

On the Definition of Criminal Liability as an Accessory in Danish Law –With Particular Reference to Cases of Violence and Robbery Resulting in Homicide

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1 Introduction

In Denmark the criminal liability of an accessory is generally subject to Section 23(1), first sentence of the Criminal Code,¹ which states as follows:

‘The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful act by instigation, advice or action.’

This provision covers all kinds of both physical and mental contributions, including contributions by agreement, contributions by action and, depending on the circumstances, contributions by failing to act.² Section 23 of the Criminal Code extends the scope of criminal liability to cover any person who has contributed to a criminal act. There is thus independent criminal liability as an accessory, as opposed to the liability which is associated with being an accessory to the principal.³ This article examines the theoretical and practical complications concerning an accessory’s liability arising out of situations where the accessory has participated in some criminal activity, but where he subsequently claims that the principal has gone beyond what was agreed. In Danish law, any liability for contributing to the principal’s criminal acts can either be based on the fact that the principal’s criminal acts were within the scope of what was agreed or contemplated (active accessory) or, if this is not the case, where the accessory’s failure to react to the principal’s acts is equivalent to an active contribution (passive accessory). In both cases the authority to punish the accessory is to be found in the general rule on accessories in Section 23 of the Criminal Code. Starting with the theoretical framework for liability for both active and passive accessories, in the following an analysis is made of a number of cases which show that, in practice, an accessory’s liability for the principal’s acts is quite extensive. This problem is particularly relevant in respect of crimes of violence and robbery that result in homicide. This review is based primarily on Danish theory and practice, but account is also taken of other Nordic law, including in particular the two main works: *Straffbar unnløtelse* by Johs. Andenæs⁴ and *Straffansvarets periferi* by Erling Johannes Husabø.⁵

1 Consolidated Act No 1290 of 23 October 2008.

2 Gorm Toftegaard Nielsen: *Strafferet 1. Ansvar*, Copenhagen 2008, p. 183 ff.

3 *Ansvar* p. 181 f.

4 Johs. Andenæs: *Straffbar unnløtelse*. Et bidrag til rettsdogmatikken, Oslo 1942. The conclusions of this thesis have been carried forward and to some extent developed in Johs. Andenæs: *Alminnelig strafferett*, 5th ed. by Magnus Matningsdal and Georg Frederik Rieber-Mohn, Oslo 2004.

5 Erling Johannes Husabø: *Straffansvarets periferi*, Medverking, forsøk, førebuing, Oslo 1999.

2 Active Accessory

2.1 Agreement as the Basis for Liability

In a case where, in accordance with an express or implied agreement, an accessory cooperates with others to commit a crime, he can be held liable both for his own acts and for the others' actions to the extent that these lie within the scope of what has been expressly agreed or contemplated.⁶ In this situation it will be the agreement which will constitute the basis for the liability for the actions which the accessory does not himself perform but for which he is nevertheless liable. Thus, an agreement to commit a specific crime will give rise to criminal liability as an accessory, regardless of whether and to what extent the accessory participates physically in the commission of the crime.⁷ According to Section 23 of the Criminal Code, the criminal activity of an accessory can consist of 'instigation, advice or action'. In the case of an agreement, this is presumably best considered as a form of instigation (psychological accessory); criminals can reinforce each others' intentions by an express or implied agreement.⁸

If there is no form of prior agreement, an accessory will only be liable for his own actions. This is illustrated by the judgment in the case reported at *TFK*⁹ 2001.387 Ø, where the High Court did not find there was sufficient evidence that the accused had acted with the necessary mutual understanding. In this case T1 and T2 were prosecuted for having acted together to carry out a serious assault, but T1 was only found guilty of the less serious assault for which he was himself directly responsible. The violence had occurred after both the accused had shouted insults at a passer-by W, who then turned to confront them. T1 punched W in the face, W fell to the ground and T2 kicked W in the head with his heavy boots, which resulted in an injury to W's eye which required surgery. In the District Court both the accused were found guilty of serious assault (under Section 245 of the Penal Code), as the Court held that the crime committed had not gone beyond what could be regarded as foreseeable.¹⁰ The High Court found that T1 was only guilty of a less serious assault (under Section 244 of the Penal Code), as it could not be established with sufficient certainty that there had been an understanding between T1 and T2 to carry out such an assault on W, or that the conditions otherwise existed for imposing liability on T1 as an accessory to the assault carried out by T2. It was presumably relevant for this finding that the assault had first been carried out after W himself had confronted T1 and T2

6 *Ansaret*, p. 187 ff.; Vagn Greve et al: *Kommenteret strfl.* Almindelig del, Copenhagen 2005, p. 228; Vagn Greve: *Det strafferetlige ansvar*, 2nd ed., Copenhagen 2004, p. 164; *Straffansvarets periferi* p. 167 ff.; and *Almindelig strafferett* p. 339.

7 In ØLD of 24.3.1976 (VIII No 213/1975), as referred to in DIK (Domme i Kriminelle sager – Judgments in criminal cases) 1973-77.19, T1 was convicted of participating in a violent assault which was carried out by common agreement between T1-T5, even though it was not proved that T1 had himself struck a blow.

8 See *Straffansvarets periferi* p. 161 ff.

9 Tidsskrift for Kriminalret, Forlaget Thomson A/S, Copenhagen.

10 On the meaning of 'foreseeable', see section 1.2.

(though as a consequence of both the accused having shouted at him). In contrast to this, see the judgment discussed below (in section 1.3.1) reported at *UfR*¹¹ 1993.945 V, where the three accused had together chased the victim.

Where it is established that two or more actors have acted *together*, in other words on the basis of an express or implied agreement to commit a crime, the next problem is to determine *the content of the agreement*. In those cases where the court finds that the conduct of the parties is evidence of the existence of an implied agreement, the task is to determine what each of the parties must have regarded as having been agreed.¹² But also in cases where an *express agreement* has been entered into to commit a crime, questions can arise about the detail of the content of the agreement, since those involved do not always discuss their plans in detail. In these circumstances it can be necessary to interpret the agreement. In this connection it is important to understand that the fact that a person who is an accessory to a crime must have acted on the basis of some prior 'common understanding' does not necessarily mean that the accessory and the principal have had the same perception of the common understanding. The accessory will only be liable as an (active) accessory to the criminal acts of the principal to the extent that, at the time of the agreement, he *perceived* those acts to be part of the agreement. This is the situation when intention is a necessary condition for criminal liability.¹³ It is therefore neither profitable nor practically possible to separate the question of the objective content of the agreement and the assessment of criminal intent.

In his review of 'the extent of the agreement and liability as an accessory', Erling Johannes Husabø appears to maintain the traditional distinction between the objective and subjective aspects of liability as an accessory.¹⁴ As a general rule, in the determination of the objective content of the agreement, Husabø emphasises *the purpose* of the criminal activity.¹⁵ The means that what must be considered necessary for achieving the purpose must also be regarded as being included.¹⁶ As for actions that are not strictly necessary but which ease or promote the intended criminal act, as well as in situations where it is not clear in advance what actions will be necessary, in the absence of any more concrete circumstances, the decision must be based on *what can normally be expected* as part of a criminal undertaking of the kind in question.

11 Ugeskrift for Retsvæsen, Forlaget Thomson A/S, Copenhagen.

12 See e.g. the case reported at *UfR* 1993.945 V, referred to below in section 1.3.1, where it was found that when the three accused had chased after F and it was understood that they would attack F.

13 The kinds of crimes dealt with in this article all require criminal intent; see Section 19 of the Criminal Code.

14 It is possible that what the author had in mind was the evaluation of evidence, but this is not apparent from the review.

15 *Straffansvarets periferi* p. 167 ff.

16 Husabø gives the examples that it can be necessary to break into a house in order to steal a specific painting or to assault a sentry in order to gain access to a military installation.

To illustrate this, Husabø refers, among other things, to the Norwegian *Andrawes* case,¹⁷ where the central question was whether Andrawes, who had taken part in the hijacking of an aircraft, had liability as an accessory for the murder of the captain of the aircraft in connection with the hijacking.¹⁸ In this case the Supreme Court ruled that those who participate in the hijacking of an aircraft – or at least a hijacking of the nature of that in the case – must be liable as accessories for the killing which results from the hijacking, unless special circumstances indicate otherwise. Husabø agrees with this and concludes that where there is a dangerous enterprise, such as hijacking an aircraft, there is clearly a foreseeable danger of more serious criminal acts resulting.

Husabø thus argues that what would *normally* be included in such an agreement is assumed to be what is in fact agreed. However, in extension of the above, the question is whether, in the absence of evidence to the contrary, the court can argue that the accessory knew what is normal, or indeed what he thinks is normal himself. Won't the fact that the starting point is the events that normally occur in a criminal action of the kind in question mean in practice that the accessory risks being punished for his negligence, because he *ought* to have foreseen how events will unfold, and this *ought* to have led him to refrain from taking part? In his theoretical analysis Husabø tries to maintain the distinction between the objective and subjective aspects of liability as an accessory, even though he admits that they are closely related.¹⁹ It is paradoxical that, in his own words, Husabø's perspective leads to an objective evaluation of the scope of the agreement, and thus in reality to an objective evaluation of intention. As discussed in more detail in the following paragraphs, there is evidence that a corresponding approach is alive and well in the practice of the Danish courts.

2.2 *Evaluation of Intention of Active Accessories*

Where the principal and the accessory have, at least to a large extent, acted on the basis of a common understanding, but where the accessory claims that at some stage in the course of events the principal has gone further than was contemplated, in practice the decisive question will be *the extent of the accessory's intention*. In Danish law there are three forms of intention: direct intention, where the accused has intended to do what the law requires for a crime to have been committed; probability intention, where the accused has regarded an outcome as overwhelmingly probable (or that some specific element will be present); and indirect or reckless intention (*dolus eventualis*) in the form of

17 Norsk Retstidende (NRT) 1995.1057, NRT. 1995.1228 and NRT 1995.1235.

18 The case is discussed in more detail in *Straffansvarets Periferi* p. 169 ff. and p. 195 f. The case is notable because it concerned the interpretation of the Norwegian extradition law. In order for Andrawes to be extradited to Germany there had to be reasonable cause for suspecting that he was an accessory to the murder. The Norwegian High Court twice found that there were not sufficient grounds, and both times the decision was overturned by the Supreme Court. On the third occasion the High Court found that there was sufficient evidence, and this was upheld by the Supreme Court.

19 *Straffansvarets periferi* p. 169 and p. 245.

positive acceptance,²⁰ where the accused has considered the events which subsequently occurred (or the existence of some criminal element) as possible, but has consciously accepted such possible consequences.²¹ Theoretically, intention is something which exists inside the head of the criminal: 'With intention an act is culpable because of the intention of the actor when he undertook it. With negligence, liability for an act can arise because the actor did not give sufficient thought to the act.'²² For very good reasons, the assessment of intention can give rise to considerable evidential problems in practice since it is impossible to determine precisely what the accused was thinking. The court therefore has to make an overall assessment based on the external facts, and this will include an interpretation of the acts of the accused.²³

The assessment of the intention of an accessory presents particular problems as it concerns not merely the accessory's intention with regard to his own acts, but also whether he had intention with regards to the acts of the principal. The consequence referred to in the definitions above is thus not only the consequences of the accessory's acts, but also the consequences of the principal's acts. *Direct intention* will thus require that an accessory desired or knew in advance that the principal would act as he did. This will be the case where the principal's acts are expressly agreed with the accessory. The problem of evidence arises in those cases where it cannot be proved that the principal's acts have been discussed with the accessory in advance. In this situation the question concerns the accessory's attitude with regard to the possible consequences of the principal acting as he has. In this connection *probability intention* will require that the accessory considered that it was overwhelmingly probable that the principal would act as he has. A conviction for acting as an accessory under the heading of probability intention would thus theoretically require there to be evidence that the accessory has considered in advance the hypothetical question: how great is the probability that the principal will act in a given way if the situation in question should arise? The accessory's thoughts, or lack of thought, will be based on a number of circumstances including: how well he knows the principal and whether he has the capacity or imagination to envisage that the situation could arise. In practice, terms such as 'must have realised' and 'must have contemplated' will often be used in judgments where it

20 Here and below, account is not taken of the hypothetical form of intention which is a part of the existing law, *see* UfR 1979.576 H, but which gives rise to considerable problems of legal certainty and which must therefore be assumed to apply only in extreme circumstances; *see Dolus eventualis – en del af gældende dansk ret*, UfR 1988B.131.

21 For a further discussion of the three form of intention, *see Ansvarret* p. 66 ff., with references. In *Om forsætsbegrebets nedre område*, UfR 2002B.391, Michael Bjørn Hansen questions the distinction between probability intent and *dolus eventualis*, and in *Acceptforsæt – en farbar vej*, UfR 2005B.140, he proposes replacing the term *dolus eventualis* with the term 'acceptance intent'.

22 *Ansvarret* p. 99.

23 On evidence of intention *see* Waaben: *Det kriminelle forsæt*, 1st ed. 5th impression, Copenhagen 1990, p. 55 ff.; *Ansvarret* p. 85 ff.; and *Kommenteret strfl.* p. 193 ff.

is argued that the accused had probability intention.²⁴ While in everyday language ‘must have contemplated’ may refer to what, on the basis of the evidence, it can be argued that the accessory has actually foreseen, it seems that ‘must have realised’ corresponds more to ‘ought to have expected’.²⁵ Another favoured term, ‘foreseeable’,²⁶ leads in the direction of a finding of negligence.²⁷ The question thus arises as to whether these terms express what the judges actually think, or whether they are merely careless use of language.²⁸ The examples given in section 1.3 show that in some cases the outcome is remarkably close to making an accessory’s liability for the actions of the principal in effect a liability for the consequences of the preceding criminal acts which were not clearly intended (negligent).

Where it cannot be argued that the course of events appeared to the accessory to be overwhelmingly probable, but where the accessory must nevertheless have recognised the events as possible, the *dolus eventualis* form of intention (positive acceptance) may be applicable. If a person has been an accessory to a dangerous act, for example a robbery, where the accessory knows that the principal has brought a loaded weapon, the accessory can hardly claim that he has not *considered the possibility* that the weapon would be used. However, according to the theory of positive acceptance, there will only be an intention to commit homicide if the accessory has accepted the consequences – that the robbery will result in killing – or expressed in some other way that ‘ultimately, this possible consequence is preferred, rather than the criminal

24 See e.g. the case discussed below (reported at UfR 1991.48 H), as well as the summing up in the case reported at UfR 1994.562 H (discussed in section 1.3.1).

25 The formulation has also been criticised in *Alminnelig strafferett* p. 235. See also Gorm Toftegaard Nielsen, ‘Om forsæt virkelighed og sprog’ in Thomas Elholm (ed.): *Ikke kun straf...*, Festskrift til Vagn Greve, Copenhagen 2008, p. 480 f. Toftegaard Nielsen has referred the term ‘måtte indse’ (‘must have realised’) to Dansk Sprognævn (the Danish Language Council), and the conclusion was that it does not cover intention, i.e. what the accused expected, but only what the accused could or ought to have expected. The author adds that it is possible that the judges in the case would argue that they intended to refer to what the accused had in fact expected.

26 See the case referred to in section 1.3.1 reported at UfR 1993.945 V and TFK 2002.164 Ø, as well as the judgment of the District Court at TFK 2001.387 Ø (section 1.1). See also TFK 2005.535 V, where both the accused were found guilty of serious assault causing death, with the court commenting that ‘both the accused are found guilty for the entirety of the assault, since the assault committed by one of the accused has not significantly exceeded the assault committed by the other, and the individual acts of violence did not exceed what could have been foreseen by the party who was not committing them.’ It is noted that the first part of this reasoning, that the assault committed by one of the accused did not significantly exceed the assault committed by the other, is not a condition for finding that a person can be found guilty for being an accessory to a crime, according to the cases reviewed in section 1.3.1.

27 See correspondingly *Answaret* p. 192 and *Om forsæt, virkelig og sprog* p. 482 ff. In Danish tort law, the term ‘foreseeability’ refers to ‘adequate causation’, in other words that the consequences are objectively within the scope of what the person concerned should have expected, because they are not untypical; see Bo von Eyben & Helle Isager: *Lærebog i erstatningsret*, Copenhagen 2003, p. 227 ff.

28 *Kommenteret strfl.* p. 228.

abandoning or refraining from the criminal act'.²⁹ On the other hand, if the accessory has only accepted the risk, but has acted believing that the principal will not commit a homicide in connection with the robbery, there is only conscious negligence in relation to the killing. And if the accessory has not considered the possibility at all, there will only be negligence. In theory the distinction is clear, but in practice proving that the accessory has consciously accepted the consequences of the principal's actions gives rise to considerable problems.

The Danish Supreme Court appears to accept a certain easing of the standard of proof in cases concerning accessories with *dolus eventualis* intention, as there are less strict requirements for evidence of acceptance of the principal's actions. In the case reported at *UfR 1998.277 H*, T3, who had driven T1 and T2 to the scene of the crime, was found guilty in the High Court as an accessory to attempted homicide on the basis of the *dolus eventualis* standard. It was argued unsuccessfully before the Supreme Court that the judge's directions to the jury had been incorrect or incomplete, since it had not been expressly emphasised that a conviction required evidence to be given that the accused had *consciously accepted the consequences in advance*, in this case that there could be a homicide. In the view of the accused, this was not the case 'where it is not the accused himself, but others who have initiated the actions, and where there was no objective evidence which proved that the accessory had, in advance, accepted the criminal consequences of the possible event. In such cases the decision depends on whether there is intention, on a purely speculative basis, which was not acceptable'. The situation differs in cases where the accessory himself participates actively in dangerous criminal activities that develop in a way that the accessory subsequently denies he intended. Here, as stated, it will be natural to consider the applicability of the *dolus eventualis* standard by interpreting the preceding participation as acceptance that things can take a course which is different to that planned but which is nevertheless foreseeable. In the case referred to in section 1.3.2, which is reported at *UfR 2004.1456 H*, T1, who had carried out an armed robbery together with T2, was convicted as an accessory to a murder committed by T2 while fleeing from the scene of the crime. T1 argued before the Supreme Court that the directions given by the High Court to the jury were incomplete and misleading as it had not been expressly emphasised that 'there is or there can be a difference between the concept of intention and the assessments that should be used, depending on whether the case concerns the requirement for intention in relation to the person who actually commits the criminal act, or the requirement for intention in relation to a person who is alleged to be criminally involved, but who has not actually fired the gun. It was not emphasised that the accused should at least have recognised the possibility that there could be a homicide, and that it must be proved that the accused has accepted this possibility'. The Supreme Court did not accept the claim that the decision should be overturned and the case referred back, but it did state that it would have been desirable for the directions to the jury 'to have contained a more detailed review of the concepts of intention, in particular in relation to the

²⁹ See the directions to the jury at *UfR 1992.455 H*.

facts of the case'. Presumably the directions to the jury in this case express how the *dolus eventualis* assessment should be undertaken in practice: 'The jury must consider: "What actually happened in the accused's mind?" To which I usually add – to the extent that anything at all happened in the accused's mind. But when they do this, the jury must consider: "How do *people normally react* to such things?" (emphasis added). Thus in practice the *dolus eventualis* form of intention leads to an objective evaluation of the intention, as referred to in section 1.1. But in contrast to probability intention, where 'normal' presumably corresponds what is most frequent, in relation to a *dolus eventualis* assessment of intention, 'normal' seems rather to mean what must be regarded as responsible behaviour according to the prevailing measure. It must be considered very abnormal that a bank robbery should result in homicide, as happened in this case. However, the judgment shows that the courts are willing to give extensive effect to an accessory's liability once he has embarked upon dangerous and risky conduct, in this case armed robbery.

The case reported at *UfR 1991.48 H*, which concerned the special provisions in Section 240 of the Criminal Code on being an accessory to suicide, is a corresponding example of this: T handed a loaded pistol, without the safety catch on, to A who was under the influence of alcohol and who had just said he was tired of life. This was accompanied by the remark: 'Do it, if you really mean it.' A killed himself with the pistol and T was convicted for being an accessory to the suicide, since T 'must have recognised that there was a *very high probability* that the dead man would carry out his threat, and T had *accepted* that this would occur' (emphasis added). In *Kommenteret strfl.*, s. 193, it is said that the wording of the judgment covers a combination of probability intention and *dolus eventualis*, but that 'it could just as well be argued that that T did not believe that A would shoot himself.' It is difficult to argue with this view. Only very few of those who threaten to commit suicide actually do so, and it is presumably only very few who would have handed the pistol to the principal, well knowing that there was a very high probability that he would shoot himself. The judgment should rather be seen as an expression of the fact that the requirements for proof of intention are weaker when there is a *possible* but *overwhelmingly serious* consequence. In the light of A's statements, T took a risk in giving the principal the pistol. *This was a risk which, in this case, the criminal law could not accept, even though the risk was very small.*³⁰ Thus, in reality the situation was that 'the evidence that he had accepted the possibility seems to be that he acted despite his knowledge of the existence of the risk'.³¹

Under Danish law it is not possible to assume, on the basis of the general danger of a criminal act (armed robbery), that an accessory has accepted that, in connection with a robbery, the principal will use a weapon to commit homicide.

30 The Swedish 'likgiltighetsuppsåt' seems to correspond to *dolus eventualis* in the form of positive acceptance; see Petter Asp: 'Uppsåtets nedre gräns – en efterlängtnad sequel', in *Juridisk tidskrift* 2004-05 p. 385 ff.; as well as Magnus Ulväng: 'Likgiltighetsuppsåt', in *Svensk Juristtidning* 2005 -01 p. 1 ff. Both authors emphasise that the fact that a person runs an *abnormal risk* can serve as evidence of acceptance (indifference) despite the low probability of the consequences occurring. An example of this would be Russian roulette.

31 *Kommenteret strfl.* p. 185.

In order to be found guilty as an accessory, it is necessary to show that the accessory had prior intention both with regard to the robbery and the homicide. By the introduction of *dolus eventualis* to these kinds of cases the Danish law comes remarkably close to the doctrine of *felony murder*, as known in American law, according to which a person who takes part in a serious crime (felony) – for example a robbery – is guilty of murder if death occurs in connection with the crime. In cases of felony murder it is only necessary to prove intention with regard to the serious crime. The intention to commit the underlying crime is automatically transferred to its consequences.³²

2.3 *Examples from the Practice of the Courts – Active Accessory*

An accessory will be culpable if it can be shown that the principal's acts lie within the scope of what has been agreed or contemplated beforehand – or in other words, *if the accessory had the intention* that the principal would undertake the acts in question. The following cases show that sometimes *very little is required to prove the accessory's intention*.

2.3.1 **Cases involving violence**

Cases involving violence in which two or more criminals take part are one of the kinds of cases where the question of an accessory's culpability for the acts of the principal often arises. Violence can rapidly escalate when tempers become heated. In the case reported at *UfR 1993.945 V*, all three accused were held liable for all the violence since it had not gone beyond 'what, from the start, was *foreseeable*' (emphasis added). T1 had initiated the assault by pushing F so that he fell over; T2 had hit F twice in the face; and T3 had given F several kicks, including in the face, while F was on the ground. Each of the accused argued that they were only responsible for the assault which they had themselves carried out. In the evidence it was shown that it was T3's remark that F was a 'black jacket' that was the initial spark for the accused chasing after F, who had just cycled past, and it was clear to all the accused that this meant that they were going to beat up F. 'Foreseeable' in this case thus referred to what the accused had clearly contemplated, but as pointed out above, the wording is unfortunate.

If the principal suddenly carries out a serious assault (under Section 245 of the Penal Code), it will be natural to expect there to be some *external sign* of the accessory's intention. This was so in the case reported at *MEDD*³³ *1997.140 V*, where in the view of the High Court it was 'foreseeable' for all participants in a serious affray that the broken bottles which had been *visibly taken along* would be used in the assault. In the case reported at *TFK 2000.46 V*, both T1 and T2 were found guilty of serious assault (under Section 245 of the Penal Code) by together (and in the stated order) attacking A by punching him in the face, hitting him on the back of the head with a beer bottle, and kicking his head and body several times while he lay on the ground. According to the reasons given

32 For a more detailed description see "www.mywiseowl.com/articles/Felony_murder". The phenomenon is referred to by Waaben in *Juristen* 1954.191 ff. as well as in *Ansvar* p. 192.

33 Reports published by the Danish Society of Licensed Advocates (Landsforeningen af beskikkede advokater).

by the High Court, it was the blow with the beer bottle that brought the case under Section 245 of the Penal Code, and it was T1 who had inflicted the blow. It is not possible to see from the judgment whether T2 was aware that T1 had brought the bottle, which indicates that this question was not relevant to the assessment of intention. On the other hand, it was presumably relevant that the evidence showed that, after the blow with the bottle, T2 participated actively in the assault by kicking A, thereby indicating that he approved of the preceding actions.³⁴ This case can be compared with the case reported at *NRT 1984.835*, where the Norwegian Supreme Court agreed with the decision of Oslo City Court, finding both the principal and the accessory guilty for the whole assault, including a flying kick by the accessory, which caused bodily harm and brought the case within the scope of the law on serious assaults. This decision was accompanied by the comment that ‘after the accessory’s flying kick, the assault was continued by kicking the victim’. In the case reported at *UfR 1996.1638 H* (see section 2.1 below), the High Court also expressly stated that *subsequent acts* can be evidence of prior intention.

The judgment in the case reported at *TFK 2002.164 Ø* goes even further. Here the fact that the accessory remained passive, in spite of the fact that he had the possibility to react, appears to have been sufficient evidence that he had a prior intention with regard to the assault carried out:

T and T1 waited together for A in order to take his moped from him. When A came riding past, T1 threw a spare wheel towards A, who was hit on the body and fell off. Thereafter T1 hit A in the head several times with his own crash helmet, so that among other things A suffered from concussion and loss of memory. In the judgment it was argued that, from the beginning, T was aware that A should be deprived of his moped by the use of violence and that he had seen that T1 was carrying the spare wheel and understood that the wheel should be thrown at A in order to stop him. As for the blows with the crash helmet, the court commented that ‘these did not go beyond that was *foreseeable* by T from the start’ (emphasis added).

The fact that T was culpable for the violence which was carried out by T1 throwing the spare wheel he was holding as they stood and waited for A can be compared with the situation in the abovementioned case reported at *MEDD 1997.140 V*, where the accomplices were visibly bringing bottles. On the other hand, on the issue of the blows with the crash helmet, it can be questioned how T could have known in advance that T1 would have gone so far. In this case the ‘foreseeability’ seems in the main to relate to liability for consequences which were not clearly intended. The judgment in the case reported at *UfR 1994.562 H* appears to support this:

T1 and T2 had no money and they decided to break into F’s home as T1 knew that F often kept quite a lot of cash. One night, T2 climbed through the window of F’s residence, taking with him a loaded sawn-off shotgun. T1 waited outside. According to T2’s statement, inside the house he was surprised by F’s dog, which

³⁴ It should be added that before the High Court both T1 and T2 had argued for the confirmation of the judgment of the District Court under Section 245.

had led to the gun going off, hitting F in the foot. He then let T1 in through the door, and they began to search the house. T1 sat on the sofa beside F, holding the shotgun. At one point T1 fired a shot to frighten T1; the shot hit the wall, but F still refused to say where the money was. The accused then decided to go outside to get some air and to decide where to search. Before doing so they taped F's hands together behind his back and put him on the bed. After 10-15 minutes they heard a bump and ran inside. It was F, who also wanted to go outside and get some air. T2 admitted that he hit F on the left side of his face and then, while F lay on the floor, kicked him in the side; he was wearing trainers. Finally, he went out into the kitchen to search for the money. From there he heard a lot of noise and groaning from the living room. It sounded like blows and kicks. He didn't look to see what was happening. When T1 and T2 left the house, F was on the floor. F was not dead, as he answered 'Yes' when they told him he should stay lying down. During the hearing an expert witness described F's injuries as having been caused by extreme violence and the nature of the injuries suggested that F had received a number of kicks and even that his rib-cage had been jumped on.³⁵ The cause of death was probably the 15-20 broken ribs suffered by F which, after a while, could lead to suffocation.³⁶

T1 was found guilty of attempted robbery and for murder.³⁷ On the basis of his own statement, T2 was convicted of attempted robbery and for being an accessory to an assault resulting in death; under the Penal Code, Section 288(2) (see Section 21), and Section 246(1)(see Section 245).³⁸ T2 was presumably convicted as an active accessory; see the direction to the jury where it was stated that 'it is the joint undertaking which defines the intention of the accessory. If the actions of the principal go beyond what an accessory *must have expected*, the accessory does not have intention with regard to these further acts' (emphasis added). The finding of guilt of T2 appears to give extensive interpretation to liability. T2's own actions – a punch and kicking the victim in the stomach while he lay on the ground – hardly go beyond a simple assault; see Section 244 of the Penal Code. It can hardly be argued that at the time when he helped tie up F, T2 intended that F should later be subject to a serious assault (Section 245). Nor is the fact that T2 brought a loaded weapon sufficient evidence that he intended it to be used other than to frighten the victim.³⁹ Moreover, it was not the weapon

35 The witness explained that a person had to fall on another person several times from a considerable height in order to cause 15-20 broken ribs, and that the injury to the foot could not have caused death, even with the blows and kicks described by T2.

36 The report is based on a transcript of the case.

37 As this was a jury trial the reasons are not given for the decision, and it is not possible to determine the reasons. However, it appears from the transcript that F's blood was found on T1's clothes and shoe, and witness S had told the police that a couple of days before the robbery T1 had said that he would 'bump off' F. In the case T1 denied everything.

38 He was also originally prosecuted for murder, but was found not guilty of this. Being found not guilty of being an accessory to murder is presumably connected to the fact that the death was not caused by using an obviously dangerous weapon, but by blows and kicks, and that the death had only occurred after T1 and T2 had left the scene. It can also have been relevant that, according to the directions to the jury, T1 had not acted with direct intention but only with probability intention.

39 See section 1.3.2.

but the punches and kicks that caused F's death, so it cannot be argued that the serious assault had been carried out with a dangerous weapon which was visible to T2 in advance. Nor did T2's subsequent actions show that he approved of what had happened; he was merely passive in relation to it.

2.3.2 Armed robbery which extends to become murder

The following examples all deal with the situation where an accessory takes part in an armed robbery which results in the principal committing murder. The accessory is aware beforehand that the principal is armed, and he acts suddenly without the accessory having the possibility of preventing the principal's acts. It appears that, traditionally, it has been the practice of the prosecuting authorities only to prosecute the principal for both robbery and murder, while the fact that the accessory was aware that a loaded weapon was brought has only led to him being prosecuted for robbery of a specially serious nature; see Penal Code, Section 288(2). An example is the case reported at *UfR 1980.893 H*, concerning a robbery carried out by T1 which resulted in murder. The robbery was carried out by agreement with and with the encouragement of T2 and T3, who were not present during the robbery, but waited for the stolen goods in a flat close by. T2 knew that T1 had a small-bore rifle with him during the robbery, since it was T2 who had given it to him. *Only T1 was prosecuted* and convicted of murder.

The case reported at *UfR 1992.94 H*, which attracted considerable public interest, concerned an attack on a cash transport vehicle at the post office in Købmagergade in Copenhagen. T1 – T4 were all prosecuted but found not guilty of the murder of a policeman which occurred in connection with the flight from scene of the crime.⁴⁰ It could not be proved who had fired the shot, and the judge did not find that there was sufficient evidence that the robbers had agreed or contemplated that during the get-away a shot should be fired with the overwhelming risk of death resulting.⁴¹ The fact that all the participants knew that a loaded shotgun was brought was not in itself sufficient evidence of intention to kill. One of the defending counsel in the case stated:

‘By being aware of or even by agreeing that a loaded shotgun should be taken along during the robbery, the accused have not, in legal terms, written a blank cheque with regard to any and every event that might occur, including that the person in possession of the shotgun should kill someone. A loaded shotgun used in a robbery can have other purposes than killing. For example, it can be used to frighten or threaten, to fire a warning shot and to put any chasing vehicle out of action.’⁴²

A different and more wide-reaching decision was given in the case reported at *UfR 2004.1456 H*, where both robbers were found guilty of murder. According to the witness statement, the events were as follows:

40 This appeared in the later judgment against one of the accomplices T, see *UfR 1994.20 Ø*.

41 This appears from an unofficial stenograph transcript of the directions to the jury; see Thomas Rørdam in *Lov og Ret* 1992.14 (p. 17).

42 See Thomas Rørdam in *Lov og Ret* 1992.14 (p. 17).

T1 and T2 carried out an armed robbery of Nordea Bank in the town of Ålsgårde. In the bank it was T1 who played the leading role, threatening the staff with a loaded weapon to hand over DKK 548,000. T1 behaved very aggressively, among other things kicking one of the members of staff even though the person concerned was lying on the ground. T2 kept watch by the porch and did not get involved in what was happening. During the robbery A, whose partner was inside the bank, became aware that a robbery was taking place and decided to try to prevent the get-away. First he overturned the robbers' motorcycle which was parked immediately outside the entrance. Then he got his car and backed it right up to the motorcycle, which then became entangled in the car. T2 saw that something was wrong outside. He went out and tried to free the motorcycle. As he was not immediately successful he fired through the back window of the car from a distance of two to three metres and killed A. T1 then came running out, and the two robbers fled on the motorcycle.⁴³

According to the wording of the direction to the jury, the decision was presumably based T1's intention with regard to the murder carried out by T2 in the form of *dolus eventualis*. It is presumably the first time that this form of intention has been directly applied in this kind of case.⁴⁴ Moreover, it appears from the directions to the jury that the assessment of intention was not based purely on the agreement to carry out the armed robbery. One of the bank's CCTV cameras had film showing that inside the bank T1 had given T2 a pistol, and the presiding judge asked the jury to consider the question: *Why did T1 give T2 a loaded pistol if he did not intend that it should be used if necessary?* T1's actions were thus interpreted as a sign that T1 had intention to kill. However, such an interpretation is very broad, given that the *dolus eventualis* theory requires not only that T1 must have understood that it was possible that T2 would use the weapon to kill, but that he consciously accepted this. There can have been many reasons why T1 handed the loaded pistol to T2, for example it could be that T1 needed to keep his hands free to carry the money. It is not clear either from the judgment or the transcript exactly *when* or *under what circumstances* the pistol was handed over, and it is remarkable that neither the accused nor the witnesses were asked about this seemingly decisive part of the course of events. It is thus doubtful whether it is possible to read more into T1's handing over of the pistol than what could already be understood on the basis of the agreement to carry out the armed robbery. Thus, in relation to the case reported at *UfR 1992.94 H*, in the case reported at *UfR 2004.1456 H* there is a lessening of the evidential requirements and thus an extension of the liability of accessories.

43 The report is based on a transcript of the proceedings.

44 The judgment is therefore in line with the general trend towards increased use of *dolus eventualis* in Danish law; see Michael Bjørn Hansen i U 2005B.140 ff. In the case reported at *UfR 1994.562 H*, the presiding judge chose deliberately not to consider *dolus eventualis* in the directions to the jury. This was not criticised by the Supreme Court. A single case from an earlier date, reported at *UfR 1956.31 H*, can presumably be explained on the basis of *dolus eventualis*, but the question of the extent of the intention of an accessory to a crime seems not to have been considered in the case. See *Ansvarret* p. 190 f. with references.

3 Passive Accessory

3.1 Basis of Liability

Even if the principal's acts must be assumed to lie outside what has been agreed or contemplated, depending on the circumstances a person can be liable as a *passive accessory* if he is present at the scene of the crime and remains passive. While the extent of an accessory's intention is decisive for defining his liability as an active accessory, with liability as a passive accessory it is the definition of the objective criteria for liability as an accessory that is the focus of attention. According to their wording, the provisions of the Penal Code are primarily directed at criminal acts, but it is generally assumed that, depending on the circumstances, passivity (failure to act) can be included.⁴⁵ According to the principle of legality, the extent to which the substance of a crime can be realised by an omission depends on an interpretation of the relevant provisions of the criminal law.⁴⁶ An example often given of a 'crime of omission' is murder by a mother's failure to give food to her child (Penal Code, Section 237).⁴⁷ For liability as a passive accessory, however, the interpretation is not linked to a provision in the special part of the Penal Code, but rather to 'instigation, advice or action' in Section 23 of the Penal Code. This gives rise to special considerations, as discussed in the following.

The starting point in Danish law is that a person who is passively present when a crime is committed cannot be punished as an accessory to the crime.⁴⁸ However, depending on the circumstances, a spectator can be punishable for their passivity. The question of being a passive accessory is traditionally based on the doctrine of omission developed by Andenæs,⁴⁹ according to which the main condition for a person being criminally liable for a failure to act is that the accused had a *special duty to act*,⁵⁰ based on a *special connection* with the factor which causes the injury or a connection with interest which is injured. There will unquestionably be such a connection where an accessory has participated actively in preparatory criminal activity.⁵¹ With liability as a passive accessory, an accessory is liable for not acting in a situation where it is expected that he should act. However, a point which is often overlooked in Denmark is that when a case concerns being an accessory due to a failure to act (passive accessory),

45 There are so-called *false* crimes of omission in contrast to *genuine* crimes of omission, where a failure to act leads directly to criminal liability.

46 *Ansvar* p. 52 ff.; *Det strafferetlige ansvar* p. 91 ff.; and *Almindelig strafferett* p. 139 f.

47 *Almindelig strafferett* p. 146 f.; and *Det strafferetlige ansvar* p. 92.

48 As expressed by Toftegaard Nielsen in *Ansvar* p. 195, so it is not punishable to be a spectator to a crime.

49 *Straffbar unnløstelse*, §§ 16-30; and *Almindelig strafferett* p. 136 ff.

50 In contrast to the previously applicable theory of legal duty, it is not sufficient that the person concerned had as duty to act. There must be a *special* duty to act, and the failure to act must be equivalent to an active action: see *Almindelig strafferett*. p.139 ff.; and *Ansvar* p. 53 ff.

51 *Straffbar unnløstelse* §§ 17-19; *Almindelig strafferett*. p. 141 ff.; and *Straffansvarets periferi* p. 193 ff.

there is a further requirement for what Andenæs calls *conclusive passivity*.⁵² According to Andenæs, liability for being a passive accessory is based on the fact that in cases where there are special reasons for expecting some action (a special duty to act), it must be possible to interpret the passivity as a form of implied agreement.⁵³ In such cases passivity can be regarded as a form of psychological assistance.⁵⁴ Andenæs considers being a passive accessory as a special form of psychological assistance where liability is based on the effect which passivity can have when there is a special duty to act.⁵⁵ Andenæs's theory is in line with what has been stated above, that any liability as a passive accessory must be based on Section 23 of the Penal Code, as passivity can be considered a form of 'instigation'.

It is also possible to find support for this approach in Danish practice, even though it is seldom expressed as directly as in the case reported at *UfR 1996.1638 H*, where T3 and T5 were convicted of being accessories to an assault on a disabled person which led to his death. During much the most of the period of mistreatment the two accused remained passive. However, towards the end, they had taken part by hitting the victim on the head with a fly-swatter and by urinating on him. However, it was not for these acts but for their passive presence during the long course of events that the High Court justified finding them guilty of being passive accessories. The High Court stated: 'Even though the accused had not been party to any prior – express or implied – agreement to use violence against A, they must have realised that by their presence during the long course of events and by their failure to distance themselves from most of what took place, they aggravated the situation in which the totally helpless A found himself. Their own actions in the last part of the course of events also *reflect their attitude to what took place*, which must almost inevitably *have been apparent* while the assault was being carried out. For this reason, on the basis of an overall assessment, they are found to have supported the actions in such a way as to make them criminally liable for the assault' (emphasis added).⁵⁶ In the case reported at *UfR 1998.545 H*, a mother was convicted of being an accessory to the violence practised by her partner against her child on the grounds that 'the fact that, despite her duty of care, the accused remained passive in relation to T1's continued

52 E.g. it seems that Knud Waaben, in *Strafferettens General Part 1, Ansvarslæren*, Copenhagen 1997, p. 60 ff. and 217 f., only considers the requirement for the existence of a special duty to act. See similarly Ib Henricson et al. in *Juristen* 1998.268 (p. 269 f.).

53 Not in the sense of a reason for exemption from criminal liability, but as a form of instigation; see immediately below.

54 See *Almindelig strafferett* p. 329 and p. 148; and *Straffbar unnløtelse* p. 434.

55 However, he points out that it is never possible to draw a direct line from a failure to fulfil a duty to act to a liability for being a passive accessory, and the question of whether the passivity should be counted as a form of assistance must ultimately depend on 'a more concrete evaluation, having regard for the nature of the circumstances which form the special connection between the failure to act and the criminal liability'; see *Straffbar unnløtelse* p. 434.

56 The case is discussed in detail in *Ansaret* p. 198 f.; and by Gorm Toftegaard Nielsen: *Om faren ved at være tilskuer og en besynderlig hængning*, in Peter Garde et al. (eds.): *Mindeværdige retssager*, Copenhagen 2002, p. 287 ff.

violence must therefore be considered as an *acceptance* of this violence' (emphasis added).⁵⁷

In *Straffansvarets periferi*, p. 178 ff., Husabø criticises Andenæs's view. For Husabø what is decisive is not whether the passivity has *affected* those who are active, but only whether there is reason to criticise a person who remains passive for their failure to act. He thereby shifts the focus from the principal to the failure of an accessory to fulfil a duty to act; if a spectator is to be punished, it is not because we reproach him for having influenced the principal, but because he was present without intervening to abate the violent acts being carried out. To illustrate that conclusive passivity is not a necessary precondition for finding someone guilty of being a passive accessory, Husabø points to the judgments in two Norwegian cases where the accessory was found guilty in situations in which he had previously taken an active part in criminal acts.⁵⁸ In one case, reported at *NRT 1995.355*, one of two robbers had suddenly pulled out a knife and killed the owner of a shop. The second robber was found guilty of being an accessory to the murder because he had not attempted to prevent it; 'A saw the knife in C's hand before the fatal stabbing and was aware that C might use it.' Husabø concludes: 'There was no requirement that the passivity should be in the nature of consent to the acts of the principal actor. Everything happened so quickly that there would hardly have been time for such communication between the robbers.'⁵⁹ As stated, there have not been many cases before the Danish courts where the court has expressly considered this dimension of liability as a passive accessory. However, it is very doubtful whether this can be understood as meaning that *it is not required* that passivity can be interpreted as a form of instigation. It makes no sense to talk of being an 'accessory' unless there is some link between the active principal and the passive accessory. Nevertheless, in the overall assessment which the courts are required to make, *it is natural to infer the existence of a form of instigation from a passive person who does not object to actions to which he is a witness when that person has himself been an active participant in the preliminary course of events*. Husabø is unquestionably correct that it is somewhat strict to infer the existence of instigation in cases where the whole action takes place so rapidly that it is difficult for there to be communication. The fact that those present only have a very short time to react is not only problematic in relation to the question of instigation. It is a general principle of criminal law that no-one has a duty to do what is impossible.⁶⁰ Any liability for the failure to fulfil a duty to act must therefore be based on the fact that it was *possible* to act.⁶¹ It must be concluded that in the case reported at *NRT*

57 In *Ansaret* p. 201 f., Toftegaard Nielsen questions whether acceptance is the same as consent.

58 *Straffansvarets periferi* p. 179.

59 The second case to which Husabø draws attention is the Andrawes case (*NRT. 1995.1057*), concerning a participant in the hijacking of an aircraft who did not intervene to prevent the killing of the captain of the aircraft. The case is discussed in section 1.1 above.

60 *Ansaret* p. 113 ff.; and *Det strafferetlige ansvar* p. 130 f.

61 *Straffbar unnløstelse* p. 455 ff.

1995.355, there was a very strict requirement with regard to the ability of the accessory to react. There is no reported Danish case in which a similar problem has been decided. This is presumably linked to the more cautious practice in bringing prosecutions.

3.2 *Examples from the Practice of the Courts – Passive Accessory*

As stated above, depending on the circumstances, an accessory can be liable as a passive accessory if he refrains from reacting to the principal's acts if he had the opportunity to do so. However, liability as a passive accessory is only relevant in those cases where the principal's acts go beyond what was agreed in advance or contemplated, so that the accessory is not liable as an active accessory. As illustrated in section 1.3.1 above, in practice the courts have given a very broad scope to liability as an active accessory. This means that the scope for liability as a passive accessory is correspondingly narrower. In the case reported at *UfR 1984.338 H*, T2 appears to have been found guilty as a passive accessory to the murder committed by T1 in connection with a robbery:

T1 and T2 had struck down F on the street and had then followed him home in order to steal money from him. Here F was hit and kicked by both the accused, after which T1 twice gripped him by the throat and stabbed him in the neck. It was the throttling of F that killed him. T1 and T2 were both found guilty of robbery and murder. As this was a jury case, the reasons are not given for the decision, but the formulation of the case for the prosecution and the questions of the jury give the impression that T2 was found guilty as a passive accessory: '*While the accused was still present in the flat, the other accused throttled the victim twice and stabbed him in the neck*' (emphasis added).

The courses of events in this case and in the case reported at *UfR 1994.562 H* (discussed in section 1.3.1), where T2 was found guilty for being an active accessory to a serious assault resulting in death, are comparable in many ways. In both cases there was a robbery which resulted in death. And in both cases T2 was aware that a murder was taking place without intervening. This leads to the question of why, in the case reported at *UfR 1994.562 H*, the High Court applied a dubiously wide interpretation of liability as an active accessory rather than applying the law on passive accessories. The answer could be that there was considered to be a real need to punish the accessory in a situation where it was questionable whether the objective conditions were fulfilled for finding the accused guilty as a passive accessory. T2 had a special connection with the situation, and thus a special duty to act, as he had taken part in the attempted robbery, including helping to tie up F. But the fact that T2 had been in the kitchen while the assault had taken place could have been considered problematic⁶² - not so much in relation to the requirement for intention, as T2 admitted that he had heard noise and groaning from the living room and T2 knew that F had been tied up and was unable to defend himself – but rather in relation to the requirement that the passivity should have acted as a form of

⁶² It is not clear from the judgment at *UfR 1984.338 H* where in the flat T2 has been when T1 throttled their victim.

instigation. An accessory's passivity will presumably be likely to have such an effect if the accessory is present to observe the principal's acts. However, it is questionable whether this can be the case if the accessory is not in the room where the violence takes place, but where he is nevertheless still present in the house and can hear the victim's cries for help. Since instigation requires there to be some kind of effect on the principal, it must be a requirement that the principal is aware that the accessory is still in the house. Only in this case will the principal be able to infer that the accessory's failure to react is a form of approval. However, it is undeniably a very broad interpretation of liability if there is considered to be psychological assistance in the situation where, without warning and after T2 has left the room, T1 carries out his fatal assault. On the other hand, if T1 was already carrying out his serious assault at the time when T2 left the room, or if at this point T1 had already indicated to T2 that he intended to kill F, the case would presumably have been decided differently.

In the Norwegian case reported at *NRT 1954.674*⁶³ no conclusive answer is given to the question whether a person who leaves the scene after having participated in preliminary criminal acts can be liable as a passive accessory: Two fishermen had enticed a third on board their boat, which was moored in a harbour. They knocked him unconscious and robbed him. One of the fishermen then left the boat, in spite of the fact that the other had indicated that he would kill their victim. The threat was carried out. The person who had left the boat was punished for failing to help the victim, but found not guilty of being an accessory to the murder. Husabø states: 'The fact that the jury flatly rejected this question of liability does not mean that there was a finding of not guilty because of lack of intention nor that the objective requirements for liability as an accessory were not fulfilled.'

The fact that T2 refrained from preventing the consequences of T1's acts, because he failed to help F who was lying helpless on the deck, cannot justify a finding of liability as a passive accessory. It would be wrong to talk about 'instigation' after the violent acts have come to an end.

Similarly, in the case reported at *UfR 2002.1518 H*, there was a robbery that resulted in murder. However, the judge distinguished the case from the above as the death resulted from unlawful imprisonment:

One evening T1 – T3 broke into business premises to steal cigarettes. They knew that there was a cleaner (F) on the premises at that time, and they had agreed in advance to keep her quiet by tying her up with tape. However, the planned robbery resulted in murder as T3 shut F in an airtight container in a refrigerated room, which meant that during the night F died from asphyxiation. T2 stated that he was standing in the room next door when F was shut in. There was no door between the two rooms. He heard a 'click' and was then told by T3 that F had been shut in. He did not know where and did not he ask. At this stage T1 was somewhere else in the building, but according to his statement he was shortly afterwards aware of what had happened, as he asked T3 where F was and was told that she had been shut in a refrigerated box.

63 The case is discussed in *Alminnelig strafferett* p. 142; and in *Straffansvarets periferi* p. 195 at footnote 717.

T1 – T3 were all charged under Section 237 of the Penal Code, but only T2 and T3 were convicted of murder. T1 was only convicted for unlawful imprisonment for the sake of gain, see Section 261(2) of the Penal Code, because he lacked the intention that the refrigerated box should be so airtight that F could be suffocated and that she would not be found before it was too late.⁶⁴ According to the directions to the jury, which the Supreme Court did not consider to be incorrect guidance, the basis of liability was that of a passive accessory as regards T1 and T2. It was argued that all three of the accused fulfilled the conditions for liability under Section 237, by ‘*instituting or accepting the imprisonment of F and by failing to prevent the possible consequences before F died*’ (emphasis added). In order to illustrate the scope of the liability of a passive accessory, in the directions to the jury the example was given of a group of youths out having fun, finding on the street a long fuse to a bomb which had been planted in a house. In this relation it was explained that: ‘If one or more of the group were to light the fuse, all would have a duty to extinguish the fuse before the bomb exploded’. However, as presented, this conclusion goes too far. As explained above, liability for passivity requires the accused to have some special connection with the situation, and it is not sufficient that they are part of a social group.⁶⁵ In relation to the specific case there is thus a lack of the decisive argument that T1 and T2 had a special duty to act, *because they had participated in the preceding robbery*.⁶⁶ As stated, the case is special because the act that caused the death was the unlawful imprisonment; see Section 261 of the Penal Code. There was thus an offence caused by the continuation of an unlawful state of affairs, to which it is possible to be an accessory as long as the unlawful imprisonment continued. Even though T1 was not present when F was shut in the box, he should nevertheless be regarded as an accessory to the continuing unlawful imprisonment from the moment he became aware that F had been shut in. It is presumably more logical to justify liability on the basis of being a passive accessory in such a situation than in cases where death is caused by violent acts.

4 Conclusion

The above discussion shows that when an accessory participates in a criminal act he is to a great extent liable for the consequences – in this connection the acts of the principal. An accessory will be liable as an active accessory as long as the principal’s acts lie within the scope of what has been agreed beforehand or has been contemplated. This means that the accessory must have had prior intention

64 In contrast to T2 and T3, T1 had not previously been employed in the business, and he said in court that he had repeatedly asked whether it was cold in the refrigerated box, and T2 and T3 had answered that it wasn’t, that she was able to breathe, that she would soon be found, and that in any case she would be able to kick a hole in the wall below and would be able to escape.

65 See e.g. UfR 1992.634 Ø.

66 See likewise *Ansvar* p. 195 f.

with regard to the principal's acts. In practice a tendency can be observed to relax the requirement for evidence of the accessory's intention, as the assessment of intention has been made objective by applying what he 'must have realised' and 'must have contemplated' as a yardstick. In those cases where the consequences are objectively overwhelmingly probable, there seems in effect to be a reversal of the burden of proof, where it is argued that the accessory must have thought as most people would have thought in the situation – and must thus have had intention – unless there is external evidence to the contrary. But even where there is a lesser probability an accessory will be liable to a large extent. In the case reported at *UfR 2004.1456 H*, the practice of the courts took a further step in the direction of finding criminal liability for indirect or reckless intention (*dolus eventualis*), as in such cases the courts have a very low burden of proof for showing positive acceptance of the consequences. It thus seems that in reality the fact that an accessory has taken part in a generally dangerous and risky crime can be sufficient to make the accessory criminally liable, as long as the principal's acts lie within the scope of what the accessory must have regarded as possible.

That an accessory's liability as an active accessory is as broad as is in fact the case means that the scope for liability as a passive accessory is correspondingly narrower. This means that it is not necessary for the court to decide on the complex problems to which the definition of the scope of the liability of a passive accessory can give rise. This applies in particular to whether passivity includes instigation within the meaning of Section 23 of the Penal Code, as well as the question of what a passive accessory must do in order to avoid criminal liability.

In general, it can be concluded that both the practice of the prosecution authorities and the practice of the courts seem to be moving towards such an *expansion of the scope of liability as an active accessory*, that effectively an accessory who intentionally takes part in a serious assault or an armed robbery risks being liable for the negligent consequences. A significant element of the explanation of this state of the law is presumably that it is reasonable and it best accords with the *sense of justice* that an accessory should be punished in such situations. As the proverb says: 'As you make your bed, so you must lie on it'. It is precisely this sense of justice which is emphasised as the explanation for the maintenance, in the majority of the states in the USA, of the felony murder doctrine described above.⁶⁷ The law in Denmark is reminiscent of the English

67 David & Susan Waite Crump: In Defence of the Felony Murder Doctrine, 8 *Harvard Journal of Law and Public Policy* 359, 1985, p. 1 ff. In the Model Penal Code it is proposed that the felony murder doctrine should be abolished in favour of a rule of assumption. This has only happened in three states in the USA, which is in line with the fact that in the eyes of most Americans, those who embark on a dangerous enterprise should accept the consequences. However, its popularity is also connected with the widespread use of juries in the American legal system; the felony murder system is simply easier for jury members to grasp than the more complex evidence concerning the intentions of an accessory. As shown, the state of the law on this matter in Denmark is connected with the significant practical difficulties in proving that the accessory had intention for the acts of the principal.

concept of 'recklessness',⁶⁸ just as there appear to be significant similarities with the doctrine of 'joint criminal enterprise' in international law, as developed in particular in the practice of the International Criminal Tribunal for the former Yugoslavia.⁶⁹

68 In *Om forsæt, virkelighed og sprog* p. 484 ff., Toftegaard Nielsen argues that in practice the application of the *dolus eventualis* doctrine corresponds to the English concept of 'recklessness', and on the basis of the practice of the courts Toftegaard Nielsen concludes that it is 'difficult to see that the accused has any real possibility of being found not guilty of a deliberate crime if he has admitted, or if the court has otherwise determined, that he was aware of the possibility of the consequences occurring or of the existence of the relevant circumstances'.

69 See similarly *Om forsæt, virkelighed og sprog* p. 482 f.; but for a different view see Flemming Orth: *Joint Criminal enterprise i dansk ret (?)*, in Lars Plum & Andreas Laursen (eds.): *Enhver stats pligt... International strafferet og dansk ret*, Copenhagen 2007, p. 425 ff.