Joint Enterprise after *Jogee*: Implications for sentencing

Jessica Jacobson
Institute for Criminal Policy Research, Birkbeck, University of London

Introduction

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 uncontentious 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 as a secondary party or accessory; 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, the doctrine of joint enterprise has been subject to widespread and vehement criticisms in recent years. The criticisms have focused on what is said to be the potential for individuals to be convicted and sentenced for the most serious offences – including murder – on the basis of highly peripheral involvement in the criminal acts. Until very recently, a particular concern has been that form of joint enterprise commonly referred to as 'parasitic accessorial liability'. This form of accessorial or secondary liability had developed through case law over the course of the past three decades,[1] and related to the situation in which two or more individuals together carried out one offence, in the course of which one of them committed a second offence which the other(s) had foreseen he might commit. Thus at the heart of parasitic accessorial liability was the principle that defendants' liability could rest on their **foresight** of a **possible** collateral offence committed by their co-defendant.

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)*.[2] Both appeals were allowed, in a decision that effectively abolished parasitic accessorial liability.[3] In the judgment handed down on 18 February 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. The judgment was also critical of the way in which 'generalised and questionable policy arguments' had contributed to the development of the law.

Joint enterprise after *Jogee*

[1] The most significant case having been *Chan Wing-Siu v R*. [1985] 1 AC 168
[2] [2016] UKSC 8; [2016] UKPC 7.
[3] Jogee was subsequently cleared of murder but convicted of manslaughter at a retrial.

Following the Supreme Court's judgment in *Jogee*, defendants can be convicted as accessories to an offence only if they acted to assist or encourage the commission of the crime with the intent to do so; foresight of the offence is no longer as a matter of law sufficient, but is merely evidence from which intent can be inferred. The Supreme Court ruling does not have any implications for cases in which two or more defendants are prosecuted as joint principals: that is, where they are all held directly responsible for the commission of the offence. It also remains the case that a defendant can be found guilty on the basis of being **either** a principal **or** an accessory, where it is not possible to prove exactly what role in the offence the defendant played.

Prior to *Jogee*, the concept of parasitic accessorial liability had permitted defendants to be convicted of an offence in relation to which they had no direct intent and no direct intent to assist or encourage, and in the commission of which they had no direct involvement. This was especially troubling in cases of murder, where a higher threshold of culpability had to be satisfied for the principal defendant to be found guilty (he must have killed with intent to kill or cause serious injury) than for the accessory to be found guilty (he could have simply foreseen that the principal defendant might kill with intent to kill or cause serious injury). The abolition of parasitic accessorial liability by the Supreme Court is an important and overdue correction to the doctrine of joint enterprise.

However, it is clear that many challenges remain in relation to the prosecution of joint enterprise cases, and the full implications of the *Jogee* ruling for determining the basis of conviction are yet to be seen. While a defendant can now only be convicted as an accessory if he has intended to assist or encourage the offence, identifying what amounts to intent to assist or encourage can be a difficult task. For example, the Supreme Court made it clear that the while foresight should no longer be regarded, in and of itself, 'as an inevitable yardstick of common purpose', it nevertheless remains legitimate 'to treat [foresight] as **evidence** of intent' (para 87; emphasis added). An accessory's knowledge of the essential matters or background facts relating to the principal's criminal act may therefore be central to consideration of the accessory's intent: for example, 'Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more' (para 98).[4] Noting that it is 'doubtful' that the *Jogee* ruling 'has conclusively resolved the problems that bedevilled this area of the law', Ormerod and Laird have examined the complexities of the relationship between 'intention' and 'foresight'..[5]

Sentencing in joint enterprise cases

[4] Since the *Jogee* ruling, the relevance of **knowledge** to consideration of intent has been reiterated by the Court of Appeal in the case of R v Anwar and others, [2016] EWCA Crim 551.
[5] D. Ormerod and K. Laird, 'Jogee: not the end of a legal saga but the start of one?', Criminal Law Review 2016, 8, 543-549.

After *Jogee*, there also remain some significant questions about the sentencing of offenders in joint enterprise cases. The numbers of such cases may decline to some extent as a result of the abolition of parasitic accessorial liability, but there is no doubt that the courts will continue to sentence large numbers of cases in which multiple offenders have been convicted of the same offence – whether as joint principals or on the basis that one or more had acted (intentionally) to assist or encourage the other(s). It is an uncontentious point that those convicted offenders whose liability is simply and unequivocally accessorial are likely to be less culpable than those convicted as principals; but how can any such lesser culpability be assessed, and to what extent should it be reflected in sentencing?

The mandatory life sentence in joint enterprise murder cases

The sentencing of offenders convicted of murder on a joint enterprise basis has long been a particular concern among critics of joint enterprise, who observe that the mandatory life sentence for murder means that the judge has limited scope to reflect in the sentence the lesser culpability of an accessory. Nevertheless, while judges are required to pass a life sentence on any accessory in a murder case, they have discretion over the minimum term they impose, since the statutory 'starting points' for the tariff, as set out in Schedule 21 of the Criminal Justice Act 2003, can be adjusted upwards or downwards in light of aggravating and mitigating factors. Accordingly, the resultant minimum term can be 'of any length', regardless of the starting point (Schedule 21, paragraph 9).

The question that therefore arises is whether a given offender's lesser role in a murder, relative to that of any co-perpetrators, can or should be treated as mitigation which would reduce the minimum term. Offender role in relation to others is not included among the (non-exhaustive) aggravating and mitigating factors cited in Schedule 21 as relevant to the minimum term. The general principle of accessorial liability, in the way in which it is formalised in statute, would appear to preclude the treatment of a lesser role as significant mitigation: paragraph 8 of the Accessories and Abettors Act 1861 states that anyone who 'shall aid, abet, counsel or procure the commission of any indictable offence … shall be liable to be tried, indicted **and punished** as a principal offender' (emphasis added). That the courts are expected to apply the 'draconian' Schedule 21 rules for minimum terms to individuals convicted of murder as secondary parties, as they do to principals, has been noted by Buxton[6] with reference not just to the Accessories and Abettors Act but also to the case of *Sanchez*.[7] This case saw the Court of Appeal substitute a short tariff imposed by the trial judge on an accessory to murder with a considerably longer term.

In the absence of detailed data on sentences passed in joint enterprise murder cases, it is not known whether judges do in practice tend to impose broadly similar minimum terms on

[6] Buxton, R. (2016) 'Jogee: upheaval in secondary liability for murder', *Criminal Law Review*, 5, 324-333

[7] R v Sanchez [2008] EWCA Crim 2936

principal and secondary parties. And while such an approach would be lawful, whether it is fair is another and pressing question that demands consideration. These issues also raises broader questions concerning the sentencing of murder: most fundamentally, whether the mandatory life sentence for murder should be reviewed, as has been urged by the Law Commission among many others.[8] The case for such a review is strengthened by the finding of public attitude research that public support for the sentence is by no means as high as politicians tend to assume.[9] Whether or not the mandatory life sentence is retained, there is also a strong case for the introduction of a sentencing guideline for murder which – as, for example, has been argued by Fitz-Gibbon – could take a more comprehensive approach to aggravation and mitigation than the 'formulaic' Schedule 21 allows.[10]

Sentencing in joint enterprise cases not involving murder

In the sentencing of joint enterprise cases involving offences other than murder, judges potentially have more leeway to reflect in sentencing each individual's specific role in the offence, since there is no mandatory life sentence. However, as in murder cases with respect to the determination of the minimum term, in non-murder cases the question arises of whether and to what extent an individual's accessory role should serve as mitigation, especially in view of the statutory obligation on sentencers to treat an accessory 'as a principal offender'.

Sentencing Council guidelines are not consistent in how they address the sentencing of co-perpetrators. The *Overarching Principles* guideline on offence seriousness, issued by the Sentencing Guidelines Council in 2004,[11] describes group offending (specifically, 'Offenders operating in groups or gangs') as, in itself, an aggravating factor. However, a greater or lesser role within a group is not cited as a source of aggravation or mitigation. Ashworth has noted that the justification for treating group offending as aggravation 'probably lies in the greater harm which it is believed to involve' – for example, in terms of fear caused to victims – although the guideline lists it among 'factors indicating higher culpability' rather than as a factor associated with more serious harm.[12]

---

[8] Law Commission (2006) *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Programme of Law Reform: Homicide*, London: TSO.

[9] Mitchell, B. and Roberts, J.V. (2012) 'Sentencing for Murder: Exploring Public Knowledge and Public Opinion in England and Wales', *British Journal of Criminology*, 52, 141-158. It is interesting to note that the same research found evidence of public resistance to the notion that an accessory could be **convicted** of murder (separate to the question of the sentencing) on the grounds of involvement in the lethal act which fell short of physical participation (Mitchell, B. and Roberts, J.V. (2010) *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales*, Coventry: Coventry University).

[10] Fitz-Gibbon, K. (2016) 'Minimum sentencing for murder in England and Wales: A critical examination 10 years after the Criminal Justice Act 2003', *Punishment and Society*, 18 (1), 47-67.

[11] Sentencing Guidelines Council (2004) *Overarching Principles: Seriousness - Guideline*

[12] Ashworth, A. (2015) *Sentencing and Criminal Justice, Sixth Edition* (Cambridge: Cambridge University Press), 170.

The offence-specific guidelines produced by the Sentencing Council present a variety of approaches to assessing culpability of offenders who acted in conjunction with others. This is evident, for example, in the *Robbery* guideline.[13] With respect to robberies that can be categorised as 'professionally planned commercial' or 'dwelling', the offender's role within a group is cited as relevant to the determination (in Step One of decision-making) of overall culpability and thereby of offence category and sentence starting point and range. Specifically, a 'leading role where offending is part of a group activity' indicates higher culpability; a 'significant role' medium culpability; and the offender having 'performed a limited function under direction' or having been 'involved through coercion, intimidation or exploitation' indicate lesser culpability. On the other hand, with respect to 'street and less sophisticated commercial robbery', only the last-named of these group-related factors (involvement 'through coercion, intimidation or exploitation') is listed as relevant to offence category. Here, the offender's 'leading role' in a group is an aggravating factor to be considered as part of the (Step Two) decision on what specific sentence should be passed within the stipulated category.

The *Burglary* guideline, like *Robbery*, covers three types of offence: aggravated, domestic and non-domestic burglary.[14] For all three, an offender's membership 'of a group or gang' is a factor indicating higher culpability for the (Step One) purpose of determining offence category; but role within the group is not cited as relevant to category – with the exception that being 'exploited by others' is said to indicate lower culpability. Among the mitigating factors listed with respect to the (Step Two) consideration of specific sentence, is 'subordinate role in a group or gang'. The *Assault* guideline, meanwhile, cites 'leading role in group or gang' and 'subordinate role' as factors indicating higher and lower culpability, respectively, for the purpose of determining offence category in the sentencing of all six offences covered by the guideline. And for most offences dealt with by the *Sexual Offences* guideline,[15] 'offender acts together with others to commit the offence' is deemed relevant to overall culpability and thereby offence category, but offender role relative to co-perpetrators is not included as a factor to be considered at either Step One or Two of the decision-making process.

Towards more consistent and principled sentencing in joint enterprise cases?

At a time when the law governing the prosecution of secondary parties has come under close scrutiny and undergone significant change, it is important to examine the principle and practice of sentencing in joint enterprise cases. Some of the particular concerns about sentencing of accessories in murder cases, which have a bearing on wider questions about the sentencing of murder, have been briefly rehearsed above. The preceding discussion has also demonstrated the notable lack of consistency in the existing Sentencing Council guidance on the sentencing of offenders who acted in groups. There would be much merit to

[13] Sentencing Council (2016) *Robbery: Definitive Guideline*
[14] Sentencing Council (2011) *Burglary Offences: Definitive Guideline*
[15] Sentencing Council (2014) *Sexual Offences: Definitive Guideline*

the development by the Sentencing Council of a set of a single, clear set of principles to guide sentencers in dealing with accessorial liability and group offending more generally. Such principles could, for example:

- Clarify the scope within existing legislation (Accessories and Abettors Act 1861) and case law for reflecting accessorial liability in sentencing.
- Clarify the extent of mitigation which – with a view to achieving proportionality and fairness – can potentially be attached to accessorial liability, with respect to both setting the minimum term in life sentences for murder and determining sentence type and length in other cases;
- Identify whether accessorial liability should be (in the terminology of the current Sentencing Council offence-specific guidelines) a 'Step One' consideration with regard to offence category or a 'Step Two' consideration with regard to the specific sentence within the category;
- Define the components of accessorial liability as they pertain to sentencing, and as they relate to other potentially mitigating ways of playing a lesser role in group offending, such as involvement through intimidation or coercion by others;
- Determine the relationship or intersection between aggravation reflecting the essential fact of group offending and mitigation reflecting an accessorial (or other lesser) role in the group.

A related and important consideration, which could also be addressed through the development of principles for sentencing group offences, is the difficulty faced by the sentencer if the respective parts played by the different offenders remain undefined at the point of conviction. As noted above, a failure to disentangle defendants' roles as principals or accessories does not necessarily impede the prosecution case. Research by the author and colleagues, involving a review of CPS files and court transcripts from multi-defendant prosecutions for murder, section 18 assault and robbery, has pointed to the immensely complicated and confused nature of many such cases. Often it is simply not possible for the prosecution (and perhaps even the protagonists themselves should they wish to do so) to produce a coherent account of exactly who did what to whom.[16] Nevertheless, any individual who is proven to have been involved in an offence as **either** a principal **or** an accessory can be convicted of that offence. At sentencing, any such lack of specificity over the offender's role necessarily limits the judge's capacity to reflect the individual's level of culpability in the sentence passed. Case law suggests that, in such a situation, the judge would be expected to sentence the offender as an accessory, since any contested facts that are adverse to the defendant must be proven to the criminal standard of beyond reasonable doubt.[17]

[16] Jacobson, J., Kirby, A. and Hunter, G. (2016) *Joint Enterprise: Righting a wrong turn?*, Prison Reform Trust. This was an exploratory study of the application of the doctrine of joint enterprise in the prosecution of serious offences, conducted by the Institute for Criminal Policy Research in partnership with the Prison Reform Trust, and funded by the Nuffield Foundation.

[17] For example, R v Kerrigan (1993) 14 Cr App R (S) 179; R v Davies [2008] EWCA Crim 1055.

A final consideration is the large potential for misunderstanding over joint enterprise on the part of those who are convicted under the doctrine and their families and friends, as well as on the part of victims, victims' supporters and the wider public. Even if the Supreme Court judgment in *Jogee* goes some way towards simplifying the law in this area, questions of how and why principal and accessorial liability are ascribed remain complex in terms of both legal doctrine and practical effect. Moreover, it is likely that there will be continuing controversy over joint enterprise as a general doctrine of criminal law, based on the perception that the scope of accessorial liability is still too wide, even with the abolition of its 'parasitic' form. In this context, the importance of clarity in judges' sentencing remarks can hardly be over-stated. The Judicial College might consider providing training on the most effective and appropriate ways of conveying sentencing decisions in cases involving multiple offenders – with a view to ensuring that defendants, victims and all others concerned in such cases (including any reporters covering them) have a clear understanding of the basis on which each individual has been convicted and sentenced.

Acknowledgements

The author would like to thank Professor David Ormerod QC, Professor Mike Hough, Amy Kirby, Gillian Hunter, Dr Antje du Bois-Pedain and Lyndon Harris for discussion and comments on earlier drafts of this article.