Joint Enterprise: A relic of the British Empire & how the Black Lives Matter movement presents an opportunity to revisit the substantial injustice test.

Garden Court Chambers

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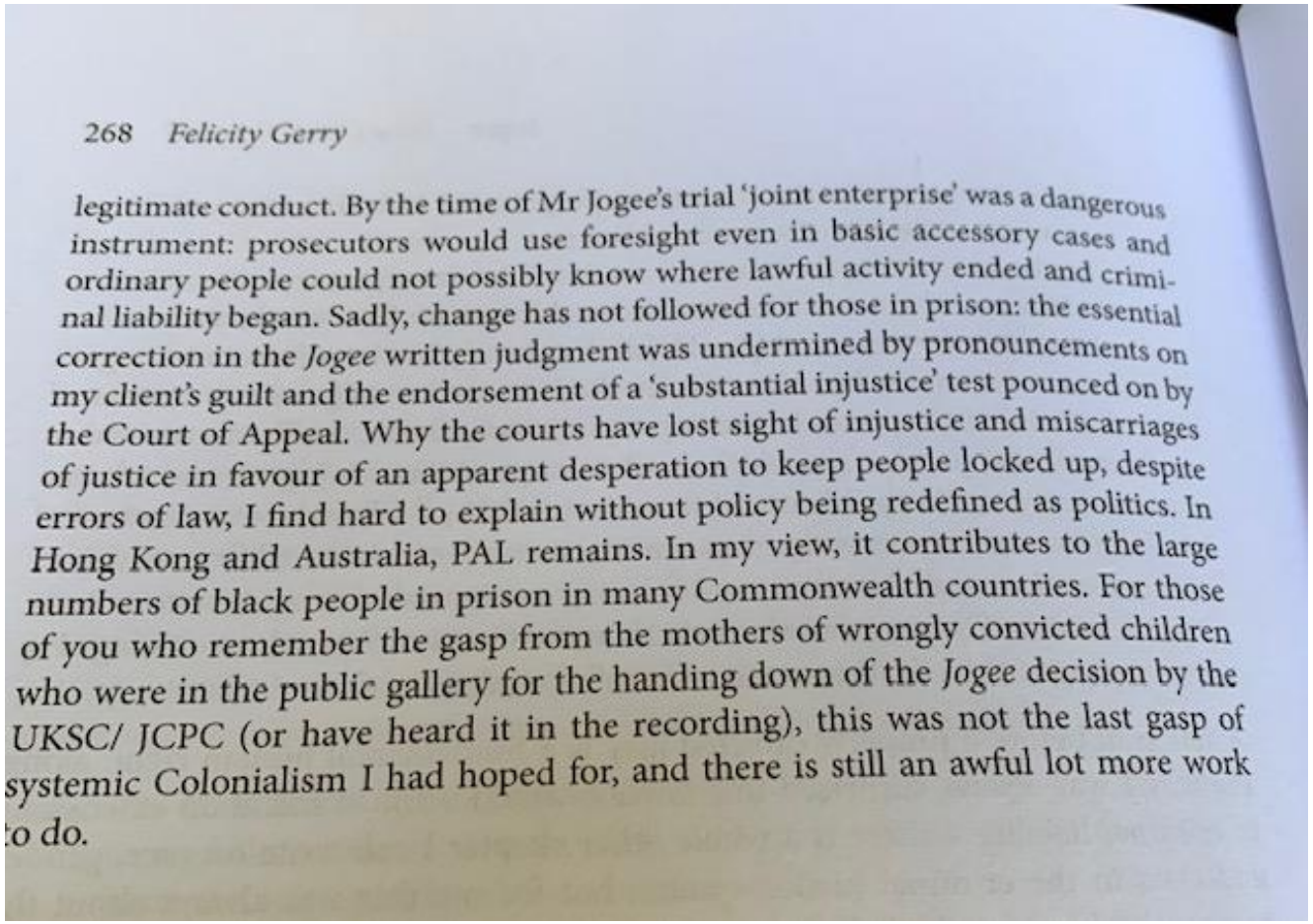
Professor Felicity Gerry QC

Book: Accessorial Liability after Jogee. Chapter 11.



legitimate conduct. By the time of Mr Jogee's trial 'joint enterprise' was a dangerous instrument: prosecutors would use foresight even in basic accessory cases and ordinary people could not possibly know where lawful activity ended and criminal liability began. Sadly, change has not followed for those in prison: the essential correction in the *Jogee* written judgment was undermined by pronouncements on my client's guilt and the endorsement of a 'substantial injustice' test pounced on by the Court of Appeal. Why the courts have lost sight of injustice and miscarriages of justice in favour of an apparent desperation to keep people locked up, despite errors of law, I find hard to explain without policy being redefined as politics. In Hong Kong and Australia, PAL remains. In my view, it contributes to the large numbers of black people in prison in many Commonwealth countries. For those of you who remember the gasp from the mothers of wrongly convicted children who were in the public gallery for the handing down of the *Jogee* decision by the UKSC/ JCPC (or have heard it in the recording), this was not the last gasp of systemic Colonialism I had hoped for, and there is still an awful lot more work to do.

Petitions

- **Alex Henry**
  https://www.carmelitechambers.co.uk/news/petition-mercy-filed-case-alex-henry
- **Asher Johnson**
  https://www.carmelitechambers.co.uk/news

Themes

- Exploring the concept of complicity through selected cases and history and how the law has responded in a discriminatory way to groups or gangs and how the courts lost sight of the presumption of innocence and denied access to justice.
- The problem with complicity is that legislators and courts extend / widen liability which creates a **danger of overcriminalisation** – that is punishing people on the periphery of events - rather than those truly responsible. The knock -on effect is the **mass over incarceration** of BAME people in a 'drag-net' of guilt by association who are then locked up, having made no significant contribution to the crime and with no real meeting of minds with the main offender.
- In assessing people - rhetoric / discrimination and prejudice
- There is a long history of desperation to convict.

Common Law Complicity

- Agreement to Pursue a Common Purpose (Joint Criminal Enterprise)
- At common law, when two or more people intentionally agree to pursue a criminal enterprise, each person will be liable for the criminal acts of the others to the agreement.
- There are two distinct ways in which a person could be liable for taking part in such an enterprise:

(a) By taking part in a "joint enterprise" or

(b) accessorial liability.

Common Purpose (Joint Criminal Enterprise)

- Joint enterprise requires the accused to have **intentionally agreed** to pursue a joint criminal enterprise, to have participated in that enterprise in some way, and for a party other than the accused to have committed an offence within the scope of the agreement.
- **The law in E & W is subjective intention.**
- **In murder an agreement to kill or cause really serious harm.**

Felony Murder Rule

- **Rightly abolished in E & W.**
- This law is objective ('foreseeable' probable consequences).
- In the US this has led to more than one young black teen being convicted of murder when a police officer shot and killed his friend – stretched far beyond individual liability.

Extended Common Purpose (Parasitic Accessorial Liability)

- After the abolition of the felony murder rule the courts created an additional form of liability "extended common purpose" based on foresight of possibilities. This extension lower than felony murder. It was always an 'error' of law. It was an 'error' in *Chan Wing Sui* but it was **deliberately** adopted in *Powell & English*. **The result is mass incarceration of wrongly convicted people which has had a particular effect on BAME youth.**
- Where the offence committed was not planned by the accused, PAL "extended" liability outside of the common purpose of the parties. This required the accused to have agreed to pursue a criminal enterprise (crime A), for the accused to **foresee the possibility** that another party to the agreement would commit an offence other than those within the scope of the agreement, and for a party other than the accused to have committed the foreseen offence in the course of carrying out the agreement (crime B).

Jogee

- Our case of **Jogee** was important because the grounds of appeal did not just challenge that his conviction was unsafe but also challenged the law on complicity – asking that PAL be removed as it 'overcriminalised' secondary parties and was contrary to the foundations of criminal law.

- ***The UKSC expunged PAL and restated the test for complicity:*** Did D know the essential facts and do acts which demonstrate a subjective intention to assist or encourage murder (**Jogee** - from outside the house where the killing occurred – when he said 'come on let's go'. See also Derek Bentley 'Let him have it').

- **Australia and Hong Kong** have deliberately ignored foundations of law and retained EJCE / PAL – see cases of *Spilios / Miller, Presley and Smith* and *Chan Kam Shing.*

Accessorial Liability

- The common law also punishes an accessory, who was a person who was linked in purpose (knew the essential facts) with the person who committed the offence, and intentionally acted to bring about the commission of the offence.
- An accessory may assist or encourage the person who commits the offence by counselling or procuring the principal offender prior to that person committing the offence; or aiding or abetting the principal offender at the time that person commits the offence. There is no need to prove the existence of an agreement between the accessory and the principal offender. The lack of an agreement is what distinguishes aiding, abetting, counselling or procuring from other forms of complicity.

Mandatory Sentencing

- The harshness of mandatory sentencing in murder for accessories is the imposition of a mandatory life sentence.
- See petitions:
- Zak Grieve In Australia: a young Aboriginal man sentenced to life imprisonment when he was not present at the killing and had withdrawn.
- Johnson – jury wrongly directed on complicity and not directed at all on withdrawal.
- Henry – jury wrongly directed on complicity and diagnosis of autism rejected where no contrary medical evidence
- Mandatory sentencing associates those not involved with condign punishment, particularly BAME youth. Wrongful pursuit of convictions for murder in multi handed cases is a miscarriage of justice.

Appeals

- The UKSC in Jogee **deliberately** raised the bar for those affected to appeal. The substantial injustice test wrongly requires an applicant for leave to appeal to prove they 'would not have been convicted'. They are denied access to justice at the leave stage and arguably a return to the abolished 'proviso' at the leave stage.
- **The result is continued mass incarceration of wrongly convicted people which has had a particular effect on BAME youth. Asher Johnson's case is prime example. Also includes vulnerable people e.g: Alex Henry with Autism.**
- **CCRC is neutered**

Ongoing cases wrong law

- The errors continue with failures to apply subjective liability. The law is NOT objective so inferences drawn must be on what D knew not what "must have been" known.
- An 'obviously in it together' approach fundamentally impacts on presumption of innocence.
- Police and CPS guidance is not clear on this issue.
- Prosecutors appear to be either (a) seeking to prove some form of 'tacit' agreement in spontaneous cases which was exactly the error in Chan Wing Sui or (b) running the types of complicit liability together which is not permissible as they are two distinct forms of liability. It is not just about levels of evidence but about legal principle.
- Judges must prohibit expansive approaches to circumstantial evidence and bad character because it risks objective conclusions (which are generally biased / prejudicial).
- **The result is continued overcriminalisation and over incarceration of wrongly convicted people which has had a particular effect on BAME youth.**

Ongoing cases wrong approach

- The different types of complicity can be confusing for juries. Each category should be treated separately, and should only be introduced into a trial if it is necessary. If the prosecution has only sought to attribute responsibility to the accused in one particular way (e.g., as principals acting in concert), and the trial has proceeded entirely on that basis, the judge should not introduce the possibility of convicting the accused on a different basis (e.g., as aiders and abettors) in his or her summing up. This denies the accused the opportunity to meet the case against them.
- **This injustice occurs when the prosecution take a "wait and see" approach and where judges do not clearly explain the differences between the different categories.** The jury must be sure that the actions of the accused meet all the elements of one category before they convict. Not sure = NG

Routes to verdict

- It is only necessary to introduce the issue of complicity if the prosecution seeks to attribute the conduct of a principal offender to a co-offender, or if the identity of the principal offender is unknown.
- Where the principal offender may be found guilty of a lesser charge, the jury may need to be directed about any viable bases of accessorial liability for those alternative verdicts.
- Judges should create a route to verdict that is clear so that the jury consider whether they are sure an agreement to pursue a criminal enterprise has been established before they consider the issue of accessorial liability.
- **Injustice also occurs if** the elements of manslaughter are not specified in summing up – routes to verdict appear to be on the basis ' if you reach this point it 'is' manslaughter, rather than 'go on to consider manslaughter'.

Appeals

- Defendants are either not appealing or
- The appeal courts are wrongly refusing leave.

Asks?

- Release the 900
- Royal Commission into 'joint enterprise' to include disproportionate effects on black and vulnerable people.
- Removal of mandatory sentencing, at least for those convicted as accessories.
- Removal of the SI test and leave to be granted as of right where issue is error of law. Charlotte Henry's Bill asks for this.
- Training for police and prosecutors and judges – like compulsory sexual offence training where they have to confront the criminology on racism and bias.
- Requirements on the police / prosecution in ongoing cases to specify roles.
- Guidance for judges to ensure foresight is used as a confining mechanism and not expansively. Requires causal connection / significant contribution. More than mere presence is not enough.
- Restrictions on inferences – ensuring subjective not objective and not possibilities. Trial monitoring program would be good.