COMMENT
Joint Enterprise and Murder

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Keywords Complicity; Assisting and encouraging; Joint enterprise; Murder

It has been said that the law relating to joint enterprise is complex, controversial and harsh.[1] This comment will explain why this is so when considering the relationship between joint enterprise and murder. The term 'complicity' will be used here as a general term encompassing aid, abet, counsel or procure (i.e. accessorial liability)[2] and joint enterprise. To keep this comment at a reasonable length some knowledge of law of complicity will be assumed. The issue of complicity arises when two or more persons are involved in committing of a criminal offence. This seems relatively straightforward, but the factual simplicity hides the difficult legal questions involved. These difficulties centre on two issues. First, there is the question of whether assisting or encouraging crime is a body of law separate from where there is a joint enterprise or common purpose to commit a crime. Secondly, when is there secondary liability for a collateral or 'parasitic' crime to a joint enterprise? It will be helpful to start by defining the term 'joint enterprise'.

What is a joint enterprise?

In *R* v *A*[3] Hughes LJ defined 'joint enterprise' as follows:

> The expressions 'common enterprise' or 'joint enterprise' may be used conveniently by the courts in at least three related but not identical situations:
> i) Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, as for example when three robbers together confront the security men making a cash delivery.
> ii) Where D2 aids and abets D1 to commit a single crime, as for example where D2 provides D1 with a weapon so that D1 can use it in a robbery, or drives D1 to near to the place where the robbery is to be done, and/or waits around the corner as a getaway man to enable D1 to escape afterwards.
> iii) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit. These scenarios may in some cases overlap.[4]

In the first situation the law of complicity is straightforward and clear as the two or more persons are joint principals in a joint enterprise. In the

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1 Professor David Ormerod commentary to *R* v *Yemoh* [2009] Crim LR 888 at 894 and to *R* v *Lewis* [2010] Crim LR 870 at 872.
2 Accessories and Abettors Act 1861, s. 8.
3 [2010] EWCA Crim 1622.
4 Ibid. at [7].

doi:10.1350/jcla.2012.76.6.804

second situation this is assisting crime and shows that joint enterprise is, in many cases, merely an incident of accessorial liability. It is with the third situation that the courts have had difficulty in defining secondary liability. To take a well-known example: Steve and Peter agree to burgle Victor's house. Steve, aware of Peter's violent nature, entreats him not to attack Victor should he discover their burglary. Peter says he will not be violent, but Steve, aware of Peter's nature, knows that Peter might not keep his word. During the burglary Peter attacks Victor, killing him. If Peter killed Victor with an intention to kill or to cause serious harm, he would be guilty of murder. Steve would also be guilty of murder (the collateral offence) if he foresaw a real risk that, during the burglary, Peter might kill Victor with intent to kill or cause serious harm.[5] This principle was first stated by the Privy Council in *R* v *Chan Wing-siu*[6] and accepted into English law in *R* v *Hyde*.[7] The *Hyde* principle was applied by the House of Lords in *R* v *Powell and Daniels; English*[8] and in *R* v *Rahman*.[9] Steve would be guilty of murder because he was subjectively reckless as to the risk of it. There is no need to show that Steve assisted or encouraged the murder, nor that he intended or agreed that it be committed. Whilst both Peter and Steve are both guilty of murder and would receive the mandatory life sentence there is no parity of culpability.[10] So the law is harsh on Steve. A moral basis for Steve being guilty of any offence committed by Peter which is collateral to their joint enterprise is that in having a common purpose to commit crime A (the burglary), foreseeing that this might result in Peter also committing crime B (the murder), he has increased in a blameworthy way the risk that crime B might be committed. It is in this third situation that accessorial liability and joint enterprise part company as in respect of the collateral offence it is the law of joint enterprise alone that governs the secondary liability.

To add to the complexity of the law a number of recent Court of Appeal decisions have held that it is sufficient that Steve foresaw the unlawful killing and gloss over the requirement that Steve, to be guilty of murder, needs also to foresee Peter's murderous intent.[11] This reflects Lord Bingham's *obiter dictum* in *R* v *Rahman*[12]where he accepted the

5 If Steve foresaw a risk of violence to Victor, but did not foresee Peter's murderous intent, then the authorities separate with some decisions holding that Steve is guilty of manslaughter: *R* v *Betty* (1964) 48 Cr App R 6; *R* v *Reid* (1976) 62 Cr App R 109; *R* v *Stewart and Schofield* [1995] 1 Cr App R 441; *R* v *Yemoh* [2009] EWCA Crim 930. In contrast, there are other decisions which hold that Steve has no liability for manslaughter because Peter's murderous intent was not foreseen by Steve, and therefore was not part of their joint enterprise: *R* v *Dunbar* [1988] Crim LR 693; *R* v *Uddin* [1998] 2 All ER 744; *R* v *Powell and Daniels; English* [1997] 4 All ER 545, HL.

6 [1985] AC 168, [1984] 3 WLR 677.

7 [1991] 1 QB 134 at 139, *per* Lord Lane CJ.

8 [1999] 1 AC 1, [1997] 4 All ER 545.

9 [2008] UKHL 45, [2009] 1 AC 129.

10 That said, differences in culpability are reflected in the minimum term that the convicted murderer has to serve in prison before he can apply to be released on licence.

11 *R* v *Lewis* [2010] EWCA Crim 496 at [29]. See also *R* v *Badza* [2009] EWCA Crim 2695.

12 [2008] UKHL 45, [2009] 1 AC 129.

Crown's contention that to convict a secondary party of murder all that party would have to foresee is the principal's *actus reus*—the unlawful killing of the victim. Foresight of the principal's murderous intent would not be needed for secondary liability for murder.[13] On the face of it this seems to be a serious extension of secondary liability for murder, but in fact it is not. Richard Buxton explains:

> When dealing, as in *Rahman* and the cases relied on, with foresight of a violent act, that will almost always be assumed to carry with it foresight of the mental state with which it is done: if D contemplates that P may use a knife on his victim he will not contemplate that that will be done in a benevolent spirit.[14]

However, the consequence of the *Hyde* principle is that it is possible that a secondary party could be guilty of murder on the basis of not much more than mere association with a joint enterprise, for example, by being a member of a gang. In *R* v *Mitchell*[15] the defendant and her friends became involved in a violent argument and fight over a taxi with another group of people. The fight ended. The defendant's co-defendants went to a nearby house and armed themselves with weapons. She did not go with them. They returned to the car park where they saw the opposing party and chased them. Having caught up with them, an assault ensued and fatal head injuries were caused to the victim. At the time, the defendant was in the car park looking for her shoes. It was left open to the jury to conclude that the enterprise that the defendant had joined at the time of the argument over the taxi still continued at the time of the fatal attack. She, by her continued presence in the car park, had not withdrawn from it. The defendant was therefore convicted of murder even though it was accepted that she may not have participated in the second assault at all.[16] The Court of Appeal dismissed her appeal holding that by remaining thereabouts the defendant was still within the joint enterprise. This decision shows the harshness of the law of joint enterprise as the effect of the *Hyde* principle is that:

> [P]rosecutions for murder on the basis of joint enterprise have become more common in recent years and are increasingly focussed on evidence of association or alleged gang membership. There is increasing potential for cases to be left to juries largely on the basis of evidence of association between defendants, a trend which we believe is directly related to the [*Hyde*] principle.[17]

If the *Hyde* principle is to continue to be part of the common law of joint enterprise, then it must be applied in a consistent and robust way to

13 Above n. 12 at [23].
14 R. Buxton, 'Joint Enterprise' [2009] Crim LR 233 at 235.
15 [2008] EWCA Crim 2552, [2009] 1 Cr App R 31.
16 House of Commons Justice Committee, *Joint Enterprise*, Eleventh Report of Session 10–12 HC 1597 (2012) 9, para. 15, available at *http://www.wronglyaccusedperson.org.uk/wp-content/uploads/2012/01/Justice-Committee-Joint-Enterprise-Report-2012.pdf*, accessed 29 October 2012. See also *R* v *O'Flaherty* [2004] EWCA Crim 526; *R* v *Bryce* [2004] EWCA Crim 1231.
17 House of Commons Justice Committee, above n. 16 at 15–16, para. 37, quoting comments by Tim Moloney QC and Simon Natas on the Law Commission 2007 proposals to retain the principle (see n. 20 below).

avoid potential miscarriages of justice. There must be strong *prima facie* evidence that the secondary party foresaw a real risk that, during the joint enterprise, the principal might kill with an intention to cause really serious harm or to kill.[18] In addition, the principle should be supplemented by a requirement that there must be some evidence of assistance or encouragement of the murder so that it was truly part of the joint enterprise.[19] At present the law of joint enterprise is uncertain, so citizens cannot govern their future conduct by it and that raises doubt as to whether it is compliant with Article 7 of the European Convention on Human Rights, which requires the criminal law to be ascertainable and certain.

The Law Commission has recommended the retention of the *Hyde* principle for two reasons. First, a secondary party can avoid liability by convincing the jury that the collateral offence of murder was committed in a fundamentally different way from that foreseen by the secondary party. Secondly, the secondary party can show that he or she clearly and unambiguously withdrew from the enterprise before the murder took place.[20] These two possibilities will now be examined.

The 'fundamental difference' rule

This rule was considered by the House of Lords in *R* v *Rahman*.[21] The facts were that there had been a history of confrontation between groups of white males and groups of Asian males in Leeds. On 20 April 2004 there was an encounter involving minor violence in which the Asians came off worse and there was talk of revenge. An opportunity for this arose on 22 April when the victim and some of his friends were sighted by a larger Asian group, the members of this group were armed with blunt instrument weapons and at least one knife. The common purpose of the Asian men was to cause serious injury to the victim and his friends. The victim was cornered at the back of a house where he was assaulted with the blunt instruments, and during this attack he was stabbed three times. One wound in his back was made with such force that the knife penetrated to a depth of at least 8 cm. The wounds proved fatal. This pathological evidence lead to the conclusion that the unknown principal acted with an intention to kill. The four appellants were convicted as secondary parties to the murder of the victim by the unknown principal.

The appeal was based on the trial judge's direction to jury, the key point being that, although the judge had directed the jury to consider

18 So that there is a realistic prospect of conviction as required by the Code for Crown Prosecutors (2010) paras 4.5 and 4.6, available at *http://www.cps.gov.uk/publications/docs/code2010english.pdf*, accessed 29 October 2012.

19 As Professor Graham Virgo points out, joint enterprise is, in the strictest sense, a misnomer because the doctrine concerns liability for an offence that is a departure from the agreed joint venture: House of Commons Justice Committee, above n. 16 at 7.

20 Law Commission, *Participating in Crime*, Law Commission Report No. 305, Cm. 7084 (2007) paras 3.8 and 3.146, available at *http://lawcommission.justice.gov.uk/areas/assisting-crime.htm*, accessed 29 October 2012.

21 [2008] UKHL 45, [2009] 1 AC 129.

whether the use of the knife was 'in a different league',[22] the appellants argued that the judge should have differentiated between the common purpose of the group to cause serious harm and, on the basis of the pathological evidence, the principal's intention to kill. The appellants argued that the failure to direct the jury on that issue was a misdirection. The jury decided that the appellants knew about the knife, and thus determined that its use was not a radical departure from the common purpose of the joint enterprise to cause serious injury, but they did not consider whether the principal killing with an intention to kill was a radical departure (or fundamentally different) from the common purpose.

The House of Lords was unanimous in rejecting the appellants' appeal. Lord Neuberger set out why the appeal was rejected:

> Accordingly, in the absence of special factors, and subject to any good reason to the contrary, I consider that, even if the primary perpetrator intended to kill the victim, an alleged accessory should not escape a murder conviction simply because he only foresaw or expected that the perpetrator intended to cause serious injury. The mere fact that the perpetrator intended to kill does not render his actions 'entirely' or 'fundamentally' different from what the alleged accessory foresaw or intended.[23]

So if a principal kills with an intention to kill and the secondary party only foresees that the principal will act with an intention to cause serious harm, the principal's more culpable state of mind does not make his murder of the victim fundamentally different (or a radical departure) so as to take it outside the common purpose to cause serious harm. This is not surprising as it makes no difference to secondary liability for murder whether the secondary party foresaw that the principal's *mens rea* was an intention to cause serious harm or an intention to kill so long as one of them is foreseen as either is sufficient *mens rea* for murder liability as a principal.[24]

The *Hyde* principle and the 'fundamental difference' rule

In *R* v *Hyde* the Court of Appeal set out the basis of secondary liability for the collateral offence to a joint enterprise.[25] The House of Lords in *R* v *English* qualified this basis with the fundamental difference rule.[26] In *R* v *Rahman* this law is restated by Lord Brown as follows:

> If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element

22 Above n. 21 at [18].
23 Ibid. at [87].
24 In *R* v *Yemoh* [2009] EWCA Crim 930, the Court of Appeal held that Steve, if he foresees that Peter might intentionally cause non-serious harm to Victor would be guilty of manslaughter even if Peter kills Victor with an intent to kill or to cause serious harm, unless Peter's *manner of doing so is fundamentally different* from that which Steve foresaw. The fact that Peter acted with a more serious intention than Steve foresaw that he might does not of itself amount to a fundamental difference. See also *R* v *Carpenter* [2011] EWCA Crim 2568.
25 *R* v *Hyde* [1991] 1 QB 134 at 139, *per* Lord Lane CJ.
26 [1999] 1 AC 1, [1997] 4 All ER 545 at 564, *per* Lord Hutton.

> for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B*. . . .[27]

Lord Scott, Lord Rodger and Lord Neuberger endorsed the restatement of the law proposed by Lord Brown. The law can be summarised as follows: if a secondary party participates in a joint enterprise in which the principal commits murder, the secondary party will become liable for that collateral offence if he contemplated that there was a real risk that the principal might act with the *mens rea* for murder in furtherance of the common purpose unless the *English* qualification applies. The qualification requires that the principal suddenly produces and uses a weapon of which the secondary party knows nothing *and* which is more lethal than any weapon of which the secondary party was aware. If this qualification is satisfied, there is no secondary liability for the collateral offence. The facts of *English* provide an example where the purpose of the joint enterprise was to attack and cause injury to a police officer using wooden posts, but, in the course of the attack, the principal used a knife with which he stabbed the police officer to death. There was a reasonable possibility that the secondary party, English, had no knowledge that the principal was carrying a knife. His murder conviction was quashed because of this lack of knowledge and because the knife was more lethal than wooden posts.

The 'fundamental difference' rule can apply in all cases other than those where the secondary party intended death to occur. This means that the secondary party may be able to rely on the rule even though he has foreseen (but not intended) that the principal may act with an intention to kill, but the principal kills using a more lethal weapon of which the secondary party knows nothing. If the secondary party has agreed to perpetrate a joint enterprise being aware that the principal may act with an intention to kill, should it matter how the principal carries out that intention? Also, it is unclear why the rule only applies when the principal 'suddenly produces' the more lethal weapon. Surely what is relevant to liability is whether or not the secondary party foresaw the use of the weapon.

Despite Lord Brown limiting the operation of the rule to weapons it must also apply to acts themselves. For example, in *Attorney-General's Reference (No. 3 of 2004)*,[28] the act done by the principal—shooting the victim at point blank range—was of a fundamentally different nature from the act foreseen by the secondary party, namely an unlawful act to frighten involving the firearm being deliberately discharged near the victim. The secondary party did not foresee the possibility of any physical harm to the victim, least of all intentional harm.

27 *R* v *Rahman* [2008] UKHL 45, [2009] 1 AC 129 at [68], emphasis in the original; the first part of the restatement represents the *Hyde* principle whilst the italicised words reflect the English qualification.

28 [2005] EWCA Crim 1882.

Their Lordships had contrasting views on the operation of the 'fundamental difference' rule and this is shown in their consideration of *R* v *Gamble*.[29] In that case (a non-jury trial) four members of the Ulster Volunteer Force went to inflict a knee-capping punishment on a delinquent member of the Force. But during the punishment the principals killed the victim by cutting his throat with extreme violence. The two secondary parties were acquitted of murder because the deliberate killing of the victim was a fundamental departure from the knee-capping punishment. Lord Bingham thought that *Gamble* was correctly decided: '. . . what, as I understand, was held to exonerate Douglas and McKee was that the violence in fact inflicted with the knife was of an entirely different character in an entirely different context from that which they had foreseen and, in that sense, bargained for. The result seems to me consistent with authority'.[30] In contrast Lord Brown, Lord Scott and Lord Neuberger had difficulty agreeing with that decision in terms of the qualified *Hyde* principle. It is submitted that Carswell J in *Gamble* and Lord Bingham got it right. At first sight it is difficult to see how a knife could be more lethal than a loaded gun, but when the use of those weapons is taken into account, it becomes apparent that, in those circumstances, the knife was more lethal and its use a radical departure from the common purpose to inflict a knee-capping punishment.

In *R* v *Mendez and Thompson*[31] the Court of Appeal reworked the 'fundamental difference' rule to make directions more understandable for juries. However, in doing so, the court made the rule more propitious to secondary parties. In reworking the rule, the court endorsed as sound in principle the argument of the appellant's counsel:

> In cases where the common purpose is not to kill but to cause serious harm, [the secondary party] is not liable for the murder of V if the direct cause of V's death was a deliberate act by [the principal] which was of a kind (a) unforeseen by [the secondary party] and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by [the secondary party].[32]

This formulation is whether the principal's deliberate act was unforeseen by the secondary party and could be regarded as being 'altogether more life-threatening than acts of the nature' intended or foreseen by the secondary party.[33] This avoids the difficulties of establishing whether, for example, a stab wound caused by a knife is fundamentally different from being beaten with an iron bar. Consider the facts of *Gamble*[34] to reflect on why the reformulation is more favourable to secondary parties. For the majority in *Rahman* the application of Lord Brown's restatement would mean a conviction for murder should ensue, but applying the reworking in *Mendez*, it would not. However, it

29 [1998] NI 268.
30 [2008] UKHL 45, [2009] 1 AC 129 at [29].
31 [2010] EWCA Crim 516, [2011] QB 876.
32 Ibid. at [45].
33 Ibid. at [48].
34 [1998] NI 268.

is submitted that, if the doctrine of precedent is to be applied robustly in the criminal law, then the qualified *Hyde* principle as restated in *Rahman* by Lord Brown is that which is binding on trial courts.

Withdrawal

If there is some evidence of prior agreement between the secondary party and the principal, then an effective withdrawal in complicity requires that the secondary party tell the principal unequivocally that he is withdrawing from the joint enterprise, but also (assuming the crime is about to take place) to take some action to prevent or stop the crime such as restraining the principal.[35] If there is a spontaneous joint enterprise without prior agreement, it appears that communication of withdrawal is not required. In *R* v *O'Flaherty*[36] spontaneous violence occurred between two groups of individuals. At place A, there was an exchange of blows between the deceased and the three appellants, F, R and T, each of whom was respectively armed with a cricket bat, a bottle and a claw hammer. The deceased was then pursued by other individuals. F followed that pursuit to place B, where the deceased was on the ground surrounded and being assailed by a number of men. F advanced to within a few feet of the prone body still armed with the cricket bat, which he did not use again, and was the first to move away from the scene. R and T did not enter place B. At place B the deceased had sustained a head injury and stab wound which killed him. F, R, T and others were convicted of murder. The Court of Appeal quashed R and T's conviction because by not going to place B they had withdrawn from the joint enterprise even though they had not communicated that withdrawal. In contrast the court held that F remained liable because he had gone to place B and therefore had not withdrawn from the joint enterprise. It seems that if, on the facts in *Mitchell* above, the defendant's co-defendants had chased the victim out of the car park, she could have been regarded as withdrawing from the joint enterprise. This is unjust because R and T in *O'Flaherty* were more culpable as they were armed and the defendant in *Mitchell* was not. The law is too tightly drawn.

Conclusion

It has been said that the House of Lords' attempt to clarify the law of joint enterprise in *Rahman* has failed,[37] but is that really true? The law is complex as the recent decision in *R* v *Gnango*[38] shows, but that was an unusual and unique case and must be regarded as turning on its own

35 *R* v *Becerra and Cooper* (1975) 62 Cr App R 212.
36 [2004] EWCA Crim 526, [2004] 2 Cr App R 20.
37 Professor David Ormerod commentary to *R* v *A* [2011] Crim LR 61 at 65.
38 [2011] UKSC 59, [2012] 1 AC 827.

facts.[39] In many cases, joint enterprise involves the application of principles of accessorial liability—they cover the same ground. Where they separate, the *Hyde* principle, as qualified, applies. That principle should be applied in a more robust way. It is submitted that the law also needs to be improved by the *Hyde* principle being supplemented with the requirement that there must also be evidence of assisting or encouraging the murder, i.e. there is both *mens rea* and an *actus reus*. These changes should prevent secondary party convictions for murder being based on not much more than mere association. It would mean accessorial liability and joint enterprise would completely overlap. The House of Commons Justice Committee has recommended that the DPP issue guidance as to the proper threshold at which association becomes evidence of involvement in crime.[40] That guidance should require Crown Prosecutors, when considering the *Hyde* principle, to have, in addition, evidence of assisting or encouraging the murder. The DPP promised to consult on that threshold,[41] but as at yet that consultation has not been issued. Clear guidance could put the law into a workable state which is fairer to secondary parties.[42]

39 Lord Phillips and Lord Judge considered it undesirable to use the *Hyde* principle in connection with the offence of affray ([2011] UKSC 59, [2012] 1 AC 827 at [41]). It is unclear as to why this *obiter dictum* should be limited to affray, but if it is a general view, then that would mean that there would be no secondary liability for the collateral offence of murder unless the secondary party intended that it be committed.

40 House of Commons Justice Committee, above n. 16 at 14, para. 33.

41 See at *http://www.cps.gov.uk/news/press_statements/statement_from_the_dpp_in_response_to_the_house_of_commons_justice_committee_report_on_joint_enterprise/*, 17 January 2012, accessed 25 August 2012.

42 The House of Commons Justice Committee has also recommended that the government should consult on the Law Commission's proposals in its 2007 Report *Participating in Crime* as they would form (in the Committee's view) an excellent starting point to legislation. The concern with those proposals is that doctrinally they start from the premise that accessorial liability and joint enterprise are separate, whereas this comment has shown that in many cases they overlap. The clauses to the draft Bill attached to the Report only provide a skeleton for the law of complicity which, if enacted, could lead to further complex case law. See G. R. Sullivan, 'Participating in Crime: Law Com No. 305—Joint Criminal Ventures' [2008] Crim LR 19.