

## Reflections on Jogee: overwhelming supervening act

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The Supreme Court's judgment in *Jogee and Ruddock v The Queen*<sup>1</sup> substantially altered the criminal law's approach to secondary liability. However, the judgment left numerous important issues unresolved. In particular, the circumstances in which a secondary party is excused liability on the basis of an overwhelming supervening act ("OSA") of the principal remains unclear. The Court of Appeal recently discussed OSA in *Lanning and Camille*,<sup>2</sup> but it too left important questions unanswered. In this article we examine this concept, which is being encountered with increasing frequency in practice.

### The Supreme Court's explanation

In *Jogee*, the Supreme Court - having restated the principles of accessorial liability - discussed the concept of OSA in some detail:

[96] If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v Church* [1966] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F(J) and E(N)* [2015] 2 Cr.App. R 5. The test is objective. As the Court of Appeal held in *R v Reid (Barry)* 62 Cr App R 109, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.

[97] The qualification to this (recognised in *R v Smith (Wesley)*, [1963] 1 W.L.R 1200; *R v Anderson*; [1966] 2 QB 110; *R v Morris* [1966] 2 QB 110 and *R v Reid* (1976) 62 Cr App.R 109); is that it is possible for death to be caused by some overwhelming supervening act 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; in that case the defendant will bear no criminal responsibility for the death.

[98] This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from *R v English*. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. [emphasis added]

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<sup>1</sup> [2016] UKSC 8.

<sup>2</sup> [2021] EWCA Crim 450.

## Terminology

Confusingly the Supreme Court referred to “overwhelming intervening occurrence” (*Jogee* at para [12]); “overwhelming supervening event” [33] and [64]; and “overwhelming supervening act” [97]. It is submitted that it is the latter expression that is the pertinent one and, in particular, the statement that the OSA was an act “by the perpetrator” ([97]). The correct focus should be on the actions of D1 whom (subject to OSA) D2 had intentionally assisted or encouraged, rather than in respect of an external circumstance (as might be implied by the words “occurrence” and “event”, e.g., a bolt of lightning that killed V).

## OSA - a matter of causation?

Liability as a secondary party is not founded on the premise that D2 caused the actus reus of the offence in question.<sup>3</sup> However, in *Anderson and Morris*, the Court of Criminal Appeal expressly described the concept of “overwhelming supervening event” as a “matter of causation”.<sup>4</sup> Given the language used by that Court, and now the Supreme Court, it is understandable that legal practitioners may seek to apply the OSA concept as one that engages causation principles - an approach that is apt to mislead. Liability as a secondary party is not based on causation. This was explicitly recognised by the House of Lords in *Kennedy (No 2)*<sup>5</sup> and in *Stringer*,<sup>6</sup> in which Toulson LJ stated that what is required is some “connecting link” between D2’s conduct and D1’s commission of the offence<sup>7</sup>.

## “Overwhelming” - what does this mean?

The supervening act must be “overwhelming”. But, what does this mean in practice? The references in *Jogee* that the act must be of such a character “as to relegate [the acts of D2] to history” (*Jogee* at para [97]); or the act has “faded to the point of mere background” or “has been spent of all possible force” [12], may provide some guidance - but not much. In some rare situations, it seems that there is an OSA because the acts of D2 cease to have any relevance or material connection with the acts of D1, even though D1’s crime is one that D2 intended. For example, D2 may provide D1 with a jemmy to enable D1 to commit burglary but, in the event, D1 does not use it until two years later (consider *R v Bryce*<sup>8</sup>; and see *Jogee* [12] and the references in that paragraph to “time, place, or circumstances”). Less clear is whether D2, who intentionally assisted or encouraged D1 to commit a crime with the requisite intent specified in *Jogee* ([90] - perhaps D2 even personally having the requisite intent for that crime) is entitled to be acquitted if D1 committed the offence in a manner that D2 had not contemplated or “authorised.” Experience indicates that this situation is much more commonly arising in practice, as, for example, where there is a plan between D1 and D2 to assault using fists, but where D1 shoots V. Where the alleged crime is murder or grievous bodily harm with intent, the prosecution may seek to answer D2’s OSA plea by contending that D2 remains liable for a mere escalation of violence (*Tas*),<sup>9</sup> or that the word “act” encompasses a course of conduct by

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<sup>3</sup> Commentary to *Tas* by Karl Laird: [2019] Crim LR 339-343.

<sup>4</sup> [1966] 2 QB 110.

<sup>5</sup> [2007] UKHL 38.

<sup>6</sup> [2011] EWCA Crim 1396, at [48].

<sup>7</sup> See Glanville Williams in “*Finis for Novus Actus*” (1989) 48 C.L.J. 391.

<sup>8</sup> [2004] EWCA Crim 1231.

<sup>9</sup> [2018] EWCA Crim 2603.

D1 (consider *Thabo-Meli*;<sup>10</sup> *Le Brun*;<sup>11</sup> *R v Church*).<sup>12</sup> Where the result of D1's conduct is the death of V, with murderous intent, and D2 intended that D1 would intentionally kill or cause GBH, in what circumstances can there be an OSA? Does it turn on the nature of D1's acts, and/or on the intent with which D1 carries them out?

### What "acts" by D1 will constitute an OSA?

The Supreme Court explained that OSA will apply when "nobody in the defendant's shoes could have contemplated [what] might happen". The cases of *Tas* (manslaughter), *Harper* (murder),<sup>13</sup> and now *Camille*<sup>14</sup> [manslaughter] have had a limiting effect on the application of the OSA principle. Echoing the broader thrust of *Jogee*, the Court of Appeal has rejected the argument that D2's ignorance of the weapon D1 uses to kill can constitute an OSA. The Court stated in *Tas* that it would not accept that:

if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of *R v Jogee*), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.<sup>15</sup>

Although every case turns on its own facts, it is likely to be rare in practice that D1's use of a weapon (and particularly a knife, following *Tas*) would be sufficient to justify leaving the OSA issue for the jury's consideration.

*Tas* also alluded to the distinction between an OSA and a "simple escalation" of violence (at [40]) or, a "mere escalation [of violence] which remained part of the joint enterprise" (at [41]) - a distinction referred to in *Jogee* (at [33], [74]). But, when does a "mere" or "simple" escalation of violence become capable of constituting an OSA? If D2 intentionally assisted D1 to cause GBH by beating V, would the shooting of V's kneecaps constitute a "mere" or "simple" escalation of violence, or an OSA?

In *Rafferty*,<sup>16</sup> R and his co-defendants, attacked V. R punched V twice. He then left the scene with V's cash card and headed for an ATM. Meanwhile, the co-defendants continued the attack on V, escalating the violence by kicking him in the head and, finally, drowning him in the sea. R returned to find V dead. The trial judge left to the jury the question whether R was liable in murder, as a joint principal, for causing the death. On appeal against R's conviction for manslaughter (the jury having acquitted R of murder), the Court of Appeal held that R could not be guilty as a principal as he was not a cause of death (drowning) but that R was, at most, a secondary party (at [46]). The court then held that, on the unusual facts of that case, no jury could properly conclude that the drowning was other than of a "fundamentally different nature" (at [50], i.e., an act that is different from kicking, punching and stamping the victim). It is submitted that, post-*Jogee*, such facts should be left to the jury as an OSA. They could not be accurately characterised as a "mere" or "simple" escalation of violence; the question for the

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<sup>10</sup> [1954] 1 W.L.R. 228

<sup>11</sup> [1992] 1 Q.B. 61.

<sup>12</sup> [1966] 1 Q.B. 59.

<sup>13</sup> [2019] EWCA Crim 343.

<sup>14</sup> [2021] EWCA Crim 450

<sup>15</sup> *Tas* [2018] EWCA Crim 2603, at [37].

<sup>16</sup> [2007] EWCA Crim 1846, and D. Ormerod [2008] Crim LR 218-222.

jury would be whether anyone in D's shoes could have contemplated V being drowned.

Can D1's mens rea which goes beyond that which D2 intended D1 to have amount to an OSA?

Post-*Jogee*, where D2 intentionally assisted or encouraged D1, intending D1 intentionally to cause V GBH but, in the commission of the crime, D1 killed V with an intent to kill, the question arises whether D1's graver intent is capable of constituting an OSA. Although not entirely clear, the Court of Criminal Appeal in *Anderson and Morris*<sup>17</sup> appears to have concluded that the operative OSA in that case, was Anderson's decision to kill. The judgment may also be explained as one that involved an "unauthorised act" by D1 falling outside the scope of an "agreed" venture. However, this may not provide a satisfactory explanation post-*Jogee*, given that the focus should now be on intention and not authorisation or tacit agreement (see below).

The validity of some older authorities is less than clear post-*Jogee*. In *Gamble*,<sup>18</sup> two defendants (D and M) were acquitted of murder, but convicted of grievous bodily harm, notwithstanding that when they participated in a "punishment shooting" with G and B, they contemplated that violence amounting to grievous bodily harm would be inflicted on V, namely, beating or "kneecapping". However, they did not know or contemplate that V would be killed by the cutting of his throat with a knife. Carswell J held that that killing of V was a crime of a different kind from the beating or kneecapping contemplated and authorised by D and M, and that the killing did not follow directly as the result of the crime to which the latter lent themselves as accessories.

In *English, Powell and Daniels*,<sup>19</sup> Lord Hutton considered the decision in *Gamble* to be correct, but in *Rahman*,<sup>20</sup> their Lordships were divided on whether the decision was right or not.

In *R v Crooks*,<sup>21</sup> Lord Carswell C.J., referred to his decision in *Gamble* stating that he did not address the question whether D and M could be convicted of manslaughter, which was not at any time argued before him. Subsequently, in *Gilmour*,<sup>22</sup> his lordship considered cases where an accessory had been acquitted of both murder and manslaughter. His lordship stated that:

[i]t is of course conceivable, as is suggested in *Blackstone, loc. Cit* that in some cases the nature of the principal's mens rea may change the nature of the act committed by him and take it outside the type of act contemplated by the accessory, but it does not seem to us that the existence of such a possibility affects the validity of the basic principle which we have propounded.

The "basic principle" to which the court referred was that establishing secondary liability for a crime of specific intent pre-*Jogee*. However, for present purposes, the salient question is whether the fact that D1 intended to kill, but D2 intended only that D1 intend GBH, means that D1's killing with that graver mens rea is sufficient to constitute an OSA. On one analysis of

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<sup>17</sup> [1966] 2 QB 110

<sup>18</sup> [1989] NICA 268.

<sup>19</sup> [1998] 1 Cr.App.R. 261.

<sup>20</sup> [2008] UKHL 45.

<sup>21</sup> [1999] NICA 6

<sup>22</sup> [2000] NICA 10

*Gamble*, it was precisely because D1 had formed an intention to kill (by cutting V's throat) that D and M were absolved from liability for murder, notwithstanding that D and M intended to cause V grievous bodily harm by beating or knee-capping (using a firearm). At first sight, *Gamble* does not sit comfortably with the statement in *Gilmour* that the court could see no policy reason why an accessory "who carries out the very deed contemplated by both should not be guilty of the degree of offence appropriate to the intent with which he so acted". The "deed" being referred to is the murder, but it could (more narrowly) refer to D1's act that represents a change of his mens rea, and thus an OSA.

Although the Supreme Court in *Jogee* must have been alive to the decision in *Gamble* (not least because it was considered, in detail, in *English* and in *Rahman*) it is regrettable that it said nothing about it or about the cases that applied it. It is submitted that the question of whether *Gamble* survives *Jogee* or not, remains open.

### Whether and when OSA should be left to the jury

The Court of Appeal confirmed in *Tas* (and, in effect, in *Camille*) that OSA need not be left to the jury in every case. Whether there is an evidential basis for leaving OSA before the jury "is very much for the judge who has heard the evidence and is in a far better position than [the Court of Appeal] to reach a conclusion as to evidential sufficiency" (at [41]). However, this is not to say that trial judges should be unduly hesitant about leaving OSA to juries. The Court of Appeal observed that it was held in *Rafferty*<sup>23</sup> that no jury could properly have concluded that the drowning of the deceased was other than a new and intervening act in the chain of events: "the court did not suggest that this should not generally be a question for the jury" (*Tas*, at [43]). More recently, in *Camille*, the Court of Appeal was unable to accept that the distinction between a planned attack and an event which occurs more spontaneously is in any sense determinative of whether the judge should direct the jury as regards an OSA:

It will be one of the factors to be borne in mind when considering the defendant's intention, but it does not, as a matter of course, lead to the conclusion that the production of a knife is an OSA" (per Fulford LJ, at [65]).

Two points are worth making about this passage. First, the Court was not saying that the production of a knife could never constitute an OSA. Secondly, after *Jogee*, and as we have pointed out, the focus should now be on intention and not authorisation, agreement or plan. Once the issue of an OSA is left for the jury to consider, the burden is on the prosecution to negate OSA.

### To which homicide offences does OSA apply: murder as well as manslaughter?

It is clear that OSA can operate to excuse D2's liability for manslaughter. Unlawful act manslaughter requires only that D2 intentionally performs an unlawful act that a sober and reasonable person would realise would *cause some physical harm* to some person and in fact caused death.<sup>24</sup> The overwhelming supervening act test asks about whether someone in D2's shoes could have contemplated *the act* of D1. In a case where a reasonable person would see a risk of some harm (and perhaps D2 even admits seeing that risk himself) he can be excused if the manner of D1's causing the harm was not foreseeable by someone in D2's shoes.

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<sup>23</sup> [2007] EWCA Crim 1846.

<sup>24</sup> *Church* [1966] 1 QB 59

The notion of OSA as negating D2's liability has its origins in cases of manslaughter (such as *Anderson and Morris*) where the mens rea of the secondary party fell short of assisting or encouraging D1 to act with murderous intent - i.e. without the intent to kill or cause grievous bodily harm. Furthermore, the Supreme Court also opened its discussion of OSA (at [96]) by remarking that if a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm "but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter". From this it could be argued, with some plausibility, that paragraph [97] in *Jogee* which restates the OSA principle should be read as limited to that context; and proceeding from that point, it could then be further argued that the OSA principle provides no assistance to a D2 who encourages or assists a D1 to attack another person with intent to kill or cause grievous bodily harm. In support of this position there is a possible moral argument as well. In such a case, D2 has satisfied the elements of the more serious offence, and that being so the manner of the killing does not seem particularly relevant. A GBH is a GBH and a killing is a killing.

On the other hand, in *Jogee* the Supreme Court certainly said nothing that categorically ruled out the application of OSA to the case where D2 encourages D1 to act with murderous intent. So there is clearly scope to argue that OSA is potentially applicable in an extreme case where D1's act is so different in nature as to relegate D2's acts to history. An example of such a case could be *Gamble*- a decision the status of which, as explained above, appears to be now open.

If OSA does indeed preclude D2's being convicted of a murder in a case like this, it is tempting at first sight to think that he might still be convicted of a manslaughter. But if OSA operates - as it seems to do - by eliminating the necessary connection between D2's act of encouragement or assistance and the victim's death, it is difficult to see how this could logically be so. The result, it is suggested, is that D2 in this case would be guilty of no homicide offence. (Though in such a case D2 would still almost certainly be guilty of a range of other serious offences.)

### "Tacit agreement", "plan", "scope of plan"

Given that, post-*Jogee*, the focus is on the intention of the secondary party (see *Jogee*, at [9-10], [90]), expressions such as "tacit agreement", "plan", "scope of plan" and "authorised" are of questionable relevance and may even mislead. A secondary party (D2) who intentionally assists or encourages D1 to act with the intent necessary for the commission of the offence in question (or where D2 himself has that intent) will (absent OSA) be guilty of the offence regardless of whether he was a party to a "plan" or not.<sup>25</sup> The expression "tacit agreement" is no less ambiguous than "tacit encouragement"<sup>26</sup> and D2's liability does not depend on whether he had "authorised" D1 to commit the offence or not. If such expression have any value it may be as analytical techniques for evaluating evidence of (e.g.) D2's intention: they ought not to be treated as if they were matters to be proved.

### Concluding comments

The law governing the criminal liability of accessories for murder and in manslaughter has been bedevilled by the structure of homicide offences under English law. The consequence has been a series of appellate decisions, each of which was intended to achieve clarity and fair labelling in respect of conduct deserving of the designations "murder" or "manslaughter". If the Supreme Court's ultimate goal was to bring clarity to this area, *Jogee* has proved to be

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<sup>25</sup> *Jogee* at [90]

<sup>26</sup> *Willett* [2010 EWCA Crim 1620.

something of a disappointment, as it has left the application and scope of OSA unclear. Such uncertainty makes it difficult to draft bespoke legal directions and Routes to Verdict. It is submitted that there may be circumstances in which D1's change of act or mens rea may justify leaving OSA to the jury. The most compelling cases will be those where there is both a change of act and a change of mens rea on the part of D1. Less clear is whether, and in what circumstances, OSA may be left to a jury on a charge of murder. OSA may apply if, for example, *Gamble* has survived *Jogee*. This remains a live issue, however.

Given that Parliament is unlikely to reform the law of homicide for many years, the burden will again fall on the courts to revisit this topic in the hope of providing a clear, coherent, and workable set of legal principles.<sup>27</sup>

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<sup>27</sup> On which see generally D. Ormerod and K. Laird, *Smith Hogan and Ormerod's Criminal Law* (16<sup>th</sup> ed 2021) ch 6.