

Causation, remoteness and the concept of the “overwhelming supervening act”: R v Grant [2021] EWCA Crim 1243

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Causation, Remoteness and the Concept of the “Overwhelming Supervening Act”

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journals.sagepub.com/home/clj**Beatrice Krebs**

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Facts

The main appellants, G and K, were, respectively, the front seat passenger and driver of a car, occupied by five people, that had been involved in a fatal hit and run. It was the prosecution case that the men had been cruising around, looking for V1 and V2, whom they intended to do really serious bodily harm. When V1 and V2 happened to cross the road in front of them, K accelerated and deliberately hit them with the car. After the collision, three of the occupants got out of the car. One of them proceeded to hit V1 with a metal bar. V1 died whilst V2 remained largely uninjured.

G and K appealed against their convictions for murder as well as their sentences. K also appealed against his conviction for attempted murder. While several grounds of appeal were raised, this case commentary will focus on G's submission that K's decision to run down the victims, instead of attacking one or both of them on foot in a face-to-face confrontation, amounted to a fundamental departure from the agreed plan such as to constitute an overwhelming supervening act (OSA), and that the trial judge had been wrong not to have given an OSA direction to the jury.

Held, dismissing the appeals against conviction, that in *Jogee* the Supreme Court had expressly disavowed the suggestion that the secondary liability of someone who encourages or assists the crime is based on causation (at [31]). This was an insuperable obstacle to the suggestion that the concept of OSA should be viewed through the lens of causation (at [32]).

Jogee had significantly limited the circumstances in which a jury would need to consider the possibility that there had been a departure from the agreed plan. As regards murder, the effect of the decision in *Jogee*, and particularly paragraph [12], was that the principal focus of the court as regards OSA would be on whether there was a credible basis for suggesting that the accessory's encouragement or assistance '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' and which 'nobody in the defendant's

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shoes could have contemplated might happen and is of such a character as to relegate his acts to history'. Ultimately the question would be whether the accessory's conduct may have been 'so distanced in time, place or circumstances from the conduct of (the perpetrator) that it would not be realistic to regard (his or her) offence as encouraged or assisted by it' (at [34], emphasis in original).

The precise manner in which the victim happened to be killed and whether the perpetrator intended to kill as opposed to inflict really serious harm were irrelevant so long as the accessory's encouragement or assistance were not 'relegated to history'. Save for exceptional circumstances which were not easy to envisage, there would be no need to direct the jury on the concept of OSA simply because fatal injuries were inflicted using an entirely different kind of weapon or method of killing than that originally contemplated and/or the perpetrator intended to kill rather than to inflict really serious harm (at [38]).

Commentary

OSA is based on ideas of remoteness, and while remoteness is sometimes referred to as 'legal' causation, the concept is in reality based on fair attribution principles. One widely held misunderstanding is that the language of remoteness in understanding OSA is misplaced because it is well established that accessorial liability does not require causation. Yet causation (in fact) and remoteness are not two sides of the same coin. A causation requirement would absolve an accessory of liability if the offence would have been committed with or without his assistance or encouragement, and this is, rightly or wrongly, plainly not the law, as the Supreme Court confirmed in *Jogee*. But this does not preclude asking the question whether the accessory's help was so far removed from the ultimately committed offence that it would be unjust to impose liability on him. It is a *non sequitur* to argue that, because causation is not required, there can be no remoteness limits placed on the accessory's liability. The question is, however, what the right test of remoteness is.

In *Grant*, the Court of Appeal is adamant that the pre-*Jogee* law, meaning the fundamental difference rule (FDR), was more generous towards accessories (in limiting their liability, in circumstances of fundamental departure from what was agreed or foreseen, under the now defunct principles of parasitic accessory liability (PAL)) than the OSA test that was meant to replace the FDR in *Jogee*. The language used by the Supreme Court in *Jogee* (repeated, mantra-like, by the Court of Appeal in *Grant*), however, is not distinguished by its clarity or precision, speaking in terms of so far removed, 'in time, place or circumstances', from the ultimate offence so as to relegate the accessory's involvement to history. It is not clear what this means and what function it serves. On one view OSA is an emaciated remoteness principle: mere lack of foreseeability will not do, what is required is a radical fissure between the accessory's involvement and the ensuing offence. This could make some sense, particularly against the background that (procuring aside) causation need not be established for accessorial liability: with only some link or connection, short of but-for causation, required, it makes sense to mirror the same relaxation of general principles when it comes to remoteness.

This approach ignores, however, that OSA was meant to replace (and fulfil the function of) the formerly applicable FDR (see *Jogee* at [87]). Under the FDR, '[i]n cases where the common purpose [was] not to kill but to cause serious harm', an accessory, D, was 'not liable for the murder of V if the direct cause of V's death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D' (*Mendez and Thompson* [2010] EWCA Crim 516 at [45], [47]). In *Jogee*, the Supreme Court seemed to take the view that the FDR was required against the background of PAL (which was abolished in *Jogee* as over-inclusive): if all that was required to fix an accessory with liability for an offence committed by the principal was foresight that the principal might commit that crime, the law needed a robust corrective to limit that very wide principle. Foresight was meant to be sufficient for liability *up to a point*, that point being where the offence was committed by means that were precisely not foreseeable. Yet it is difficult to see how the FDR could ever have served such a function. If the test required for PAL was foresight, and what is foreseen is death, surely the manner in which that death is brought about should not matter, far

less absolve the accessory of liability? Rather, the point of the FDR, it is suggested, was that the *mens rea* for murder is constructive: if a perpetrator intends to inflict serious harm, we treat him, by way of legal fiction, as if he intended to kill. Yet while the question whether or not the victim has been killed is binary (he is either dead or he is not), there is a sliding scale of seriousness of injuries that an accessory might have foreseen or intended, and in that context the manner in which those injuries are to be brought about assumes primary importance. So, prior to *Jogee*, an accessory who could foresee that the principal might inflict serious harm on a victim, but nevertheless went along with the criminal enterprise, might escape liability if, rather than using the (foreseeable) knife or baseball bat, the principal used a machine gun in inflicting the (unsurprisingly) fatal serious injuries on the victim. The abolition in *Jogee* of PAL does nothing, however, to address this problem. All it does is replace the language of foresight with the language of intention. An accessory might intend, rather than merely foresee, the infliction of serious harm by way of a knife or a baseball bat, and might, rightly, be convicted of being an accessory to murder if that harm results in death. It is not at all obvious, however, that he should also be so liable if the principal instead uses a machine gun or rocket launcher. This is because the risk of death is lower where grievous bodily harm is inflicted by knives than where it is inflicted by a rocket launcher. The principal sets that risk by his choice of weapon and is rightly held liable even where his intention was merely to inflict serious harm; yet the accessory, who anticipated the use of a less lethal weapon, sets a lower risk of death, notwithstanding his proven intention that the victim be caused serious harm.

The insistence on an accessory's *intention* in *Jogee* and the abolition of PAL did nothing to solve the puzzle of how to deal with accessories to constructive crimes such as murder or unlawful dangerous act manslaughter. The Supreme Court in *Jogee* does not appear to have appreciated this. Unfortunately, in *Grant*, the Court of Appeal reads various (*obiter*) passages in *Jogee* as if they formed part of a statute, thus missing the chance to put OSA back on a secure (and principled) footing.

The court gives the example of a team of assassins setting out to kill a victim. They envisage that the victim will be killed by a gun, but in the event the killing is brought about by one of them using explosives. While the weapon chosen is different, even fundamentally different, suggests the court, clearly this cannot be allowed to let the accessory off the hook. But the crucial point in the example is that both principal and accessory share an intention *to kill*. Where their intention falls short of this, and where the accessory merely intends that the victim be caused serious harm, the weapon chosen by the principal matters, or at least it should.

One reason why the Court of Appeal rejects this argument (that it should matter whether there is an intention to kill or merely to inflict grievous bodily harm) is the perceived danger of accessories talking their way out of liability in cases of escalating violence. Where a victim is killed by a stab wound, other participants should not be allowed to argue that all they contemplated was the use of fists. I would argue that this danger is overstated. As the Court of Appeal recently stressed in another case, *Lanning and Camille* [2021] EWCA Crim 450, it is important to look at the facts against the relevant factual matrix. Setting out *en groupe* to inflict violence does, unfortunately, nowadays almost guarantee the use of knives, and an accessory is going to find it extremely hard to argue that, in setting out to inflict really serious harm by fists and feet, he discounted the risk of knives being used. It is implicit in the Court of Appeal's judgment in *Lanning and Camille*, however, that had the principal used a rocket launcher or a lethal nerve poison, the accessory would have stood a better chance of invoking OSA.

This is a sensible stance to take, and it is unfortunate that the Court in *Grant* ignores it when it insists that OSA does not apply where, instead of being subjected to a serious beating, the victim is run over with a car. It is telling that the Court admits that it cannot readily think of an example – *any* example – where OSA would actually apply. This shows how impossibly high the bar has become for OSA to be even left to the jury. This cannot be what the Supreme Court had in mind. There are clear indications in *Jogee* that remoteness was to be part and parcel of the test for assistance and encouragement, see para [12]: '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.' As for *Grant*, in the absence of evidence to suggest that G had encouraged K to run

the victims over, it would have been prudent to let the jury decide whether the hit and run was an act so distanced in circumstances as to absolve G of liability for V1's death.

In fleshing out OSA, the courts must not lose sight of the fact that the concept was meant to succeed the FDR. The constructive nature of murder and manslaughter can still lead to over-inclusiveness for accessories, so that OSA, like the FDR before it, is needed as a safety valve.

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