prosecutors will be unsure how best to utilise. It would seem to be available for incidents ranging from disputes between neighbours to wolf-whistles from building sites. Unless there is judicial interpretation limiting the meaning of this offence, it would appear to be a significant extension of the criminal law, with little guidance given on its precise limitations.

The section 4 offence occurs where, as a result of the defendant's conduct, the victim fears on at least two occasions that violence will be used and the defendant knows or ought to have known that the conduct would cause such fear. As Offences Against the Person Act 1861, s. 47, carries the same maximum sentence as the new section 4 offence, it may be preferred by a prosecutor for two main reasons. First, the new section 4 offence requires the conduct to take place on at least two occasions, whereas it is clear that a single incident can form the basis of a section 47 offence. Secondly, the section 4 offence requires proof that the victim would suffer significant harm, whereas it is enough for the section 47 offence if the victim believes that she *might* suffer harm. However, section 4 will be needed in cases where the victim has not suffered a medically recognised illness. This may not be very often given that stress was included as one of the illnesses accepted as sufficient for actual bodily harm in *Ireland.*

It is commendable that Parliament and the courts have decided that the law should address the issues of stalking and seriously harassing conduct, but if the criminal law is to deal with these areas without threatening values our society holds dear, such as freedom of speech, the offences need to be far more tightly and carefully defined.

JONATHAN HERRING

CLARIFYING ACCESSORIAL LIABILITY

THE main question for the House of Lords in *Powell and English* [1997] 3 W.L.R. 959 concerned when a defendant, who was participating in the commission of one crime, could be found liable for other crimes which were committed by the principal. For example, if an accessory was assisting the principal in the commission of a burglary and the principal committed murder, when should the accessory himself be convicted of murder? In answering this question the House of Lords has finally resolved a number of doubts relating to the ambit of accessorial liability. As a result of this case a number of principles can be identified concerning the liability of accessories for crimes committed by the principal.

(1) The accessory will be convicted of murder if he foresees that

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the principal might kill with an intention to do so or to cause serious harm. This was the essence of the decision in *Powell and English,* where it was affirmed that recklessness was sufficient culpability for an accessory to be convicted of murder. This result, with the consequent imposition of a mandatory life sentence, was justified by their Lordships on the ground that the accessory's fault lay in the fact that he had continued to assist or encourage the principal even though he had foreseen a risk that such a serious crime as murder might be committed.

(2) The House of Lords also affirmed that it was sufficient that the accessory foresaw the commission of murder as a possibility rather than a probability.

(3) If the principal committed a crime which the accessory had not contemplated then the accessory cannot be liable for it. So if the acessory was unaware that the principal had a gun, which was used to kill the victim, the accessory would not be guilty of murder.

(4) If the accessory is to be liable for the principal's crime he must foresee that the principal might commit an act of the type which was in fact committed. So, as happened in *English,* where the accessory contemplates that the principal might beat the victim with a stake but the victim is stabbed to death, then the accessory should not be convicted of murder because he did not foresee that type of act. Where, however, the accessory contemplates that the principal might kill the victim by shooting but he is actually stabbed to death, then the fact that a different weapon is used is irrelevant, because it is as dangerous as the weapon which the accessory contemplated might be used. The distinction between these two cases is fine, but it can be justified on the basis that in the first case the accessory presumably only contemplates that a particular type of grievous bodily harm may be caused rather than death, whereas in the second case the accessory contemplates that the victim might be killed and he is killed. It should follow from this that if the accessory contemplates that the principal might kill the victim with a stake but he is stabbed to death, then the accessory should be convicted of murder.

A further example arises where the accessory contemplates that the principal might use a weapon, such as a gun, to cause serious harm, such as kneecapping, but it is used to kill the victim. In this type of case, as Lord Hutton acknowledged, the accessory should not be guilty of murder, even though death is caused by a weapon which the accessory contemplated might be used. This is because the accessory had presumably not contemplated that death might result from the kneecapping, so the shooting was a different act from that which had been contemplated.

(5) All the judges, except Lord Mustill, emphasised that the

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accessory is liable for the crimes committed by the principal because of what the accessory foresaw rather than because the accessory had tacitly agreed to the commission of the crimes. An important implication of this analysis is that references to joint enterprise liability cease to be relevant, since it is not necessary to show that the accessory had wanted the principal to commit the crime; we are only concerned to determine what crimes the accessory contemplated that the principal might commit. It is to be hoped that in future joint enterprise liability can be treated simply as a historical footnote and not as a distinct part of accessorial liability.

(6) The implications of *Powell and English* are not confined to cases where the principal commits murder, since these principles apply regardless of the crime committed by the principal. So, for example, if the accessory and principal agree to commit a burglary and, in the course of doing so, the principal commits robbery, the accessory will be convicted of that crime if he foresaw its commission as a possibility.

(7) Similarly, the principles recognised in *Powell and English* apply regardless of whether the accessory was present or absent when the principal committed the crime: *Rook* (1993) 97 Cr.App.R. 327.

(8) Although the matter was not specifically examined by the House of Lords, it should now be accepted that where the principal commits one crime and the accessory foresees the commission of a lesser offence, then the accessory should be convicted only of the offence he contemplated: *Stewart and Schofield* [1995] 1 Cr.App.R. 441. Lord Hutton appears to have endorsed this conclusion in *Powell and English.*

Although the decision of the House of Lords resolves a number of doubts as to accessorial liability, the central conclusion of the court remains unacceptable. Why should an accessory be convicted of murder, and so receive a mandatory life sentence, when he merely foresaw that the principal might kill, albeit with the requisite intent? Nobody doubts that the accessory should be punished in such circumstances, but surely the defendant should be guilty of manslaughter and not murder. The obstacle which prevented the accessory from being convicted of a lesser offence than that of the principal was removed by the Court of Appeal in *Stewart and Schofield,* but this case was, surprisingly, not considered in *Powell and English.* Rather, the judges for the most part justified the conviction of the accessory for murder by reference to reasons of pragmatism and public policy, such as the need to protect the public from the commission of crimes by gangs. But this misses the point. By accepting that the accessory can be convicted of murder when he

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acted recklessly, whereas the principal will only be convicted if he or she had the necessary intent, the House of Lords has approved a result which is both illogical and unprincipled. If the accessory was convicted of manslaughter the result could still be justified on the grounds of pragmatism and policy, but it would also be consistent with fundamental principles of the criminal law.

Clearly the battle against accessories being convicted of murder where they are reckless has been lost. But the judgments of Lords Steyn and Mustill suggest that the fight will now shift to an even more controversial issue, namely reform of the law of murder itself. Both judges criticised the law of murder in the strongest terms, particularly the rule that a defendant can be convicted of murder if he intended to cause a serious crime without contemplating the risk of death. Such a rule makes murder a constructive crime. If this rule had been changed it would follow that the objections to *Powell and English* would be weaker, since it is more likely in these cases that the principal would be convicted of manslaughter and so would the accessory. The consequence of this would be that the sentence could be fashioned to fit the crime. It would be even more satisfactory if the mandatory life sentence for murder itself was abolished. As Lord Mustill suggested, reform of the law of murder might not be popular but it would be just.

GRAHAM VIRGO

PUNISHMENT WITHOUT CONVICTION IN TWO JURISDICTIONS

CONSIDER the following scenarios. In case (i), A is convicted of a burglary. He is not convicted of aggravated burglary, but it appears that A possessed a firearm at the time of the offence. In case (ii), B is convicted on one count of theft. The count is a specimen count which, on the evidence adduced, is representative of a series of similar thefts for which B has not separately been charged. In case (iii), C is convicted of supplying 5 grams of cocaine. Because there is a reasonable doubt about her guilt, she is acquitted on a second charge of supplying 10 grams of cocaine on the same occasion to another person; but it appears that, on the balance of probabilities, she in fact also committed the second offence.

On what basis are A, B and C to be sentenced? The Criminal Justice Act 1991 confers a broad discretion to take cognisance of all information available regarding the character of the offender and circumstances of the offence, including any aggravating or mitigating factors. But should the sentencing judge take into account circumstances such as possession of a firearm in case (i), or the

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