

The ... JOGEE ... effect

John Crilly's release in April 2018 marks the only conviction quashed as a result of *Jogee*. Paul Taylor QC considers the evolution of the law on joint enterprise and impact on potential appellants convicted under the 'old law'

For some, the terms 'Joint Enterprise' and 'Parasitic Accessory Liability' (PAL) trigger a sense of injustice. The unfairness is felt most acutely in murder cases because of what has been described as the prosecution's 'obvious and profound advantage' of being able to secure the conviction of defendant A on the limited basis that, having been a secondary party to a joint enterprise with P (Principal) to commit a lesser crime than murder, A realised that P might commit GBH or kill with intent, even if A did not intend this and even if A pleaded with P not to act in that way (see 'CFA finds "no wrong turning": Michael Jackson, *Hong Kong Lawyer*, March 2017).

In 2016, the PAL doctrine was abolished in England, Wales and the Caribbean (although retained in Hong Kong and Australia) when the Supreme Court, sitting in a conjoined appeal also as the Privy Council, 'clarified' the previous understanding of the common law (*R v Jogee* [2016] UKSC 8 [87]). That decision stated that a defendant charged as a secondary party to murder can only be convicted if he participated with the *intention* to encourage/assist P to commit the offence with the required *intent* to kill or cause GBH. At that point in time, a simplistic summary of *Jogee* may have been: 'In 1985 the law on joint enterprise took "a wrong turn". Thirty years later it was put right.' The next question would have been: what about the safety of historic convictions based on the old, pre-*Jogee*, law? The Supreme Court quickly suppressed any hope of wholesale correction. 'The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down' previously (*Jogee* [100]). Moreover, in line with the Court of Appeal's previous approach to managing appeals based on a clarification of the law (See Rose LJ, *R v Kansal (No 2)* [2001] 3 WLR 751, *Jogee* [100], *Johnson* [19]), additional hurdles were put in place in order to stem a potential flood of historic applications, and to meet 'the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law' (*Johnson, Garwood, Green and others* [2017] 4 WLR 104 at [18]).

Out of time post-*Jogee* appeals

In all post-*Jogee* out of time appeals – that is, those lodged later than 28 days from the date of conviction, and all second appeals brought via the Criminal Cases Review Commission (CCRC) see *Johnson* [15] – an applicant requires 'exceptional leave', and this will only be granted if the applicant can demonstrate that, as the result of the change in the law, s/he has suffered 'a

substantial injustice'. This was described as 'a high threshold' (*Johnson* [20]). In *Johnson*, the first murder appeals following the *Jogee* clarification, the Court of Appeal set out the approach to 'exceptional leave':

- i. The court was not interested in either the merits of the case to see if the change in the law *might* have made a difference to the verdict ([15] emphasis added), nor whether the applicant suffered some adverse consequences as a result of a conviction, even if this was the stigma of a murder conviction ([16], [17]).
- ii. The court was interested in '[T]he strength of the case advanced that the change in the law *would, in fact, have made a difference*' ([21] emphasis added). The court will ask 'Can it therefore be said that there is a sufficiently strong case that the defendant *would not* have been convicted of murder if the law had been explained to the jury as set out in *R v Jogee*?' ([191] emphasis added).
- iii. In determining this question, the court will consider the following factors: 'If 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, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct.' [21]

A restrictive approach

The consequence of this restrictive approach has been that, despite 30 years of erroneously applying the common law in this area, only one conviction has been quashed and only three have been referred back to the Court of Appeal by the CCRC. (The reference appeals have not been heard at the time of writing.) The other applications for leave have all been refused on the basis that no substantial injustice has been demonstrated. So, although perhaps understandable in terms of case management, the exceptional leave approach has not provided any consolation to those who



Since Ameen Jogee's (left) successful appeal in 2016, just one joint enterprise murder conviction has been quashed and three referred to the CCRC



Campaign groups such as JENGBA are taking up the joint enterprise cause

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may have been wrongly convicted of murder (because the Supreme Court accepted that the law had been wrongly applied for 30 years) under the old law but whose appeals have been stopped short by the strictures of this test. In the words of Lord Akin: 'Finality is a good thing, but justice is a better.' (*Ras Behari Lal v King-Emperor* [1933] All ER 723, 726) Consequently, on the basis that an unsafe conviction resulting from a change in the law is as much a miscarriage of justice as other unsafe convictions, it is arguable the additional stringent criteria are unfair and risk preventing meritorious applications from succeeding for the following reasons:

- i. The certainty with which an applicant is required to show the detrimental impact of the change in law on his conviction is far more onerous than in other appeals. The need to show that he 'would not' have been convicted under the new law contrasts with the usual need to show that a misdirection 'might have' made a difference to the verdict (*Graham* [1997] 1 Cr App R 302, 308 per Lord Bingham CJ, a conviction is unsafe if the CACD '... is left in doubt whether the Appellant was rightly convicted of that offence or not'). As Professor Ormerod QC has pointed out: 'Indeed, if the evidence is such that D 'would not' have been convicted of murder then presumably it would be inappropriate for there to be a retrial for murder?' (CALA Conference paper, November 2017, para 2.20.)
- ii. The higher test also brings with it a greater danger that the Court of Appeal will need to speculate improperly about the jury's reasoning and the potential impact that the 'old law' misdirection would have had (see *Pendleton* [2002] 1 Cr App R 34 [16-19]).
- iii. The requirement for the court to 'have regard to... whether the applicant was guilty of other, though less serious, criminal conduct' may cause particularly serious injustice. The fact that an applicant may be not guilty of murder but guilty of manslaughter should not be a basis for denying that she suffered a substantial injustice. As has been pointed out, there is a qualitative difference between being labelled as a murder and a 'manslaughterer' as a matter of both label and sentence (see *Jogee – Not the End of a Legal Saga but the Start of One?*: Ormerod, Laird: [2016] Crim LR 539, 551).
- iv. The use of the date on which the application for leave was lodged as the sole criteria for triggering the far stricter 'substantial injustice' test can lead to arbitrary results. The court in *Johnson* demonstrated this unfairness when it stated on the one hand that: 'It is not... in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice' [21], but on the other recognised that to apply the 'substantial injustice' test to applicants who had sought leave to appeal *within* 28 days of conviction on the non-*Jogee* grounds, but required an extension of time in respect of the *Jogee* grounds, would 'be unjust' ([84] emphasis added).

Mr Crilly's successful appeal

But despite (or perhaps because of) these challenges, there has been one successful post-*Jogee* appeal. Mr Crilly [C] sought leave to appeal, out of time, against his 2005 murder conviction ([2018] EWCA Crim 168). The Court of Appeal accepted that the most likely factual scenario was that C went with two others (F and G) to burgle what was believed to be an unoccupied flat but discovered the elderly occupier, M, in the living room. From then on C's role was limited to searching the bedroom. He shouted at F to leave on two occasions, helped M when F pushed and later punched M. C left and waited outside for ten minutes. The prosecution case that was put to the jury was that the men were a party to an assault with intent to rob. In cross-examination of C, the prosecution focused on the issue of his foresight that grievous bodily harm would be caused and intended by the other two. The court allowed the appeal on the basis that this was not planned as a robbery and no violence was initially intended; C was not accused of intending or foreseeing any violence when they arrived at the flat, nor of inflicting the violence, or intending to cause grievous bodily harm. The violence was limited. The case against the applicant was to all intents and purposes a case about his foresight. 'The evidence against him was not so strong that we can safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm had the issue been left to them by the judge.'



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General principles and the future

Is it possible to discern any general principles as to when the Court of Appeal is most likely to quash a conviction as a result of the post-*Jogee* clarification? On the basis of the one case in which the court did, the positive factors are likely to be the absence of a weapon and any initial agreement to do violence, attempts to stop the violence by others and to withdraw, and limited violence.

What is the answer to those who argue that the 'substantial injustice' test is an impediment to achieving justice? In *Garwood, Miah and Hall* [2017] EWCA Crim 59 the applicants attempted unsuccessfully to bring the 'substantial injustice' test back before the Supreme Court to review and clarify. The Court of Appeal refused to certify a question because it had no jurisdiction to do so because there had been no 'appeal', only applications for leave. As a result, it seems that the Supreme Court is unlikely to be troubled by the issue any time soon unless the Court of Appeal grants leave but then dismisses the appeal which is an unlikely scenario in light of the comments in *Johnson* that '... if the threshold required to justify exceptional leave to appeal is reached, it is likely to be difficult to conclude that the conviction remains safe' [23], or, as suggested by Prof Ormerod, the CCRC refuses to refer a case based on *Johnson*, that decision is judicially reviewed and then appealed by 'leap frogging' to the Supreme Court, on the basis that the 'substantial injustice' test has been misinterpreted. Failing that the alternative would be legislation, although in light of Parliament's refusal to act prior to *Jogee* it seems an unlikely scenario now. ●

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Paul is a member of Doughty Street Chambers, London. The author is grateful to James Wood QC for their discussion on the current state of the law, and to Professor Ormerod QC for his comments on a draft of this article. Any errors are his own.