


Hilary Term
[2016] UKSC 8
[2016] UKPC 7
On appeal from: [2013] EWCA Crim 1433 and JCPC 0020 of 2015

JUDGMENT

R *v* Jogee (Appellant)

Ruddock (Appellant) *v* The Queen (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Hughes
Lord Toulson
Lord Thomas

JUDGMENT GIVEN ON

18 February 2016

Heard on 27, 28 and 29 October 2015

Appellant (Jogee)
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Respondent
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(Instructed by Crown Prosecution Service Appeals and Review Unit)

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Intervener (Just for Kids Law)
Francis FitzGibbon QC
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Intervener (Joint Enterprise Not Guilty by Association)
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LORD HUGHES AND LORD TOULSON: (with whom Lord Neuberger, Lady Hale and Lord Thomas agree)

1. In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial.

2. In the last 20 years a new term has entered the lexicon of criminal lawyers: parasitic accessory liability. The expression was coined by Professor Sir John Smith in a lecture later published in the Law Quarterly Review (*Criminal liability of accessories: law and law reform* [1997] 113 LQR 453). He used the expression to describe a doctrine which had been laid down by the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168 and developed in later cases, including most importantly the decision of the House of Lords in *R v Powell and R v English* [1999] 1 AC 1. In *Chan Wing-Siu* it was held that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it.

3. The appellants Jogee and Ruddock were each convicted of murder after directions to the jury in which the trial judges sought to apply the principle deriving from *Chan Wing-Siu.* In these appeals the court has been asked to review the

doctrine of parasitic accessory liability and to hold that the court took a wrong turn in *Chan Wing-Siu* and the cases which have followed it. It is argued by the appellants that the doctrine is based on a flawed reading of earlier authorities and questionable policy arguments. The respondents dispute those propositions and argue that even if the court were now persuaded that the courts took a wrong turn, it should be a matter for legislatures to decide whether to make any change, since the law as laid down in *Chan Wing-Siu* has been in place in England and Wales and in other common law jurisdictions including Jamaica for 30 years. The two appeals, Jogee in the Supreme Court and Ruddock in the Judicial Committee of the Privy Council, were heard together.

History

4. The Accessories and Abettors Act 1861, section 8 (as amended), provides that:

> "Whosoever shall aid, abet, counsel or procure the commission of any indictable offence … shall be liable to be tried, indicted and punished as a principal offender."

For summary offences the corresponding provision is in section 44 of the Magistrates' Courts Act 1980.

5. In its original form section 8 of the 1861 Act referred to "any misdemeanour" rather than "any indictable offence". It was amended by the Criminal Law Act 1977 on the abolition of the previous distinction between felonies and misdemeanours. Prior to the abolition of that distinction, the substantive law about who could be convicted of an offence as a secondary party was the same for felonies and misdemeanours, but for historical reasons the terminology was different.

6. The purpose of section 8 was to simplify the procedure for the prosecution of secondary parties. It did not alter the substance of the law governing secondary liability. Its language was consistent with a line of earlier statutes. Foster commented in his Crown Law, re-published 3rd ed (1809), pp 130-131, that the precise language used in those statutes was not always identical but was to the same effect. The effect of the language of section 8 was accurately summarised by the Law Commission in its report on *Participating in Crim*e (2007) (Law Com 305), paragraph 2.21:

> "Disregarding 'procuring', it is generally accepted that these specified modes of involvement cover two types of conduct on

> the part of D, namely the provision of assistance and the provision of encouragement."

7. Although the distinction is not always made in the authorities, accessory liability requires proof of a conduct element accompanied by the necessary mental element. Each element can be stated in terms which sound beguilingly simple, but may not always be easy to apply.

8. The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1.

9. Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal: *National Coal Board v Gamble* [1959] 1 QB 11, applied for example in *Attorney General v Able* [1984] QB 795, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350 per Lord Lowry at 1374G-1375E, approved in the House of Lords at 1356A; 1358F; 1359E; 1362H and echoed also at 1361D.

10. If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent. D2's intention to assist D1 to commit the offence, and to act with whatever mental element is required of D1, will often be co-extensive on the facts with an intention by D2 that that offence be committed. Where that is so, it will be seen that many of the cases discuss D2's mental element simply in terms of intention to commit the offence. But there can be cases where D2 gives intentional assistance or encouragement to D1 to commit an offence and to act with the mental element required of him, but without D2 having a positive intent that the particular offence will be committed. That may be so, for example, where at the time that encouragement is given it remains uncertain what D1 might do; an arms supplier might be such a case.

11. With regard to the conduct element, the act of assistance or encouragement may be infinitely varied. Two recurrent situations need mention. Firstly, association between D2 and D1 may or may not involve assistance or encouragement. Secondly, the same is true of the presence of D2 at the scene when D1 perpetrates the crime. Both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided. Numbers often matter. Most people are bolder when supported or fortified by others than they are when alone. And something done by a group is often a good deal more effective than the same thing done by an individual alone. A great many crimes, especially of actual or

threatened violence, are, whether planned or spontaneous, in fact encouraged or assisted by supporters present with the principal lending force to what he does. Nevertheless, neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts: see *R v Coney* (1882) 8 QBD 534, 540, 558.

12. Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1's conduct or on the outcome: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2's conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1's offence as encouraged or assisted by it.

13. An early example is the case of *Hyde* (1672), described in Hale's *Pleas of the Crown* (1682), vol 1, p 537, and in Foster's *Crown Law*, p 354. This was Foster's description and explanation:

> "A, B and C ride out together with intention to rob on the highway. C taketh an opportunity to quit the company, turneth into another road, and never joineth A and B afterwards. They upon the same day commit a robbery. C will not be considered an accomplice in this fact. Possibly he repented of the engagement, at least he did not pursue it; nor was there at the time the fact was committed any engagement or reasonable expectation of mutual defence and support so far as to affect him."

In other words, on the particular facts A and B were not regarded as having committed the robbery with C's encouragement or assistance. Any original encouragement was regarded as having been spent and there was no other assistance. (It appears from Hale's account that C parted from A and B at Hounslow and that the later robbery took place three miles away.)

14. With regard to the mental element, the intention to assist or encourage will often be specific to a particular offence. But in other cases it may not be. D2 may intentionally assist or encourage D1 to commit one of a range of offences, such as

an act of terrorism which might take various forms. If so, D2 does not have to "know" (or intend) in advance the specific form which the crime will take. It is enough that the offence committed by D1 is within the range of possible offences which D2 intentionally assisted or encouraged him to commit (*Maxwell*).

15. In *Maxwell* the defendant was a member of a terrorist organisation, the Ulster Volunteer Force ("UVF"). Under UVF instructions he took part in what he knew was a planned military mission, by guiding a car containing three or four other men on a cross country journey to a country inn on a winter evening. He knew that they were intending to carry out some form of violent attack on the inn, whether by shooting, bombing or some incendiary device, and he intentionally acted in order to help them to carry out the mission. He did not know the precise form of attack that they were intending to carry out (which was in fact an explosion), but it was held to be enough that he knew that they were intending to carry out a violent attack on the inn and that he intended to assist them to do so.

16. The decision in *Maxwell* did not derogate from the principle identified in para 9 that an intention to assist or encourage the commission of an offence requires knowledge by D2 of any facts necessary to give the principal's conduct or intended conduct its criminal character. In *Johnson v Youden* [1950] 1 KB 544 a builder committed an offence by selling a house for £250 more than the maximum permitted under a statutory regulation. The £250 was paid to him in advance by the purchaser. The builder then instructed a firm of solicitors to act for him in the sale. Two of the partners in the firm had no knowledge of the earlier payment, but they were convicted by the magistrates of aiding and abetting the builder's offence. Their convictions were quashed by the Divisional Court because they had no knowledge of the facts which gave the transaction its criminal character. They therefore lacked the mens rea to be guilty as accessories.

17. Secondary liability does not require the existence of an agreement between the principal and the secondary party to commit the offence. If a person sees an offence being committed, or is aware that it is going to be committed, and deliberately assists its commission, he will be guilty as an accessory. But where two or more parties agree on an illegal course of conduct (or where one party encourages another to do something illegal), the question has often arisen as to the secondary party's liability where the principal has allegedly gone beyond the scope of what was agreed or encouraged.

18. For Foster it was an objective question, firstly, what in substance was agreed or encouraged, and secondly, what was likely to happen in the ordinary course of events.

19. As to first question, Foster wrote at p 369 (in a passage much cited in later authorities):

> "Much hath been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another hath gone beyond the terms of such instigation, or hath, in the execution, varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. For on his part it was no more than a fruitless ineffectual temptation. *The fact cannot with any propriety be said to have been committed under the influence of that temptation.*
>
> But if the principal in substance complieth with the temptation, varying only in circumstance of time and place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessary before the fact, if present a principal."
>
> (Emphasis added. At the time when Foster wrote, the word "fact" was used when we would use the word "act".)

20. As to the second question, Foster continued at p 370:

> "So where the principal goeth beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advice will be an accessary to that felony …
>
> [Foster proceeded to give three examples. One is enough for present purposes.]
>
> A adviseth B to rob C, he doth rob him, and in so doing, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, killeth him. A is accessary to this murder.
>
> …

> These cases are all governed by one and the same principle. The advice, solicitation, or orders in substance were pursued, and were extremely flagitious on the part of A. The events, although possibly falling out beyond his original intention, were *in the ordinary course of things the probable consequences of what B did under the influence, and at the instigation of A.* And therefore, in the justice of the law, he is answerable for them." (Foster's emphasis)

21. Foster's original edition was published in 1762, the year before his death, and so he was writing about the law in the mid-18th century. (The edition quoted was a re-publication.) Cases in the 19th century show that there was a significant change of approach. It was no longer sufficient for the prosecution to prove that the principal's conduct was a probable consequence, in the ordinary course of things, of the criminal enterprise instigated or agreed to by the secondary party. The prosecution had to prove that it was part of their common purpose, should the occasion arise.

22. In *R v Collison* (1831) 4 Car & P 565 two men went out by night with carts to steal apples. They were detected by the landowner's watchman. One of the thieves attacked him with a bludgeon which he was carrying and caused the man severe injury. On the trial of the second thief for assault and wounding with intent to murder, Garrow B ruled at p 566:

> "To make the prisoner a principal, the Jury must be satisfied that, when he and his companion went out with a common illegal purpose of committing the felony of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavour to apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal."

This ruling highlighted the importance of identifying the common purpose. If it was only to steal apples, the defendant was not guilty of the greater offence with which he was charged. He was guilty of that offence only if the common purpose included using severe violence to resist arrest, should the occasion arise.

23. Other authorities were consistent with the direction in *Collison*: see *R v Macklin* (1838) 2 Lewin 225, *R v Luck* (1862) 3 F & F 483, and *R v Turner* (1864) 4 F & F 339, 341 ("on a charge of murder there must be evidence not only of a common design to commit a felony, but a common design quoad the homicidal act itself", per Channell B). The position in England and Wales was at one time complicated by the doctrine of constructive murder known as felony murder. Under this doctrine a person was guilty of murder if he used violence in furtherance of a felony which resulted in death, whether or not he intended to cause death or serious harm. The doctrine did not apply to misdemeanours, which included poaching. Pollock CB explained the law as it affected accessories in *R v Skeet* (1866) 4 F & F 931, 936-937 (a case in which poachers were stopped by a gamekeeper, who was shot by one of them):

> "… the doctrine of constructive homicide … does not apply where the only evidence is that the parties were engaged in an unlawful purpose: not being felonious. It only applies in cases where the common purpose is felonious, as in cases of burglary: where all the parties are aware that deadly weapons are taken with a view to inflict death or commit felonious violence, if resistance is offered. That doctrine arose from the desire on the part of old lawyers to render all parties who are jointly engaged in the commission of a felony responsible for deadly violence committed in the course of its execution. But that doctrine has been much limited in later times, and only applies in cases of felony, where there is no (*sic*) evidence of a felonious design to carry out the unlawful purpose at all hazards, and whatever may be the consequences. The possession of a gun would not be any evidence of this, for a gun is used in poaching. And poaching itself is only an unlawful act and a mere misdemeanour."

24. The inclusion of the word "no" in this passage appears to be an error, because it is contrary to the general sense of the passage and to the case reporter's commentary at p 934 on the judgment:

> "It is the common design or intention to kill in the prosecution of the unlawful object, whether it be misdemeanour or felony, which involves the others in the guilt of homicide. For, even if the common purpose is felonious, if only the actual perpetrator of the act had the intention to kill in the prosecution of the purpose, the others, who did not concur in the act, are not guilty of the offence of homicide."

It will be seen that the expression "common design" is here treated as synonymous with shared intention. (It would have been more strictly accurate to add "or cause grievous bodily harm" after the word "kill".)

25. *R v Spraggett* [1960] Crim LR 840 is a more modern example of the principle that where violence is used in furtherance of a criminal venture, a co-adventurer will be liable only if he shared an intention to use violence to resist interference or arrest. Three men were involved in the burglary of a sub-post office. Two of them went into the building while the third waited outside. During the burglary the owner of the shop came on the scene and was knocked down. The appellant was convicted of burglary and assault with intent to rob. The judge directed the jury that if the defendants jointly decided to break into premises, each was liable for any incidental violence. The appellant's conviction was quashed. Lord Parker CJ said that the summing-up treated it as a presumption of law that where a person was found to be acting in concert with others to commit a burglary, it should be presumed that he was also acting in concert with others to use violence in the course of the crime, whereas the jury had to be satisfied on the evidence that there was such a preconceived intention to use violence. (The commentary in the Criminal Law Review noted that under the trial judge's direction, a burglar who had no intention to do anything to anyone might find himself guilty of murder.)

26. The evidential relevance of the carrying of a weapon on a criminal venture has been a common theme in the case law. Its evidential strength depends on the circumstances. As Pollock CB observed in *Skeet*, a poacher's possession of a gun did not of itself then point to more than an intent to use it to kill game. In other circumstances it might provide powerful evidence of an intent to use it to overcome resistance or avoid arrest. See Professor Glanville Williams' *Criminal Law, The General Part,* 2nd ed (1961), p 397:

> "The knowledge on the part of one criminal that his companion is carrying a weapon is strong evidence of a common intent to use violence, but is not conclusive."

27. In a line of cases the courts recognised that even where there was a joint intent to use weapons to overcome resistance or avoid arrest, the participants might not share an intent to cause death or really serious harm. If the principal had that intent and caused the death of another he would be guilty of murder. Another party who lacked that intent, but who took part in an attack which resulted in an unlawful death, would be not guilty of murder but would be guilty of manslaughter, unless the act which caused the death was so removed from what they had agreed as not to be regarded as a consequence of it: *R v Smith (Wesley)* [1963] 1 WLR 1200, *R v Betty* (1964) 48 Cr App R 6, *R v Anderson and R v Morris* [1966] 2 QB 110 and *R v Reid* (1976) 62 Cr App R 109.

28. In *Wesley Smith* (see pp 1205-1206) the trial judge directed the jury:

> "Manslaughter is unlawful killing without an intent to kill or do grievous bodily harm. Anybody who is party to an attack which results in an unlawful killing which results in death is a party to the killing.
>
> … a person who takes part in or intentionally encourages conduct which results in a criminal offence will not necessarily share the exact guilt of the one who actually strikes the blow. His foresight of the consequences will not necessarily be the same as that of the man who strikes the blow, the principal assailant, so that each may have a different form of guilty mind, and that may distinguish their respective criminal liability. Several persons, therefore, present at the death of a man may be guilty of different degrees of crime - one of murder, others of unlawful killing, which is manslaughter. *Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results*." (Emphasis added.)

29. Smith was convicted of manslaughter. Because he appealed against that conviction, it fell to a Court of Criminal Appeal of five judges to consider the direction as a whole, including the passage relating to murder. They praised the judge for his clear summing up, which they described as "legally unassailable". They added that it was possible to hypothesise a case where what was done was wholly beyond the defendant's contemplation, but that could not be said in that case, where the death resulted from use of a knife which the appellant knew that the principal offender was carrying. (We will consider later in more detail the relevance of objective foreseeability in relation to manslaughter.)

30. In *Betty* Lord Parker CJ quoted the passage from the summing up in *Wesley Smith* emphasised above and noted that the court of five judges had approved it.

31. In *Anderson and Morris*, a fatal stabbing resulted in the conviction of Anderson for murder and Morris for manslaughter. The evidence of Morris's role, if any, in the attack was unclear. The judge directed the jury that if there was a common design to attack the victim, but without any intent by Morris to kill or cause grievous bodily harm, and if Anderson, acting outside the common design, produced a knife about which Morris had no knowledge and used it to kill the victim, Morris was liable to be convicted of manslaughter. The defendants' appeal was heard by a

Court of Criminal Appeal of five judges, presided over by Lord Parker CJ. Mr Geoffrey Lane, QC for Morris submitted that the authorities from about 1830 onwards established the principle that (see p 118):

> "… where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that, if one of the adventurers *goes beyond what has been tacitly agreed* as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act." (Emphasis added)

32. It was submitted that the judge had therefore misdirected the jury in saying that Morris could be liable if Anderson had acted outside the common design. Accepting counsel's proposition as set out above and allowing Morris' appeal, Lord Parker said at p 120:

> "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 …
>
> 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 on as causative factors."

33. The court in that case did not call into question what had been said in *Wesley Smith*, and Lord Parker noted that it had been approved by the court in *Betty*. The court was not therefore resiling from the general statement that where a person takes part in an unlawful attack which results in death, he will be guilty either of murder or of manslaughter according to whether he had the mens rea for murder. But the court recognised that there could be cases where the actual cause of death was not simply an escalation of a fight but "an overwhelming supervening event". That there had been such an event in *Anderson and Morris* may have been a charitable view on the facts, but the principle was endorsed by the court in *Reid* (of which the former Mr Geoffrey Lane QC was a member).

34. Reid and two others were tried for the murder of a colonel who was the commander of an army training camp. The three men were alleged to be supporters of the IRA. They went to the colonel's house in the early hours of the morning and rang the doorbell. The door was opened by the colonel, and one of the other defendants immediately shot him dead. The other two men were convicted of murder and Reid was convicted of manslaughter. All three were also convicted of joint possession of a revolver, knife and imitation gun. Reid's defence was that he was not an IRA supporter and that he went with the others as an interested but innocent spectator with no intention of causing any harm. The jury must have rejected that defence, but must also have accepted it as possible that he did not intend the victim to suffer death or serious harm. Reid appealed against his conviction for manslaughter on the ground that there was no evidence for finding that he intended to cause some harm but not serious harm, and reliance was placed on *Anderson and Morris*. The appeal was dismissed in a reserved judgment of a strong Court of Appeal (Lawton and Geoffrey Lane LJJ and Robert Goff J).

35. Lawton LJ distinguished *Anderson and Morris* on the basis that the court in that case on its facts had regarded the act which caused death as "an overwhelmingly supervening event". Dealing with Reid, he said at p 112:

> "The intent with which the appellant was in joint possession of the weapons with the others has to be inferred from the circumstances. He did not share the murderous intent. … The first problem for us is whether this court would be entitled to infer from the fact of joint possession an intent to do some harm to Colonel Stevenson … If men carrying offensive - indeed deadly - weapons go to a man's house in the early hours of the morning for no discernible lawful purpose, they must, in our judgment, intend to do him harm of some kind, and the very least kind of harm is of causing fright by threats to use them. The second problem is whether, on the evidence in this case, Colonel Stevenson's death resulted from the unlawful and dangerous act of being in joint possession of offensive weapons. The appellant did not intend either death or serious injury. On the jury's findings O'Conaill must have gone beyond anything he may have intended ….
>
> When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intend to do with them is to use them to cause fear in another, there is, in our judgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious

> injury. *If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter*." (Emphasis added.)

Chan Wing-Siu [1985] AC 168

36. The three appellants went, each armed with a knife, to a flat used by a prostitute, where her husband was habitually present. The prosecution's case was that they planned to rob the husband. In written statements they admitted going to the flat to get money from him, which they said that he owed to one of them. The husband was stabbed to death and his wife was slashed across the head. The appellants were all convicted of murder and wounding with intent to cause grievous bodily harm. Complaint was made of the trial judge's direction to the jury that an accused was guilty on each count if proved to have had in contemplation that a knife might be used by one of his co-adventurers with intent to inflict serious bodily injury. It was conceded by the appellants that if the contingency in which knives were used (such as resistance to a robbery) was foreseen by an accused, it was not necessary that he should have regarded the occurrence of that contingency as more probable than not; but it was submitted that it was necessary to prove that he foresaw a more than 50% likelihood that one or other of his co-accused would act with intent to cause death or really serious harm.

37. This submission was unsurprisingly rejected. It is also unsurprising that the appeals were dismissed. There was an overwhelming case for inferring that the appellants foresaw the likelihood of resistance and that their plan included the possible use of knives to cause serious harm. However, the Privy Council upheld the convictions on a different basis. Sir Robin Cooke, delivering the judgment of the Board, said at p 175:

> "In the typical case [of aiding and abetting] the same or the same type of offence is actually intended by all the parties acting in concert. In view of the terms of the directions to the jury here, the Crown does not seek to support the present convictions on that ground. The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.
>
> That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words,

> authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight."

38. Sir Robin Cooke cited *Anderson and Morris*. He noted that the Court of Criminal Appeal had reviewed a line of relevant authorities from 1830, but no reference was made to any of them. He referred to *Anderson and Morris* only for the case of one adventurer going beyond what had been agreed. He said that in England it appeared not hitherto to have been found necessary to analyse the test which the jury had to apply more elaborately than in the formulation by Mr Geoffrey Lane QC which the Court of Criminal Appeal had accepted. He drew on the judgments of the High Court of Australia in *Johns v The Queen* [1980] HCA 3; (1980) 143 CLR 108 and *Miller v The Queen* (1980) 55 ALJR 23. The only other English case to which he referred was *Davies v Director of Public Prosecutions* [1954] AC 378.

39. In *Davies v Director of Public Prosecutions* [1954] AC 378 a fight between two groups of youths resulted in a fatal stabbing. The appellant was convicted of murder. One of the prosecution witnesses was a youth named Lawson. He gave evidence of an oral admission by the appellant after the event. One of the grounds of appeal was that the judge ought to have given the jury a warning that Lawson could be regarded as an accomplice, and therefore was someone whose evidence required to be treated with special caution. Lawson admitted being involved in the fight at some stage, but he denied all knowledge of a knife and there was no evidence that he was present when it was produced. He was initially charged with murder, but no evidence was offered against him. The House of Lords rejected the argument that an accomplice warning was required. Lord Simonds LC said at p 401:

> "I can see no reason why, if half a dozen boys fight another crowd, and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of the knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to a common assault. 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 in its felonious use."

40. This was not a ruling that, as a matter of law, knowledge by Lawson that one of his companions had a knife would make him an accessory to murder. Nor was Lord Simonds addressing the question of when "contemplation" of an attack with a knife would do so. He was speaking in the context of considering the need for an accomplice warning. The question was whether there was evidence on which the person concerned could be regarded as an accomplice. Evidence that he knew that one of his companions was armed with a knife would plainly have been evidence from which it would be open to a jury to infer a common intent to use it (see para 26 above). There is a major difference between saying that in the absence of evidence of knowledge of the knife there was no cause to give an accomplice warning, and saying that knowledge of the knife and the possibility of its use would of itself constitute the mens rea needed for guilt of murder as an accessory.

41. In *Johns v The Queen* the appellant was convicted of murder and assault with intent to rob. His role was to drive the principal offender, W, to a rendezvous with a third man, D. The appellant was to wait at the rendezvous while the other two men robbed a known receiver of stolen jewellery. Afterwards the appellant was to take possession of the proceeds and hide them in return for a share. The appellant knew that W was carrying a pistol, and W told him that he would not stand for any nonsense if he met any obstacle during the robbery. In the event the victim resisted and W shot him dead.

42. The judge directed the jury that the appellant and D would be guilty if the act constituting the offence committed was within the contemplation of the parties as an act done in the course of the venture on which they had embarked. It was argued on the appellant's behalf that while this was an appropriate direction in the case of D, who was present and therefore a principal in the second degree, it was a misdirection in the case of the appellant, who was an accessory before the fact. It was submitted that in his case it was necessary for the jury to conclude that it was a likely or probable consequence of the way in which the crime was to be committed that the gun would be discharged so as to kill the deceased.

43. The High Court unanimously rejected the argument that any distinction was to be drawn between the liability of a principal in the second degree and an accessory before the fact. The majority judgment was given by Mason, Murphy and Wilson JJ. They said (at p 125) that there was no reason as a matter of legal principle why such a distinction should be drawn. They also said (at p 131):

> "26. The narrow test of criminality proposed by the applicant is plainly unacceptable for the reason that it stakes everything on the probability or improbability of the act, admittedly contemplated, occurring. Suppose a plan made by A, the principal offender, and B, the accessory before the fact, to rob

> premises, according to which A is to carry out the robbery. It is agreed that A is to carry a revolver and use it to overcome resistance in the unlikely event that the premises are attended, previous surveillance having established that the premises are invariably unattended at the time when the robbery is to be carried out. As it happens, a security officer is in attendance when A enters the premises and is shot by A. It would make nonsense to say that B is not guilty merely because it was an unlikely or improbable contingency that the premises would be attended at the time of the robbery, when we know that B assented to the shooting in the event that occurred.
>
> 27. In the present case there was ample evidence from which the jury could infer that the applicant gave his assent to a criminal enterprise which involved the use, that is the discharge, of a loaded gun, in the event that [the victim] resisted or sought to summon assistance. We need not recapitulate the evidence to which we have already referred. The jury could therefore conclude that the common purpose involved resorting to violence of this kind, should the occasion arise, and that the violence contemplated amounted to grievous bodily harm or homicide."

44. This was an orthodox approach in line with the authorities going back to *Collison* (1831) 4 Car & P 565.

45. In *Miller v The Queen* the defendant regularly drove the principal offender, W, on outings to pick up girls. He would drive to a deserted spot and walk away while W satisfied his sexual desires. Sometimes the sex was consensual and the girl would be returned unharmed, but on seven occasions W murdered the girl and the defendant helped him to dispose of her body. The defendant was convicted of murder on all but the first occasion. The judge directed the jury that the defendant would be guilty of murder if he and W acted in concert to pick up a girl and it was within his contemplation that the particular girl might be murdered. The defendant argued that this was a misdirection. The court held that the direction should reasonably have been understood as referring to a plan between the parties which included the possible murder of the girls, and as such the direction was unobjectionable. It is worth noting, as did the High Court, that this was not a case of a plan to carry out crime A, in which one party carried out crime B. There was nothing illegal about the venture of picking up girls for consensual sex. It became illegal if and when the common purpose came to include murder as an eventuality.

46. In *Chan Wing-Siu* Sir Robin Cooke touched briefly on public policy saying (at p 177):

> "What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment, only too likely to have been optimistic."

47. It is not necessary to refer to all the cases which have followed *Chan Wing-Siu* but some call for mention.

R v Slack [1989] QB 775, R v Wakely [1990] Crim LR 119 and R v Hyde [1991] 1 QB 134

48. Reserved judgments of the Court of Appeal, expressed to follow *Chan Wing-Siu,* were given in these cases by Lord Lane CJ. In *Slack* he said, at p 781, that for a person to be guilty of murder as an accessory it had to be proved that he lent himself to a criminal enterprise involving the infliction of serious injury or death or that he had an express or tacit understanding with the principal that such harm or death should, if necessary, be inflicted. In *Wakely* he added that mere foresight of a real possibility of violence being used was not, academically speaking, sufficient to constitute the mental element of murder.

49. Professor Smith in a commentary on *Wakely* in the Criminal Law Review at pp 120-121 suggested that the Court of Appeal had failed properly to follow *Chan Wing-Siu*. He identified the question raised by *Slack* and *Wakely* as being whether it was sufficient to prove that a party to a joint enterprise knew that another party might use the violence that was used, or whether it was necessary to prove that it was understood between them expressly or tacitly that, if necessary, such violence would be used. The problem arose from the elision by Sir Robin Cooke in *Chan Wing-Siu* at p 175, of "contemplation" and "authorisation which may be express but is more usually implied". Professor Smith commented that "contemplation" is not the same thing as "authorisation", because one may contemplate that something will be done by another without authorising him to do it, but that the general effect of *Chan Wing-Siu* was that contemplation or foresight was enough.

50. In *Hyde* Lord Lane said that in *Slack* and *Wakely* the court had been endeavouring to follow *Chan Wing-Siu*, but on reconsideration he accepted

Professor Smith's criticism. Contrary to *Wakely*, foresight of the possibility that B might kill or intentionally inflict serious injury would amount to a sufficient mental element for B to be guilty of murder.

Hui Chi-Ming v The Queen [1992] 1 AC 34

51. In *Hui Chi-Ming* the Privy Council, at p 50, affirmed the correctness of *Hyde* and expressly endorsed the following statement in the judgment in *Hyde*:

> "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 for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture."

R v Powell and R v English [1999] 1 AC 1

52. The House of Lords at p 27 held in answer to a question certified by the Court of Appeal that (subject to a qualification in the case of English) "it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm". The leading judgment was given by Lord Hutton, with whom the other judges agreed. It was argued by the appellants that this was inconsistent with the mens rea requirement for murder laid down in *R v Moloney* [1985] AC 905 and *R v Hancock* [1986] AC 455, but those cases were distinguished on the basis that they applied only to the principal offender.

53. Lord Hutton, at p 18, considered that there was a "strong line of authority", beginning with *Wesley Smith*, that participation in a joint criminal enterprise, with foresight or contemplation of an act as a possible incident of that enterprise, is sufficient to impose criminal liability for that act carried out by another participant in the enterprise. He held, at p 19, that in that case the Court of Appeal had "recognised that the secondary party will be guilty of unlawful killing committed by the primary party with a knife if he contemplates that the primary party may use such a weapon". He added that the judgment in *Anderson and Morris* was not intended to depart from that principle.

54. Lord Hutton recognised that "as a matter of strict analysis" there is a difference between a party to a common enterprise contemplating that in the course of it another party may use a gun or knife and a party tacitly agreeing to the use of

such a weapon, but he said that it was clear from a number of decisions in addition to *Wesley Smith* that a party embarking on a joint criminal enterprise was liable for any act which he contemplated might be carried out by another party even if he had not tacitly agreed to that act.

55. Lord Hutton recognised that as a matter of logic there was force in the argument that it was anomalous that foreseeability of death or really serious harm was not sufficient mens rea for the principal to be guilty of murder, but was sufficient in a secondary party. But he said that there were weighty and important practical considerations related to public policy which prevailed over considerations of strict logic. He saw considerable force in the argument that a party who takes part in a criminal enterprise (for example, a bank robbery), with foresight that a deadly weapon may be used, should not escape liability for murder because he, unlike the principal party, is not suddenly confronted by the security officer so that he has to decide whether to use the gun or knife or have the enterprise thwarted and face arrest.

56. In a concurring judgment, Lord Steyn recognised at p 13, that foresight and intention are not synonymous, but he held that foresight is a "necessary and sufficient" ground of the liability of accessories. He too recognised that there was at first sight substance in the argument that it was anomalous that a lesser form of culpability was required in the case of a secondary party involved in a criminal enterprise, viz foresight of the possible commission of the greater offence, than in the case of the primary offender, who will be guilty of murder only if he intended to kill or cause really serious injury. But he held at p 14, that the answer to the supposed anomaly was to be found in practical and policy considerations:

> "If the law required proof of the specific intention on the part of a secondary party, the utility of the accessory principle would be gravely undermined. It is just that a secondary party who foresees that the primary offender might kill with the intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. … The criminal justice system exists to control crime. A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed."

57. Lord Mustill agreed with the decision, but with evident unease. He said that throughout the modern history of the law on secondary liability, in the type of case

under consideration, the responsibility of the secondary party, D2, had been founded on participation in a joint enterprise of which the commission of the crime by the principal offender, D1, formed a part. If D2 foresaw D1's act, this would always, as a matter of common sense, be relevant to the jury's decision on whether it formed part of a course of action to which D2 and D1 agreed, albeit often on the basis that the action would be taken if particular circumstances should arise. In cases where D2 could not rationally be treated as party to an express or tacit agreement to commit the greater offence, but continued to participate, he would have favoured some lesser form of culpability; but that could not be fitted in to the existing concept of a joint venture. For his part he would not have favoured the abandonment of a doctrine which had for years worked adequately in practice and its replacement by something which he conceived to be new. But since the other four members of the panel saw the matter differently, and for the sake of clarity in the law, he was willing to concur in their reasoning.

58. English, who was aged 15, and another young man, W, took part in attacking a police sergeant with wooden posts. In the course of the attack W drew a knife and stabbed him to death. Both youths were convicted of murder. It was a reasonable possibility on the evidence that English did not know that W was carrying a knife. The judge directed the jury that English would nevertheless be guilty of murder if he foresaw a substantial risk that W might cause serious injury to the sergeant with a wooden post. It was submitted on behalf of English, and the House of Lords agreed, that "the use of a knife was fundamentally different to the use of a wooden post". The summing-up was therefore defective and his conviction was quashed. Lord Hutton added at p 30:

> "… if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice versa."

59. In later cases which proceeded on the assumption that the law was as stated in *Chan Wing-Siu*, courts have endeavoured to clarify the test of what is to be regarded as "fundamentally different" for this purpose; such cases include *R v Rahman* [2008] UKHL 45; [2009] 1 AC 129 and *R v Mendez* [2011] QB 876. The need to address a concept of "fundamental departure" assumed great importance because guilt was based, under the *Chan Wing-Siu* and *Powell and English* rule, on foresight of what D1 might do.

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60. *Chan Wing-Siu* was followed by the High Court of Australia in *McAuliffe v The Queen* (1995) 183 CLR 108, which was in turn followed by the High Court in *Gillard v The Queen* (2003) 219 CLR 1 and *Clayton v The Queen* (2006) 231 ALR 500. In *Clayton* the majority adopted the theory (at para 20) that what is there described as "extended common purpose liability" differs as a matter of jurisprudential foundation from secondary liability as aider or abettor, the first being grounded in common embarkation on crime A and the second in contribution to another's crime. There was a dissenting judgment by Kirby J, who pointed, among other considerations, to the disparity between the mental element required of an aider or abettor and that required by the rule of extended common purpose (para 102).

Analysis

61. The court has had the benefit of a far deeper and more extensive review of the topic of so-called "joint enterprise" liability than on past occasions.

62. From our review of the authorities, there is no doubt that the Privy Council laid down a new principle in *Chan Wing-Siu* when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it. We have referred (at paras 31-33 and 39-45) to the authorities on which the Privy Council placed reliance in laying down that principle: *Davies v Director of Public Prosecutions*, *R v Anderson and R v Morris*, *Johns v The Queen* and *Miller v The Queen*.

63. What Lord Simonds said in *Davies* was in a very different context and does not provide support for the *Chan Wing-Siu* principle for the reasons which we have explained.

64. In *Anderson and Morris* the Court of Appeal affirmed *Wesley Smith* including the rule that if an adventurer departed completely from what had been tacitly agreed as part of an agreed joint enterprise his co-adventurer would not be liable for the consequences of that unauthorised act. In such a situation, the effect of the overwhelming supervening event is that any assistance is spent. The issue was whether that applied to Morris. The court did not otherwise address the question of what is necessary to establish joint responsibility, and specifically whether what is required is intention to assist or mere foresight of what D1 might do. Still less did it

address the meaning of contemplation (foresight) and authorisation. It provided no foundation for the rule in *Chan Wing-Siu.*

65. The Privy Council judgment, moreover, elided foresight with authorisation, when it said that the principle "turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied". But as Professor Smith observed, contemplation and authorisation are not the same at all.

66. Nor can authorisation of crime B automatically be inferred from continued participation in crime A with foresight of crime B. As Lord Brown accurately pointed out in *R v Rahman* at para 63, the rule in *Chan Wing-Siu* makes guilty those who foresee crime B but never intended it or wanted it to happen. There can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such intent (or, if one likes, of "authorisation"), not conclusive of it.

67. In *Johns v The Queen* the ratio decidendi of the majority was that there was ample evidence from which the jury could infer that the defendant gave his assent to a criminal enterprise which involved the discharge of a firearm, should the occasion arise. This was an entirely orthodox approach. So too was the decision in *Miller v The Queen*, where the High Court held that the judge's direction to the jury would reasonably have been understood as saying that the defendant would be guilty of murder if he acted in concert with the principal offender in a plan which included the possible murder of the victims. As already noted, that case did not involve a plan to carry out crime A, in the course of which crime B was committed.

68. In *Powell and English* Lord Hutton placed considerable reliance on *Wesley Smith*, which had been cited in *Chan Wing-Siu* but was not mentioned in the judgment. Lord Hutton said that he considered that in *Wesley Smith* "the Court of Appeal recognised that the secondary party will be guilty of unlawful killing committed by the primary party with a knife if he contemplates that the primary party may use such a weapon" (p 19). But the unlawful killing to which the Court of Appeal was referring was manslaughter, not murder, and it is very important to understand its reasoning. The defendant in *Wesley Smith* was one of a group of four men who became involved in a row in a public house. He and one other went outside and threw bricks at the building. One of the two who remained inside stabbed the barman with a knife which Smith knew he carried. Smith was acquitted of murder but convicted of manslaughter.

69. The question in *Wesley Smith* was whether his conviction for manslaughter was unsafe in the light of his acquittal of murder. The starting point was that anyone who takes part in an unlawful and violent attack on another person which results in death is guilty (at least) of manslaughter. There might conceivably have been an intervening act by another person of such a character as to break any connection between the defendant's conduct and the victim's death (as, for example, in *Anderson and Morris*); but the fact that it must have been within Smith's contemplation that the principal might act in the way that he did was fatal to the argument that he was not guilty even of manslaughter. (See para 96 below).

70. Although Lord Hutton quoted part of the judge's summing-up in *Wesley Smith* he ended his quotation with the first part of the passage set out at para 28 above. ("Anybody who is party to an attack which results in an unlawful killing … is a party to the killing".) He did not go on to refer to the critical passage which followed, including the statement:

> "Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results."

71. Moreover, as we have explained at para 29, the Court of Appeal had explicitly praised the summing-up as a correct statement of the law. Far from supporting the *Chan Wing-Siu* principle, *Wesley Smith* was an authority contrary to it.

72. *Wesley Smith* was not the only authority inconsistent with the *Chan Wing-Siu* principle. We have referred to other authorities from *Collison* to *Reid*, which were not cited in *Chan Wing-Siu*. *Reid* was cited in *Powell and English*, but it was not mentioned in any of the judgments, although it was a reserved judgment of a strong Court of Appeal which reiterated that a secondary party could not be convicted of murder unless he had the mens rea for murder.

73. In *Chan Wing-Siu* Sir Robin Cooke referred, at p 176, to the "modern emphasis on subjective tests of criminal guilt". There has indeed been a progressive move away from the historic tendency of the common law to presume as a matter of law that the "natural and probable consequences" of a man's act were intended, culminating in England and Wales in its statutory removal by section 8 of the Criminal Justice Act 1967. Since then in England and Wales the foreseeability of the consequences has been a matter of evidence from which intention may be, but need not necessarily be, inferred; whether the evidential approach differs in Jamaica is a topic not addressed in argument before us. But in any event the proper subjective counterpart to Foster's objective test (whether "the events, although possibly falling

out beyond his original intention, were in the ordinary course of things the probable consequence of what B did under the influence, and at the instigation of A") would have been intention, as was held to be necessary in *Wesley Smith* and *Reid*. Foresight may be good evidence of intention but it is not synonymous with it, as Lord Steyn acknowledged in *Powell and English* at p 13.

74. It was, of course, within the jurisdiction of the courts in *Chan Wing-Siu* and *Powell and English* to change the common law in a way which made it more severe, but to alter general principles which have stood for a long time, especially in a way which has particular impact on a subject as difficult and serious as homicide, requires caution; and all the more so when the change involved widening the scope of secondary liability by the introduction of new doctrine (since termed parasitic accessory liability). In *Chan Wing-Siu* the Privy Council addressed the policy argument for the principle which it laid down in two sentences (see para 46 above). The statement at p 177 "Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences …" may be thought to oversimplify the question of what is the enterprise to which he has intentionally lent himself, but it also implies that he would escape all criminal liability but for the *Chan Wing-Siu* principle. On the facts postulated, if the law remained as set out in *Wesley Smith* and *Reid* he would be guilty of homicide in the form of manslaughter, which carries a potential sentence of life imprisonment. The dangers of escalation of violence where people go out in possession of weapons to commit crime are indisputable, but they were specifically referred to by the court in *Reid*, when explaining why it was right that such conduct should result in conviction for manslaughter if death resulted, albeit that the initial intention may have been nothing more than causing fright. There was no consideration in *Chan Wing-Siu*, or in *Powell and English*, of the fundamental policy question whether and why it was necessary and appropriate to reclassify such conduct as murder rather than manslaughter. Such a discussion would have involved, among other things, questions about fair labelling and fair discrimination in sentencing.

75. In *Powell and English* Lord Hutton referred to the need to give effective protection to the public against criminals operating in gangs (at p 25), but the same comments apply. 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. A further policy reason suggested by Lord Hutton for setting a lower mens rea requirement for the secondary party than for the principal was that the secondary party has time to think before taking part in a criminal enterprise like a bank robbery, whereas the principal may have to decide on the spur of the moment whether to use his weapon. But the principal has had an earlier choice whether to go armed or not. As for the secondary party, he may have leisure to think before going out to rob a bank, but the same is not true in many other cases (for example, of young people

who become suddenly embroiled in a fight in a bar and may make a quick decision whether or not to help their friends).

76. We respectfully differ from the view of the Australian High Court, supported though it is by some distinguished academic opinion, that there is any occasion for a separate form of secondary liability such as was formulated in *Chan Wing-Siu*. As there formulated, and as argued by the Crown in these cases, the suggested foundation is the contribution made by D2 to crime B by continued participation in crime A with foresight of the possibility of crime B. We prefer the view expressed by the Court of Appeal in *Mendez*, at para 17, and by textbook writers including Smith and Hogan's *Criminal Law*, 14th ed (2015), p 260 that there is no reason why ordinary principles of secondary liability should not be of general application.

77. The rule in *Chan Wing-Siu* is often described as "joint enterprise liability". However, the expression "joint enterprise" is not a legal term of art. As the Court of Appeal observed in *R v A* [2011] QB 841, para 9, it is used in practice in a variety of situations to include both principals and accessories. As applied to the rule in *Chan Wing-Siu*, it unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law.

78. As we have explained, secondary liability does not require the existence of an agreement between D1 and D2. Where, however, it exists, such agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. The long established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent is an example of the intention to assist which is inherent in the making of the agreement. Similarly, where people come together without agreement, often spontaneously, to commit an offence together, the giving of intentional support by words or deeds, including by supportive presence, is sufficient to attract secondary liability on ordinary principles. We repeat that secondary liability includes cases of agreement between principal and secondary party, but it is not limited to them.

79. It will be apparent from what we have said that we do not consider that the *Chan Wing-Siu* principle can be supported, except on the basis that it has been decided and followed at the highest level. In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments. We recognise the significance of reversing a statement of principle which has been made and followed by the Privy Council and

the House of Lords on a number of occasions. We consider that it is right to do so for several reasons.

80. Firstly, we have had the benefit of a much fuller analysis than on previous occasions when the topic has been considered. In *Chan Wing-Siu* only two English cases were referred to in the judgment - *Anderson and Morris* and *Davies.* More were referred to in the judgments in *Powell and English*, but they did not include (among others) *Collison, Skeet, Spraggett* or notably *Reid*.

81. Secondly, it cannot be said that the law is now well established and working satisfactorily. It remains highly controversial and a continuing source of difficulty for trial judges. It has also led to large numbers of appeals.

82. Thirdly, secondary liability is an important part of the common law, and if a wrong turn has been taken, it should be corrected.

83. Fourthly, in the common law foresight of what might happen is ordinarily no more than evidence from which a jury can infer the presence of a requisite intention. It may be strong evidence, but its adoption as a test for the mental element for murder in the case of a secondary party is a serious and anomalous departure from the basic rule, which results in over-extension of the law of murder and reduction of the law of manslaughter. Murder already has a relatively low mens rea threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The *Chan Wing-Siu* principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so. It savours, as Professor Smith suggested, of constructive crime.

84. Fifthly, the rule brings the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal.

85. As to the argument that even if the court is satisfied that the law took a wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine (put into statutory form in section 8 of the 1861 Act) and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.

86. It is worth attention that the Westminster Parliament has legislated over inchoate criminal liability in the Serious Crime Act 2007. Section 44 provides:

> "(1) A person commits an offence if -
>
> (a) he does an act capable of encouraging or assisting the commission of an offence; and
>
> (b) he intends to encourage or assist its commission.
>
> (2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act."

Section 45 creates a parallel offence if a person does such an act believing that the offence will be committed and that his act will encourage or assist his commission, but both sections are subject to a statutory defence if the defendant acted reasonably in the circumstances as he believed them to be. It is a noteworthy feature of the present law in England and Wales that Parliament has provided that foresight is not sufficient mens rea for the offence of intentionally encouraging or assisting another to commit an offence; whilst at present under *Chan Wing-Siu* if that other person goes on to commit the offence, such foresight is sufficient mens rea for the secondary party to be regarded as guilty of the full offence at common law. The correction of the error in *Chan Wing-Siu* brings the common law back into recognition of the difference between foresight and intent, consistently with Parliament's approach in section 44(2) of the 2007 Act and more generally in section 8 of the Criminal Justice Act 1967 (referred to at para 73 above).

87. It would not be satisfactory for this court simply to disapprove the *Chan Wing-Siu* principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles. We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre *Chan Wing-Siu* practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose. We address below the potential impact on past convictions.

Restatement of the principles

88. We have summarised the essential principles applicable to all cases in paras 8 to 12 and 14 to 16. In some cases the prosecution may not be able to prove whether a defendant was principal or accessory, but it is sufficient to be able to prove that he participated in the crime in one way or another.

89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.

90. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1 (as stated in para 10 above). If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. To take a homely example, if D2 encourages D1 to take another's bicycle without permission of the owner and return it after use, but D1 takes it and keeps it, D1 will be guilty of theft but D2 of the lesser offence of unauthorised taking, since he will not have encouraged D1 to act with intent permanently to deprive. In cases of concerted physical attack there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least and D2 having the intention himself that such harm be caused. In such cases it may be simpler, and will generally be perfectly safe, to direct the jury (as suggested in *Wesley Smith* and *Reid*) that the Crown must prove that D2 intended that the victim should suffer grievous bodily harm at least. However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do. Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all.

91. It will therefore in some cases be important when directing juries to remind them of the difference between intention and desire.

92. In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is

armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.

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

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

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* [1965] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective. As the Court of Appeal held in *Reid*, 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 *Wesley Smith*, *Anderson and Morris* and *Reid*) 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 *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. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.

99. Where the offence charged does not require mens rea, the only mens rea required of the secondary party is that he intended to encourage or assist the perpetrator to do the prohibited act, with knowledge of any facts and circumstances necessary for it to be a prohibited act: *National Coal Board v Gamble*.

Past convictions

100. The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence. An example is *Ramsden* [1972] Crim LR 547, where a defendant who had been convicted of dangerous driving, before *Gosney* (1971) 55 Cr App R 502 had held that fault was a necessary ingredient of the offence, was refused leave to appeal out of time after that latter decision had been published. The court observed that alarming consequences would flow from permitting the general re-opening of old cases on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal had been based. No doubt otherwise everyone convicted of dangerous driving over a period of several years could have advanced the same application. Likewise in *Mitchell* (1977) 65 Cr App R 185, 189, Geoffrey Lane LJ re-stated the principle thus:

> "It should be clearly understood, and this court wants to make it even more abundantly clear, that the fact that there has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction."

For more recent statements of the same rule see *Hawkins* [1997] 1 Cr App R 234 (Lord Bingham CJ) and *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2007] 1 WLR 3262 (Sir Igor Judge P) together with the cases reviewed in *R v R* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150. As *Cottrell and Fletcher* decides, the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal: see in particular para 58.

Jogee

101. On 28 March 2012 Jogee and a co-defendant, Hirsi, were each convicted at Nottingham Crown Court of the murder of a man named Fyfe. His appeal to the Court of Appeal Criminal Division was dismissed. The cause of death was a stab wound inflicted by Hirsi. The stabbing took place shortly before 2.30 am on 10 June 2011 at the home of a woman called Naomi Reid in Leicester. Jogee and Hirsi spent the evening of 9 June 2011 together at various places, taking drink and drugs. They became increasingly intoxicated and their behaviour became increasingly aggressive. Shortly before midnight they arrived at Miss Reid's house. The prosecution's case about what happened after that was based on her evidence. According to her account, Jogee was angry about a recent encounter with another man. He picked up a large knife from a kitchen block and waved it about, saying that they should go and "shank" him. Miss Reid wanted them to leave. She was in a relationship with the deceased and told them that she was expecting him home shortly. They replied that they were not scared of him and would sort him out. They left after Jogee received a call from someone wanting to buy cocaine, but said that they would be back.

102. Hirsi later returned alone to Miss Reid's house and was there when the deceased arrived. Miss Reid phoned Jogee and told him to take Hirsi away. Jogee arrived, and he and Hirsi left. After they had gone, Miss Reid sent Jogee a text telling him not to bring Hirsi to her house again. Within minutes the two men returned. Hirsi entered the house, shouting. The deceased came downstairs and there was an angry exchange. The deceased went upstairs to put on his jeans. While that was happening, Hirsi took the knife from the kitchen. According to Miss Reid, the deceased came down and tried to get Hirsi and Jogee to leave. The deceased was in the hallway. Hirsi was inside the front door, armed with the knife. Jogee was outside, striking a car with a bottle and shouting encouragement to Hirsi to do something to the deceased. At some stage Jogee came to the doorway, with the bottle raised, and leaned forward past Hirsi towards the deceased, saying that he wanted to smash it over the deceased's head, but he was too far away. The deceased told them to go, but both men said that they were not going anywhere. Miss Reid threatened to call the police. Hirsi pointed the knife at her chest and grabbed her by the throat. Miss Reid backed away and went to the kitchen, but she saw Hirsi make a stabbing motion towards the deceased's chest and both men ran off. The deceased had been stabbed by Hirsi and died of his wounds.

103. At the close of the prosecution's case a submission was made that the appellant had no case to answer. The judge, Dobbs J, rejected the submission. She held that, set against the background of the behaviour of the defendants during the evening, it was open to jury to find that the appellant realised that Hirsi might use a knife, intending to cause at least serious bodily harm, and that by his conduct he encouraged Hirsi to act with the requisite intent.

104. Neither defendant gave evidence. The judge directed the jury that the appellant was guilty of murder if he participated in the attack on the deceased, by encouraging Hirsi, and realised when doing so that Hirsi might use the kitchen knife to stab the deceased with intent to cause him really serious harm. This was an orthodox direction in accordance with the *Chan Wing-Siu* principle.

105. Mr John McGuinness QC on behalf of the prosecution properly accepted that the appellant's conviction could not stand if we were to conclude, as we do, that the *Chan Wing-Siu* principle was wrong.

106. Ms Felicity Gerry QC submitted on behalf of the appellant that he could not properly have been convicted either of murder or of manslaughter.

107. We regard that submission as hopeless. The jury's verdict means that it was sure, at the very least, that the appellant knew that Hirsi had the knife and appreciated that he might use it to cause really serious harm. In returning to the house, after 2.00 am, in the circumstances which we have summarised, the appellant and Hirsi were clearly intent on some form of violent confrontation. The appellant was brandishing a bottle, striking the car and shouting encouragement to his co-defendant at the scene. There was a case fit to go to the jury that he had the mens rea for murder. At a minimum, he was party to a violent adventure carrying the plain objective risk of some harm to a person and which resulted in death; he was therefore guilty of manslaughter at least. The choice of disposal is whether to quash the appellant's conviction for murder and order a re-trial or whether to quash his conviction for murder and substitute a conviction for manslaughter. We invite the parties' written submissions on that question.

Ruddock

108. On 26 January 2010 Ruddock was convicted at Montego Bay Circuit Court of the murder of Pete Robinson. A co-defendant, Hudson, pleaded guilty to murder at the beginning of the trial. Ruddock's appeal to the Court of Appeal of Jamaica was dismissed. The prosecution's case was that the murder was committed in the course of robbing the deceased of his Toyota station wagon.

109. The deceased was a taxi driver. His body was found on the morning of 1 July 2007 on a beach in the fishing village of White House. His hands and feet were tied with cloth and his throat had been cut. On 4 July 2007 the deceased's son saw the Toyota being driven in the town of Maggotty. He immediately reported it to the police. Soon afterwards two police officers came across the vehicle parked in Maggotty. Hudson was in the driver's seat, a woman was in the front passenger seat

and Ruddock was in the back seat. They were told that the police had information that the vehicle had been stolen and the owner murdered, and they were taken to Maggotty police station.

110. The prosecution's case against Ruddock was based on what he was alleged to have told the police. The investigating officer, DC Spence, gave evidence that he interviewed Ruddock under caution on 5 July 2007. He said that Ruddock stated that he was not the one who cut the deceased's throat, that this was done by Hudson with a ratchet knife, but that he had tied the deceased's hands and feet. The officer then recorded a statement from him, which was not adduced in evidence.

111. After taking Ruddock's statement, DC Spence interviewed a woman whose picture appeared on Hudson's mobile phone. He was asked by prosecuting counsel what the woman said, but at this point the judge rightly intervened to warn the prosecution against hearsay evidence. DC Spence told the jury that he then went back to see Ruddock and, despite the judge's warning, he continued:

> "I told him that the female had explain (sic) to me that, told me all what they have done to her and the deceased, Pete Robinson, while they were on the beach at White House in St James."

112. DC Spence said that he subsequently arrested Ruddock, and that under caution he repeated that he had tied up the deceased's hands and feet and that Hudson used a ratchet knife to cut his throat. Ruddock allegedly added that they then drove away in the car with "the female", which the jury is likely to have understood to mean the female about whom DC Spence had been speaking. The female was not called as a witness.

113. Ruddock did not give evidence, but he made an unsworn statement from the dock to the effect that he had not been present at the murder and had no knowledge of it. He gave an explanation for being in the car when he was picked up by the police. He said that he told the police that he knew nothing about the murder, but that they beat him and offered him a bribe to build a case against Hudson.

114. The judge directed the jury that the prosecution had to prove that each defendant shared a common intention to commit "the offence", and that common intention included a situation in which "the defendant, whose case you are considering, knew that there was a real possibility that the other defendant might have a particular intention and with that knowledge, nevertheless, went on to take part in it".

115. The judge reminded the jury that it was the prosecution's case that the two defendants intended to rob the deceased of his car, and that in so doing they tied him up and cut his throat. He invited the jury to consider the evidence of the state in which the deceased's body was found (bound hands and feet and throat cut) and he posed the question for their consideration whether this was the work of one man or more than one.

116. The judge also reminded the jury of DC Spence's evidence of what he told Ruddock about what the female had said regarding "what they did to her at White House on the beach and what they did to Mr Robinson". He commented that the jury would have to "look at that", together with the fact that there seemed to have been no reply from Ruddock.

117. There are three problems about the summing up. The first is the direction based on the *Chan Wing-Siu* principle.

118. Secondly, that the judge failed to tell the jury that if they were sure that Ruddock was a party to carrying out the robbery, it did not automatically follow that he was also party to the murder of the deceased. That question required separate and further consideration. Ruddock's alleged statements to the police were, or were at least capable of being understood as, a denial that he was responsible for the deceased's murder. He admitted to tying up the deceased, but that was consistent with a simple intent to rob. The fact that the defence advanced by Ruddock at trial was a total denial of involvement in the incident did not remove the judge's obligation to point out to the jury that there was evidence in Ruddock's words to the police which was intended to exculpate himself from the murder.

119. Thirdly, and less significantly, the judge's treatment in his summing up of what DC Spence said to Ruddock about the female in the photograph was unsatisfactory. It was potentially prejudicial. The judge should have told the jury that they had not heard from the woman, and that they should ignore altogether any reference to what she had said.

120. Mr Howard Stevens QC properly accepted on behalf of the prosecution that if the Board concluded that the *Chan Wing-Siu* principle is wrong, the appeal must be allowed on that ground. It is therefore unnecessary to consider further the consequences of the other defects on the safety of the conviction. The Board invites the parties' written submissions as to the advice which it should humbly tender to Her Majesty regarding the disposal of the appeal.