

# PARTICIPATION

## 1. MODES OF PARTICIPATION

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### A) THE PRINCIPAL

The principal is the one whose act is the most immediate cause of the *actus reus*, ie the defendant who has actually committed the offence in question. For example, the person who, with *mens rea*, pulls the trigger of the gun which fires the bullet, which kills the victim, is the principal on a charge of murder.

### B) JOINT PRINCIPALS

It is possible to have more than one principal if more than one person is directly responsible for the *actus reus*. For example, where two defendants stab the victim to death but it is not clear which one of them dealt the fatal blow, the defendants can simply be charged as joint principals.

There are borderline cases where it will not be clear whether the second person was a joint principal or merely assisting. The test in such cases is whether the defendant contributed to the *actus reus* by his own independent act rather than merely aiding or abetting.

### C) INNOCENT AGENT

Where a defendant acts through an intermediary who is an "innocent agent", the instigator will still be regarded as the principal offender. This situation arises where one person arranges events so that the *actus reus* of the crime is carried out by another person who is totally innocent. The person committing the *actus reus* may be totally innocent because he is under the age of criminal responsibility (ten years old), or is insane, or does not have the *mens rea* for the crime. For example see:

*R v Butt* (1884) 51 LT 607.

Burglary may be committed by an innocent agent. Sir Matthew Hale (*The History of the Pleas of the Crown*, 1736) wrote:

"If A, being a man of full age take a child of seven or eight years old well instructed by him in this villainous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to A who carries them away, this is burglary in A, tho the child, that made the entry, be not guilty by reason of his infancy.

So if the wife in the presence of her husband by his threats or coercion breaks and enters the house of B in the night, this is burglary in the husband, tho the wife, that is the immediate actor, is excused by the coercion of her husband."

If an older child formed the *mens rea* for the crime, the child would be the principal and the man a secondary party.

### D) ACCOMPLICE

An accomplice is the defendant who has helped the principal in some way. Accomplices (also known as accessories) are further subdivided into aiders, abettors, counsellors and procurers, as detailed below.

Consider the following example of the burglary of a jewellery shop. D1 forces the security shutters with a crow-bar, smashes the shop window and takes out

all the jewellery. The crow-bar had been lent to him by D2 who knew that it was for a burglary. D3 keeps watch and D4 drives the get-away car. D1 is the principal and D2, D3 and D4 are all accomplices.

## **2. SECONDARY PARTIES**

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### A) LIABILITY

The liability of secondary parties is governed by **s8 of the Accessories and Abettors Act 1861**:

"whosoever shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender."

Section 44 of the Magistrates' Courts Act 1980 makes a similar provision with respect to summary offences.

All four words may be used together to charge a person who is alleged to have participated in an offence otherwise than as a principal. So long as the evidence establishes that the defendant's conduct satisfied one of the words, that is enough.

In *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773, Lord Widgery CJ stated that the words in s8 should be given their ordinary meaning.

#### (i) **AID**

\* The natural meaning of "to aid" is to "give help, support or assistance to".

\* Aiding generally takes place at the scene of the crime.

\* It is not necessary to prove agreement or consensus between the principal offender and the person charged with aiding the commission of the offence.

\* No causative link need be established between that which is done by the aider and the commission of the offence by the principal offender.

#### (ii) **ABET**

\* The natural meaning of "to abet" is "to incite, instigate or encourage".

\* Abetting is committed by an accomplice who is at the scene of the crime when it is committed.

\* Abetting implies consensus between the principal and the abettor.

\* However, there need be no causative link between the actions of the abettor and those of the principal in committing the offence.

#### (iii) **COUNSEL**

\* Counsel may be defined as "to encourage".

\* Counselling normally refers to help given before the commission of a crime and may take the form of advice, information, encouragement or the supply of equipment etc.

\* Counselling implies consensus between the person charged as a principal offender and the counsellor.

\* It is not necessary to establish a causal link between the counselling and the commission of the full offence. However, the offence committed must have been within the scope of the counselling. See:

*R v Calhaem* [1985] QB 808.

(iv) ***PROCURE***

\* Lord Widgery CJ opined: "To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening".

\* Consensus between the procurer and the principal offender need not be established.

\* Procuring requires proof of a causal link between the procuring by the secondary party and the commission of the offence by the principal offender. See:

*Attorney-General's Reference (No 1 of 1975)*.

B) **PRESENCE AT THE SCENE OF THE CRIME**

Mere presence at the scene of a crime will not be sufficient for liability as an accomplice, even where the defendant remains at the scene to watch the crime being committed. See:

*R v Coney* (1882) 8 QBD 534.

*R v Bland* [1988] Crim LR 41.

However, if the person intended to encourage the principal offender through his presence, with knowledge of the circumstances constituting the offence, there will be liability. See:

*Wilcox v Jeffrey* [1951] 1 All ER 464.

For the direction to be given to the jury see:

*R v Clarkson* [1971] 1 WLR 1402.

C) **PARTICIPATION BY INACTIVITY**

Where the defendant has a right to control the actions of another and he deliberately refrains from exercising it, his inactivity may be a positive encouragement to the other to perform an illegal act, and therefore, an aiding and abetting. See:

*Tuck v Robson* [1970] 1 All ER 1171.

D) **MENS REA OF SECONDARY PARTIES**

The *mens rea* required on the part of a secondary party is (a) that the defendant intended to do the acts which he knew to be capable of assisting or encouraging the commission of the crime, and (b) knowledge that the principal will commit a crime of a certain type.

(a) It is the intention to do the acts of assistance or encouragement which must be proved (which is not the same thing as an intention that the crime be committed). See:

*National Coal Board v Gamble* [1959] 1 QB 11.

(b) (i) If the defendant aids, abets, counsels or procures the principal to commit a crime of a certain type, neither party specifying any particular victim, time or place, the defendant may be convicted as a secondary party to any crime of that type which the principal commits. See:

*R v Bainbridge* [1960] 1 QB 129.

(ii) If the defendant gives assistance to the principal, knowing that the principal intends to commit a crime, but being uncertain whether the principal has crime X, or crime Y, or crime Z in mind, the defendant will be

liable as a secondary party to whichever of those crimes the principal in fact commits. See:

*DPP for N. Ireland v Maxwell* [1978] 3 All ER 1140.

Where the offence is procuring the commission of a crime, recklessness as to whether the principal will commit the crime, is not sufficient *mens rea* for the secondary party. See:

*Blakely and Sutton v DPP* [1991] Crim LR 763.

### **3. PARTICIPATION PURSUANT TO A JOINT ENTERPRISE**

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Joint enterprise is a term used in criminal law to refer to "the participation of two or more persons in a criminal activity" (LB Curzon, *Dictionary of Law*, 1994, p206). The allegation is that one defendant participated in the criminal act of another (*R v Stewart and Schofield* [1995] 3 All ER 159). The parties must share a common purpose and make it clear to each other by their actions that that was their common intention (*R v Petters and Parfitt* [1995] Crim LR 501). Each member of the group assumes responsibility for the actions of other members in that group. The joint "plan" or joint common enterprise is also referred to as the "common design".

See the explanation of Hobhouse LJ in:

*R v Stewart and Schofield* [1995] 3 All ER 159.

It is now necessary to consider the liability of the accomplice where the principal commits some unexpected, or unforeseen offence. At what point can the accomplice successfully argue that he ceases to be a party to the principal's crimes?

#### **A) ACCIDENTAL DEPARTURE FROM THE COMMON DESIGN**

The general rule is that an accomplice will be liable for all the accidental or unforeseen consequences that flow from the common design being carried out. See:

*R v Baldessare* (1930) 22 Cr App R 70.

#### **B) DELIBERATE DEPARTURE FROM THE COMMON DESIGN**

Where the principal deliberately departs from the common design, by doing what was not authorised or agreed upon, then he alone will be liable for the resultant consequences and the accomplice ceases to be a party to his actions. See:

*Davies v DPP* [1954] AC 378

*R v Anderson and Morris* [1966] 2 QB 110

*R v English* [1997] 4 All ER 545.

In *Anderson and Morris* the judges focused on the question whether the acts could be said to be "authorised" or tacitly agreed upon. However, a more recent case viewed the question as whether the act could be said to have been foreseen. See:

*R v Mahmood* [1994] Crim LR 368.

If the accomplice had in fact contemplated a different offence, with a different actus reus which does not occur, then the accomplice will not be liable for any offence. See:

*R v Dunbar* [1988] Crim LR 693.

Despite the principle in *Anderson and Morris*, there are cases eg, *R v Smith* [1963] 1 WLR 1200 and *R v Betty* (1964) 48 Cr App R 6, where the courts have upheld convictions for manslaughter on the part of accomplices where the principal offender has been convicted of murder. A different view was also recently taken in:

*R v Stewart and Schofield* [1995] 3 All ER 159.

#### C) ACCOMPLICES TO MURDER

An accomplice, involved in a joint unlawful enterprise, can be convicted as an accomplice to murder, if he realised (without agreeing to such conduct being used) that the principal offender might kill or intentionally inflict serious injury, but nevertheless continued to participate with the other party in the venture and the other party, with the requisite intent, killed in the course of the venture. See:

*Chan Wing-Siu v R* [1985] AC 168  
*R v Slack* [1989] 3 All ER 90  
*R v Hyde* [1990] 3 All ER 892  
*Hui Chi-Ming* [1991] 3 All ER 897  
*R v Roberts* [1993] 1 All ER 583  
*R v Powell and Daniels* [1997] 4 All ER 545.

#### D) REPENTANCE OF SECONDARY PARTIES

Where one person has counselled another to commit a crime, or is present aiding the other in the commission of it, it may be possible for the secondary party to escape liability by withdrawal before the principal goes on to commit the crime.

However, mere repentance without any action clearly leaves the accomplice liable. What is *effective withdrawal* will depend on the mode of the accomplice's participation in the contemplated offence, and is for the jury to decide. According to Smith and Hogan, *Criminal Law*, Eighth ed., p158-9:

- \* If an accomplice only advised or encouraged the principal to commit the crime he must at least communicate his withdrawal to the other parties.
- \* Where an accomplice has supplied the principal with the means of committing the crime, the accomplice must arguably neutralise, or at least take all reasonable steps to neutralise, the aid he has given.
- \* It may be that an effective withdrawal can be made more easily at the preparatory stage than when the crime is in the course of commission, in which case the only effective withdrawal may be physical intervention.

The relevant cases in this area include:

*R v Becerra and Cooper* (1975) 62 Cr App R 212.  
*R v Grundy* [1977] Crim LR 543.  
*R v Whitefield* (1984) 79 Cr App R 36.  
*R v Rook* [1993] 2 All ER 955.

## **4. ACQUITTAL OF THE PRINCIPAL OFFENDER**

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If the principal offender is acquitted, a secondary party can nevertheless be convicted if it can be proved that an offence was committed. The position is as follows:

- (a) If there is an *actus reus*, but the principal has been acquitted because he has a defence or because the *mens rea* of the crime has been

negated, then in certain circumstances the secondary party may nevertheless be liable. See:

*R v Bourne* (1952) 36 Cr App R 1251.  
*R v Cogan and Leak* [1976] QB 217.

(b) If no offence has been committed then there cannot be secondary liability. See:

*Thornton v Mitchell* [1940] 1 All ER 339.

## **5. ASSISTANCE AFTER THE CRIME**

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It is only assistance before or during a crime that can render a person liable as an accomplice. However, a person can become criminally liable for assisting an offender after the commission of an offence. Section 4(1) of the Criminal Law Act 1967 provides:

Where a person has committed an arrestable offence, any other person who, knowing or believing him to be guilty of the offence or of some other arrestable offence, does without lawful authority or reasonable excuse any act with intent to impede his apprehension or prosecution shall be guilty of an offence.

### ACTUS REUS

There are two elements in the *actus reus*: (1) an arrestable offence must have been committed by the person whose apprehension or prosecution the defendant is charged with impeding; and (2) the defendant must have done "any act" with the appropriate intent.

### MENS REA

There are two elements in the *mens rea*: (1) the defendant must know or believe the offender to be guilty of the arrestable offence which he had actually committed, or of some other arrestable offence; and (2) the defendant must intend to impede the apprehension or prosecution of the offender.

### EXAMPLES

A woman is driving along a street when she sees a friend standing by the kerb. She stops and the friend tells her that he has just burgled a shop and wants to get away quickly. If the woman drives him away she will be guilty of doing an act "with intent to impede his apprehension or prosecution" under s4 of the Criminal Law Act 1967. She would not be guilty as an accomplice to the burglary as she did not help until after the crime was over (unlike the typical get-away driver, who is present during the crime as part of the plan).

The offence would also be committed by intentionally misdirecting police who were pursuing the offender, or making a false statement to a detective (which would also amount to other offences as well).

## **6. REFORM OF THE LAW**

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See the details of the Law Commission Consultation Paper No 131, *Assisting and Encouraging Crime*.