
Paras 17.13, n 50 and 17.49 In *Anwar* [2016] EWCA Crim 551, the question before the court was whether a reasonable jury properly directed could be sure that D had participated with others in a plan to rob V, knowing that one of the members to the agreement would embark on the joint criminal venture with a loaded gun, and intending that the venture should include the gun being fired with the intent to kill should it become necessary in the course of the agreed robbery. The Court of Appeal were asked to consider whether the trial judge was correct in finding that there was insufficient evidence to leave this issue before the jury. The Court of Appeal, allowing the appeal, recognised, that as no prior agreement was necessary, a reasonable jury could draw inferences from the evidence of significant pre-planning and coordination between the defendants, both in luring V to the scene and in their movements at the scene, including one of the party shouting 'shoot him', that all parties to the agreement to rob V knew that V would be shot if necessary in order for them to complete the robbery.

Para 17.34 In *Anwar,* the Court of Appeal applying the recent Supreme Court decision in *Jogee* stated (at [20]) that:'

> 'In addition to sufficient proof of encouragement or assistance, what is required is an intention, perhaps conditional, to encourage the commission of the relevant offence: see [*Jogee* at] [90]. It is clear that any defendant must have knowledge of existing facts necessary for the principal's intended conduct to be criminal and knowledge, if such there be, that any particular weapon is carried by the principal will be evidence going to the jury's assessment of the defendant's intention: see [*Jogee* at] [9], [16], [26].'

The Court of Appeal went on to state (at [21]) that the jury will continue to look at the full picture in determining whether the necessary intent (including conditional intents) can be inferred.

Para 17.45-17.48 In *HKSAR v Chan Kam-Shing* (2016) FACC No. 5 of 2016, the Hong Kong Court of Final Appeal declined to apply the Supreme Court's decision in *Jogee* (which disapproved *Chan Wing-Siu v R* and *Powell and Daniels; English* – see 17.46), preferring the Privy Council decision in *Chan Wing-Siu v R.* The Hong Kong Court of Final Appeal disagreed with the Supreme Court's decision in *Jogee* on three grounds:

(1) The Court did not accept that the principle derived under *Chan Wing-Siu v R* and *Powell and Daniels; English*, as suggested by the Supreme Court in *Jogee*, over-extended a secondary party's liability. It considered that those who engage in a joint criminal venture foreseeing that a member of the joint criminal venture may commit a further, more serious, crime should be treated as gravely culpable.

(2) The Court considered abolition of the principle derived under *Chan Wing-Siu v R* and *Powell and Daniels; English* to create a serious gap in the law, depriving the law of complicity of valuable principles in crimes committed by more than one person where the situation is evidentially unclear.

(3) The Court felt that the concept of 'conditional intent' introduced by the Supreme Court in *Jogee* (see discussion in 17.49 of the text) caused conceptual and practical difficulties.

Although this decision does not affect the validity of *Jogee* under the law of England and Wales, it shows some of the criticisms of the Supreme Court's decision in *Jogee*.

Para 17.49 In *Agera* [2017] EWCA Crim 740, applying *Jogee*, the Court of Appeal confirmed that there was no difference in a joint criminal venture entered into on the spur of the moment and one which involved pre-planned violence.

***Paras 17.49 and 17.53** In *Brown* [2017] EWCA Crim 1870, the defendants were convicted of unlawful wounding as secondary parties to the stabbing of V. The defendants appealed against their conviction, mainly, on the basis that the judge had failed to direct the jury that they should decide whether the conduct of the perpetrator in producing the knife and stabbing V might have gone beyond what had been tacitly agreed by the defendants as part of the joint criminal venture. The Court of Appeal, dismissing the appeal, held that the trial judge had properly directed the jury. In doing so, the Court of Appeal stated (at [28] – [30]) that:

> 'Post-*Jogee*, knowledge of a weapon used by a perpetrator to inflict harm is not determinative of secondary party liability. It is evidence that may inform a jury's decision as to whether a defendant who did not himself wield a weapon intended to cause harm to the victim; and if he did, the level of harm…
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> Thus, the judge on the facts of this case was not obliged to direct the jury that they could only convict a secondary party of either a section 18 offence or a section 20 offence if they were sure that the secondary party knew that the principal had a knife. Nonetheless, the judge did, in effect, direct the jury that the joint enterprise alleged was to wound with a knife.
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> In the main body of the summing up…, the judge correctly directed the jury to focus on the extent of the joint enterprise and then on the intent of the individual defendants…'

***Para 17.61 and 17.62** In *TL* [2018] EWCA Crim 1821,an adult male, Mr U, operating on behalf of a non-police group trying to identify paedophiles, pretended to be a 14-year-old on a chat room. D, believing it was a 14-year-old

girl, tried to persuade her to meet to have sexual intercourse with him and his girlfriend. Mr U and others reported the matter to the police and went to the address given by D. D was arrest and charged with attempting to meet a child following sexual grooming contrary to the Criminal Attempts Act 1981, s 1(1). D argued that Mr U had entrapped him to commit an offence and that a stay of proceeding was, as a result, appropriate in order to avoid an abuse of process. Based on this, the trial judge, applying the House of Lords decision in *Looseley* discussed at para 17.61, granted a stay of proceedings on the grounds of entrapment. On appeal, the Court of Appeal, allowing the appeal and ordering a retrial, held that the trial judge had been wrong to stay the proceedings, and in doing so, had wrongly applied the test contained in *Looseley.* In reaching this decision, the Court of Appeal recognised that the case of *Looseley* was concerned with agents of the state and concluded (at [31]) that the trial judge had erred in not drawing a distinction between the conduct of Mr U, a private citizen, and agents of the state, when considering whether to stay the proceedings as an abuse of process. Although the Court of Appeal recognised, as shown by the decisions of English courts and EctHR, that in theory the conduct of private citizens could lead to a stay of proceedings as an abuse of process albeit in rare situations, it concluded that this case was not an example where a stay of proceeding should be granted on the basis of the actions of a private citizen. The Court of Appeal outlined (at [35]) that:

> 'A starting point in considering whether the conduct of a private citizen should result in a stay of proceedings is to ask whether the same, or similar, conduct by a police officer would do so. A precise comparison may be difficult because when the police or other state investigators or prosecutors act in this way, they do so subject to codes of conduct and strict hierarchical oversight.'

Applying this to the facts of the case, the Court of Appeal concluded (at [37]) that if 'police officers had engaged in broadly similar conduct an application to stay the proceedings as an abuse of process should have failed.' The Court of Appeal recognised that Mr U, although having insufficient information to show that he had a reasonable suspicion that the chat room was being improperly used for grooming purposes, was given the name of the chat room by others interested in stopping such behaviour. The Court stated that his actions were therefore similar to police officers, in the absence of a reasonable suspicion, proceeding on an intelligence led basis to investigate potentially serious criminal activity. The Court proceeded to recognise (at [38]) that even if Mr U had chosen the chat room at random 'that would not support a suggestion that his conduct was so egregious that the integrity of the court would be compromised by allowing the prosecution to proceed.'