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Case Note

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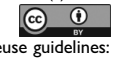

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Does Complicity Require a Measurable Contribution?

R v Hussain and Others [2023] EWCA Crim 697

Keywords
Accessory liability, assistance, causation, encouragement, joint enterprise

Facts

The applicants (Saddam Hussain, Fiaz, and Carpenter) sought leave to appeal against their convictions for murder and conspiracy to rob. The victim had been fatally stabbed by Hammad Hussain (Hammad), the brother of the first applicant. Hammad had then fled the country and was never arrested. It was the prosecution case that the victim was a drug dealer and that he was stabbed because Hammad wanted to steal his stock and money and/or put him out of business. The prosecution alleged that Hammad had been assisted and/or encouraged by the applicants who had been parties to a joint plan which included an intention that the victim would, if necessary, be caused really serious injury.

On the facts as the jury must have found them, Carpenter had phoned the victim to arrange a meeting. He then drove, together with Fiaz and Hammad, to an area near the victim's flat where they waited for the victim to come home. A few minutes after the victim and his girlfriend had returned to the flat, Carpenter entered the block of flats, leaving the outer door propped open. Fiaz and Hammad remained in the car. Not long thereafter, a message was sent from Fiaz's phone to Carpenter, asking 'Drop ready?' Two minutes later, a further text was sent asking 'Shall I send him or wat [sic]?' Soon afterwards, Hammad entered the flat with a large knife. Fiaz remained in or near the car. Hammad approached the victim, addressing him in rude language but making no request for drugs or money. The victim grabbed a baseball bat. As the two men fought, Carpenter left the flat. Hammad inflicted the fatal stab wound before the victim's girlfriend managed to fend off the attack.

This case note will focus on one of Fiaz's grounds of appeal which raises an interesting issue of law: he submitted that whilst it was not necessary for the prosecution to prove that the accessory in encouraging the commission of a crime by another did in fact cause that other to commit the crime, it was nonetheless necessary to prove that his conduct had made 'a measurable contribution' to the crime (at [58]). There was insufficient evidence to show that Fiaz was more than merely present in the car and that Hammad's actions were within the scope of what Fiaz knew, intended or participated in. Somebody else might have used Fiaz's phone to send the messages to Carpenter. The judge had wrongly failed to explain to the jury what was meant by a defendant being 'more than merely present' (at [54]).

Held, dismissing all applications for leave to appeal, that the evidence adduced by the prosecution was 'unarguably sufficient to enable a reasonable jury to conclude that each of the applicants was party to a plan to attack and/or to rob [the victim], if necessary, causing him really serious injury' (at [75]). The applicants had all accepted that there was a plan at least to steal, if not to rob; and the jury were entitled to reject as unrealistic any suggestion that drugs and money would be taken from the victim without any intention to use violence and to cause serious injury if required. A plan to steal could have been accomplished by burgling the flat in the victim's absence, but those in the car waited for the victim to return before Carpenter entered the flat and left the door ajar for Hammad to follow.

Whilst the court agreed with Fiaz's counsel that it was important not to treat an omission to act as necessarily being evidence of complicity, it found that 'the jury were entitled to view Fiaz's action in remaining in or near the car as evidence of his intentional assistance or encouragement' (at [76]). The court did not accept Fiaz's submissions that there was a need for the court to lay down detailed rules including at least a measurable contribution by an accessory to the commission of the crime by a principal. *Jogee* clearly confirmed that there was no need to prove a causal link between the secondary party's assistance or encouragement and the principal's commission of the crime, but the secondary party must be proved to have assisted or encouraged the principal to commit the crime, or the type of crime, which the principal in fact committed (at [84]). In the court's view, the suggested need for a measurable contribution was no more than a restatement of that requirement. A more detailed direction was not needed to assist the jury to distinguish between mere presence and intentional assistance or encouragement.

Commentary

Fiaz's application to appeal was doomed to fail on the facts as there was evidence that his involvement in Hammad's crimes had extended beyond having been present at or near the scene of crime: his phone was used to keep open lines of communication with other participants. However, his grounds of appeal raise an interesting question of law, namely what suffices for the *actus reus* of complicity to link an accessory to the principal offender's commission of the crime?

The gist of Fiaz's complaint was that the trial judge had failed to make it clear to the jury that there had to be some nexus (a 'measurable contribution') between the alleged acts of assistance and encouragement and the principal's commission of the crime. The trial judge had directed the jury that 'if an accused was *deliberately present at the scene and by his presence either assisted or encouraged* or did participate intending to, he would be guilty of the particular crime alleged. …' (at [38], emphasis added). Counsel for Fiaz accepted (at [74]) that the judge's directions could not be criticised on the law as it stood after *Jogee* [2016] UKSC 8. However, she argued that, without further guidance on the (level of) contribution made by the accessory's action towards the principal's commission of the offence, the jury would not have been able to distinguish between an accessory who was merely present and one who by his presence had assisted or encouraged. This submission (which, even if the court had agreed with it, would probably not have changed the outcome) might usefully have been engaged with in more depth by the court, obiter though any such discussion would have been. The law needs clarification, and it is unlikely that *Jogee* will prove to have been the final word.

Jogee did not specify, or set a minimum threshold for, what counts as participation by way of assistance or encouragement. The issue is treated as one of fact and degree for the jury. As with the overwhelming supervening act (OSA) principle, such guidance as can be found in the case law predominantly speaks to what is not required rather than what is. In the words of *Jogee* at [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 [the principal offender's] conduct or on the outcome'. Clearly, this does away with the need to prove a causal link (in the but for sense) between the accessory's conduct and the commission of the principal offence. However, the case law accepts that there must be some connection. Indeed, this is implicit in the very language of 'assistance or encouragement' – these words require a reference object, something or someone that is in fact assisted or encouraged. Yet the courts have never been able to describe that link clearly or to say what needs to be proven to show that it was there. In fact, the case law does not even insist on proving this connection beyond proof that there was assistance or encouragement (see *Hussain* at [82]).

Jogee can be criticised for having failed to illuminate the nature of the connection or clarify whether it involves (a rebuttable presumption of) a lesser degree of causality than 'but for' causation as some of the pre-*Jogee* case law has suggested (see Rebecca Williams, 'What is the Theoretical Basis for Accomplice Liability?' in Beatrice Krebs, *Accessorial Liability after Jogee* (Hart, 2019) 29–51 with reference to

Bryce [2004] 2 Cr App R 35 (CA) at [72–73], [93]; *Luffman and Briscoe* [2008] EWCA Crim 1739 at [39–40]; *Mendez and Thompson* [2010] EWCA Crim 516 at [23], [18]). Nor did the Supreme Court elaborate on what the concepts of assistance or encouragement entail either quantitatively or qualitatively. The court in *Hussain* presumed that the pre-*Jogee* case law remains authoritative on these points. In [82], it cited [132–134] from *Rowe* [2022] EWCA Crim 27 (which in turn had relied on the decisions in *Calhaem* [1985] QB 808 and *Stringer* [2011] EWCA Crim 1396) which had held 'that the accessory's conduct must be "relevant" to the offence of the principal and, in that sense, there must be a "connecting link"'.

Stringer (at [50]) has suggested that complicity may be based on the accessory having made a material contribution to the principal's commission of the offence:

> [i]f D provides assistance or encouragement to P … there is good policy reason for treating D's conduct as materially contributing to the commission of the offence, and therefore justifying D's punishment as a person responsible for the commission of the offence, whether or not P would have acted in the same way … .

However, in practice, a broader view tends to be taken. A relevant connection can be found even when it is not clear that the conduct labelled assistance or encouragement was in fact beneficial for the principal's commission of the offence. Indeed, in *Hussain*, the court confirmed the position taken in *Rowe* that submissions to the effect that, although the accessory's encouragement of the principal need not have caused the offence, the accessory must nonetheless have had some effect on the events, are 'unarguable' (at [82]).

Qualms about the open-endedness of this approach arise in instances such as those exemplified by Fiaz's case whose participation in murder seems to have consisted largely in having been around the principal offender and present in the vicinity at the time he committed the offence. In the court's words: 'the jury were entitled to view *Fiaz's action in remaining in or near the car* as evidence of his intentional assistance or encouragement' (at [76], emphasis added).

This assertion betrays a fundamental problem with the case law: it tends to focus on the accessory's conduct rather than his contribution to the principal's commission of the offence. As the Court of Appeal said in *Hussain*, paragraph [12] of *Jogee* (above) 'was described in *R v Grant & others* … as "an insuperable obstacle" to a suggestion that the concept of overwhelming supervening act should be viewed through the lens of causation: *it is encouragement and assistance that count*' (at [81], emphasis added). But when it comes to identifying assistance or encouragement, there often is no clear distinction drawn between the relevant rules of substantive law and the law of evidence.

The substantive law is clear that mere presence at the scene of a crime is not enough to furnish guilt; however, the Supreme Court in *Jogee* at [11] considered that presence (and association) was 'likely to be very relevant evidence on the question whether assistance or encouragement was provided'. Clearly, where D stands outside a building in which P is committing a burglary, his presence might provide evidence that D was assisting P's commission of the crime by acting as a lookout. Likewise, where D waits with his car outside a bank where a robbery is taking place, his presence might suggest that he was assisting as a get-away driver. Similarly, if D's presence during an incident of violence can be shown to have signalled to P that he was there to assist as a backup should the need arise. This approach does not work so well, however, where presence is relied on both as *evidence* of assistance or encouragement and as *the very act* of assistance or encouragement – how is the jury to distinguish between those who merely happen to be present and those who by their presence are assisting or encouraging?

Counsel for Fiaz submitted that the law requires further guidance and a threshold test. Relying on a paper published in this journal (Matthew Dyson, 'The contribution of complicity' (2022) 86(6) J Crim L 389–419), it was argued that it is necessary for the prosecution to prove that an accessory has made a 'measurable contribution' to the principal's commission of the crime. The Court of Appeal, with characteristic reluctance to depart from, add to, or clarify the wording used in *Jogee*, rejected these submissions, explaining (at [84]) that it had had 'some difficulty understanding what exactly was meant by "a

measurable contribution"'. Asserting that '*Jogee* clearly confirms that there is no need to prove a causal link between the secondary party's assistance and encouragement, and the principal's commission of the crime', the court concluded that counsel's 'suggested need for a "measurable contribution" was no more than a restatement of [the requirement that the secondary party must be proved to have assisted or encouraged the principal to commit the crime]' (at [84]).

However, in the context of Dyson's argument (which the court set out at some length, only then to dismiss it out of hand), 'measurable' clearly meant a 'substantial' or 'significant' causal contribution falling short of 'but for' causation (Dyson, pp. 389, 391, 400, 412–414). On one reading of the judgment, the court in *Hussain* was simply not minded to engage with the suggestion that the law of complicity needs clarification and, possibly, incremental development to flesh out the connection necessary to link the accessory's actions in a meaningful way to the commission of the principal offence.

The proposed test of a measurable contribution sought to tighten the *actus reus* element in complicity. Counsel relied on *Jogee's* recognition of an exclusion principle according to which a defendant will not be criminally responsible for a death if it was caused by some overwhelming supervening act (OSA) 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. The argument (developed in Dyson's paper) rationalises OSA under a two-part approach that puts the accessory's contribution at the centre of his liability: 'a jury would first have to decide what level of contribution the assistance or encouragement of the accomplice had made, and would then have to decide whether that had persisted to the point when the principal committed the offence' (at [58]).

This is an attractive proposition. However, the Court of Appeal keeps insisting (see *Grant* [2021] EWCA Crim 1243 at [31]-[32]; *Rowe* at [139]) that OSA is not to 'be viewed through the lens of causation: it is encouragement and assistance that count' (*Hussain* at [81]). As explained above, there currently is no minimum threshold for the conduct element. The more trivial the conduct, the weaker the connection between the accessory's actions and the principal's commission of the offence will be. But the weaker the connection, the more the need arises for a remoteness principle like OSA to prevent manifestly unfair attribution of liability to secondary parties. It does thus not follow that OSA only makes sense if there has been a 'measurable contribution' that was subsequently superseded. Counsel's argument has merit, however, in that it draws attention to the elusiveness of the 'connecting link' and whether such a link ought to require *explicit* proving (rather than being implicitly presumed through evidence of assistance or encouragement which is the approach taken by *Hussain* and earlier cases).

The court's lack of enthusiasm for refining the *actus reus* of complicity is, perhaps, understandable given the backdrop of very wide-reaching inchoate liability for those who engage in acts capable of assisting or encouraging crime under ss 44–46 of the Serious Crime Act 2007: it might appear futile to try and confine the *actus reus* of accessorial liability when the *actus reus* of ss 44–46 is so far-reaching and the sentencing regime for these offences follows that of the anticipated substantive offence which, by virtue of s 8 of the Accessories and Abettors Act 1861, also informs the sentencing for accessorial liability. Any attempt to restrict the *actus reus* in secondary liability might not make much difference if wider-reaching liability for secondary parties can still be achieved via a different route.

However, if the concern is that the *actus reus* of accessorial liability is over-reaching, because assistance or encouragement can be rather trivial and '[t]here is no additional requirement for the prosecution to prove that the encouragement or assistance did contribute to the commission of the offence' (*Hussain* at [82] citing [134] of *Rowe*), it is hardly an argument for retaining the status quo to point out that there is over-reach elsewhere.

The adjective 'measurable' as a qualification to the accessory's involvement arguably finds some support in *Stringer*'s material contribution rationale. Whether the explicit recognition of such a requirement would be setting the threshold for complicity too high is, of course, debatable: presently, assistance or encouragement need not be substantial, let alone causal. However, much of the case law establishing this position pre-dates the introduction of the inchoate offences under ss 44–46 of the Serious Crime Act 2007.

Arguably, there is now less pressure for complicity to encompass trivial acts of assistance or encouragement as prosecutors can charge these under the inchoate route to liability.

Having said that, some form of guidance that reminds the jury that the *actus reus* in complicity requires not just conduct but conduct that was relevant to the principal's commission of the crime, in the sense that it has somehow (not necessarily in a causal way) furthered or facilitated the principal offence, would not go amiss: how are jurors to distinguish between mere presence and presence that assisted or encouraged? Currently, most of the relevant work seems to be done by the *mens rea* element (e.g., intention to assist or encourage through one's presence). However, if the relevant mental state is inferred from the circumstances (as in *Hussain*), including from evidence of presence, then the jury's task becomes somewhat circular: mere presence is insufficient to establish the conduct element, but evidence of presence can be used to demonstrate an intention to assist or encourage, at which point the presence is transformed into actual assistance or encouragement, now satisfying the conduct element.

The law is clear that intention alone does not furnish guilt; criminal liability attaches to wrongdoing, so wrongdoing needs careful consideration. The lack of stringency around the *actus reus* in complicity breeds the danger that secondary liability might evolve into little more than a thought crime; at the least, when the requirement of assistance or encouragement is, in practice, satisfied by evidence of conduct *capable* of assisting or encouraging, without emphasising the need that it must have somehow (not necessarily in a causal way) contributed to the principal's commission of the crime, then, as Dyson has argued (p. 412), complicity becomes indistinguishable from inchoate liability which is difficult to square with the treatment and labelling of secondary parties under s 8 of the Accessories and Abettors Act 1861.

Several steps could be taken to alleviate this risk: first, at trial, there should be greater emphasis on proving that there was a robust act of assistance or encouragement. Secondly, prosecutors should be encouraged to state more clearly whether their case is based on (physical) assistance or (psychological) encouragement. Submissions often gloss over this aspect by speaking broadly in terms of 'assistance or encouragement', but the requirements of these two forms of participation differ, as *Calhaem* shows: encouragement requires a meeting of the minds (and that the principal's actions fell within the scope of what the accessory encouraged him to do). Assistance does not necessitate communication but that the accessory's conduct was in fact supportive of the principal's commission of the crime, even if the principal did not necessarily require any help.

Finally, greater emphasis should be placed on establishing that there was a *meaningful* connection between the accessory's conduct and that of the principal. It might help to advise juries that the accessory's participation must have somehow furthered or facilitated the principal in his commission of the crime in fact. Facilitation does not imply that the accessory's involvement has necessarily made a difference to the outcome (in line with *Jogee*'s insistence that no causal link or proof of a positive effect is necessary). The crime could still have been committed, and in the same manner, but for the secondary party's involvement. But it might clarify that what is required is *actual support towards the principal's commission* of the crime. By way of an example, *Smith, Hogan & Ormerod's Criminal Law* (16th edn, OUP 2021) at p. 193 mentions an accessory's presence enabling the principal to commit the offence more easily or with greater safety.

Fiaz's case did not provide the best set of facts to advocate for a test of 'measurable contribution'. But in lieu of the common law resolving its unclear and controversial position on causality and recognising that assistance and encouragement presuppose some contributory input short of 'but for' causation, the approach suggested has merit: it would put complicity's focus more firmly on the 'connecting link' and help juries understand that accessorial participation does not just require conduct but also a contribution (short of 'but for' causal impact). It may make juries think harder about whether the person accused of participation as a secondary party in fact merits conviction like a principal offender.

Beatrice Krebs