Current Law Week

FOCUS ON CRIMINAL LAW

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JOINT ENTERPRISE AND SECONDARY LIABILITY

In *Stewart and Schofield* (1995) 1 Cr.App.R. 441 L, S1 and S2 took part in a robbery at a shop during which V was beaten to death with a metal pole wielded by L. S1 entered the shop carrying a knife while S2 (who admitted knowledge of the weapons) remained outside keeping watch. L pleaded guilty to murder and robbery. S1 and S2 pleaded guilty to robbery and they were convicted of manslaughter. Their defence was that L acted out of racial hatred and not in furherance of the common design to commit robbery. On appeal, S1 and S2 relied on the cases of *Dunbar* [1988] Crim. L.R. 693, *Lovesey and Peterson* (1969) 53 Cr.App.R. 216 and *Anderson and Morris* (1966) 50 Cr.App.R. 216, contending that those decisions were authority for the proposition that where one defendant exceeds the scope of the common design (*e.g.* to rob) and commits murder, then a co-defendant, acting only in furtherance of the common design, is neither guilty of murder nor manslaughter. It was contended that *Reid* (1976) 62 Cr.App.R. 109, could not stand with these cases. The C.A. disagreed and held that in *Reid, Smith* [1963] 1 W.L.R. 1200, and *Betty* (1964) 48 Cr.App.R. 6, liability attached by virtue of the principle of "joint enterprise" whereas, in the other three cases, the court took a different view of the facts and concluded that the appellants had not acted within the scope of the joint enterprise. The Court referred to *Chan Wing-Siu v. R.* (1984) 80 Cr.App.R. 117, *Ward* (1987) 85 Cr.App.R. 71, *Hyde* (1991) 92 Cr.App.R. 131 and *Hui Chi-Ming v. R.* (1992) 94 Cr.App.R. 236, but not to *Wan Chan* [1995] Crim. L.R. 296 or *Rook* (1993) 97 Cr.App.R. 327.

What, then, is meant by the phrase "joint enterprise"? Advocates, perhaps unwisely, often use that phrase descriptively to encompass both joint principalship and secondary liability. But in *Stewart and Schofield*, the Court defined joint enterprise as (i) a principle distinct from aiding, abetting, counselling and procuring, on the grounds that an aider or abettor "is truly a secondary party to the commission of whatever crime it is that the principal has committed although he may be charged as a principal" and therefore, (ii) joint enterprise "properly so termed" is not to be confused with counselling or procuring ([1995] 1 Cr.App.R. 441, 453, but see *Rook* (1993) 97 Cr.App.R. 327 and *Wan and Chan* [1995] Crim. L.R. 296) whereas, (iii) joint enterprise is an allegation "that one defendant participated in the criminal act of another" in circumstances where "he was aware of the character of the joint enterprise in which he was joining and foresaw that the relevant criminal acts were liable to be involved".

This analysis has been strongly criticised by Professor Smith in his commentary to *Stewart and Schofield* (see [1995] Crim. L.R. 420, at 422) and, even more forcefully, in his commentary to *Wan* and *Chan* , describing the distinction between joint enterprise, and the statutory terms "aid, abet, counsel or procure", as "entirely illusory" because joint enterprise is merely an aspect of the law of secondary participation: "if we retain joint enterprise, we retain aiding and abetting because they are the same thing" (see [1995] Crim. L.R. 296 and the commentary to *Grundy* [1989] Crim. L.R. 502). If the distinction does exist, then *O'Brien* [1995] Crim. L.R. 73, is an object-lesson in the confusion that can arise in respect of the mental ingredient required to be proved against the secondary party.

Three matters should be separated out. First, irrespective as to whether "joint enterprise" represents a distinct category of liability or not, the ultimate question is whether what

was done by the primary actor fell inside or outside the scope of the joint enterprise. In *Stewart and Schofield*, the court held that this issue is a question of fact for the jury. It is difficult to see how this could be anything other than an issue of fact, not law, subject to the power of the judge to rule upon a submission of no case to answer if the evidence of D2's foresight/contemplation of the "collateral" offence was insufficient. On the facts of *Stewart and Schofield* it was therefore open to the jury to conclude that S1 contemplated events which S2 did not. To Professor Smith this is just the sort of issue that is too important to be left to "the vagaries of a jury" ([1995] Crim. L.R. 423). Secondly, there is the need to clarify the parameters of secondary liability and, thirdly, to decide whether there really is a "doctrine" of joint enterprise that is distinct from aiding, abetting, counselling or procuring.

Although the arguments of Professor Smith are very powerful, the distinction made by the Court in *Stewart and Schofield* is supported, but only up to a point, by the Law Commission in Working Paper No. 131 (*Assisting and Encouraging Crime 1993*; see para. 1.14) and by other cases: for example, *O'Brien* [1995] Crim. L.R. 734 and *Chan Wing-Siu* [1985] A.C. 168, (in so far as that case refers to "a wider principle"). According to the Law Commission, the "doctrine" of joint enterprise arises where D and P pursue a common enterprise to commit a criminal offence (*e.g.* robbery) during which P commits a "collateral" offence (*e.g.* murder) but D will be "inculpated in respect of P's crime although he does not commit its actus reus and does not possess the mens rea required of a principal" (para. 2.110, W.P. No. 131). The Law Commission suggest that although joint enterprise was once seen as a "distinct body of rules, *different from the rules on aiding and abetting*, recent developments have made the position less clear": (emphasis added; see paras. 2.119 and 4.198).

It is obviously cause for concern that such an important area of law should still cause considerable difficulties of application and comprehension. Legislative reform is probably a long way off. It is submitted that two primary factors have contributed to the confusion. The first concerns the complex issue as to the extent to which the criminal law should intervene to punish acts of assistance or encouragement of crime (see para. 1.3, W.P. No. 131; and *Glanville Williams* [1990] Crim. L.R. 4). The second factor concerns the chequered development of a variety of expressions employed over the last 130 years to formulate or explain the principles of secondary liability. Following *Att.-Gen.'s Reference (No. 1 of 1975)*, the courts have tried to bring the old wording of s.8 of the 1861 Act into line with modern requirements but frequently (as in *Rook*) the courts prefer to depart from the language of that section and to use expressions such as "assisting" or "encouraging" the commission of an offence. The origin of the term "joint enterprise" is unclear. It may be rooted in *Macklin* (1838) 2 Lew CC 225 but the principle there stated was that "if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law, done by all" (*per* Alderson B.). The *Stewart and Schofield* definition of joint enterprise is different in nature: note the words, in *Macklin*, "in pursuance of the common intent".

Prove the Crime or the Actus Reus?

The principle that an "aider and abettor", etc., can only be an accessory to a crime that has in fact been committed is regarded as well established and yet, in *Cogan and Leek* [1976] Q.B. 217, L's conviction for aiding and abetting rape was upheld where L terrorised his wife into having sexual intercourse with C notwithstanding that C's conviction was quashed (see *Bourne* (1953) 36 Cr.App.R. 125). Although this decision was reached, in part, by an ingenious application of the doctrine of innocent agency, conceptual difficulties remain and its impact on the law of secondary liability is still uncertain. For example, if it were to be decided that *Cogan and Leek* is authority for the proposition that a person can, in certain circumstances, be liable for counselling or abetting merely the actus reus of an offence (see Cross, Jones and Card, *Introduction to Criminal Law*, 11th ed., p.596; *Smith & Hogan*, 7th ed., p. 153) then this would be a very different principle to that applicable in cases of so-called joint enterprise, where the issue is whether the "collateral" crime came within the scope of the parties tacit agreement or foresight: see *Chan Wing-Siu* and *Hyde*. The word "crime" is emphasised here because what must be contemplated or foreseen is the performance by the primary actor of the actus reus with the requisite mens rea: it therefore makes no difference whether the offence was completed or merely attempted. Thus in *O'Brien* [1995] Crim.L.R. 734, O allowed M to leave a motorcar, with a rifle, shortly after which M fired shots into a police car in which two police officers were travelling. O and M were convicted of attempted murder. O's appeal, against his convictions, was dismissed on the ground that the judge correctly directed the jury that it was sufficient if O knew that M might shoot to kill (rather than would shoot to kill).

Weapons

A weapon, used or carried on a criminal expedition, is symbolic of an accused's state of mind at the time the relevant acts were performed. Ultimately, it is the contemplation of the crime that matters. To know that an implement is being carried is one thing, but an accused's contemplation as to how it will be used, is quite another. In *Davies* (1954) 38 Cr.App.R. 11, Lord Simonds L.C., observed that "If all that was designed or envisaged was in fact a common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting of its felonious use", namely, murder. The circumstances in which a weapon was used or carried by the primary actor may be powerful evidence of his mens rea and thus it is relevant to explore D2's knowledge of those circumstances. If D2 did not know that D1 carried a knife or a loaded gun, or that D1 would act so as to cause death, then this fact is merely evidence (perhaps powerful evidence) that D1 acted beyond the scope of the common design: see *Anderson and Morris* (knives), *Reid* (guns), *Dunbar* (metal pole) and see *Carberry* [1994] Crim. L.R. 446.