

**REGINA -v- POWELL AND ENGLISH REVISITED**  
**NEW GUIDELINES FROM THE HOUSE OF LORDS**

This morning (2nd July, 2008) the House of Lords will give judgment in **R v Rahman and Others**<sup>1</sup>. Apart from upholding the convictions and the judgment of the Court of Appeal in respect of the certified point, the House of Lords have restated the law and approved (with one amendment) the questions which were posed by the trial judge to the jury. The restatement and the questions will be of immediate value to all practitioners currently conducting joint enterprise cases (not necessarily homicide) or about to give advice or deal with such cases where the prosecution case rests primarily or otherwise on the foresight of secondary parties to a crime committed by the principal and which was not the purpose of the joint enterprise.

**Restatement of the Law**<sup>2</sup>

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."<sup>3</sup>

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<sup>1</sup> Michael Harrison, Q.C. and Yusuf Valli for the Appellants and Robert Smith, Q.C. and Paul Greaney for the prosecution

<sup>2</sup> Paragraph 68 – Lord Brown

<sup>3</sup> This direction can be suitably adapted to accommodate the same principle in other categories of offending.

**The Trial Judge's Questions**<sup>4</sup>

1. Are you sure that the man, whoever he was, who stabbed V with a knife so as to cause his death intended, at the very time of the stabbing, to kill him or to cause him really serious injury, i.e. was he guilty of murder?

If not sure: not guilty [and only if there is an alternative count "and go to Count 2"] because as a matter of law none of these defendants can be guilty of murder unless you are sure that the knifeman committed the offence of murder.

If sure: go to Question 2

2. Are you sure that the defendant whose case you are considering took some part in the attack on V? Did the defendant use violence to V? Did he ... with others surround V intending to enable others to use such violence? As I have directed you, mere presence at or very near the scene of an attack is not enough to prove participation. But if you find that a particular defendant was on the scene and intended and did by his presence alone encourage the others to attack V, that would amount to participation in it.

If not sure: not guilty [and go to Count 2]

If sure: go to Question 3

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<sup>4</sup> See paragraph 18: Lord Bingham – these have been amended by the author to render them fact neutral.

3. Are you sure that in taking part in the attack on V the defendant whose case you are considering [either]<sup>5</sup> shared the intention [to kill him or]<sup>5</sup> [at least]<sup>6</sup> to cause him really serious injury; or that he realised that one of the attackers might use such violence by the use of lethal weapons to V as to kill him with intent to kill or to cause him really serious injury?

If not sure: not guilty [and go to Count 2]

If sure: go to Question 4

4. Are you sure either that the actions of the knifeman in producing the knife and stabbing V as he did with it was within the scope of the common purpose of those attacking him which that defendant joined; or that the defendant whose case you are considering because of particular matters within his knowledge realised that one or more of the attackers might produce and use a knife in the attack and that such attacker might kill with the intention of killing V or causing him really serious injury?

If not sure: not guilty [and go to Count 2]

If sure: guilty of murder [and go no further]

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<sup>5</sup> Amendment agreed by the House of Lords as unduly favourable to the defendant and deleted – it would need clarification in the directions that a shared intention to kill would fall outside this type of secondary participation and amount to "plain vanilla" joint enterprise – Lord Hoffman's catchphrase in Brown and Isaac v The State [2003] U.K.P.C. 10, para 8.

<sup>6</sup> Proposed addition by the author in the light of the amendment.

Lord Bingham made it clear that there is no prescriptive formula for directing juries and that it is for trial judges to choose the terms most apt to enable juries to reach a just decision in a particular case. He preferred the judge's questions to those proffered by the Court of Appeal ([2007] E.W.C.A. Crim. 342, paragraph 69).

Park Court Chambers will deliver a seminar on the subject in September/October 2008 which will also include the vexed question (not arising on these appeals) of when manslaughter should be left as an alternative. Note: this was not such a case since the defendants would be guilty of neither murder nor manslaughter if Question 4 was answered in the negative – the reference to Count 2 in the judge's questions was to an alternative of violent disorder.

**ROBERT SMITH, Q.C.**

Dated the 2nd July, 2008