SWEET & MAXWELL

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Archbold Review

Cases in Brief

Investigation—judicial review of—thresholds—application—rationality of decision making—European Convention on Human Rights Art.8—proportionality—disclosure—common law—EU Directive 2012/13/EU

R (SOMA OIL AND GAS LTD) v DIRECTOR OF THE SFO [2016] EWHC 2471 (Admin); October 12, 2016

S, a company engaged in oil and gas exploration in Somalia, sought judicial review in respect of the investigation by the SFO of "capacity building" payments made in Somalia and certain "other strands" of inquiry that had subsequently arisen. Leave was refused at a rolled-up hearing.

(1) Even if the SFO had not, in a "unique exception" to its usual policy, written to S to the effect that there was currently (August 2016) insufficient evidence to found any realistic prospect of conviction of S in respect of the capacity building payments, there would be no prospect of a mandatory order that the investigation be terminated, or alternatively that a final decision be taken. First, challenges to *prosecutors* could only be advanced on narrow grounds and would only rarely succeed: *R(L) v DPP* [2013] EWHC 1752; [2013] 177 JP 502, [3] – [7]; *Chaudhry* [2016] EWHC 2447 (Admin) and cases there cited). It was, if anything, still more difficult to challenge the decision of *investigators*: the discretion allowed to the Director of the SFO by Criminal Justice Act 1987 s.1(3) was very wide. While the authorities did not preclude a challenge to the SFO's discretion, they spoke with a consistent voice in lending no encouragement to such challenges: *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756; *R (Bermingham) v Director of SFO* [2006] EWHC 200 (Admin); [2007] 2 WLR 635; and – particularly relevant to these circumstances – *C* [2006] EWHC 2352 (Admin). There was nothing about the conduct of the investigation that would have persuaded the Court that this case was "wholly exceptional" (*Bermingham*) or "most exceptional" (*C*), so as to warrant the Court's intervention. It was accepted that the SFO was acting in good faith. There had been no undue delay and, constitutionally, intervention by the Court would amount to a "blurring of the separate roles" of Court and SFO (*C*). Secondly, S faced a very high threshold to show (as it pleaded) that not concluding the investigation was irrational, the Court adopting the working definition of irrationality in *De Smith's Judicial Review* (7th ed), para.11-036 ("lacking ostensible logic or comprehensible justification"). There was nothing whatever irrational about either the commencement or the continuation of the investigation. Thirdly, even assuming (without deciding) that the investigation engaged S's European Convention on Human Rights Art.8 rights (and thus not entering into the controversy between Lord Hoffman in *R v G* [2008] UKHL 37, [10] and the Court of Appeal in *SXH v Crown Prosecution Service* [2014] EWCA Civ 90, [71] and [79]), the same considerations that told against a review of an investigator's decision were highly likely to support the argument that any such interference was justified under Art.8(2). As to proportionality, the papers showed that the SFO, far from approaching the matter in generic terms, had been very much alive to the position of S. It could not be said, as S contended, that the proportionality calculus involved weighing the severe consequences for S against the lack of any prejudice if the investigation were ended, given the compelling rebuttal provided by S – that was an easy proposition for S to assert at the outset, but one that required careful consideration by the SFO. Further, the fact of the "unique exception" letter showed the proportionality of the SFO's approach.

(2) In respect of the "other strands", there was no basis to compel the SFO to make further disclosure of a continuing investigation into serious crime. There was no common law right to compel further disclosure. *R (Kent Pharmaceuticals*

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Ltd) v Serious Fraud Office [2005] 1 WLR 1302, an authority concerned with disclosure by the SFO to another government department of seized documents, did not assist S in relation to disclosure of lines of inquiry in a continuing investigation with foreign and sensitive aspects. S relied on EU Directive 2012/13/EU on the rights of an accused or suspected person, particularly Art.6(1) (member state to "ensure that suspects…are provided with information about the criminal act they are suspected…of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence"). Even assuming (without deciding) direct effect, as recital (28) made clear, information was to be provided "without prejudicing the course of ongoing investigations". Art.6(1) said nothing about providing information about investigative lines of inquiry.

Prosecution appeal—which of two rulings was appeal effectively against; liability of corporations—identification principle—conspiracy—application—where controlling mind may have more than capacity

A LTD, X AND Y [2016] EWCA Crim 1469; July 28, 2016

A Ltd, a company incorporated in the jurisdiction but a member of a multinational group, its Chairman and Chief Executive X and Y, the manager of a foreign subsidiary of the group, were charged with paying bribes to foreign organisations.

(1) The Court rejected an argument that a prosecution appeal under the Criminal Justice Act 2003 s.58 was out of time because a ruling at an earlier hearing governed the substance of the issues and the ruling at the second hearing purportedly the subject of the appeal merely applied the first ruling. The contention rested on a dispute as to the proper analysis of the first of the two rulings; either it amounted to a rejection of an application to exclude evidence of two alleged conspirators not before the court under Police and Criminal Evidence Act s.78, during which the judge set out the principles governing the admissibility of acts or declarations in furtherance of a common design as set out in *Archbold 2016* paras 33-63 to 33-66; or the judge exercised his discretion under s.78 to limit the evidence available to the prosecution by reference to the three-pronged test set out in *Archbold 2016* para 33-66 (that the judge must be satisfied that the act or declaration (a) was made by a conspirator, (b) was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and (c) there was some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement); and in the second ruling, merely applied that ruling to exclude certain evidence. Analysing the terms of both rulings, the Court concluded that the second ruling was a ruling within the meaning of s.75 of the 2003 Act ("a decision, determination, direction, finding, notice, order, refusal, rejection or requirement"), notwithstanding that the genesis of some of the reasoning of the second ruling could be found in the first. Whilst the judge cited extensively from the first ruling in the second, the subject matter of the two rulings was, as a matter of fact, materially different. The Court emphasised that this conclusion was not to encourage attempts to re-run arguments that have been unsuccessful in an effort to generate a late appeal.

(2) The judge, in the second ruling, wrongly ruled inadmissible evidence of diary entries written by B, a director of A Ltd who was not before the court. It was not contested that B was a controlling mind of A Ltd (as was X). In concluding that the diary entries were not acts or declarations in furtherance of the conspiracy and were not admissible against A Ltd to prove its guilt by the identification principle, the judge elided the quite separate concepts of the identification principle and the three-pronged test in *Archbold 2016* para.33-66 governing the admissibility of acts and declarations made by one co-conspirator in the absence of another. According to the analysis in *St Regis Paper Co Ltd* [2012] Cr.App.R 14, the identification principle, by which corporate bodies are deemed to act and acquire knowledge through those individuals who can be identified as their directing minds, remained that stated in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, in relation to offences requiring proof of *mens rea* (and see *Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* [1915] AC 705). In this case, the Crown sought to prove the guilt of A Ltd by relying on B's diary entries to prove his guilty state of mind and knowledge, which were to be imputed to the company by means of the identification principle. The acts and declarations of one conspirator in furtherance of the common design may be admissible against a co-conspirator. Where the purpose of the admission of such acts or declarations was to prove the involvement of a co-conspirator not present when the things were said or done, the narrower three-pronged test was to be applied. The judge erred by considering the evidence only through the prism of co-conspirators. A director and a corporation comprise separate legal personalities and, if only one mind is involved, they cannot in law conspire together (*McDonnell* [1966] 1 QB 233). But the situation here was different. There was no question of only one human mind being implicated and the evidence of the directing minds was admissible as direct evidence as against A Ltd. The only relevant principle or test to be applied as between B and A Ltd was the identification principle. Proof of the guilt of the directing mind was probative of the guilt of the corporation. Thus, insofar as the diary entries of B were probative of his guilty state of mind at the relevant time, they were relevant and admissible to prove the guilt of A Ltd. The judge should have admitted the diary entries of B on this simple basis. It followed that the three-pronged test had no application to the direct evidence against A Ltd. The company argued that, although B may have been acting as the directing mind of A Ltd when he was acting in his capacity as a director of A Ltd, he was not acting as the directing mind of A Ltd when he was acting in his capacity as the head of the compliance department of a parent or associate company (a role he performed). This was true, but did not assist A Ltd. The critical question was to examine the knowledge and state of mind of B when acting for A Ltd. That is not confined only to such knowledge and other mental elements as he may have acquired while acting for A Ltd. He brought to his actions on behalf of A Ltd all the knowledge which he had by then acquired, in whatever capacity. It would be absurd to suggest that, although he formed an intention to pay a bribe while acting as head of compliance for a parent or associated company, this intention was to be ignored when, acting as a director of A Ltd, he put that intention into practice.

Prosecution—Criminal Justice Act 2003 Pt.3—conditional cautions—interpretation of apparent prohibition in respect of domestic violence cases—proper interpretation

R (ROBSON) v CPS [2016] EWHC 2191 (Admin); 29 July 2016

The prosecution declined to conditionally caution R under Pt.3 of the Criminal Justice Act 2003, rather than prosecute her for criminal damage, solely because they considered that the offence constituted domestic violence against her ex-partner. The relevant document recording the decision stated that "a conditional caution cannot be applied in DV matters". The Director's Guidance on Adult Conditional Cautions (7th ed, April 2013) stated in mandatory terms that a conditional caution may not be offered in such circumstances (the court also referred to the Conditional Cautioning Code of Practice made under s.25 of the 2003 Act, which, it said, provided that "careful account" should be given to other current guidance; and to the Domestic Abuse Guidelines to Prosecutors). There was nothing in the Act, or the Code made under it, which precluded the availability of conditional cautions in cases of domestic violence or abuse – the prohibition came only from the Director's Guidance. The Guidance in turn took a very wide definition of "domestic violence" from the Domestic Abuse Guidelines, which, taken with the clear prescriptive terms of the prohibition in the Director's Guidance, meant that a wide range of offences were thereby excluded from the conditional caution regime. Neither the terms of the Act nor the statutory Code of Practice supported such a mandatory rule. Prosecutorial judgement was for the DPP: *R(E), R(S and R) v DPP* [2012] [2011] EWHC 1465 (Admin), 1 Cr.App.R 6, and the grounds upon which a challenge might be successful were narrow, having regard to the constitutional significance of the independence of the CPS (see e.g. *L v DPP and Commissioner of Police for the Metropolis* [2013] EWHC 1752 (Admin); 177 JP 501). The challenge in this case was only permissible because its underlying nature was a challenge to the lawfulness of the Director's Guidance. As counsel for the CPS accepted, the Director's Guidance and the Domestic Abuse Guidelines had created an inflexible rule. It was a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of the decision maker (see, e.g. *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2011] 1 AC 245, [21] and *R v Home Secretary, ex parte Venables* [1998] AC 407, 496H-497C). The policy-maker otherwise exceeded the discretionary powers accorded by the statute. The fact that the CPS had been conducting a pilot study of a form of conditional caution in domestic violence cases in some areas showed that, in fact, the DPP did not interpret the Director's Guidance as absolute. It was accordingly not necessary to interpret the Guidance and Guidelines in so inflexible a way as to make them unlawful. Rather, they must be interpreted as including, by necessary implication, words which permit of exceptions. They should be interpreted as (at least) specifying that a conditional caution would rarely be appropriate in a domestic violence case where the evidential test for Crown prosecutors was satisfied (as specified in the Guidance on Simple Cautions for Adult Offenders). In R's case, it was clear that the decision-maker interpreted the Director's Guidance as permitting no exceptions, which amounted to a misinterpretation of the policy, and the decision was quashed.

Sexual offences—sexual behaviour—Youth Justice and Criminal Evidence Act 1999 s.41—whether defence bound by complainant's answers to questions about sexual behaviour going to credibility

EVANS [2016] EWCA Crim 452; April 21, 2016

On a reference from the CCRC, E, who had been convicted of rape, sought to admit fresh evidence of a complainant's sexual behaviour as relevant to consent under the Youth Justice and Criminal Evidence Act 1999 s.41(3)(c). The prosecution were wrong to argue that s.41 should be interpreted to mean that even if a judge ruled that questions about a complainant's sexual conduct with other men was admissible, the defence would be bound by her answers: they would not be able to call evidence about her sexual conduct because the evidence would go to her credit, and a "collateral issue". If the proposed questioning of the witness or the evidence the defence sought to adduce went *solely or mainly* to the issue of credibility, it would be prohibited by s.41(4). To an extent, any challenge to a complainant's evidence involved an attack upon her credibility. To obtain leave under s.41, the defence must satisfy the judge that the provisions of s.41(3) or (5) obtained, and that if leave were refused a subsequent conviction would be unsafe. Thus, it was only if the proposed questioning and evidence of specific instances of sexual behaviour related to a relevant issue and either did not go to the issue of consent under s.41(3)(a) or did go to the issue of consent and the requirements of s.41(3)(b), (c)(i), or (c)(ii) were fulfilled that a judge may give leave. If the judge gave leave the section made clear provision for the asking of questions and the calling of evidence. The defence could not possibly be "bound" by the complainant's answers.

SENTENCING CASE

Historic sexual offending

FORBES [2016] EWCA Crim 1388, September 12 2016

Considering several appeals that each concerned sentencing for historic sexual offences, the Court of Appeal affirmed the guidance given in Annex B of the Definitive Guideline on Sexual Offences (2013).

Annex B codified the guidance given in *H* [2011] EWCA Crim 2753. The Court of Appeal stated that the Annex was a convenient statement of the applicable principles which, subject to a caveat concerning the relevance of the offender's immaturity (see below), a court should apply without reference to *H* or other cases. The Court went on to state the following general principles:

The basic principles

(i) The offender must be sentenced in accordance with the regime applicable at the date of sentence.

(ii) The sentence that can be passed is limited to the maximum sentence available at the time of the commission of the offence, unless the maximum has been reduced, when the lower maximum will apply.

Regard to the guidelines for the equivalent offence

Paragraph 3 of Annex B requires the court to have regard to any applicable sentencing guidelines for equivalent of-

fences under the Sexual Offences Act 2003. A court should have regard to the maximum sentence applicable to the offence and not simply mechanically apply guidelines premised on much higher maximum sentences. The duty of the court under s.125 (1) (a) of the Coroners and Criminal Justice Act 2009 to "follow" guidelines only applies to offences committed after the Act came into force on 6 April 2010.
The judge must first select the relevant guideline and then determine the sentence having regard to that guideline as adjusted by reference to the maximum sentence applicable to the offence. The judge should not attempt to construct an alternative notional sentencing guideline. Occasionally, the court should look at more than one guideline to determine the appropriate sentence.

The type of sentence: Article 7
The court is not concerned to ascertain what the appropriate sentence would have been if the case had been tried shortly after commission of the offence; it is concerned to ascertain the statutory maximum. There may be rare cases where a broader inquiry is necessary (for example, see the circumstances of the appellant BD, discussed at [13]).

Assessment of culpability
The guidelines state relevant aggravating or mitigating factors. To avoid double counting, the court must bear in mind that the starting points will reflect the essential gravity of the offence.

Abuse of trust
The phrase "abuse of trust", as used in the guideline, connotes something more than relationships where, in a colloquial sense, a young child's parents would trust another individual (for example, a cousin, other relation or a neighbour). Mere association or one sibling being older than another does not necessarily amount to breach of trust in this context.
What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found. Examples of relationships in which a breach of trust may occur are given at para.[18] of the judgment.

Immaturity
Paragraph 9 of Annex B provides that the offender's immaturity at the time of the offence may amount to personal mitigation. The Court of Appeal preferred the view expressed in *H* at para.[47(c)] that immaturity is instead relevant to the assessment of culpability. In assessing such culpability, it is necessary to consider all the facts and reach an overall assessment.
In the absence of reliable evidence regarding the offender's maturity when he committed the offences, the maturity of a youth should be assessed by reference to the maturity of a youth of the offender's age at the material time.

When sentencing an adult offender, the Youth Guidelines and Part 7 of the original Sentencing Guidance Council Sexual Offences guideline are not generally applicable as they assume the offender is still a youth. Their relevance in these circumstances is confined to the emphasis placed on the significance of immaturity at the time of the offending to their culpability. They are not relevant for any other purpose. *GB* [2015] EWCA Crim 1501 (noted by Falk in Issue 2) should not be followed.

Good character since the offences
Paragraph 8 of Annex B provides that where there is an absence of further offending over a long period of time, especially combined with evidence of good character, this may be a mitigating factor. However, previous good character/exemplary conduct is different from having no previous convictions. The more serious the offence, the less weight that should normally be attributed to this factor. Where previous good character/exemplary conduct facilitated the offence, this mitigation should not normally be allowed and may constitute an aggravating factor.

Assessment of harm caused
Paragraph 6 of Annex B provides that the court must assess carefully the harm done to the victim, which can be devastating. However the starting points and sentencing ranges provide for harm which is the inevitable effect of this type of serious criminal behaviour. There has to be significantly more before harm is deemed a further aggravating factor and/or before a judge finds there has been extremely severe psychological or physical harm.

Relevance of the passage of time
Paragraph 7 of Annex B provides that the court must consider the passage of time carefully as it can aggravate or mitigate seriousness. Passage of time where there are threats or attempts to discourage the complainant from reporting the offence is not a mitigating factor of any material weight.

The importance of specifying the criminality in the indictment and taking care in framing charges.
It is the duty of the prosecution to reflect the criminality alleged in the counts on the indictment and to provide the judge with appropriate sentencing powers.

Section 236A of the Criminal Justice Act 2003
Where s.236A of the Criminal Justice Act 2003 applies, the judge should impose an additional one year period of licence beyond that normally applying. Section 11 (3) of the Criminal Appeal Act 1968 will prevent the Court of Appeal imposing such an additional licence period where the application or the appeal is dismissed.

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Features

Misconduct in public office – the Law Commission's review

By Justine Davidge[1]

The Consultation Paper, *Reforming Misconduct in Public Office,* begins the Law Commission's second phase of consultation and sets out options for what the law of misconduct in public office should be.

In January 2016, the Law Commission published a background paper *Misconduct in Public Office: Issues Paper 1 – The Current Law*. That paper began our first phase of consultation: setting out the current law and the problems associated with it.

In general, consultees who responded to the background paper agreed that the boundaries of the offence are fundamentally unclear. The limitations on holding public officials accountable via the criminal law for misconduct committed in connection with their official duties is clearly a matter of legitimate public interest.

The current offence

Misconduct in public office is a common law offence of indeterminate age. The leading modern case of *Attorney General's Reference (No 3 of 2003)*[2] ("AG's Reference") stated that the elements of the offence are:

(1) a public officer acting as such;

(2) who wilfully neglects to perform his duty and/or wilfully misconducts himself;

(3) to such a degree as to amount to an abuse of the public's trust in the office holder; and

(4) without reasonable excuse or justification.

The Law Commission's approach to reform

The Consultation Paper sets out the Law Commission's view that the underlying issue tying together the problems with the current offence is that it is not clear what mischief the current offence targets and therefore what form the offence should take. In order to identify the relevant mischief, the Law Commission has sought, first, to untangle the underlying harms and wrongs within the types of conduct the offence is used to prosecute. The reform proposals in the Consultation Paper are built on the harms and wrongs that arguably justify criminal sanction.

Second, the Law Commission has attempted to devise a more rigorous definition of public office for the purpose of any new statutory offence or offences to replace the common law offence.

The options for reform

The Law Commission's approach has led to proposals for two possible new offences to replace the current offence of misconduct in public office. Both offences seek to prevent types of harm to the public interest.

(1) Option 1 involves a new offence addressing breaches of duty that risk causing serious harm, when committed by particular public office holders (those with duties concerned with the prevention of harm). This option is based on the wrongs of breach of trust (in the sense of a failure to perform a duty as expected) and negative misgovernment (failure to exercise state power when required).

(2) Option 2 involves a new offence addressing corrupt behaviour on the part of all public office holders. This option is based on the wrongs of breach of trust (in the sense of abuse of position for personal advantage and/or causing detriment to another) and positive misgovernment (abuse of state power).

The Law Commission invites views on whether either or both options are desirable as a replacement for misconduct in public office.

The Law Commission also includes a third option within its consultation. Option 3 involves abolition of the current law without replacement. At this stage, it is the Law Commission's view that reform of this nature would be likely to leave unacceptable gaps in the law.

Public office

Both Options 1 and 2 apply to public office holders only. The Law Commission explains that any new offence replacing misconduct in public office will still need to be underpinned by this concept. There are three reasons for this:

(1) There are two overlapping wrongs to be addressed by the offence: breach of trust and misgovernment. The latter wrong is limited to individuals who perform state functions.

(2) Public office is a good indicator that an individual is in a position of public trust (which is a wider concept than public office) and that a risk of public harm is likely to arise if he or she breaches that trust. In addition, public office may serve to aggravate the harms and wrongs arising from a breach of public trust.

(3) For reasons of legal certainty, it may be necessary to define with precision a category of potential offenders even though the underlying rationale of the offence may also apply in some cases outside that category.

However, not every new offence proposed to replace misconduct in public office needs to apply to all public office holders. This is the case with Option 1, which would only apply to a subset of public office holders with duties concerned with the prevention of harm.

It was highlighted in the Law Commission's background paper that the current, vague definition of public office is a major problem with the current offence. Many prosecutions for misconduct in public office result in legal challenges at trial and on appeal as to whether the defendant is in public office. In at least one case it has been argued that the uncertainty renders the offence so vague as to infringe

1 Law Commission lawyer.
2 ([2004] EWCA Crim 868; [2005] QB 73).

Art.7 of the European Convention on Human Rights.
Therefore the Consultation Paper discusses four possible methods of defining public office more rigorously. The Law Commission provisionally considers that public office could be most effectively defined as a position involving a public function associated with a state or public power; or a position involving a public function which the office holder is obliged to exercise in good faith, impartially or as a public trust.
The Law Commission also considers the separate question of how the definition of public office should be reflected in statute, once one of these four approaches has been adopted. One possibility is that the statutory definition of public office should take the form of a general definition, perhaps supplemented by a non-exhaustive list of indicative examples of functions or offices. Alternatively, an exhaustive list of specific functions or specific offices could be prescribed.

Responses to the consultation
The Consultation Paper and associated documents can be downloaded from *www.lawcom.gov.uk/project/misconduct-in-public-office*. The consultation is open until **28 November 2016.** Responses can be sent to misconduct@lawcommission.gsi.gov.uk.

The Relationship Between Inchoate and Accessorial Liability after *Jogee*

By Professor Graham Virgo[1]

Whilst the decision of the Supreme Court in *Jogee and Ruddock*[2] is of profound importance to the operation of the law on accessorial liability, certain dicta in the case, relating to the operation of the inchoate offences involving assisting and encouraging a crime contrary to the Serious Crime Act 2007, reveal both a serious misunderstanding about the nature of those offences and a significant disconnect between the function of inchoate offences and accessorial liability. This raises the possibility that the inchoate offences could in future be deployed by the prosecution to avoid the Supreme Court's restrictive interpretation of accessorial liability.

What did *Jogee* decide?
The Supreme Court in *Jogee* overruled earlier decisions of the Privy Council[3] and the House of Lords,[4] which had recognised that foresight of the commission of a crime was a sufficient substantive mental element for accessorial liability, and confirmed that the relevant mental element is instead that the accessory intended to assist or encourage the commission of the crime committed by the principal, which requires knowledge of any facts which render the conduct criminal.[5] It was, however, acknowledged that foresight of such facts on the part of the accessory is evidence from which the relevant intention might be, but need not be, inferred.
There may in fact still be circumstances where foresight remains of substantive significance, notably where the accessory intentionally assists or encourages the principal to commit one of a range of possible offences, knowing that an offence will be committed but is not sure which. This is illustrated by the decision of the House of Lords in *DPP v Maxwell*,[6] which was confirmed by the Supreme Court. In *Maxwell* the defendant was a member of a terrorist organisation who guided a car containing other members of the organisation to an inn. The defendant knew that the others were intending to commit a violent attack at the inn, but he did not know whether this would be bombing of property or people or shooting. Despite this he was convicted of being an accessory to the bombing which occurred. Although the Supreme Court in *Jogee* considered that *Maxwell* was an example of a case where the accessory knew all relevant facts which made the principal's conduct criminal, in fact the accessory knew only that there would be a crime committed, and was reckless as regards the crime which was actually committed. Whilst such recklessness is now, after *Jogee*, to be treated only as evidence of intention that the crime be committed, the finding of intention should be treated as inevitable where the accessory knew that one of a range of criminal offences will be committed but foresaw that the specific crime would be committed.
Despite this particular complexity where the accessory does not intend to assist or encourage the commission of a particular offence, the general approach of the Supreme Court is to treat foresight as being only of evidential significance to establish the necessary intention for accessorial liability. The Supreme Court sought to justify this renewed focus on the substantive requirement of intention by reference to s.44 of the Serious Crime Act 2007. Lords Hughes and Toulson recognised[7]

> "that Parliament has provided that foresight is not sufficient *mens rea* for the offence of intentionally encouraging or assisting another to commit an offence".

It is true that s.44 creates an offence where the defendant commits an act which is capable of encouraging or assisting the commission of an offence which he intends to encourage or assist, and s.44(2) states that the defendant is not be taken to have intended to encourage or assist the commission of a crime merely because "such encouragement or assistance was a foreseeable consequence of his act". But the operation of s.44 is more complex than the Supreme Court suggests, because, as will be examined in the next section, recklessness is specifically recognised as a substantive mental element for s.44, so it is incorrect for the Supreme Court to indicate that Parliament has stated that foresight is not sufficient *mens rea* for the s.44 offence.

1 Faculty of Law, University of Cambridge.
2 *Jogee* [2016] UKSC 8; *Ruddock* [2016] UKPC 7, [2016] 2 WLR 681.
3 *Chan Wing-Siu* [1985] AC 168.
4 *Powell and English* [1999] 1 AC 1.
5 *Jogee* [2016] UKSC 8; *Ruddock* [2016] UKPC 7, [2016] 2 WLR 681, [14]. See also [87].
6 [1978] 1 WLR 1350.
7 *Jogee* [2016] UKSC 8; *Ruddock* [2016] UKPC 7, [2016] 2 WLR 681, [86].

Foresight generally, and recklessness in particular, have been recognised at different times as being sufficient to establish all forms of inchoate liability. Each form of inchoate liability needs to be considered separately to determine whether there remains any significant difference of approach between accessorial and inchoate liability as regards the role of foresight.

Relevance of foresight in the inchoate offences

(a) Encouraging and assisting

The three inchoate offences created by Pt.II of the Serious Crime Act 2007 are notoriously convoluted. Whilst on the face of ss.44-46 the relevant mental element is an intention or belief that the defendant's act will assist or encourage the commission of a substantive offence, this must be read subject to s.47(5). Paragraph (a) applies where the relevant substantive offence is one which requires proof of fault, in which case it will be necessary to prove an additional mental element on the part of the defendant, namely that:

(i) the defendant believed that the act committed by the other party would be done with the necessary mental element for that substantive offence;

(ii) recklessness as to whether the other party would have the relevant mental element for the substantive offence; or

(iii) if the defendant had committed the relevant act he would have had the appropriate mental element for the commission of the substantive offence.

Paragraph (b) applies where the offence requires proof of particular circumstances or consequences in which case the defendant must have believed or been reckless that the act would be done in those circumstances or with those consequences.

It follows that, if, for example, the defendant intended to encourage the other party to kill the victim, but the defendant did not intend the other party to have the mental element for murder, the defendant could still be convicted of encouraging murder contrary to s.44 if one of the three additional mental elements under s.47(5)(a) could be proved, namely a belief that the other party would intend to kill or cause serious injury; recklessness as to whether the other party would have such *mens rea*; or, if the defendant had done the act himself, he would have had the necessary intent to kill or cause serious injury. Similarly, if the defendant does not intend the other party to kill but intends to encourage him to do an act which the defendant realises might cause the death of the victim, this will be sufficient to convict the defendant of encouraging murder, because he is reckless as to the consequence of murder occurring, provided that one of the mental elements in s.47(5)(a) also applies in respect of the other party's mental state.

If the other party had actually killed the victim in such circumstances, could the defendant be convicted of being an accessory to murder after *Jogee*? According to the Supreme Court the accessory must have "intended to encourage or assist [the principal] to commit the crime, acting with whatever mental element the offence requires" of the principal.[8] Crucially, if "the crime requires a particular intent, [the accessory] must intend (it may be conditionally) to assist [the principal] to act with such intent."[9] It follows that there is a significant difference between accessorial and inchoate liability to assist or encourage. For example, to be an accessory to murder the accessory must intend the principal either to kill or to cause serious injury[10] and also intend that the principal will intend to kill or to cause serious injury. Of course, foresight that the principal might kill with the necessary intent may be evidence of the defendant's intent, but it will not constitute the substantive mental element requirement. If the accessory cannot be shown to have intended to assist in the causing of death or serious injury but did intend to assist a violent attack which results in death, the accessory will be guilty of manslaughter rather than murder.[11] Presumably the defendant will also be an accessory to manslaughter where death has occurred and the defendant only foresaw the possibility that the principal will have an intention to kill or to cause serious injury if this is not considered by the jury to be sufficient evidence of an intention that murder is committed. For the s.44 inchoate offence, however, recklessness that the other party might have the intention to kill or to cause serious injury or that death might occur will constitute the substantive mental element for the offence. It follows that inchoate liability is wider than accessorial liability, even though for the former it is not necessary to prove that any harm has been caused as a result of the assistance or encouragement.

Foresight is also relevant under s.46 of the Serious Crime Act 2007, where the defendant believes that one of a range of offences will be committed. *Sadique (No. 2)*[12] confirmed that the s.46 offence requires the defendant to believe that *one or more* of the offences which are capable of being committed *will* be committed, but this perceived inevitability of commission is not required in respect of *each* offence. It followed, on the facts of *Sadique*, that the defendant would be guilty of a s.46 offence in supplying chemical cutting agents if he believed that the chemicals would be used to supply drugs but was not sure whether these would be Class A or Class B, but would be one of them. Where the defendant is convicted under s.46, the maximum sentence is that of the reference offence which has the longest term. Admittedly, this has the potential to generate harsh results. Suppose that the defendant lends the other person a knife which the defendant thinks that person will use to commit burglary, battery, or murder, but is not sure which. Since the defendant contemplates that the other party might use the knife to commit murder, which is the most serious offence contemplated, he is liable to a maximum sentence of life imprisonment.[13] If, however, the other party does commit murder, the defendant would be subject to the mandatory life sentence as an accessory, but only, after *Jogee*,[14] if the defendant intended this, albeit that foresight might be evidence of intention; whereas, for s.46, it is sufficient that the defendant foresaw that murder might be committed but believed that another offence would be committed. It is surely unacceptable that the defendant can be convicted of an inchoate offence relating to murder with less culpability than is required for accessorial liability. But this is a consequence of the draconian approach to inchoate offences in the Serious Crime Act and of the failure of the Supreme

8 Ibid, [86].
9 Ibid, [90].
10 Ibid, [95] and [98], although it is unclear why an intention to cause serious injury is sufficient *mens rea* to be an accessory to murder.
11 Ibid, [96].
12 [2013] EWCA Crim 1150; [2014] 1 WLR 986. See Virgo, "Making Sense of Section 46 of the Serious Crime Act 2007" (2013) 7 *Archbold Review* 4.
13 Serious Crime Act 2007, s.58(5).
14 [2016] UKSC 8; [2016] 2 WLR 681.

Court to appreciate the disconnect created in *Jogee* between accessorial and inchoate liability.

(b) Conspiracy

It was once recognised that foresight is a sufficient mental element for conspiracy. In *Sakavicas*[15] the conspiracy related to a money-laundering offence which required proof of knowledge or suspicion of the illegal provenance of the funds. The Court of Appeal held that the conspirators were guilty of conspiracy to commit the offence on the basis of their suspicion that the funds they agreed to process were the proceeds of drug trafficking. This decision was, however, overruled by the House of Lords in *Saik*,[16] which held that, where liability for a substantive offence could be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, s.1(2) of the Criminal Law Act 1977 required proof that any conspirator knew or intended that the fact or circumstance "shall or will" exist when the conspiracy was put into effect. Whilst this provision is restricted to substantive offences which do not require proof of knowledge, it is preferably interpreted as existing for the avoidance of doubt and reflects the general position that for all statutory conspiracies intention or knowledge is required in respect of all the elements of the substantive offence. This interpretation was endorsed by the House of Lords in *Saik*.[17]

> It follows that recklessness as regards the actus reus of the substantive offence is not sufficient *mens rea* for conspiracy, although an exception has been recognised where recklessness constitutes a requirement of the substantive offence but this is unrelated to any *actus reus* element.[18]

In such circumstances recklessness is sufficient for the conspiracy as well. So, for example, if two people are charged with conspiracy to commit criminal damage being reckless as to whether life is endangered,[19] then, since it need not be proved that life is actually endangered, this need not be intended or known and recklessness as to endangerment suffices.

The Law Commission[20] reviewed the appropriate mental element for conspiracy and recommended that it should be reformed so that: (i) where the substantive offence requires proof of no fault or only negligence in respect of any element of the crime, it should be sufficient to prove recklessness as regards such elements for the conspiracy; and (ii) where the substantive offence requires proof of subjective fault, that same fault element should also apply as regards such elements for the conspiracy, which could encompass recklessness or suspicion. A consequence of this reform would be that the defendants in *Saik* would be guilty of conspiring to launder money if they suspected that the money might be the proceeds of crime, since suspicion is the applicable *mens rea* for the substantive offence. The adoption of such a reform would be a significant change and would create a further distinction between inchoate and accessorial liability, with the former easier to establish than the latter despite the commission of a substantive offence.

(c) Attempt

According to the Criminal Attempts Act 1981 the substantive mental element for an attempt is intention. Recklessness or suspicion are not sufficient mental elements for this offence as was confirmed by the Court of Appeal in *Pace*,[21] where the police offered scrap metal for sale to the defendants who purchased it. Had the metal been stolen, the defendants would have been guilty of converting criminal property[22] if they had suspected that the metal had been stolen.[23] The metal was not stolen and so the defendants were charged with attempting to convert stolen property. It was held that the mental element for attempt required the defendant to intend all the elements of the substantive offence, so the defendant had to intend the metal to be stolen. *Pace* is inconsistent with an earlier decision of the Court of Appeal. In *Khan*[24] the defendant had attempted to have sexual intercourse with the victim, aware that she might not consent. On the interpretation of the *mens rea* for attempt adopted in *Pace*, the defendant would be liable for attempted rape only if he intended to have sex with the victim intending that she did not consent. But in *Khan* the defendant was found to have been reckless about the victim's consent. In confirming the defendant's conviction for attempted rape, the Court of Appeal in *Khan* held that, provided the defendant intended the conduct element of the full offence, sex in that case, proof of recklessness as to any circumstances of the crime would permit a finding that the defendant intended to commit rape. The Court emphasised that the *mens rea* for rape and attempted rape were the same,[25] since at the time recklessness as to absence of consent was the required *mens rea* for rape.[26]

Khan was tentatively distinguished in *Pace* on the grounds that the *mens rea* for rape at the time was recklessness and also because, had the defendant succeeded in penetrating the victim, he would have been guilty of rape, whereas the defendants in *Pace* could never have successfully converted stolen property because the property was not stolen. But neither ground is convincing. Although the relevant *mens rea* for the substantive offence in *Khan* was recklessness which is different from the relevant *mens rea* of suspicion in *Pace*, since recklessness requires the defendant to foresee a risk which it is unreasonable to take, recklessness and suspicion are not in this context significantly different, and no reason was identified as to why the existence of recklessness as a *mens rea* for the substantive offence should result in a different approach, especially where that approach is inconsistent with the *mens rea* requirement for attempt as interpreted by the Court in *Pace*. Further, whilst it is certainly the case that rape in *Khan* was possible, since the victim was not consenting to sex, and the conversion of stolen property in *Pace* was impossible, because the property was not stolen, it is unclear why this should make any difference to the *mens rea* requirement for attempt. It would have been preferable for the Court of Appeal in *Pace* to have held that *Khan* was incorrectly decided, being inconsistent with the *mens rea* requirement explicitly articulated in the Criminal Attempts Act 1981.

Assuming that *Khan* has not survived *Pace*, proving that D

15 [2004] EWCA Crim 2686.
16 [2006] UKHL 18, [2007] 1 AC 18.
17 Ibid, [21] (Lord Nicholls).
18 Ibid, [4] (Lord Nicholls).
19 Contrary to the Criminal Damage Act 1971, s.1(2).
20 Law Com. No. 318, *Conspiracy and Attempts* (2009) paras. 2.137 and 2.146.
21 [2014] EWCA Crim 186, [2014] 1 WLR 2867.
22 Proceeds of Crime Act 2002, s.327.
23 Ibid, s.340(3)(b).
24 [1990] 1 WLR 813.
25 Ibid, 819.
26 But see now the Sexual Offences Act 2003, s.1(1).

was reckless as to circumstances is no longer enough to establish his guilt of an attempt. This brings the law of attempt closer to the law on accessory liability as restated in *Jogee*. But that said, there still seems to be a significant difference. The approach to proof of intention adopted by the Supreme Court in *Jogee* strongly suggests that evidence the defendant's suspicion is material from which intention can be inferred.[27] But by contrast, the Court of Appeal's remarks in the final paragraph of the judgment in *Pace* suggest the opposite. Here the Court of Appeal said that knowledge or belief as to elements of the substantive offence were relevant to an attempt, and that this included turning a blind eye to the facts and a deliberate failure to ask questions. But it also said that a charge of attempted handling "will, we appreciate, require proof of a higher level of *mens rea* than mere suspicion."[28] As with its recommendations on reform of the law of conspiracy, the Law Commission has recommended that the law on attempt should be reformed such that recklessness should be a sufficient mental element, at least as regards the circumstances of the substantive offence for which no fault or negligence need be established.[29] If adopted, this would create a further division between inchoate and accessorial liability.

Conclusions

The growing disconnect between the breadth of inchoate liability and the restrictive interpretation of accessorial liability following *Jogee* is a cause of particular concern, especially since this might mean that prosecutors prefer to prosecute the defendant for the inchoate offence of assisting or encouraging despite the commission of the substantive offence. Whilst the state of the law on the mental element of conspiracy appears to be consistent with accessorial liability, where recklessness may be of evidential significance to establish intention, for attempt recklessness appears not to be even evidence of intention. The most significant problem is with the inchoate offences of assisting and encouraging a crime, where recklessness clearly operates as a substantive element as expressly recognised by statute. The divide between inchoate offences and accessorial liability would be even more marked were the recommendations of the Law Commission adopted.

This division between inchoate and accessorial liability is intuitively incorrect, since surely the requirement to establish that a substantive offence has been committed in order to establish accessorial liability justifies recognising lesser culpability, whereas inchoate liability turns on identifying clear culpability in the absence of the commission of any harm. The disharmony is primarily caused by the Serious Crime Act inchoate offences. The recognition of recklessness as a substantive element of those offences is inconsistent with the other inchoate offences, as interpreted by the House of Lords and the Court of Appeal, and with the new law on accessorial liability. This is a further reason why Pt.II of the Serious Crime Act needs to be reformed urgently to facilitate greater consistency between inchoate and accessorial liability, thereby helping to ensure that the operation of the inchoate offences of assistance and encouragement is restricted. Further, the recognition in *Jogee* that recklessness and suspicion may be evidence of intention should be recognised for all inchoate offences.

27 *Jogee*, [66], 73] and [87].
28 *Pace* [2014] EWCA Crim 186, [2014] 1 WLR 2867, [81].
29 Law Com. No. 318, *Conspiracy and Attempts* (2009) para. 8.133.

Comment

Time to revisit the rules on private enterprise entrapment

On 21 October Mazher Mahmood, alias "The Fake Sheikh", was sentenced to 15 months imprisonment for perverting the course of justice by persuading a witness in a criminal trial to alter his statement to make it less helpful to the defence. That he had done so came to light during the trial of Tulisa Contostavlos, a singer, for a drug offence which he had seemingly persuaded her to commit by a "sting" operation in which he posed as a film financier anxious to transform her from a minor "sleb" into a major film-star.[1] At this point, the judge had stopped her trial as an abuse of process because the credibility of the key witness – Mahmood – was fatally undermined. At the outset, however, he had refused to stop the case as an abuse of process resulting from her entrapment by Mahmood, a journalist for the *Sun on Sunday*, into breaking the law to do something she would not otherwise have done. In so ruling he applied the current law, which draws a distinction between entrapment by agents of the state, and entrapment by private citizens. A prosecution following a "sting" by the police is to be stopped as an abuse of process if the person stung was lured or pressured into committing a crime of a type that they would not otherwise commit.[2] But not constituting "state-created crime", a prosecution following a "sting" by a private person cannot be stopped as an abuse of process unless there was something worse.[3]

This distinction is surely not one that the law should make. It is grossly unfair, surely, if someone is prosecuted for a crime of a type they would not otherwise commit they were pressured or lured into committing by anyone whose aim was to get them into trouble: whether an over-zealous police officer, a tabloid journalist, a police informer out to maximise his earnings, or a personal enemy actuated by pure disinterested malice. In any of these cases, surely, the prosecution should be stopped – at any rate, where the crime in question had no victim.

JRS

1 The elaborate steps that Mahmood and his employers took to ensnare their victim are described by Jeremy Dein QC and Laura Vernon Collier in "Non-State Agent Entrapment – the X-Factor", [2014] 10 *Archbold Review* 4.

2 *A-G's Reference (No.3 of 2000) and R v Loosley (or Loosely)* [2001] UKHL 53; [2001] 1 WLR 2060.

3 Per Goldring J in *Council for Regulation of Health Care Professionals v Gurpinder Saluja* [2006] EWHC 2784 (Admin), [2007] 1 WLR 309; cf *Shannon* [2001] 1 WLR 51.

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