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Article

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Court of Appeal

For want of a shoe her freedom was lost: judicial law reform and dashed hopes in *R v Mitchell*

R v Mitchell (Laura) [2018] EWCA Crim 2687

Keywords: Murder, joint enterprise, substantial injustice, conditional intent

The appellant Laura Mitchell, her partner Michael Hall, Carl Wood and Carl Holmes were involved in a violent dispute in the car park of a public house. The conflict started when the appellant's group took a taxi which had been booked by another group, including Craig Powell, his brother Dean Powell and their friend Andrew Ayres. The appellant "was in the thick" (at [4]) of the resulting violence. She was seen shouting, swearing, punching members of the other group and hitting them with her handbag. At some stage during the commotion, she lost her shoes. There was a lull in the violence during which Ms Mitchell and her partner remained in the car park, looking for her shoes. Meanwhile their friends went to a nearby house where they obtained "weapons and reinforcement" (at [5]). They returned with a mace, a knuckle-duster and a CS gas spray. The attack resumed. Mr Ayres was caught and brought to the ground. He was kicked and stamped upon by Mr Holmes who later pleaded guilty to his murder. Others, including the appellant, may have been involved in the fatal attack; however, the evidence was not clear.

It was the prosecution case that the appellant and her friends were all party to a joint enterprise, in which they each foresaw the possibility that one of their group would cause the death of one of those being attacked with the intention to kill or cause really serious bodily harm. It was the appellant's case that she had got into the taxi and then been ordered out. Her partner was attacked and she had intervened in an attempt to stop the fighting. She accepted that she was involved at the start of the violence and primarily responsible for it. However, she maintained that she was not involved in, and had not encouraged, the subsequent attack on Mr Ayres. She was in the vicinity solely because she was searching for her shoes.

The jury were directed that they could convict the appellant either on the basis that she had played some part in the fatal attack on Mr Ayres, intending him really serious bodily harm, or that she was involved in a joint enterprise to attack him and his friends, realising that one or more of the attackers might cause really serious harm with intent to do so, and that the principal's actions were not fundamentally different from the acts she realised might occur.

Ms Mitchell was convicted of murder and violent disorder. She immediately, but unsuccessfully, appealed her conviction. Her current appeal was based on a reference by the Criminal Cases Review Commission (CCRC) pursuant to s. 9 of the Criminal Appeal Act 1995. Notwithstanding the CCRC referral, because this appeal was brought out of time and based on the change of law in *Jogee* [2016] UKSC 8, the appellant needed to demonstrate 'substantial injustice', i.e. that there was a sufficiently strong case that she would not have been convicted had the law as identified in *Jogee* been applied to her case (*R v Johnson and Others* [2017] 1 Cr App R 12; [2016] EWCA Crim 1613).

Held, dismissing the appeal, that whilst the judge's directions "were undoubtedly flawed" and "the approach of the court on the last occasion similarly flawed", *Jogee*-compliant directions would not have made a difference to the appellant's conviction. The appellant had the necessary conditional intent.

The Court accepted the Crown's submission that the position of Ms Mitchell could not be distinguished from the position of Mr Hall, "who, like her, did not collect weapons and against whom the prosecution alleged a joint enterprise as opposed to his being a principal" in the final phase of the attack.

"Arguably, this was a joint enterprise to inflict grievous bodily harm with intent to do so from the outset. The enterprise that the appellant started appears to have been to get the Powell brothers and Mr Ayres to the ground and kick them with a shod foot or feet. Even if the joint enterprise was simply to attack the three men, the common purpose was to punch and kick. Although there was a lull in the violence, the joint enterprise to punch and kick continued (after the weapons were collected) and the jury found that the appellant was still a party to it. Mr Ayres was punched and kicked to death. The appellant foresaw the possibility of grievous bodily harm of this kind being caused with intent yet did not withdraw from the enterprise. She was therefore involved throughout in one joint enterprise to use significant violence and it led to a man's death. On those facts, the evidence of her foresight was strong evidence of her conditional intent that grievous bodily harm would be caused" (at [6]).
The Court re-iterated that "substantial injustice" is a "high test" (and noted its powers in s. 16C of the Criminal Appeal Act 1968 to dismiss CCRC referrals summarily if these are solely based on a change of law). It held that, on the facts, there would be no substantial injustice in refusing the appellant exceptional leave. The Court added that had the sole issue been one of safety, it would have reached the same result, for the same reasons.

Commentary

Mitchell is the first post-*Jogee* referral by the CCRC. The Commission referred the case on the basis that there was a real possibility that the Court would find that there was a sufficiently strong case that the change in law brought about by *Jogee* would have made a difference to the verdict in the Appellant's case, and a real possibility that the Court would find that there would be substantial injustice if the conviction were to stand. The CCRC had concluded that the circumstances of Ms Mitchell's involvement could be distinguished from that of her co-accused Michael Hall, one of the unsuccessful applicants in the consolidated appeals reported as *R v Johnson and Ors*, because, in contrast to Mr Hall, there was no clear evidence that Ms Mitchell had been physically involved in the final phase of the attack. The Court of Appeal (Hallett LJ, Nicol J and Pepperall J) disagreed.

The outcome is defensible – depending on one's reading of the facts – but the Court's reasoning lacks a clear line of argument and analytical rigour. The problems are confounded by an ambiguity about the case against Ms Mitchell: is she accused of having instigated a joint enterprise that was from the outset *aimed at* causing really serious harm and then failed to withdraw (at [6])? Is her crime *encouragement* of the final and fatal attack (at [5])? Or is it that she had participated in a joint enterprise to assault the deceased and his friends, with *conditional* intent that they be caused really serious harm (at [8])?

All three possibilities feature in the judgement, with the Court oscillating between assertions that "she was … involved throughout in one joint enterprise *to use significant violence*" (which implies that she shared an outright intention with her co-accused to inflict GBH) and conclusions that there is no substantial injustice because "the evidence of her foresight [that others might inflict GBH] is strong evidence of her conditional intent that grievous bodily harm would be caused" (at [6]).

The Court does not identify the most plausible scenario on which to base its legal analysis (unlike the Court in *Crilly* [2018] EWCA Crim 168). It makes much of the fact that the victim was killed with a shod foot rather than any of the weapons collected by Ms Mitchell's friends, the fatal attack thus mirroring the initial attack, during which she had thrown punches and where there was some effort to get people to the ground. This suggests that Ms Mitchell's

conviction stands because she had failed to withdraw after instigating (i.e. *assisting and encouraging*) a serious group assault, the nature (kicking and punching) and early results (split lip, broken nose) of which indicate that the parties shared an *intention* that their victims be seriously harmed. This may well be the most plausible factual scenario, and if so, the outcome is justifiable, because it meets the post-*Jogee* requirements of secondary liability. Other passages, however, indicate that the Court may have based its decision (also) on the questionable inference that she had *encouraged* the final, fatal attack, with the requisite conditional intent. And herein lies the second problem: it is not easy to reconstruct how the Court arrived at the factual findings (which, interestingly, it derives not just from the jury's verdict but also from its own findings at the previous, "flawed" appeal) that justify its decision to uphold the conviction. For example, the Court explains (citing para [20] from the previous appeal) that the prosecution case "was not summed up as a case of aiding and abetting" (at [5]). It also acknowledges that, while Ms Mitchell may have been involved in the final attack, the evidence is unclear. Yet, it infers that she "was still present and encouraging the others, including Holmes" (at [6]).

It is true that the trial judge directed the jury that they could convict, if "she was still a party to that enterprise at the time Holmes murdered Mr Ayres, *present encouraging the others*" (emphasis added). However, this part of the directions concerned Ms Mitchell's conduct; the judge went on to invite the jury to consider whether "she realised that one or more of the attackers might cause really serious harm with intent to do so". On the basis of these instructions, and against the evidential backdrop and the way the prosecution case was primarily presented and summed up at trial, it is not possible to infer more than that Ms Mitchell participated in one joint enterprise to assault, possibly by encouraging (the resumed attack), foreseeing that one or more of the attackers might cause really serious harm with intent to do so, and then failed to withdraw by the time Mr Holmes killed Mr Ayres. In going on to conclude that *Jogee*-compliant jury instructions would not have made a difference to Ms Mitchell's verdict, given that (in analogy to *Hall's* case at para [198]) "it would have been open" to the jury to infer from the evidence of foresight that she had the necessary conditional intent, the Court raises the bar for substantial injustice. That test is almost impossible to meet if it suffices for a finding of conditional intent that the jury *could* have, rather than *must have*, so inferred. There is all the difference between an *entitlement to infer* and a finding that the jury *must have inferred*. There are obvious difficulties in drawing inferences as to what a jury must have found: juries do not give reasons for their verdicts. Perhaps then it is time that they were allowed to indicate their findings. In an era where juries are routinely given "routes" or "steps to verdict", this might be achieved by asking the jury to point out at which stage in a series of sequential questions they came to reach their verdict. Such a move could be implemented without adverse resource implications and complicating matters for the jury, and would make it easier for the Court, and the CCRC, to examine alleged miscarriages of justice.

Then there are the issues side-stepped, partly due to concessions made during the hearing at the invitation of the Court. Counsel for Ms Mitchell felt compelled (rightly or wrongly) to concede that certain issues could not be re-opened, *Jogee* notwithstanding. Thus, the question of whether there had been one or two criminal enterprises was not re-visited by the Court, and neither was the question of withdrawal. The jury's finding that there was but one joint enterprise remained central to the Court's conclusions and significantly weakened the appellant's case. However, it may well have been influenced by the "parasitic accessory liability" misdirection, given that pre-*Jogee* the scope of the violent enterprise was determined with reference to the foresight of its participants. Arguably, therefore, this issue should have been re-considered in the light of *Jogee*, albeit not in terms of "was there one or two joint enterprise(s)?" but by asking "which offence(s) did Ms Mitchell intentionally assist or encourage?"

Similarly, had the issue of withdrawal not been conceded, *Mitchell* might have presented the Court with an opportunity to consider whether the principles of withdrawal need to be re-

shaped, or at least re-stated, in light of the change of law in *Jogee*. It is plausible that this area of law has been affected by the existence of "parasitic accessory liability", and now that PAL is gone, the principles of withdrawal, which are not very well-defined in the first place, might need to be re-visited.

Finally, the Court's insistence to consider *Mitchell's* appeal relying on the imprecise language of joint enterprise – criticisms of that terminology in *Jogee* notwithstanding – did nothing to advance clarity. *Jogee* is clear that the only way to become a secondary party is by intentional assistance and encouragement. Why then is the Court eschewing this terminology? In particular, why does it speak in terms of "common purpose" (rather than "shared intent")? Is it perhaps trying to resurrect the old, now defunct, common purpose doctrine? Whatever the intention of the Court, it would have been preferable to utilise the language of assistance and encouragement, following *Jogee*'s lead, and to analyse *Mitchell's* case in those terms throughout. A clearer picture as to why there is no substantial injustice in her case might have thus emerged.

The final paragraph of the judgment, which suggests that the Court would have dismissed the appeal even if the only issue to consider had been the safety of Ms Mitchell's conviction seems intended to make this ruling safe from an appeal to the Supreme Court on the substantial injustice issue. However, simply to assert that the conviction is not unsafe based on the same (flawed) reasoning that led to a finding that the decision did not lead to substantial injustice seems rather weak. Unless the Court becomes less willing to infer (conditional) intent from evidence of foresight and/or conditional intent becomes a more demanding concept, *Jogee* will have no retrospective effect in "historic" joint enterprise cases involving spontaneous and escalating violence.

Beatrice Krebs