Neutral Citation Number: [2019] EWHC 619 (Admin)

Case No: CO/1824/2018

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

18 March 2019

Before :

THE RT. HON LORD JUSTICE LEGGATT
and
THE HON. MR JUSTICE HOLGATE

- -

Between :

YOLANDA SHAKILLA CLEVELAND	**Claimant**
- and -	
THE GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Mr Alex Bailin QC and Mr Nicholas Hearn (instructed by **Lawrence & Co, Solicitors**) for the **Appellant**
Mr David Perry QC and Ms Catherine Brown (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 31 January 2019

- -

Approved Judgment

Mr Justice Holgate:

Introduction

1. Yolanda Cleveland appeals against the decision of District Judge Crane sitting at the Westminster Magistrates Court on 26 February 2018 to order her extradition to the United States of America pursuant to a request made on 18 April 2017 and certified by the Secretary of State for the Home Department on 8 June 2017. She appeals with the leave of Garnham J. The request relates to 10 offences contained in an indictment issued in May 2015 and relating to a single incident on 14 February 2008. The indictment contains allegations of murder, aggravated assault, and possession of a firearm during the commission of a felony. Permission to appeal was limited to a single ground, namely;

> "the District Judge erred in concluding that the conduct in the [extradition request] discloses an extradition offence pursuant to section 78(4)(b) and section 137(2) [of the Extradition Act 2003]"

The judge refused permission to appeal on a second ground, namely the extradition request failed to provide sufficient particulars of the Appellant's conduct to satisfy section 78(2)(c) of the 2003 Act.

2. Section 78(4)(b) required the judge to decide whether "the offence specified in the request is an extradition offence". The only issue was whether the conduct alleged in the request "would constitute an offence under the law of the relevant part of the United Kingdom..." (section 137(3)(b)), or in other words an issue of dual criminality.

Factual background and the conduct alleged

3. The facts of the alleged case against the Appellant have been summarised in an affidavit in support of the extradition request sworn by the District Attorney. The victim of the alleged murder was Cleveland Carter. On 14 February 2008 at about 14:30 he was driving a car in Albany, Dougherty County, Georgia. His partner Brittany Coleman was in the right front passenger seat and her two daughters were in the rear of the car. Ms Coleman says that just after she and Mr Carter had left her grandmother's home, he told her that they were being followed by the "boys who were trying to get him". She believed the motive for the pursuit to be a dispute about some marijuana that she was holding for Mr Carter. She says that Mr Carter asked her to look at a car that was following them. She saw a blue/green Honda Civic with tinted windows carrying 2 individuals.

4. When Mr Carter stopped his car for a red traffic signal at a junction, the Honda Civic pulled into a lane next to and to the left of Mr Carter's car. Neil Adam Smith, also known as "E" or Elderin Smith, was the driver of the Honda Civic and the Appellant was sitting next to him in the front passenger seat. The front passenger window of the Honda (i.e. the window next to the Appellant) was lowered and the driver fired several shots through the open window in the direction of Mr Carter and Brittany Coleman. Mr Carter was hit, became unconscious and lost control of his car. Ms Coleman grabbed the steering wheel and managed to bring the car to a stop. Mr Carter died at the scene.

5. Police officers nearby reported hearing about 5 gun shots. At least two witnesses stated that they saw the driver of the Honda fire a gun and that his name was E or Elderin Smith. Another witness says that the Appellant was the person sitting in the right front passenger seat of the Honda.

6. The results of an autopsy performed on Mr Carter confirmed that he died as the result of a gunshot wound to the head. Forensic examination of the bullet recovered from his body revealed that it was a .40 calibre metal jacket bullet, consistent with having been fired from (inter alia) a Glock .40 calibre pistol.

7. On 14 February 2008, the police were told by the Appellant's brother, Michael Edwards, that both Mr Smith and the Appellant had been staying with him at an address in Albany and that Elderin Smith carried a pistol at all times. He also stated that at some time after 15:00 on 14 February 2008, he saw Mr Smith and the Appellant arrive at that address; they were both upset and uneasy and remained there for only a few minutes before leaving in a blue Honda. Mr Edwards heard Mr Smith say that he and the Appellant were going to Atlanta, Georgia together.

8. The police then searched this address. In the bedroom which had been occupied by Mr Smith and the Appellant the police found a gun case for a .40 calibre Glock semi-automatic pistol. Mr Edwards and one other person identified the gun as belonging to Mr Smith and the Appellant. The police were able to trace the gun case to a Sports Store in Albany. There they were told that the Appellant had purchased a .40 calibre Glock semi-automatic pistol and 50 rounds of .40 calibre full metal jacket 180 grain ammunition.

9. During the evening of 14 February, police officers searched the last known address of Mr Smith and the Appellant in Albany. An occupier of the residence told them that Mr Smith and the Appellant had stopped there earlier that afternoon in a blue Honda Civic, they had run inside, grabbed several items and then left. While in the house Mr Smith was overheard saying that he had just shot someone. The occupier also stated that Smith and the Appellant had left Albany.

10. Vehicle registration records show that on 14 February 2008 the Appellant was the registered owner of a blue 2000 Honda Civic car registered in the state of Florida. This car is said to match the description given by eye-witnesses of the car they had seen at the scene of the shooting and from which the gun was fired. On 25 August 2008 the car registered to the Appellant was found in Florida.

11. On 11 August 2009 Mr Smith left the United States on a flight from Los Angeles bound for Heathrow Airport. There is no record of the Appellant leaving the United States, but the US Authorities believe that she left with Mr Smith under an assumed identity.

12. The District Attorney supplied further information in a letter dated 18 October 2017. In response to the question "is there evidence as to where the other bullets which were discharged went" he answered "yes. In addition to the bullet which struck Mr Carter in the head, the driver's side window was shattered; this was most likely the result of the other shots fired….".

13. The District Attorney answered the question "what is the forensic evidence that is said to link [the Appellant] to the offending?" by saying "the bullet that killed Mr Carter

was a .40 calibre metal-jacketed round, which matched the types of bullets and hand-gun required to fire such projectiles purchased by [the Appellant] prior to the murder." He added that the Appellant bought the Glock gun on 31 January 2008 about two weeks before the killing of Mr Carter. He concluded by stating that the behaviour of Mr Smith and the Appellant following the killing represented a "radical departure from the daily routine of the Defendants, and their absconding from the city of Albany, is evidence that they knew or had reason to believe that they would be sought in respect of the murder of Mr Carter."

14. The indictment contains a number of allegations against the Appellant which may be summarised as follows:-

i) Count 1 – "malice murder". On 14 February 2008, Mr Smith and the Appellant, individually and as parties concerned in the commission of a crime, unlawfully, and with malice aforethought, caused the death of Mr Carter by shooting him in the head with a hand-gun;

ii) Count 2 – "felony murder". On the same date, Mr Smith and the Appellant, individually and as parties concerned in the commission of the crime of aggravated assault, caused the death of Mr Carter, by shooting him in the head with a hand-gun, a deadly weapon, an instrument that when used offensively is likely to cause serious bodily injury or death;

iii) Count 3 – "aggravated assault". Mr Smith and the Appellant, individually and as parties concerned in the commission of a crime made an assault upon the person of Mr Carter with a deadly weapon by shooting at him with a hand-gun;

iv) Counts 4, 5 and 6 – "aggravated assault". These counts alleged that Mr Smith and the Appellant, individually and as parties concerned in the commission of a crime, committed aggravated assaults (as defined under count 3) upon each of Ms Coleman and her two daughters;

v) Counts 7, 8, 9 and 10 – possession of a fire-arm during the commission of a felony. On the same date, Mr Smith and the Appellant individually and as parties concerned in the commission of a crime had within arm's reach of their person a fire-arm during the commission of the crimes of murder, felony murder, aggravated assault. Count 7 relates to the shooting of Mr Carter. Counts 8, 9 and 10 relate to shooting at Ms Coleman and her two daughters.

15. Mr David Perry QC submitted on behalf of the Respondent that extradition has been sought on the basis that count 1 would equate to murder under the law of England and Wales relying upon an intention to kill. Count 2 would equate to manslaughter and count 3 would equate to at least an offence under section 20 of the Offences Against the Person Act 1861. Counts 4, 5 and 6 equate to offences of affray contrary to section 3(1) of the Public Order Act 1986 because (as the judge held) it would suffice that, although Mr Carter and not the other occupants of his car was the intended target, nonetheless each of them would have had reasonable cause to fear for their own personal safety. Count 7 equates to an offence under section 18 of the Firearms Act 1968. Finally, counts 8, 9 and 10 equate to offences contrary to either section 16 or section 18 of that Act.

16. Paragraphs 27 to 29 of the Affidavit by the District Attorney deal with the requirements under Georgia Law for establishing that an accused person is guilty of aiding and abetting offences of the nature alleged:-

> "27. Cleveland was indicted as a party concerned in the commission of these crimes as presented from the investigation of this matter. Under Official Code of George Annotated Section 16-2-20, every person concerned in the commission of a crime is a party or accessory thereto. Additionally, Official Code of Georgia Annotated Section 16-2-21 provides that any party who did not directly commit the crime may be convicted of the crime upon proof that the crime was committed and he/she was a party thereto, despite the outcome of the one who directly committed the crime.
>
> 28. An accessory to a crime is a person who participates knowingly and voluntarily in the commission of a crime. A person is concerned in the commission of a crime only if she:
>
> (a) directly commits crime;
>
> (b) intentionally causes some other person to commit crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;
>
> (c) intentionally acts or abets in the commission of crime; or
>
> (d) intentionally advises, encourages, hires, counsels, or procures another to commit crime.
>
> 29. "Abet" means to encourage, incite or help and "aid" means to give help or assistance to. Presence alone is insufficient. Approval of the act is insufficient if it does not amount to encouragement. Proof of a common criminal intent with the actual perpetrators is necessary, and may be inferred from his/her conduct before, during, and after the crime. If associates shared common design to do an unlawful act, then any act done in pursuance by any one of them would be the act of each of them. Under the natural and probable consequences doctrine of Georgia Law, if the defendant assisted the principal with the intent to further a specific crime's commission, and the principal commits a different crime that is foreseeable at the time of the defendant's assistance, the defendant can be liable as an accomplice. The burden of proof beyond a reasonable doubt may be accomplished by means of direct evidence, circumstantial evidence, or both. Punishment is that of the substantive offence."

17. In paragraphs 30 to 33 of his Affidavit the District Attorney summarises how the allegations against the Appellant would satisfy the requirements of malice-murder under count 1. The affidavit explains that the Prosecution would rely upon the evidence

that I have already summarised. Mr Edwards says that the evidence will establish that Mr Smith along with "his accomplice" the Appellant in a car registered to her name "actively pursued Mr Carter and the passengers in Mr Carter's car with malice aforethought and without justification" and that he killed Mr Carter and shot at the passengers using the gun bought by the Appellant.

18. Paragraphs 34 to 43 of the Affidavit set out in a similar manner the way in which the Prosecution would seek to establish each of the other alleged offences. Not surprisingly, the grounds of appeal raise essentially the same arguments in relation to each of the counts.

The decision of the District Judge

19. The Appellant submitted before the judge that the extradition request failed to allege any encouragement or assistance by the Appellant in relation to the shooting of Mr Carter by Mr Smith, her conduct was consistent with simple presence in the vehicle, and there was no evidence of any "knowing assistance". It was submitted the description of the alleged conduct was insufficient to found criminal liability under English law as an accessory to murder.

20. In paragraphs 22 to 23 of her judgment the District Judge said as follows:

> "22. It is unnecessary for me to provide a detailed analysis of the case of *R v Jogee [2016] UKSC 8* on joint enterprise. Professor Morrison has provided an analysis of the mental element required to be provided in Georgia for an allegation of aiding and abetting an offence and compared that to the UK case law. Her conclusion is that the elements to be proved are the same. Neither party has sought to dispute that.
>
> 23. The JA is not required to show a *prima facie* case. The arguments of the RP stray into this territory. The request makes clear that Ms Cleveland aided and abetted in the offences set out in the indictment. The requirements in law for 'aiding and abetting' in Georgia are set in paragraphs 27 to 29 of the DA's affidavit and paragraphs 30 to 43 set out what the JA will have to prove in relation to Ms Cleveland's conduct in relation to each charge. The allegations are clear in what it is alleged that she has done and her role and the mental element that they will be seeking to infer from that conduct. Whether they can prove the mental elements required will be a matter for trial. The conduct alleged could amount to aiding and abetting offences of murder, affray and firearms offences and are all extradition offences."

Legal principles

21. A number of relevant legal principles are well-established. In Norris v Government of the United States of America [2008] 1 AC 920 the House of Lords decided that a court should not consider whether the elements of the offence in an extradition request correspond with the elements of an English offence. Instead the court should consider whether the alleged conduct, if it had occurred in the United Kingdom, would amount

to an offence under English law. Where, as in the present case, the request alleges multiple offences, each one needs to be considered separately, but need not be assigned to a reciprocal offence under English law. Where the alleged conduct relevant to a number of offences is closely interconnected, it does not matter whether that conduct would be charged in this jurisdiction in the same manner as in the requesting state (Tappin v Government of the United States of America [2012] EWHC 22 (Admin) at para. 44). There is no legal requirement for the Respondent to demonstrate a *prima facie* case in respect of any of the offences detailed in the indictment, nor is it for the court to examine the evidential strengths and weaknesses of the prosecution case (Norris at para. 77 and Ruiz and others v Central Criminal Court No.5 Madrid [2008] 1 WLR 2798 at para. 74).

22. On behalf of the Appellant, Mr Alex Bailin QC repeated the contention made before the district judge that the extradition request did not disclose conduct amounting to criminal liability under English law as an accessory to murder. He said that the conduct described was consistent with the Appellant's mere presence in the car and with Mr Smith having acted independently. He criticised the request for failing to allege any overt encouragement or assistance by the Appellant, such as uttering words of encouragement, passing the gun to Mr Smith or opening the passenger window to enable him to shoot at Mr Carter. Although the Appellant has been refused permission to argue that the extradition request failed to provide sufficient particulars to satisfy section 78(2)(c) of the 2003 Act, her argument does beg the question whether, as a matter of law, it was necessary for the extradition request to set out details of the kind identified by Mr Bailin. In other words, the particularity required for an extradition request forms part of the context for considering whether the conduct alleged discloses an offence under English law of murder as an accessory.

23. Section 78(2) required the judge to decide whether the documents sent to the court by the Secretary of State include "(c) particulars of the offence specified in the request". This requirement for particulars is no less onerous than the more specific tests in Part 1 of the 2003 Act for the contents of a European Arrest Warrant (Dudko v The Government of the Russian Federation [2010] EWHC 1125 (Admin) at paras. 15-16; Government of the United Arab Emirates v Allen [2012] 1 WLR 3419 at para. 15).

24. Under s.2(2) to (4) an accusation EAW must contain a statement that the person in respect of which the warrant is accused in a category 1 territory of the commission of an offence specified in the warrant and must contain:

> "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and…"

25. Scrutiny by the court of the description of conduct alleged to constitute the offence specified, is not an inquiry into the adequacy of the evidence summarised in the warrant or request. The court is not concerned to assess the quality or sufficiency of the evidence in support of the conduct alleged (R (Castillo) v Spain [2005] 1 WLR 1043 at para. 25). Instead, the court is concerned with whether the warrant, or request for extradition, discloses matters *capable* of constituting conduct amounting to the extradition offences alleged (Palar v Court of First Instance Brussels [2005] EWHC 915 (Admin) at para. 7). In deciding whether a warrant or request identifies conduct

amounting to an extradition offence, it is inappropriate to expect the specificity or particulars sometimes required for a pleading in civil proceedings or a count in an indictment (Fofana v Tribunal de Grande Instance de Meaux [2006] EWHC 744 (Admin) at paras. 38-39).

26. A balance must be struck between, on the one hand, a requested person's need to have an adequate description of the conduct alleged against him and, on the other, the object of the 2003 Act to simplify extradition procedures. The requested person needs to know what offence he is said to have committed and to have an idea of the nature and extent of the allegations against him in relation to that offence. The amount of detail may turn on the nature of the offence. Where dual criminality is involved, the level of detail must also be sufficient to enable the transposition exercise to take place (Ektor v National Public Prosecutor of Holland [2007] EWHC 3106 (Admin) at para. 7; Owens v Court of First Instance Marbella, Spain [2009] EWHC 1243 (Admin) at para. 11).

27. In Zak v Regional Court of Bydgoszcz, Poland [2008] EWHC 470 (Admin), the Divisional Court held that the warrant or request need not identify the relevant *mens rea* of the equivalent English offence for the purposes of satisfying dual criminality. Instead, it suffices that that necessary mental element *can* be inferred by the court from the conduct identified in those documents or that "the conduct alleged includes matters *capable* of sustaining" the mental element necessary under English law (paras. 15 to 17).

28. That approach was endorsed by Maurice Kay LJ in Mauro v The Government of the United States of America [2009] EWHC 150 (Admin) at paras. 8 to 11, taking into account the decision of the House of Lords in Norris. He explained that s.137 (2)(b) does not require the requesting state to prove the guilt of the requested person in English law. That would be absurd, not least because it would import a higher test than the *prima facie* test abrogated by the 2003 Act. The words "would constitute an offence" simply mean "would, *if proved*, constitute" the English offence. The Divisional Court was dealing with the mental element of an English crime, but Maurice Kay LJ made it plain that whether the court is dealing with *actus reus* or *mens rea*, the principle is the same, namely it suffices that the matters alleged would be *capable* of satisfying the requirements for the English offence, if proved.

29. One of the main issues raised by Mr Bailin is whether the principle in Zak and Mauro has been altered by the decision in Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin) so that it is only permissible to infer from alleged conduct the *mens rea* required for the equivalent English offence if, in the circumstances of the case, that inference would be inevitable or the only reasonable inference that could be drawn.

The Appellant's submissions

30. Plainly the extradition request proceeds on the basis that it was Mr Smith and not the Appellant who fired the gun. The conduct alleged against the Appellant under each of the counts depends upon her criminal liability being established as an accessory.

31. In R v Jogee [2017] AC 387 the Supreme Court held that accessory liability requires proof of a conduct element accompanied by the necessary mental element. Here the requisite conduct element is that the Appellant encouraged or assisted the commission of the various offences alleged against Mr Smith. The mental element is that the

Appellant must have intended to assist or encourage the commission by Mr Smith of the crimes alleged against him. In the case of murder, the Appellant must have intended to assist or encourage Mr Smith to shoot at Mr. Carter intending to kill him. With regard to the conduct element, acts of assistance or encouragement can be infinitely varied. The association of a secondary party with the principal or his presence at the scene of the crime may or may not involve the encouragement or assistance necessary to establish accessory liability. Those factors "are likely to be very relevant evidence" on that issue but neither is "necessarily proof of assistance or encouragement" (see Jogee at paras. 7 to 11). Secondary liability does not depend upon the existence of an agreement between the principal and others to carry out a joint enterprise (para. 78).

32. As I have already noted, Mr Bailin submits that, in relation to conduct, the request does not allege any overt encouragement or assistance on the part of the Appellant. The description of the conduct is consistent with her simply being present in the car Mr. Smith was driving when he independently decided to shoot Mr. Carter. There is no allegation such as the Appellant spoke words of encouragement to Mr Smith, or passed the gun to him, or opened the passenger window so that he could shoot through it. He says that it would be unrealistic to rely upon the Appellant not attempting to distance herself from the shooting because of the speed with which it occurred and the lack of any realistic opportunity to warn the occupants of the other car. The Appellant's failure to flee the car and her decision to leave the city with Mr. Smith is consistent with the possibility that he acted independently of her and without her assistance or encouragement. The Appellant's ownership of the car and of the gun does not materially add anything to mere presence at the scene of the shooting.

33. Turning to the mental element, Mr Bailin submits that, applying Assange, the conduct set out in the request is insufficient to amount to extraditable offences unless the inference of the requisite *mens rea* in the equivalent English offences is an inevitable inference, or the only reasonable inference that could be drawn. He refers to his submissions on the conduct element to argue that the conduct described cannot support an inference crossing that high threshold. By way of example, he accepts that the Appellant's conduct in fleeing from the scene of the killing is "capable of contributing" to an inference that the Appellant contemplated in advance, or intended, that the killing of Mr Carter should take place, but it does not "impel" such an inference (para. 34 of skeleton). He describes this as "the Norris/Assange test" (para. 37 of skeleton). In order to consider whether Mr Bailin's identification of this test is correct, it will be necessary to revisit Norris, Assange and cases which have applied the passage in Assange upon which he relies. That issue occupied much of the hearing before the court, but it is convenient first to deal with the Appellant's submissions in relation to *actus reus* and the Appellant's participation in the offences alleged against Mr Smith.

34. Mr. Bailin submitted that dual criminality regarding both *actus reus* and *mens rea* for counts 2 to 10 of the US indictment raises no additional issues different from those relating to count 1. He therefore accepts that the outcome of this appeal will depend upon the success or otherwise of his arguments in relation to count 1 and that there is no need for the court to address counts 2 to 10 separately.

Actus reus for murder as an accessory

35. The starting point is that it is not the court's function to evaluate the evidential sufficiency of the material put forward in the extradition request. So, for example, the

Respondent does not have to show a *prima facie* case that the Appellant is guilty of murder. It suffices that the conduct alleged would be capable of satisfying the *actus reus* for aiding and abetting murder under UK law if proven by evidence.

36. Here, the conduct expressly alleged in the request against the Appellant is that she participated in the murder of Mr Carter by acting as his accomplice. It is not suggested by the Respondent that she was merely associated with Mr Smith or simply present at the time of the shooting. Both those factors may be taken into account, although by themselves they could not be sufficient or conclusive (Jogee para. 11).

37. The Respondent relies upon the Appellant's relationship with Mr Smith, before, during and after the incident, as set out in the request, and her ownership of the car and of the recently purchased gun, both of which Mr Smith used in the killing.

38. As regards presence, the Respondent's case is not simply that the Appellant was a passenger in the Honda car driven by Mr Smith. The Respondent relies upon evidence that Ms Coleman was told by Mr Carter they were being followed by people who were "trying to get him", which she believed to relate to a dispute over marijuana she was holding for Mr Carter. She looked behind, as he requested her to do, and saw the Appellant's car. It was that car that pulled up alongside Mr Carter's car when it was stationary at a traffic signal and from which the driver fired the gun. The Appellant was not merely sitting in the front passenger seat. The Respondent's case is that Mr Smith and the Appellant acting as his *accomplice, actively pursued* Mr Carter and the passengers in his car *with malice aforethought*.

39. In effect, the submission that the Respondent's request does not allege, for example, that the Appellant passed Mr Smith the gun, or opened the window so that he could shoot through it, or used words of encouragement, simply amounts to a criticism of the level of detail which has been provided in the request. In my judgment the absence of further evidential detail does not prevent the court from concluding that, taken as a whole, the conduct alleged, if proved, would establish the *actus reus* for murder as an accessory, through participation, encouragement or assistance.

40. I am therefore in no doubt that the extradition request on count 1 satisfies sections 78(4) and 137(3)(b) so far as the conduct element of an extradition offence is concerned.

41. The decision of the Divisional Court in Owens provides some support for this conclusion. In that case the appeal related to an extradition under Part 1 of the 2003 Act. The EAW alleged robbery and murder. It seems likely that that conduct was certified as comprising Framework List offences. In that event, there would have been no requirement to show that the allegations amounted to a criminal offence in this jurisdiction (section 64(2) of the 2003 Act). The issue was simply whether the EAW provided adequate particulars in accordance with section 2(4). At para. 11 of its judgment the Court relied upon the decision in Ektor as to the level of detail required, in particular the entitlement of the person sought by the warrant to know the offence he is alleged to have committed and to have an idea of the nature and extent of the allegations against him.

42. The description in the EAW of the offences of robbery and murder simply stated that on a certain date, Mr Owens, acting in collaboration with other persons charged, stole some jewellery and credit cards from a dwelling, "after which they murdered" one of

the owners of the property and hid his body in a well. The other persons alleged to have taken part in this joint enterprise were identified elsewhere in the warrant. The Court rejected Mr Owens complaints that the warrant failed to provide any particulars enabling him to understand even in broad terms how the murder was alleged to have been committed or the degree of his participation in the murder or the robbery (e.g. whether he was physically present, whether he administered blows, or whether he possessed a weapon).

43. Lloyd-Jones J (as he then was) held that the description in the warrant satisfied the statutory requirement for particulars to be given of "the circumstances in which the person is alleged to have committed the offence". It was unnecessary for the description to provide details of the precise manner in which the killing had taken place, or the precise acts said to have been performed by Mr Owens, or the precise acts he had performed in pursuance of the alleged joint enterprise. It was sufficient that the joint enterprise had been described as set out in the warrant and that Mr Owens was alleged to have taken part in that joint enterprise. Accordingly, the Appellant could have been under no misapprehension as to the substance of the charges (see [2009] EWHC 1243 (Admin) at paras. 12 to 22).

44. Mr Bailin points out that the present case differs from Owens in that here dual criminality has been raised as an issue. But in my judgment the extradition request has given sufficient details to enable the Appellant to know in substance what is alleged against her, and as regards her participation in the shooting, to identify equivalent English offences. The conduct alleged, if proved, is capable of amounting to those offences (see e.g. Mauro). As the District Judge rightly pointed out, the submissions on behalf of the Appellant have strayed into the forbidden territory of evidential inquiry or evidential sufficiency.

Norris v United States of America

45. It is necessary to bear in mind that in Norris separate legal issues arose in relation to different parts of the US indictment. Count 1 alleged a strict liability offence which rendered illegal the making of a price-fixing agreement or cartel. It did not require proof of fraud, deception or dishonesty. Counts 2 to 4, on the other hand, alleged a conspiracy to obstruct a criminal investigation into price fixing by tampering with witnesses and potential evidence.

46. In relation to count 1 the House of Lords held that in English law there had been no equivalent strict liability offence of price-fixing until the enactment of section 188 of the Enterprise Act 2002, which postdated the offending described in the extradition request. Accordingly, Mr Norris could not be extradited in relation to count 1 because that straightforwardly failed the dual criminality requirement in section 137 of the 2003 Act (paras. 6 to 63). As their Lordships made plain in para. 63, that conclusion was sufficient for Mr Norris's appeal on count 1 to be allowed. But because the correct legal approach to dual criminality had been fully argued and was of general importance, the House of Lords went on to decide that issue (paras. 64 to 91).

47. Mr Norris's argument on count 1 was not that the description in the extradition request of the conduct alleged against him was simply inadequate. Rather it was that the US offence lacked a legal ingredient essential to establishing criminal liability under English law. Although, the House of Lords held that the correct test for dual criminality

involves examining the *overall* conduct alleged rather than the ingredients of the offence relied upon, where a person argues that the alleged offence in the requesting state lacks an ingredient essential for identifying any criminality under English law, it is also necessary for that objection to be determined, as in Norris itself. In the Magistrate's Court an expert report from Professor Morrison was served on behalf of the Appellant. It showed (inter alia) that the mental elements required to be proven under the law in Georgia were the same as those in England post-Jogee. The District Judge recorded in para. 22 of her judgment that that analysis was not disputed by either side. But this does not entitle Mr Bailin to criticise her decision in the following paragraph on the dual criminality issue for having wrongly used the "offence" test rejected by the House of Lords in paras. 63 to 91 of its opinion.

48. The respondent in Norris sought to overcome the flaw in its case on count 1 by arguing that a price-fixing agreement was capable of amounting to a conspiracy to defraud (see e.g [2008] 1 AC at pp.926-8). The supporting affidavit from the US Department of Justice had stated that the conspirators had "in effect…defrauded their customers by requiring that they pay higher prices than they might otherwise have paid had there been no conspiracy" (see [2008] 1 AC p 930B). But that point formed no part of the indictment. At most it was simply a description of the economic effect of the American strict liability offence of price-fixing.

49. At para. 63 the House of Lords rejected the respondent's argument. If the allegation in the US indictment had been that, having entered into a price-fixing agreement, there was a conspiracy to deceive customers by making false representations that there was no such agreement, then that offence would have been recognised in English law. Mr Bailin accepts (para. 36 of his skeleton) that if such a conspiracy had been alleged, that would have been sufficient to connote the additional English ingredient of "dishonesty". Indeed, it might be thought nowadays that such an inference would be a statement of the obvious, because, having identified a defendant's actual knowledge or belief as to facts, the test for dishonesty is entirely objective (see Ivey v Genting Casinos UK Ltd [2018] AC 391; DPP v Patterson [2018] 1 Cr App R 28). But in Norris the US Government did not allege any conspiracy of that kind and the House of Lords did not lay down the "inevitable inference" test for which Mr Bailin contends. The reference in paras. 4 and 63 to the defrauding of the conspirators' customers was simply "narrative background" in the sense intended by the House of Lords, namely it had nothing to do with the "main conduct" for which extradition was sought (see also paras. 83, 85 and 91).

50. The House of Lords went on to reject the "offence" test, which involves examining the ingredients of the offence alleged in the requesting state to see whether an English offence corresponds to those ingredients (para. 65), and to endorse the "conduct" test. The latter involves examining the conduct alleged against the requested person *as a whole* to see whether it falls within the scope of an English offence. This was described as "the broad conduct" approach, which was already being followed in most of the rest of the common law world (para. 90). In support of that conclusion the House of Lords relied upon the policy of the legislature when passing the 2003 Act to make the extradition process, whether under Part 1 or Part 2, simpler and more efficient (para. 78). The House of Lords did not accept Mr Norris's argument that the stricter "offence" test should be adopted because it favoured the liberty of the subject in a criminal context. Rather they endorsed the "conduct" test as a more liberal construction of the

legislation which would promote the purpose of extradition treaties, namely to bring to justice those accused of serious crimes, and would involve "a much less technical approach" (paras. 86-91).

51. The argument in the House of Lords relating to counts 2 to 4 was completely different. It simply involved determining how those offences should be transposed into English law for the purposes of considering dual criminality. Mr Norris argued that an allegation that he had obstructed a criminal investigation into price-fixing did not have any English equivalent, because price-fixing agreements were not illegal in England ([2008] 1 AC at p. 926A). The House of Lords rejected that argument on the basis that it was necessary to carry out the transposition exercise by focusing on the substance of the criminality alleged, or the essence of the acts of the requested person, ignoring "adventitious circumstances" (paras. 97 to 99). The House of Lords decided that the essence of the alleged conduct was that Mr Norris had obstructed an investigation by a duly appointed body into possible criminal conduct, and that was an offence recognised by English law. I agree with Mr Perry that the Appellant's reliance upon the requirement in para. 99 of Norris to disregard "adventitious circumstances" is nothing to the point in the present appeal. In Norris that approach was applied so as to avoid the transposition exercise being artificially and improperly influenced by the *inclusion* of a non-essential factor. That issue does not arise on the Appellant's case here.

52. In my judgment there is nothing in Norris which supports the Appellant's proposition that a necessary mental element of an English equivalent offence may only be inferred from the description of conduct in the extradition request where that inference is inevitable or the only rational inference that may be drawn, rather than an inference which is capable of being drawn.

Assange v Swedish Prosecution Authority

53. Mr Bailin's submission therefore depends upon a passage from the judgment of the Divisional Court in Assange at [2011] EWHC 2849 (Admin). In particular, he relies upon para. 57 where Sir John Thomas, President of the Queen's Bench Division (as he then was), said:

> "It was accepted by Mr Assange that it was not necessary to identify in the description of the conduct the mental element or *mens rea* required under the law of England and Wales for the offence; it was sufficient if it could be inferred from the description of the conduct set out in the EAW. However, the facts set out in the EAW must not merely *enable* the inference to be drawn that the Defendant did the acts alleged with the necessary *mens rea.* They must be such as to *impel* the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. Otherwise, a Defendant could be convicted on a basis which did not constitute an offence under the law of England and Wales, and thus did not satisfy the dual criminality requirement. For example, an allegation that force or coercion was used carries with it not only the implicit allegation that there was no consent, but that the Defendant had no reasonable belief in it. If the acts of force or coercion are proved,

> the inference that the Defendant had no reasonable belief in consent is plain."

54. However, that passage, and the subsequent authorities in which it has been applied, must be read and understood in the context of the issue which fell for decision. When that is done, it is apparent that what was said in Assange is *not* authority for a general proposition that when considering dual criminality, *mens rea* required under English law may never be inferred from the conduct alleged unless that inference is "impelled", or the only reasonable inference, or inevitable.

55. In Assange the EAW set out four alleged offences (see para. 3). Count 1 (which was not a Framework List offence) alleged that the Appellant in that case had "by using violence forced [the complainant] to endure his restricting her freedom of movement. The violence consisted in a firm hold of the injured party's arms and a forceful spreading of her legs whilst lying on top of her and with his body weight preventing her from moving or shifting". This allegation was separate from other allegations of rape and sexual molestation. The issue under count 1 was whether it could be inferred that Mr Assange had no reasonable belief that the complainant was consenting to his use of force or coercion on her. That ingredient, which was essential to the English offence, and thus to establishing dual criminality, had not been included in the EAW.

56. At all events, Mr Assange accepted that if the EAW described his alleged conduct accurately and fairly, then it would constitute an English offence, because absence of reasonable belief in consent could be inferred. But his argument was that if regard were to be had to extraneous material (witness statements from the complainant), the description of his conduct was not fair and accurate because that material demonstrated his reasonable belief in the complainant's consent, and on that basis the conduct would not amount to an English offence. Given the way in which his case was argued, it is obvious that the absence of reasonable belief in the complainant's consent was not an ingredient of the Swedish offence, because if it had been the dual criminality issue could not have arisen. Instead, Mr Assange's attempt to rely upon the extraneous material would simply have been a matter to be left to any trial in Sweden in the normal way.

57. The Divisional Court rejected Mr Assange's contention that it was appropriate to have regard to the extraneous material (paras. 63 to 71). However, the Court then went on to consider *de bene esse* his contention that the extraneous material showed that his alleged conduct had not been fairly and accurately described in the EAW and that he had, or might have, reasonably believed that the complainant consented to what happened. The court concluded that the extraneous evidence did not support that contention. Accordingly, I respectfully agree with the High Court of Justiciary in HM Advocate v Lisek (2017) J.C. 223 that the test laid down in para. 57 of Assange, namely that an inference may only be drawn from conduct if impelled or inevitable, formed no part of the Divisional Court's conclusions on the issue raised by Mr Assange for their decision (para. 21).

58. However, I do not accept that what appears in para. 57 was no more than a mere summary of the submissions made by counsel for Mr Assange. Instead, it set out the basis upon which the Divisional Court was prepared to accept the concession made by the Appellant's counsel, which had been too widely stated by him. As paras. 71(v) and 75-76 make clear, the court was of the view that the facts set out in the EAW must not merely *enable* a necessary mental element to be inferred; they had to *impel* the drawing

of that inference. The Divisional Court went on to say that the use of the force or coercion described in the EAW plainly implied that Mr Assange had no reasonable belief in the complainant's consent to what he was alleged to have done.

59. The rationale for the Divisional Court's insistence upon the "inevitability" test is clear and delimits the circumstances in which it is proper for that test to be applied by the court. Where the offence in a foreign state does not include an element (e.g. *mens* rea) essential to establishing criminal liability under English law, that element may be inferred provided that it is an inevitable corollary of, or necessarily implied from, the conduct which will have to be established in that foreign jurisdiction. Plainly, where an essential ingredient under English law is absent from the alleged foreign offence, dual criminality can only be satisfied by insisting on that test, rather than by being satisfied that the inference is one which *could* or *might* be drawn; otherwise, a person could be convicted in a foreign court for something which would not be a criminal offence in this jurisdiction.

60. It is necessary to distinguish two situations which have arisen in some of the authorities and where, on a correct analysis, the principle in para. 57 of Assange is not engaged.

61. First, in some cases the argument raised is not that the *offence* alleged in the foreign state lacks an ingredient essential to criminality in this jurisdiction, but simply that the *particulars* of conduct supplied in the warrant or request do not address an ingredient of an equivalent English offence. In such cases there is no legal justification for applying the "inevitable inference" test in para. 57 of Assange in order to ensure that the person requested could not be convicted of an offence overseas which would not amount to any crime in this country. That risk does not arise. Instead, the issue is whether *the particulars* contained in the warrant or request are sufficient to enable an offence under English law to be identified. In this situation, it is the principles summarised in paras. 21 to 28 above which fall to be applied. If a warrant or request fails to include any allegation dealing with an essential ingredient, the court *may* conclude that the *particulars* are insufficient and decline to order extradition. But in other cases, the court *may* conclude that a gap (whether as to conduct or any mental element) is filled because an inference *can* properly be drawn from information contained in the warrant or request. Here, that approach to the drawing of an inference is legally correct because the offence for which a person is to be extradited does not lack an ingredient essential to criminal liability under English law.

62. This distinction may be illustrated by considering the mental element of criminal conduct. The offence alleged in the foreign jurisdiction may require proof of a simple intention to commit that crime and the equivalent English offence may not require the proof of any additional specific intent. In this country proof of intention depends in most cases upon the drawing of inferences by the jury (or by the magistrates' court). Such inferences may be drawn from the conduct of an accused person and from what they said before, at the time of, and following the incident (see e.g. Chapter 8 of Part 1 of the Crown Court Compendium – December 2018). In this situation there is no "gap" in the mental element of the foreign offence which needs to be filled. The mere fact that intention would need to be inferred from conduct in order to establish guilt in any future trial in the foreign court, does not justify the imposition of an "inevitable inference" test in order to satisfy dual criminality at the extradition stage. Instead, where this issue is raised, the court need only consider whether the inference of intention is one which

is *capable* of being drawn from the matters alleged, leaving the question of whether that inference will be established to the trial process.

63. But in some instances, extradition may be resisted because the English equivalent offence requires proof of a specific intent (e.g. dishonesty or knowledge of or belief in a state of affairs), whereas the foreign offence for which extradition is sought only requires proof of a simple intent and not also that specific intent. In this situation it is necessary for the court to apply the test in para. 57 of Assange to decide whether that gap in the ingredients of the foreign offence can be filled by drawing an inference from other matters set out in the warrant or extradition request. Here, dual criminality depends upon the court being satisfied that, if the matters constituting the alleged foreign offence were to be proved, the inevitable or only reasonable inference would be that the additional intent required by English law would also be established.

64. There is a second situation which needs to be distinguished where the objection is not that the foreign offence lacks an essential ingredient of an English equivalent, but that the *particulars* fail to address an essential ingredient. If the respondent argues that that gap may be filled by the drawing of an inference from matters contained in the warrant or request, the court may conclude that those matters are *incapable* of supporting any such inference. This is the obverse case of the example considered in paragraph 61 above. Here again, the outcome does not depend upon the application of the test in para. 57 of Assange. Instead, the straightforward conclusion of the court is that it is inappropriate or impossible to draw the inference suggested.

Authorities following Assange

65. Leading Counsel helpfully referred to a number of authorities which have referred to, or appeared to involve, the principle in paras. 57, 71(v) and 75-76 of Assange. It is unnecessary in this judgment to address all of these cases separately. None of them lend any support for the broader principle for which Mr Bailin contends. Instead, in so far as they involved the application of that part of the judgment in Assange, they are consistent with the explanation of the principle as set out above.

66. In several of the cases the Assange issue arose because the warrant concerned criminal conduct lacking a specific mental element which was an essential ingredient of the equivalent English offence, such as dishonesty, or knowledge or belief or suspicion that property was stolen:-

> Gesiewski v District Court in Bialystok, Poland [2012] EWHC 1765 (Admin)
> Margiela v Circuit Court in Swidica, Poland [2012] EWHC 1766 (Admin)
> Brodziak v Circuit Court in Warsaw, Poland [2013] EWHC 3394 (Admin)
> Adamczewski v District Court in Jelemia Gora, Poland [2014] EWHC 2958 (Admin)
> Kricka v County Court in Varazdin, Croatia [2018] EWHC 1129 (Admin)

In some of these cases the Court held that the conduct alleged showed that if the allegation were to be proved, it was inevitable or necessarily implicit that the specific mental element required under English law would also be satisfied (Gesiewski, Margiela, Brodziak and Kricka) and in one case not (Adamczewski).

67. In Tappin v the Government of the United States of America [2012] EWHC 22 (Admin) the extradition request alleged that the appellant participated in a conspiracy to export

to Iran "controlled defence articles", namely batteries, without the necessary export licence, so as to defraud the US customs authorities. The appellant submitted that the request did not satisfy the requirement for dual criminality because the US indictment did not allege dishonesty, an essential requirement under English law. He also contended that he had not been responsible for any specific misrepresentation to deceive the US authorities so as to evade export licence rules and that the only deception of the US authorities had been in the export declaration made by the shipper. The Divisional Court rejected those submissions, holding that allegations of the appellant's dishonesty ran throughout the extradition request. For example, when the batteries were detained by the US customs, the appellant had suggested that an alternative and untrue explanation be given by the shipper to the authorities as to their end user by a Dutch company. The Court did not refer to the principle stated in Assange. But even if the appellant had argued that dishonesty was not an ingredient of the US offence, it is plain that dishonesty was an inevitable inference of the conduct alleged against him, if proved.

68. The circumstances in Cheng v The Government of the United States of America [2014] EWHC 4091 (Admin) were similar to Tappin. The extradition request concerned an indictment which alleged that the appellant had been a party to a conspiracy to export equipment to Iran, but there was no specific allegation of dishonesty. The conspiracy involved ordering the parts in relatively small quantities for delivery to companies in China, without revealing that the intended end user was in Iran. It was alleged that the appellant had deliberately misled the US exporter and the US customs authorities who were thereby deceived into issuing export licences. The Divisional Court dismissed the appeal on the basis that the conduct alleged "supported" an inference of dishonesty, which was essential to the equivalent offences under English law. The Divisional Court did not refer to the principle stated in Assange, but as in Tappin, even assuming that it was necessary to apply that principle, it is plain that dishonesty was an inevitable inference of the conduct alleged against the appellant, if proved.

69. Two of the cases cited involved the application of the Assange test to an element of *conduct* essential to an equivalent English offence, rather than a mental element.

70. In Lis v Regional Court in Rzeszow, Poland [2014] EWHC 3226 (Admin) the warrant sought extradition for driving a vehicle in road traffic whilst under the influence of alcohol. The appellant was alleged to have been intoxicated but nothing was said about the degree of intoxication. Consequently, it was not possible for the respondent to rely upon the English offence of driving with an excess level of alcohol. Instead, it had to rely upon the alternative offence of driving whilst unfit through drink or drugs. But it was well-established in English law that merely to prove driving whilst under the influence of alcohol is insufficient to constitute the offence of driving whilst *unfit to drive* through alcohol. An essential ingredient of that offence is the impairment of the defendant's ability to control his vehicle properly because of drink. Referring to the principle at para. 57 of Assange, Blake J held that a bare allegation that the appellant was intoxicated, unaccompanied by any further allegation about his behaviour or physical condition or alcohol level, did not enable the court to infer that he was unfit to drive through drink, as the inevitable or only reasonable inference. Consequently, the court decided that the conduct alleged in the warrant was insufficient to satisfy the requirement for dual criminality.

71. In Horkovs v Prosecutor General Office of Latvia [2015] EWHC 1050 (Admin) the warrant alleged that the appellant had *acquired* a firearm and ammunition. The issue was whether the conduct described was sufficient to identify the ingredient of the English offence of being in *possession* of a firearm and ammunition (without a licence). Possession was not an ingredient of the Latvian offence. The warrant described how Horkovs and a second person, having made a "prior agreement" with intention to commit "concealed stealing" of moveable property, "approached a parked car, noticed a handbag inside and, "implementing the joint criminal intention", Horkovs acted as a "lookout" while his accomplice opened the car door and stole the handbag. The contents included a pistol and a magazine of 8 bullets.

72. Silber J rejected the objection by Horkovs that the description in the EAW failed to allege that he had come into possession of the firearm and ammunition. The judge referred to the test for the drawing of inferences set out in Assange (see para. 11). He decided that the key words in the warrant "they thereby illegally acquired the firearm and ammunition" made it clear that it was being alleged that the appellant and his accomplice had made a plan to steal the handbag. That was also indicated by the words "acting in co-ordinated manner pursuant to the prior arrangement" and "acted together clandestinely". Once they had realised that the bag contained the gun and ammunition, it was to be inferred that they took possession thereof, as was shown by the words "then another person together with the [appellant] left the spot of the crime and went to the forest…and thereby they illegally acquired the firearm and ammunition" (para. 12). The judge held that the use of the word "acquired" indicated that either Horkovs had physical possession of those items, or that he had joint possession of them with his accomplice because he had joint control (paras. 13-14). Silber J relied upon the well-established principle in English law, that if the prosecution proves that a person knowingly has in his possession an article (which is a firearm) then the offence of possessing a firearm is committed irrespective of the fact that he does not know that that article is in fact a firearm. In effect, the judge decided that it was an inevitable inference of the joint acquisition of the firearm and ammunition in the circumstances described in the EAW that Horkovs was in possession of the same.

73. Although Mr Bailin sought to apply his broad interpretation of the principle set out in Assange solely to inferences regarding *mens rea*, there is no logical reason as to why that principle should not apply to the conduct element of an offence as well as to any mental element. Indeed, Lis and Horkovs are examples of that very point. Yet it is clearly established that when assessing the conduct alleged to determine whether a requirement for dual criminality is met, the court is only concerned with whether the allegation discloses matters which are *capable* of amounting to the equivalent English offence, and not with assessing the quality or sufficiency of supporting evidence (Palar, Castillo and Mauro). The latter is for the relevant trial court in the requesting state to determine. It is important to note that the Divisional Court in Assange reiterated those principles at paras. 63 and 95. Plainly, the Court saw no inconsistency between those principles and the approach it had set out in para. 57. Mr Bailin's broad interpretation of that approach is inconsistent with those principles.

74. In Mauro v The Government of The United States of America [2009] EWHC 150 (Admin) the request for extradition alleged offences of failing to file a tax return in one year and then attempting to evade paying income tax in following years. The evasion of tax came about by false representations made in later tax documents. It was common

ground that although the US offences involved a mental element, namely a deliberate intention to violate the law, they did not require dishonesty to be proved, whereas the equivalent English offences did (see paras. 3 and 6). Thus, the situation bore some similarity with offence 1 in Norris, in that the US offences lacked an ingredient essential to criminal liability under English law. But there were two significant differences. In Mauro, the allegations related to offences which required some *mens rea* to be established in the foreign jurisdiction, whereas in Norris, the allegation of a price-fixing cartel was a strict liability offence. Second, in Norris the mental ingredient missing from the US offence was incapable of being inferred from the conduct necessary to establish that offence. In Mauro, the missing ingredient in the US offences, dishonesty, could be so inferred.

75. In Mauro, the Divisional Court applied the test in Zak, namely that it was sufficient that the necessary mental element was *capable* of being inferred from the conduct alleged. However, in both Zak and Mauro, the offence for which extradition was sought did not require proof of a form of specific intent required by English law. Accordingly, in those circumstances, the "inevitable inference" test laid down in para. 57 of Assange would now have to be applied, instead of the less stringent test laid down in Zak (see para. 63 above). However, I do not consider that the outcome in either Zak or Mauro would have been different. For example, in Mauro the Divisional Court held that proof that the appellant had made a series of deliberate, false representations on IRS forms, including that he was not a US citizen and that he was entitled to an exemption from withholding for tax by his employer (when he knew that he had earned large sums of money during the relevant period), would amount to dishonesty without more (paras. 9 to 12). Thus, the outcome in Mauro is consistent with subsequent authorities which have applied para. 57 of Assange to justify an inference of dishonesty and satisfy the requirement for dual criminality (see para. 66 above).

76. Mr Perry submitted that the decisions following Assange were correct, save for Gruszka v Regional Court in Opole and Circuit Court in Swidica, Poland [2015] EWHC 2564 (Admin). The relevant part of that decision was concerned with two warrants which gave rise to different arguments. EAW 1 alleged an offence of causing another to dispose disadvantageously of properly for the offender's private financial gain, either by misleading that person or profiting from their error. It was said that the appellant had bought oil under a deferred payment contract, "not intending or being able to pay this amount due". This description included conduct which was incapable of amounting to dishonesty under English law, namely an inability to pay which had arisen by the time the payment for the fuel became due, without any intention not to pay that debt. The problem faced by the respondent was that the allegation in EAW 1 went too far, by including conduct which was not criminal under English law.

77. I therefore respectfully agree with the High Court of Justiciary in Lisek (paras. 24 and 25) that, although the decision in Gruzska that EAW 1 did not disclose an extradition offence was correct, the principle in para. 57 of Assange was not in point.

78. Paragraphs 6 to 21 of Gruzska addressed EAW 2 which alleged that the appellant, acting with "aforethought intent" had fraudulently obtained money by drawing cheques at various bank branches, while being aware that he did not have sufficient funds in his bank account. King J held that such conduct did not amount to dishonesty because the mere drawing of cheques in those circumstances constitutes a request to the bank to provide overdraft facilities sufficient to meet the payment. The bank can choose

whether to agree to that request (Barclays Bank Ltd v W.J Simmons & Cooke (Southern) Ltd [1981] 1 QB 677).

79. The Barclays Bank case did not consider whether any dishonesty was involved. That was not in issue there. But other case law indicated that to establish dishonesty in such circumstances depended upon showing that there had at least been a specific misrepresentation and deception. In Gruzska King J accepted that where a cheque is presented to a bank cashier for payment of cash and the drawer deceives the cashier (e.g. as to the availability of funds in his account) dishonesty may be an inevitable inference (see e.g. paras. 15 and 21 and contrast the decision in Gdansk Regional Court v Ulatowski [2010] EWHC 2673 (Admin)). Gruzska and Ulatowski, along with Adamczewski, all turned on whether the warrant contained a sufficient allegation of deception or misrepresentation so as to displace or overcome the effect of the principles of banking law laid down in the Barclays Bank case, which would otherwise prevent an inference of dishonesty from being drawn.

80. In Gruzska it appears that the offences in Poland did not depend upon proof of any such deception or misrepresentation and so those matters had not been alleged. As the High Court of Justiciary put it in Lisek, the conduct alleged in EAW 2 lacked an element essential to criminal liability under English law. King J decided that the requisite deception or misrepresentation was not necessarily implicit in, or an inevitable corollary of, the conduct alleged. But, given that the warrant simply described the cashing of cheques at bank branches and alleged fraud without more, this was a case where plainly it was *impossible* to infer or imply an allegation as specific as the making of a misrepresentation to, or the deception of, a cashier. Consequently, I agree with the Court in Lisek that the principle in para. 57 of Assange was not in point.

81. For these reasons, I am unable to accept Mr Perry's submission that Gruzska was wrongly decided. I respectfully agree with King J that the bare allegation of acting "fraudulently" did not assist in the particular circumstances of that case to supply the missing ingredient of an extradition offence. Mr Perry's submission that "fraudulently" was sufficient to connote dishonesty would not go far enough. That term did not indicate a fraud involving specific misrepresentations and deception of a kind which, in that case, would have overcome the effect of the decision in Barclays Bank.

82. Overall, I agree with the Court in Lisek that the decision in Gruzska on dual criminality was plainly correct, but that the principle in para. 57 of Assange was not engaged at all.

83. To summarise, the "inevitable inference" test set out in para. 57 of Assange is solely aimed at preventing a person being extradited and then convicted in the requesting state on a basis which would not constitute an offence under English law. Where an essential ingredient under our criminal law is missing from the offence for which extradition is sought, a requirement for dual criminality is nonetheless satisfied if the court concludes that that ingredient would be the inevitable corollary of proving the matters alleged to constitute the foreign offence. But, there is no legal justification for applying that "inevitable inference" test more widely. To do so would involve breaching the general principle that a court dealing with a request for extradition is not concerned to assess the strength of the evidence that would be presented in any trial in the foreign court. Accordingly, in other circumstances, the test set out in paras. 16 to 17 of Zak, namely whether an inference is *capable* of being drawn, continues to be applicable.

84. Furthermore, Norris and Gruzska provide a reminder that some "missing ingredient" problems cannot be overcome by the drawing of an inference to fill the "gap", for example, where it would be legally impossible to draw the inference needed. So, in Norris, establishing the ingredients of the strict liability US offence of entering into a price-fixing cartel could not have enabled any inference to be drawn to satisfy the requirement under English criminal law for dishonesty to be shown.

85. The upshot of this analysis of authorities following Assange is that I find no support for the wider principle for which Mr Bailin has contended.

***Mens rea* for murder as an accessory**

86. The starting point for considering the Appellant's arguments is that this is not a case in which it is alleged that the law of Georgia on the mental element necessary for murder as an accessory lacks any ingredient essential to the equivalent English offence. Professor Morrison's analysis in the Magistrates' Court has not been challenged either there or in this court. Accordingly, the extradition request here does not raise the dual criminality issue which arose on offence 1 in Norris, the allegation of a price-fixing cartel. Nor is it analogous to offence 1 in Assange. There the absence from the Swedish offence of an essential ingredient under English law, namely that these was no reasonable belief in the complainant's consent to the use of force or coercion on her, did not prevent dual criminality being met, because proof of the elements of the Swedish offence would necessarily satisfy that mental element of the English offence. In the present case, there is no need for the test in para. 57 of Assange to be applied to overcome that kind of difficulty.

87. Once that position has been reached, the Appellant's complaint should be considered according to the principles summarised in paras. 25 to 28 and 61 to 62 above. When determining whether the description given of the offence is sufficient to satisfy the dual criminality requirement in section 137(3)(b), it is necessary to have in mind the legislative policy of the 2003 Act to make the extradition process, whether under Parts 1 or 2, simpler and more efficient. That favours a more liberal interpretation which promotes the objective of bringing to justice persons accused of serious crimes (Norris and para. 50 above).

88. The details provided must be capable of amounting to an English offence, but need not amount to proof of guilt. It suffices that the allegations, whether in relation to *actus reus* or *mens rea*, would, if proved, constitute an English offence. The court's determination of the adequacy of the particulars given does not involve any inquiry into evidential sufficiency or quality. The specificity expected of pleadings is not the test. A balance has to be struck by the court between notifying the requested person of the nature and extent of the allegations against him and the objectives of the 2003 Act.

89. Mr Bailin's criticisms of the allegations regarding *mens rea* were similar to his submissions on the description of the conduct alleged. He says that the allegations simply relate to mere presence at the scene without any active words or actions to assist or encourage Mr Smith in the shooting of Mr Carter. He goes on to submit that one possible inference from the matters alleged is that Mr Smith acted independently of the Appellant and that the circumstances alleged do not disclose that the Appellant *must* have intended to assist or encourage Mr Smith to shoot at Mr Carter intending to be killed.

90. In my judgment, the particulars in the extradition request are sufficient to satisfy dual criminality for the mental element as well as the conduct element of murder as an accessory. The Respondent's case as stated in the request is that the Appellant was not merely present as a passenger in the car driven by Mr Smith. She was in her car as the accomplice of Mr Smith in the active pursuit of Mr Carter with malice aforethought, or an intention to kill him, using the gun and ammunition she had recently purchased. The Appellant's criticisms of the extradition request simply go to the level of evidential support for the allegations, rather than to the issue of whether the request *identifies* an offence known to English law. The inference of an intention to commit murder satisfying the requirements in Jogee is one which is *capable* of being drawn from the allegations set out in the extradition request. Whether that inference is established will be a matter for the trial process in the requesting state.

91. Mr Bailin placed considerable reliance upon the decision of this court in Adamczewski and Gruszka. But those decisions, along with Ulatowski involve an entirely different situation. Not only was the essential English ingredient of dishonesty missing from the allegation, but a principle of our banking law applied so as to prevent the drawing of an inference of dishonesty, unless the judicial authority specifically alleged deception and/or misrepresentation, which they had not done. It was for that reason that a bare allegation that the requested person had acted "fraudulently" was legally inadequate to satisfy the requirement of dual criminality. In this particular context, it was *impossible* to draw any inference from such bare language that the necessary specific misrepresentations had been made to the cashier with an intention to deceive that person. It was because the decision in Barclays Bank operated in that manner, that it was essential for the court to know in what way it was alleged by the judicial authority that the requested person had acted fraudulently.

92. Accordingly, I reject the Appellant's contention that the extradition request failed to satisfy the requirement for dual criminality in relation to the *mens rea* necessary for murder as an accessory.

Conclusion

93. For these reasons, I conclude that the extradition request in this case did disclose extradition offences in relation to each of the matters contained in the US indictment. Subject to the views of my Lord, I would dismiss this appeal.

Lord Justice Leggatt

94. I agree.