CPS Guidance on:

Joint Enterprise Charging Decisions

December 2012

Joint Enterprise charging decisions
Principal, secondary and inchoate liability

Contents

Introduction

1. The guidance sets out how charging decisions are to be approached in cases involving joint enterprise. In particular, it addresses:

- Application of the Full Code Test to cases involving joint enterprise.
- The use of evidence of presence and association in proving participation in a joint enterprise.
- The principles to be applied when selecting charges that involve principal, secondary and inchoate liability.
- The approach to charging group assaults, including cases of murder and manslaughter.
- Charging offences under the Serious Crime Act 2007.

2. Insofar as this guidance attempts to set out the law on secondary liability, what it sets out is the Crown Prosecution Service's understanding, which does not have the force of law.

Concerns

3. Concerns about the application of the doctrine of joint enterprise resulted in a House of Commons Justice Committee inquiry in 2011-12. The Committee published its report in January 2012, which recommended that the DPP issue

guidance on the use of the doctrine when charging, including the relationship between association and complicity.

The doctrine of joint enterprise

4. Courts and academics have expressed different opinions on the meaning of the common law doctrine of joint enterprise. Although some academics consider joint enterprise to differ from ordinary principles of secondary liability, according to Smith and Hogan's Criminal Law, 13th ed (2011), 230, the Court of Appeal has now firmly rejected this approach: for instance, the court in R v Mendez and Thompson [2010] EWCA Crim 516 (para 17), R v Stringer [2011] EWCA Crim 1396 (para 57), and R v ABCD [2010] EWCA Crim 1622 note that joint enterprise can be seen as an aspect or form of secondary liability, and not an independent source of liability. No distinction is made between cases where those involved share a common purpose to commit crime X, and cases where there is no shared purpose.

5. Joint enterprise can apply where two or more persons are involved in an offence or offences. The parties to a joint enterprise may be principals (P) or secondary parties (accessories / accomplices) (D).

6. A principal is one who carries out the substantive offence ie performs the conduct element of the offence with the required fault element.

7. A secondary party is one who assists or encourages (sometimes referred to as "aids, abets, counsels or procures") P to commit the substantive offence, without being a principal offender.. However, a secondary party can be prosecuted and punished as if he were a principal offender: s8 Accessories and Abettors Act 1861.

8. Secondary liability principles can be applied to most offences. The principles remain the same, whichever offence they are applied to. The principles are commonly used in offences of violence, theft, fraud and public order.

9. A joint enterprise may or may not be pre-planned. Sometimes a jointly committed crime occurs spontaneously. The applicable law is the same in either case: R v Mendez and Thompson.

> **Example**
> People in a crowd of demonstrators suddenly start attacking a person who shouts abuse at them.

Three types of joint enterprise

10. In R v ABCD the Court of Appeal identified three ways in which a joint enterprise would usually operate, recognising that the scenarios may in some cases overlap (para 7):

(1) ***Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals.***

Examples

i. P1 and P2 agree to commit a robbery. Each plays a part in carrying out the conduct element: together they attack and take money off security men making a cash delivery. Both are liable for robbery as joint principals.

ii. P1 and P2 go on a shoplifting spree together, both taking goods out of shops without payment. They are joint principals.

iii. P1 and P2 break into a house and they both help themselves to items of the owner's property. P1 and P2 are both guilty of burglary as principal offenders.

In these cases each player has performed all the elements of the offence (robbery or theft) in his own right. Little difficulty or controversy arises in respect of the liability of P1 and P2 in such cases.

(2) ***Where D assists or encourages P to commit a single crime.***

In this scenario, P, with the fault element, carries out the conduct element alone. D is an accessory (assists or encourages the offence). D does not need to be present at the scene of the offence. Both are liable for the offence. P is liable as a principal. Ds liability as a secondary party is based on proving:

- P's commission of the offence, although P need not be identified, charged or convicted. (Note that where the offence is committed through the medium of an innocent agent, such as a child or any other person who is not criminally responsible, the person who incites the crime is liable as a principal.)
- D giving assistance or encouragement to P: R v Clarkson [1971] 1 WLR 1402; R v Jones and Mirrless (1977) 65 Cr App R 250, CA.
- D's intent to assist or encourage: R v Clarkson; R v Jones and Mirrless.
- D's knowledge of the essential elements of P's offence: Johnson v Youdon [1950] 1 K.B. 544, DC. The courts have interpreted knowledge broadly in this context. It has been held to include belief, contemplation or foresight that the essential elements might be committed. See para 8.4.2.2 of Smith and Hogan's Criminal Law (13th ed, 2011) for a detailed commentary.

Examples

i. P and D commit a burglary. P alone enters as a trespasser and steals from the premises. D assists or encourages P by driving P to and from the scene and/or acting as a look-out, knowing that P is going to commit burglary. Both are liable for the burglary, P as the principal, D as an accomplice.

ii. D and P assault V causing ABH. D and P approach V. P punches V, causing injuries that amount to ABH. D shouts encouragement to P

during the assault. P is liable as a principal; D is liable as an accomplice, for assisting and encouraging P.

iii. D provides P with a weapon so that P can use it in a robbery. P is liable as a principal; D is liable as an accomplice.

(3) *Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit.*

In this scenario, D may act as a principal or an accessory to crime A. D is also liable for crime B, as an accessory. It is not necessary that D wants or intends this further offence to be committed, although D must have foreseen that P would or might carry out the conduct element of offence B with the necessary fault element of offence B. This type of secondary liability is sometimes referred to as “parasitic liability” or “parasitic accessory liability”. Most of the case law in this area involves cases of murder and manslaughter, although the principles are applicable to other offences.

Examples

i. D and P carry out a burglary (offence A). P acts as principal, entering the premises and stealing. D assists or encourages P by acting as a lookout. However, In the course of the burglary, P kills householder V, with intent to kill or do really serious harm. P is liable for murder of V as a principal. D may also be liable for murder, as a secondary party, if D foresaw when participating in the burglary with P, that P might commit a criminal act (use unlawful force) with intent to kill or do really serious bodily harm: Chan Wing-Siu v R. [1985] A.C. 168, PC; R v Powell; R v English [1999] 1 A.C. 1, HL; R v Rahman [2008] UKHL 45; R v Yemoh [2009] EWCA Crim 930; R v Mendez and Thompson [2010] EWCA Crim 516.

ii. As in example i. above, except that D only foresees that P might commit an unlawful act (use unlawful force) with intent to cause some (less than really serious bodily) harm to V. P is liable for murder of V. D is liable for manslaughter: R v Rahman; R v Yemoh; R v Carpenter [2011] EWCA Crim 2568.

11. Note that where two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both: R v Lane and Lane (1986) 82 Cr App R 5; R v Aston and Mason (1992) 94 Cr App R 180. (However, where it can be shown that both persons are at least secondary parties, they could be liable.) An exception is s5 of the Domestic Violence, Crime and Victims Act 2004, which creates an offence of causing or allowing the death or serious injury of a child under the age of 16 or of a vulnerable adult.

Transferred malice

12. The principle of transferred malice is often explained by reference to offences of violence: if D intends to kill or do really serious bodily harm to V1, but by mistake kills V2 instead, he is guilty of murder of V2.

13. The doctrine applies to secondary parties: D intentionally assists or encourages P to murder V1 but P, intending to kill V1, mistakenly kills V2 instead. D is guilty of the murder of V2.

14. In R v Gnango [2011] UKSC 59 the Supreme Court used a combination of the common law principles of secondary liability and the common law doctrine of transferred malice. The Supreme Court ruled that: where D1 and D2 indulge in a gunfight in a public place, each intending to kill or cause serious injury to the other, but it is an innocent bystander V who is killed in the cross-fire, both D1 and D2 are liable for the unintended murder of V, regardless whether it is D1 or D2 who kills V. Both are liable, whether they are regarded as principals to the agreed joint activity of shooting with intent to kill or cause serious injury, or as an accessory to the act of firing the fatal shot (paras 60-62).

15. Transferred malice will not apply where P deliberately selects a different victim from that foreseen by D. However, in such situations, consideration should be given to a charge under the Serious Crime Act 2007, or a charge of conspiracy.

Qualifications on the scope of joint enterprise

16. There are two main qualifications that limit the scope of joint enterprise. Persons will not be liable where:

- P's act is fundamentally different to that foreseen by D; or
- D withdraws from the joint enterprise before the offence is committed.

Fundamentally different act

17. Where a principal does an act "fundamentally different" from that which was foreseen by D, P will be regarded as going beyond the scope of the joint enterprise, and D will not be liable for P's act.

18. Whether what P did is fundamentally different from anything foreseen by D is a question of fact: R v Yemoh [2009] EWCA Crim 930 (paragraph 140).

19. The question is determined by the jury: see para 63 R v Rahman for the appropriate direction to a jury.

20. The court in R v Mendez and Thompson [2010] EWCA Crim 516 expressed the test as whether P's act was "of a nature likely to be altogether more life-threatening than the acts of the nature which D foresaw or intended"; and therefore should be considered "in a different league" from what D intended or foresaw (paragraph 48).

Example
D and P intend to inflict really serious harm, by beating V with their fists, but P produces a knife that D did not know P was carrying, and intentionally stabs V to death. In this kind of case, whilst P is guilty of murder, D is guilty of neither murder nor manslaughter (R v English [1999] 1 A.C. 1, HL). This is because P's act in murdering V with a knife is in a different league from what was planned, or foreseen by D, so only P - not D - is responsible for it. However, in this example, D may still be guilty of, for example, an offence under the Serious Crime Act 2007, or conspiracy to cause grievous bodily harm. Note that in this type of case the practical issue is likely to be whether there is evidence that D either knew of the existence of the knife, or its use was foreseen by D.

21. The fundamentally different act principle will not apply where the common purpose is achieved but P commits the offence in a different manner to that contemplated by D. For instance, where P and D share a common purpose to kill V (rather than to cause really serious bodily harm), D will still be liable for murder if P uses a gun to kill rather than a knife, which D had contemplated, or vice versa: see R v English and R v Mendez and Thompson.

22. For a detailed summary of the way in which the courts have applied the principle in cases of murder and manslaughter see para 8.5.2.3 of Smith and Hogan's Criminal Law (13th ed, 2011).

Withdrawal
23. D will not be liable for the act of P where D withdraws from the joint enterprise before the offence is committed.

24. However, where D is not liable as a secondary party because of a withdrawal, he may nevertheless be liable for an inchoate offence, such as conspiracy, attempt or an offence under the Serious Crime Act 2007 (see below).

25. Whether D has withdrawn is a question of fact and degree, will depend on the circumstances of each case, and is one for the jury to decide.

26. Factors that may be considered, for instance, are: the nature of the assistance and encouragement given by D; how imminent the commission of the crime (for example, infliction of the fatal injury) is at the time of withdrawal; and the action that is said to constitute the withdrawal: R v O'Flaherty, Ryan and Toussaint [2004] 2 Cr.App.R. 20, CA.

27. R v Stringer [2011] EWCA Crim 1396 makes clear that there may be cases where any assistance or encouragement provided by D is so distanced in time, place or circumstances from the conduct of P that it would be unjust to regard P's act as done with D's encouragement or assistance, particularly in a spontaneous joint enterprise: where D starts to join in chasing V with hostile

intent, but quickly thinks better of it and stops, it would be unjust for D to be automatically guilty of whatever violence was inflicted on V by others who continued to chase V (paras 52-53).

Prosecuting offences on the basis of joint enterprise

28. Prosecutors may only start a prosecution if a case satisfies the Full Code Test set out in the Code for Crown Prosecutors. This test has two stages: the first is the requirement of evidential sufficiency and the second involves consideration of the public interest.

29. At the evidential stage, a prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. This means that an objective, impartial and reasonable jury (or bench of magistrates or judge sitting alone), properly directed and acting in accordance with the law, is more likely than not to convict. It is an objective test based upon the prosecutor's assessment of the evidence, including any information that he or she has about the defence.

30. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

31. If the evidential stage is satisfied, prosecutors must then go on to consider the second stage: whether a prosecution is required in the public interest.

The evidential stage applied to joint enterprise cases

32. The evidential stage of the Full Code Test applies in the same way to cases involving joint enterprise as it does to all other cases.

33. When assessing the sufficiency of evidence in a joint enterprise case a prosecutor is likely to ask a number of the following questions:

- Is there evidence that the defendants acted as joint principals?
- If not, did D assist or encourage another to commit offence A?
- Or, did D assist or encourage P to commit offence A, foreseeing that P might carry out the conduct element of offence B, with the necessary fault element of offence B?
- Was P's act fundamentally different from what was foreseen by D?
- Does D have a viable claim to have withdrawn from the joint enterprise?

34. Prosecutors should exercise particular care when assessing the questions above in cases that involve:

- A spontaneous joint enterprise; and
- Youths and mentally disordered suspects.

Participation

35. The live issue in a joint enterprise case is often whether D has participated in the venture. This will involve proving that D by words or conduct assisted or encouraged P, with the requisite intention, knowledge and, where applicable, foresight. Liability does not depend on D being present at the scene of the offence.

36. Without some participation by D, the following will not satisfy the evidential stage:

- Mere accidental presence at the scene of an offence.
- Association with the principal offender(s).
- Association with or membership of a group or gang.

37. The court in R v Stringer addressed the difficulty in defining the evidential threshold for participation:

> "*Whether D's conduct amounts to assistance or encouragement is a question of fact. Professor Glanville Williams commented in Criminal Law: The General Part (1961) 2nd ed, at page 356, that it is sometimes difficult to know what degree of assistance is to be regarded as aiding. Several centuries of case law have not produced any definitive legal formula for resolving that question. This is unsurprising because the facts of different cases are infinitely variable. It is for the jury, applying their common sense and sense of fairness, to decide whether the prosecution have proved to their satisfaction on the particular facts that P's act was done with D's assistance or encouragement*" (para 51).

Presence at the scene of an offence as evidence of participation

38. Mere accidental presence at the scene of an offence is not sufficient for D to be liable as a secondary party. A number of authorities confirm that D must assist or encourage P in some way.

39. For example, D who stands outside a building while his friend commits a burglary cannot be convicted of burglary without proof that he assisted or encouraged his friend by, for example, acting as a lookout, or waiting to carry off the stolen items, even if none in fact emerge.

40. It follows that D's voluntary and purposeful presence at the scene, depending on the circumstances of the case, may amount to assistance or encouragement to P, so as to assist or encourage P's offence. In such circumstances, D may be liable as an accomplice.

41. However, voluntary presence at the scene will not of course necessarily amount to assistance or encouragement to P. For instance, in a case of spontaneous joint enterprise D's initial presence may have been for a wholly innocent purpose, such as a gathering of friends in a public place. If spontaneous violence subsequently occurs, prosecutors should identify evidence of assistance and encouragement and the evidential basis for the proof of D's intent to assist or encourage (see, for example, R v Miah [2004] EWCA Crim 63.

42. Examples where D's voluntary and purposeful presence may amount to assistance or encouragement are:

Examples

i. P rapes V. D1 and D2 hear V screaming and enter the room where the rape is taking place. They do not provide direct physical assistance, for example by holding down V; nor do they provide verbal encouragement. However, they voluntarily and purposefully remain in the room, witnessing the rape, offering no opposition to it, where they have the power to do so, and may reasonably be expected to do so, or at least to express dissent. Depending on all the circumstances of the case, D1 and D2s voluntary and purposeful presence may be evidence that each of them separately encouraged the rape, and intended to do so. Note that it must be proved that D intended to encourage; if D merely observes the scene in the capacity of a voyeur, he might not intend to encourage P, even though he may in fact encourage P. See R v Clarkson and Others (1971) 55 Cr. App. R. 445.

ii. Two gang members meet an alley for a pre-arranged fight. Depending on all the circumstances of the case, the voluntary and purposeful presence of those who attend the fight is capable of being encouragement to the participants in the fight. It must be proved in relation to each D separately that they encouraged the participants, and intended to give encouragement.

43. Factors to consider when deciding whether D's presence amounts to assistance or encouragement, and whether D had an intention to assist and/or encourage, include: whether D voluntarily attended the location; whether the joint enterprise was pre-planned or arose spontaneously; the effect that D's presence has on P; and D's state of mind.

44. In cases where evidence of D's assistance or encouragement is based solely or primarily on D's voluntary and purposeful presence at the scene of the offence, prosecutors should consider carefully whether a prosecution is required in the public interest, with regard to the factors listed in the Code for Crown Prosecutors, and those outlined below.

45. For a detailed analysis of the case law see Archbold 2013 paras 18-18 and 18-19 and Smith and Hogan's Criminal Law (13th ed, 2011) para 8.4.1.4.

Association with P or a group or gang as evidence of participation

46. D's association with P or a gang cannot, on its own, make D complicit in a joint enterprise. D must participate in the offence in some way. It therefore makes little sense to speak about the threshold at which association will make D liable as a participant to a joint enterprise.

47. Whether there is sufficient evidence for a suspect to be charged as a secondary party will depend on all the circumstances of the case, which may

or may not include evidence of association. Accordingly, the value of association evidence will necessarily vary from case to case.

48. There are many ways in which D's links with P or a group or gang can form part of the circumstantial evidence in a case. For instance:

> **Examples**
> i. D's prior involvement in / awareness of communications with other participants (eg postings on Facebook) may demonstrate that he was not a mere disinterested bystander, accidentally at the scene of the offence, or that by his voluntary presence he intended to assist or encourage P's commission of the offence.
>
> ii. D's association with P and his knowledge of P's propensity to violent criminal behaviour may be evidence that D foresaw that, in the course of a burglary, P might assault V, if apprehended.
>
> iii. D's association with a gang and his knowledge of gang members' tendency to carry / use weapons may be evidence from which it can be inferred that D knew the gang member(s) were carrying potentially lethal weapons. If D did know this, and foresaw that P might use the weapon, ordinarily that will mean that D realised / foresaw that P might act with intent to kill / do really serious harm: see R v ABCD [2010] EWCA Crim 1622 para 34.

49. Where such association evidence is relied on, the circumstances of the association of D with P, together with the other evidence in the case, must give rise to the inference that D was assisting or encouraging P's offence.

The public interest stage applied to joint enterprise cases

50..As stated above, where there is sufficient evidence to prosecute, prosecutors must go on to consider whether a prosecution is required in the public interest.

51. The Code sets out the approach that should be taken when considering the public interest. This approach applies to cases involving joint enterprise.

52. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. Prosecutors must look at the facts and merits of each case, and form an overall assessment of the public interest.

53. The more serious the offence, the more likely it is that a prosecution is required.

54. When deciding the level of seriousness of the offence committed, prosecutors should consider the suspect's culpability and the harm caused to the victim. Prosecutors should take into account views expressed by the

victim about the impact the offence has had. In appropriate cases this may also include the victim's family.

55. The greater the suspect's level of culpability, the more likely it is that a prosecution is required. In determining the level of culpability, the following factors may be of particular relevance in cases of joint enterprise:

- The suspect's level of involvement.
- The extent to which the offending was premeditated and/or planned (or was it a spontaneous joint enterprise).
- The suspect's age or maturity: significant weight must be attached to the age of the suspect if they are a child or young person under 18. The best interests and welfare of the child or young person must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness or persistence of the offending. Prosecutors must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. As a starting point, the youger the suspect, the less likely it is that a prosecution is required.
- Whether the suspect is, or was was at the time of the offence, suffering from any significant mental or physical ill health.

56. Further guidance is available on the CPS website in relation to youth offenders and mentally disordered offenders.

Selecting charges: principal, secondary and inchoate liability

57. The selection of charges will involve consideration of the public interest in pursuing a particular charge, an alternative charge, or no charge at all.

58. In all cases prosecutors should select charges which:

- Reflect the seriousness and extent of the offending supported by the evidence.
- Give the court adequate powers to sentence and impose appropriate post-conviction orders.
- Enable the case to be presented in a clear and simple way.

59. Prosecutors need not always choose or continue with the most serious charge where there is a choice.

60. Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

61. These principles are of particular relevance to cases of joint enterprise, as prosecutors may have the option of charging several different offences, and of charging a suspect as a principal, as an accomplice or with an inchoate offence.

62. To ensure that charges reflect the culpability of D, prosecutors should specifically consider the following factors when making charging decisions in joint enterprise cases:

- Is there evidence that D acted as principal? If so, the suspect should be charged as a principal.

- Where the evidence does not point to D acting as a principal, is there evidence that D acted as an accomplice? That is, did D assist or encourage the commission of the offence in some way? If so, D should be charged as an accomplice. Note that where it is not possible to charge a substantive offence, a Serious Crime Act offence or other inchoate offence should be considered (see the sections on Serious Crime Act offences and on charging conspiracies).

- Where D is charged as an accomplice, this should be clarified in the case summary or opening note.

- Where D's role as an accomplice is minor or peripheral and the offence in question is a minor offence, consider whether it is in the public interest to charge D at all. In particular, where a court is likely to impose only a nominal penalty on conviction a prosecution will often not be in the public interest: see Guidance on Minor Offences.

- Where D's role as an accomplice is minor or peripheral but the offence is a serious one, consider whether a less serious charge than that charged against the principal is more appropriate. For instance, where the offence attracts a mandatory or automatic or minimum sentence, the charge may be considered disproportionate to the culpability of D. In the vast majority of cases there is likely to be an appropriate lesser charge available. However, in the unlikely event that no lesser charge is available, prosecutors must weigh carefully the merits of proceeding with a charge for the serious offence, or not proceeding at all. The decision as to where the public interest lies will depend on the facts of each case.

- If it is unclear whether D acted as principal or accomplice but the evidence demonstrates that it was one or the other, the prosecution case may be advanced on an alternative principal / accessory basis, and D may be charged as a principal, due to s8 of the Accessories and Abettors Act 1861: see Archbold para 18-32. The exact role of D may properly emerge during the trial process, and the judge may sentence on this basis. Prosecutors should ensure that an indictment contains alternative offences which carry penalties appropriate for the seriousness of the conduct of those involved: see R v Greatrex [1999] 1 Cr. App. R. 126. This will enable a jury to convict D of a lesser offence, such as violent disorder for example, where it is not satisfied that D is criminally liable for the more serious offence arising from the joint enterprise.

- Where alternative verdicts are open to a jury pursuant to ss6(2) and (3) Criminal Law Act 1967, alternative charges need not necessarily be

preferred. Prosecutors should decide on the facts of a particular case whether the inclusion of an alternative count on the indictment will be helpful or a distraction to the jury: see Archbold para 19-203.

63. Prosecutors must take account of any relevant change in circumstances as the case progresses after charge. For example, if D's role in the offence becomes clearer at a later stage, it may be appropriate to amend the charge or indictment accordingly.

Charging group assaults

64. Where a death or serious assault occurs at the hands of a group or gang, prosecutors should seek to determine the exact role played by each suspect and select charges that differentiate the roles.

65. However, prosecutors should be mindful, when selecting charges, not to overly complicate the presentation of a case. This includes a consideration of the directions of law that the indictment will require as a result.

66. In practice it is not always possible to identify who are the killer(s) or principal offender(s) and who are the secondary parties. In R v ABCD [2010] EWCA Crim 1622, Hughes LJ stated: "It is not, of course, necessary for the guilt of D that P be identified. In a multi-handed assault it will often be the case that no-one can say whose hand did the act which proved fatal. But what is necessary is that someone (identified or not) be shown to have committed murder."

67. In such cases, it is permissible to prosecute the participants to the offence as principals, without necessarily differentiating roles: see paragraph 50, bullet 6, in relation to s8 of the 1861 Act. However, alternative charges may be put on the indictment, to allow the jury to convict D of a lesser offence, where it is not satisfied that D engaged in the joint enterprise: see also paragraph 62, bullet 6.

68. The following example demonstrates how charge selection may be approached in this type of case. The actual charges selected will depend on the particular evidence against each suspect.

Example

Group A chases group B, and attacks and kills V, who is a member of group B. Some of group A carry and use knives, others inflict harm without the use of a weapon. It is not clear who inflicts the fatal injury, which is a stab wound to the heart. Not all of group A is present at the final attack, and not all of those present at the final attack assault V.

Possible charges

- Murder: against some or all of group A, on the basis that those charged participated in a joint enterprise for unlawful violence, realising that one of the group might use force of the kind that was actually used, with intent to kill or to cause really serious harm to any

member of group B that they caught. In accordance with the 1861 Act they may all be charged as principals.

- Manslaughter: in some group assaults resulting in the death of V, this may be an alternative charge to murder, on the basis that D took part in a joint enterprise, foreseeing that one of the group might cause only some (non-serious) injury or harm to any member of group B. However, in this example it is undesirable to charge manslaughter, even against those who did not take part in the final attack and did not carry a weapon: where death is caused by a lethal weapon (eg a knife), D's liability for any homicide offence will depend on D's knowledge of the presence of a knife or other bladed or potentially lethal weapon. In such circumstances, the prosecution would contend that, given D's knowledge of a knife, D foresaw that one of the group might use a knife with intent to cause at least really serious harm. D would then be liable for murder. Note, though, that in appropriate cases the judge is likely to leave manslaughter as an alternative verdict for the jury: if a jury is not satisfied that D is guilty of murder, it may find D guilty of manslaughter (s6(2) Criminal Law Act 1967).

- Violent disorder: as an additional charge to murder, to allow the jury the opportunity to convict on a lesser offence, should they acquit of a homicide offence.

- Serious Crime Act offences: as an alternative charge to murder, against those who texted or posted messages on social media sites, encouraging others to join in the proposed attack on Group B.

- Conspiracy to cause grievous bodily harm or conspiracy to murder: an additional charge against those who were involved in planning the attack beforehand.

69. Culpability will be further differentiated on sentence, when the judge will take into account the role played by D in relation to the offence(s) for which he is convicted.

Charging murder or manslaughter in group assaults without a weapon

70. Deaths caused by groups (or by individuals, whether identified or not, within a group) where no lethal weapon is carried or used require careful consideration of the fault element of P and D.

71. Whereas there will be no doubt that someone has committed a murder in cases where a lethal weapon is used, other cases are more problematic, as explained by Hughes LJ in R v ABCD:

> "*But it is not quite so clear where there is no lethal weapon and the common purpose is to administer a beating. If death ensues, that may well justify the conclusion that someone at least acted with the*

necessary murderous intent, viz to kill or to do grievous bodily harm, but it does not necessarily do so. The issue may in some cases be a live one. The mere fact that the injuries proved fatal is a powerful pointer to their having been inflicted, by one or more of the assailants, with intent at least to do grievous bodily harm. But as everyone knows, death may sometimes result where the intent of the assailant(s) has been no more than to cause some, not serious, injury; that is the basis of many convictions for manslaughter" (para 37).

72. In many cases of this kind, type 3 parasitic accessory liability will not apply. The joint enterprise will involve only one crime, A, and there is no crime B.

73. For instance, the joint enterprise is for a violent attack on V. Most defendants, if not principals, are likely to be caught by basic accessory liability: If all are intent on violence by beating without weapons, and join in or encourage the violence, intending really serious harm, and death results, all are liable for murder.

74. If any D joins in intending only some (less than <u>really serious</u> bodily) harm, he is liable for manslaughter.

75. However, there may be cases where type 3 parasitic accessory liability applies: if crime B (the act leading to death with intent at least to cause really serious harm) is one not agreed upon or intentionally encouraged.

76. In such cases, when assessing the evidence, the prosecutor should take the following approach:

i. Is there sufficient evidence that one of the assailants (although not identified) committed murder as a principal ie killed V with intent at least to cause grievous bodily harm? If not, murder charges would not be appropriate.

ii. If there is sufficient evidence that one of the assailants committed murder, consider, in relation to each D who participated in the joint enterprise: did D foresee that one of the assailants might commit a criminal act (use unlawful force) of the kind resulting in death, with intent to kill or to cause really serious harm? If so, subject to any viable claim of fundamentally different act or withdrawal, a charge of murder may be appropriate against that particular D.

iii. If no murder is committed, or if a particular D does not have the requisite foresight to be charged with murder, consider: did D foresee that one of the assailants might commit a criminal act (use unlawful force) with intent to cause some (less than <u>really serious</u> bodily) harm? If so, a charge of manslaughter may be appropriate against that particular D.

77. Lesser or alternative offences may also be charged.

Charging offences of encouraging or assisting: Serious Crime Act 2007

78. Part 2 Serious Crime Act 2007 (SCA) offences of encouraging or assisting crime (ss 44-46) abolished the common law offence of incitement.

79. Since SCA offences are inchoate in nature (the substantive offence does not need to occur), they can be used where it is not possible to charge someone as a secondary party. These include the following situations:

i. No substantive offence is committed. Secondary liability does not arise.

> **Example**
> D supplies a jemmy to P, believing that P will use it to commit a burglary. If P does not in fact commit a burglary, D cannot be liable as a secondary party to the burglary. Nor can D be liable for conspiring with P to commit a burglary, unless there is an agreement to do so. D may nevertheless be charged under s45 SCA, for encouraging or assisting an offence.

ii. D does an act capable of encouraging or assisting P, but the act does not in fact provide encouragement or assistance: there is no connecting link between D and P's act. (Note that in contrast, although secondary liability may not require a causative link between D's actions and the offence or P's involvement, it does require that D assisted or encouraged P.)

> **Example**
> D emails / tweets / posts an entry on Facebook encouraging others to commit an offence or a number of offences, such as public order offences. P does not read D's communication but nevertheless commits the offence(s) that D encouraged. D performs the conduct element of a SCA offence by the act of posting / tweeting etc, regardless whether P receives the communication or acts upon it.

80. More detailed guidance on SCA offences can be found in the CPS Legal Guidance on Inchoate offences.

Charging common law offences or Serious Crime Act 2007 offences

81. Although the SCA offences are inchoate, their wording also allows them to be used where a substantive offence is committed. Therefore, there is a clear overlap between charging someone as a secondary participant and the SCA offences.

82. Prosecutors should be alert to cases that present the possibility of charging either as a secondary participant or a SCA offence.

83. In these circumstances, D should be charged as a secondary participant; and a SCA offence should only be charged when it is not possible to charge a substantive offence.

84. Note that where an SCA offence is charged, the penalties are the same as that for the reference offences that D encourages or assists P to commit: s58 SCA.

85. The following should be noted in relation to the overlap between charging either as a secondary participant or a SCA offence:

- D gives assistance to P, not knowing the precise offence that P will commit, but the crime committed by P is one of a number of crimes within the contemplation of D. For example, D drives P to a pub, not knowing which offence P is to commit, murder, robbery or an offence against the person. P murders V. D could be charged as an accomplice (DPP for Northern Ireland v Maxwell [1978] 1 W.L.R. 1350 HL), or with a s46 offence. However, the fault element for the s46 offence is arguably stricter, and therefore more difficult to prove:

❖ In Maxwell, the court held that the offence committed by P must be one of a number of crimes "within the contemplation of the accomplice";
❖ S46 SCA requires D to believe that one or more of a number of offences will be committed (although he has no belief as to which). See also s47 for the further fault element required for a s46 offence.

- Where the evidence is inconclusive as to whether D acted as a principal or an accomplice, but it must be one or the other, he may be charged as a principal (see above); however, he also may be charged with a SCA offence: s56 allows a charge where it is proved D committed the inchoate offence or the anticipated offence, but it is not proved which. D should be charged as a principal, as D will then be liable to conviction and sentence as a principal or as an accomplice, depending on the evidence that emerges during trial.

- By virtue of section 118(1) of the Criminal Justice Act 2003 a statement made by a party to a common enterprise is admissible against another party to the enterprise as evidence of any matter stated. Such evidence may be lost if a SCA offence is charged.

86. There may however be circumstances where it is not possible to charge a substantive offence on the evidence available. For example, where D has a viable claim that he is not liable as a secondary offender due to:

- P carrying out a fundamentally different act to that foreseen by D, or
- A withdrawal from the joint enterprise by D.

In such cases a prosecutor should assess how the defence is likely to affect the prospects of conviction. In many instances, it will be proper to charge D as an accomplice and for these live issues to be decided by the jury. In some cases however, prosecutors may conclude that the evidence sufficiently supports D's defence, and therefore charging a SCA offence will be more appropriate (there is no defence of withdrawal to a Pt 2 SCA offence; and where P carries out a fundamentally different act to that foreseen by D, D may still be liable for encouraging or assisting a different offence to the one committed by P).

Charging an offence under s46 Serious Crime Act 2007

87. An offence under s46 SCA can be charged where D does an act capable of encouraging or assisting the commission of one or more of a number of offences, believing that one or more of those offences will be committed but he has no belief as to which.

88. The court in R v S & H [2011] EWCA Crim 2872 held that the prosecution must identify the offences in question, and include separate s46 counts on the indictment for each offence identified. This will ensure that the judge is clear as to the basis for conviction under section 46, and avoid difficulties that could otherwise arise in relation to sentence, if the offences pleaded in a single s46 count attract different maximum sentences.

89. Prosecutors should also note the court's recommended wording for drafting the statement and particulars of offence for a s46 count, and guidance on what needs to be proved (at paras 84-90):

> *a. Either:*
> *(i) D believes that offence X will be committed (see s46(1)(b)(i)); or*
> *(ii) D believes that one or more of the offences specified in the indictment (X, Y and Z) will be committed but has no belief as to which* (see s46(1)(b)(i)*; and*
>
> *b. D believes that his act will encourage or assist the commission of X* (see s46(1)(b)(ii))*; and*
>
> *c. D believes that X will be committed with the necessary fault for X* (see s47(5))*.*

90. Note though that the wording of s47(5) is in the conditional, and relates not only to proof of fault - s47(5)(a) - but also to proof of circumstances and /or consequences - s47(5)(b). Therefore c. above might be taken to read:

> *D believes that were X to be done it would be done in the circumstances and with any consequences and fault necessary for X*.

Charging conspiracy

91. In cases where there is no substantive offence, or where there is insufficient evidence that D participates in the substantive offence, but there is evidence from which an agreement to commit an offence can be inferred, a charge of conspiracy may be appropriate.

92. The essential element of the offence of conspiracy is an agreement by two or more persons to carry out a criminal act. Even if nothing is done in furtherance of the agreement, the offence of conspiracy is complete.

93. Statutory conspiracies are charged under section 1(1) of the Criminal Law Act 1977, and are triable only on indictment.

94. Where a conspiracy is charged, evidence in furtherance of the agreement / joint enterprise may be admissible against another party to the enterprise: section 118(1) of the Criminal Justice Act 2003.

95. Further guidance on conspiracies is available in the CPS Legal Guidance on Inchoate offences.