Underwhelming supervening acts: R v Lanning and Camille [2021] EWCA Crim 450 (30/03/2021)

Article

Accepted Version

Underwhelming supervening acts

R v Lanning and Camille [2021] EWCA Crim 450 (30/03/2021)

Keywords: joint enterprise, manslaughter, murder, overwhelming supervening act

The appellants, Lanning and Camille, appealed against, respectively, murder and manslaughter convictions that had resulted from an altercation at an underground station between them and two other young men, V1 and V2. The incident started with an exchange of words between Lanning and V1 and V2 who were standing on the opposite platform from Lanning. Lanning crossed over to their platform. On his way there he was joined by Camille. Camille was unarmed, but Lanning proceeded to brandish a sheathed knife towards V1. The argument evolved into two fights: one involving Lanning and V1, the other Camille and V2. Whilst Camille and V2 exchanged punches and kicks, V1 was fatally wounded by Lanning's knife.

Lanning admitted that he had unlawfully killed V1 but denied he had intended to kill or cause serious harm. On his account, he had been wielding the knife in order to scare V1 and the fatal stabbing had occurred when he was holding V1 in a bear hug and V1 had turned onto the blade during their struggle. Lanning had previous convictions for unlawful wounding and drug dealing offences to whose admission he had opened the door by impugning the victims' characters.

Camille was accused of having encouraged or assisted Lanning to attack V1, intending that V1 would be killed or caused really serious harm. Alternatively, the case against him was that if he had encouraged or assisted Lanning to attack V1 but had not intended that V1 would be killed or caused really serious bodily harm, he was guilty of manslaughter. Camille was convicted of manslaughter.

Lanning appealed against his murder conviction, submitting that the judge had wrongly admitted the evidence of his previous convictions or had erred in not excluding it under s. 101(3) of the Criminal Justice Act 2003.

Camille appealed on the basis that the judge had erred in not directing the jury that they could acquit him of manslaughter if the actions of Lanning in killing V1 amounted to an overwhelming supervening act (OSA). He submitted that *Jogee* did not preclude the possibility of the judge leaving OSA to the jury in all cases in which a knife was used during an escalation of violence during a fight. He further submitted that a distinction should be drawn between defendants depending, *inter alia*, on whether they had deliberately placed themselves in a position in which reliance on OSA would not arise, for instance by joining a violent street gang or participating in a venture when it was clear weapons may be used.

Held, dismissing the appeals, that the judge was correct to rule that the evidence of Lanning's previous convictions ought not to have been excluded under s.101(3) of the Criminal Justice Act 2003. The judge had evaluated the relevant factors, including the nature of the previous convictions and their age, and he was entitled to reach the conclusion he did. Any potential prejudicial effect of the admission of the bad character evidence was appropriately addressed by the judge's directions during

summing-up. In the circumstances of this case, the evidence countering the character attack had clear probative value in correcting what was said to be a false impression and it would have provided the jury with information relevant to whether Lanning's assertions against the character of [V1 and V2] were worthy of belief (at [55]).

The judge had also appropriately ruled that there was insufficient evidence to leave the question for the jury to decide as to whether the production and use of a knife by Lanning on V1 constituted an OSA. This conclusion was based on the development of the law in *Jogee* and other authorities [*Tas* [2018] EWCA Crim 2603 and *Harper* [2019] EWCA Crim 343].

The court was unable to accept that the distinction between a planned attack and an event which occurs more spontaneously is in any sense determinative of whether the judge should direct the jury as regards an OSA. It would be one of the factors to be borne in mind when considering the defendant's intention, but it did not, as a matter of course, lead to the conclusion that the production of a knife is an OSA.

The CCTV footage significantly supported the contention that this was a joint attack by Lanning and Camille. It would have been clear that Lanning was seeking an unnecessary confrontation with the victims, who had upset or angered him. Bearing in mind that knives are produced in situations of this kind with a high degree of frequency leading to serious injury or death, the judge was entitled to conclude that there was an insufficient factual basis for a jury to conclude that '*nobody in the defendant's shoes could have contemplated*' that the production and use of a knife in the joint attack might happen. It was open to the judge to determine that the production of the knife was not an event of such a character as to relegate Camille's acts of encouraging Lanning to assault the two victims to history.

It was irrelevant in this regard that Camille was unaware of the presence of the knife when he set out with Lanning to confront the victims, or that he did not have a history of carrying knives and had not been associated with street gangs. What mattered was whether Camille intended to assist Lanning in a crime where some physical harm would be caused to the victims. Given that the effect of *Jogee* was that in cases of this kind knowledge of a weapon had been relegated to proof of intent, the court did not consider that in the present context its production meant that an OSA should have been left to the jury. This wholly unnecessary fatality was a paradigm of rapidly escalating violence which was part of a joint enterprise attack.

Commentary

Camille is the third notable appeal based on OSA to be dismissed by the Court of Appeal since the concept was revived by the Supreme Court in *Jogee*. Although OSA is a fact-specific issue, the present decision confirms that it will be all but futile for a defendant to try and invoke OSA where group violence has resulted in a homicide committed with a knife unknown by the secondary party to have been present at the scene of the incident. Following *Tas* and *Harper*, the outcome of Camille's appeal was predictable. While it confirms when OSA does not apply, it does not tell us what OSA is and when it does.

Jogee established that, if the victim is attacked in a manner different to that which the accessory envisioned, the accessory will not be liable for a resulting homicide, provided the fatal act amounted to 'some overwhelming supervening act … 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' (*Jogee* at [97]). The wording and description used by the Supreme Court are reminiscent of a *novus actus interveniens*, which is peculiar because the modern law of complicity (except for procuring) does not require (proof of) a causal connection between the accessory's conduct and the fatal outcome, although some connecting link is clearly presupposed. While the causal overtones might simply be owed to OSA's historic inception – the Supreme Court derived it from the discussion of supervening acts in *Anderson and Morris*, there explicitly described as a matter of causation – these have been readily adopted in the post-*Jogee* case law. Conceptualising OSA as a matter of causation (rather than as a defence) when causation is not required to found accessorial liability in the first place is difficult to justify from the perspective of criminal law theory, even though treating it as a matter of causation might be plausible on the facts of individual cases.

Jogee also suggested that OSA has 'normally' (*Jogee* at [98]) replaced the so-called fundamental difference rule (FDR). Under the FDR, where an accessory intended serious but weapon-less violence, the unexpected (and uncontemplated) use of a weapon by the principal offender was treated as a material departure from the joint criminal enterprise which absolved the accessory of liability for murder. Likewise, where the accessory had anticipated violence would be inflicted with one specific weapon, but a more dangerous weapon was used in the event. The FDR did not extend to situations in which the accessory and principal had shared an intention that death be caused, however (*Yemoh* [2009] EWCA Crim 930 at [135]; *Mendez and Thompson* [2010] EWCA Crim 516 at [44]), suggesting that it operated as a safety valve for the grievous bodily harm (GBH) rule in murder. Whether OSA, which was conceived in *Anderson and Morris* in the context of unlawful dangerous act manslaughter, but, as the successor to the FDR, surely must apply to murder, too, remains limited to instances of constructive liability is not clear. If OSA replaces the FDR, and the FDR aimed to prevent overreach of constructive liability in the context of complicity, then it seems reasonable to suggest that OSA should likewise be so restricted (meaning it should not be applied where principal and secondary party shared an intent that the victim be killed). Whether this is indeed the direction in which OSA is travelling, or whether OSA has a wider scope, remains to be seen. Since it concerned constructive manslaughter, *Camille* could not clarify this point.

In deciding whether OSA should have been left to the jury, the court in the instant case followed the distinction in *Tas* between acts that constitute a 'mere escalation which remained part of the joint enterprise' (*Tas* at [41]) and, therefore, attributable to the accessory, and acts that amount to an OSA (because these were, one might add, in effect an excess rather than an escalation). The court agreed with the trial judge's conclusion that if 'one or more of the perpetrators are unaware that one of their number has produced and then used a knife, that would not constitute an OSA' because 'once you have agreed to take part in an unlawful assault, it is an escalation of the violence to which you have signed up to and that is one of the perils of signing up' (at [37]). But surely an accessory does not sign up to each and every possible escalation. Even where he is reconciled to the risk of serious violence (which Camille was not), the extent and nature of that risk cannot be wholly irrelevant. Would *Camille* have been decided the

same way if Lanning had produced a machete rather than a knife? Or a machine gun? Or a rocket launcher? The level of risk that infliction of what amounts to actual or grievous bodily harm will actually result in death differs depending on the nature of the weapon involved and how it is being used. The FDR used to take this into account, and OSA would do well to do the same.

But how can this be done without ending up with the kind of intricate weapons-focussed litigation that bedevilled the FDR and the pre-*Jogee* case law? Here, *Camille* might point the way forward: a significant feature of the court's approach is the distinction it draws between the uncontemplated but commonplace and the uncontemplated and extraordinary. The court's decision (that the trial judge was entitled to conclude that there was an insufficient factual basis for OSA to be left to the jury) and reasoning place a lot of reliance on the fact that, notwithstanding Camille's personal lack of knowledge that Lanning carried a knife, the weapon was one that is frequently present and used in incidents of a similar nature. As the court explained, '*in today's social climate'* where 'knives are produced in situations of this kind with a high degree of frequency leading to serious injury or death' (at [69]), it did not follow that simply because Camille was unaware that Lanning carried a knife '*nobody in the defendant's shoes could have contemplated*' (at [69], emphasis in original) a stabbing might happen. This clarifies that OSA looks to the wholly unexpected, not from the defendant's point of view, but ultimately from the perspective of general life experience (which is then attributed to someone in the defendant's position). And even then, the wholly unexpected needs to be so momentous as to consign the accessory's deeds to history – a taxing two-limbed test.

Camille sheds no more light on what acts might meet the description of an OSA than the cases before it, but it is helpful in that it highlights that OSA requires something uncontemplated and extraordinary rather than the uncontemplated but commonplace. Knife crime, given its prevalence, sadly fits the latter category and is therefore unlikely to meet the high threshold of an OSA.

Beatrice Krebs