

Joint Enterprise

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UK Supreme Court in Parliament Square, London, Britain - Jul 2009 United Kingdom Supreme Court emblem

Jessica Jacobson, Amy Kirby and Gillian Hunter ask, how do we achieve clarity and transparency?

Joint enterprise is a doctrine of criminal law which permits two or more defendants to be convicted of the same criminal offence in relation to the same incident, even where they had differing types or levels of involvement in the incident. For centuries, it has been an established and relatively uncontroversial aspect of the criminal law of England and Wales that an individual who has intentionally assisted or encouraged another to commit an offence can be held liable for that offence; and that both individuals can be convicted even if it is not known which of them committed the essential act and which was the "accessory".

However, over the past few decades, case law evolved in such a way that the very definition of what constituted acting as an accessory broadened far beyond the giving of direct assistance or encouragement for the offence. This development was associated with increasingly vehement criticisms of both principle and practice relating to joint enterprise voiced by lawyers, members of the judiciary, academics, politicians and penal reformers, as well as by individuals prosecuted in joint enterprise cases and their supporters. These criticisms focused on what was said to be the potential for individuals to be convicted and sentenced, under the doctrine of joint enterprise, for the most serious offences on the basis of highly peripheral involvement in the criminal acts. It was argued that in many such cases the level of participation in the offence was so slight, or the evidential threshold of conviction so low, that the conviction amounted to a substantial injustice. A related criticism was that young men from black, Asian and minority ethnic (BAME) groups were disproportionately affected or were explicitly targeted by joint enterprise convictions in cases of presumed gang-related violence. Joint enterprise was thus said to operate as a kind of criminal justice "drag-net" sweeping up large numbers of young people into criminal prosecutions on the basis of their social networks and associations rather than any active involvement in criminality.

Against this backdrop of increasing controversy about joint enterprise and a lack of systematic information about how the doctrine was being applied by the courts, the Institute for Criminal Policy Research, in partnership with the Prison Reform Trust and with funding from the Nuffield Foundation, undertook an exploratory study which entailed a review of the law relating to joint enterprise, and analysis of a sample of CPS case files and associated court transcripts.

The Law on Joint Enterprise

Guidance issued by the Crown Prosecution Service (CPS) in 2012 – which is now being revised in light of the recent Supreme Court ruling on joint enterprise (see below) - described three main types of joint enterprise:

1. Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals.
2. Where D assists or encourages P to commit a single crime.
3. Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit.

See: https://www.cps.gov.uk/legal/assets/uploads/files/joint_enterprise.pdf.

The second and third of the above categories concern the assignment of secondary or "accessorial" liability for a criminal offence. Cases involving an accessory accused of assisting or encouraging a principal defendant (category 2) are often described in terms of "general accessorial liability". Where the principal's commission of a second offence arose out of an original joint offence (category 3), this is commonly denoted "parasitic accessorial liability" (henceforth PAL). The origins of PAL lie in the 1985 case of *Chan Wing-Siu v. R.* [1985] 1 AC 168. At the heart of PAL was the principle that defendants' liability could rest on their *foresight* of a *possible* collateral offence committed by their co-defendant. In recent years, this principle was roundly criticised for permitting defendants to be convicted of offences in relation to which they had no intent and no intent to assist or encourage, and in the commission of which they were not involved.



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In October 2015, a joint session of the UK Supreme Court and Privy Council heard two appeals against joint enterprise convictions for murder: *R. v. Jogee* and *Ruddock v. The Queen (Jamaica)* [2016] UKSC 8; [2016] UKPC 7]. Both appeals were allowed, in a decision that effectively abolished PAL. In the judgment handed down on February 18, 2016, it was stated that the common law on joint enterprise had previously taken a “wrong turn”: the courts should not have treated defendants’ foresight of an offence as equivalent to intent to assist that offence, and this had had the effect of over-extending the scope of secondary liability.

Joint Enterprise In Practice

ICPR’s study sought to find out more about how, in practice, the doctrine was utilised in the prosecution of serious offences. To this end, a sample of Crown Prosecution Service (CPS) case files and associated court transcripts were analysed. The sampled files, of which there were 61 in total, concerned multi-defendant prosecutions for robbery (34 cases), s.18 assault (wounding/causing grievous bodily harm with intent) (15 cases) and murder (12 cases). All the cases had been completed in London over a four-month period in 2015.

In just over one-third of the sampled cases, two or more defendants were ultimately convicted of the same principal offence of robbery, s.18 assault or murder. 15 cases concluded with a single defendant being convicted of the principal offence, while in 10 cases there were convictions for lesser offences only, and 13 cases resulted in no convictions, following withdrawal of charges or acquittals. Almost two-thirds of the defendants in the sampled cases were aged under 25. Of defendants for whom ethnicity was known, around two-thirds were from minority ethnic groups and over 40% were black.

The sampled cases featured a mix of opportunistic and planned acquisitive crime, assaults and fights in the context of fraught or fractured family and other interpersonal relationships, and serious group and apparently gang-related violence. Robberies, assaults and other violence had taken place in streets, in pubs, in private homes and elsewhere, and defendants and/or victims were often under the influence of drugs and alcohol at the time. In some cases, the distinction between victims and offenders was blurred; and in two cases co-defendants were also victim and offender in relation to certain charges faced. Defendants frequently faced multiple charges relating to the same or different incidents, and not uncommonly had other charges pending; most had previous convictions. In the vast majority of the cases, the prosecution proceeded on the basis that the defendants had acted as joint principals in the offence and/or at least one defendant had provided assistance or encouragement to others (general accessorial liability). Three of the sampled cases – all of which were murder cases – involved some possible element of PAL.

Very often it appeared that the prosecution was not able to disentangle the role of each individual accused of taking part in the offence. Under the doctrine of joint enterprise, such absence of precision over defendants’ roles is not in itself a bar to conviction: conviction depends on proving a defendant’s liability for the offence in question, but there is no need to establish whether that liability was on a principal or accessory basis.

Looking Ahead

The Supreme Court in *Jogee* and *Ruddock* concluded that the creation of the form of secondary liability which became known as PAL was a fundamental “error”. The ruling means that, in essence, a defendant can now be convicted as an accessory only if he acted in some way to assist or encourage the commission of the offence with the intent to do so. No longer will mere foresight of the offence be deemed to equate to that intention – although foresight can be treated as *evidence* of intent. It is to be hoped that this ruling will substantially reduce the potential for miscarriages of justice and perceived “drag-net” prosecutions under the joint enterprise doctrine.

However, it is important to bear in mind that the Supreme Court ruling has direct relevance only to that sub-set of joint enterprise cases turning on PAL and/or foresight. This study’s review of an – admittedly small – sample of case files suggests that such cases are likely to make up only a fraction of all joint enterprise cases, if joint enterprise is understood in broad terms as a doctrine permitting multiple defendants to be convicted of the same offence regardless of their level or type of involvement in its commission.

In other words, the Supreme Court ruling does not have implications for cases involving general accessorial liability, unless that liability hinged on the defendant’s foresight of how his actions served to assist or encourage the offence. Nor does the ruling have any implications for multiple defendant cases in which the defendants were joint principals. As stated in a newly published Crown Court Compendium, it remains the case that a defendant can be found guilty on the basis of being *either* a principal *or* an accessory:

“In almost all cases the prosecution will allege that one or more Ds are guilty because he/they must have been either a principal offender or an accessory/secondary party. In such cases it is not necessary for the jury to be satisfied whether any one D was a principal or an accessory, provided that they are satisfied that he participated”. *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up, Judicial College* (s.7-3 para.4).]

Meanwhile, constructive debate on the subject of joint enterprise is likely to be hampered by continuing misperceptions and misunderstandings of this difficult aspect of the criminal law. Even if the Supreme Court judgment goes some way towards simplifying the law on joint enterprise, questions of how and why principal and accessorial liability are ascribed in serious cases remain complex in terms of both legal doctrine and practical effect. Furthermore, there are currently no provisions for routine recording and monitoring of cases involving forms of joint enterprise, and hence the information gap remains large.

There is an urgent need to address this information gap, and to achieve greater clarity and transparency in the prosecution of joint enterprise cases. It is also evident that, following the significant correction that has been made to the law on accessorial liability, there is both more urgency and more opportunity associated with the task of making the prosecution rationale clearer and more transparent. Success in this task will increase the chances that individuals directly involved in multi-defendant cases will understand the prosecution case against the defendant and, potentially at least, will view the prosecution process as legitimate. Clarity and transparency are also of critical importance to criminal justice practitioners, who can only apply the law in a fair and consistent manner if they have a precise and shared understanding of it and knowledge of how it works on a day-to-day basis.

Recommendations For Enhancing Clarity And Transparency

Charging decisions and recording

1. The CPS should ensure that, in all cases in which multiple defendants are charged with the same principal offence, the alleged basis of liability is identified and recorded on file. This should entail recording:
 2. whether each defendant is charged as a principal, accessory or either;
 3. for each defendant charged as a (possible) accessory, the basis of this.
4. Recording of alleged principal and/or accessorial liability should be updated where charges are amended and (if applicable) at point of conviction.
5. A review should be undertaken to support the trialling and development of the new charging and recording process outlined above, and to monitor prosecutions.

Communications

1. As part of current development of the Common Platform for digital management of case information across the criminal justice system, provision should be made for collation and publication of national figures on cases in which multiple defendants are convicted of the same principal offence.
2. Better identification and recording of the basis of liability as alleged against each defendant should help to ensure that practitioners fulfil their existing obligations to keep defendants and complainants fully informed about charges.
3. Judges should be offered training and guidance on appropriate ways to cover issues of principal and accessorial liability in the delivery of sentencing remarks.
4. The courts, the CPS and other bodies should avoid use of the now toxic phrase "joint enterprise" in future, and consideration should be given to the development of an alternative terminology.

Sentencing

1. The Sentencing Council should consider providing guidance on the sentencing of multiple offenders whose specific roles with respect to the offence(s) are not known.
2. In passing sentence, Judges have limited capacity to reflect differing levels of culpability of defendants convicted of murder on an accessory basis. The mandatory life sentence for murder should be reviewed.

The full report from which this paper is drawn – Joint Enterprise: Righting a Wrong Turn? (Jessica Jacobson, Amy Kirby and Gillian Hunter) is available here: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/joint%20Enterpri...>

Authors details

Dr Jessica Jacobson is Director of the Institute for Criminal Policy Research at Birkbeck, University of London (<http://icpr.org.uk/>), where Amy Kirby is a Research Fellow and Gillian Hunter is a Senior Research Fellow.

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