

LORENZO PASCULLI

Senior Lecturer in Law at Kingston University*

A RIGHT TURN IN THE ENGLISH CRIMINAL LAW: NO MORE ANOMALOUS
FORMS OF COMPLICITY. AN IMPORTANT LESSON FROM THE UK SUPREME
COURT

PAROLE CHIAVE

Concorso di persone nel reato – concorso anomalo (reato diverso da quello voluto da taluno dei concorrenti)
– previsione, prevedibilità e intenzione – omicidio volontario e colposo

KEY-WORDS

Complicity – parasitic accessory liability – foresight, foreseeability and intention – murder and manslaughter

ABSTRACT

Per oltre trent'anni il diritto inglese ha previsto che laddove due concorrenti avessero la comune intenzione di commettere un certo reato ma uno di essi commettesse un reato diverso, l'altro rispondeva penalmente per i fatti commessi dal primo laddove avesse previsto la possibilità che questi avrebbe potuto agire come di fatto ha agito. Il principio si basava sull'equazione fra previsione e intenzione. La recente decisione della Corte Suprema del Regno Unito nei casi congiunti Jogee e Ruddock cambia il diritto riaffermando il più antico principio per cui l'elemento soggettivo richiesto per il concorrente secondario è pur sempre il dolo di assistere o incoraggiare il concorrente primario nella commissione del reato. Previsione non equivale ad autorizzazione. La decisione ha l'effetto di ricondurre l'elemento soggettivo del concorrente secondario a parità con quello richiesto per il concorrente primario e di restringere l'ambito della punibilità. Inoltre, può essere di stimolo per i giuristi e il legislatore italiano per intraprendere un profondo ripensamento della disciplina del tanto dibattuto concorso anomalo.

For more than thirty years the English law established that whenever two defendants had a common intention to commit a particular crime, but one of them committed another crime, the other party was criminally liable for the acts by the primary offender if he had foreseen the possibility that he might have acted as he did. The principle was based on the equation between foresight and intent. The recent decision of the UK Supreme Court in the joint cases Jogee and Ruddock changes the law, by restating the older principle according to which the mental element required of a secondary party is an intention to assist or encourage the principal to commit the crime. Foresight is not equivalent to authorisation. This decision has the effect of bringing the mental element of the secondary party back into broad parity with what is required of the principal and of narrowing

* Kingston Law School, Kingston University London, United Kingdom, L.Pasculli@kingston.ac.uk; Ph.D. (dottorato di ricerca) in Comparative and European Legal Studies at the University of Trento, Italy.

the scope of criminal law. It can also stimulate Italian lawyers and law-makers to start a thorough rethinking of the law of the much-debated concorso anomalo.

TABLE OF CONTENTS: 1. Introduction. – 2. The Italian and the English law of complicity in a nutshell. – 2.1. A brief comparison between the Italian law of the *concorso anomalo nel reato* and the English law of parasitic accessory liability. – 3. The *Jogee* case. The facts. – 3.1. The decision. - 3.2. The principles of secondary liability as restated by the Supreme Court. – 3.3. The effect of the *Jogee* decision on past convictions. – 4. Conclusions.

1. *Introduction*. – One of the most problematic issues in the English law of complicity is the so-called parasitic accessory liability. The expression, coined in 1997 by John Smith¹, indicates those cases in which two defendants have a common intention to commit a particular crime, but one of them, as an incident of committing that crime, commits another crime and the other has foreseen the possibility that he might do so². The main problem is posed by the *mens rea* required for considering the secondary party criminally responsible for the different crime committed by the principal offender.

During the years the English courts have given different answers to this question, reaching a seemingly definitive solution in the case *Chang Wing-Siu*³, in which the Judicial Committee of the Privy Council decreed that a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. The principle, based on a debatable equation between foresight and intent, was later reprised and developed by the House of Lords (now UK Supreme Court) – notably in the case *R v Powell and R v English*⁴, and thus it became law. The decision of 18 February 2016 of the UK Supreme Court in the joint cases *R v Jogee (Ameen Hassan) and Ruddock v The Queen*⁵, hailed by the Criminal Bar Association as a «masterpiece of modern legal reasoning»⁶, changes the law, by restating the principle, well-established before *Chang Wing-Siu*, that the mental element required of a secondary party is an intention to assist or encourage the principal to commit the crime. Foresight is not equivalent to authorisation.

¹ J.C. SMITH, *Criminal liability of accessories: law and law reform*, in *Law Quarterly Review*, 111, 1997, 455.

² *R v Gnango* [2011] UKSC 59; [2012] 1 A.C. 827; [2012] 1 Cr. App. R. 18, at [42].

³ [1985] AC 168 36.

⁴ [1999] 1 AC 1.

⁵ [2016] UKSC 8; [2016] 2 W.L.R. 681; [2016] 2 All E.R. 1; [2016] 1 Cr. App. R. 31. In the website of the UKSC it is possible to watch the video recording of the Court's sessions, as well as of the judgment summary: <https://www.supremecourt.uk/cases/uksc-2015-0015.html>.

⁶ J. ROBINS, «*Masterpiece of modern reasoning*», in *Criminal Law & Justice Weekly*, 180, 2016, 147.

The present article has three purposes: (i) offering a short outline of the English law of complicity and of the *Jogee* decision, especially to the benefit of Italian lawyers; (ii) offering a short outline of the Italian law of complicity, especially to the benefit of non-Italian lawyers; (iii) trying to draw from *Jogee* suggestions for a possible rethinking of the Italian law of the so-called *concorso anomalo nel reato*. Therefore, the analysis of the *Jogee* decision will be conducted in the particular perspective of comparative law – which should also give it an element of originality compared to the many comments published so far⁷. As a matter of choice, given the economy of this work, bibliographic references will be limited to few essential contributions to the most relevant topics, to the purpose of giving a first orientation of the readers who are not familiar with either of the considered legal systems.

2. *The Italian and the English law of complicity in a nutshell*. – Unlike the Italian law of complicity⁸, which does not differentiate between the possible forms of participation⁹, the English law¹⁰ distinguishes principals – the actual perpetrators of the crime – from secondary parties (or accessories or accomplices) – those who assist or encourage the principals to commit a crime. However, both Italian and English law of complicity are based on a similar fundamental principle, that is, that all the participants in a crime are considered guilty of that offence. In Italy, the principle is affirmed by article 110 of the penal code (c.p.)¹¹, according

⁷ See, in addition to the other comments cited in the rest of the article, R. BUXTON, *Jogee: upheaval in secondary liability for murder*, in *Criminal Law Review*, 5, 2016, 324; C. MARR, D. CZUGLER, *Joint enterprise: putting the law right*, in *Solicitors Journal*, 160(12), 2016, 30-31; S. PERSAUD, C. HUGHES, *A wrong turn in the common law*, in *Law Society's Gazette*, 113(13), 2016, 22; H. ROBERTS, *Joint enterprise liability: a fresh approach*, in *CILEx Journal*, Apr. 2016, 48; M. ROGERS, *Supreme Court: joint enterprise "wrongly interpreted"*, in *Solicitors Journal*, 160(7), 2016, 10; T. STOREY, *End of an era: Court of Appeal gives final judgment on the contemplation principles in cases of murder by joint enterprise*, in *Journal of Criminal Law*, 80(2), 2016, 82.

⁸ Some monographic studies of the Italian law of complicity are P. CARNUCCIO, *Il concorso di persone nel reato*, Milano, 2012; R. MAZZON, *Il concorso di reati e il concorso di persone nel reato*, Padova, 2011; S. CAMAIONI, *Il concorso di persone nel reato*, Milano, 2009; M. PELISSERO, *Il concorso nel reato proprio*, Milano, 2004; S. SEMINARA, *Tecniche normative e concorso di persone nel reato*, Milano, 1987; G. INSOLERA, *Problemi di struttura del concorso di persone nel reato*, Milano, 1986; G. MARINI, *Concorso di persone nel reato*, Torino, 1981; L. STORTONI, *Agevolazione e concorso di persone nel reato*, Padova, 1981; T. PADOVANI, *Le ipotesi speciali di concorso nel reato*, Milano, 1973; A.R. LATAGLIATA, *I principi del concorso di persone nel reato*, Napoli, 1962; M. GALLO, *Lineamenti di una teoria sul concorso di persone nel reato*, Milano, 1957; R. DELL'ANDRO, *La fattispecie plurisoggettiva in diritto penale*, Milano, 1956; M. Spasari, *Profili di teoria generale del reato in relazione al concorso di persone nel reato colposo*, Milano, 1956; C. PEDRAZZI, *Il concorso di persone nel reato*, Palermo, 1952.

⁹ On this specific issue, M. HELFER, *Il concorso di più persone nel reato*, Problemi aperti nel sistema unitario italiano, Torino, 2013.

¹⁰ On the English law of complicity, apart from the many criminal law textbooks, see also for further references A. REED, M. BOHLANDER (eds.), *Participation in Crime*, Aldershot (UK), 2013; K.J.M. SMITH, *A Modern Treatise on the Law of Criminal Complicity*, Oxford (UK), 1991; for the perspective of an Italian scholar, see S. VINCIGUERRA, *Diritto penale inglese comparato*, 2nd ed., Padova, 2002, 397.

¹¹ For one of the first comments, see G. BETTIOL, *I lineamenti dell'istituto del concorso di più persone nel reato, secondo il nuovo codice penale italiano*, Modena, 1931.

to which those who take part to the commission of a crime are subjected to the penalties established by the law for that crime. In England, the principle is stated in section 8 of the Accessories and Abettors Act 1861¹², which provides that: «Whosoever shall aid, abet, counsel or procure the commission of any indictable offence¹³ ... shall be liable to be tried, indicted and punished as a principal offender».

The distinction between aiding, abetting, counselling or procuring is not a legislative differentiation between possible degrees of involvement. There is a substantial degree of overlap between the four behaviours, to the extent that it is generally accepted that they might be easily reduced to two: assisting and encouraging¹⁴. These roughly correspond to the two main forms of complicity recognised in Italian criminal law: the material and moral participation in crime (*concorso materiale e morale*). Secondly, there is no statutory connection between the modalities of participation listed in section 8 and the severity of punishment. Common law's typically pragmatic approach makes it a matter of prosecutorial and judicial discretion, allowing for a sentencing flexibility which can punish accessories as severely, more severely or less severely than perpetrators¹⁵. Incidentally, also Italian law provides for a certain judicial discretion in the determination of the punishment of the participants in crime, establishing that instigators, promoters, organisers and directors of the cooperation in crime or persons who uses innocent agents (art. 111 c.p.) can be punished more severely and that, on the contrary, those whose participation has had a minimal importance in the preparation or the commission of the crime and those who have been determined to commit the crime by instigators taking advantage of a particular position can be punished less severely (art. 115 c.p.)¹⁶.

In the English criminal law, accessory liability requires proof of a conduct element accompanied by the necessary mental element¹⁷. The conduct element is that the secondary offender has encouraged or assisted the commission of the offence by the principal. The mental element would be an intention to assist or encourage the commission of the crime, which requires knowledge of any existing facts necessary for it to be criminal¹⁸. The intention

¹² As amended by the Criminal Law Act 1977.

¹³ For summary offences the corresponding provision is in sec. 44 of the Magistrates' Courts Act 1980.

¹⁴ Cf. W. WILSON, *Criminal Law*, 5th ed., Harlow (UK), 2014, ch. 5.

¹⁵ Law Commission's report on *Participating in Crime* (2007) (Law Com 305), par. 2.21.

¹⁶ On these issues, cf. P. SEMERARO, *Concorso di persone nel reato e commisurazione della pena*, Padova, 1986.

¹⁷ *Jogee* at [7].

¹⁸ *Jogee* at [9], citing *National Coal Board v Gamble* [1959] 1 QB 11, *Attorney General v Able* [1984] QB 795, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *Director of Public Prosecutions for Northern Ireland v Maxwell* [1978] 1 WLR 1350. On the mental element in complicity, see A.

to assist or encourage does not need to be specific to a particular offence, but it can be referred to a range of offences. If so, the accessory does not have to know (or intend) in advance the specific form which the crime will take, provided that the offence committed by the principal is within the range of possible offences which the accessory intentionally assisted or encouraged him to commit¹⁹. Similarly, according to Italian criminal law, the liability of participants in crime requires both a conduct and a mental element. The former is some form of (material or moral) contribution to the causation of the crime. The latter includes two components: on the one hand, the intent (*dolo*, which comprises both knowledge and intention) of the crime to be committed; on the other hand, the intention to participate to the commission of that crime together with other parties²⁰. Like in English criminal law, this intention does not need to be specific to a particular offence, but could be referred to a range of alternative offences (so-called *dolo alternativo*).

Neither Italian nor English law requires a previous agreement between the participants in crime.

2.1. *A brief comparison between the Italian law of the concorso anomalo nel reato and the English law of parasitic accessory liability.* – A problem arises as to one party's liability where another party has allegedly gone beyond the scope of the illegal course of conduct to which the former intended to participate.

In Italy such cases fall under the legal framework of the «*reato diverso da quello voluto da taluno dei concorrenti*» (literally, crime different than that wanted by one of the participants)²¹, also called *concorso anomalo* (anomalous complicity) set forth by article 116 c.p., according which, when the committed crime is different than that intended by one of the participants in a criminal enterprise, the latter is liable for such crime together with the actual perpetrator, whenever the harmful event is a consequence of his action or omission. The

SIMESTER, *The Mental Element in Complicity*, in *Law Quarterly Review*, 123, 2006, 578. See also I. Dennis, *The Mental Element for Accessories*, in P. Smith (ed.), *Criminal Law, Essays in Honour of J.C. Smith*, London (UK), 1987, 40.

¹⁹ Maxwell, cit.

²⁰ Cf. G. FIANDACA, E. MUSCO, *Diritto penale*, Parte Generale, 7th ed., Bologna, 2014, 533.

²¹ On the topic, *ex multis*, E. BASILE, *Condotta atipica e imputazione plurisoggettiva: alla ricerca del coefficiente di colpevolezza del concorrente «anomalo»*, in *Riv. it. dir. proc. pen.*, 2015, 1336; S. CANESTRARI, *La responsabilità del partecipe per il reato diverso da quello voluto e il principio di colpevolezza*, in *Studium Iuris*, 1996, 1396; R. STOCCO, *Alla ricerca di una dimensione costituzionale dell'art. 116 c.p.*, in *Cass. pen.*, 1990, 36; G. INSOLERA, *Tentativo di una diversa lettura costituzionale dell'art. 116 c.p.*, in *Riv. it. dir. proc. pen.*, 1978, 1489; A. PAGLIARO, *La responsabilità del partecipe per il reato diverso da quello voluto*, Milano, 1966.

judge can punish less severely the offender who intended to commit a less serious crime than the one actually perpetrated.

Like the English law of parasitic accessory liability, this disposition has always been very problematic with regard to the mental element required for the criminal liability of the participant who did not intend to commit the different crime perpetrated by another party, as it seemed to found such liability on mere causation, without requiring any particular mental state, to the extent that many suspected it to be a case of *responsabilità oggettiva* (strict liability). Such a form of liability contrasts with the Italian Constitution, which, in establishing the principle of personal criminal responsibility (art. 27), forbids any criminal liability for acts ascribable, subjectively and objectively, to others. The Italian Supreme Court (*Corte di cassazione*) and the Constitutional Court²² intervened to prevent that the much-criticised norm could lead to unconstitutional forms of strict liability, by stating that in order for the party to be held criminally liable for the different crime perpetrated by another a coefficient of blameworthiness is still required. This would consist in the possibility for the former offender to contemplate the crime committed by the latter as a logically foreseeable development («*sviluppo logicamente prevedibile*») of the crime that the former intended to commit.

This mental state would be framed within the paradigm of negligence (*colpa*)²³, consisting in the violation of precautionary rules in relying on the activity of others in order to commit the crime originally intended²⁴. The party who did not want the different crime committed by another participant is liable for that crime because he *could* and he *should* have foreseen it and he *could* and *should* have refrained from contributing to it. This liability is founded on foreseeability, rather than on foresight. In fact, Italian courts agree that whenever one of the parties to a criminal venture actually foresees and accepts the risk of the different crime committed by another party, he authorises and intends to participate to that crime, according to the paradigm of *dolo eventuale*, a highly discussed form of intent based on the equation between foresight and acceptance of the risk of a harmful criminal event and intent of causing it. In this case, the party who accepts the risk of a different crime committed by another participant in the criminal enterprise, would be criminally liable according to the general rule set by article 110, as he would be considered to satisfy both the requirements of the conduct

²² Corte cost. n. 42/1965.

²³ Cf. F. BASILE, *Sempre più «colpa» nel concorso c.d. anomalo di persone*, Nota a Cass. sez. I pen. 28 febbraio 2014, n. 9770, in *Giurisprudenza italiana*, 2014, 1485.

²⁴ Cf., for instance, Cass. pen., sez. V, 18/03/2015, n. 44359, sez. I, 15/06/1998, n. 9323, sez. I, 09/11/1995, n. 12740 and sez. I, 07/02/1995, n. 3921.

element and the mental element of intent (*dolo*). The anomaly of the particular case of complicity envisaged by article 116 stays, therefore, in that a criminal liability intentional in nature – and, as such, carrying a more serious stigma and capable of being punished more severely – is attached to a negligent attitude and behaviour²⁵. In other words, the offender who did not intend, nor even foresee the crime different than that originally planned or agreed, is held liable for the different crime as if he intended to commit it, whenever it is considered to be a logically foreseeable ordinary development of the original crime he intended to commit. This implies, however, that liability is excluded whenever the different crime is an exceptional and unpredictable development of the criminal venture as originally intended²⁶.

The framework of the English law of parasitic accessory liability is partly different²⁷.

In his *Crown Law*, firstly published in 1762, Sir Michael Foster suggested an objective test, according to which, unless the principal did totally and substantially varied the original terms of the joint enterprise²⁸, the other party should be criminally liable, as an accessory, for the crime committed by the principal whenever such crime was a «probable consequence of what was ordered or advised»²⁹. This approach bears some resemblance with the current Italian law. But Foster was writing about the law in the mid-18th century. English cases in the 19th century showed a significant change of approach. It became no longer sufficient for the prosecution to prove that the principal's conduct was a probable consequence, in the ordinary course of things, of the criminal enterprise instigated or agreed to by the secondary. The prosecution had to prove that it was part of their common purpose, should the occasion arise. The principle was firstly affirmed in *R v Collison* and later followed by other decisions³⁰.

Particular focus was posed on the evidential relevance of the carrying of a weapon on a criminal venture. In a line of cases the courts recognised that even where there was a joint intent to use weapons to overcome resistance or avoid arrest, the participants might not share an intent to cause death or really serious harm. If the principal had that intent and caused the

²⁵ See T. PADOVANI, *Diritto penale*, 10th ed., Milano, 2012, 303.

²⁶ Cass. pen., sez. I, 29/05/2001, n. 25239 and sez. I, 26/06/1985.

²⁷ On this specific form of liability, see, amongst others, the recent debate between G. VIRGO, *Joint Enterprise Liability is Dead: Long Live Accessorial Liability*, in *Criminal Law Review*, 2012, 850 and P. MIRFIELD, *Guilt by association*, A reply to Professor Virgo, *ivi*, 2013, 577.

²⁸ On joint enterprise, see, amongst others, B. KREBS, *Mens Rea in Joint Enterprise*, A Role for Endorsement?, in *The Cambridge Law Journal*, 74(3), 2015, 480; W. WILSON, D. ORMEROD, *Simply Harsh to Fairly Simple*, Joint Enterprise Reform, in *Criminal Law Review*, 1, 2015, 3; R. BUXTON, *Joint Enterprise*, *ivi*, 4, 2009, 233; M. GILES, *Complicity*, The problems of joint enterprise, *ivi*, June 1990, 383.

²⁹ M. FOSTER, *Crown Law*, 3rd ed., London, 1809, 369-370.

³⁰ *R v Collison* (1831) 4 Car & P 565, *R v Macklin* (1838) 2 Lewin 225, *R v Luck* (1862) 3 F & F 483, *R v Turner* (1864) 4 F & F 339, 341, and *R v Spraggett* [1960] Crim LR 840.

death of another he would be guilty of murder, which requires the intention to kill or cause serious bodily harm. Another party who lacked that intent, but took part in an attack which resulted in an unlawful death, would be not guilty of murder but of manslaughter, which require lesser forms of blameworthiness than murder. However, the courts agreed that when the act which caused the death was «wholly beyond the defendant's contemplation»³¹, so as to be an «overwhelming supervening event»³², then the party lacking the intention to kill or causing serious bodily harm could not be considered as having authorised such event and, therefore, should not be held criminally liable³³.

This framework changed radically with *Chan Wing-Siu*. The three appellants were all convicted of murder of a man and wounding his wife with intent to cause grievous bodily during a robbery in their flat, to which they went each armed with a knife. The Court of appeal dismissed the appeals, as there was overwhelming evidence that the appellants foresaw the likelihood of resistance and that their plan included the possible use of knives to cause serious harm. However, the Privy Council upheld the convictions on the different «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. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal liability lies in participating in the venture with that foresight». Precedents of the Privy Council are not binding on English courts, but the principle was later restated by the House of Lords in *R v Powell and R v English*: «it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm».

The turn in the law was impressive: contemplation (foresight) was not any more evidence of, but equated authorisation (intent). The English system of secondary liability made a step towards the Italian legal system of *concorso anomalo*, by allowing a secondary who did not have any intent (to kill or to cause grievous bodily harm) to be held liable for a crime of intent (murder) committed by another, only because he foresaw the possibility of such crime, instead to being held liable for a crime requiring a lesser form of blameworthiness

³¹ *R v Smith (Wesley)* [1963] 1 WLR 1200.

³² *R v Anderson and R v Morris* [1966] 2 QB 110.

³³ *Smith (Wesley)* cit., *Anderson and Morris*, cit., *R v Betty* (1964) 48 Cr App R 6, and *R v Reid* (1976) 62 Cr App R 109.

(manslaughter) actually attributable to the secondary due to his foresight. Still, the English law differed from the Italian law in that it equated foresight, not foreseeability, to intent.

3. *The Jogee case. The facts.* – With the *Jogee* decision, the UK Supreme Court impresses a new turn – a right one – to the English law of secondary liability.

The decision concerns the joint cases of the appellants *Jogee*³⁴ and *Ruddock*³⁵.

Jogee was convicted at Nottingham Crown Court of the murder of Paul Fyfe. In the early hours of 10 June 2011 the appellant and his co-defendant, Mohammed Hirsi, after having taken drink and drugs and become increasingly intoxicated and aggressive, visited several times Ms Naomi Reid's house, who told them to leave. During the last visit Hirsi entered the house and had an angry confrontation with Mr Fyfe, Ms Reid's boyfriend. From outside, *Jogee* shouted to Hirsi to do something to Mr Fyfe and threatened Mr Fyfe to smash a bottle over his head. Hirsi took a knife from the kitchen and stabbed Fyfe to death.

Ruddock was convicted in the Circuit Court at Montego Bay, Jamaica, of the murder of Peter Robinson, committed by the co-defendant Hudson in the course of robbing him of his station wagon. Under caution, *Ruddock* admitted he was involved in committing the robbery and he was present when Hudson killed the victim but denied to be responsible for the killing.

In each case the direction to the jury derived from *Chan Wing-Siu* and *Powell and English*, as the trial judges directed the jury that the defendants were guilty of murder if they took part, respectively, in the attack and the robbery and knew that it was possible that the respective co-defendants might act as they did with intent to cause serious harm or kill.

3.1. *The decision.* – According to Law Lords, with *Chan Wing-Siu* the law «took a wrong turn». The *Chan Wing-Siu* principle cannot be supported, as its introduction was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments. Moreover, far from being well-established and working satisfactorily, the principle remained highly controversial and a source of difficulty for trial judges, leading to large numbers of appeals.

In *Jogee* the Supreme Court conducted a far deeper and more extensive review of the topic of so-called joint enterprise liability than on past occasions. In *Chan Wing-Siu* only two

³⁴ On appeal from [2013] EWCA Crim 1433.

³⁵ On appeal from the Court of Appeal of Jamaica.

English cases were referred to in the judgment – *Anderson and Morris* and *Davies*³⁶. More were referred to in *Powell and English*, but they did not include (among others) *Collison*, *Skeet*, *Spraggett* or *Reid*, which, according to the Law Lords, did not support the *Chan Wing-Siu* principle. Indeed, these decisions represented a «progressive move away from the historic tendency of the common law to presume as a matter of law that the “natural and probable consequences” of a man’s act were intended, culminating in England and Wales in its statutory removal by section 8 of the Criminal Justice Act 1967». Since then, in the common law foresight may be evidence of intention, but it is not synonymous with it. Its adoption as a test for the mental element for murder in the case of a secondary party «is a serious and anomalous departure from the basic rule». «Murder already has a relatively low *mens rea* threshold, because it includes an intention to cause serious injury, without intent to kill or to cause risk to life. The *Chan Wing-Siu* principle extends liability for murder to a secondary party on the basis of a still lesser degree of culpability, namely foresight only of the possibility that the principal may commit murder but without there being any need for intention to assist him to do so».

The Supreme Court clarifies that, as the doctrine of secondary liability is a common law doctrine and it has been unduly widened by the courts, it is proper for the courts, rather than Parliament, to correct the error. However, such a correction is consistent with Parliament’s approach both in section 8 of the Criminal Justice Act 1967 (referred above) and in section 44(2) of the Serious Crime Act 2007, which, in introducing the inchoate offence of intentionally encouraging or assisting crime, expressly provides that a person who does an act capable of encouraging or assisting the commission of an offence «is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act».

3.2. *The principles of secondary liability as restated by the Supreme Court.* – The UK Supreme Court used this occasion to restate, as nearly and clearly as possible, the principles of secondary liability, which can be summarised and systematised as follows.

1) Prosecution does not need to prove whether a defendant was principal or accessory. It is sufficient to prove that he participated in the crime in one way or another.

2) The requisite conduct element is that the secondary has assisted or encouraged the commission of the crime. Such participation may take many forms. Association with the

³⁶ *Davies v Director of Public Prosecutions* [1954] AC 378.

principal and the presence at the scene of the crime are likely to be very relevant evidence that assistance or encouragement was provided. Nevertheless, neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts³⁷.

3) Once encouragement or assistance is proved to have been given, the prosecution does not need to prove that it had a positive effect on the principal's conduct or on the outcome³⁸.

4) The requisite mental element is an intention to assist or encourage the principal to commit the crime, acting with whatever mental element the offence requires of the principal.

5) Intention to assist is not the same as desiring the crime to be committed. On the contrary, the intention to assist, and indeed the intention that the crime should be committed, may be conditional. It is a question of fact for the jury to infer from the facts and circumstances proved whether the principal's act was within the scope of the plan to which the secondary gave his assent and intentional support – that is, whether the secondary expressly or tacitly agreed to a common purpose to commit a crime which included the principal going as far as he did, and committing another crime, if the occasion arose.

6) Liability as an aider or abettor does not necessarily depend on there being some form of agreement between the defendants; it depends on proof of intentional assistance or encouragement, conditional or otherwise. If a person joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if the principal acts with intent to cause serious bodily injury and death results, both he and the secondary will each be guilty of murder. 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, or if he participates 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, he will be not guilty of murder but guilty of manslaughter³⁹. The test is objective.

7) 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 death⁴⁰.

³⁷ *R v Coney* (1882) 8 QBD 534, 540, 558.

³⁸ *R v Calhaem* [1985] QB 808.

³⁹ *R v Church* [1965] 1 QB 59, approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5.

⁴⁰ *Smith (Wesley)*, cit. and *Anderson and R v Morris*, cit.

8) This type of case apart, what matters is whether the secondary encouraged or assisted the crime. 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 the principal has in his possession. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what the secondary knew of what weapon the principal was carrying can and should give way to an examination of whether the secondary intended to assist in the crime charged.

9) Where the offence charged does not require *mens rea*, the only *mens rea* required of the secondary party is that he intended to encourage or assist the perpetrator to do the prohibited act, with knowledge of any facts and circumstances necessary for it to be a prohibited act⁴¹.

3.3. *The effect of the Jogee decision on past convictions.* – The decision inevitably carries important issues of inter-temporal law, which is not possible here to consider extensively.

In short, in the Supreme Court's words, the effect of «putting the law right» is not to render invalid all convictions arrived at over many years by applying the law as laid down in *Chan Wing-Siu* and in *Powell and English*. The error identified is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. However, the Court of Appeal will not grant leave simply because the law applied has now been declared to have been mistaken. According to a principle consistently applied by English courts for many years, the fact that there has been an apparent change in the law or that previous misconceptions have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction⁴².

As for the two particular cases of *Jogee* and *Ruddock*, the convictions for murder must, of course, be set aside because the law was wrongly understood and the appeals were brought in time. Nevertheless, in *Jogee* the Court considered that he was unquestionably guilty at least of manslaughter and there was evidence on which the jury could have found him guilty of murder on a proper direction (as he was brandishing a bottle and shouting encouragement to his co-defendant at the scene). Therefore, after having received and considered from both

⁴¹ *National Coal Board v Gamble*, cit.

⁴² *Mitchell* (1977) 65 Cr App R 185, 189, but see also *Ramsden* [1972] Crim LR 547; *Hawkins* [1997] 1 Cr App R 234 (Lord Bingham CJ) and *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2007] 1 WLR 3262 (Sir Igor Judge P) together with the cases reviewed in *R v R* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150.

parties whether there should be a re-trial for murder or whether the conviction for murder should be replaced by a conviction for manslaughter, in April 2016 the Court has issued an order directing that Jøgee will be re-tried on the charge of murder (with the included alternative of manslaughter)⁴³.

In *Ruddock*, apart from the direction based on the *Chan Wing-Siu* principle, the summing up of the case by the trial judge to the jury was affected by other, unrelated problems. Now that the correct position in law has been identified, the Court deemed it unnecessary to consider further the consequences of the other defects on the safety of the conviction and asked for written submissions from both sides, as to what should be the appropriate disposal of the appeal.

4. *Conclusions.* – The *Jøgee* judgement is a very welcomed counter-revolution after the revolution of *Chan Wing-Siu*. It sets the English law of secondary liability straight, after the distortion created by the latter. It corrects what the Law Lords considered to be a «striking anomaly», and should be regarded as a proper injustice, as the previous law ended up in requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal, while holding both liable for the same crime of intent. This created unjustified disparity, on the one hand, between the secondary and the principal and, on the other hand, between the rule for parasitic accessory liability and the rule secondary parties in other cases of complicity, which require the intention to assist or encourage the principal to commit the crime.

In *Jøgee* the Court brought the mental element of the secondary party back into broad parity with what is required of the principal with effect of narrowing the criminal law by demolishing a head of accessory liability⁴⁴, without necessarily weakening the preventive and retributive effect of the law of secondary liability. The Court explicitly dismissed the policy arguments, advanced in *Chan Wing-Siu*, based on the need that co-adventurers in crimes which result in fatality should not escape conviction, as they did not consider that, in any event, the secondary parties would generally be guilty of manslaughter, which carries a potential sentence of life imprisonment. The fundamental policy question is rather whether and why it was necessary and appropriate to reclassify such conduct as murder rather than manslaughter – which involves, among other things, questions about fair labelling and fair discrimination in sentencing.

⁴³ See <https://www.supremecourt.uk/news/r-v-jøgee-retrial.html>.

⁴⁴ J.R. SPENCER, *Jøgee: the “parasite” excised*, in *Archbold Review*, 3, 2016, Andover (UK), 4.

The *Jogee* case might be also an occasion to rethink the Italian law of *concorso anomalo*.

Before *Jogee*, such law presented both elements of similarity and of differentiation with the English law of parasitic accessory liability. The similarity consisted in that both legal frameworks give raise to the «anomaly» of requiring a lower mental threshold for guilt in the case of one party than in the case of the other participant. The difference consisted in that, unlike Italian law, the English law based on *Chan Wing-Siu* did equated foresight, not foreseeability, with intention. After the intervention of the UK Supreme Court in *Jogee*, the anomalous and unjust attachment of liability for a crime of intent to the participant who did not perpetrate it, nor actually wanted or foresaw it, remains only in the Italian law of *concorso anomalo*, but the clarification by the Law Lords that the test for the responsibility of the secondary is objective – that is, based on what a reasonable person would foresee – correctly allows for his liability to be founded on foreseeability, other than foresight.

The *Jogee* decision prompts important questions on the justness of the Italian law of *concorso anomalo*. If, as acknowledged by Italian courts, the mental state of the participant who did not intend the crime committed by another party is negligence, then the time might have come for the Italian Parliament to change the law by differentiating the nature of the liability of each of the parties involved in a criminal enterprise according to the actual mental element they had with respect to the crimes committed. This would imply the possibility of considering the participants in the same crime guilty of two different criminal offences: respectively of a crime of intent (for the perpetrator who intended it) and the corresponding crime of negligence, if any (for the party who should have foreseen it). For instance, in a case of homicide, the perpetrator who intends to kill beyond the scope of the common criminal venture should be held guilty of intentional homicide (art. 575 c.p.), while the participant whose moral or material contribution to that crime is merely negligent should be held guilty of negligent homicide (*omicidio colposo*, art. 589 c.p.). This might put in crisis the dogmatic purity of the idea of qualifying the same fact as one single offence, but it would eliminate the injustice brought by a form of liability clearly bearing the mark of *responsabilità oggettiva* and, however, perceived and even labelled as «anomalous».