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Joint Enterprise charging decisions Principal, secondary and inchoate liability

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Introduction

1. This 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.

Concerns

2. 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.

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The doctrine of joint enterprise

3. The common law principles of joint enterprise can apply where two or more persons carry out an offence or offences. The parties to a joint enterprise may be principals (P) or secondary parties (accessories / accomplices) (D).

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

5. A secondary party is one who aids, abets, counsels or procures P to commit the substantive offence. A secondary party will be indicted and punished as a principal: s8 Accessories and Abettors Act 1861.

6. Joint enterprise 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.

7. The same principles that apply to a pre-planned joint enterprise apply equally to a spontaneous joint enterprise: R v Mendez and Thompson [2010] EWCA Crim 516.

8. In R v ABCD [2010] EWCA Crim 1622 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.

In these cases each player has performed all the elements of the offence (robbery or theft) in his own right.

(2) *Where D aids and abets P to commit a single crime.*

In this scenario, P carries out the conduct element alone. D is an accessory (aids, abets, counsels or procures the offence). Both are liable for offence X. P is liable as a principal. D's liability as a secondary party is based on proving:

- P's commission of the offence (although P need not be proved guilty).
- 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

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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 aids and abets 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 aiding and abetting 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. 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 attack V, a rival gang member, on the understanding or agreement that the assault on V will involve something less than GBH. P acts as principal, carrying out the assault; D aids and abets P by being present and shouting encouragement. In the course of the attack, P kills V, with intent to kill or do GBH. P is liable for murder of V as a principal. D foresaw when participating in the assault with P, that P might commit an unlawful act (use unlawful force) with intent to kill or do GBH. This is sufficient for D to be liable for the murder of V as a secondary party: 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 (non-serious) injury or harm to V. P is liable for murder of V. D is liable for manslaughter: R v Rahman [2008] UKHL 45; R v Yemoh [2009] EWCA Crim 930; R v Carpenter [2011] EWCA Crim 2568).

9. 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:

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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

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

11. The doctrine applies to secondary parties: D intentionally aids, abets, counsels or procures P to murder V1 but P, intending to kill V1, mistakenly kills V2 instead. D is guilty of the murder of V2.

12. In R v Gnango the Supreme Court used a combination of the common law principles of aiding and abetting and the common law doctrine of transferred malice in ruling that: where D1 and D2 indulge in a gunfight in a public place, each intending to kill or cause serious injury to the other, in circumstances where there was a foreseeable risk that an innocent bystander V would suffer death or serious injury, both D1 and D2 are liable for the unintended murder of V, regardless whether D1 or D2 kills V. Both are liable, whether 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).

Qualifications on the scope of joint enterprise

13. 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

14. 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.

15. 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).

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

17. The court in R v Mendez and Thompson [2010] EWCA Crim 516 expressed the test as whether P's act should, or should not, be considered "in a different league" from what D intended or foresaw (paragraph 48).

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18. 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

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

20. 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 SCA (see below).

21. 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.

22. D must make a timely communication of his intention to withdraw to those who continue in the enterprise.

23. Factors that may be considered, for instance, are: the nature of the assistance and encouragement given by D; how imminent the 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.

Prosecuting offences on the basis of joint enterprise

24. 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.

25. 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.

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

27. 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.

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The evidential stage applied to joint enterprise cases

28. 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.

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

- Was there a joint enterprise?
- Did D participate in the joint enterprise?
- Was the joint enterprise still ongoing when offence X was committed?
- Did D foresee that P might act unlawfully with the relevant fault element?
- 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?

Participation

30. The live issue in a joint enterprise case is often whether D has participated in the venture. This will involve first identifying what is the venture. In a parasitic liability case (see paragraph 8, third scenario) the venture may be crime A (eg robbery / burglary / low level violence); but where a killing occurs (crime B), D's liability will depend upon his continuing to take part, with the requisite foresight.

31. Whether D has participated / continued to participate in the venture will depend on the particular facts of the case. The evidence must be assessed against each suspect on each charge separately.

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

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

33. However, these factors are all capable of being evidence in a case. Moreover, the level of participation required may sometimes, depending on the circumstances, be minimal in order to satisfy the evidential stage.

Presence at the scene of an offence as evidence of participation

34. Mere 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 aid, abet, counsel or procure P in some way.

35. 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.

36. However, the courts have sometimes interpreted D's voluntary and purposeful presence at the scene as amounting to sufficient encouragement

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to P, so as to aid and abet P's offence. In such circumstances, D may be liable as an accomplice.

37. Whether D's presence amounts to encouragement or participation is a question of fact and degree. Factors to consider include whether D voluntarily attended the location, the effect that D's presence has on P, and D's state of mind.

38. For a detailed analysis of the case law see Archbold 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

39. 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.

40. 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.

41. 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:

- 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.
- 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.
- 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 GBH: see R v ABCD [2010] EWCA Crim 1622 para 34.

The public interest stage applied to joint enterprise cases

42. 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.

43. Every case must be considered on its own individual facts and merits.

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

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Selecting charges: principal, secondary and inchoate liability

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

46. In all cases prosecutors should select charges which:

- Reflect the seriousness and extent of the offending supported by 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.

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

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

49. Prosecutors should always reflect the culpability of D through appropriate charges.

50. To do so, 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 aid, abet, procure or counsel the commission of the offence in some way? If so, consider whether it is more appropriate to charge D as an accomplice or with a SCA or other inchoate offence (see paragraph 74 for factors to consider).
- Where D is charged as an accomplice, this may 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. However, if no appropriate lesser charge is available, the public interest will usually require a prosecution, as only in exceptional cases would it be appropriate not to

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charge a suspect who has participated in the commission of a serious offence.

- 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.

51. 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

52. 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.

53. 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.

54. 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."

55. 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,

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where it is not satisfied that D engaged in the joint enterprise: see also paragraph 50, bullet 6.

Example

56. 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.

57. The following 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.

- 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 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. In some circumstances, the jury might be directed only to consider this charge should they acquit of a homicide offence.
- SCA 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 GBH or conspiracy to murder: an additional charge against those who were involved in planning the attack beforehand.

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58. 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

59. 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.

60. 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.”

61. 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.

62. 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.

63. If any D joins in intending only some harm, he is liable for manslaughter.

64. 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.

65. 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 an unlawful act (use unlawful force) of the kind resulting in death, with intent to kill or to cause grievous

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bodily 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 an unlawful act (use unlawful force) with intent to cause some injury or harm? If so, a charge of manslaughter may be appropriate against that particular D.

66. Lesser or alternative offences may also be charged.

Serious Crime Act 2007 offences charged as inchoate offences

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

68. 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:

- 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 for aiding and abetting 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.

- 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.

69. 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

70. 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

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overlap between charging someone as a secondary participant and the SCA offences.

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

72. One advantage of using a SCA offence is that it makes clear to the judge and jury the distinct role of D in the offence, and distinguishes his role from that of any principals. This can be contrasted with charging the defendant as an accessory (aids, abets) where, due to the Accessories and Abettors Act 1861, the defendant is liable to be tried and punished as a principal offender.

73. That said, the penalties for SCA offences are the same as that for the reference offences that D encourages or assists P to commit: s58 SCA.

74. Where a prosecutor has an option of charging as a secondary participant or a SCA offence, the following factors may be considered:

- 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. The appropriate charge will therefore depend in part on a consideration of the evidence available to prove the respective fault elements.
- 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. In such circumstances, it will usually be appropriate to charge the suspect as a principal, so that D is liable to conviction and sentence as a principal or as an accomplice, depending on the evidence that emerges during trial.
- The different defences that may apply. In particular, does D have 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?If so, a prosecutor should assess how the defence is likely to affect the prospects of conviction. In many cases, it will be proper to charge D as an accomplice and for these live issues to be decided by the jury. In some

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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).

- 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. Would such evidence be lost if a SCA offence is charged?

Charging an offence under s46 Serious Crime Act 2007

75. 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.

76. 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.

77. 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)).

78. 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.