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

https://doi.org/10.1017/S0008197300134269 Published online by Cambridge University Press

related criminal conduct in cases (ii) and (iii), where the relevant facts constitute an offence for which the offender was not convicted?

In recent years, the Court of Appeal had given conflicting judgments in this area. Now, in a full and considered judgment, it has said no to case (ii), and by so doing has provided more general guidance regarding these questions. In *R.* v. *Canavan; R.* v. *Kidd; R.* v. *Shaw* [1998] 1 All E.R. 42, the Court held that where a defendant is convicted on a specimen count, which is allegedly representative of similar criminal conduct on other occasions, the sentencing court may not take account of that other conduct in order to increase the sentence imposed: "he may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence" (at 44).

The reason offered for this rule, which overturns earlier decisions such as *R.* v. *Mills* (1979) 68 Cr.App.R. 154 and *R.* v. *Bradshaw* [1997] Crim.L.R. 239, is that it is "inconsistent with principle that a defendant should be sentenced for offences neither admitted nor proved by verdict". In *Kidd,* the Court acknowledges an overriding principle: that however compelling may be the evidence of further offences, and even if their commission is an "inevitable" inference, to sentence on the basis of those other offences "is to deprive the appellant of his right to trial by jury in respect of the other alleged offences" (at 44–45).

By implication, case (iii) is also decided. If a defendant is actually tried and acquitted, she should not then find herself in a worse position than if she were not tried at all.

This, then, states the current law regarding sentencing for unproved offences in England and Wales. But what of case (i)? An instructive contrast is provided by the recent decision of the United States Supreme Court in *U.S.* v. *Watts; U.S.* v. *Putra* 117 S.Ct. 633 (1997). The facts of *Watts* involved a case of type (i). A jury convicted Watts of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), but acquitted him of using a firearm in relation to a drug offence, in violation of 18 U.S.C. § 924(c). Despite Watts' acquittal on the firearms count, the District Court found on the balance of probabilities that Watts had possessed the guns in connection with the drug offence, and sentenced him on that basis. *Putra* was a case of type (iii). She was charged, *inter alia,* with aiding and abetting possession with intent to distribute one ounce of cocaine on 8 May 1992; and with aiding and abetting possession with intent to distribute five ounces of cocaine on 9 May 1992, both in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The jury convicted Putra on the first count but acquitted on the second. At

https://doi.org/10.1017/S0008197300134269 Published online by Cambridge University Press

sentencing, however, the District Court found on the balance of probabilities that Putra had indeed been involved in the 9 May transaction, and therefore calculated Putra's sentence under the US Sentencing Guidelines by aggregating the amounts of both sales.

In both cases, separate panels of the Court of Appeals for the Ninth Circuit vacated the original sentencing decision and remanded for resentencing. Reasoning that the jury's verdict of acquittal manifested an "explicit rejection" of Putra's involvement in the 9 May transactions, the Court of Appeals held that "allowing an increase in Putra's sentence would be effectively punishing her for an offense for which she has been acquitted" (78 F. 3d, at 1389). Similarly, in *Watts,* the Court held that "a sentencing judge may not, 'under *any* standard of proof', rely on facts of which the defendant was acquitted" (67 F. 3d, at 797).

Sitting as the highest Federal Court, however, the Supreme Court overruled the Court of Appeals, and held that an acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, provided that conduct is proved on the balance of probabilities.

The United States and England, then, diverge sharply on the question whether a defendant may be sentenced on the basis of related but unproved offences. What are the merits of the two approaches? They reflect conflict between two important principles in sentencing: first, that offenders should not be punished for offences they did not commit, and secondly, that limiting the information that judges can consider limits judicial capacity to choose an appropriate sentence.

In *Kidd,* the English Court of Appeal has ruled that the first principle trumps the second, despite the wide discretion to consider relevant facts that is afforded by the Criminal Justice Act 1991. While, instinctively, this may seem right, the priority accorded by the Supreme Court to the second principle is not without warrant. At issue in *Kidd* was *not* the possibility of punishing the innocent, but rather the question of how much to punish the guilty. Thus there is no breach of what Ashworth terms the "fair warning" constraint, since D still has control over whether he is subjected to State punishment.

Given the social significance that a criminal conviction has for citizens, and the starkness of the Court's conviction decision (in which the only options are to convict or acquit), it is clearly proper to minimise the possibility of error by starting with a presumption of innocence and requiring proof of guilt beyond reasonable doubt before convicting a defendant. By contrast, these considerations do not apply to the sentencing decision, which involves selection from a

https://doi.org/10.1017/S0008197300134269 Published online by Cambridge University Press

continuum of options after the defendant has been convicted. It follows that there is less reason to protect the defendant against error. Indeed, the approach in *Kidd* may result in worse rather than better justice, since it is likely to lead to defendants' consistently being punished less than they deserve.

One possible solution involves distinguishing between case (i) and cases (ii) and (iii). As the US Supreme Court observed in *Watts,* "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction". In case (i), the aggravating circumstance of A's burglary is the very *manner* in which it was committed. Even though that circumstance is constitutive of a further offence, it is therefore a feature that may properly be taken into account when sentencing A for the burglary itself. The undoubted importance of licensing sentencing only by conviction does not mandate the exclusion of relevant facts from sentencing merely because those facts constitute a separate offence. By contrast, in cases (ii) and (iii), the aggravating circumstance is not the manner in which the convicted offence was committed, but rather the fact that the defendant committed *other,* distinct (if similar) offences.

This, it is submitted, is a distinction the Supreme Court purported to acknowledge but in fact contravened in *Putra.* However, the distinction is consistent with the reasoning in *Kidd,* where the Court of Appeal made clear that under the Criminal Justice Act 1991 "account may be taken of acts done in the course of committing that offence or offences, even where such acts might have been separately charged [case (i)] ... We cannot, however, read s. 3(3) as entitling the court to base its opinion on the commission of offences not forming part of the offence or offences for which the offender is to be sentenced and not themselves the subject of prosecution [cases (ii) and (iii)]" (at 46–47). The balance thus drawn seems the appropriate one.

A.P. and D.I. Simester

JURISDICTION OVER RESTITUTIONARY CLAIMS

The separate nature of restitutionary claims founded on unjust enrichment, distinct from claims in contract or tort, continues to be emphasised by the House of Lords. This separation led it to conclude, in *Kleinwort Benson Limited* v. *Glasgow City Council* [1997] 3 W.L.R. 923, that such a restitutionary claim does not fall within the statutory provisions allocating jurisdiction between different parts

https://doi.org/10.1017/S0008197300134269 Published online by Cambridge University Press