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Prosecuting joint enterprise cases: seeking ways through the fog?

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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 different 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 (the principal) and which was the 'accessory' (the secondary party). In recent years the doctrine of joint enterprise has come under increasing scrutiny, with critics arguing that individuals were being convicted and sentenced for the most serious offences – including murder – on the basis of highly peripheral involvement. At the forefront of such criticisms is the argument that joint enterprise operates as a kind of criminal justice 'drag-net' which sweeps up large numbers of young people into criminal prosecutions on the basis of their social networks and associations rather than active criminal involvement.¹ One dimension of joint enterprise which has been the subject of much concern is what has commonly been known as parasitic accessorial liability (PAL). At the heart of PAL is 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). Both appeals were allowed, in a decision that effectively abolished PAL.

For the purposes of this short article the legal discussion surrounding joint enterprise will not be examined further; this has been done at length elsewhere.² Instead, this article outlines the approach to a piece of empirical research which sought to understand how the joint enterprise doctrine was utilised in the prosecution of serious offences.³ The imperative to conduct exploratory research on this topic was born out of the lack of routine recording of cases which involve some form of joint enterprise (Justice Select Committee, 2012; 2014; Bureau of Investigative Journalism, 2014) and the corresponding shortage of official data available on the number and types of cases in which the doctrine has been applied. This article draws specific attention to the immense complexities involved in prosecuting multi-defendant cases.

¹ See, for example, House of Commons Justice Committee (2012; 2014), Bridges (2013), Bureau of Investigative Journalism (2014), Crewe et al (2015), Just for Kids Law (2015), Williams and Clarke (2016).

² See, for example, Buxton (2016), Dyson (2015), Krebs (2015), Wilson and Ormerod (2015).

³ The study, which was funded by the Nuffield foundation, was conducted by the Institute for Criminal Policy Research (ICPR) and Prison Reform Trust (PRT).

Methods

Permission from the Director of Public Prosecutions was sought to conduct an analysis of a sample of Crown Prosecution Service (CPS) case files and associated court transcripts. The sampled files concerned multi-defendant prosecutions for robbery, section 18 assault (wounding/causing grievous bodily harm with intent) and murder. In total, 61 CPS case files were reviewed upon the basis that they met the following criteria:

- Two or more defendants charged with the primary offence of robbery, section 18 assault or murder
- Case had proceeded at least as far as an initial Crown Court hearing
- Case was finalised over a specified four-month period in 2015⁴
- Case was dealt with by CPS London
- The documents held on file were sufficiently detailed to provide a clear picture of the case.

This produced a unique dataset comprising detailed information about the individual (alleged) offences, defendants and (alleged) victims, the prosecution process, and its outcomes. As such the dataset provides insight into how joint enterprise is understood, deployed and referred to within the different constituent parts of the criminal justice process, and into the kinds of complex and confused scenarios of conflict and violence with which the law on joint enterprise grapples.

Of the 61 cases in the sample, 34 involved allegations of robbery, 15 allegations of section 18 assault and 12 allegations of murder. A total of 157 defendants were charged with these principal offences. In just over one-third of the cases, two or more defendants were ultimately convicted of the same principal offence of robbery, section 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. These figures on ethnicity resonate with the general concerns about the disproportionate impact of the joint enterprise doctrine on BAME groups (see, for example, Williams and Clarke, 2016) and with wider concerns surrounding disproportionality in the criminal justice system in relation to the treatment of BAME groups (see Uhrig, 2016).

Complexities of multi-defendant cases

Due to the exploratory nature of the review and the limitations of the case data, we are unable to make an appraisal of the appropriateness of initial charging decisions or the

⁴ This means that all of the cases included in this review were finalised prior to the Jogee and Ruddock judgement. However, it is unlikely that any of the cases would have been dealt with differently had they been dealt with since the judgement: in only three cases did PAL appear to be a dimension of the prosecution and in each of these cases other bases of secondary liability were also under consideration.

fairness of outcomes. What we can show, however, is the confused and complicated nature of these multi-defendant cases, and the difficulties of establishing a coherent account of what happened and who did what, in what was aptly described by a member of this study's Advisory Group as 'the fog of offending'.

The cases under review 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. The cases included alleged offences in which not only was the specific role of each defendant difficult to establish, but also the distinction between victims and offenders was blurred. In two cases, co-defendants were also victim and offender in relation to one of the charges faced: attempted murder and section 18 assault respectively. Defendants frequently faced multiple charges relating to the same or different incidents, and not uncommonly had other charges pending; and most had previous convictions. Defendants and victims were often personally known to each other prior to the alleged offence – for example, as friends or associates in at least 11 cases, as members of what were described as opposing gangs in five cases, and as relatives in four cases. In four cases, a victim's death followed a sustained period of physical and psychological abuse. This included a case in which the victim was a seven-year-old girl whose mother and mother's partner were tried for murder and eventually both convicted of manslaughter.

Among other incidents which had occurred in the context of pre-existing relationships, was a fight between two brothers and their sister's boyfriend whom they accused of making a sexual comment to another sister, and a mass brawl which was an escalation of a previous altercation between a pub landlord and some of the pub's customers. On the other hand, other offences appeared to be of a more random nature, with offenders and victims unknown to each other. This applied to many of the more opportunistic robberies – four cases of which, for example, involved alleged attacks on taxi drivers by their customers; and six cases in which the alleged robbery took place late at night as the complainant(s) made their way home on foot. Among several cases in our sample, a gang-related feud was a central theme in the prosecution. In one such case, linked to a 'turf war' over control of a local drugs market, four defendants were convicted of murder following the fatal stabbing of two men.

Lack of specificity over defendant roles

In the context of the complex and confused nature of such offending and alleged offending, prosecutions sometimes proceeded in the absence of evidence about the specific role played by each individual accused of taking part in the offence. This included one case of murder in which the two defendants were alleged to have attacked the victim. Both defendants were found guilty after trial; in sentencing the judge remarked 'I accept that on the evidence you [D2] appear to have played a lesser role, although precisely what each of you did ... will never be known'. Likewise in a separate case of murder, two defendants

were alleged to have physically attacked the victim, while a third was said to have assisted by waiting in a nearby vehicle and facilitating the getaway. The prosecution was unable to identify which defendant had played which role, but all three were convicted of murder. In sentencing, the judge stated: 'I am unable to resolve the conflicting prosecution evidence as to which one of you carried on in the [vehicle] whilst the other two pressed home the murderous attack on foot. It is unnecessary for me to do so, as each of you are equally responsible for its outcome.' 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.

Just over half of the cases reviewed included specific references to 'joint enterprise', or a related term such as 'joint attack', in prosecutors' notes on charging decisions or case reviews. These ranged from brief references – such as 'this case will proceed against both defendants as a joint enterprise' – to discussions at varying levels of detail about the basis upon which the prosecution would proceed in relation to joint enterprise. In a small number of cases, prosecutors had made a note that the specific role of each defendant could not be established, but that the prosecution could proceed on a joint enterprise basis:

I'm satisfied that the evidence shows that this was a joint attack by at least one other besides the person wielding the knife ... In these circumstances I am satisfied that there is sufficient evidence to show that this suspect [D2] was a joint offender with D1 and should also be charged with S18 wounding.

Sometimes, the prosecutors noted the basis on which prosecution would proceed 'at this stage', highlighting the probability that greater clarity about defendants' roles would emerge as the case progressed. In other instances, prosecutors had more certainty from the outset about the respective role of each party. For example:

[The witness] provides clear and unequivocal evidence that [defendant 1] fired the shots. The case against [defendants 2 and 3] will be put on a joint enterprise basis. The former ordered the shooting ... The latter [was] with [defendant 1] and encouraged him to open fire. (murder)

Conclusion

The review of CPS case files provides insight into the inherent complexities involved in prosecuting multi-defendant cases. The study findings illustrate that in many cases 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. Even if the Supreme Court judgment in *Jogee* and *Ruddock* 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.

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