THE GUILTY ASSIST: THE LAW OF ACCOMPLICE LIABILITY

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In order for criminal liability to attach to accomplices for the commission of a crime (carried out by one or more of the other offenders), the law requires "all for one" (i.e. that each offender share the same state of mind required for the commission of the offense), and "one for all" (i.e.. that each offender either does something to set the other(s) into criminal motion or intentionally aids them in carrying out their criminal purpose. Of course, if one turns and testifies against the others, (see for example, People v Couser 94 NY2d 631 (2000), the motto of Alexandre Dumas' Three Musketeers may well be replaced by Geoffrey Chaucer's "every man for himself," (from a Knight's Tale).

Section 20.00 (Accessorial Liability) of the Penal Law defines the circumstances in which one person may be criminally liable for the conduct of another/others. It states that when one person engages in conduct constituting a criminal offense (e.g. murder), another person is criminally liable for such conduct (e.g. the fatal stabbing of the victim), when acting with the state of mind required for the commission of such offense (in this example, the intent or conscious objective to cause the victim's death), he/she solicits (i.e. requests for a particular purpose), commands (i.e. authoritatively directs: think Caesar holding up a downward-pointing thumb), importunes (i.e. persistently requests, entreats or harangues), or intentionally aids such person to engage in such (criminal) conduct (e.g. by providing the murder weapon or informing the killer of the intended victim's whereabouts).

It should be noted that a person's MERE PRESENCE at the scene of the crime with knowledge that it is taking place, or his/her association with the perpetrators does not, in and of itself, make one an accomplice to the crime committed by the others. (People v Slacks 90 NY2d 850 [1995]): The trial court did not err in refusing to give this instruction where there was no reasonable view of the evidence to support it. The evidence established that the defendant and two others [who got away], robbed two victims, one of whom was shot and killed in a car).

The law does not appear to draw much distinction between liability as a principal (i.e. the main actor) or as an accomplice (i.e. aider and abettor), (People v Duncan 46 NY2d 74 [1978]), and once the People have proven the defendant's culpable involvement, he/she is deemed to be as guilty of the crime as if he personally committed every last act comprising it. In this sense, "in for a penny" is tantamount to "in for a pound." (Depending on the circumstances, the defendant may, however, receive some sentencing consideration for the fact that he/she did not fire the fatal shot or strike the killing blow. Then again, some judges may not look too kindly on the dastardly coward who orders the killing but leaves the dirty work to others).

While the People must prove accessorial liability beyond a reasonable doubt, they need not convince all 12 jurors (six in a misdemeanor trial), that the defendant acted as an accomplice rather than as a principal. (People v Mateo 2 NY3d 383 [2004]). (A verdict of guilty, one way or the other, must still be unanimous).

As long as the People do not change their theory of the prosecution as reflected in the Grand Jury evidence underlying an indictment, they may seek to convict the defendant at trial as either a principal or accomplice. In People v Rivera 84 NY2d 766 (1995), for example, the defendant was indicted for Murder 2d degree and Criminal Possession of a Weapon upon facts establishing that the defendant, during an argument with the victim at the defendant's apartment (where several others were present), shot him at close range, after which the defendant and the others dragged the victim away.

The trial court, over defendant's objection, instructed the jury on Accomplice Liability. The Appellate Division (AD) affirmed the defendant's conviction (for Manslaughter), holding that while the indictment did not allege accomplice liability, the proof at trial established that he acted in concert with others. (198 AD2d 529).

Citing People v Duncan supra, the AD noted that there is no distinction between liability as a principal and criminal culpability as an accessory, and the status for which the defendant is convicted has no bearing on the theory of the prosecution (in this case, that the defendant intentionally shot and killed the victim during a face-to face confrontation).

The Court of Appeals affirmed the conviction, rejecting the defendant's argument that he was denied his due process right to be tried upon charges authorized by the Grand Jury so that he could prepare a defense and avoid double jeopardy. (citing People v Iannone 45 NY2d 589 [1978]).

The Court, citing, inter alia, People v Bliven 112 NY 79 (1889), noted that it is permissible to admit evidence establishing the defendant's culpability as an accessory where an indictment charges him as a principal because an instruction on "acting in concert" (with others), in this case, did not charge a (new) substantive crime not contained in the indictment or impermissibly amend it to charge additional acts or crimes. (People v Wilczynski 97 Misc 2d 307 [Sup Ct NY County 1977]).

In contrast, the Court pointed to People v Roberts 72 NY2d 489 where the indictment (charging the defendant with Manslaughter), alleged that the defendant struck the victim in the throat and killed him (based, in large measure, on the defendant's own grand jury testimony that he punched the victim in the throat in the backseat of an out-of-control taxi), and then sought to prove at trial that the defendant intentionally strangled the victim.

The Court held that where the indictment specifies a particular set of facts supporting a material element of the crime charged (punching V in the neck during a fight in a swerving vehicle), they are not then free to present evidence that affirmatively disproves their original theory of the case and offer an entirely different factual scenario (purposeful strangulation indicative of murder) for which the defendant had not been indicted.

In Rivera, no new theory of prosecution was introduced, and the facts remained the same (that the defendant allegedly shot and killed the victim). Moreover, that the defendant was indicted as a principal and convicted either as principal or accomplice was of no great moment since the People still had to prove the elements of the crimes charged in the indictment. (As noted in the Practice Commentary to PL20.00, whether one is the actual perpetrator or an accomplice is, for purposes of criminal liability for the offense, essentially irrelevant. (See Donnino Practice Commentary to PL section 20.00).

The People, therefore, are NOT required to specify in an indictment whether the defendant is charged as a principal or an accomplice because any distinction between the two, for purposes of criminal liability, is considered to be academic. In other words, the theory upon which prosecution and conviction are sought does not depend on whether the defendant is proven to have acted as a principal or an accomplice. (People v Giudice 83 NY2d 630 [1994]).

See also People v Jones 195 AD2d 1072 where the Fourth Department (citing People v Duncan supra), held that the trial court's decision to instruct the jury on Accomplice Liability did not change the People' theory of the case (that D stole the victim's wallet). Although the defendant's cohort testified that he stole the wallet, the jury was free, in the court's estimation, to discredit such testimony and accept the testimony of the People's witnesses who said that the defendant secreted the wallet in his pocket before tossing it into a bush when the police arrived. And, whether the jury decided that he acted as principal or accomplice was neither here nor there with respect to his criminal liability for the theft.

When analyzing the "intent" component of accessorial liability, it is important to keep in mind that the the defendant need only share the intent required for the commission of the charged crime (rather than a specific intent not called for by the charging statute). In People v Kaplan 76 NY2d 140 (1990), for example, the Court held, in a case involving Criminal Sale of a Controlled Substance 1st degree, that the People need only establish beyond a reasonable doubt that the defendant (as an accomplice), KNOWINGLY participated in the unlawful sale of a drug and NOT that he "SPECIFICALLY INTENDED" to sell drugs. (Citing, inter alia People v Flayhart 72 NY2d 737 [1988]).

In that case, the defendant aided and abetted his cousin (a drug dealer) in the sale of cocaine to an undercover officer by retrieving and handing over an envelope (containing the drugs) to the undercover (in exchange for cash which he counted) after the cousin directed him to "take care of her." The court held that the trial court properly instructed the jury that in order to find the defendant guilty, "you must find that he acted with the specified intent required for the offense (i.e. knowing and unlawful), and that he intentionally aided (in) the sale."

In Flayhart, supra, the Court held that a defendant can be found guilty as an accomplice to homicide (in that case Criminally Negligent Homicide), even though neither participant had a conscious objective (i.e. intent) to cause the victim's death. In such case, both actors who jointly engage in deliberate conduct can fail to perceive a substantial and unjustifiable risk of death inherent in their conduct. (The defendants, husband and wife, were found to be criminally negligent in the death [from malnutrition and pneumonia] of the husband's mentally and physically disabled brother who was entirely dependent upon them for his care and well-being).

The defendant argued that it is logically impossible to aid and abet Negligent Homicide (an unintentional crime), because one cannot intentionally aid another to fail to perceive a substantial and unjustifiable risk of death. The Court noted, however, that PL section 20.00 imposes accessorial liability NOT for aiding or encouraging another to reach a particular mental state, but for intentionally aiding another to ENGAGE IN CONDUCT which constitutes the charged offense while him/herself acting with the mental culpability required for the commission of that offense.

As the Court saw it, the defendants were convicted because the jury found that each of them, while failing to perceive a substantial and unjustifiable risk of death (the common mental state), intentionally aided the other to engage in certain conduct (in this case, omissions), including the failure to provide necessary sustenance and medical attention which ultimately resulted in the brother's demise.

A similar outcome might occur where two individuals, while drag racing in separate vehicles, collide and lose control, leading to a fiery crash that results in the unintended (but entirely foreseeable death) of a passenger who didn't have the good sense to watch form a distance. Each driver, it can be argued, failed to perceive (or entirely disregarded) a substantial and unjustifiable risk of death, and each aided the other by intentionally participating in a highly dangerous activity.

In People v Russell 91 NY2d 280 (1998), the court upheld the defendant's conviction for Depraved Mind Murder arising from a gang-related shoot-out between willing (and foolhardy) adversaries whose cock-eyed aim and reckless disregard for the lives of others, resulted in the death of an innocent bystander from errant gunfire. In the court's view, the combatants, notwithstanding their status as enemies, manifested a "community of purpose" by engaging in mutual combat that caused the death of an unintended victim. In doing so, they essentially "aided and abetted" each other in participating in this deadly exercise, and as such, could properly be deemed accomplices for purposes of accessorial liability under PL 20.00.

The Russell court is considered to have expanded the "COMMUNITY OF PURPOSE" rule from accomplices (i.e. cohorts) to adversaries, and the fact that the combatants set out to kill each other (rather than some innocent party who happened to be in the wrong place at the wrong time), did not preclude a finding that each offender "intentionally aided the other" to participate in violent combat that resulted in death.

The Court also noted that Depraved Mind Murder does not require the People to prove which participant fired the fatal shot as long as the evidence sufficiently establishes that each of them acted with the REQUISITE MENTAL STATE (i.e. a conscious disregard for a substantial and unjustifiable risk of death under circumstances demonstrating a gross deviation from the standard of care of a reasonable person), and participated to one degree or another in the conduct that resulted in death. The Court noted that each participant tacitly agreed to engage in a private war with high-powered rifles in the middle of a densely-populated housing complex and thereby placed the lives of innocent bystanders at risk, and ultimately caused the death of one of them.

In People v Davis 2019 NY Slip Op. 08061 (4th dep't 11/18/19), the Fourth Department held that a defendant's culpability as an accomplice (in particular whether she possessed the requisite mental state for the crime charged), can be established by circumstantial evidence. (Citing, inter alia, People v Ozarowski 38 NY2d 481 [1976] and People v Zuhlke 67 AD3d 1341 [4th dep't 2009]).

The evidence in this Robbery/Assault/ Weapons Possession case established that the defendant arranged with a long-time acquaintance to purchase marijuana for $300.00. When the defendant arrived at the designated location, she got into a car but did not have sufficient funds to complete the transaction. She then made what appeared to be a cell phone call (though her phone records did not support this), to a friend, ostensibly to obtain the balance of the money.

A short while later, the co-defendant arrived and held up the two victims (but did not point his gun at the defendant), and stole their stash. He then shot the victims and let the defendant out of the vehicle. The victims subsequently identified the shooter from photographs that were on the defendant's Face Book page. (The court also admitted evidence of a phone conversation between them that reflected a more-than-just-friendly relationship).

Defendants charged with Felony Murder (PL 125.25[3]) can experience the broad reach of Accomplice Liability if they intentionally participate in a designated felony (e.g. Burglary 1st degree, during the course of which (or in immediate flight therefrom), another participant (whom the defendant aided and abetted [e.g. by driving co-defendants to the site of the intended burglary]), causes the death of a non-participant. (See, for example, People v Santanella 63 AD2d 744 [2d dep't 1978]).

The defendant may however, in appropriate cases, assert an affirmative defense (which he must prove by a preponderance of the evidence derived either from the People's own proof or other evidence that he may introduce) that: a. he did not commit the homicidal act, b. he was not armed with a deadly weapon or other instrument readily capable of causing death or serious physical injury (and of a sort not ordinarily carried in public places by a law-abiding citizen), c. he had no reasonable ground to believe that any other participant was armed with such a weapon/instrument and d. he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physics injury to a non-participant,

In such circumstances, the defendant is basically claiming that while he may have been involved to a point, he was not armed, didn't kill anyone and was an unwitting dupe with respect to the possession of a deadly weapon/dangerous instrument or the violent intentions of any of the other participants. ("Hey, I was waiting in the car, and I was led to believe that no one was home and they were gonna get in and get out without anyone knowing what happened or who did it.")

The defendant may also, in appropriate cases, seek an instruction on PL 20.15 which states that "except as otherwise expressly provided in this chapter, when two or more persons (per PL 20.00) are criminally liable for an offense which is divided into degrees (e.g. Assault 2d degree [intent to cause serious physical injury] and Assault 3d degree [intent to cause

physical injury], each person is guilty of such degree as is compatible with his own culpable mental state and with his own accountability for an aggravating fact or circumstance.

In People v Castro 55 NY2d 972 (1982), the Court of Appeals held that the trial court erred in refusing to instruct on PL 20.15 (in addition to PL 20.00), where the defendant was charged with Riot 1st and 2nd degrees and Unlawful Imprisonment 1st and 2d degrees because it is the mental state and accountability for an aggravating fact or circumstance of each defendant that determines the degree of offense for which he/she may be found guilty. (The court made matters worse when, in response to a juror inquiry whether the defendant had to be a direct participant in inflicting personnel injury to be guilty of Riot 1st degree, the court just re-read Section 20.00 but not 20.15).

(Riot 1st degree [PL240.06] requires proof that the defendant: 1. simultaneously with ten or more persons, engaged in tumultuous and violent conduct; 2. thereby intentionally or recklessly caused or created a grave risk of causing public alarm; and 3. that in the course of and as a result of such conduct, a non-participant suffered physical injury or substantial property damage occurred. Riot 2d degree [PL 240.05] is similar to Riot 1st degree except that it only requires the defendant's simultaneous involvement with four or more persons and there is no requirement for physical injury to a non-participant or substantial property damage).

As is evident, while accessorial liability requires a "commonality of purpose" (i.e. shared mental state as defined by the crime charged), whether among friends or foes, and conduct that either triggers or aids in the principal's commission of the crime, the law doesn't appear to require all that much in the way of protracted participation for the conduct of a principal to be imputed to an accomplice. Depending on the circumstances, purposely pushing the first in a long line of dominoes may be just as blameworthy as making sure that the last one accomplishes the common criminal purpose of the participants.