

SPECULATIVE LEAP IN INFERRING CONDITIONAL INTENT

WHEN a co-perpetrator spontaneously murdered someone other than the originally targeted victim, when is there a basis on which a jury can infer a defendant's conditional intent to assist or encourage that murder? In *R. v BHV* [2022] EWCA Crim 1690 (hereafter *BHV*), the Court of Appeal problematically allowed the prosecution's appeal against the trial judge's termination ruling in respect of a murder charge against one of the co-accused. The court's reasoning appears to involve a speculative leap regarding the formation of conditional intent. The long-standing problem of how conditional intent can be distinguished from foresight resurfaces in this context, and the court arguably misreads and distorts the guidance given by the Supreme Court in *R. v Jogee* [2016] UKSC 8, [2017] A.C. 387 (hereafter *Jogee*) as regards the liability of the secondary party.

BHV and two other co-accused, R and B, were each charged with murder and possessing an offensive weapon. The three defendants made a journey to the victim's (W) house with a view to attacking Leon (one of the four sons of W). R and B carried knives while *BHV* brought an axe. At first, all three defendants entered the garden of the property. R then went up to the house and called out to the inhabitants to "send Leon out for a fair one on one fight". At some point, *BHV* had moved to stand on the pavement outside the garden. While this was going on, W returned home in the company of a small child. When W realised that R and B were threatening an attack towards one of his family members with knives, he quickly ran into the garden to intervene. R stabbed W and penetrated his heart, causing his death. B also inflicted a further wound after R's fatal stabbing. *BHV* remained on the pavement outside the garden when the attacks happened. The three defendants then ran away.

At the Crown Court, the trial judge held that while there was ample evidence that the defendants were in a "dangerous and unlawful joint endeavour" with "an agreed plan to threaten with knives and if possible to inflict unlawful violence with them upon Leon", it would involve a speculative leap for the jury to conclude that *BHV* intended to assist in the attack of anyone other than Leon, in particular (as the prosecution had suggested) on "anyone who got in the way". As such, the trial judge held that *BHV* had no case to answer for murder but had a case to answer for manslaughter.

In allowing the prosecution's appeal against the termination ruling on *BHV*'s murder charge, the Court of Appeal held that there was a proper evidential basis on which the jury could find "the alleged conditional intent [of *BHV*] to be proved". The court relied on a passage in *Jogee* where the Supreme Court had pointed to the possibility that intention

might be conditional (e.g. bank robbers may only intend to kill when resistance is met) and suggested that proof of foresight might be used as evidence to infer the necessary conditional intent (at [92]–[94]).

In overturning the trial judge's termination ruling, the Court of Appeal insisted that there is "no ... legal principle" that whenever "the principal target of a joint enterprise attack is clearly identified ... the joint enterprise cannot also include a conditional intention to attack anyone who gets in the way" (at [33]). This is correct, but also beside the point. As the excerpt from the trial judge's ruling (*BHV* at [32]) clearly shows, the trial judge appropriately considered that *the facts presented by the prosecution in this specific case* provided no basis on which the jury could properly infer *BHV's* conditional intent to do serious harm if resistance is met.

The Court of Appeal's reasoning is problematic in two respects. The first aspect is that in any event, the core issue of the case should not be identified as whether *BHV* had the conditional intent to attack "anyone who got in the way". The test in *Jogee* (at [90]) is to ask whether "D2 intended to assist D1 to act with the requisite intent". But the criminal act that D2 intended to assist in must be clearly defined. In *Jogee*, the Supreme Court explained (at [90]) that "it may be simpler ... to direct the jury ... that the Crown must prove that D2 intended that *the victim* should suffer grievous bodily harm at least" (emphasis added). As murder was committed against a specific victim, the requisite mens rea for D2 would be an intention to cause (or assist D1 to cause) at least really serious harm against the specific victim.

The charge brought against *BHV* was (assisting in) murdering *W*, not murdering "anyone who got in the way" or any person other than *W*. It is therefore submitted that the correct issue to be addressed is: is there an evidential basis on which the jury could properly infer that *BHV* had the conditional intent to assist in causing at least really serious harm to *W*? This question, which the court failed to address, will be returned to after exploring the second, interlinked problem with the judgment.

The second problematic aspect is the speculative basis on which the court assumes that *BHV* must have thought about the possibility of meeting with resistance and that he potentially intended to assist in attacking "anyone who got in the way" including *W*. In *Jogee* an example is given that (at [92]) a "group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done". Yet in *BHV*, the Court of Appeal introduces its own speculation when it suggests that there was an obvious risk that occupiers of the house would use knives or other weapons to resist violently, and infers from that that "[a]ny sensible plan [to attack Leon] would therefore include a plan for dealing with a refusal

of the occupiers to yield up Leon to his attackers and with the use of violence to repel them” (at [34]). None of the factual evidence before the court suggested that the young defendants had engaged in any sensible planning or given any thought to possible violent resistance. None of their behaviour on the premises suggested that they had formed any plan beyond going there and demanding that Leon come out “for a fair one on one fight”.

But even if BHV had the conditional intent to assist in attacking the house’s occupiers if they resisted is a conclusion that could be reached by proper inferential reasoning, it is far from clear that the jury could possibly make the further inference that BHV had a blanket-like conditional intent to cause really serious harm to anyone who in any way interfered with their action. Consider the hypothetical situation in which the attackers while on their way to the house are stopped by a police officer, and a co-perpetrator stabs the police officer to death. In such a scenario, without more evidence, the other defendants could hardly be seen to have intended to assist in such a murder. This is another reason why inferring that BHV had the intent to attack “anyone who got in the way” is problematic and unsupported by the evidence.

Returning to the issue that the court should have addressed, there is simply no evidence to show BHV had considered the possibility that a co-perpetrator would cause at least really serious harm to a person in W’s position (who was not inside the house and suddenly entered the scene without a weapon), let alone that he had formed such an intention. One cannot form a (conditional) intent towards a crime before having thought about it (i.e. foreseen the possibility that the crime might be committed). Even assuming that an inference could be drawn that BHV had foreseen there was a small chance that someone like W might intervene from outside of the house, that is still far from inferring that BHV had intended/tacitly agreed (see *Jogee* at [93]) for a co-perpetrator to cause really serious harm to such a person. By moving from (1) BHV’s intent to attack Leon to (2) inferring that BHV foresaw that occupiers of the house might resist them and that his co-defendants might then use violence against them, to (3) finding that the prosecution could possibly prove BHV’s conditional intent for his co-defendants to attack “anyone who got in the way” including W, the step from (2) to (3) most certainly involves a speculative leap.

The principle of parasitic accessory liability in joint enterprise was widely criticised because the low mental threshold of foresight resulted in over-extension of criminal liability (*Jogee*, at [83]). By abolishing this mode of liability and declaring the universal application of orthodox principal-accessory liability in *Jogee*, the Supreme Court confirmed that only those who give intentional assistance or encouragement (whether conditional or not) towards a crime could be convicted of this crime (see *R. v Crilly*

[2018] EWCA Crim 168, [2018] 4 W.L.R. 114). The Supreme Court in *Jogee* was concerned to ensure fair labelling of criminal responsibility by matching the conviction offence to the magnitude of law-breaking. A speculative approach leads to the exact opposite. In line with *Jogee*'s objectives, juries should not be invited to draw far-fetched inferences regarding a defendant's intent based on limited evidence, as the Court of Appeal did in *BHV*. Not surprisingly, *BHV* was eventually acquitted of murder by the jury (see *BHV*, at [1]).

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