CASE NOTE

JOHNS v. THE QUEEN[1]

Criminal Law — Murder — Accomplices — Mens Rea

THE FACTS

Johns agreed to drive Watson to Kings Cross to meet Dodge as part of a plan to rob Morriss. On the way to Kings Cross Watson told Johns that Morriss would be armed and that he, Watson, who was also armed, would stand no nonsense. Johns dropped Watson at Kings Cross where Watson met Dodge and drove off with him to Potts Point in another car. Half an hour later the other car returned and Watson informed Johns that the robbery had been unsuccessful and had gone bad.

What had happened while Johns was waiting was that Morriss had been killed by Watson in the course of the attempted robbery by Watson and Dodge. Watson died before the trial.

Johns and Dodge were charged with murder. The learned trial judge told the jury that Johns was guilty as an accessory before the fact if he was aware of the possibility that somebody might be killed in the attempt to carry out the robbery. Johns was convicted of murder and appealed to the New South Wales Court of Criminal Appeal and thence to the High Court of Australia.

Johns argued, *inter alia*, that an accessory before the fact to robbery cannot be liable as an accessory to murder unless the death was a probable consequence of the robbery. The High Court rejected this contention and dismissed Johns' appeal.

COMMENTARY

The law of accomplices raises difficult questions many of which relate to *mens rea*. This case settles one question but raises others. Now that recklessness is becoming recognized as a sufficient *mens rea* for common law offences (*e.g.* murder, assault and rape), one of the main questions relating to accomplice liability is whether recklessness is a sufficient *mens rea* here also. *Johns v. The Queen* provides a rather uncertain answer.

The judgments of the High Court speak in terms not of intention and recklessness, which are commonly used in relation to the liability of actual perpetrators, but in terms of common purpose and foresight of consequences. While it cannot be claimed that the words 'intention' and 'recklessness' have acquired fixed meanings, the use of other concepts like common purpose and foresight can only add to the confusion.

On one interpretation *Johns'* case is concerned with a fairly narrow question — where A and B form a common purpose to commit crime X and B commits crime Y, what state of mind is required to make A liable for crime Y, where crime Y is an offence requiring at least recklessness on the part of B? The narrowness of the question is brought out most clearly in the judgment of Stephen J. who says:

> The criminal responsibility here under discussion is not that relating to the crime which is the prime object of a criminal venture.[2]

[1] High Court of Australia. Barwick C.J.; Stephen, Mason, Murphy and Wilson JJ. Judgment delivered 7th February 1980.

[2] *Ibid.* 8.

The other judgments implicitly accept this view.

The answer given by the High Court is that A is liable for crime Y if it is within the common purpose, and that foresight of the possibility that crime Y may be committed is enough to bring it within the common purpose. In their majority judgment Mason, Murphy and Wilson JJ. say:

> In each case liability must depend on the scope of the common purpose. Did it extend to the commission of the act constituting the offence charged.[3]

Their Honours held that an act foreseen as a possible incident of the execution of the planned exercise falls within the parties' own purpose.[4]

This approach, though attractive at first sight, has an element of fiction in it. If A and B plan to commit armed robbery their common purpose is to rob, not to kill. It is precisely because there is no common purpose to kill that a problem arises at all. If they had planned to rob and to kill, the accomplice would undoubtedly be liable for the perpetrator's act of killing as it would be one of the very acts planned and one of the primary objectives. Where A and B foresee the possibility of death but do not desire it, it cannot be said that it is their purpose to cause death. In the familiar terms used in relation to primary liability they do not intend death; they are reckless. This is a more satisfactory analysis of the position since it does not involve relying on a fiction.

Another advantage of recognizing that liability is based on recklessness is that it provides a just solution in cases where the element of common purpose is more obviously lacking. Suppose A and B plan an armed robbery and that B makes it clear that because of a grudge he will kill security guard X if he is present. A says that he hopes X will not be present because he is only interested in the money, though he recognizes that the gun may have to be used if there is any resistance to the robbery. If in A's absence B carries out the robbery and kills X who happens to be present but who puts up no resistance what is A's liability? If, as the High Court suggests, the primary test is common purpose, it would seem that A would not be liable, since it is no part of his purpose that X should in those circumstances be killed. If however the test is recklessness A will be liable because he foresees the possibility that X will be killed and unjustifiably subjects X to that risk. It is difficult to see why the law should treat A more generously in these circumstances than if B killed guard Y who put up resistance to the robbery.

The common purpose approach also leaves unanswered the question of the *mens rea* required of an accomplice where there is no agreement with the perpetrator at all. Suppose A knows of B's plan to commit armed robbery against V, and has his own reasons for wishing B every success (for example: A may wish to steal the proceeds of the robbery from B). A knows that B may kill if necessary to overcome resistance or make good his escape. A contributes to B's success by causing a bomb scare which occupies the attention of a large number of local police officers. Is A liable for V's death if V resists the robbery and B kills him? The problem cannot be solved by recourse to common purpose since there is no meeting of minds between A and B at all. On the other hand there is no difficulty in holding A liable on the basis of aiding and abetting and recklessness. This result would be consistent with the High Court's decision in *Johns v. The Queen*, but the court's emphasis on common purpose leaves the question undecided.

If *Johns v. The Queen* does support the view that accomplice liability is based on recklessness further questions arise. In *Johns'* case the crime in question was murder. The High Court did not examine the *mens rea* required of a principal murderer, but

[3] *Ibid.* 15.
[4] *Ibid.* 19.

the weight of current authority is that express malice is limited to intention to kill or cause grievous bodily harm or recklessness which involves foresight of the probability of one of these consequences.[5] If that is indeed the law then the *mens rea* required of an accomplice, whether accessory before the fact or a principal in the second degree is wider than that required for liability as a principal in the first degree. The accomplice is liable if he foresees death or grievous bodily harm as possible while the principal is guilty only if he foresees death or grievous bodily harm as probable.

If that is so a question arises whether an accomplice is liable on the basis of recklessness involving foresight of possibility where the crime in question is one limited to intentional wrongdoing. The House of Lords has recently given an affirmative answer to that question. In *DPP for Northern Ireland v. Maxwell*,[6] Maxwell acted as guide for a group of terrorists. He knew that they would engage in a terrorist attack but did not know what form it would take. One of the terrorists threw a pipe bomb into a public house. Maxwell was charged with doing an act with intent to cause an explosion. Despite the form of the charge, his liability fell to be tested as a principal in the second degree. The effect of the decision of the House of Lords is that the fact that Maxwell foresaw the possibility that the terrorists would do an act with intent to cause an explosion was enough to render Maxwell liable as a principal in the second degree. There seems no reason to distinguish in this respect between principals in the second degree and accessories before the fact. In *Johns v. The Queen* the High Court of Australia expressly rejected any such distinction. The combined effect of these two cases is that the *mens rea* for accomplice liability includes recklessness based on foresight of possibility, whether or not the crime in question is limited to intentional wrongdoing and whether or not the accomplice is an accessory before the fact or a principal in the second degree.

While *Johns v. The Queen*, like *DPP for Northern Ireland v. Maxwell*, recognizes a wide *mens rea* for accomplice liability, the majority of the High Court took the view that actual foresight is required at least as a general principle. Mason, Murphy and Wilson JJ. noted a principle stated by Foster[7] and Stephen[8] to the effect that an instigator of a crime is liable not only for the crime instigated but any other crime which is committed and was the natural and probable consequence of the crime instigated. This principle appears to impose liability for the ulterior crime on the basis of negligence, since the accomplice would be liable not only if he foresaw the second crime but also if he ought to have foreseen it. In their joint judgment Mason, Murphy and Wilson JJ.[9] approved a statement by Street C.J. in the court below that a subjective approach to criminal liability has prevailed in more recent times. This observation appears to be a gentle rejection of the continued authority of Foster and Stephen on this point.

On the other hand there is a passage in the judgment of Barwick C.J. which appears to be a modified restatement of the principle recognized by Foster and Stephen:

> The participants in a common design are liable for all acts done by any of them in the execution of the design which can be held fairly to fall within the ambit of the common design. In deciding upon the extent of that ambit, all those contingencies which can be held to have been in the contemplation of the participants, or which in the circumstances ought necessarily to have been in such contemplation, will fall within the scope of the common design.[10]

[5] See Lanham D. J., 'Recklessness and Grievous Bodily Harm' [1978] 2 *Criminal Law Journal* 255.
[6] [1978] 3 All E.R. 1140.
[7] *Crown Law* (1809) 370.
[8] *Digest of the Criminal Law* (4th ed. 1889) Art. 41.
[9] High Court of Australia, Judgment delivered 7th February 1980, 20.
[10] *Ibid.* 3.

The present common law probably falls somewhere between the view of the majority and those of the Chief Justice. The subjective approach though dominant is not yet universal. There are still examples of constructive liability the most notorious of which is felony-murder. *Johns*' case did not consider the complexities of accomplice liability under the New South Wales felony-murder rule. Such liability is complicated by the fact that armed robbery is not in itself one of the felonies within the New South Wales formulation of the rule. What would the position have been if the facts has taken place in Victoria? It is arguable that an accessory before to armed robbery would be liable for murder committed in the course of the robbery even if the accessory did not foresee the possibility of death or grievous bodily harm.[11]

D. J. LANHAM*

[11] For further discussion see Lanham D. J., 'Accomplices and Constructive Liability' [1980] *Criminal Law Journal*, April issue.

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