be inflicted on V, namely, beating or "kneecapping". However, they did not know or contemplate that V would be killed by the cutting of his throat with a knife. Carswell J held that that killing of V was a crime of a different kind from the beating or kneecapping contemplated and authorised by D2s, and that the killing did not follow directly as the result of the crime to which the latter lent themselves as accessories.

In *English, Powell and Daniels*,[22] Lord Hutton considered the decision in Gamble to be correct,[23] but in *Rahman*,[24]

8 [2004] EWCA Crim 1231 2 QB 110.
9 We say more about the use (post-*Jogee*) of the expressions "authorised", "tacit agreement", "plan", and "scope of the plan", later in this article.
10 [2018] EWCA Crim 2603.
11 [1954] 1 W.L.R. 228.
12 [1992] 1 Q.B. 61.
13 [1966] 1 Q.B. 59.
14 [2018] EWCA Crim 2603.
15 [2019] EWCA Crim 343.
16 n 2 above.
17 *Tas* [2018] EWCA Crim 2603, at [37]. See also *Harper* [2019] EWCA Crim 343, at [33]. Both decisions are cited and applied in *Lanning* and *Camille*.
18 Consider *Gamble* [1989] NICA 268, discussed below.
19 [2007] EWCA Crim 1846, and see the commentary to this case by Professor D. Ormerod [2008] Crim LR 218-222.
20 "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" (Per Lord Parker CJ., at p.120 B/C).
21 *Gamble* [1989] NICA 268.
22 [1998] 1 Cr.App.R. 261.
23 [1998] 1 Cr.AppR. 285.
24 [2008] UKHL 45.

their Lordships were divided on whether the decision was right or not.[25]

In *R v Crooks*,[26] Lord Carswell C.J., referred to his decision in *Gamble* stating that he did not address the question whether D2s could be convicted of manslaughter, which was not at any time argued before him. Subsequently, in *Gilmour*,[27] his lordship considered cases where an accessory had been acquitted of both murder and manslaughter. His lordship stated that:

> [i]t is of course conceivable, as is suggested in *Blackstone, loc. Cit*[28] that in some cases the nature of the principal's mens rea may change the nature of the act committed by him and take it outside the type of act contemplated by the accessory, but it does not seem to us that the existence of such a possibility affects the validity of the basic principle which we have propounded.

The "basic principle" to which the court referred was that establishing secondary liability for a crime of specific intent pre-*Jogee*.[29] However, for present purposes, the salient question is whether the fact that D1 intended to kill, but D2 intended only that D1 intend GBH, means that D1's killing with that graver mens rea is sufficient to constitute an OSA. On one analysis of *Gamble*, it was precisely because D1 had formed an intention to kill (by cutting V's throat) that D2s were absolved from liability for murder, notwithstanding that they intended to cause V grievous bodily harm by beating or knee-capping (using a firearm). At first sight, *Gamble* does not sit comfortably with the statement in *Gilmour* that the court could see no policy reason why an accessory "who carries out the very deed contemplated by both should not be guilty of the degree of offence appropriate to the intent with which he so acted". The "deed" being referred to is the murder, but it could (more narrowly) refer to D1's act that represents a change of his mens rea, and thus an OSA. Although the Supreme Court in *Jogee* must have been alive to the decision in *Gamble* (not least because it was considered, in detail, in *English* and in *Rahman*) it is regrettable that it said nothing about it or about the cases that applied it. It is submitted that the question of whether *Gamble* survives *Jogee* or not, remains open.

Whether and when OSA should be left to the jury

The Court of Appeal confirmed in *Tas* (and, in effect, in *Camille*) that OSA need not be left to the jury in every case. Whether there is an evidential basis for leaving OSA before the jury "is very much for the judge who has heard the evidence and is in a far better position than [the Court of Appeal] to reach a conclusion as to evidential sufficiency" (at [41]). However, this is not to say that trial judges should be unduly hesitant about leaving OSA to juries. The Court of Appeal observed that it was held in *Rafferty*[30] that no jury could properly have concluded that the drowning of the deceased was other than a new and intervening act in the chain of events:[31] "the court did not suggest that this should not generally be a question for the jury" (*Tas*, at [43]). More recently, in *Camille*, the Court of Appeal was unable to accept any distinction between in this context a planned attack and an event which occurs more spontaneously is in any sense determinative of whether the judge should direct the jury as regards an OSA:

> It will be one of the factors to be borne in mind when considering the defendant's intention, but it does not, as a matter of course, lead to the conclusion that the production of a knife is an OSA" (per Fulford LJ, at [65]).

Two points are worth making about this passage. First, the Court was not saying that the production of a knife could never constitute an OSA. Secondly, after *Jogee*, and as we have pointed out, the focus should now be on intention and not authorisation, agreement or plan. Once the issue of an OSA is left for the jury to consider, the burden is on the prosecution to negate OSA.

To which homicide offences does OSA apply: murder as well as manslaughter?

It is clear that OSA can operate to excuse D2's liability for manslaughter. Unlawful act manslaughter requires only that D2 intentionally performs an unlawful act that a sober and reasonable person would realise would *cause some physical harm* to some person and in fact caused death (see *Church*). The overwhelming supervening act test asks about whether someone in D2's shoes could have contemplated *the act* of D1. In a case where a reasonable person would see a risk of some harm (and perhaps D2 even admits seeing that risk himself) he can be excused if the manner of D1's causing the harm was not foreseeable by someone in D2's shoes.

The notion of OSA as negativing D2's liability has its origins in cases of manslaughter (such as *Anderson and Morris*) where the mens rea of the secondary party fell short of assisting or encouraging D1 to act with murderous intent – i.e. without the intent to kill or cause grievous bodily harm. Furthermore, in *Jogee* the Supreme Court also opened its discussion of OSA (at [96]) by remarking that 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". From this it could be argued, with some plausibility, that paragraph [97] in *Jogee* which restates the OSA principle should be read as limited to that context. Proceeding from that point, it could then be further argued that the OSA principle provides no assistance to a D2 who encourages or assists D1 intending that D1 will kill or do GBH with intent to kill or cause grievous bodily harm. In support of this position there is a possible moral argument as well. In such a case, D2 has satisfied the elements of the more serious offence, and that being so the manner of the killing does not seem particularly relevant. A GBH is a GBH and a killing is a killing.

25 See Lord Bingham [29]; Lord Rodger [38-40]; Lord Brown [67-68]; and Lord Neuberger [91-93].

26 28 June 1999; [1999] NICA 6; [1999] NI 226; Court of Appeal (Northern Ireland).

27 5 June 2000; [2000] NICA 10; CARC3185; and see the commentary to this case [2000] Crim LR 762.

28 *Blackstone's Criminal Practice*, 2000 ed., para A5.5 at p 75.

29 Carswell LCJ said (earlier in the judgment: *Gilmour*), "To establish that a person charged as an accessory to a crime of specific intent is guilty as an accessory it is necessary to prove that he realised the principal's intention: see *R v Hyde* [1991] QB 134 at 139, per Lord Lane CJ, approved by Lord Hutton in *R v Powell* [1999] AC 1 at 27-8. The line of authority represented by such cases as *R v Anderson and Morris* [1966] 2 QB 110, approved in *R v Powell,* deals with situations where the principal departs from the contemplated joint enterprise and perpetrates a more serious act of a different kind unforeseen by the accessory. In such cases it is established that the accessory is not liable at all for such unforeseen acts. It does not follow that the same result should follow where the principal carries out the very act contemplated by the accessory, though the latter does not realise that the principal intends a more serious consequence from the act."

30 [2007] EWCA Crim 1846.

31 More precisely, the Court in *Rafferty* held that "no jury could properly conclude that the drowning was other than of a fundamentally different nature" (at [50]).

On the other hand, in *Jogee* the Supreme Court certainly said nothing that categorically ruled out the application of OSA to the case where D2 encourages D1 to act with murderous intent. So there is clearly scope to argue that OSA is potentially applicable in an extreme case where D1's act is so different in nature as to relegate D2's acts to history. An example of such a case could be *Gamble* – a decision the status of which, as explained above, appears to be now open.

If OSA does indeed preclude D2's being convicted of a murder in a case like this, it is tempting at first sight to think that he might still be convicted of a manslaughter. But if OSA operates – as it seems to do – by eliminating the necessary connection between D2's act of encouragement or assistance and the victim's death, it is difficult to see how this could logically be so. The result, it is suggested, is that D2 in this case would be guilty of no homicide offence. (Though in such a case D2 would still almost certainly be guilty of a range of other serious offences.)

"Tacit agreement", "plan", "scope of plan"

Given that, post-*Jogee*, the focus is on the intention of the secondary party (see *Jogee*, at [9-10], [90]), expressions such as "tacit agreement", "plan", "scope of plan" and "authorised" are of questionable relevance and may even mislead. A secondary party (D2) who intentionally assists or encourages D1 to act with the intent necessary for the commission of the offence in question (or where D2 himself has that intent) will (absent OSA) be guilty of the offence regardless of whether he was a party to a "plan" or not.[32] The expression "tacit agreement" is no less ambiguous than "tacit encouragement" (see *Willett)*[33] and D2's liability does not depend on whether he had "authorised" D1 to commit the offence or not. If such expressions have any value they may be as analytical techniques for evaluating evidence of (e.g.) D2's intention: they ought not to be treated as if they were matters to be proved.

Concluding comments

The law governing the criminal liability of accessories for murder and in manslaughter has been bedevilled by the structure of homicide offences under English law. The consequence has been a series of appellate decisions, each of which was intended to achieve clarity and fair-labelling in respect of conduct deserving of the designations "murder" or "manslaughter". If the Supreme Court's ultimate goal was to bring clarity to this area, *Jogee* has proved to be something of a disappointment, as it has left the application and scope of OSA unclear. Such uncertainty makes it difficult to draft bespoke legal directions and Routes to Verdict. It is submitted that there may be circumstances in which D1's change of act or mens rea may justify leaving OSA to the jury. The most compelling cases will be those where there is both a change of act and a change of mens rea on the part of D1. Less clear is whether, and in what circumstances, OSA may be left to a jury on a charge of murder. OSA may apply if, for example, *Gamble* has survived *Jogee*. This remains a live issue, however.

Given that Parliament is unlikely to reform the law of homicide for many years, the burden will again fall on the courts to revisit this topic in the hope of providing a clear, coherent, and workable set of legal principles.

32 As the Supreme Court remarked in *Jogee* ([90]), "….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."

33 [2010] EWCA Crim 1620.

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