**17/75**

**COURT OF APPEAL (ENGLAND)**

# *ATTORNEY-GENERAL'S REFERENCE No 1 of 1975*

**Lord Widgery LCJ, Bristow and May JJ**

**25 April 1975**

**[1975] EWCA Crim 1; [1975] QB 773; [1975] 2 All ER 684; [1975] RTR 473; [1975] 3 WLR 11; 61 Cr App R 118; 139 JP 569; New Law Jo 15 May 1975; *The Times* 26 April 1975**

**MOTOR TRAFFIC – DRINK/DRIVING – DRIVING WITH AN EXCESS CONCENTRATION OF ALCOHOL – DRIVER HAD HIS DRINKS LACED SURREPTITIOUSLY BY ANOTHER PERSON – WHETHER THAT PERSON WAS ENTITLED TO A 'NO CASE TO ANSWER' WHEN CHARGED WITH BEING AN AIDER AND ABETTOR: *ROAD TRAFFIC ACT* 1972 (UK), S36.**

In Attorney-General's Reference No. 1 of 1975 the Attorney-General put the following question in a reference under the *Road Traffic Act* 1972, s36: 'Whether an accused who surreptitiously laced a friend's drinks with double measures of spirits when he knew that his friend would shortly be driving his car home, and in consequence his friend drove with an excess quantity of alcohol in his body and was convicted of the offence under the 1972 Act, is entitled to a ruling of 'no case to answer' on being later charged as an aider and abettor, counsellor and procurer, on the ground that there was no shared intention between the two, that the accused did not by accompanying him or otherwise positively encourage the friend to drive or on any other ground.

**HELD: The person who laced the motorist's drink was guilty of procuring an offence. To 'procure' meant to produce by endeavour, by setting out to see that something happened, and taking the appropriate steps to produce that happening, 'Surreptitiously' was important. It might well be that in cases where the lacing of the drink or introduction of alcohol was known to the driver, different considerations might arise. The offence had been procured because unknown to the driver and without his collaboration he had been put in a position in which, in fact, he had committed an offence which he never would have committed. A trial judge, when directing the jury, should instruct them that an offence was committed, if it was shown beyond reasonable doubt that the defendant knew that the friend was going to drive, and also that the ordinary and natural result of the alcohol added to the friend's drink would be to bring him above the statutory limit. The judge should also direct them to consider whether the act was surreptitious. Accordingly there was a case to answer.**

**THE LORD CHIEF JUSTICE WIDGERY:** This case comes before the Court on a reference from the Attorney General under section 36 of the *Criminal Justice Act* 1972, and by his reference he asks the following question: "Whether an accused who surreptitiously laced a friend's drinks with double measures of spirits when he knew that his friend would shortly be driving his car home, and in consequence his friend drove with an excess quantity of alcohol in his body and was convicted of the offence under the *Road Traffic Act* 1972 section 6(1) is entitled to a ruling of no case to answer on being later charged as an aider and abetter counsellor and procurer, on the ground that there was no shared intention between the two, that the accused did not by accompanying him or otherwise positively encourage the friend to drive, or on any other ground."

It is of course now well known that the purpose of section 36 of the Act of 1972 is to enable the Attorney General to obtain a ruling on a point of law which is not capable of being investigated by the normal appellate procedure because the case in which the point of law arose resulted in an acquittal of the accused. It would be a mistake to think, and I hope people will not think, that references by the Attorney General are confined to cases where very heavy questions of law arise and that they should not be used in other cases. On the contrary, I hope to see this procedure used extensively for short but important points which require a quick ruling of this Court before a potentially false decision of law has too wide circulation in the courts.

The present question has no doubt arisen because in recent years there have been a number of instances where men charged with driving their motor cars with an excess quantity of alcohol in the blood have sought to excuse their conduct by saying that their drinks were laced,

as the jargon has it; that is to say some strong spirit was put into an otherwise innocuous drink and as a result the driver consumed more alcohol than he had either intended to consume or had the desire to consume. The relevance of all that is not that it entitles the driver to an acquittal because such driving is an absolute offence, but it can be relied upon as a special reason for not disqualifying the driver from driving. Hence no doubt the importance which has been attached in recent months to the possibility of this argument being raised in a normal charge of driving with excess alcohol.

The question, as I have already disclosed, requires us to say whether on the facts posed there is a case to answer, and needless to say in the trial from which this reference is derived the Judge was of the opinion that there was no case to answer and so ruled. We have to say in effect whether he is right. The language referred to in the section which determines whether a secondary party, as they are sometimes called, is guilty of a criminal offence committed by another embraces the four words "aid, abet, counsel or procure". The origin of those words is to be found in section 8 of the *Accessories and Abettors Act* 1861, which provides:

> "Whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanour at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender."

Thus, in the past, when the distinction was still drawn between felony and misdemeanour, it was sufficient to make a person guilty of a misdemeanour if he aided, abetted, counselled or procured the offence of another. When the difference between felonies and misdemeanours was abolished in 1967, section 1 of the *Criminal Law Act* of that year in effect provided that the same test should apply to make a secondary party guilty either of treason or felony.

Of course it is the fact that in the great majority of instances where a secondary party is sought to be convicted of an offence there has been a contact between the principal offender and the secondary party. Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact so that each knows what is passing through the mind of the other.

In the same way it seems to us that a person who counsels the commission of a crime by another almost inevitably comes to a moment when he is in contact with that other when he is discussing the offence with that other, and when, to use the words of the statute, he counsels the other to commit the offence.

The fact that so often the relationship between the secondary party and the principal will be such that there is a meeting of minds between them caused the learned trial Judge in the case from which this reference is derived to think that this was really an essential feature of proving or establishing the guilt of the secondary party and, as I understand his judgment, he took the view that in the absence of some sort of meeting of minds, some sort of mental link between the secondary party and the principal, there could be no aiding, abetting or counselling of the offence within the meaning of the section.

So far as aiding, abetting and counselling is concerned we would go a long way with that conclusion. It may very well be, as I said a moment ago, difficult to think of a case of aiding, abetting or counselling when the parties have not met and have not discussed in some respects the terms of the offence which they have in mind. But we do not see why a similar principle should apply to procuring. We approach this section on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if four words are employed here — "aid, abet, counsel or procure" — the probability is that there is a difference between each of those four words and the other three, because if there were no such difference, then Parliament would be wasting time in using four words where two or three would do. Thus, in deciding whether that which is assumed to be done under our reference was a criminal offence we approach the section on the footing that each word must be given its ordinary meaning.

To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are

plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In our judgment the offence described in this reference is such a case.

If one looks back at the facts of the reference, "the accused surreptitiously laced his friend's drink". This is an important element, and although we are not going to decide today anything other than the problem posed to us, it may well be that in similar cases where the lacing of the drink or the introduction of the extra alcohol is known to the driver quite different considerations may apply. We say that because where the driver has no knowledge of what is happening, in most instances he would have no means of preventing the offence from being committed. If the driver is unaware of what has happened, he will not be taking precautions. He will get into his car seat, switch on the ignition and drive home, and consequently the conception of another procuring the commission of the offence by the driver is very much stronger where the driver is innocent of all knowledge of what is happening, as in the present case where the lacing of the drink was surreptitious.

The second thing which is important in the facts set out in our reference is that following and in consequence of the introduction of the extra alcohol the friend drove with an excess quantity of alcohol in his blood. Causation here is important. You cannot procure an offence unless there is a causal link between what you do and the commission of the offence, and here we are told that in consequence of the addition of this alcohol the driver, when he drove home, drove with an excess quantity of alcohol in his body.

Giving the words their ordinary meaning in English, and asking oneself whether in those circumstances the offence has been procured, we are in no doubt that the answer is that it has. It has been procured because, unknown to the driver and without his collaboration, he has been put in a position in which in fact he has committed an offence which he never would have committed otherwise. We think that there was a case to answer and that the trial Judge should have directed the jury that an offence is committed if it is shown beyond reasonable doubt that the accused knew that his friend was going to drive, and also knew that the ordinary and natural result of the additional alcohol added to the friend's drink would be to bring him above the recognised limit of 80 milligrammes per 100 millimetres of blood.

It was suggested to us that if we held that there may be a procuring on the facts of the present case, it would be but a short step to a similar finding for the generous host, with somewhat bibulous friends, when at the end of the day his friends leave him to go to their own homes in circumstances in which they are not fit to drive and in circumstances in which an offence under the Road Traffic Act is committed. The suggestion has been made that the host may in those circumstances be guilty with his guests on the basis that he has either aided, abetted, counselled or procured the offence.

The first point to notice in regard to the generous host of course is that this is not a case in which the alcohol is being put surreptitiously into the glass of the driver. This is a case in which the driver knows perfectly well how much he has to drink and where to a large extent it is perfectly right and proper to leave him to make his own decision. Furthermore, we would say that if such a case arises, the basis upon which the case will be put against the host is, we think, bound to be on the footing that he has supplied the tool with which the offence is committed. This of course is a reference back to such cases as those where oxy-acetylene equipment was bought by a man knowing it was to be used by another for a criminal offence. There is ample and clear authority as to the extent to which supplying the tools for the commission of an offence may amount to aiding and abetting for present purposes.

Accordingly, so far as the generous host type of case is concerned we are not concerned at the possibility that difficulties will be created, as long as it is borne in mind that in those circumstances the matter must be approached in accordance with well known authority governing the provision of the tools for the commission of an offence, and never forgetting that the introduction of the alcohol is not there surreptitious, and that consequently the case for saying that the offence was procured by the supplier of the alcohol is very much more difficult. Our decision upon the reference is that the question posed by the Attorney-General should be answered in the negative.