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REDEFINING MURDER: JOINT ENTERPRISE

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Abstract

This article explores the evolution of secondary liability and the unforgiving doctrine of joint enterprise in homicide cases. Exploration of the current law ensues to determine if the distinct decisions of their Lordships in both *Powell* and *Rahman* have failed to sufficiently clarify the law; followed by in depth analysis of the Law Commission and Ministry of Justice proposals to reform this infamously disputed area of law.

Keywords: secondary liability, joint enterprise, murder, manslaughter, reform

Introduction

In January 2012, 19 years after his horrific, heart-wrenching demise, justice for Steven Lawrence finally prevailed. The doctrine of joint enterprise allowed the jury at the Old Bailey to finally convict two of Lawrence's alleged killers of his brutal murder. However, just days later, headlines read 'MPs call for new gang murder law',² following the publication of the Commons Justice Select Committee's Report on joint enterprise, projecting the notorious and controversial debate over the common law doctrine back into the national media.³ Joint enterprise is a complex principle that allows multiple parties to a crime to be convicted of the same offence. Therefore, in cases of murder liability will be imposed not only to the principal offender who inflicts the lethal blow but also any secondary parties who have been involved in the commission of the crime. However, it has been the subject of severe scrutiny and review for several years. Arguably there is a particular problem with secondary liability to

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² 'MPs call for new gang murder law', *BBC News*, 18 January 2012: <http://www.bbc.co.uk/news/uk-16605581>.

³ House of Commons Justice Select Committee, *Eleventh Report: Joint Enterprise* (2012, HC No. 1597).

murder; mandatory life sentences may appear disproportionate to the part an individual has played in the commission of a crime and should be reserved for those culpable of inflicting the deadly blow.

Nonetheless, the law is unequivocal; s.8 Accessories and Abettors Act 1861, clearly states that both principal and secondary parties are to be treated equally in the eyes of the law. However, this is an area of law that is incredibly complex and that, too frequently, causes considerable confusion. Ashworth echoes this view stating:

The English law of complicity is replete with uncertainties and conflicts. It betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.⁴

The doctrine has a very wide ambit and secondary parties find themselves exposed to a charge of murder without killing the victim and without having any subjective intention to kill; mere association appears to be enough. Indeed, Lord Kerr recently stated that 'mere presence at the scene of a crime can in certain circumstances be enough to justify a finding of guilt', emphasising the need for reform of this infamously disputed doctrine.⁵

1 The Evolutionary Tale of Fatal Joint Enterprises

The combined appeals of *Powell and English* thrust the notoriously contested common law doctrine of joint enterprise back into the courts just over a decade ago, throwing the controversial debate on whether secondary parties could be liable for a charge of murder into further disrepute.⁶ The Court of Appeal dismissed both appeals but leave to the House of Lords was granted and certification was sought from their Lordships on two primary questions. First:

Whether it was sufficient to found a conviction for murder to a secondary party on foresight of the primary parties' intention or whether the secondary party must have held the intention himself?⁷

And second:

Can a conviction for murder be upheld in circumstances where the secondary party intends or foresees that the primary party would or may act with intent to cause

⁴ Ashworth, A., *Principles of Criminal Law* (2006, OUP), p .441; Law Commission, *Report on Participating in Crime* (2007 Law Com No. 305).

⁵ *R v Gnango* [2011] UKSC 59, at Para. [117].

⁶ *R v Powell; R v English* [1999] 1 AC 1.

⁷ *Ibid.*, p.16.

grievous bodily harm but an unforeseen lethal act is carried out by the primary party which is fundamentally different?⁸

It is an established common law principle that those charged with murder must have the requisite *mens rea*; an intention to kill or cause grievous bodily harm.⁹ One would be morally outraged if anything less should suffice when the ultimate penalty of life imprisonment is the price one pays for committing the most heinous of crimes. However, in response to the first certified question, that is ultimately what their Lordships were asked to consider; does the secondary party have to hold the intention himself or is mere foresight of the primary's intention sufficient to impose criminal liability for a crime that the secondary party held no intention to carry out? Lord Hutton began his principal opinion addressing that very issue, stating that their Lordships would need to determine if such principle had been propounded in earlier authorities and 'if there be such an established principle, it could stand as good law with regard to the decision of this House that foresight is not sufficient to constitute *mens rea* for murder'.¹⁰ In deciphering whether there is a principle established in the authorities, one must, as his Lordship in the present case states, review a number of earlier decisions – particularly *R v Smith*,¹¹ *Chan Wing-sui v R*,¹² *R v Hyde*,¹³ and *Hui Chi-ming v The Queen*.¹⁴

In *Smith*, a fight broke out during the course of an argument between a group of men, in which one of the men stabbed a barman to death. All four men were charged with murder; Smith claimed that he was outside at the time of the stabbing, nonetheless was aware that Atkinson was in possession of the knife. He was convicted at trial of manslaughter following what Slade J referred to in the present case as a 'wholly unexceptionable direction' to the jury that 'anybody who is a party to an attack which results in an unlawful killing... is a party to the killing'.¹⁵ Slade J acknowledged also that the standpoint asserted by the courts was that any act arising from the concerted arrangement shall be the full responsibility of any individual who chooses to enter into the criminal venture.¹⁶ The principle established in *Smith* has continued to be applied in an array of cases, none less so than in *Chan Wing-Siu*. Sir Robin Cooke's judgment emphatically asserted 'that there is such a principle is not in doubt... the criminal culpability lies in participating in the venture with that foresight'.¹⁷

⁸ *Ibid.*, p.17.

⁹ *R v Cunningham* [1982] AC 566.

¹⁰ *Powell* [1999], pp.17-18.

¹¹ (*Wesley*) [1963] 1 WLR 1200.

¹² [1985] AC 168.

¹³ [1991] 1 QB 134.

¹⁴ [1992] 1 AC 34.

¹⁵ *Ibid.*, p.1205; *Powell* [1999], p.19.

¹⁶ *Hui Chi-ming* [1992] p.1206; *Powell* [1999], p.19.

¹⁷ *Chan Wing-Siu* [1985], p.175; *Powell* [1999], p.20.

This principle was also subsequently followed by the Court of Appeal in *Hyde*, where Lord Lane CJ took note of Professor Smith's comment on *R v Wakely* that there is a 'distinction between tacit agreement and foresight and made it clear that foresight is the proper test'.¹⁸ Therefore it is evident, as stated by Lord Hutton, that 'there is a strong line of authority';¹⁹ but one must question, as their Lordships did, whether such a principle exists and stands in good law in respect of the decisions of the House of Lords in *R v Moloney* and *R v Hancock*.²⁰ *Prima facie*, one would be forgiven for understandably considering that the authoritative decision of their Lordships in *Moloney* had provided certainty and clarity to this problematic area of law. Their Lordships unequivocally reiterated that murder requires explicit intent; anything other than an intention to kill or perpetrate grievous bodily harm will undoubtedly fail to suffice.²¹ Furthermore, 'foresight of a consequence may provide no more than evidence of the existence of an intention' and unquestionably does not automatically infer the existence of intention.²² This view was emphasised by Lord Scarman in *Hancock*.²³ On the other hand dependence upon this decision would provide an inconceivable anomaly.

Their Lordships categorically assert that it is insufficient to find the principal's *mens rea* for murder on foreseeability of risk; yet in juxtaposition, a secondary party can have imposed upon himself a lesser *mens rea* requisite than a principal offender. This argument was justifiably submitted by counsel on behalf of Powell and Daniels in *Powell*; indeed, where there is one *mens rea* test for a principal offender and a lesser test for a secondary party who has neither the requisite *actus reus* or *mens rea* for a standard murder charge, that test is manifestly disadvantageous to the secondary party.²⁴ Nonetheless, despite having the opportunity to expressly overrule, their Lordships decided that the principle was justified. Lord Hutton decisively justified their reasoning, stating that:

The rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public operating in gangs... there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in *Chan Wing-Sui v The Queen* which prevail over considerations of strict logic.²⁵

This epitomises how the harsh and unforgiving nature of the joint enterprise doctrine reigns supreme; policy considerations, coupled with the need for public protection and group

¹⁸ *Ibid.*, p.139; *Powell* [1999], p. 21.

¹⁹ *Powell* [1999], p.21.

²⁰ [1985] A.C. 905; [1986] AC 455

²¹ *Ibid.*

²² *R v Hancock* [1986] AC 455, p.471.

²³ *Ibid.*, pp. 471-472 *per* Lord Scarman; *Powell* [1999], p. 22.

²⁴ *Powell* [1999], p.23. Note that they do have the *actus reus* of 'aiding, abetting, counselling or procuring'.

²⁵ *Ibid.*, p. 25 *per* Lord Hutton.

association deterrents, arguably dominated their Lordships' influence on this common law doctrine. A further anomaly arises from the second certified question in *English* on whether a 'fundamentally different' rule could be applied. There is a principle within the authorities that foresight of a primary party's intention is sufficient to found a conviction for murder on a second party. Nonetheless, is it justifiable that where a primary party to a venture kills with a deadly weapon, completely unknown to the secondary party and therefore unquestionably without foresight, the secondary party should be guilty of murder. Their Lordships ultimately found that if the principal offender departs from the joint venture and commits a 'fundamentally different' act, the secondary party shall not be guilty of murder. This principle arguably arises from the provision stated in *Chan Wing-Sui*; indeed Sir Robin Cooke stated that cases must 'depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.'²⁶ This is illustrated in *R v Gamble*.²⁷

In *Gamble*, two of the defendants, who intended to inflict grievous bodily harm, were controversially not convicted of murder; the defendants had contemplated that the deceased would be subjected to 'kneecapping' but had not foreseen that a knife would be used to cut his throat nor had they contemplated bullets being fired directly at vital parts of his body. The prosecution argued that the defendants be charged with murder despite the fact that they had not foreseen the use of the knife or contemplated death as a result. Carswell J consciously rejected this view, distinguishing from earlier authorities, that such reasoning 'would fix an accessory with consequences of his acts which he did not foresee and did not desire or intend',²⁸ reasoning that their Lordships later accepted in *English*. The foundations of this of course derive from the assertion of Lord Parker CJ in *R v Anderson* that to allow convictions when one party has departed completely from the concerted action forming an intent that any secondary party could not suspect 'would revolt the conscience of people today'.²⁹ The reasoning in their Lordships' decisions in answering the certified questions in *Powell and English* are, on the whole, unambiguous. Nonetheless, it has lent itself to criticism. A secondary party can be found guilty of murder without possessing the standard *mens rea*, yet a secondary party who does hold intention to cause grievous bodily harm, such as *English* and the defendants in *Gamble*, can be acquitted of murder.

²⁶ *Chan Wing-Sui* [1985], p.175; *Powell* [1999], p.28.

²⁷ [1989] NI 268.

²⁸ *Ibid.*, p.283-284 *per* Carswell J; *Powell* [1999], p.29.

²⁹ *R v Anderson Morris* [1966] 2 QB 110, p.120; *Powell* [1999], p.29.

2 The *English* Qualification

Their Lordships in *Powell and English* made a conscious attempt to clarify this notoriously complex area of law. Despite their Lordships' attempts to re-clarify the principles, 'numerous cases have struggled to decipher what Lord Hutton meant in *English* by "fundamentally different"; this definition remains elusive'.³⁰ As such, the 'fundamentally different' rule has been heavily criticised, creating frequent difficulties in subsequent cases. In *Attorney-General's Reference (No. 3 of 2004)* the deceased was shot at point-blank range;³¹ the defendant had only foreseen that the principal would discharge the firearm in the vicinity of the victim. The Court of Appeal held that the defendant could not be held liable as the act of the principal was 'fundamentally different' from any act that he had contemplated. The defendant was aware of the weapon but the fundamental change, it was held, was that instead of firing near the victim, the principal fired at the victim – thus implying that it is the act of the principal which must be 'fundamentally different'.

In contrast, Ormerod has questioned whether a distinction should be drawn between weapons that have a 'fundamentally different' potential to cause harm.³² Indeed, in *Uddin*, it was submitted that if the character of the weapons used were equally likely to inflict fatal injuries, then the mere fact that a different weapon is used 'may be immaterial'.³³ The victim died from a single stab wound; despite his own conduct and being involved in the group attack, the defendant argued that the principal's change of intention to use a knife was 'fundamentally different' from the agreed use of bars and poles. However, Bedlam J clearly states:

If the character of the weapon, e.g. its propensity to cause death, is different from any weapon used or contemplated by the others, and if it is used with a specific intent to kill, the others are not responsible for the death unless it is proved that they knew or foresaw the likelihood of the use of such a weapon.³⁴

It is clearly evident that the 'English qualification' has in essence added further complexity to this already difficult area of law. Academics and judges have been divergent in their interpretations of the requirements of 'foresight' and the 'fundamentally different' rule; further clarification was, without question, a necessity in order to give this incredibly complicated area of law some coherence and transparency.

³⁰ Ormerod, D., 'Case Comment: Joint Enterprise: in course of a joint enterprise to inflict unlawful violence the principal kills with an intention to kill which is unknown and unforeseen by a secondary party' (2007) *Criminal Law Review*, p.725.

³¹ [2005] EWCA Crim 1882.

³² Ormerod, 'Joint Enterprise' (2007), p.725.

³³ *Uddin* [1999] QB 431, p. 441 *per* Bedlam J.

³⁴ *Ibid.*

This appeared to be forthcoming in the case of *Rahman*.³⁵ Following a group on group attack, the deceased died as a result of a knife wound. It was submitted that the common intention was to inflict serious harm, not kill. There was no evidence to suggest that either defendant had used the knife and it was purported that the act of the principal took the killing outside the common intention and was sufficient to be classed a 'fundamentally different' act under the 'English qualification'. However, the defendants had armed themselves with numerous weapons; thus, each of them were aware that weapons were to be used to cause serious harm, undoubtedly foreseeing that a weapon, such as a knife, would be used. They were convicted of murder but appealed on the basis that under the principle established in *Powell* it was foresight of the principal's intention that was fundamental and not the principal's acts. Their Lordships were essentially asked to revisit the earlier decision of *Powell and English* and provide clarity on the principles; namely whether the principals' intention is relevant in establishing foresight and in what circumstances does the 'fundamentally different' rule apply.

Their Lordships made it unequivocally clear that it is foresight of the principal's acts with which the courts are concerned and not whether a secondary party had foreseen the principal's intention. It is an established principle, fundamental to the law of murder, that an intention to cause grievous bodily harm or an intention to kill is sufficient to found a conviction for murder. The principal and the appellants in *Rahman* had, at least, an undeniable shared intention to cause really serious harm to the deceased and thus the appellants held the necessary intention for murder. This is however contradictory to the turn of events in *English*; the defendant had an intention to cause really serious harm, yet their Lordships acquitted him. Nonetheless, this unforgiving rule is, as stated by Lord Bingham, reinforced by a 'quality of earthy realism'.³⁶ With regards to the 'fundamentally different' qualification, their Lordships in *Rahman* appear to suggest that an act can only be 'fundamentally different' by the change of a weapon or the use of a weapon when one was not contemplated.³⁷ There is evidence in the authorities to imply that this stance was the correct approach and that originally intended. In *Powell*, Lord Hutton referred to the decision of *Gamble*:

In my opinion this decision was correct in that a secondary party who foresees kneecapping with a gun should not be guilty of murder where, in an action

³⁵ *R v Rahman* [2008] UKHL 45.

³⁶ *Ibid.*, p.25.

³⁷ *Ibid.*, p.47 *per* Lord Roger; p.68 *per* Lord Brown; p.88 *per* Lord Neuberger; Ormerod, 'Joint Enterprise' (2007), p.983.

unforeseen by the secondary party, another party to the criminal enterprise kills the victim by cutting his throat with a knife.³⁸

Despite this, 'ambiguity remains, because, although a change of weapon is a necessary requirement of the English qualification, it is not, it seems a sufficient one'.³⁹ Lord Brown in *Rahman*, in essence, adds a surplus requirement that the weapon used must be different to that foreseen by the defendant and must be more 'lethal'.⁴⁰ This seemingly echoes the view of Bedlam J in *Uddin*, that the difference in weapon is immaterial if its 'propensity to cause death' remains the same.⁴¹ However, the task of deciding whether acts are 'fundamentally different' remains difficult, as was unmistakably demonstrated in *Rahman* by the 'divergence of opinion amongst their Lordships over the earlier decision in *Gamble*'.⁴² Lord Bingham regarded a change of weapon ample; the act of kneecapping very substantially contrasts with that of throat cutting, and in his view was 'of an entirely different character in an entirely different context'.⁴³

3 Reform

Lord Steyn's plea for reform in *Powell* appeared to be a forthcoming prospect following an influx of publications and proposals from the Law Commission and the Ministry of Justice.⁴⁴ However, would this once again prove to be a half-hearted attempt at reform or would a new type of liability be formed?

3.1 Report on Participating in Crime

This paper issued by the Law Commission acknowledges the specific problems with secondary liability in relation to the law of homicide, but does clearly state that the current law⁴⁵ and principles are those propounded in *Chan Wing-Sui* that were later cited with approval in both *Powell* and *Rahman* – that is, foresight is sufficient to impose liability on a secondary party. The Commission's recommendations do appear to reflect the test outlined in *Chan Wing-Sui*; thus, the Commission's recommendations in respect of joint criminal ventures are not too dissimilar to the position already adopted by the courts. The paper

³⁸ *Powell* [1999], pp.29-30.

³⁹ Ormerod, 'Joint Enterprise' (2007), p.983.

⁴⁰ *Rahman* [2008], Para. [68].

⁴¹ *Uddin* [1999], p.441.

⁴² Ormerod, 'Joint Enterprise' (2007), p.983.

⁴³ *Rahman* [2008], Para. [29].

⁴⁴ Note that these proposals were before the House of Lords judgment in *Rahman* [2008]; Law Commission, *Report on Murder, Manslaughter and Infanticide* (2006, Law Commission No. 304); Law Commission, *Report on Inchoate Liability for Assisting and Encouraging Crime* (2006, Law Commission No. 300); Law Commission, *Report on Participating in Crime* (2007, Law Commission No. 305); Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for reform of the Law* (2008 CP 19/08).

⁴⁵ That is, the current law at the time the Law Commission paper was written.

made several recommendations. In order to satisfy the conduct element, the secondary party must either 'agree with P to commit an offence; or share a common intention with P to commit an offence'.⁴⁶ Second, it recommended that:

If the principal and secondary party are party to a joint criminal venture, the secondary party satisfies the fault required in relation to the conduct element of the principal offence committed by the principal if:

- (1) D intended that P (or another party to the venture) should commit the conduct element;
- (2) D believed that P (or another party to the venture) would commit the conduct element; or
- (3) D believed that P (or another party to the venture) might commit the conduct element.

Furthermore, the Commission stated that even if the secondary party intended or believed that the principal party would or might commit the conduct element of the offence, that the secondary party should not be liable if the principal's actions were outside the scope of their joint venture.⁴⁷ This is surprising, specifically in the context of murder; if the secondary party intended that the victim be killed, yet the principal killed in a different way than the agreed concerted action, the secondary party would escape all liability for homicide. Nonetheless, a similar observation to the Commission's recommendation can be seen in *Rahman*, although it should be noted that their Lordships explicitly emphasised that only acts unforeseen by the secondary party would qualify under the 'fundamentally different' qualification. In relation to weapons, a change would be immaterial if its 'propensity to cause death' remained the same.⁴⁸

However the proposals are not without difficulty. The legislative technique adopted by the Commission appears to be somewhat ambiguous. The Commission clearly stated that, after careful consideration and feedback, the law should be expressed in 'open textured' form to prevent the Bill being 'too complex' and 'too difficult' to work with.⁴⁹ However, the actual Bill provides no detailed explanations, mentions no foresight requirement and leaves a great deal to interpretation, providing no more certainty and clarity to the law than already exists. The Commission defended this approach by justifying that it would be 'for the courts, guided by our report feeding into Judicial Studies Board specimen directions to juries, to fill in the details in particular cases'.⁵⁰ Specimen directions are contained in the Crown Court Bench Book of specimen directions, which provides advice to the judiciary for preparation of a

⁴⁶ Law Commission, *Participating in Crime* (2007), Paras. [7.9]-[7.10].

⁴⁷ *Ibid.*, Para. [7.11].

⁴⁸ *Uddin* [1999], p.441 *per* Bedlam J.

⁴⁹ Law Commission, *Participating in Crime* (2007), Paras. [A.15]-[A.16].

⁵⁰ *Ibid.*, Para. [A.15].

summing up. It is often referred to by the higher courts, particularly the Criminal Division of the Court of Appeal, as a starting point 'for a correct direction on matters of law'.⁵¹ However, it is questionable how this will assist the judiciary. The purpose of specimen directions was clearly stated by Lord Lane:

They are not intended as a substitute for the careful preparation which every summing up requires. They are not intended to limit the freedom of the trial judge to direct the jury as he thinks fit... [t]hey should not be regarded as a magic formula to be pronounced like an incantation. They are not intended... to offer solution to vexed questions of law. Indeed, where the law is uncertain no specimen direction is provided.⁵²

In *Rahman*, Lord Bingham emphatically expressed that 'there is, and can be, no prescriptive formula for directing juries'.⁵³ What is more concerning is the view, emphasised clearly by Buxton, that this approach is contrary to the fundamental constitutional principle that it is the legislature that make laws not the Judicial Studies Board which is merely responsible for the training of judges.⁵⁴ Subsequently, the 'prospect of judges, let alone juries, construing the text of Law Com No 305 in order to find the meaning of the statute is not encouraging'.⁵⁵

3.2 Assisting and Encouraging Crime

The Commission proposed that new inchoate offences should be brought in for secondary offenders,⁵⁶ introducing a new mode of liability that represented the Commission's aim to reform the law of complicity 'whereby inchoate and secondary liability will support and supplement each other in a way that is rational and fair'.⁵⁷ Similar proposals made their way into Part 2 of the Serious Crime Act 2007, with s.59 abolishing the old inchoate offence of incitement. This was unexpected as the Commission had stated that the offence 'rarely troubled the courts' as opposed to other doctrines, such as joint enterprises, evidenced by the rareness of appellate decisions.⁵⁸ However, in *Assisting and Encouraging Crime* the Commission identified numerous problems with the offence which presented several 'unsatisfactory features' and a great deal of uncertainty.⁵⁹ Fortson and Ormerod argue that, despite these problems, there was never a convincing case for reform, stating that it 'falls a long way short of accepting a compelling case of outright abolition of incitement and its

⁵¹ Mr Justice Kay quoted in Slapper, G., Kelly, D., *The English Legal System* (2011, Routledge), p.428.

⁵² Judicial Studies Board for Northern Ireland, *Crown Court Bench Book & Specimen Directions*: <http://www.jsbni.com/Publications/BenchBook/Pages/default.aspx>

⁵³ *Rahman* [2008], Para. [27] *per* Lord Bingham.

⁵⁴ Buxton, R., 'Joint Enterprise' (2009) *Criminal Law Review*, p.240.

⁵⁵ *Ibid.*, p.240.

⁵⁶ Law Commission, *Inchoate Liability* (2006), Para. [5.4].

⁵⁷ Law Commission, *Participating in Crime* (2007), Para. [1.4].

⁵⁸ *Ibid.*, Para [3.17]; Fortson, R., Ormerod, D., 'Serious Crime Act 2007: the Part 2 Offences' (2009) *Criminal Law Review*, p.395.

⁵⁹ Fortson, 'Serious Crime Act' (2009), p.395; Law Commission, *Inchoate Liability* (2006), Part 3.

replacement with a range of disturbingly wide offences'.⁶⁰ Nonetheless, what can be drawn on is the fact that the old incitement offence covered encouraging a crime but provided no liability for assisting one. Additionally, a significant problem in relation to secondary liability was that no liability could be imposed under s.8 Accessories and Abettors Act 1861 if there was no principal act to charge the secondary party against. Thus, the new inchoate offences rectify this significant gap in the law.

In October 2008, three key statutory offences came into force under the Serious Crime Act 2007: s.44 (intentionally encouraging or assisting an offence); s.45 (encouraging or assisting an offence believing it will be committed); and a new offence not proposed by the Commission under s.46 (encouraging or assisting offences believing one or more will be committed). Section 44 best represents the Clause 1 offence proposed in *Assisting and Encouraging Crime*. This is beneficial as it encompasses liability for acts that are capable of assisting when the principal offence is not fully committed. Section 45 replicates the Clause 2 offence proposed by the Commission. In the context of gangs and homicides, this is advantageous to the Crown in prosecuting members of gangs who supply weapons. It rectifies the problem posed by s.8 Accessories and Abettors Act 1861, that groups and gangs who armed themselves or supplied others with weapons escaped liability unless a violent attack causing grievous bodily harm or homicide was committed by the principal. So, if a group of individuals give or arm one another with weapons, transport weapons, or drive members of a group to assist them in committing a crime they could be charged; even if the crime does not take place, if they had that belief that the offence would be committed, they can be liable.

The s.46 offence is not too dissimilar to the principles of accomplice liability. In *Maxwell v Director of Public Prosecutions*, the defendant had assisted and directed terrorists to a pub.⁶¹ He knew that they were going to commit a terrorist attack but was unsure in which form the attack would take place. It was held that it was sufficient to impose liability if the defendant foresaw one of the acts that actually took place. In tackling group violence, the s.46 offence will fill a significant gap in the law as the inchoate offence does not require the full offence to have been committed. However, the task of construing the text of the act has proven difficult; interpretation of the meaning of common text, such as, 'capable of, encouraging, assisting', is complicated by a lack of definition. Fortson submits that *Assisting and Encouraging Crime* will therefore become a vital document for interpreting Parliament's

⁶⁰ *Ibid.*, p.396.

⁶¹ [1978] 1 WLR 1350.

intentions.⁶² In *S and H*, the Court of Appeal had to consider the remit of s.46 and whether the defendant had to believe that each of the one or more offences will be committed or whether he must simply contemplate that each offence may be committed and one will be committed.⁶³ The Court of Appeal held that ‘a defendant... could be convicted if he believed that his act would, not might, encourage or assist the commission of the specified offence’, stressing that ‘it seems to us that to permit conviction of D for any offence which he believed might be committed is to extend the ambit of s.46 beyond that permitted by the use of the word “will”’.⁶⁴ This is significantly more stringent than the law governing joint enterprise, which only requires foresight of what ‘might’ happen and not what ‘will’. The Court sought to clarify any problems in interpreting the text of the statute. Virgo claims that it has in fact resulted in the opposite, ‘making the offence vague, uncertain and effectively redundant’.⁶⁵

4 Theories: Derivative v Inchoate

The Commission’s proposals in *Participating in Crime*, in respect of joint ventures, relied heavily on the fact that the principal has to have committed the crime for any liability to be imposed, appearing to reflect the theory that criminal liability of the secondary party derives from the principal who has committed the crime.⁶⁶ The theory does appear to be in line with the principles established in *Chan Wing-Sui* and *Powell* that the secondary party should be convicted of the same offence as the principal echoing the statutory law of s.8 Accessories and Abettors Act 1861. Wilson argues that the reason the common law treats the secondary party as if he had committed the offence himself, or in other words as a principal offender, is for both ‘practical and moral’ reasons.⁶⁷ On a practical level, the identity of a killer cannot always be established, particularly when groups or gangs are involved in a homicide; thus ‘there are obvious procedural and evidential advantages in collapsing the distinction between the perpetrators and other participants’.⁶⁸ This is a particularly advantageous and vital tool that can be used against members of joint criminal ventures to ensure convictions that would otherwise fail. A prime illustration is the case of Stephen Lawrence in which the doctrine of joint enterprise ensured the conviction of Gary Dobson and David Norris of his brutal murder preventing further injustice. This is supported by the moral justification, which Wilson argues should be given equal importance: that criminal results must be ascribed to

⁶² Fortson, ‘Serious Crime Act’ (2009), pp. 398 and 401.

⁶³ *R v Sadique and Hussain* [2012] 1 Cr App R 19.

⁶⁴ *Ibid.*, p.56 *per* Hooper LJ.

⁶⁵ Virgo, G., ‘Encouraging or assisting more than one offence’ (2012) *Archbold Review*, p.7.

⁶⁶ Law Commission, *Participating in Crime* (2007)

⁶⁷ Wilson, W., ‘A rational scheme of liability for participating in Crime’ (2008) *Criminal Law Review*, p.3.

⁶⁸ *Ibid.*

principal offenders.⁶⁹ However, secondary parties, by actively associating themselves with that venture, must be held accountable for the criminal activity that in reality may not have occurred otherwise. The Law Commission heard from a report by the Jill Dando Institute of Criminal Science that:

There is a strong social science research literature which shows that individuals in groups behave very differently than they do when alone. They take more risks, they feel pressure to conform with the majority, and they feel less personal responsibility.⁷⁰

This undoubtedly supports Wilson's derivative moral theory that the responsibility attributed to the principal and secondary party for the outcome is often of little difference. Secondary liability therefore permits a 'degree of flexibility in setting the parameters of accountability for criminal wrongdoing'.⁷¹ Thus, the statutory law ensures that both the principal and secondary party are liable for the same crime.

This, however, is at odds with the notion propounded by Kadish that individuals are autonomous agents who should be responsible only for their own conduct and not that of the principal.⁷² The criminal law treats accessories or secondary parties as if they had committed the crime themselves and are only too often, particularly in homicide cases, charged with murder themselves, even when they had not inflicted the fatal act. Wilson recognises that this is a good thing; however, he is critical of the sentencing imposed on secondary parties which fails to be 'capable of distinguishing fairly and consistently' between the severity and variant levels of participation.⁷³ In terms of murder, only one sentence can prevail and that is life imprisonment, leaving no discretion to the judiciary on which sentence to impose as liability derives from the acts of the principal rather than the secondary party. The Law Commission's recommendations and the enactment of the inchoate offences have gone some way to rectifying this problem by specifically differentiating between principal offenders who perpetrate crime and those who simply assist or encourage. This is advantageous, as inchoate liability, Wilson asserts, attacks the fiction of 'moral congruence' between principal and secondary offenders, a view that would surely satisfy Kadish.⁷⁴ However, Wilson is also critical, arguing that the hindrance of such a principle is that it 'ignores the intuition that is

⁶⁹ Ibid.

⁷⁰ Marshall, B., Webb, B., Tilley, N., *Rationalisation of Current Research on Guns, Gangs and other weapons: Phase 1* (2005, Jill Dando Institute of Crime Science); Law Commission, *Participating in Crime* (2007), Para. [3.144].

⁷¹ Wilson, 'A Rational Scheme' (2008), p.4.

⁷² Kadish, S., *Blame and Punishment: Essays in the Criminal Law* (1987, Macmillan); Herring, J., *Criminal Law: Text, Cases and Materials* (2010, OUP), p.890.

⁷³ Wilson, W., *Central Issues in Criminal Theory* (2002, Hart), pp. 220-4; Herring, *Criminal Law* (2010), p.892.

⁷⁴ Ibid.; Herring, *Criminal Law* (2010), p.892.

often appropriate to ascribe authorship of a crime to someone other than the perpetrator'; for example, individuals who should without doubt be tarnished in the same way as the principal offender and not merely labelled an assister or encourager such as the supplier of a deadly and lethal weapon.⁷⁵

Furthermore, in the context of murder it is often hard to separate the subjective intentions of each party. There is a fine line to be drawn between convicting two or more parties to a killing, particularly in cases where the principal offender cannot be identified, and the need for criminal liability to prevail so as not to cause an injustice. It is therefore vital, as stressed by Sir John Smith:

In the context of murder, those who are instrumental in bringing about a killing should not have their responsibility set apart from those who directly perpetrate it because ... (We) feel strongly that D is responsible for those deaths. If we are going to punish him because he bears that responsibility, we are going to punish him for the homicide.⁷⁶

It is thus hard to see how Wilson's variant degree of punishment could be enforced. In contrast, both *Assisting and Encouraging Crime* and the Serious Crime Act 2007 appear to have adopted the theory of inchoate liability. The benefit of adopting the inchoate model as opposed to the derivative theory is well explained by the Commission in *Assisting and Encouraging Crime*. Ensuring the police could use an offence that would capture the preliminary acts or assistance of secondary parties would be a 'valuable addition to the state's resources in tackling serious organised crime'.⁷⁷

Although one would presume this mainly refers to terrorist planning, it is equally applicable to groups and gangs forming joint criminal ventures with the intention to kill or cause serious injury. It is advantageous if the police are armed with the vital tools to convict parties to the planning of a crime, therefore having the opportunity to intervene before the crime takes place. This is particularly beneficial in deterring violent groups embarking on joint criminal ventures, enabling the police to stop members of gangs before a crime results in a homicide. Indeed, the Commission justified its rationale underlying the proposals for inchoate liability, stating that the utilitarian rationale illustrates the benefits of avoiding crime and the evasion of harm (or in the context of this article homicide), with those benefits far outweighing any disadvantages arising from what sceptical critics perceive as premature intervention.⁷⁸

⁷⁵ Ibid.

⁷⁶ Smith, J., 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR, p.461; Wilson, 'Central Issues' (2002); Herring, *Criminal Law* (2010), p.892.

⁷⁷ Law Commission, *Inchoate Liability* (2006), Para. [4.4].

⁷⁸ Ibid., Para. [4.5].

However, the problem with the inchoate theory, and a view asserted by Husak, is that it is hard to justify punishment for what in essence is a crime that has not caused any harm to society.⁷⁹ If no harm results it is questionable whether culpability is morally justifiable or whether the imposition of criminal liability is unmerited. Ashworth asserts a similar view, stating that 'as the form of criminal liability moves further away from the infliction of harm, the grounds of liability should become narrower'.⁸⁰

Sullivan adopted a more cautious assessment, stating prior to the enactment of the Serious Crimes Act that:

There must be, as always, the familiar balance struck between the effectiveness of law enforcement and concerns about freedoms and the quality of collection of evidence, particularly when one moves far back from the point of commission of the offence.⁸¹

However, these criticisms can be dispelled by the need for social protection. In *Powell*, Lord Steyn asserted his view in favour of crime control arguments and the need for public protection:

A prime function of that system must be to deal justly but effectively with those who join with others in criminal enterprises. Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences.⁸²

5 Alternative Verdict Manslaughter

In 2006, the Law Commission also produced a paper entitled *Murder, Manslaughter and Infanticide* with a potential to review and substantially reform the law of homicide.⁸³ The Commission felt, as does the author, that the 'fundamentally different' principle represents a significant gap in law; if successful, parties to a joint enterprise will currently escape all liability for the homicide offence as no alternative charge for manslaughter was substituted or even considered in *English*.⁸⁴ The Commission's paper provided a much-needed stepping stone for the government, resulting in the Ministry of Justice Consultation Paper *Murder, Manslaughter and Infanticide: proposals for reform*, echoing many of the Commission's views.⁸⁵ The government appeared troubled by the fact that secondary parties are liable for

⁷⁹ Husak, D., 'The Nature and Justifiability of Nonconsummate Offenses' (1995) 37 *Arizona Law Review*, pp.170-176; Herring, *Criminal Law* (2010), p.818.

⁸⁰ Ashworth, *Principles* (2006), p.423; Fortson, 'Serious Crime Act' (2009), p.395.

⁸¹ Sullivan, G., 'Inchoate liability for assisting and encouraging crime – the Law Commission report' (2006) *Criminal Law Review*, p.1052.

⁸² *Powell* [1999], p.14.

⁸³ Law Commission, *Report on Murder* (2006)

⁸⁴ [1999] 1 AC 1.

⁸⁵ MOJ, *Murder* (2008)

murder, when in truth they may not be murderers at all. Furthermore the 'fundamentally different' rule adopted by the courts has caused confusion and disparity in its application, particularly in that it is unforgiving to secondary parties when the principal takes the agreed act one step further than anticipated.

In *R v Parsons*, the defendant was charged with murder.⁸⁶ The principal had shot dead the victim after the defendant had driven him to the scene; however, the defendant claimed that he did not know what was going to happen. He believed they were going to buy drugs but became suspicious once he was told to stop near the victim's

house believing that the principal may commit robbery. It was held that the defendant must have foreseen the principal's action; although he claimed that he had not seen the gun in the car, he had in fact seen it earlier that evening whilst in the principal's house. Therefore the act was not considered 'fundamentally different', despite the defendant having no intention to kill or cause grievous bodily harm. He appealed, claiming an alternative verdict of manslaughter should have been considered; nonetheless, the Court of Appeal stated that 'in cases where the fatal weapon is a gun, the discharge of which is envisaged as a possibility by the secondary party, manslaughter will less often be an appropriate alternative verdict'.⁸⁷ Alternatively, one can argue that it is far 'too lenient' allowing secondary parties with *mens rea*, as in *English*, to escape all liability if the act of the principal is found to be 'fundamentally different' from that which was originally agreed.⁸⁸

These discrepancies are wholly unacceptable and both the Commission and the Ministry of Justice have expressed views that the current principles are 'unsatisfactory and produce unjust outcomes'.⁸⁹ The Ministry of Justice sought to rectify the problem in determining the secondary parties' liability, relying heavily on the acts and intentions of the principal by creating the offence of 'assisting and encouraging the offence of manslaughter'.⁹⁰ This offence would look at the intention held by the secondary party and not that of the principal, as is the case under the Accessories and Abettors Act 1861. This provides a more sound foundation upon which to base liability, representing the principle propounded by Kadish. However, in relation to joint enterprises, the Commission and the Ministry of Justice proposed to preserve the current law, but on a statutory basis of 'murder in the context of joint criminal venture'.⁹¹ This is surprising. The lower threshold principle has been the subject of controversy for several years and the decision in *Powell* did not go unnoticed.

⁸⁶ [2009] EWCA Crim 64.

⁸⁷ *Ibid.*, Para. [25] *per* Keene LJ.

⁸⁸ MOJ, *Murder* (2008), Para. [73].

⁸⁹ *Ibid.*, Para. [76].

⁹⁰ *Ibid.*, Annex C, Clause 2.

⁹¹ *Ibid.*, Annex C, Clause 3.

Unexpectedly, the proposed second offence appears harsher than the present law; the secondary party need only foresee the intention to cause death or serious injury by any member of the group. Additionally, the proposed third offence appears to preserve the 'fundamentally different' rule espoused in both *Powell* and *Rahman*. The proposed Act merely requires foreseeability of serious injury, with a surplus requirement (3B) that the act must be within the scope of the venture.

The need for reform in this area of law has been evident for many years; yet if above statutory scheme were enacted, no real change would occur and the position would remain the same in a statutory context. There may be beneficial advantages for clarity and coherence brought by legislation, but, in the absence of any express interpretation of what renders an act 'fundamentally different', it is doubtful if legislation would even stop appeals. In contrast, the Ministry of Justice suggested a notable change in relation to the 'fundamentally different' rule, so as to avoid an '*English* situation' that would lead to a complete acquittal for a charge of murder. The rule has been criticised for its dissimilarity between harshness and leniency, which subsequently produces disproportionate and unjust results by focusing too much on whether the secondary party has foreseen the acts of the principal.⁹² The Ministry of Justice acknowledged the conscious attempt by their Lordships in *Rahman* to clarify the law but are of the opinion that their Lordships were constrained – it is, after all, supposed to be the legislature that makes laws and not the judiciary. The Ministry of Justice therefore proposed to reduce the ambiguity surrounding the rule by introducing an alternative verdict of 'manslaughter in the context of a joint criminal venture', but remained adamant that where the secondary party also held the intention to kill he shall be liable for murder.⁹³

This means that secondary parties would not escape liability for murder as they currently do under the 'fundamentally different' principle. Instead, when an act is found to be 'fundamentally different', they would be liable for a charge of manslaughter. However, section (2) requires serious injury, whereas section (3) requires some harm. This is somewhat broader than the current law and, essentially, the threshold would be lowered once again as there appears to be no escape from a charge of manslaughter even if the act is fundamentally different. The effect of section (3) as an alternative charge means that the secondary party need only foresee, in essence, a physical assault or battery to have liability imposed upon him or her for manslaughter if the principal kills. The Commission and the Ministry of Justice were not the sole proponents of an alternative verdict of manslaughter;

⁹² *Ibid.*, Para. [73].

⁹³ *Ibid.*, Annex C, Clause 4.

thus, it is assumed that the proposals will also be welcomed by Clarkson, who argued for an alternative verdict of manslaughter following *Powell*.⁹⁴ Whilst accepting that it would be naive and unrealistic to ignore the weight of the policy arguments and the 'dangerousness of collaborative ventures' that restricted their Lordships in *Powell* to convict on the basis of murder or not at all, Clarkson strongly criticised their Lordships for failing to consider an alternative charge of manslaughter.⁹⁵ He rejected the Commission's earlier statement in 1993 that 'the desire to implicate everyone concerned in the homicide may well outrun the more stringent demands of legal analysis', asserting the view that crime control arguments should not determine the level of liability imposed.⁹⁶ This is not too dissimilar to Wilson's view that liability should be distinguished fairly and consistently.⁹⁷

The law on murder is clear, and in *Woollin*, it was decisively stated that death or grievous bodily harm must be foreseen as virtually certain to impose liability on a defendant.⁹⁸ The lower threshold test – that the secondary party need only foresee what the principal might do – falls significantly short of the *Woollin* test. Clarkson argues that in these circumstances, where the secondary party holds no intention to kill, foreseeing what might happen is distinctly different from foreseeing what will happen and a charge of manslaughter would be more apt.⁹⁹ Thus, whilst some responsibility must be given to the secondary party, a moral distinction must be drawn so as not to become 'over-inclusive'.¹⁰⁰ Furthermore, the decision in *Powell* has leant itself to 'under-inclusiveness' with its 'fundamentally different' principle. Clarkson questions whether the approach adopted in *Powell* – that the secondary party shall be guilty of murder or no homicide offence at all – is justifiable.¹⁰¹ He believes that the weapon used or manner of killing should not make an act 'fundamentally different', a view closely related to that of Bedlam J in *Uddin*, who submitted that the character of a weapon may be immaterial if its 'propensity to cause death' was the same.¹⁰² Nonetheless, in some circumstances, it will be easy to distinguish between acts of a similar nature. In *English*, there was considered to be a significant difference between beating someone with wooden posts and killing them with a knife. Similarly, in *Gamble*, producing a knife and cutting the victims throat was not the same as the intended kneecapping. The problem Clarkson has,

⁹⁴ Clarkson, C., 'Complicity, Powell and Manslaughter' (1998) *Criminal Law Review*

⁹⁵ Clarkson., 'Complicity' (1998), p.558.

⁹⁶ Law Commission, *Consultation Paper on Assisting and Encouraging Crime* (1993, Law Commission No 131), Para. [2.109].

⁹⁷ Wilson, 'A rational scheme' (2008).

⁹⁸ [1999] 1 AC 82.

⁹⁹ Clarkson., 'Complicity' (1998), p.558.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² [1999] QB 431, p.441.

however, is their Lordships' failure 'mark this moral distinction'.¹⁰³ He suggests that a manslaughter charge would be more appropriate in both cases. This would put a secondary liability on a more even footing, adding both clarity and coherence.

There have, in fact, been cases where secondary parties have been convicted of manslaughter thus indirectly supporting Clarkson's observations. It is therefore astonishing that their Lordships in neither *Powell* nor *Rahman* considered this verdict. In *R v Stewart and Schofield*, the defendants were found guilty of manslaughter.¹⁰⁴ The joint venture was to rob a shop; however, the principal, motivated by racial hatred, killed the shop keeper. The defendants did not foresee death and the jury were given an alternative verdict of manslaughter to consider. Similarly, in *R v Roberts*, two of the parties were convicted of murder and the defendant was only convicted of manslaughter due to his intention that only some injury would be inflicted.¹⁰⁵ Laws LJ stated, 'in our judgment in such a case there is no reason why the participants should not be convicted and sentenced appropriately as to their several states of mind dictate'.¹⁰⁶

This view has subsequently been followed in *R v Yemoh* and *R v Aimes*.¹⁰⁷ However, in *Attorney-General's Reference (No.3 of 2004)*, the Attorney General recommended that the defendant be charged with manslaughter after the defendant allegedly recruited two others to kill the victim, which one did. The defendant argued that he only recruited the others to scare the victim, which may have included discharging a firearm within the vicinity to add pressure but did not envisage or foresee any physical harm taking place. Thus, when the co-defendant shot the victim, the shooting was then rendered 'fundamentally different'. The Court of Appeal emphatically rejected the Attorney General's position, stating:

Whether the rule is a good rule or a bad rule, there is no doubt... that if the primary party goes outside the scope of the joint enterprise then the secondary party is not guilty of murder or manslaughter... There is no dispute about that and could not be on the law as it stands, confirmed as it was in *Powell and English*.¹⁰⁸

This would appear to cast doubt on the authority of the alternative verdict of manslaughter. However, most recently, in *R v Carpenter*, Richards LJ unequivocally stated that the Court of Appeal should 'take the view that the Roberts line of authority remains good law'.¹⁰⁹

¹⁰³ Clarkson., 'Complicity' (1998), p.558.

¹⁰⁴ [1995] 1 Cr App R 441.

¹⁰⁵ [2001] EWCA Crim 1594.

¹⁰⁶ *Ibid.*, p.53.

¹⁰⁷ [2009] EWCA Crim 930; [2003] EWCA Crim 1440.

¹⁰⁸ *Ibid.*, p.24 *per* Hooper LJ.

¹⁰⁹ [2012] 1 Cr App R 11.

Conclusion

Their Lordships' decision undoubtedly acted as the catalyst for the influx of reform proposals that followed; the 'fundamentally different' rule has been severely problematic, causing disparity in its application. Yet, the proposals have failed to make any impact on the law of complicity and no action to date has been taken to implement any reform into statute, with the recommendations being shelved by the Government. This was not unanticipated. The proposals, particularly in *Murder, Manslaughter and Infanticide*, merely mirror the current law and it is therefore unsurprising to see the Government's reluctance to put this complex and controversial area onto a more balanced statutory footing. However, this leaves an inadequate set of principles governing an unsatisfactory law. The *Powell* principles were reaffirmed in *Rahman* nearly a decade later. Yet academics and judges remain divergent in their interpretations of the requirements of 'foresight' and the 'fundamentally different' rule. Thus, the task of deciding whether acts are 'fundamentally different' remains ambiguous. Further clarification is, without question, a necessity in order to make this incredibly complicated area of law more coherent and transparent.

The 'fundamentally different' rule should be amended so that those that intend grievous bodily harm or death do not escape liability for murder when they have the requisite intent. The writer therefore adopts a similar view to that of Bedlam J in *Uddin*, that a difference in weapon is immaterial if its 'propensity to cause death' remains the same.¹¹⁰ Of course, there is a fine and distinct line to be drawn between those who should be guilty of murder and those who should not. Where the secondary party only has an intention to do some harm, or foresees some harm, he or she should not be liable for murder, but of an alternative verdict of manslaughter when the principal acts in a 'fundamentally different' way. That being said, one must acknowledge the difficulties in drawing such a distinction between what the parties intended in homicide offences. Too often there is evidence to link several, if not all, members of a group to a murder, with no unequivocal evidence as to who inflicted the deadly act. These practical and policy issues seemingly influenced the courts' decisions and were emphatically approved by Lord Hutton in *Powell*.¹¹¹ However, despite recent calls for reform from the Commons Justice Select Committee, the former Secretary of State for Justice, Kenneth Clarke, responded by stating that any reform would not be undertaken in the life time of the current Parliament.¹¹² The law therefore remains in a complex state, with the

¹¹⁰ [1999] QB 431.

¹¹¹ *Powell* [1999], p.25.

¹¹² House of Commons Justice Select Committee 11th Report, *Joint Enterprise: Government's Response to the Committee's Eleventh Report of session 2010 – 2012* (2012, HC No.1901):

prospect of reform not forthcoming. The author will observe with interest the developments in this notoriously controversial area, but ultimately feels that the prospect of reform is still years away.