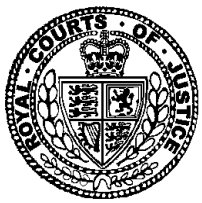

Neutral Citation Number: [2022] EWHC 91 (Admin)

Case No: CO/2949/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 19 January 2022

Before :

LORD JUSTICE FULFORD

Vice-President Court of Appeal (Criminal Division)

and

MRS JUSTICE FARBEY

- -

Between :

Omar Scott **App**

- and –

Director of Public Prosecutions **Respo**

- -

- -

Adrian Waterman QC and Tim James-Matthews (instructed by **Bindmans LLP**) for the **Appellant**

Louis Mably QC (instructed by **Crown Prosecution Service Appeals and Review Unit**) for the **Respondent**

Hearing date: 25 November 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the court remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.00am on 19 January 2022

MRS JUSTICE FARBEY :

1.

The appellant appeals by way of Case Stated against a decision of District Judge Ross Johnson ("the DJ") sitting at Stratford Magistrates' Court on 27 April 2021. The appellant contends that the DJ misdirected himself in law when he found the appellant guilty of one charge of encouraging or assisting an offence believing it would be committed, contrary to section 45 of the Serious Crime Act 2007 ("the 2007 Act" or "the Act"). The offence which the appellant was found to have encouraged was the possession by a prisoner of an unauthorised mobile phone contrary to section 40D(3A) of the Prison Act 1952. The encouragement was that he had made and received phone calls, and sent and received text messages, to and from the prisoner's phone.

2.
In the Case Stated the DJ asks the following questions:

"I. Can an offence of encouraging or assisting the commission of an either way offence contrary to s. 45 of the Serious Crime Act 2007 apply in relation to the possession of a mobile phone in prison, when the phone was already in the possession of the principal offender before any conduct was carried out by the defendant?

II. Was I wrong to conclude that the conduct of the defendant was capable of encouraging or assisting the offence of possession of a mobile phone in prison on the facts of this case?"

3.
We heard submissions from Mr Adrian Waterman QC with Mr Tim James-Matthews on behalf of the appellant and Mr Louis Mably QC on behalf of the respondent. We are grateful to counsel for their excellent submissions.

Background

4.
The facts of the offence are set out in the Case Stated and were agreed at trial. On 30 November 2019, David Sika was remanded in custody at HMP Bristol. On 22 January 2020, following a search of his cell, Mr Sika was found to be in possession of a mobile phone. On 21 April 2020, police searched the appellant's home and found an iPhone. On the same day, the appellant was arrested on suspicion of encouraging or assisting an either way offence. He was taken to Islington Police Station where he answered "no comment" to all questions in interview.

5.
The appellant was an acquaintance of Mr Sika and knew that he was on remand at HMP Bristol. He had visited him there on 21 January 2020 and was one of Mr Sika's approved telephone contacts. Investigations revealed that Mr Sika's telephone number had been stored in the appellant's phone since 16 December 2019. Between 10 December 2019 and 11 January 2020, the appellant's phone had contacted or attempted to contact Mr Sika's phone by calls and texts on 61 occasions (27 calls and 34 text messages). Between the same dates, Mr Sika's phone was used to contact or attempt to contact the appellant's phone on 71 occasions (35 calls and 36 text messages).

6.
Following charge, the appellant appeared at Highbury Corner Magistrates' Court on 23 April 2020 and entered a not guilty plea. Owing to the Covid-19 pandemic, a number of hearings were adjourned but there was a hearing before the DJ on 27 January 2021 which concerned alternative charges. It is not necessary to deal with the outcome of that hearing which is not relevant to the questions we have to answer.

7.
The trial took place before the DJ on 27 April 2021 when the appellant was convicted. As set out in the Case Stated, the DJ considered that the question under section 45 was whether the appellant's communications with Mr Sika's phone were "capable of encouraging or assisting" the ongoing possession of the prison phone. He found that Mr Sika had retained possession of the phone in order to communicate with parties outside the prison on an unmonitored device. If nobody had answered or returned any calls or messages from the phone, Mr Sika would have been discouraged from continuing with the possession of the phone. There would have been no purpose in taking the ongoing risk of possession and it would have been a simple matter for him to relinquish possession.

8.
The DJ found that, as the appellant was one of Mr Sika's contacts who had actively engaged in communication with the phone, the appellant's actions were capable of encouraging Mr Sika to continue to possess the phone in prison in order to carry on contact with the outside world. The DJ disagreed with the defence submission that there was no causal link or connection between the appellant's actions and the ongoing possession of the phone. It mattered not whether Mr Sika would have continued to possess the phone regardless of the appellant's actions. The DJ held that the same would apply to each and every one of Mr Sika's contacts who actively engaged in communication with the prison phone. Each of the contacts was capable of encouraging the ongoing possession of the phone. Whether or not they did encourage the continued possession of the phone was not the issue under section 45.

9.
The DJ went on to consider the mental elements of the section 45 offence and found that they were satisfied. As he was sure that all elements of the offence were satisfied, he found the appellant guilty.

10.
On 22 June 2021, at Thames Magistrates' Court, the DJ sentenced the appellant to four months' imprisonment. The application to the DJ to state a case for the High Court was served on that day; he granted unconditional bail to the appellant pending the outcome of this appeal.

Legal framework

The 2007 Act

11.
Section 45 of the 2007 Act provides as follows:

"**Encouraging or assisting an offence believing it will be committed**

A person commits an offence if–

(a) he does an act capable of encouraging or assisting the commission of an offence; and

(b) he believes–

(i) that the offence will be committed; and

(ii) that his act will encourage or assist its commission."

12.
This was one of three offences created by Part 2 of the Act. Section 44 created the offence of intentionally encouraging or assisting an offender. Section 46 criminalised the encouragement or

assisting of offences believing one or more will be committed. Part 2 of the Act expressly abolished the common law, inchoate offence of inciting the commission of another offence (see section 59). It was not in dispute before us that the three Part 2 offences together were intended to replace the offence of incitement.

13.
It was also not in dispute that, by introducing Part 2 of the Act, Parliament intended to remedy an anomaly. The offence of incitement could be committed where a person encouraged a principal to commit an offence that was not in the event committed. By contrast, where a person assisted a principal to commit an offence, there was no criminal liability if the offence was not ultimately carried out. The Law Commission, in its Report on Inchoate Liability for Assisting and Encouraging Crime (July 2006) (Law Com No 300) (Cm 6878), had described this distinction as a "major defect of the common law" (see para 1.3).

14.
The new offences in Part 2 of the Act removed the distinction. A person may commit a Part 2 offence "whether or not any offence capable of being encouraged or assisted… is committed" (section 49(1)). The Act therefore treats encouraging and assisting in the same way: there is no need in either case for the Crown to prove that any other offence materialised. A section 45 offence may be committed at the point when a person does an act that is "capable of encouraging or assisting" an offence without the need for any other offence to eventuate (section 45(1)(a)).

15.
Although sections 44-46 refer to encouraging or assisting an offence or offences, there is nothing in the language of the 2007 Act to suggest that Parliament intended to effect any other change or modification to the common law principles of secondary liability such as the notion of aiding and abetting. Nor does it affect anything in section 8 of the Accessories and Abettors Act 1861 by which a person who aids or abets the commission of any indictable offence is liable to be indicted as a principal offender. The Part 2 offences are discrete statutory offences. They have a different function from the principles of secondary liability. A key distinction is that secondary liability may only be established when the commission of the principal offence has been proved (R v Robert Millar (Contractors Ltd) [1970] 2 QB 54, 72F-73D and authorities cited there). As I have already set out, an offence under section 45 does not depend on the commission of any other offence.

16.
As regards the mens rea of a section 45 offence, a person must believe that the offence that is capable of being encouraged or assisted (which I shall for convenience hereafter call the principal offence) will be committed and that his or her act will encourage or assist its commission (section 45(b)). In addition, section 47(5) of the Act provides:

"In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence–

(a) if the offence is one requiring proof of fault, it must be proved that–

(i) D believed that, were the act to be done, it would be done with that fault;

(ii) D was reckless as to whether or not it would be done with that fault; or

(iii) D's state of mind was such that, were he to do it, it would be done with that fault; and

(b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that–

(i) D believed that, were the act to be done, it would be done in those circumstances or with those consequences; or

(ii) D was reckless as to whether or not it would be done in those circumstances or with those consequences."

17.
It is neither necessary nor fruitful to catalogue how the various elements of a section 45 offence might differ from what is needed to establish secondary liability (as authoritatively surveyed in R v Jogee [2016] UKSC 8, [2017] AC 387). I agree with Mr Mably that it is not the court's task to interpret Part 2 with the purpose of delineating the Part 2 offences from other parts of the criminal law. The function of the court when interpreting the words of a statute is to attribute meaning to those words within their particular statutory setting. We were not directed to any principle of statutory interpretation that would suggest that, in performing this function, we should do anything other than focus on the language of Part 2. There is inevitably a degree of overlap between section 45 and secondary liability. The overlap will be relevant to the decision whether to charge a person with one offence or another. It cannot cause this court to limit the scope or reach of Part 2. The court should not, under the banner of interpretation, reformulate offences created by statute (R v Sadique (No 2) [2013] EWCA Crim 1150, [2014] 1 WLR 986, para 21).

Unlawful possession of a phone

18.
Section 40D of the Prison Act 1952 provides (in so far as relevant):

"(3A) A person who, without authorisation, is in possession of any of the items specified in subsection (3B) inside a prison is guilty of an offence.

(3B) The items referred to in subsection (3A) are—

(a) a device capable of transmitting or receiving images, sounds or information by electronic communications (including a mobile telephone)…"

19.
The concept of unlawful possession as part of the actus reus of a crime extends to an ongoing course of conduct. A person who takes and keeps hold of a firearm (for instance) does not cease to possess it because time passes: the possession of the firearm is an ongoing act which may give rise to criminal liability at any time that is within the timeframe of the indictment (R v Styles [2015] EWCA Crim 161, para 32; see also Blackstone's Criminal Practice 2022, para A1.8). The same applies in my judgment to the possession of a phone under section 40D of the Prison Act.

The parties' submissions

20.
On behalf of the appellant, Mr Waterman made two overarching submissions. **First**, he submitted that Part 2 of the Act was intended to create a scheme for anticipatory offending, meaning that a section 45 offence must take place prior to and in anticipation of the commission of the principal offence. The statutory focus is on acts "capable of" encouraging or assisting an offence in the future and not on what the principal offender has already done. The section 45 offence is the act capable of encouraging

or assisting (together with the requisite mens rea) so that criminal liability becomes crystallised prior to any actual offending by the principal. The Act itself refers to the principal offence as the "anticipated offence" (sections 47(9), 50(3), 54(1) and (3), and 55). It refers to what the accused "anticipates" the principal might do (section 52). The accused must believe that the principal offence "will be committed" (section 45(b)(i)) which involves a forward-looking or prospective analysis.

21.
Mr Waterman drew our attention to the fact that the Part 2 offences are grouped together under the italic heading "Inchoate offences." He submitted that the heading emphasises the inchoate nature of the Part 2 offences. Inchoate liability is different from secondary liability. The latter involves a culpable act which is (as Mr Waterman expressed it) contemporaneous with the principal offence. By contemporaneous Mr Waterman did not mean that the acts of the secondary party and the principal must happen at the same time but that the secondary party will have involved himself in the commission of the principal's crime (R v Stringer [2011] EWCA Crim 1396, [2012] QB 160, para 48). Inchoate offences do not have this contemporaneous aspect but look forward to a principal offence in the future.

22.
Mr Waterman relied on case law which had characterised the former offence of incitement as being an inducement to commit an offence by means of (for example) a suggestion or proposal or persuasion (R v Goldman [2001] EWCA Crim 1684, para 22). An inducement by its nature looks forward to the act that is induced. The forward-looking nature of incitement had been replaced by the forward-looking nature of the Part 2 offences.

23.
It followed from these features of the statutory scheme that, for the purposes of section 45 of the Act, a person cannot encourage or assist the commission of an offence that is complete at the time of the act of encouragement or assistance.

24.
Secondly, Mr Waterman accepted that the DJ was correct to characterise Mr Sika's possession of the phone as an ongoing offence which continued from the time the phone came into his possession until it had been confiscated. However, he submitted that the "commission" of the offence (which was what had to be encouraged or assisted under section 45(a)) took place and was complete at the moment when Mr Sika came into possession of the phone. From then onwards, the offence had required no further act or conduct on the part of Mr Sika so that its "commission" had already taken place.

25.
On the basis of these two overarching submissions, Mr Waterman contended in relation to Question 1 in the Case Stated that the DJ had erroneously assumed that an act of encouragement or assistance to the ongoing possession of the phone could give rise to a section 45 offence. The forward-looking focus of section 45 means that no offence may be committed if the principal offence is complete at the time of the relevant alleged acts of encouragement or assistance: it is not possible to give anticipatory encouragement to a completed offence. Mr Sika's offence was complete before he had any phone contact with the appellant so that section 45 could have no purchase.

26.
In relation to Question 2, Mr Waterman submitted that the DJ should not have found that the appellant was capable of encouraging the possession of the phone merely by being in contact with it. It could not be said that anyone in contact with a prison phone would thereby be capable of

encouraging the prisoner to possess it. On the facts of this case, the appellant was far from being Mr Sika's most frequent or important contact. Mr Sika had continued to use the phone for 10 days after the appellant had ceased all communications with him. The DJ could not exclude the reasonable prospect that contact with the appellant may have been entirely ancillary to the possession of the phone. The DJ could not exclude the prospect that Mr Sika may have possessed the phone regardless of the appellant's actions and received no encouragement or assistance from him.

27.
On behalf of the respondent, Mr Mably accepted that section 45 is forward-looking and concerns what is anticipated in the future to the extent that a section 45 offence is concerned with acts done by an accused in relation to future offending by a principal. If the principal's offence has come to an end, then section 45 cannot have any application. Save to that extent, however, nothing in section 45 or in Part 2 of the Act would justify the conclusion that there is some temporal or other limit to the connection between the accused's and the principal's offending.

28.
It was sufficient for the commission of a section 45 offence that the accused believed "that an act would be done which would amount to the commission of [the principal] offence" (section 47(3)(a)). The doing of an act includes "the continuation of an act that has already begun" (section 47(8)(b)). The language of the statute therefore makes clear that encouragement or assistance may be given to a continuing act. Applying a forward-looking analysis, an act of encouragement or assistance that anticipates the continuation of an act may give rise to criminal liability under section 45.

29.
Mr Mably relied too on section 67 of the 2007 Act by virtue of which a reference to an "act" in Part 2 includes a reference to "a course of conduct." Parliament had thereby intended the Part 2 offences to apply to those who encouraged or assisted an ongoing state of affairs. Mr Waterman's submission that the Part 2 offences could not survive the full course of the principal's offending was inconsistent with the express provisions of the statute.

30.
Mr Mably submitted that the DJ was correct to conclude that the offence of possession of an unauthorised prison phone was a continuing offence and that it was therefore capable of being encouraged during the period of the charge against the appellant. The DJ had directed himself properly on the law. He had applied the correct legal principles to the evidence before him. Having asked the right questions, he came to the right answers.

Analysis and conclusions

31.
The drafting of Part 2 and the offences it creates have been described by David Ormerod and Rudi Fortson (as they then were) as "tortuously difficult" ("Serious Crime Act 2007: the Part 2 offences" Crim LR 2009 389, 395). It may be that the statutory provisions are complex; but it remains the court's task to give effect to Parliament's intention through the established principles of statutory interpretation.

32.
Mr Waterman relied on various passages of the Law Commission's Report to support his submissions. For example, he cited the Commission's view at para 5.37 of the Report that "encouraging should have the same broad meaning that inciting has acquired at common law" as support for the

proposition that the section 45 offence must be inapplicable to anything other than a future, anticipated offence by the principal. However, the views set out in the Report cannot be conclusive on the question of what the Act means or how it is to be applied (R v Y [2008] EWCA Crim 10, [2008] 1 WLR 1683, para 36). Nor in any event are the provisions of the Act the same as the Commission's recommendations. The deployment of the Report as an aid to the interpretation of specific provisions when Parliament did not enact the Commission's proposed scheme would be fraught with risk.

33.
I turn to the provisions themselves. The actus reus in section 45(a) is doing an act "capable" of encouraging or assisting. In my judgment, the word "capable" has a prospective meaning. The question is whether the act may at some future point encourage or assist the commission of an offence, rather than whether the act is already providing encouragement or assistance. To this extent, I agree with Mr Waterman.

34.
It does not follow that section 45 cannot apply after the commencement of the principal's offending. I do not see how such a limitation would operate even as a matter of logic and free from any consideration of Part 2.

35.
It is, however, plain from Part 2 that Parliament intended no such limitation. Although section 45 is expressed in brief terms, it must be read in accordance with the detailed provisions of section 47 (which has the heading "Proving an offence under this Part"). Section 47 treats the commission of an offence in terms of the doing of an act (see, for example, section 47(3)(a)). Section 47(8) provides that the doing of an act includes "the continuation of an act that has already begun."

36.
I read section 47(8) as referring – even on a narrow interpretation - to the continuation of an act of the principal. That reading is consistent with the view of the court in R v Sadique [2011] EWCA Crim 2872, [2012] 1 WLR 1700 which held (at para 60) that section 47(8) is limited to the act of the principal. Mr Mably submitted that a wider reading was appropriate: section 47(8) applies both to the principal's act and to the act of a person accused under section 45. I need not consider that submission or whether this court would be permitted to depart from the narrower interpretation in Sadique. It is sufficient for present purposes that section 47(8) applies to the continuation of an act in the commission of the principal offence, and means that the commission of an offence by the principal is not limited to a one-off action.

37.
It follows that, reading section 45 in accordance with section 47(8), the "commission of an offence" in section 45(a) includes not only the doing of an act but also the continuation of an act by the principal. In short, section 47(8) extends the actus reus in section 45(a) to encouraging or assisting the continuation of a criminal act that has already begun. By parity of reasoning, section 67 (which applies to the whole of Part 2) extends the actus reus in section 45 to encouraging or assisting a course of conduct by the principal.

38.
For these reasons, I have concluded that section 45 is apt to cover the encouragement or assistance of the principal's ongoing criminality. I reject, therefore, the submission that encouragement or assistance falls to be treated as overtaken by events at the start of the principal's offending. Neither

the description of the Part 2 offences as inchoate in the relevant heading nor the nature of the abolished offence of incitement makes any difference to our conclusion.

39.
The offence of possession of a prison phone is a continuing offence. The concept of possession does not relate only to the initial act or circumstances in which the person first comes into possession of a phone. It extends to the continued knowing control of the phone and involves continuing conduct on the part of the person in possession. Whether the continuing conduct is better described as the continuation of an act under section 47(8) or a course of conduct under section 67 of the 2007 Act does not matter. An act capable of encouraging the continuing conduct may give rise to criminal liability under section 45.

40.
The DJ considered with care the provisions of section 45. He was sure on the evidence before him that the appellant's actions were capable of encouraging the ongoing possession of the phone. He distinguished between acts capable of encouraging or assisting an offence and actual encouragement or assistance, taking only the former into consideration. He was sure that the appellant's actions were capable of encouraging Mr Sika to continue to possess the phone in prison in order to maintain contact with the outside world. On the facts of this case, he was entitled to reach that conclusion.

41.
Mr Waterman submitted that the DJ's reasoning would criminalise everyone who makes phone contact with an unauthorised prison phone, regardless of circumstances or culpability. He pointed in particular to the DJ's conclusion that "the same would apply to each and every contact who actively engaged in such communication." The circumstances in which a person may have phone contact with a prisoner are varied. If the DJ's interpretation were correct, the section 45 offence would cover such a range of culpability that there would be no clear connection between the degree of a person's culpable behaviour and his or her criminal liability. The court should be cautious to interpret a criminal statute in a way that would cut loose the link between criminal liability and what could sensibly be regarded as the commission of a culpable act.

42.
I do not agree that this part of the DJ's analysis implies that anyone who phones a prisoner on an unauthorised phone will be criminally liable under section 45. The DJ's reasoning is contained in the section of the Case Stated that deals with the actus reus but the mens rea in section 45(b) will also need to be proved. A person who does not believe that an offence will be committed or who does not believe that his or her phone contact will encourage or assist its commission will be not guilty. In my judgment, the Crown's burden of proving the requisite beliefs, together with the additional burden of proving the mental elements in section 47(5), represents an adequate touchstone for culpability. It may mean (for instance) that a worried mother who is unaware of prison life but wants to pass urgent news to her son may avoid being criminalised for a single phone call. In the present case, it was open to the DJ to find on the evidence that the appellant's communications were capable of encouraging the commission of a criminal offence and that he satisfied the requisite mental element. There is no reason to interfere.

Conclusion

43.
For these reasons:

i.

I would answer Question 1 in the affirmative. An offence of encouraging or assisting the commission of an either way offence contrary to section 45 of the 2007 Act may apply in relation to the possession of a mobile phone in prison, when the phone was already in the possession of the principal offender before any conduct was carried out by the defendant.

ii.

I would answer Question 2 in the negative. The DJ was not wrong to conclude that the conduct of the defendant was capable of encouraging or assisting the offence of possession of a mobile phone in prison on the facts of this case.

44.

Accordingly, I would dismiss this appeal.

LORD JUSTICE FULFORD V.P. :

45.

I agree.