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Main Themes:

- What are the rules?

- Why do we have these rules? What has influenced law to take this shape? How have they been shaped historically, culturally, socially etc.?

- Whether the law should be in that form? Is the law in the shape that it should be in? Is it appropriate? Is it effective?

A. COMPLICITY

“Many Crimes are not committed single-handed”- Lord Bingham

- COMPLICITY IS NOT AN OFFENCE!
- It is the rules by which liability can be extended to multiple participants in the commission of a crime
- Three sets of rule:
 - o Joint Criminal Enterprise (JCE)
 - o Extended joint Criminal Enterprise
 - Allows for the conviction of D2 for the ‘additional’ crime committed by D1 during the course of a JCE
 - o Accessorial Liability (aids, abets, counsels or procures)
 - Where D2 (the ‘accessory’) provides assistance or encouragement for a crime committed primarily by D1 (the ‘principal’)
 - A person who provides assistance or encouragement to the principal in first degree at the scene is referred to as the principal in the second degree while a person who is not present at the scene but has earlier provided assistance or encouragement is known as an accessory before the fact
- Rule of Conspiracy:
 - o Criminalises an agreement to commit a crime even if no steps are taken in pursuit of the agreement

a) Joint Criminal Enterprise (JCE)

- Where defendant 1 (D1) and defendant 2 (D2) agree to commit a crime together
- “Liability attaches to all the parties to the agreement who participate in some way in furthering its execution” (HUYNH)
- **OSLAND:** D2 will be liable for a crime, even where D1 performs most or all of the relevant conduct if:
 - o D2 agreed with D1 to commit the crime
 - o D2 possessed the mens rea for the crime
 - o D2 was present at the scene
- D2 has to be present at the scene (**OSLAND, HUYNH**)
- Key elements of JCE:

Agreement + participation

But presence (without any other conduct) can constitute participation

- Agreement does not have to be express
- Agreement can be formed contemporaneously with the crime
- Liability of D2 (and if accountable, D3, D4, D5 etc.) is primary- not derivative
- All acts of the parties to the JCE are attributed to each other
 - o Thus, you can still be convicted as a principal even if you didn’t personally carry out the AR

The Prosecution must prove:

- D agreed with one or more other persons to pursue a JCE (and at that time had the state of mind required for the commission of the relevant offence)
- D participated in the joint enterprise in some way
- In accordance with the agreement, one or more parties to the agreement performed all of the acts necessary to commit the offence charged.

OSLAND:

- A person who commits the acts which form the whole or part of the AR of crime is the principal in the first degree
- Those who aided the commission of a crime but were not present at the scene of the crime were known as accessories before the fact or principals in the third degree. Their liability is derivative and dependent upon the guilt of the person who had been aided and abetted in committing the crime. If that person was not guilty, the principal in the second degree could not be guilty.

b) Extended Joint Criminal Enterprise

Q: What happens if D1 and D2 agree to commit a crime (JCE) and during the planned crime, D1 commits an additional (unplanned) crime? Can D2 be held liable for that additional crime?

- Yes D2 can but the prosecution must prove that D2 foresaw the possibility that D1 might commit the additional crime (**MCAULIFFE**)
- Must prove that D2 foresaw the possibility that D1 might engage in the actus reus with the requisite mens rea (**GILLARD**)
- But there must be a foundational crime (**TAUFAHEMA**)
- Two Scenarios:
 - o As part of the arrangement all agree to take the risk of P committing a more serious offence than the core offence
 - o One or more of the parties foresees the risk of P acting outside the arrangement and committing a more serious offence
 - o **LAW IS THE SAME IN BOTH CASES!**
- “If a party to a JCE foresees the possibility that another might be assaulted with intention to kill or cause serious injury to that person, and, despite that foresight, continues to participate in the venture, the criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight” (**CLAYTON v R**)

Prosecution must prove:

- D agreed with one or more other persons to pursue a JCE (the ‘foundation crime’)
- D foresaw that it was possible that another member of the group would commit (AR + MR) a different crime (the ‘additional crime’)
- D participated in the JCE
- Another member of the group did commit the additional crime (AR + MR)

Criticisms of Current Extended JCE Laws

Five main Criticisms identified by NSWLRC:

- Insufficient alignment with notions of moral culpability

- The secondary participant in a murder has a lesser forms of mens rea
- Different forms of complicity require different subjective elements for murder
- Secondary participant more likely to be found guilty of murder rather than manslaughter
- Undesirable technicality and complexity

Recommendations of Extended JCE Law by NSWLRC”

- For cases other than murder:
 - o Test should be whether D foresaw that, in the course of carrying out the JCE, there was a substantial risk that P (principal) would commit the additional offence
- For murder
 - o where P causes a death in the course of carrying out a JCE, the test for D’s liability should be: Did D foresaw that it was probable (that is, likely) that a death would result from an act of P that was done with intent to kill or cause grievous bodily harm, in the course of carrying out the JCE in which D was participating?

c) Accessorial Liability

- Prosecution should only need to rely on accessorial liability where:
 - o there is no agreement between D1 & D2; or
 - o where D2 has not participated in any way
- Liability of D2 (and, as appropriate, D3, D4, D5 etc) is derivative in nature – not primary
- It derives from the liability/criminality of D1 where there is no agreement between D1 & D2

AR:

- P must prove D2 ‘aided, abetted, counselled or procured’ the commission of the offence by D1
 - o Aiding, abetting & counselling: assistance and/or encouragement

Q: How much assistance is enough?

- Mere assent/acquiescence not sufficient
- need to show encouragement and intent to encourage (**CONEY**)
- “linked in purpose” (**PHAN**)
- “The prosecution is not required to establish that the acts said to constitute aiding and abetting in fact assisted or encouraged the principal in the first degree.” (**LAM**)
- words must be spoken and conduct take place in the presence of the primary offender
- ‘the fact that a person was voluntarily and purposely present, witnessing the commission of a crime, and offered no opposition, though he might reasonably be expected to prevent it and had the power do so, or at least express his dissent, might afford evidence upon which a jury would be justified in finding that he intentionally encouraged the principal offender and so aided and abetted’ (**SUMNER & SUMNER**)

MR:

- P must prove that D2 intended to assist or encourage the commission of the offence (**GIORGIANNI**)
- P must prove that D2 had knowledge of the ‘essential matters’ of the offence – ie AR and MR (**STOKES & DIFFORD**)
- D2 need not have knowledge of the precise manner/timing of D1’s commission of the offence
- Doesn’t matter whether D is effective in aiding and abetting the crime

SCENARIO:

- What if D1 commits murder, but P cannot prove that D2 assisted/encouraged with knowledge that D1 would cause death with intent to kill/cause GBH?
 - o D2 may be convicted of manslaughter if P can prove that:
 - D2 was an accessory to an unlawful act by D1; and
 - a reasonable person would have realised that the deceased was thereby exposed to an appreciable risk of serious injury (ie the test for unlawful and dangerous act manslaughter)

Problem Question for Complicity

JCE

1. What is JCE?
 - *JCE is where defendant 1 (D1) and defendant 2 (D2) agree to commit a crime together*
 - “Where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out the enterprise.” **(TANGYE)**
2. What kind of liability is JCE?
 - *JCE is primary liability which allows for all the acts of the parties to the JCE to be attributed to each other. Therefore even if the principal offender is acquitted or receives a lesser charge, the JCE offender may still be convicted of the greater offence. (OSLAND)*
3. First must prove:
 - a. Agreement
 - There was an agreement between the accused and the committer of the offence **(OSLAND)**
 - Does not have to be expressly communicated
 - ‘common mind acting in common aim’ **(KANAAAN)**
 - Mutuality of assistance **(TAUFAHEMA)**
 - b. Participation*****
 - Presence **(OSLAND)**
 - Presence (without any other conduct) can constitute participation
 - No presence **(HUYNH)**

NOTE: (OSLAND) D2 will be liable for a crime even where D1 performs most or all of the relevant conduct if:

- o D2 agreed with D1 to commit the crime
 - o D2 possessed the mens rea for the crime
 - o D2 was present at the scene
 - D2 has to be present at the scene **(OSLAND, HUYNH)**
4. Has there been withdrawal?
 - *The prosecution must negate one of three elements beyond reasonable doubt (TIETIE):*
 - o Was the withdrawal ‘timely’? (defined by whether it was too late to stop the train of events which the defendant’s participation and actions had encouraged **(TIETIE)**)
 - o Did the defendant make their withdrawal known?

- Did the defendant, by such words as may be appropriate, do what he reasonably could to dissuade the others from continuing with the criminal enterprise?
 - To what standard? – **(TIE TIE)** – to countermand effect of earlier encouragement and participation.

What is JCE and explain the liability

Step 1 prove agreement

Step 2 prove participation

Step 3 prove withdrawal