THE FAULT ELEMENT AND WITHDRAWAL PRINCIPLES IN JOINT CRIMINAL ENTERPRISE: THE NEED FOR A RESTATEMENT

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Abstract: Joint enterprise principles have extended accomplice liability to establish a form of guilt by association. Judicial sleight of hand has been adapted, in general, to common design rationale, and it has been used as a prosecutorial expedient towards establishing derivative inculpation. The pro-prosecution bias attached to joint enterprise doctrine is self-evident, and courts have zealously favoured its application as an inculpatory tool. This article focuses on extant law relating to fault elements for homicide within common design, and comparatively reviews alternative juridical precepts. New proposals are adduced on appropriate fault threshold levels that ought to be supererogatory to satisfy the specific intention offence-definitional element for a murder conviction. The debate then extends to review withdrawal principles as part of reverse conduct prophylaxis. A new restatement is chartered that identifies imputed normative proportionality for withdrawal, penitent motive, and reverse burden of persuasion as key factorisations.

Keywords: joint venture; collateral crimes; foresight; contemplation; fundamentally different rule; public policy considerations; withdrawal; reform

I. Introduction

The concept of joint criminal enterprise (JCE) has grown to play a major inculpatory factorisation before English courts. The first available statistics on the number of individuals to be convicted using the doctrine of joint enterprise shows that between 2005 and 2013, 1,853 persons were prosecuted for homicides that involved four or more defendants.1 Between the same period, 4,590 persons were prosecuted for homicides involving two or more defendants. The actual figure is

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greater as these findings are based solely on the use of joint enterprise in cases of homicide.\textsuperscript{2} The same statistics shows that the number of published Court of Appeal rulings that dealt with convictions based on joint criminal liability, among other modes of liability, doubled in five years. In 2008, the figure was 11% and by 2013 had increased to 22%.\textsuperscript{3}

In England and Wales, members of a JCE who formed the criminal plan are responsible not only for those crimes they agree to but for all other crimes (collateral to the primary principal offence) that would be considered a foreseeable consequence of the plan regardless of whether they carry out the physical conduct or possess the requisite mental state of the collateral crime. In recent years, the doctrine of JCE and its relationship to general complicity concepts and requirements have been the centre of much confusion and uncertainty, and the House of Commons Select Committee has recommended that the JCE doctrine needs statutory reform.\textsuperscript{4} The application of joint enterprise, particularly in murder cases, has been far-reaching to the extent that it has been infamously considered as a “jack of all trades”,\textsuperscript{5} and pervasively that the doctrine has shifted from exculpatory to inculpatory, resulting in a “catch-all” method of fault attribution,\textsuperscript{6} widening the scope of criminalisation, and consequently that the doctrine is “no longer fit for purpose”.\textsuperscript{7}

In contradistinction, some commentators view JCE liability as an imperative part of the English legal system and crucial for ensuring justice for innocent victims. Ormerod, however, has stigmatised the doctrine as complex, controversial and harsh.\textsuperscript{8} There are many areas of the doctrine that are proving to be problematic for the courts, but arguably the main and recurring issue is to what extent, if any, D (the accessory) should be liable for any act that P (the principal) commits outside the agreed joint venture. Other concerns regarding the applicability of this doctrine by English courts were addressed by KJM Smith nearly 25 years ago.\textsuperscript{9} Smith wondered whether, in determining the liability for collateral offences, the basis of responsibility is different from that used in setting liability for the primary offence.\textsuperscript{10}

In relation to specificity of knowledge, does the \textit{mens rea} necessary for complicity in the primary offence in any way act as a substitute for or dilute the full accessorius

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\item \textsuperscript{2} Ibid.
\item \textsuperscript{3} Ibid.
\item \textsuperscript{5} Johannes Keiler, \textit{Actus Reus and Participation in European Criminal Law} (Intersentia, 2013) 258.
\item \textsuperscript{6} Beatrice Krebs, “Joint Criminal Enterprise” (2010) 73 \textit{The Modern Law Review} 578, 585.
\item \textsuperscript{8} David Ormerod, Commentary to \textit{R v Yemoh} [2009] Crim LR 888, 894; Commentary to \textit{R v Lewis} [2010] Crim LR 870, 872.
\item \textsuperscript{9} KJ Smith, \textit{A Modern Treatise on the Law of Criminal Complicity} (Oxford University Press, 1991).
\item \textsuperscript{10} Ibid.
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mens rea that would normally be required for the collateral offence?\textsuperscript{11} Whether the joint enterprise doctrine is no more than a linguistic variant of a single general culpability standard or whether it embodies a substantive culpability distinction also remains opaque.\textsuperscript{12} Considerable uncertainty still persists as to the standard of mens rea an accessory (D) is required to have in respect of any collateral offence committed by the principal offender (P). This prevailing uncertainty as to the mens rea offence-definitional element extends also to the realm of any affirmative withdrawal defence to potentially exculpate the complicious actor. In truth, the parameters of this defence have developed solipsistically in an ad hoc manner, and it is difficult to distil an effective overarching rationalisation.

The initial sections of the article examine the problems inherent in the common law doctrine of JCE focusing on the significance of liability under this doctrine, its requisite elements and its place in the law of complicity. The authors argue that the current law of JCE is unsatisfactory due to inconsistencies and lack of clarity on issues surrounding the requisite fault element.

The debate then extends to re-examine the affirmative defence of withdrawal, deconstructed in terms of extant law, but comparatively extirpated in terms of alternative legal system perspectives. The authors suggest as part of a restated new optimal pathway that the conceptual edifice of withdrawal from joint enterprise is predicated on three central tenets:

(i) imputed normative proportionality in terms of a general standard of reasonableness of action to be applicable;
(ii) a focus on attitudinal motivation for disavowal vis-à-vis voluntary and complete renunciation. This engages a comparison between the reasonableness — proportionality standardisation attached to the withdrawal defence and individual liability created by supervening fault; and
(iii) the introduction of a reverse burden of proof standardisation, replicating U.S. precepts, on a preponderance of the evidence standardisation.

II. The Joint Enterprise Enigma in England and Other Common Law Jurisdictions

Even though there is no statutory definition of joint enterprise in English criminal law, it is commonly recognised that there are at least two scenarios in which a joint venture can materialise. The first scenario or the basic form covers situations best referred to as co-perpetration, ie cases where D and P agree or act in concert to commit crime X. In such basic form, D will be party to the joint enterprise if he

\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid.