

## Riot

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## **Riot: The law of equals and opposites?**

The law of public order is an entrenched element of established criminal law. Historically, at common law, riots of notoriety tended to be treated as treason, and tried accordingly - resulting in the death penalty for some. It would thus not be unreasonable to speculate that the Public Order Act 1986 (preceded by prior, now repealed, legislation) might have been presented as something of an improvement for the accused, compared to the previous position at common law. However, the 1986 Act (POA 1986) presented its own unique set of challenges - including some which have not yet been fully explored at common law. This article critically evaluates Section 1 of the Public Order Act 1986 - the offence of riot.

### **Party time?**

The statutory definition of riot, under Section 1(1) of the POA 1986, sets out: "Where 12 or more persons who are present together use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using unlawful violence for the common purpose is guilty of riot." The offence is thus one requiring a party of individuals to be involved in the offence.

### **The invisible man?**

As for the "12 or more persons," it would appear that all must be present. This raises questions as to the applicability of Section 1 when not all 12 were present for the duration of the interlude - for instance, if one or more came late, or if (as may sometimes arise in the course of defendants' narratives) one happened to be in the lavatory at the relevant time, before walking into a situation in which he was forced to defend himself (self-defence being a viable defence to such a charge, as confirmed in *Rothwell & Barton* [1993] Crim LR 626).

The Act further stipulates, under s. 1(2): "It is immaterial whether or not the 12 or more use or threaten to use unlawful violence simultaneously." So, while the contemporaneity of violence (or threat thereof) is not a pre-requisite for this offence, the *presence* of all 12 together at the relevant time is - and, as *per Woolmington* [1935] AC 462, the burden of proving the same, beyond reasonable doubt, remains with the prosecution. In cases of instances where a "head count" may be required, the prosecution might be mindful as to the potential issues this may present. It would also appear that, in order to be a riot, its elements must be spatially and temporally connected (*Jones* (1994) 59 Cr App R 120).

### **Privacy - and potatoes?**

The Act further confirms (s.1(4)) that: "no person of reasonable firmness need actually be or be likely to be present at the scene." This then begs the question as to how such cases are reported in the first place, in order to lead to prosecution. It is possible that the answer to this may rest

with CCTV or other forms of observation - though the extent to which this alone would be probative of all elements is questionable.

On a similar matter, the Act states, at s.1(5): "Riot may be committed in private as well as public places." Again, this raises the possibility that the events charged may have unfolded between as few as 12 people - and in private - yet could still legally be deemed to be a riot, and potentially attracting a possible 10 year custodial sentence (or a fine (s.1(6)). From a hypothetical perspective, a disturbance at a dinner party where bread rolls are thrown (or threatened to be thrown), could, in theory, constitute a riot, provided the party were of sufficient significance to interest 12 people to attend - and on the condition that undesired physical contact from the landing of a thrown bread roll could constitute sufficient "unlawful force" for battery (and, from the extensive precedent at common law, it appears that it might). This thus leads to the farcical situation whereby the throwing of bread at a dinner party could theoretically be deemed to be a riot, under the present legislation, if the situation were to be tense enough to lead to a non-existent bystander fearing for their personal safety. A similar situation could arise for antagonistic disturbances occurring in such a setting.

One control which acts to avoid such spurious situations is that, to charge s.1 riot, the DPP's consent is necessary. While this avoids prosecutions for food fights at dinner parties, the question may be asked as to whether a charge may be permitted were a food fight involving boiled potatoes (or another such incident) to break out inside a prison canteen or dining area- even among a similarly small number of inmates. It may be that the location and context have more bearing on the use of the offence of riot than it would appear at first blush.

### **Nothing in common?**

The next issue to be examined in this article is the most complex - and one which does not necessarily readily yield conclusive answers - particularly considering recent common law reversals and revisions to the doctrine of joint enterprise (JE), or parasitic accessory liability (PAL).

The 1986 Act requires the use, or threat of, unlawful violence, "for a common purpose" (s.1(1)). Curiously, it does not define "common purpose" - and there does not appear to be a satisfactorily comprehensive definition in common law either. The Act provides further confusion, in seeking to clarify, in stating that: "The common purpose may be inferred by conduct." (s.1 (3)). This could be likened to attempting to define an elephant by saying what it is not - while, in both scenarios, the elephant of "common purpose" may, in some circumstances, be obvious. Nevertheless, the definition of "common purpose" remains an elephant in the room in many discussions on criminal law. This then raises the question of the conundrum presented by seeking to charge mutually antagonistic parties with s.1 riot - particularly where there are numbers low enough to render a "head count," or the thought of one, necessary.

In cases where all 12 (or more) are in agreement, acting towards achieving an identical goal, or

of identical intentions, this may not be an issue. However, if there were to be an incident where a "head count" were required, and the 12 (or more) were made up of two (or more) antagonistic groups, the suitability of a riot charge could be questioned. This is further complicated by the point that there need not necessarily be prior agreement between the parties- and the act may be spontaneous (though in such cases, a plea of self-defence, reactive or pre-emptive, may be relevant).

Furthermore, while s.1(1) sets out that the presence of the 12 is necessary for such a charge, it is only individuals who actually *use* unlawful violence who are guilty of riot. Whether the others could be charged as secondary parties remains unclear. This, and the issue of "common purpose" in the context of riot, imply far more interaction with the (now abolished) doctrine of joint enterprise than has previously been discussed in the academic literature on this area.

For instance, it could be argued that, were a "head count riot" to consist of two or more antagonistic groups of individuals, totalling 12 or more individuals by *including both sides*, the "common purpose" may not necessarily be made out - for, if there are less than 12 acting for any given "side," and the requisite minimum of 12 individuals is made up by aggregating, or "adding on" their foes to the "head count," the extent to which it can be concluded they were acting with "common purpose" could be open to debate.

In its most natural construction, it remains a point for discussion as to whether antagonistic groups can be deemed to have a "common purpose." This argument was advanced in *Gnango* [2010] EWCA Crim 1691, where two individuals were shooting at one another, and a passer-by was inadvertently fatally shot. Here, the CoA described the two gunmen as acting: "independently and antagonistically" and thus quashed the conviction - apparently due to the perceived lack of "common purpose." However, it was reinstated by the UKSC in *Gnango* [2011] UKSC 59, which took the view that mutual killing or infliction of GBH was a "common purpose." However, were this to be applied to broader settings (e.g. protest or other forms of assembly), it could be limited in its application - for mutual obliteration is rarely the object in such cases, and few involve the use of firearms (or of any sort of weapon). The question of "common purpose" in the specific context of riot, however, may remain an open question.

Nevertheless, the recent reversal of the doctrine of joint enterprise (JE) in the case of *Jogee* [2016] UKSC 8, may be of significance - both to the construction of "common purpose," and in the possibility of non-violent individuals among the 12 (or more) being at risk of a charge for secondary liability. *Jogee* held that 30 years of precedent on JE was "wrongly decided." The effect on "common purpose" remains to be seen, but the effect on possible secondary parties (i.e. individuals composing the 12 or more, but who *do not* actually *use* physical force), is potentially significant. Expanding the existing precedent of *Woollin* [1999] UKHL 28 (for non-JE murder cases), in *Jogee*, it was held that: "foresight and intention are not synonymous" (at [73]). It could thus be extrapolated that principles set out in the *Jogee* judgment may be of relevance to this area of law.

### **Mixed messages?**

This leads into discussion of the *mens rea* of s.1 riot. Section 6(1) sets out that an individual may be found guilty if, and only if, he “intends to use violence” or “is aware that his conduct may be violent.” Again, there are clear links with the recent case of *Jogee*, in terms of intention- in that foresight does not necessarily equate to intention. However, the second aspect, “awareness,” is more troublesome - and arguably entirely subjective. It could be suggested that this notion of “awareness” could (with some subtle differences) be comparable to foresight, recklessness, or a hybrid of the two. The potential for confusion here could lead to a lack of clarity. Whichever it may be, from the wording of the statute, it is again possible that *Jogee* may be of relevance to its interpretation, especially given the serious nature of the offence. The notion of “common purpose” could also be said to link to foresight and awareness - and is, in itself, a distinct aspect of the *mens rea*. “Common purpose,” as previously discussed, must be evidenced, for all 12 (or more) of the individuals. This is a useful, and seldom discussed, consideration.

### **Riot Act read?**

Despite being a significant and heavily used piece of legislation, there remain a number of unaddressed aspects of the Public Order Act 1986 - most notably in terms of the interpretation and application of s.1 riot. Although this Act is now 31 years old, one year older than the now-reversed approach to JE, it remains possible that some, if not all, of these aspects may become resolved in later precedent. However, it can only be hoped that any residual learning curve is not at the expense of those defendants whose cases fall under the less tested parts of this Act - and that some level of pre-emptive discussion may assist in avoiding the same. A case could be made for the re-evaluation of the post-*Jogee* use of the term “common purpose.” It is also valid to suggest that the law of public order could learn from the example of JE. As Audre Lorde once observed: “The learning process is something you can incite, literally incite, like a riot.”