**Asif Tufal**

# CASES ON PARTICIPATION

## 1. MODES OF PARTICIPATION

***R v Butt*** (1884) 51 LT 607.

The defendant had deliberately given false information to the book-keeper of the company for which he worked, knowing that it would be entered into the accounts. As the book-keeper had innocently entered the wrong information, the defendant was convicted as the principal on a charge of falsifying the accounts.

## 2. SECONDARY PARTIES

A) LIABILITY

***R v Calhaem*** [1985] QB 808.

The defendant had hired a man named Zajac to kill a woman. Z testified that after being paid by the defendant he had decided not to carry out the killing, but instead to visit the victim's house, carrying an unloaded shotgun and a hammer, to act out a charade that would give the appearance that he had tried to kill her. He claimed that when he had stepped inside the front door of the victim's house, she had screamed and he panicked, hitting her several times with the hammer. The defendant appealed, submitting that, on Z's evidence there was no causal connection, or no substantial causal connection.

The Court of Appeal affirmed the defendant's conviction. It was held that the offence of counselling a person to commit an offence is made out if it is proved that there was a counselling, that the principal offence was committed by the person counselled and that the person counselled was acting within the scope of his authority and not accidentally when his mind did not go with his actions. It is not necessary to show that the counselling was a substantial cause of the commission of the offence.

***Attorney-General's Reference (No1 of 1975)*** [1975] QB 773.

The accused had laced a friend's drinks with alcohol knowing the friend would shortly afterwards be driving home. The friend was convicted of drunken driving. The accused was charged as an accomplice to this offence, but was acquitted following a successful submission of no case to answer. The trial judge had taken the view that there had to be evidence of some agreement between the accomplice and the principal.

Lord Widgery CJ held that the offence had been procured because, unknown to the driver and without his collaboration, he had been put in a position in which he had committed an offence which he never would have committed otherwise. There was a case to answer and the trial judge should have directed the jury that an offence is committed if it is shown beyond reasonable doubt that the accused knew that his friend was going to drive, and also knew that the ordinary and natural result of the added alcohol would be to bring the friend above the prescribed blood/alcohol limit.

B) PRESENCE AT THE SCENE OF THE CRIME

***R v Coney*** (1882) 8 QBD 534.

The two defendants were present at an illegal bare fists prize fight. It did not appear that the defendants took any active part in the management of the fight, or that they said or did anything. It was held to be a misdirection to tell a jury that mere presence at an illegal prize fight was sufficient for there to be a

conviction of the defendant for abetting the illegal fight. It is simply one factor for a jury to take into account.

***R v Bland*** [1988] Crim LR 41.

The defendant lived with her co-accused, R, in one room of a shared house. R was guilty of possession of drugs. The defendant was also charged with possession of a controlled drug because she was living with R. The Court of Appeal quashed her conviction and held that there was no evidence of assistance, active or passive. The fact that she and R lived together in the same room was not sufficient evidence from which the jury could draw such an inference. Assistance, though passive, required more than mere knowledge. For example, it required evidence of encouragement or of some element of control, which was entirely lacking in the case.

***Wilcox v Jeffrey*** [1951] 1 All ER 464.

W was convicted of aiding and abetting a musician in the contravention of the Aliens Order 1920. The musician was not to take any employment, paid or unpaid. W had met the performer at the airport, bought a ticket for the concert, watched the musician performing unlawfully and later praised the musical performance in his magazine. The Divisional Court held that the defendant's presence at the concert was not accidental, and that in the circumstances there was evidence of encouragement to the musician to commit an offence and therefore, to convict W of aiding and abetting.

***R v Clarkson*** [1971] 1 WLR 1402.

Two soldiers (the defendants) had entered a room following the noise from a disturbance therein. They found some other soldiers raping a woman, and remained on the scene to watch what was happening. They were convicted of abetting the rapes and successfully appealed on the basis that their mere presence alone could not have been sufficient for liability.

It was held that the jury should have been directed that there could only be a conviction if (a) the presence of the defendant at the scene of the crime actually encouraged its commission, and (b) the accused had intended their presence to offer such encouragement.

C) PARTICIPATION BY INACTIVITY

***Tuck v Robson*** [1970] 1 All ER 1171.

The defendant was the licensee of a public house. He allowed his customers to drink after hours and thereby commit the offence of consuming alcohol after permitted hours on licensed premises contrary to the Licensing Act 1964. His inactivity was held to constitute aiding and abetting because he did not take steps to enforce his right to eject customers or at any rate to revoke their licence (permission) to be on the premises.

D) MENS REA OF SECONDARY PARTIES

***NCB v Gamble*** [1959] 1 QB 11.

A lorry driver had filled his lorry with coal at an NCB yard. The weighbridge operator noticed that the lorry was overloaded and informed the driver. The driver said he would take the risk and the operator gave him a weighbridge ticket. The driver was found guilty of using an overloaded lorry on the highway. The ownership in the coal did not pass until the ticket was handed over and, therefore, the driver could not properly have left the yard without it. It was held that the NCB (as employers of the operator) were liable as accomplices. The operator knew he had a right to prevent the lorry leaving

with the coal. It was enough that a positive act of assistance had been voluntarily done with knowledge of the circumstances constituting the offence.

***R v Bainbridge*** [1960] 1 QB 129.

The defendant had supplied some cutting equipment which was subsequently used to break into the Midland Bank in Stoke Newington. He claimed that he had thought the equipment might be used for some illegal purpose, such as breaking up stolen property, but that he had not known that it was to be used to break into a bank. The defendant appealed unsuccessfully against his conviction for being an accomplice to the break-in.

The Court of Appeal held that it was essential to prove that the defendant knew the type of crime that was going to be committed. It was not necessary to show knowledge of the particular date and premises concerned. Lord Parker CJ said that it was not enough that he knew that some kind of illegality was contemplated; but that, if he knew breaking and entering and stealing was intended, it was not necessary to prove that he knew that the Midland Bank, Stoke Newington, was going to be broken into.

***DPP for N. Ireland v Maxwell*** [1978] 3 All ER 1140.

The defendant drove the principal offender to an inn, realising that the principal intended either to plant a bomb or to shoot persons at the inn. In fact, the principal intended to plant a bomb and did plant a bomb. The defendant was liable for that offence. He would have been liable for murder if the principal had shot and killed. It would have been otherwise if the principal had committed another type of crime which was not in the defendant's contemplation when he did the relevant act. Lord Scarman stated with regard to such an accomplice:

"He may have in contemplation only one offence, or several: and the several which he contemplates he may see as alternatives. An accessory who leaves it to his principal to choose is liable, provided always the choice is made from the range of offences from which the accessory contemplates the choice will be made."

***Blakely and Sutton v DPP*** [1991] Crim LR 763.

B was having an affair with T. At a pub, T told B that he intended to go home to his wife. B discussed this with S, who suggested that if they added alcohol to T's tonic water, T would not drink and drive. B & S intended to tell him before he left to drive home so that he would not go home. Unfortunately, T (the principal) left before they could tell him and was subsequently found to be over the limit when breathalysed. The defendants' evidence ensured that the principal was given an absolute discharge to the charge of drink-driving.

B & S were subsequently convicted of procuring that offence after the magistrates decided that they had been reckless (within the meaning of *Caldwell*). The Court of Appeal quashed their convictions and held that objective recklessness was not enough for liability. The court expressed the opinion that only intention should suffice.

## 3. PARTICIPATION PUSUANT TO A JOINT ENTERPRISE

A) ACCIDENTAL DEPARTURE FROM THE COMMON DESIGN

***R v Stewart and Schofield*** [1995] 3 All ER 159.

The Court of Appeal held that there is a difference between taking part in the execution of a crime as a joint enterprise and being an aider, abettor, counsellor or procurer. According to Hobhouse LJ:

"A person who is a mere aider or abettor etc is truly a secondary party to the commission of whatever crime it is that the principal has committed although he may be charged as a principal. If the principal has committed the crime of murder, the liability of the secondary party can only be a liability for aiding and abetting murder. In contrast, where the allegation is of a joint enterprise, the allegation is that one defendant participated in the criminal act of another. This is a different principle."

Thus, in a joint enterprise, each participant may be liable according to his own *mens rea*, provided that what was done was within the scope of the joint enterprise. One might be guilty of murder, another of manslaughter.

***R v Baldessare*** (1930) 22 Cr App R 70.

Two defendants stole a car to go joyriding. The car was driven recklessly, the brakes were violently applied and the head-lights were not lighted. The driver killed another road user and was convicted of his manslaughter. The passenger, B, was convicted as an accomplice to the manslaughter. Lord Hewart CJ stated that the defendant and the driver were responsible for the way in which the car was being driven at the moment of collision.

B) DELIBERATE DEPARTURE FROM THE COMMON DESIGN

***Davies v DPP*** [1954] AC 378.

Two gangs of boys had a fight, during which the principal offender (Davies) had killed an opponent with a knife. The defendant was convicted of murder. Lawson, an accomplice was acquitted of being an accomplice to either murder or manslaughter because there was no evidence that L knew that any of his companions had a knife.

Note: Had the victim died from blows to the head from the principal's fist or boot, then D could have been guilty as an accomplice to manslaughter, because such a mode of attack was contemplated by him, and the death of the victim would have been an unforeseen consequence of its being carried out.

***R v Anderson and Morris*** [1966] 2 QB 110.

M had a fight on the street with W (the victim) because W had just tried to strangle Mrs A. When A arrived and learnt what had happened, he went with M in a car to find W. When W was found, there was a fight in the street. A was seen punching W, with M standing behind A, apparently not taking any definite part in the fight. A then stabbed W to death. M denied knowing that A had a knife. M was convicted of manslaughter and appealed.

It was held by the Court of Appeal that where two persons embark on a joint enterprise, each is liable criminally for acts done in pursuance of the joint enterprise, including unusual consequences; but if one of them goes beyond what has been tacitly agreed as part of the joint enterprise, the other is not liable for the consequence of the unauthorised act. M's conviction was quashed.

Note: The use of the knife was not agreed upon. However, if W had died from a punch thrown by A, M would have been an accomplice to manslaughter.

***R v English*** [1997] 4 All ER 545.

See Law Report.

***R v Mahmood*** [1994] Crim LR 368.

The defendant was a passenger in a car that had been unlawfully taken and was being driven recklessly in a police chase. The defendant and the driver jumped out of the car, leaving it in gear. The car mounted a pavement and killed a baby in a pram. It was held that if the death had occurred while they were still in the car, the defendant could have been liable for manslaughter because what had occurred would have resulted from a common unlawful enterprise which had culminated in unforeseen consequences. However, there was insufficient evidence "that he contemplated the second type of reckless driving, namely the abandonment" and accordingly there could be no liability for manslaughter.

Question: Was this decision correct?

***R v Dunbar*** [1988] Crim LR 693.

Two men killed a woman and were convicted of murder. The defendant was charged with counselling the offence and convicted of manslaughter. The defendant appealed. She admitted that she may have expressed a wish to see the victim dead, but she had been drinking and taking drugs. She suspected that her co-defendants planned to burgle the victim's flat and that some violence might be done to the victim, but she did not contemplate the possibility of any serious harm being inflicted.

The Court of Appeal quashed her conviction because of a misdirection by the trial judge. If she was a party to an agreement to kill, she was guilty of murder. If she was a party to an agreement to inflict some harm, short of g.b.h, then she would not be guilty of murder or manslaughter, because the killing could not be within the ambit of the agreement.

***R v Stewart and Schofield*** [1995] 3 All ER 159.

Lambert, Stewart and Schofield were charged with the murder of a shopkeeper. Stewart had suggested that they should rob him in the shop and armed herself with a knife for this purpose. Lambert armed himself with an iron bar and Schofield kept watch outside the premises. Lambert beat the shopkeeper to death with the iron bar and pleaded guilty to murder and robbery. The trial judge told the jury that they could convict the defendants of manslaughter if they found that they knew that Lambert would or might use some violence, albeit not serious. The defendants were convicted of manslaughter.

On appeal they contended that, with reference to *R v Anderson and Morris*, they could not be convicted of manslaughter where the principal offender, in committing murder, deliberately exceeded the joint enterprise (ie, the robbery). Their evidence was that in carrying out the murderous attack, Lambert had been motivated by racial hatred, using an uncontemplated level of force, and not his desire to effect the robbery.

The Court of Appeal dismissed the appeal. It was held that in the light of *R v Smith* (1963) and *R v Betty* (1964), a party to a joint enterprise who was charged with murder, could only escape liability for manslaughter (in cases where the principal offender was convicted of the murder), if the killing was not actually committed in the course of the joint enterprise– a question of fact not law. In arriving at its conclusion the court acknowledged the conflict of authority on this point. Hobhouse LJ distinguished *Anderson and Morris* on the ground that the principal offender was acting outside the joint enterprise in that case but within it in *Stewart and Schofield*.

C) ACCOMPLICES TO MURDER

***Chan Wing-Siu v R*** [1985] AC 168.

The appellants were members of a gang who had gone to the victim's house to commit a robbery, arming themselves with knives. During the robbery the victim was stabbed to death by a member of the gang and the defendants were convicted as accomplices to the murder.

The Privy Council dismissed their appeals. It was held that for an accomplice to be guilty of murder it was sufficient for the prosecution to establish that he foresaw death or grievous bodily harm as a possible incident of the common design being carried out. On the other hand, if it was not even contemplated by the accomplice that serious bodily harm would be intentionally inflicted, he is not a party to murder.

***R v Slack*** [1989] 3 All ER 90.

The defendant and the principal burgled a house. The principal stabbed the householder with a knife carried and handed to him by the defendant. Lord Lane CJ said that the accomplice was guilty if he "lent himself to a criminal enterprise" if there had been an express or tacit understanding with the principal that serious harm or death should, if necessary, be inflicted.

***R v Hyde*** [1990] 3 All ER 892.

The defendants were jointly convicted of murder. They carried out a joint attack repeatedly kicking the victim, and although it was impossible to determine who had struck the fatal blow(s), their intention had been to cause serious injury or each had known that that was the intention of the others. Their defence was that since the jury could not be sure whose actions had caused the death, none of them should be convicted as the murderer. The jury were directed that if all three intended to do grievous bodily harm they were guilty of murder; if they did not, but one of them decided to do it, and the others foresaw the possibility of such harm, they would still be responsible. The defendants were convicted of murder. The appeals were dismissed. Lord Lane CJ said:

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise . . ."

***Hui Chi-Ming v R*** [1991] 3 All ER 897.

Four people, including the defendant, attacked the wrong victim. One of them (not the defendant) struck the fatal blow. The defendant was liable for murder because even though there was no agreement between the parties, he had contemplated the possibility of serious injury or death. The Privy Council confirmed the law as set out in *Chan Wing-Siu*.

***R v Roberts*** [1993] 1 All ER 583.

The defendant, with another man, was involved in a robbery of an elderly man, during which the victim was killed. The trial judge directed the jury that the defendant was an accomplice to the killing if he had lent himself to the joint enterprise and foreseen that the principal might kill or inflict grievous bodily harm on the victim in the process. The defendant was convicted of murder.

An appeal was dismissed by the Court of Appeal. It was held that regardless of whether the purpose of the joint enterprise was to rob, burgle or inflict harm, and regardless of whether or not weapons were carried by the defendants, the court could convict an accomplice to murder if the death of the victim resulted from the joint enterprise and he had foreseen death or grievous bodily harm as something that might occur. The carrying of offensive weapons to the scene of the crime would be evidence that the accomplice had the necessary *mens rea*.

***R v Powell and Daniels; R v English*** [1997] 4 All ER 545.

Law Report.

D) REPENTANCE OF SECONDARY PARTIES

***R v Becerra and Cooper*** (1975) 62 Cr App R 212.

The defendants agreed to burgle a house, and B gave C a knife to use in case there was any trouble. When they were disturbed by one of the tenants, B jumped out of the window and ran off, shouting "There's a bloke coming. Let's go." C remained behind and murdered the tenant. B was convicted as an accomplice to the murder despite his contentions that he had withdrawn from the enterprise. In dismissing B's appeal against conviction, Roskill LJ stated the law as follows:

- After a crime has been committed and before an abandonment of the common enterprise can be established there must be something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences. What must be done to break the chain of responsibility will depend upon the circumstances of each case.

- Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. "Timely communication" ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.

- In the present case, the knife having been contemplated for use when it was handed over by B to C, if B wanted to withdraw at that stage he would have to "repent" in some manner vastly different and vastly more effective than merely to say "Come on, let's go" and go out through the window.

***R v Grundy*** [1977] Crim LR 543.

The defendant had supplied a burglar with information about the premises, the habits of the owner and other useful matters. However, for two weeks before the burglar did so, the defendant had been trying to stop him breaking in. It was held that, following *Becerra*, the defence of withdrawal should have been left to the jury.

***R v Whitefield*** (1984) 79 Cr App R 36.

Two people burgled a flat while the occupier was away. The defendant, who lived next door, admitted telling the principal offender that the flat would be empty. He also admitted that he had agreed to carry out the burglary with the principal, but that he had later changed his mind. W was present in his flat the night the burglary was committed. He heard the flat being broken into but did nothing to prevent the offence. At his trial for burglary, W unsuccessfully submitted that he had withdrawn from the common enterprise to burgle the adjoining flat (by informing the principal that he did not wish to take part in it,

and by refusing to allow him access to his flat and balcony for the purpose of effecting entry to his neighbour's flat).

The Court of Appeal quashed the conviction. There was evidence that W had served unequivocal notice on the principal that, if he proceeded with the burglary they had planned together, he would do so without W's aid or assistance. The jury should have been told that, if they accepted the evidence, that was a defence.

***R v Rook*** [1993] 2 All ER 955.

R had agreed with A, B and C to kill C's wife. He claimed to have withdrawn from the venture before it had been carried out. On the day in question he did not turn up to meet the others as arranged. He claimed that he wanted nothing more to do with the killing and that he hoped the others would not go through with the killing once they realised he was not there. He made no attempt to inform the others that he had had a change of mind. The Court of Appeal held, following *Becerra*, that R had not even done the minimum necessary to withdraw from the joint venture since he had not communicated his change of mind to the other parties.

The court also raised, but did not answer, the question of whether mere communication in itself would have been sufficient or whether the defendant would have to do something to neutralise the help already given. The Court of Appeal gave a strong hint that mere communication would not be enough. The Court of Appeal stated that a suggestion that "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse" went too far. The court commented, "It may be enough that he should have done his best to step on the fuse."

## 4. ACQUITTAL OF THE PRINCIPAL OFFENDER

***R v Bourne*** (1952) 36 Cr App R 1251.

The defendant had terrorised his wife into committing buggery with a dog. He was convicted of aiding and abetting his wife to commit buggery with a dog. Lord Goddard CJ stated that if the woman had been charged herself with committing the offence, she could have pleaded duress, which would have shown that she had no *mens rea*. However, if an act of buggery is committed, the crime is committed. The evidence was that the defendant had caused his wife to have connection with a dog and was therefore guilty.

***R v Cogan and Leak*** [1976] QB 217.

L persuaded C to have sexual intercourse with Mrs L, telling him that she liked being forced to have sex against her will, and that if she struggled it was merely evidence of her enjoyment. C was convicted of rape but appealed successfully against his conviction on the basis that he had honestly thought she was consenting to sexual intercourse. L appealed against his conviction for aiding and abetting the rape, on the basis that if the principal had been acquitted, there was no offence to which he could have been an accomplice.

In dismissing the appeal, the Court of Appeal held that the *actus reus* of rape had been committed by C in that Mrs L had been forced to submit to sexual intercourse without her consent. L had known that she was not consenting, and thus had the necessary *mens rea* to be an accomplice. Alternatively, the court was willing to view C as an innocent agent through whom L had committed the offence of rape.

***Thornton v Mitchell*** [1940] 1 All ER 339.

A bus driver relied upon the signalling and guidance of his conductor to reverse his bus. The conductor failed to see two pedestrians standing behind

the bus who were injured. The driver was charged with careless driving and the conductor was charged with abetting that offence. The charge against the driver was dismissed. He had not been careless; it had been reasonable for him to rely upon the conductor's advice. However, the conductor was convicted and appealed. The conviction was quashed as " a person cannot aid another in doing something which that other has not done". (per Lord Hewart CJ)