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DEBATE PACK

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Joint Enterprise

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Commons Chamber, Thursday 25 January 2018

A Backbench Business Committee debate on Joint Enterprise is scheduled for Thursday 25 January 2018. The debate will be opened by Lucy Powell MP.

Contents

1. Background

1.1 Secondary liability

The actual perpetrator of a criminal offence – the person who fired the gun, or burgled the house – is known as the "principal". A person who assists or encourages the principal to commit the crime is known as an accessory or secondary party, and he can be held liable for the principal's act under common law principles of secondary liability. In the words of the Supreme Court:

> It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial.[1]

Secondary liability is a common law doctrine, which means it has been developed by the courts over the years. Until the 1980s, convicting someone as an accessory to a crime on the basis of secondary liability required proof of the following elements:

- The **conduct** element: that the accessory had encouraged or assisted the principal to commit the offence. The act of assistance or encouragement may be "infinitely varied".[2]
- The **mental** element: that the accessory had the intention to assist or encourage the commission of the crime, in the knowledge of any existing facts necessary for the principal's act to be criminal (the "mental" element). If the crime required a particular intent, the accessory must have intended to assist or encourage the principal to act with such intent.

The mental element required to convict the accessory under secondary liability was therefore broadly similar to what was required to convict the principal.

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1 R v Jogee (Appellant) [2016] UKSC 8 and Ruddock (Appellant) v The Queen (Respondent) (Jamaica) [2016] UKPC 7, at para 1

2 Ibid, at para 11

However, during the 1980s, a new "strand" of secondary liability emerged, which became known as "parasitical accessory liability" or – more commonly – "joint enterprise". This placed a new emphasis on the accessory's foresight of what the principal might do, rather than on his intention of how the principal should act.

1.2 Parasitical accessory liability (PAL)

'Parasitical accessory liability' (PAL) was developed by the courts (beginning with the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168)) as a specific subset of secondary liability.

PAL concerned the situation where two (or more) people, D1 and D2, agreed to commit a criminal offence (A). If D1 committed an additional offence (B), D2 could also, in certain circumstances, have been guilty of offence B. So for example, offence A might be burglary and offence B might be murder. D2 would be liable for offence B if he **foresaw the possibility** that D1 **might** commit crime B. If he did foresee that possibility and continued to participate in offence A, D2 was guilty of offence B, even if he did not intend to assist or encourage crime B at all.

Joint enterprise, in this sense of PAL, was controversial and much criticised. This was particularly so where offence B was murder, as this carries a mandatory life sentence. In the words of the Justice Committee, which has conducted two inquiries into the law of joint enterprise:

> …the mandatory life sentence for those convicted of murder removes much judicial discretion to hand down appropriate sentences to secondary participants who may have played a minor role and may have had no intention that a murder or grievous bodily harm should take place.[3]

In 2016, however, the Supreme Court ruled in the case of Jogee that the courts had taken a 'wrong turn' in pursuing the concept of PAL.

1.3 Jogee: the Supreme Court's decision

The Supreme Court's decision in the case of Jogee was handed down in February 2016.[4] The Supreme Court ruled that the previous interpretation of the law (following Chan Wing-Siu) was wrong, and that there should be no separate form of accessorial liability known as PAL. D2 should not be liable for offence B unless he **intended** to assist or encourage D1 to offence B. Whether he did have such an intention or not will be for the jury to decide. The jury might consider D2's foresight to be evidence of such an intent, but foresight would no longer be sufficient in and of itself.

The Supreme Court published a useful 3 page press summary of its decision in Jogee, which sets out the key elements of the judgment:

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3 Joint enterprise: follow-up, Fourth Report of Session 2014–15, HC 310, 17 December 2014, p2. See also Joint Enterprise, Eleventh Report of Session 2010–12, HC 1597, 17 January 2012.

4 R v Jogee (Appellant) [2016] UKSC 8 and Ruddock (Appellant) v The Queen (Respondent) (Jamaica) [2016] UKPC 7

> The law in this field has always been a matter of the common law rather than of statute, and so it is right for the courts, which have created it, to investigate whether a wrong turning was taken.
>
> The court holds, in a unanimous judgment, that the law must be set back on the correct footing which stood before Chan Wing-Siu. The mental element for secondary liability is intention to assist or encourage the crime. Sometimes the encouragement or assistance is given to a specific crime, and sometimes to a range of crimes, one of which is committed; either will suffice. Sometimes the encouragement or assistance involves an agreement between the parties, but in other cases it takes the form of more or less spontaneous joining in a criminal enterprise; again, either will suffice. Intention to assist is not the same as desiring the crime to be committed. On the contrary, the intention to assist may sometimes be conditional, in the sense that the secondary party hopes that the further crime will not be necessary, but if he nevertheless gives his intentional assistance on the basis that it may be committed if the necessity for it arises, he will be guilty. In many cases, the intention to assist will be co-terminous with the intention (perhaps conditional) that crime B be committed, but there may be some where it exists without that latter intention. It will remain relevant to enquire in most cases whether the principal and secondary party shared a common criminal purpose, for often this will demonstrate the secondary party's intention to assist. The error was to treat foresight of crime B as automatic authorisation of it, whereas the correct rule is that foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage. It is a question for the jury in every case whether the intention to assist or encourage is shown.
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> This brings the mental element of the secondary party back into broad parity with what is required of the principal. The correction is also consistent with the provision made by Parliament in a closely related field, when it created (by the Serious Crime Act 2007) new offences of intentionally encouraging or assisting the commission of a crime, and provided that a person is not to be taken to have had that intention merely because of foreseeability.

1.4 Appeals following Jogee

The Supreme Court in Jogee considered the position of those convicted under the "old" law as set out in Chan Wing-Siu. It said that its decision in Jogee would not render such convictions "invalid", but that those affected would instead have to make an out-of-time application to the Court of Appeal or seek a review by the Criminal Cases Review Commission (CCRC). In paragraph 100 of its judgment the Supreme Court said that the Court of Appeal would only grant permission to appeal if it considered the applicant had suffered "substantial injustice" and that "it will not do so simply because the law applied has now been declared to have been mistaken":

> The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in Chan Wing-Siu and in Powell and English. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a

> conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been appreciated, have been charged with a different offence.

Since the judgment in Jogee was handed down there have been a handful of appeals to the Court of Appeal regarding cases decided under the "old" law. On 31 October 2016 the Court of Appeal gave its decision (in the case of Johnson and others) in several appeals brought post-Jogee.[5] Each of these appeals was unsuccessful. The Court said:

> The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly in cases where death has resulted and closure is particularly important.[6]

The Court gave the following guidance on how to determine whether there had been a substantial injustice:

> In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice.[7]

1.5 The response to Jogee

The Government

The Secretary of State for Justice wrote to the Justice Committee in November 2016 regarding the Government's consideration of the decision in Jogee and said the Government had concluded that no

5 R v Johnson and others [2016] EWCA Crim 1613
6 Ibid, at para 18
7 Ibid, at para 21

further review of the law on joint enterprise was necessary following the outcome:

> We have been considering the implications of the judgment carefully and I am particularly mindful of the uncertainty the judgment has created for victims' families who do not know if the offenders involved in the death of their loved ones will successfully appeal. The Minister of State for Policing, Fire, Criminal Justice and Victims has met the Victims' Commissioner and members of the Victims' Panel to reassure them about the narrow category of cases to which the judgment applies, and that families will be kept informed by the relevant agencies if a prisoner successfully appeals or is released from custody. We have concluded that no further review of the law is necessary at this time. Law enforcement agencies will be updating their guidance to reflect the law as it now stands. I trust that previous and existing Committee members will welcome these developments. As parasitic accessory liability no longer exists as a distinct strand of liability, MoJ and CPS are not currently counting the number of these cases.

The Crown Prosecution Service

The Crown Prosecution Service (CPS) is currently reviewing its guidance on charging decisions in secondary liability cases, in response to the decision in Jogee. Interim guidance was published in July 2017 and was open for consultation until September 2017. Final guidance has not yet been issued.

For the interim guidance, which remains in force for the time being, please see *Legal guidance - Secondary Liability: charging decisions on principals and accessories* (accessed 23 January 2018). This includes the following comments on selecting appropriate charges post-Jogee:

> …in some cases proving the requisite intent of D2 may be problematic, such as where D2 foresaw only a slight possibility that D1 might commit crime B. In such cases, prosecutors should carefully consider whether the evidence of foresight, together with the other evidence in the case, is sufficient to prove intent and charge D2 with the offence in question, or whether to charge a lesser offence or no offence at all. If D2 is charged with the main offence, it may be appropriate to add an alternative lesser charge to the indictment, such as manslaughter as an alternative to murder. This will allow the jury to decide whether D2 is criminally liable for the more serious offence, or a lesser offence only.

The guidance goes on:

> The selection of charges will involve consideration of the public interest in pursuing a particular charge, an alternative charge, or no charge at all.
>
> In all cases prosecutors should select charges which:
>
> - Reflect the seriousness and extent of the offending supported by the evidence.

- Give the court adequate powers to sentence and impose appropriate post-conviction orders.
- Enable the case to be presented in a clear and simple way.

Prosecutors need not always choose or continue with the most serious charge where there is a choice.

Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

These principles are of particular relevance to cases of secondary liability, as prosecutors may have the option of charging several different offences, and of charging a suspect as a principal, as an accomplice or with an inchoate offence.

David Lammy, in his 2017 report into his review of the treatment of Black, Asian and Minority Ethnic (BAME) individuals in the criminal justice system, commented on the use of the "old" law in prosecuting gang crime, and on the impact this had on BAME individuals. He called for the CPS to use its review on secondary liability to explore its approach to gang prosecutions more widely:

> …experts in the field remain concerned about some of the legal practice on Joint Enterprise. Many are not convinced that the line between 'prohibitive' and 'prejudicial' information is drawn appropriately in the evidence put before juries when cases reach trial. People must be tried on the basis of evidence about their actions, not their associations - and the evidence put before juries must reflect this. The CPS should take the opportunity, while it reworks its guidance on Joint Enterprise, to consider its approach to gang prosecutions in general.
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> Recommendation 6: The CPS should take the opportunity, while it reworks its guidance on Joint Enterprise, to consider its approach to gang prosecutions in general.[8]

1.6 Statistics

There are no official statistics available on joint enterprise convictions, which can make it difficult to assess how big an impact the "wrong turning" in the law has had in practice.[9]

In 2014 the Justice Committee drew what it described as a "partial picture" from other sources:

> In their written evidence JENGbA say they know of over 400 people serving life sentences for joint enterprise offences. Home Office figures obtained by TBIJ [*the Bureau of Investigative Journalism*] show 497 secondary parties convicted of murder between 2005/06 and 2012/13. CPS figures obtained by TBIJ show 1,853 homicide prosecutions in cases where there were four or more defendants in the period between 2005 and 2013. These account for nearly 18% of all homicide prosecutions over that

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8 David Lammy, *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, September 2017, pp19-20

9 This is something that has been criticised by the Justice Committee: see paragraphs 19-25 of Joint Enterprise, Eleventh Report of Session 2010–12, HC 1597, 17 January 2012

> period. 1,356 convictions during that period resulted from prosecutions in those cases with four or more defendants. Figures for numbers of prosecutions brought and convictions are much higher for cases where there were two or more defendants. Although those cases are likely to be a less reliable proxy for joint enterprise, a proportion of them will involve use of the doctrine. Finally, just over half the sample of 294 young prisoners serving very long life sentences in the Cambridge Institute of Criminology research study were convicted of joint enterprise offences.[10]

The Justice Committee went on:

> It is clear that a large proportion of those convicted of joint enterprise offences are young Black and mixed race men. In the Cambridge research sample, 37.2% of those serving very long sentences for joint enterprise offences are Black/Black British, eleven times the proportion of Black/Black British people in the general population and almost three times as many as in the overall prison population. There is also a much higher proportion of mixed race prisoners convicted of joint enterprise offences than there are in the general prison population (15.5% compared to 3.9%). Janet Cunliffe of JENGbA claimed that an even higher proportion of people convicted of joint enterprise who had contacted JENGbA were from the BAME community, about 80%, and nearly all working class. She drew the conclusion that joint enterprise was being used to target the most marginalised sections of society, and was having the effect of breaking communities apart. Dr Ben Crewe from the Cambridge Institute of Criminology said that there were probably two main reasons for the disproportionate impact of joint enterprise on young Black men, the first being that "BME men may be over-represented in the kinds of communities where young men typically hang around in groups that are labelled by outsiders as gangs" and the second that "an association may exist unconsciously in the minds of the police, prosecutors and juries between being a young ethnic minority male and being in a gang, and therefore being involved in forms of urban violence".[11]

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10 Joint enterprise: follow-up, Fourth Report of Session 2014–15, HC 310, 17 December 2014, para 23 [footnotes omitted]

11 Ibid, para 24 [footnotes omitted]

2. News and Blogs

The Justice Gap

CPS guidance on joint enterprise 'fails to get to grips' with problem

Will Bordell October 2017

The Leveller

Joint enterprise: a tool to tackle gang crime or sweep up 'undesirables'?

Shane Boothby 25 February 2017

Centre for Crime and Justice Studies

Joint enterprise and the wheels of justice

Will McMahon 2 September 2016

The Justice Gap

'Urgent' need to clarify joint enterprise prosecutions, says new research

Lucie Boase July 2016

Park Square Barristers

Wrong turnings and joint enterprise – the new law restates the old

Abdul Iqbal QC 19 February 2016

UK Human Rights Blog

Supreme Court abolishes "wrong turn" joint enterprise law

Diarmaid Laffan 18 February 2016

The Justice Gap

Joint enterprise ruling: 'How many people serving life sentences should not be in prison?'

Miranda Grell February 2016

Manchester Metropolitan University

Are joint enterprise convictions racially motivated?

27 January 2016

2.1 Press

Huffington Post

How joint enterprise landmark ruling went from 'opening the flood gates', to changing nothing

22 July 2017

Telegraph

Joint enterprise: judges refuse to overturn guilty verdicts in test case challenge

31 October 2016

Independent

'Joint enterprise' murder verdicts due following revelation that law has been 'misinterpreted for 30 years'

31 October 2016

Daily Mail

Judges refuse to overturn the murder convictions of 13 men who claim they were wrongly jailed due to 'joint enterprise' laws

31 October 2016

Guardian

The joint enterprise law has changed. Yet still we must fight to free our sons

7 September 2016

Telegraph

Joint enterprise: first murder case defendants walk free after landmark ruling

7 March 2016

BBC News

The complex case of joint enterprise

18 February 2016

BBC News

Joint enterprise law wrongly interpreted for 30 years, Supreme Court rules

18 February 2016

Financial Times

UK Supreme Court overturns 'joint enterprise' interpretation

18 February 2016

Telegraph

Hundreds of convicted killers may seek to appeal after 'joint enterprise' law wrongly interpreted for 30 years

18 February 2016

Guardian

Joint enterprise law: what is it and why is it controversial?

18 February 2016

Bureau of Investigative Journalism

Joint enterprise disproportionately affects black men, according to Institute of Criminology

2 September 2014

Bureau of Investigative Journalism

Read the report: joint enterprise, an investigation

31 March 2014

3. Parliamentary Business

3.1 Debates

Race Disparity Audit

HC Deb 10 October 2017 c181-93 [Ministerial Statement]

Extract (c192):

Lucy Powell:

Like others, I welcome this audit, but I am not sure that we needed an audit to tell us of the deep rooted injustices and discriminations in many of our institutions. I have a specific question about charges brought under joint enterprise. Is the Minister aware of research from Manchester Metropolitan University that found huge disparities in the number of people in prison under joint enterprise and how those prosecutions are brought?

More than three quarters of those in prison for joint enterprise found that gang narrative and neighbourhood narrative were used in their prosecution if they were from black and ethnic minority backgrounds, compared with less than 40% for those from white backgrounds. I had a recent case in Moss Side that found exactly that: the young black men who were facing these charges found that they relied heavily on a neighbourhood narrative about Moss Side. It is no wonder that people from places such as Moss Side feel that the criminal justice system works against them, not for them. What will the Minister do about it?

Damian Green:

I was not aware of that report, but it is clearly centrally important to the sort of evidence that the audit will produce. The hon. Lady will be able to see from the audit at a local level whether the criminal justice system is working in a discriminatory way. I will speak to the Lord Chancellor and the Prisons Minister about the specific points that she raises.

Homicide Law Reform

HC Deb 30 June 2016 c149-62WH

3.2 Parliamentary Questions

Engagements

Asked by: Stuart Andrew

In 2004 the 16-year-old son of my constituent Lorraine Fraser was murdered by a gang, and the conviction of four of them was secured through joint enterprise. The recent ruling in the Supreme Court has caused Lorraine and many other victims' families a great deal of anxiety. Will my right hon. Friend agree to facilitate a meeting to enable these

families to discuss their concerns with Ministers and understand what the ruling might mean in cases such as theirs?

Answered by: The Prime Minister

Through my hon. Friend, may I extend my sympathy to his constituents? He is right—we should begin by remembering the families of all those who have lost loved ones to dreadful crimes and who are worried about that judgment and what it might mean for them. I am very happy to facilitate a meeting between him and one of the Justice Ministers to discuss it. I think we should be clear that that judgment referred only to a narrow category of joint enterprise cases, and it would be wrong to suggest that everyone convicted under the wider law on joint enterprise will have grounds for appeal. It is very important that that message goes out, but I will fix the meeting that my hon. Friend calls for.

HC Deb 2 March 2016 c949

Aiding and Abetting

Asked by: Andy Slaughter

To ask the Secretary of State for Justice, how many people have been convicted under joint enterprise in each year since 2010.

Answered by: Mike Penning | Ministry of Justice

The Court Proceedings Database shows how many defendants were prosecuted and convicted for each offence in a given year. It does not show what percentage of those were prosecuted and convicted following their involvement in group offending; or what role each person played within the enterprise. Such information is not held centrally and could only be obtained at disproportionate cost.

5 February 2016 | Written question | 25422

Aiding and Abetting

Asked by: Ruth Cadbury

To ask the Secretary of State for Justice, whether the Government plans to review legislation on joint enterprise.

Answered by: Mike Penning | Ministry of Justice

Joint enterprise law has enabled some of the most serious offenders to be brought to justice. It ensures that if a crime is committed by two or more people, all those involved can potentially be charged and convicted of that offence.

The Justice Committee made recommendations for a review of the law during the last Parliament, which the Government has been considering carefully.

Ministers are also mindful that the Supreme Court is looking at a case which might change the way the law in this area is applied. The

Government will decide how to proceed after the Court has delivered its judgment.

18 January 2016 | Written question | 22058

4. Further reading

Official publications and reports

Crown Prosecution Service, Secondary Liability: charging decisions on principals and accessories, Legal Guidance, 6 July 2017

Criminal Cases Review Commission, Development of Law: formal memorandum, 15 February 2017

Supreme Court, Judgment: R v Jogee (Appellant), [2016] UKSC 8, 18 February 2016

Supreme Court Press Summary, R v Jogee (Appellant) [2016] UKSC 8, 18 February 2016

Justice Committee, Joint Enterprise: follow-up, HC 310, 17 December 2014

Justice Committee, Joint Enterprise, HC 1597, 17 January 2012

JENGbA

JENGbA - Joint Enterprise Not Guilty by Association

Other reports

Susie Hulley, Joint enterprise and legitimacy among long-term prisoners, British Society of Criminology Newsletter, 79, Winter 2016

Jessica Jacobson, Amy Kirby and Gillian Hunter, Joint enterprise: righting a wrong turn? Report of an exploratory study, Institute for Criminal Policy Research and Prison Reform Trust, 2016

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