Hong Kong Court of Final Appeal: divided by a common purpose (case comment)

Article

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Hong Kong Court of Final Appeal

Divided by a Common Purpose

Chan Kam Shing [2016] HKCFA 87

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The appellant was a member of the triads. Following an order from his boss to 'chop' members of a rival organisation, he went searching for victims. When fellow gang members found some of their rivals, he went to join in their attack. The victim was fatally injured before the appellant arrived at the scene. The appellant's murder conviction was based on his participation in the joint enterprise to 'chop' their rivals, with the court noting that his involvement constituted encouragement to other members of his gang.

These facts do not necessarily call for an analysis in terms of joint enterprise liability (as opposed to aiding and abetting), as the Court readily accepts (at [100]), but then neither did the facts of *Jogee*. Both cases went to appeal because the robustness of the joint enterprise principles operating in their respective jurisdictions needed examining by their highest courts – in England because public and academic pressure to revise parasitic accessorial liability (PAL) had grown overwhelming; in Hong Kong because *Jogee* had thrown the correctness of the doctrine into doubt.

Held, dismissing the appeal, that the doctrine of joint enterprise should continue to be applied in Hong Kong (at [97-98]). Ribeiro PJ (who delivered the leading judgment) identified three principal reasons for this: first, that secondary parties to a joint criminal enterprise deserve 'to be regarded as gravely culpable' (at [65]); secondly, that abolition of the joint enterprise doctrine would 'deprive the law of a valuable principle for dealing with dynamic situations involving evidential and situational uncertainties which traditional accessorial liability rules are ill-adapted to addressing' (at [71]); thirdly, that '*Jogee's* introduction of the concept of "conditional intent" … gives rise to significant conceptual and practical problems' (at [58]).

Commentary

The decision of Hong Kong's Final Court of Appeal (HKFCA) in the present case deals another blow to the joined Supreme Court (UKSC) and Privy Council (JCPC) decision in *R v Jogee* [2016] UKSC 8; *Ruddock v The Queen* [2016] UKPC 7; [2016] 2 WLR 681. It follows hard on the heels of *Miller v The Queen* [2016] HCA 30, in which the High Court of Australia also refused to follow the lead of their former imperial masters; both jurisdictions, in no uncertain terms, declined to abolish their respective variants of parasitic accessory liability, whereby parties to a joint criminal enterprise are convicted for incidental crimes committed by their associates-in-crime which the former foresaw but did not necessarily intend.

While the judgment in *Chan Kam Shing* echoes some of the pragmatic reasons given in *Miller* for retaining joint enterprise liability, such as its undoubted usefulness in imposing liability in the face of evidential or situational uncertainties, the decision is more far-reaching in its outlook and offers some apposite criticisms that go to the

very taxonomy of criminal complicity and the principles of attribution that underpin it. If *Jogee*, as is to be hoped, is to endure, our courts will need to address these concerns.

Like its English equivalent, Hong Kong's joint enterprise doctrine can be traced back to the Privy Council decision in *Chan Wing-Siu* [1985] AC 168. But while the UKSC concluded that there was no place for the *Chan Wing-Siu* principle in the common law of England and Wales (for it had led to an 'over-extension' of liability), Hong Kong's top court thought joint enterprise worth retaining.

Ribeiro PJ places joint enterprise liability within a framework of complicity that significantly differs from the one underlying *Jogee*. The latter was clearly based, albeit tacitly, on the analytical framework set out by Hughes LJ (as he then was) in *R v A and others* [2010] EWCA Crim 1622; [2011] QB 841 at [9], whereby an individual can become complicit-in-crime (1) by joint perpetration, (2) by aiding and abetting, or (3) by the doctrine of PAL. *Chan Kam Shing* agrees with this taxonomy only as far as joint perpetration and aiding and abetting are concerned (at [8-20]). It perceives of joint criminal enterprise as involving *two* distinct doctrines: basic joint enterprise aka 'common purpose' liability on the one side (where two or more individuals agree on the commission of a crime which is then committed), and extended joint enterprise aka PAL on the other (concerning crimes unilaterally committed incidentally to the agreed offence).

Against this backdrop, the abandonment of PAL by *Jogee* is understood by *Chan Kam Shing* to encompass also the abandonment of the doctrine of common purpose. Because it does not wish to abandon the latter, the HKCFA is loath to lose the former. It needs emphasising, however, that the decision in *Jogee* does not refer to common purpose as the 'wrong turn' but to PAL specifically. On *Jogee's* framework of complicity the one does not even encompass the other: PAL is there seen as a new principle laid down by the Privy Council in *Chan Wing-Siu* (*Jogee*, at [62]). While *Jogee* makes frequent reference to 'common purpose' in its historical overview of accessorial liability, it is not treating this as a head of liability but rather as forming part of the evidential matrix to establish aiding and abetting: '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' (*Jogee*, at [87]). It is difficult to verify the historical accuracy of either position; however, what is clear is that, since *Jogee* and *Chan Kam Shing* rely on different taxonomies, the two judgments are at cross-purposes.

The difference in taxonomy also accounts for the differing views taken regarding the blameworthiness of secondary parties in a joint enterprise. The Court's objections to treating these as 'having a lesser culpability' (at [61]) than the perpetrator follows logically from the Court's characterisation of the secondary party's liability as independent and primary in nature rather than derivative and secondary. On this view, participants in an extended joint enterprise are 'gravely culpable' (at [65]) because their wrongdoing 'lies in the mutual embarkation on a crime with the awareness that the incidental crime may be committed in executing their agreement' (at [64]). This is mere assertion. Participating in crime A with foresight of crime B is not the moral equivalent of participating in crime B. Ribeiro PJ seems to appreciate this himself,

because, still under the heading of culpability, he puts forward another justification, namely that the secondary party must be regarded 'as tacitly agreeing to or "authorising" the crime by the actual perpetrator which he foresaw as a possible incident of a joint criminal enterprise' (at [67]). This is not, however, an alternative to the prior argument; it is entirely free-standing and much more convincing. Unlike the former, it is able to accommodate Lord Mustill's 'puzzling case'. Briefly, Lord Mustill in *R v Powell* [1999] 1 AC 1 at 11 found it difficult to account for the PAL liability of an accomplice who had expressed his opposition to crime B in the run-up to crime A, but continued to participate in crime A notwithstanding (for whatever reasons, some much less culpable than others). Such a person could not be said thereby to have 'authorised' the perpetrator to commit crime B – and would thus not be caught in the net of PAL. The HKCFA does not expressly deal with this or it would realise that the two explanations it puts forward for retaining PAL lead to diametrically opposed results in such cases: authorisation provides a link between the secondary party's conduct and crime B committed by the perpetrator. This link is missing under the first, assertion-based, explanation.

Chan Kam Shing cites the loss of the common purpose doctrine as another reason for rejecting *Jogee*, explaining that those who agreed on a joint enterprise are blameworthy almost like principal offenders, 'whichever one of them actually carried out the *actus reus*' (at [63]). However, on a proper understanding of the complicity model underlying *Jogee*, common purpose has not really been abandoned; it is what informs the attribution principles of joint perpetration (which *Jogee* left untouched).

The real problem seems to be that *Jogee* does not quite realise the full logic of its own taxonomy. If one of two joint principals goes further than expressly agreed, evidence that his actions were still covered by the other's (conditional) intent should lead the court to find that the scope of their joint wrongdoing includes the further offence, so that the non-acting associate continues to be liable as a joint principal rather than as an accessory. If we came to accept that the net of liability for co-perpetration is cast rather too narrowly, at the expense of the law of aiding and abetting, where crimes incidental to a (genuine) common plan or purpose are concerned, some of the concerns voiced by the HKCFA in *Chan Kam Shing* might yet be resolved within the framework of complicity as envisaged by the UKSC in *Jogee* and, indeed, with recourse to a concept of common purpose.

Jogee relies on the idea of conditional intent 'in order to deal with situational uncertainties' (at [76]). The HKCFA takes the view that conditional intent is unsuited for this purpose, arguing that the UKSC leaves open how conditional intent is meant to fit in with 'the *actus reus* and *mens rea* of traditional accessorial offences', explaining the concept instead 'in the context of joint criminal enterprise (referring to acts pursuant to "prior joint criminal ventures", "common purpose" and "common intent")' (at [76]). The Court also finds that '[t]he proposition that a finding of foresight is only evidence of conditional intent is … difficult to follow', as foresight itself will usually be an inferential conclusion (at [78]). An alternative, the Court argues, is not to read *Jogee* as permitting 'one inference on top of another, but that liability can only be established … if the irresistible inference to be drawn is that the participant harboured a conditional intent and not just foresight of the possible commission of crime B' (at [79]). However, the Court does not think this interpretation to be any less problematic, since 'the prosecution would be required to

prove beyond reasonable doubt that the participant not only foresaw the possible commission of the further offence … but intended, that is, desired or believed as a virtual certainty, that it should contingently occur. This would impose an unjustifiably high burden on the prosecution and inappropriately exculpate participants who commit themselves to a joint criminal enterprise fully foreseeing – but not desiring or viewing as virtually certain – the commission of the further offence …' (at [79]).

It is true that the UKSC's analysis of conditional intent is somewhat opaque and that it falls back on language that is (also) associated with the doctrine of joint enterprise. However, on the taxonomy underpinning *Jogee*, co-perpetration and aiding and abetting continue to give rise to joint enterprises, understood here as an umbrella term to designate multi-handed undertakings. The use of joint enterprise language to explain conditional intent is thus consistent with using this concept to *determine the scope of the undertaking that was to be assisted or encouraged.* Although assistance does not presuppose a meeting of the minds between perpetrator and accessory, in reality there will often be some interaction (as *Jogee* and *Chan Kam Shing* illustrate) resulting in a rough, albeit dynamic, plot. The UKSC's approach is clearly pragmatic: it aims to establish whether, from the defendant's perspective, if things turn out one way rather than another, the parties would still have understood this to be covered by their undertaking.

It is also true that the UKSC suggests that foresight might still be a powerful piece of evidence allowing a jury to conclude that the secondary party intended crime B, albeit only 'in certain contingencies' (at [77]). This suggestion could well be said to be open to the same objections as the logical gap in the traditional PAL analysis that participation in crime A with foresight of crime B suffices to ground liability for crime B. To make things worse, the common law is still unclear in its definition of intention. Everybody is agreed that where P acts with the purpose to bring about a proscribed result, that is the paradigm case of intention. However, under *Woollin* [1999] 1 A.C. 82, where the outcome was not the purpose of the act, intention must not be found unless the actor appreciated that the outcome was in fact virtually certain to follow from his actions. Simester argues that there is no reason why this should be different where the intent of the accessory is concerned: 'S must either act in order to assist P to commit a burglary (i.e. because for some reason S has an interest in P's committing it), or act in the practical certainty that his or her conduct will assist P to commit a burglary. Will, not may' ((2017) 133 LQR 73 at 84). *Cham Kam Shing* seems to agree. But this is doubtful after *Jogee*, where the UKSC can be understood to suggest that it remains open to juries to make the inference to intention (whether direct or indirect) from foresight in whatever degree (see *Jogee*, at [94]).

There are two ways to deal with this: either, *Jogee* must be read against the background of *Woollin*, and passages that are inconsistent with *Woollin* must be disregarded, re-interpreted or distinguished. Or one could argue that *Jogee* has impliedly overruled *Woollin*. If the former, the concept of conditional intent would appear extremely difficult to satisfy, and this, as the HKCFA explains [at 80-93], leads to a watering down of how it is proven in practice. The English Court of Appeal decisions in *Anwar* [2016] EWCA Crim 551; [2016] 4 WLR 127 and *Johnson* [2016] EWCA Crim 1613; [2017] 1 Cr App R. 12 indeed demonstrate an understanding of conditional intent that is not very far removed from the foresight requirement that

Jogee has supposedly abolished, and the HKCFA is quick to point out that English law is thus 'drifting back' to a position resembling PAL [at 92-93].

If, on the other hand, *Woollin* is thrown into doubt, what is to be put in its place? It could be argued that both *Jogee* and *Chan Kam Shing* missed a trick in failing to explore the idea of 'authorisation' further. It is mentioned in both cases (at [67] in *Chan Kam Shing*; at [65-66] in *Jogee*), as well as in *Miller* [2016] HCA 30 [at 139, 142-144], but its potential is underestimated by all three. Authorisation might well replace the cognitive 'virtual certainty' approach in *Woollin*, placing intention firmly on a volitional footing (which is where it belongs).

To conclude, while it is regrettable that *Chan Kam Shing* refuses to follow *Jogee*, the decision is helpful in showing up some of the difficulties with the post-*Jogee* position. Both co-perpetration and accessorial liability need criteria by which to determine the 'scope of the enterprise'. *Jogee* took the first step towards developing such criteria, but there is, as the HKCFA astutely observes, a real danger that, with a very demanding threshold of intention, the courts will revert to foresight as the decisive criterion, albeit as a matter of evidence rather than substance. What is needed is a more flexible, yet meaningful, definition of intention (to be complicit in someone else's crime). The idea of 'authorisation', now having in one way or another been kept in play by the top courts of the UK, Australia and Hong Kong, might just be it.

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