



How Joint Enterprise Liability Neutered the Criminal Cases Review Commission in England

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Résumé de l'article

In 2016 the English Supreme Court corrected the law concerning joint enterprise liability in *R v Jogee* ([2016] UKSC 8). The decision did not invalidate every conviction made under the erroneous, albeit faithful application of the old law, on the basis it could lead to an unmanageable number of appeals. Individuals convicted as secondary parties prior to *Jogee* who appeal outside of the statutory 28 days have to demonstrate they have suffered a substantial injustice, the test imposed by the Court of Appeal in all change of (common) law cases. The Court of Appeal will also apply this test to a referral made by the English Criminal Cases Review Commission (CCRC). This has meant that the CCRC has no choice for this category of applicant, but to apply its own statutory test and also the substantial injustice test. The CCRC's statutory real possibility test has been criticised for compromising its independence, on the basis the language makes it subordinate to the Court of Appeal. The fact that the CCRC has to apply the Court of Appeal's substantial injustice test further questions just how subservient it is to the Court. This article is based on a research study produced by the author, which was the first to examine applications made to the CCRC from individuals who have been convicted under joint enterprise liability. The findings explore the extent to which the corrected law from *Jogee* is used in applications, and shows the limiting effect that the substantial injustice test has had on the CCRC. The study also reveals the low number of applicants identifying as Black British, despite existing research suggesting this demographic has the highest conviction rate for joint enterprise.

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How Joint Enterprise Liability Neutered the Criminal Cases Review Commission in England

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In 2016 the English Supreme Court corrected the law concerning joint enterprise liability in R v Jogee ([2016] UKSC 8). The decision did not invalidate every conviction made under the erroneous, albeit faithful application of the old law, on the basis it could lead to an unmanageable number of appeals. Individuals convicted as secondary parties prior to Jogee who appeal outside of the statutory 28 days have to demonstrate they have suffered a substantial injustice, the test imposed by the Court of Appeal in all change of (common) law cases. The Court of Appeal will also apply this test to a referral made by the English Criminal Cases Review Commission (CCRC). This has meant that the CCRC has no choice for this category of applicant, but to apply its own statutory test and also the substantial injustice test. The CCRC's statutory real possibility test has been criticised for compromising its independence, on the basis the language makes it subordinate to the Court of Appeal. The fact that the CCRC has to apply the Court of Appeal's substantial injustice test further questions just how subservient it is to the Court. This article is based on a research study produced by the author, which was the first to examine applications made to the CCRC from individuals who have been convicted under joint enterprise liability. The findings explore the extent to which the corrected law from Jogee is used in applications, and shows the limiting effect that the substantial injustice test has had on the CCRC. The study also reveals the low number of applicants identifying as Black British, despite existing research suggesting this demographic has the highest conviction rate for joint enterprise.

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I Introduction

Between 2009 and 2020 there were 247 applications made to the English Criminal Cases Review Commission (CCRC) from individuals that have been convicted under an aspect of joint enterprise liability.

160 of these applications were made from individuals convicted as secondary parties and of these, 91 applications were made after 2016. This is significant because that was when the English Supreme Court in *R v Jogee* ([2016] UKSC 8) corrected the law concerning joint enterprise liability, abolishing an aspect of joint enterprise known as parasitic accessorial liability (PAL). The decision in *Jogee* should have provided individuals convicted under PAL the potential to appeal their conviction. Yet, because of this change taking effect at common law, the decision has in fact had the opposite effect, especially on applications made to the CCRC.

The CCRC is an independent body that has the power to return criminal cases back to the English Court of Appeal Criminal Division (CACD). Established in March 1997 by the Criminal Appeal Act 1995, applicants must show either fresh evidence or a new legal argument not used at trial or on appeal, to which the CCRC applies the statutory real possibility test identified in s.13 of the Criminal Appeal Act 1995:

13. (1) A reference of a conviction ... shall not be made under any of sections 9 to 12B unless— (a) the Commission consider that there is a real possibility that the conviction verdict, finding or sentence would not be upheld were the reference to be made. [1]

Applicants to the CCRC must have exhausted the criminal appeals process, which means they either must have had leave to appeal denied or a full appeal dismissed.

The statutory real possibility test has been criticised on the basis it makes the CCRC deferential to the CACD, calling into question its status as an independent body (Law Commission report 2015, Westminster Commission on Miscarriages of Justice report 2021). Following *Jogee*, the CCRC is mandated to apply the CACD's own substantial injustice test for applicants who identify as secondary parties convicted under joint enterprise liability (*Jogee* [100]). As will be explained, the substantial injustice test provides a threshold that has to be met by any individual wishing to appeal on the basis of a change at common law. The test is supposed to limit the number of appeals based on a change in the law (*Jogee* [100]). For the CCRC however, it further calls into question its independence from the CACD.

The study this article is based on was the first to examine applications to the CCRC from secondary parties convicted on the basis of joint enterprise. The main finding is that the imposition of the substantial injustice test on the CCRC has created a two-tier approach for individuals convicted as secondary parties under joint enterprise liability. The first tier under the statutory real possibility test applies the threshold of safety (of the conviction) but the second tier under substantial injustice applies a higher threshold. This approach is so restrictive that it stops the CCRC fulfilling its purpose, which is to provide a service for *anyone* who believes they have been wrongfully convicted or sentenced in criminal courts in England, Wales and Northern Ireland (ccrc.gov.uk). It cannot provide the same service for all applicants because secondary party applicants are treated differently. Despite existing research suggesting that Black British individuals have the highest conviction rate under joint enterprise liability (Crewe, Hulley and Wright 2014, Young 2020), the study revealed the low number of this demographic making applications to the CCRC. Furthermore, whilst the findings highlighted that applicants are able to access legal representation, it also showed that the corrected law from *Jogee* is being applied

incorrectly by lawyers, which essentially wastes an application but also gives false hope to the convicted individual.

II Joint Enterprise Liability: Before and After the Supreme Court Decision in England

The term joint enterprise in England and Wales refers to three different types of criminal liability: principal, joint principals and secondary parties (Crown Prosecution Service, 'Secondary Liability: charging decisions on principals and accessories, February 2019). A principal is someone who carries out the conduct element of the substantive offence, and if two or more people do this together they are identified as joint principals. As joint principals the Crown Prosecution Service (CPS) needs to prove that the offence was committed as a joint agreement, which need not be formal or expressed verbally and can amount to a nod or behaviour from which an agreement can be inferred. A secondary party is described by the CPS as someone who aids, abets, counsels or procures (often referred to as assists or encourages) someone to commit the substantive offence, without being the principal offender. A secondary party can also be prosecuted and punished as if he were a principal offender under s8 Accessories and Abettors Act 1861. The Supreme Court was highly critical of the use of the term 'joint enterprise' which in its view is not a legal term of art and has been subject to public misunderstanding (*Jogee* [77]), but the phrase continues to be used by the CACD (*R v Garwood* [2017] EWCA Crim 59 [2] and [17]; *R v Brown* [2017] EWCA Crim 167 [41] and [54]; *R v Aradour* [2017] EWCA Crim 605 [16]).

PAL referred to a situation where two defendants agreed to be involved in an initial first crime, during the course of which the principal defendant went on to commit another crime. If the second defendant foresaw the possibility of the second crime being committed then they were also guilty of the second crime. It can be best illustrated through a scenario concerning two defendants, D1 and D2 both of which have a common intention to commit a robbery. During the robbery, D1 attacks and kills a security guard. PAL made it easier to convict D2 of the murder of the security guard because since D2 was already committing a crime they would be liable for any crimes committed by their accomplice as long as D2 had foreseen the risk that another crime might occur. The second crime was parasitic on the first crime. The problem with the application of PAL was that for the secondary party, liability could be found to exist even though the second offence was not part of the joint enterprise to which they had originally agreed (Way, 2015). In effect, the standard of proof for the secondary party was easier to meet than for the principal for whom it was necessary to show intent.

Mr Jogee was convicted of murder having gone to the home of the victim with the principal. Here the principal stabbed the victim with a knife. Jogee was outside when this happened smashing a bottle against a car and shouting words of encouragement. Both men were convicted in March 2012 (*Jogee* [101]), and Jogee made an unsuccessful appeal in 2013 (*Jogee* [101]). It was a further appeal to the Supreme Court which found that the law had taken a wrong turn in the case of *Chan Wing-Sui* ([1985] AC 168). The court stated that:

'The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre Chan

Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose.’ ([2016] UKSC 8 at [87])

The Supreme Court returned foresight to where it should always have been: evidence of intention, rather than a sufficient standard on its own.

The decision was initially celebrated, until the realisation set in that it was to have limited practical impact, especially for those individuals whose convictions applied PAL prior to it being set aside. The Supreme Court made it clear that a ‘faithful application of the law as it stood at the time’ (*Jogee* [100]) can only be set aside by seeking exceptional leave to appeal to the CACD out of time (beyond the statutory 28 day appeal period). The Court would only grant such leave where an individual could demonstrate a substantial injustice, a principle the court highlighted, that had been applied for many years to general cases where there was a change in the law (*Jogee* [100]). The CACD in the subsequent case of *Johnson and Others* ([2016] EWCA Crim 1613 [15]) defined what would constitute a substantial injustice for ‘out of time’ appeals (made beyond the statutory 28 day time period) resulting from the corrected law in *Jogee*. The CACD determined substantial injustice to be considered on ‘the strength of the case advanced that the change in the law would, in fact, have made a difference’ (*Johnson* [22]). The key question the court has to answer is, would the defendant have not been convicted of murder if the law as set out in *Jogee* had been explained to the jury. In determining this question, the CACD refer to where a case falls on the spectrum of offending; where 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’ and at the other end of the spectrum where crime A is a different crime, not involving intended violence or use of force. The court acknowledged that the substantial injustice test is one with a ‘considerably higher threshold’, (*R v Towers* [2019] EWCA Crim 198 [72]) than that of the safety test used for appeals made within the statutory 28-days (Gerry 2021). The CACD, rejected submissions that argued to the contrary, and held that the correction of the law in *Jogee* did not demonstrate a substantial injustice (*Johnson* [17] and [18]). As Felicity Gerry described in 2018: ‘Put another way, appellants have to satisfy the CACD that they would have been found not guilty on the basis of the law in *Jogee* to demonstrate that they have suffered a ‘substantial injustice’. (Gerry 2018). The substantial injustice test is likely to be satisfied where appellants were not in possession of a weapon, or were unaware that the principal or others were carrying a weapon, and did not set out to commit offences of violence (*Jogee* [98]).

The CACD made it clear that the requirement to show a substantial injustice extended to cases referred by the CCRC, stating that the ‘Criminal Cases Review Commission must make its assessment of alleged miscarriages of justice in the light of the approach of this court’ (*Johnson* [14]). This has proven to be significant because it placed the CCRC’s statutory real possibility test in a framework of developing CACD jurisprudence concerning substantial injustice. There has only been one successful appeal direct to the CACD applying the corrected law from *Jogee* and arguing a substantial injustice (*R v Crilly* [2018] EWCA 168). The CCRC has made four referrals to the CACD for applicants convicted as secondary parties (one in 2017/18, and another three in 2018/19).

This low number indicates the struggle applicants have in meeting the high threshold of the substantial injustice test, which the CCRC has said, will only be crossed in ‘the rarest of circumstances’ (CCRC 2017/18).

III The Problem with Joint Enterprise in England

The Supreme Court’s actions have been described as substantive law reform that was not made explicit because it would have raised concerns as to judicial activism (Stark 2016). Studies have pointed out that whilst *Jogee* corrected the law there has been ‘no discernible impact on the numbers of people prosecuted or convicted of serious violence as secondary suspects.’ (Mills, Ford and Grimshaw 2022). Mills *et al* highlighted how legal professionals consider that *Jogee* only really changed how joint enterprise is expressed, with little change in the number of individuals prosecuted as secondary suspects, as some had hoped for. The decision of the Supreme Court was not followed by common law jurisdictions Australia and Hong Kong (Jackson 2017, Dyer 2018). Where these states have decided not to apply the correction, it is thought that PAL continues to contribute to ‘large numbers of black people in prison’ (Gerry 2021).

Joint enterprise has been characterised as a dragnet legal principle, on the basis that it disproportionately draws large numbers of Black And Minority Ethnic (BAME) young men into the criminal justice system (Young 2020, Mills *et al* 2022). Research supports this perspective. In 2014, the Institute of Criminology at the University of Cambridge collated figures concerning the race of individuals convicted of murder under joint enterprise. The study explored the experiences of male prisoners who were convicted at 25 years old or younger and given sentences of 15 years or more (Crewe, Hulley and Wright 2014). The research identified that of those convicted under joint enterprise, 57.4% were BAME (37.7% Black/Black British, 4.7% Asian and 15.5% Mixed Race) compared to 38.5% who were White (Crewe, Hulley and Wright 2014). A different study by Williams and Clarke in 2016 examined the extent to which gang discourse influence the prosecution of young Black men in joint enterprise cases. The report identified that convictions of BAME individuals under joint enterprise have been premised on gang rhetoric. The survey used in the study showed that 69% of BAME prisoners said the gang narrative was introduced in the court room, compared to 30% of White prisoners (Williams and Clarke 2016). David Lammy MP carried out a review in 2017 into the treatment of, and outcomes for, Black, Asian and Minority Ethnic (BAME) individuals in the Criminal Justice System. A survey of prisoners suggested that half of those convicted under joint enterprise identify as BAME (Lammy 2017).

There are situations when joint enterprise liability is necessary, such as where an offence is committed by two people acting with a common purpose as joint principals, or where someone is an accessory and helped or encouraged the the principal offender to commit the offence, for example as a getaway driver. The reach of secondary liability however, has been extended through association with gangs and violence, so much so it has become central to the crime control response and has been seen as a catch-all approach (Williams and Clarke 2016). Lord Falconer, former Lord Chancellor speaking in a radio interview in 2010 highlighted his support for joint enterprise convictions for gang-related offences:

The message that the law is sending out is that we are very willing to see people convicted if they are a part of gang violence - and that violence ends in somebody's death. Is it unfair? Well, what you've got to decide is not, 'Does the system lead to people being wrongly convicted?' I think the real question is: 'Do you want a law as draconian as our law is, which says juries can convict even if you are quite a peripheral member of the gang which killed?' And I think broadly the view of reasonable people is that you probably do need a quite draconian law in that respect (Cited in Jacobson *et al*, 2015).

This supports the notion that protecting society is favoured over protecting the individual, with which the accompanying perception is that the conviction of a secondary party is acceptable collateral damage (Young 2020).

This position underpins the primary criticism of the use of joint enterprise as being unfair, especially from individuals convicted of murder as secondary parties, where often they do not perceive themselves to be murderers on the basis they did not kill anyone directly (Hulley, Crewe and Wright 2019). The study from Hulley *et al* in which a number of convicted secondary parties were interviewed, describe the label of 'murderer' as being too far removed from the actions for which these individuals identify with, such as not calling the police or not intervening to stop a violent situation (Hulley *et al* 2019). The common point amongst this group was that joint enterprise did not make sense (Hulley *et al* 2019).

IV The First Study to Examine Applications to the CCRC Concerning Joint Enterprise

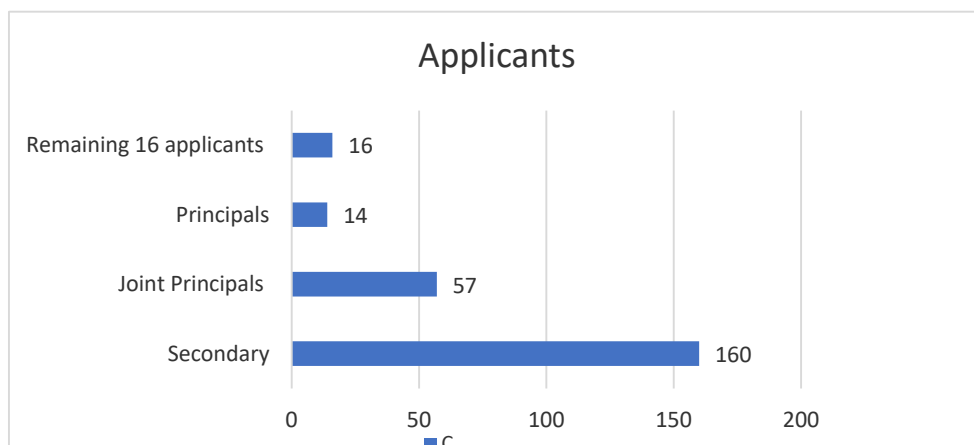
Informing this article is the first study to which the CCRC gave access to 247 applications. These had been made between 2009 and 2020 from individuals convicted where joint enterprise liability had been applied. The initial aim of the study was to examine the 207 applications referred to in the CCRC's annual report of 2017/18, (CCRC Annual Report and Accounts 2017/2018) post the decision in *Jogee*. However, where the global pandemic delayed the start of the research, when the data did become available the CCRC provided an additional 40 applications. The 247 applications account for only 1.8% of the total number of 13,730 applications made between 2010 and 2020 (taken from the CCRC annual reports which started in 2010 available at www.ccr.gov.uk). The study received ethical approval from the University of Greenwich.

The initial design of the study had two primary aims which were to 1) identify points of commonality in the applications, and 2) construct a statistical portrait of applicants, focusing on key demographic characteristics. When the research began and upon reading the applications, it became clear that to achieve the first aim, a separate research study would be required based on the variation in documents submitted by applicant, as well as the split in applications that had legal advice and those that did not. The focus of the current study was consequently reframed with the primary aims to explore a) how the corrected law in *Jogee* was being used in applications, b) whether applicants had legal representation, and c) the demographic characteristics of applicants.

The research was initially approved by the CCRC in 2020, but the global pandemic caused problems with access to the relevant data so the proposed start date of February 2020, became 1 March 2021.

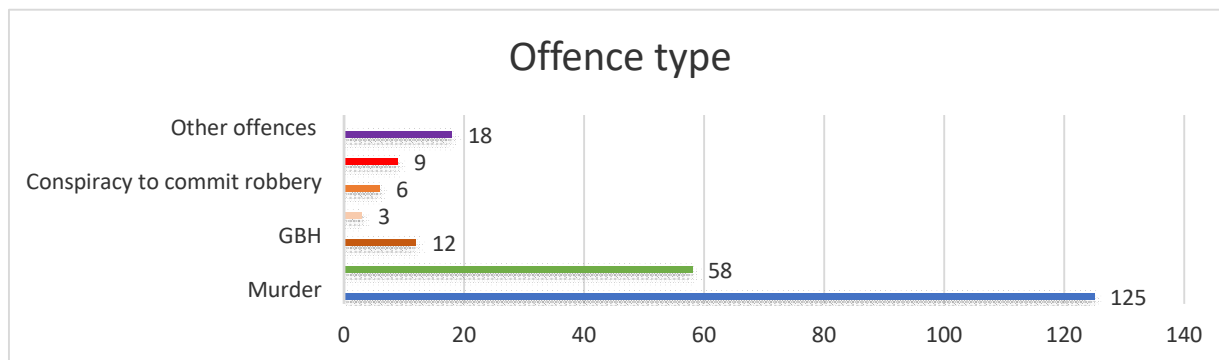
From the 247 applications, 160 were convicted as secondary parties, 57 were convicted as joint principals and 14 were convicted as the principal. There were 14 applications where the no joint enterprise liability was applied because the applicants were convicted in either multi-defendant trials or under the Accessories and Abettors Act, these were excluded from the analysis. In two applications the paperwork had been destroyed so it was not possible to determine what type of joint enterprise the applicant had been convicted under. These were also excluded from the analysis (Hewitt 2023). This left 231 applications (see figure 1 below).

Figure 1: Numbers of applicants listed as principals, joint principals or secondary parties.



From the 231 applications examined, 125 applicants had been convicted of murder, whilst 58 had been convicted of murder as well as another offence such as robbery or Actual Bodily Harm. Twelve applicants had been convicted of Grievous Bodily Harm (GBH) and, three had been convicted of GBH together with other offences. Six applicants had been convicted of conspiracy to commit robbery and nine applicants had been convicted of conspiracy to commit robbery as well as another offence. The remaining applicants had been convicted of rape, theft, hijacking and other offences (Author 2023). Figure 2 shows this below.

Figure 2: Type of offence applicants were convicted of.



V The Effect of *Jogee* and Substantial Injustice on Applications to the CCRC

From the 160 applicants convicted as secondary parties, 65 (40%) of these that referred to the corrected law in *Jogee* also claimed to have suffered a substantial injustice citing *Johnson*. Nineteen applications (12%) referred solely to *Jogee* and did not argue a substantial injustice. There were 75 secondary party applicants (47%) that did not refer to either *Jogee* or *Johnson*, because the applications focused on new evidence, new legal arguments or the case law was not applicable to the conviction. One application solely referred to *Johnson*.

The corrected law is not a routine feature of applications to the CCRC, evident in the 40% of secondary party applicants that used both *Jogee* and *Johnson*. Indeed, a higher number of applicants chose to apply on the basis of new evidence or a new legal argument more likely because of the high threshold required for demonstrating substantial injustice. The CCRC has made only four referrals to the CACD for applicants convicted as secondary parties (one in 2017/18, and another three in 2018/19). This 6% referral rate (4 out of the 65 applicants that cited *Jogee* and argued a substantial injustice under *Johnson*) appears higher than the CCRC's historical average of 2% out of all applications made to it (CCRC, 2023). It is easy to suggest the referral figures for secondary parties are high when dealing with such a small numbers of applications. The 160 applications from secondary parties make up only 1.1% of the total number of 13,730 applications made to the CCRC between 2010-2020 (taken from the CCRC annual reports, although there was no report for 2009, accessible via www.ccr.gov.uk). If the four referrals are taken in the context of the 13,730 applications, the referral rate diminishes to less than 1%.

The application of the substantial injustice test by the CCRC was challenged in *R (on the application of Davies) v CCRC* ([2018] EWHC 3080) where Felicity Gerry QC (as it was referred to then, now it is KC) argued that the necessary approach was for the CCRC to apply the statutory real possibility test, and that the substantial injustice test was a diversion. The court disagreed and held that the substantial injustice test was intrinsic to and required by the statutory real possibility test (*R v Davies*). As such, it bound the CCRC to adopt the starting point that follows the legal approach taken by the CACD, when considering whether a substantial injustice has been demonstrated in applications from individuals convicted as secondary parties (*R v Davies*).

There were no active records by either the CPS or the Home Office of prosecutions that applied joint enterprise liability (McClenaghan *et al* 2014), until the CPS started a pilot in February 2023 to monitor homicide / attempted homicide cases that use joint enterprise liability (CPS Joint Enterprise Pilot: data Analysis, 2023). The pilot applied a flag to the aforementioned cases in six of the 14 CPS areas. Research carried out previously therefore, had to use data from appeal judgements, the CPS and also data from the Ministry of Justice and the Home Office. The Bureau of Investigative Journalism in 2014 obtained information from both the CPS and Home Office. Following a consultation with legal professionals, the Bureau asked for information on cases that involved two or more defendants convicted in murder cases (McClenaghan *et al* 2014). The study found that for the prosecution of 1,853 individuals charged with murder in cases involving four or more defendants between 2005 and 2013 joint enterprise was almost certainly relied upon (McClenaghan *et al* 2014).

This accounted for approximately 17.7% of all homicide prosecutions for this period. In the same eight years there were 4,590 prosecutions for murder in cases involving two or more defendants which was equivalent to 44% of all murder prosecutions in those years (McClenaghan M. McFadyean M. and Stevenson R. 2014). A smaller study of 61 CPS case files involving multiple parties charged with the same violent offence, identified that a third of cases resulted in two or more people being convicted of the principal offence (Jacobson 2016). A more recent study in April 2022, by the Centre for Crime and Justice Studies (Mills, *et al*) was the first research study that used national data to assess the use of joint enterprise in prosecutions and serious violence in England and Wales over the last 15 years. The report, acknowledging the lack of data in the public domain about the use of joint enterprise adopted a similar to the method used by the Bureau of Investigative Journalism in 2014, and submitted Freedom of Information requests to the Ministry of Justice, the CPS and the Home Office. Their study looked at: the number of people that had been prosecuted and convicted for serious violent offences [2] under joint enterprise law, who had been prosecuted and convicted for serious violence where joint enterprise had been applied, and the impact the Supreme Court decision had on trends in the use of joint enterprise in convictions. Not surprisingly, the results showed that over 1,000 people had been convicted of murder or manslaughter as a secondary suspect [3] in the 10 -year period to 2020. Over 2,000 had been convicted of murder in cases involving four or more defendants in the 15- year period to 2020. Young adults aged between 18-24 were the recipients of 2,218 convictions between 2005 and 2020. Young black people were over-represented in the figures, with 46% from BME backgrounds convicted of murder as secondary parties compared to 34% of all BME individuals convicted of murder (Mills, Ford and Grimshaw 2022). The study also made it clear that *Jogee* appeared to have ‘no discernible impact’ on the number of people prosecuted or convicted of serious violence as secondary parties.

Krebs (2019) described the requirement of the substantial injustice test for secondary party applicants as rigorous, a point illustrated by *R v Crilly* ([2018] EWCA Crim 168), the only successful case to overcome the threshold required. John Crilly’s defence was able to demonstrate that ‘the accusation was built on foresight all along’ (Krebs 2019) which was sufficient to satisfy the CACD that had the jury been directed on the basis of the law in *Jogee*, he would not have been convicted of murder. The justification for imposing the substantial injustice test arose from the decision in *Cottrell & Fletcher* (2007 EWCA 2016 [46]) where the CACD, citing *Ramzan and others* made it clear that the:

‘very well established practice of this court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the defendant’.

Extending the substantial injustice test to the CCRC started in *Cottrell*. The CACD referred to the divisional court’s decision in *R (DRCP) v Criminal Cases Review Commission* (2006 EWHC 3065), when the court considered whether the CCRC, in exercising its statutory function should have regard to the practice adopted by the CACD in change of law cases. The divisional court decided that, ‘the independent Commission was under no obligation to have regard to, still less to implement, a practice of the CACD which operates at a stage with which the Commission is not concerned’ (*Cottrell* [49]).

As a result of the decision the CCRC drafted a seventh version of its Formal Memorandum: Discretion in Referrals (issued in March 2007) where it asserted that ‘regard *will not* be had to....the Court of Appeal’s practice in relation to applications for an extension of time in which to appeal change-of-law cases’ (*Cottrell* at 49). The decision in *R (DRCP)* meant that individuals could circumvent the requirement for an application to the CACD for an extension to an out of time appeal. If an individual applied directly to the CCRC on the basis of a change made at common law, and if the CCRC referred it back to the CACD, the referral would effectively bridge the time gap and circumvent the request for an extension for an an appeal out of time. This meant the CACD could end up hearing a case that it *would not* have granted an out of time extension to (*Cottrell* at [51]). The CACD highlighted that whilst the CCRC was vested with considerable authority, it did not have the jurisdiction to quash convictions, this was the exclusive responsibility of the CACD (*Cottrell* at [52]).

The concern from the CACD was that thousands of cases could potentially be returned to the court on the basis of changes made at common law, so the matter was referred to Parliament. This resulted in s.16C (1) of the Criminal Appeals Act 1968 (inserted by s.42 of the Criminal Justice and Immigration Act 2008), giving the CACD the power to dismiss CCRC referrals summarily if based solely on a change in the law. The provision sought to prevent the situation arising where the CCRC refers a case to the CACD in the circumstances that the court would not have granted an extension of time for leave to appeal had the applicant gone directly to it. In *Johnson* the CACD made reference to s.16C (at [15]):

‘Thus, for convictions not brought in time (including second appeals brought through the Criminal Cases Review Commission) it is necessary to identify the considerations the court will take into account in determining whether there has been a substantial injustice’.

The ramifications of this legislation mean that individuals convicted under the now abolished PAL are unable to access justice through the CCRC due to the substantial injustice threshold imposed by the CACD (Westminster Commission on Miscarriages of Justice report 2021), which is higher than that for the safety of the conviction (*Johnson* [20]). The CCRC’s statutory test has been reframed by the jurisprudence of the CACD but only for applications from secondary parties convicted under joint enterprise. For this category of applicant, there is a two-tier approach where the CCRC applies both its statutory test and the substantial injustice test. The threshold of safety from the real possibility test is overridden by the higher threshold of substantial injustice. Yet for other applications where joint enterprise is not used and the law has not been changed it applies only the statutory test. When the CCRC was established in 1997 it was given the statutory real possibility test to apply to all applications it received, reviewing them to the same threshold (safety of the conviction). It is the CACD that has imposed the substantial injustice test on the CCRC, and pushed for a change in the law to retain its control over it as evidenced in *Cottrell*. The low number of applicants that attempted to argue a substantial injustice using *Johnson* in addition to applying *Jogee*, alongside only four referrals from the CCRC, shows how difficult it is to overcome the threshold for substantial injustice.

The CCRC's independence has been examined in reports from the House of Commons Justice Select Committee in 2015 (at [12]) and the Westminster Commission on Miscarriages of Justice in 2021. The real possibility test has been identified as encouraging the CCRC to be deferential to the CACD (Westminster Commission on Miscarriages of Justice, 2021 at [36]). Where the CACD has mandated the CCRC to use a test developed through its own jurisprudence, this further calls into questions the extent to which the CCRC is truly independent of the court. The purpose of the CCRC as an organisation is to provide a service for *anyone* who believes they have been wrongfully convicted or sentenced in criminal courts in England, Wales and Northern Ireland (ccrc.gov.uk). It cannot provide that service for all applicants, because secondary party applicants are treated differently. Echoing Felicity Gerry KC in her evidence to the Westminster Commission, the substantial injustice requirement 'effectively neuters the CCRC' (2021).

VI The Demographics of Applicants

The data revealed information about the demographics of the 247 applicants to the CCRC. There were 38 Black British applicants, 79 White British applicants, 7 (3%) identified as British Mixed, 15 applicants (6%) identified as Asian and 24 applicants (10%) identified their ethnicity ranging as Irish, Chinese, Jamaican, Lithuanian, Romanian, etc. 84 (34%) people did not identify any ethnicity. The two most represented groups were Black British and White British. Out of the Black British applicants, 26 (65%) identified as secondary parties (six identified as joint principals and the remainder identified as the principal). Out of the secondary parties, 19 (73%) had been convicted of murder or murder plus another offence and 7 (27%) were convicted of offences ranging from GHB, robbery, manslaughter, conspiracy and s.18 offences against the person. Of the joint principals, five (83%) were convicted of murder or murder plus another offence.

From the White British applicants 57 (75%) were convicted as secondary parties, 49 (86%) of these were convicted of murder or murder and another offence. Twelve (16%) White British applicants were convicted as joint principals, and 11 (92%) of those were convicted of murder or murder and another offence. The remaining seven (9%) White British applicants identified as the principal offender, five (71%) of these had been convicted of murder or murder and another offence. Examining the age of the White British applicants when the offence was committed showed that 59 (24%) were aged 19 or under, 97 (39%) were aged between 20-29 years old and 44 (18%) were aged between 30-39 years old. Twenty (8%) were aged between 40-49 years old when the offence took place, 5 (2%) were aged between 50-59 years old and for 22 applicants (9%) it was not possible to ascertain this information.

Out of the 38 Black British applicants, 17 (45%) were aged 19 or under when the offence took place, 13 (34%) were aged between 20-29 years old and 5 (13%) were aged between 30-39 years old. The remainder did not provide an age. Out of the 79 applicants that identified as White British, 15 (20%) of these were aged 19 and under when the offence took place, 28 (37%) were aged 20-29 years old, 17 (22%) were aged between 30-39 and 13 (17%) were aged between 40-49 years old. The remaining applicants did not provide an age.

Although 85 applicants did not identify any ethnicity there is a lower number of Black British applicants (convicted under joint enterprise liability) to the CCRC, when considered in the context of existing research that shows the disproportionate representation of Black secondary parties (McClenaghan *et al* 2014 and Mills *et al* 2022). The CCRC compares its diversity statistics with those of the general prison population where 24% of the prison population is from minority ethnic groups, so anything near to this percentage is represented as being successful in terms of the CCRC meeting its diversity targets (Hewitt 2023). Twenty-five per cent of applicants identifying as black British is low in comparison to the 46% identifying as White British, but it would appear that applicants identifying from an ethnic minority group are under-represented more generally in CCRC applications. In the CCRC annual report for 2021/22, 24.4% of applicants describe themselves as being from an ethnic minority group, which was an increase of 19.8% from 2020/21 where the number of applicants identifying as from ethnic minority groups had dropped below the normal average of 24%. The report in 2020/21 also stated that 43.8% of applicants were white. Annual reports from previous years do not include information as to the ethnicity of applicants. As this is the first study to examine applications made to the CCRC from individuals convicted under joint enterprise liability, although it advances an understanding of the demographic of these applicants, there is no data on which to base a prediction as to the expected number of black British applicants. The Bureau for Investigative Journalism stated that it found at ‘least 1800 and up to 4590’ people were prosecuted for joint enterprise homicide between 2005/2006 and 2012/2013 (McClenaghan *et al* 2014). The same study found that 57.4% were BAME. The most recent study by Mills *et al* in 2022, indicates that between 2005 and 2020 5,783 cases involving two or more defendants resulted in a conviction and 2,222 cases with four or more defendants resulted in a conviction. This study found that for individuals convicted as secondary parties of murder between 2010 and 2020, 46% were BAME compared to 34% of all those convicted during the same time period. These studies are unable to accurately reflect the number of individuals convicted using joint enterprise liability because as already highlighted the CPS only started recording this data in February 2023. What both studies indicate however, is the over representation of Black individuals convicted under joint enterprise liability. When set in this context, 38 applications from BAME individuals over 11 years (between 2009 and 2020) averages 3 applications a year, which is a low number.

One reason for this low number could be the lack of trust in the criminal justice system from BAME defendants, a point highlighted by David Lammy in 2017 in his review of the disproportionate representation of BAME groups as youth prisoners between 2006-2016 (p69). If BAME individuals do not trust the system when they enter it at the time of being charged with an offence then there is very little to suggest they will start trusting it after exhausting the appeals process with only an application to the CCRC as their last resort. Further research would be needed to explore this point and is something the CCRC should consider carrying out to ensure that potential cases that could be referred back to the CACD are not being missed on the basis that young Black men, convicted under joint enterprise are not making applications. The CCRC should commission research into Black British applicants convicted of joint enterprise as secondary parties to understand whether there is an issue of trust in the criminal justice system that extends to the CCRC.

VII Legal Representation and Applications to the CCRC

This examination of applicants encouragingly showed that that individuals convicted under joint enterprise liability are being represented by lawyers in applications to the CCRC. The findings of this study break down the number of applicants that had legal representation in the context of White British and Black British applicants, on the basis these were the majority in terms of the demographic of ethnicity. Sixteen (61%) Black British secondary parties and four (66%) Black British joint principals had legal representation. For White British secondary party applicants 30 (53%) and six (50%) joint principal applicants had legal representation.

From the perspective of the 160 secondary party applicants, of the 91 applications made post *Jogee*, 44 of these were represented by a lawyer. Thirty-eight of the 91 applications were made after *Johnson* and 20 of these were represented by lawyers. Of the six applications that that were made after *Johnson*, but referred solely to *Jogee* and did not argue a substantial injustice, three of them were represented by a lawyer.

This data can be considered in the context of, firstly an increase in overall applications, from around 1,000 per year between 2006 and 2011 to around 1,500 per year between 2012 and 2019 (CCRC 2018/19); secondly the suggestion of an increase in unrepresented clients (CCRC 2019/20), and thirdly the limited funding that a solicitor can claim for each application based on ten hours of work (Clarke and Welsh 2022). An early study in 2008 by Professor Jacqueline Hodgson and Juliet Horne identified that from 2248 cases rejected as ineligible or having no reviewable grounds of appeal between 2001-2007, 29% of them were legally represented. The authors suggested this was a lack of understanding as to the CCRC's legal remit. A more recent three-year study published in 2021, carried out by Professor Richard Vogler *et al* (2021) from the University of Sussex identified that 42% of lawyers who participated in the research were no longer willing to accept publicly funded CCRC cases (see also Clarke and Welsh 2022), a position caused by the low remuneration rates for what is a demanding area of work. As a result of the lack of funding, law firms select cases where the issues are straight forward and rejected those that were time consuming or where there is considerable evidence to consider (Vogler *et al* 2021). The participants interviewed were almost unanimous in suggesting that CCRC work should be carried out by experienced lawyers, but the restricted funding meant that paralegals, trainees and sometimes consultants were paid to put together applications (Vogler *et al* 2021). There is an indication that lawyer-led applications to the CCRC are better structured and organised than those that are not represented (Hodgson and Horne 2009). Existing studies have considered the quality of representation in the context of applications being sent for review by the CCRC (Hodgson and Horne 2009, Vogler *et al* 2021), yet for this research a judgment can be based on quality in terms of how the relevant case law has been used. The study shows that some applicants, a few of which were supported by lawyers, used the law from *Jogee* incorrectly, whilst others did not argue a substantial injustice. Using the corrected law alone does not demonstrate a substantial injustice meaning that there is no scope to base an application solely on that decision (Gerry 2018). Nineteen applications referred solely to *Jogee*, six of these were made after *Johnson* was decided but the applications did not claim a substantial injustice. Three of the six applications made after *Johnson* were represented by a lawyer. Seventeen applicants convicted as joint principals referred to the corrected law from *Jogee*, eight of these were represented by a lawyer. This aspect of joint enterprise does not engage the corrected law.

In the majority of responses the CCRC made this clear in the statement of reasons, using a comment similar to the one below:

The *Jogee* judgment relates only to secondary parties in simple terms where people are convicted of helping the principal (or main) offender commit an offence. For example if A gives B a knife or shouts encouragement and B stabs someone, B is the principal offender and A is a secondary party. *Jogee* only relates to the mental state that must be proved against A.

This implies that there is a lack of understanding amongst some lawyers as to what the corrected law in *Jogee* applies to. Whilst research indicates a positive association between applications with legal representation, the use of *Jogee* in this way is misguided and normally associated with applications that do not have the benefit of legal advice (Vogler *et al* 2021). This finding echoes the conclusion from the study in 2009 that there was a need to improve the quality of representation in CCRC cases (Hodgson and Horne) and a more recent study in 2021 highlighted the consensus amongst interviewees as to a deterioration in the overall quality of lawyer-led applications (Vogler *et al* 2021). Funding for a CCRC application is nearly non-existent and does play a large role in the time available for experienced lawyers to take on the work. Whilst the CCRC does provide the aforementioned comment above in the statement of reasons that is sent to the applicant and their legal representative, the use of incorrect case law should be made explicit by the CCRC in a separate advisory note to the lawyer.

VIII Conclusion

This article has shone a light on the issues caused by joint enterprise liability in applications made to the CCRC, which is an area that is under-researched. Existing research used data drawn from convictions for serious violent offences including murder where joint enterprise liability was applied in the period both before and after the Supreme Court decision in *Jogee*. This study introduces data from applications made to the CCRC by individuals convicted under joint enterprise liability (Hewitt 2023).

Research that examined legal representation for CCRC applications indicates that whilst this is a benefit, it can vary in quality and the lack of funding for applications is directly affecting the use of more experienced lawyers to carry out the work. This article has exemplified the position for applications concerning joint enterprise, where although applicants are able to find legal representation, some of it is misguided, especially where *Jogee* is referred to for individuals convicted as joint principals or used alone without reference to substantial injustice. The CCRC must continue to explain in detail to applicants when the decision in *Jogee* does not apply to them because they have been convicted as joint principals or a principal in the offence. They should go further to provide a separate advisory note to the representing lawyer so that future applications are not wasted by using the law incorrectly.

The overwhelming outcome of research before this, is that a disproportionate number of BAME men have been convicted of offences where joint enterprise was used (Young *et al* 2020).

The low number of applicants identifying as Black British as outlined in this article is not consistent with the existing data. Further research is urgently needed to explore this point, and it is something the CCRC should carry out to ensure that potential cases that could be referred back to the CACD are not being missed on the basis that this demographic are not making applications.

This article alongside the findings from the corresponding study (Author 2023) show that the decision in *Jogee* has had little, if any effect on historical convictions that incorrectly applied PAL. Despite the over representation of secondary parties, there is a high number of applications that chose to use new evidence or a fresh legal argument and did not apply *Jogee* and *Johnson*. The reason being, the hurdle of substantial injustice is almost impossible to overcome, and the effect of the substantial injustice test on the CCRC is significant. The discussion has shown that the imposition of the test by the CACD has placed the statutory real possibility test in a body of CACD jurisprudence, the effect of which has created a two-tier approach for individuals convicted as secondary parties under joint enterprise. The CCRC has to apply two different thresholds from the two different tests: real possibility uses the threshold of safety of the conviction and the substantial injustice test has a higher threshold.

This situation is so restrictive that the CCRC is unable to fulfill its purpose, which is to provide a service for *anyone* who believes they have been wrongfully convicted or sentenced in criminal courts in England, Wales and Northern Ireland (ccrc.gov.uk). It cannot provide the same service for all applicants because secondary party applicants are treated differently.

Notes:

[1] Continued....(b)the Commission so consider—

(i)in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or

(ii)in the case of a sentence, because of an argument on a point of law, or information, not so raised, and

(c)an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.

(2)Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

[2] The report states that the term serious violence is used to refer to murder, manslaughter and homicide.

[3] The report uses this term to refer to those convicted as joint principals as well as those convicted as secondary parties, derived from the Homicide index applied by the Home Office, which is one source of the data used in the research.

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