Revisiting the law of joint enterprise

Michael Gleeson reports on a significant UK criminal justice decision of *R v Jogee* [2015] UKSC XX and considers the possible ramifications for Australian criminal law in the areas of complicity and extended joint criminal enterprise.

In *R v Jogee; Ruddock v The Queen*[1] the UK Supreme Court delivered a joint ruling with the Judicial Committee of the Privy Council. This was the third time in six years that the UK's highest court has had to consider the law of joint enterprise; but it was the first time it had been asked to examine the history of the law in detail and the first time it was shown that a basic error in a Privy Council decision arising from a Hong Kong murder case decided in 1984[2] had taken the law in this area in the wrong direction.

The appellants' lawyers performed a feat of forensic archaeology,[3] digging through the layers of decisions over five centuries, to reveal the origins and development of the law of secondary liability, whereby those indirectly involved in crime can be found guilty along with the principal offenders. The cases referred to included duelists, apple thieves killing watchmen and poachers shooting gamekeepers.

The 1984–2016 common law position had been characterised as a fishing expedition: 'drop your drift net into the ocean and you pull up all sorts of fish, big and small, and you hope someone's going to drop the small fish back in before its too late but you can never be sure that's going to happen'.[4]

The rule as it applied during that period was that the prosecution had to prove that the defendant did intend their actions but for accomplices it was enough to show that they should reasonably have foreseen the likely consequences. Intention was held to follow automatically from knowledge in a way not true of the principal defendant.

The particular point at issue in *Jogee* was a subtle one. If a group of criminals set out deliberately to commit one crime, all are guilty under the doctrine of joint enterprise. However, what happens if in the course of the first offence, another crime is committed by one of the gang? Do the others share his guilt under the doctrine of common purpose?

The physical acts of complicity can take two forms. In the first, the accessory assists to provide physical aid to the principal in the commission of the crime, by providing a weapon, information or acting as a lookout. This contribution could be very small. In the second, the accessory encourages, supports, lends courage to or tells someone to commit a crime.

The 1984 case of *Chan Wing-Siu* created another tier of complicity where the accused agrees to one crime but another crime comes out of it. Two rules made it easier to convict there. First, the law did not require the accessory to make a clear contribution to the second crime; and secondly, the accessory

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no longer had to intend the principal to commit the second crime, but merely foresees the chance that the principal might commit it.[5] From there the test of mere foresight of a possibility was applied in all complicity cases, not just ones with multiple crimes arising from a first (this form of complicity is commonly referred to as 'parasitic' in that the defendant was being made liable for a second crime parasitically on the first).[6]

The Supreme Court in *Jogee* held that the authorities relied on by the Privy Council in *Chan Wing-Siu* did not support the proposition that foresight was sufficient to engage accessory liability in cases of joint criminal enterprise, and that the Privy Council wrongly equated foresight with authorisation in formulating the principle in the way that it did.[7]

Following *Jogee* it must be established that the accessory intended to assist the principal defendant to act with the intent required to establish the crime.[8] It is no longer to be taken as automatically true that if a defendant had in law foreseen a second crime arising as a result of their intent to commit or assist with the first one, they therefore intended both. Reasonable foresight, in this sense, is no longer proof of the defendant's intention but one indication, which the jury must weigh up among others.

In its judgment, the court declared that 'there does not appear to have been any objective evidence that the law prior to *Chan Wing-Siu* failed to provide the public with adequate protection'. With those words it knocked away the spurious public policy defence of the rule, which held that there was a pressing social need to treat group violence with a broad legal brush.[9]

What will the impact of the case of *Jogee* be on Australian state and territory criminal laws?[10]

The *Jogee* decision will undoubtedly affect many others who have been convicted as accomplices.[11] Since *Ruddock* was a Privy Council decision the impact could be felt around the world in all countries that still apply the common law as set out in *Chan Wing-Siu*.

However any hopes that the floodgates in this area were about to be flung open were quickly extinguished by the UK Supreme Court which made it clear that the effect of putting the law right was not to render invalid all convictions which were arrived at

over many years faithfully applying the law in *Chan Wing-Siu*.[12]

Almost 500 people are thought to have been convicted of murder in the United Kingdom between 2005 and 2013 as secondary parties in joint-enterprise cases. Many of those were recorded as gang-related attacks. The UK Court of Criminal Appeal is now expecting those who believe that they have been wrongly convicted under the old foresight rules to apply for their cases to be reviewed.

Thus it seems after correcting the test for culpability and complicity in joint enterprise cases, the change in the UK law is predominantly one for the future and will only be of consequence in the past in cases of review to correct cases of 'substantial injustice,'[13] not to undo every case. That injustice will be more likely to arise in cases where the defendant had a peripheral role and was only convicted because the jury thought he must have foreseen what might happen rather than the accomplice intending it to happen.

Many lawyers and organisations that had campaigned to change the law welcomed the Supreme Court's judgment. Francis FitzGibbon QC commented 'the effect of the decision is that a member of a group cannot be found guilty of an offence unless there is proof that he or she positively intended that it should be committed. Mere foresight of what someone else might do is not enough'.[14]

In Australia the principle of extended joint criminal enterprise operates where there was a joint criminal enterprise to commit a crime, and during the commission of that crime, one of the offenders committed a different crime instead of or in addition to the crime that was agreed upon. The High Court in *McAuliffe v The Queen*[15] confirmed the *Chan Wing-Siu* position that joint criminal enterprise liability should arise from everything agreed upon and all foreseeable consequences of that agreement. Therefore the Crown must prove that the secondary offender foresaw that the principal might form the requisite intent for the further crime, for example the intent to kill or inflict really serious bodily injury in the case of murder. If the secondary offender did possess such foresight and despite this continued to participate in the enterprise, then he or she will be liable for the further offence.[16]

The Australian courts have heavily criticised the doctrine of extended joint criminal enterprise. The most common criticism of the doctrine is that it contravenes the basic principles of criminal law because an individual can be convicted without possessing either the *actus reus* or *mens rea* for the offence.

In *Clayton*[17] Kirby J (in dissent) pointed out the inconsistency in the law when the test for the secondary offender (foresight of possibility) is less onerous than the test for the primary offender (elements of the crime): 'the unreasonable expectation placed upon Australian trial judges … to explain the idiosyncrasies of differential notions of secondary liability to a jury is something that should concern this court. The law should not be as unjust, obscure, disparate and asymmetrical as it is'.

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It is inevitable that in the near future the ripples emanating from the decision in *Jogee* will be felt in Australia. Not being bound by decisions of the Privy Council, it will be necessary for the common law rule to be modified by the High Court, departing from *R v McAuliffe*. The UK decision will have considerable impact and is likely to provide the occasion for Australian courts to reconsider the principles of accessory liability so as to ensure better fairness for those who get caught up in crimes they did not intend. The operation of the *Jogee* principle is likely to better protect young accused or those with learning difficulties who may have been convicted on an assumption of what was in fact their immature lack of foresight.

The author recently spoke to Felicity Gerry QC, the barrister who led the *Jogee* legal team that ultimately persuaded the UK Supreme Court to change the law[18]. Ms Gerry stated that the law ought to be corrected across the Commonwealth where it sits at common law and where the error has infected statutes and criminal codes. In Ms Gerry's view, the ultimate consequence of the old principle is injustice based on class-ridden assumptions on crowd behaviour concocted in the Privy Council and rolled out illogically and on flawed policy reasoning. In Australia, there is scope for legal change.

In a recent decision, *R v John Paul Spilios*,[19] it was argued by a defence team including Ms Gerry QC that *R v McAuliffe* was wrongly decided, the South Australian Court of Criminal Appeal holding that it was bound by that decision until disturbed by the High Court.[20] Should there be an application for special leave to the High Court, the occasion may arise for reconsideration of the Australian position.

Endnotes

1. Full case name *R v Jogee (Appellant); Ruddock (Appellant) v The Queen (Respondent) (Jamaica)* [2016] UKSC 8 Argued 27-29 October 2015. Decided 18 February 2016. Hilary Term [2016] UKSC 8 [2016] UKPC 7. On appeal from: [2013] EWCA Crim 1433 and JCPC 0020 of 2015.
2. *Chan Wing-Siu v The Queen* [1985] AC 168; *Hui Chi-Ming v The Queen* [1992] 1 AC 34.
3. Francis Fitzgibbon is a QC at Doughty Street Chambers in London and vice-

chair of the Criminal Bar Association.
4. Francis FitzGibbon QC, 'Joint Enterprise' – 3 March 2016, London Review of Books.
5. Chan Wing-Siu [1985] AC 168 at 175 per Sir Robin Cooke.
6. See *R v Jogee* at [2].
7. *R v Jogee* at [62]-[75].
8. *R v Jogee* at [90].
9. *R v Powell* [1997] 4 All ER 545.
10. The common law doctrine of joint criminal enterprise does not apply to offences prosecuted under the Criminal Code Act 1995 (Commonwealth) confirmed in *R v Salcedo* [2004] NSWCCA 430 at [26]–[27].
11. The High Court followed *Chan Wing-Sui* in *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1 and *Clayton v The Queen* (2006) 231 ALR 500.
12. *R v Jogee* at [100].
13. *R v Hawkins* [1997] 1 Cr App R 234.
14. 'Joint enterprise law wrongly interpreted for 30 years court rules' – *The Guardian*, 18 February 2016.
15. *McAuliffe v The Queen* (1995) 183 CLR 108.
16. *Clayton v The Queen* (2006) 231 ALR 500 at [17].
17. *Clayton v The Queen* (2006) 231 ALR 500 at [102].
18. Felicity Gerry QC. Admitted to the Supreme Court of the Northern Territory, Appointed Queen's Counsel 2014, Admitted to the Bar of England and Wales 1994. William Forster Chambers, Darwin, Northern Territory.
19. [2016] SASCFC 6.
20. Spilios at [69].

What's in an oath? Jury treatment of unsworn evidence under the Uniform Evidence legislation

Chris Parkin reports on *The Queen v GW* [2016] HCA 6.

In *The Queen v GW* [2016] HCA 6, the High Court considered the proper approach to be taken to a tribunal of fact's assessment of unsworn evidence given by a witness under the *Evidence Act 2012* (ACT) (The Evidence Act).

The Evidence Act permits both sworn and unsworn evidence to be received by a tribunal of fact.[1] Unsworn evidence may only be given by a person 'who does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence'.[2] The provisions of the Evidence Act considered by the High Court are identical across the uniform evidence legislation jurisdictions, including New South Wales.

Typical classes of witnesses who might give unsworn evidence include those with intellectual disabilities and children.

Procedural history

GW was convicted of committing an act of indecency in the presence of his daughter (complainant), who was five years old at the time. The complainant gave unsworn evidence at a pre-trial hearing which was recorded and played to the jury in accordance with the ACT's legislative arrangements for the giving of evidence by children.

In the course of the trial, defence counsel twice requested (unsuccessfully) that the jury be directed that the complainant's evidence was unsworn because she lacked the capacity to understand the obligation to give truthful evidence.

One of the two successful grounds of appeal to the Court of Appeal contended that the trial judge erred 'in failing to properly direct the jury regarding the unsworn evidence of [the complainant]'. The other successful ground held that the evidence was inadmissible because the statutory presumption of competence (see s 13(6)) had been misapplied.

The Court of Appeal had held that it was the policy of the Evidence Act (based on an analysis of ss 12, 13, 21 of the Evidence Act) to give primacy to sworn evidence because of the solemnity which attaches to sworn evidence and the threat of sanction for giving false evidence under oath.[3] Accordingly, a direction to that effect was said to be required because the complainant was the key witness in the prosecution case.[4]

Appeal to the High Court

The Crown appealed to the High Court in respect of both successful grounds in the Court of Appeal. The Crown succeeded in arguing that the Court of Appeal erred in determining the complainant's evidence should not have been admitted.

In addressing the Crown's appeal concerning the adequacy