Howard League for Penal Reform

Joint Enterprise (Significant Contribution) Private Members' Bill

Second Reading – 2 February 2024

Howard League Briefing

The Howard League for Penal Reform is a charity working for less crime, safer communities and fewer people in prison. Established in 1866 and named after the prison reformer John Howard, the charity was at the forefront of the campaign to abolish capital punishment and helped to create the probation service. Today, through research, campaigning and legal work, and with the support of our members, including members in prison and their families, we promote solutions that deliver better justice and minimise the harms of prison, for prisoners, victims and society at large.

Introduction to the Bill

The Joint Enterprise (Significant Contribution) Private Members' Bill was presented to Parliament on 6 December 2023 by Kim Johnson MP. It will "*amend the Accessories and Abettors Act 1861 to provide that only a person who directly commits, or who makes a significant contribution to the commission of, an offence may be held criminally liable."*

The Howard League has long campaigned against injustices associated with joint enterprise prosecutions. As such, we support this Bill, which seeks to narrow the scope of secondary liability and put an end to the conviction of people who have made no significant contribution to an offence.

The problem this Bill seeks to address

The term "joint enterprise" is typically used to describe a form of secondary criminal liability where two or more parties can be convicted of an offence. At its core is the idea that a secondary party can and should be convicted of the offence that a principal party has committed, even if the secondary party has not themselves committed the offence but has instead "aided, abetted, counselled or procured" the principal party to do so.

An example of this would be where two people agree to rob a bank together, carrying guns and prepared to shoot the cashier if necessary. Most people would agree that there is no material difference in culpability between the person who shot the cashier and the person who shot and accidentally missed.

However, there are circumstances in which secondary parties have been found to be liable for offences committed to which they have made no meaningful contribution, including cases where they were not present at the scene of a spontaneous fight or where they were in an abusive relationship with the principal. They are convicted and receive the same sentence as the 'primary'.

Of particular concern is how these principles apply in cases of murder. The broad scope of secondary liability in joint enterprise cases is at odds with the public's understanding of what it means for someone to be culpable of murder – in particular, that you could be convicted of murder without having made any significant contribution to the commission of the offence - and the mandatory imposition of a life sentence for both principals and secondaries convicted of murder amplifies this discordance.

While there is no official data – neither the CPS nor the courts currently routinely capture who is a principal or a secondary party in joint enterprise cases – the data that exists suggests Black men are overwhelmingly likely to be convicted as a secondary party in a joint

enterprise. Data from a recent Crown Prosecution Service (CPS) pilot showed that 30 per cent. of defendants in joint enterprise cases were Black, most aged 18-24, despite Black people comprising just four per cent. of the general population.

A study published in 2022 found that over a thousand secondary suspects were convicted of murder or manslaughter in the ten-year period to 2020; and that "*those from minority ethnicity communities, particularly the Black community, are consistently over-represented in multi-defendant prosecutions and convictions for homicide."* Significantly, His Majesty's Prison and Probation Service (HMPPS) does not record data relating to those prisoners convicted on the basis of secondary liability and there is poor understanding of what it is like to serve a life sentence as a convicted secondary party, or its intersection with a prisoner's racial identity.

Our experience of working with, and talking to, young people convicted of murder on a joint enterprise basis tells us secondary liability often comes at a high personal cost, including mistrust of 'the system' and difficulty in engaging with systems and programmes in prison that require acceptance of guilt/personal responsibility. David Lammy MP noted in the Lammy Review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic (BAME) individuals in the Criminal Justice System that he "*met many BAME prisoners harbouring grievances about their sentences, often because they knew others who they believed had committed similar offences, but received quite different sentences*" (Lammy, 2017). In our experience, a not-dissimilar sense of grievance can also arise in the context of secondary liability for murder, particularly when the person with secondary liability was far removed physically or otherwise peripheral to the act.

Any visit to a 'lifer prison' inevitably involves conversations with large numbers of people - in our experience, predominantly Black men - who have been convicted of murder as secondary parties. They speak of their initial confusion that they could be convicted of something that they didn't do, with this disbelief ultimately giving way to a deep sense of injustice. One of our members currently serving in a category B prison recently wrote to us and said "*I'm serving 31 years for a crime I didn't do due to the horrific law which is joint enterprise."* Another member in another category B prison is serving 25 years under joint enterprise, and tells us "*joint enterprise has led to a massive rate of convictions among young people…these cases go against what is humanely justified."*

Details of the Bill

The Joint Enterprise (Significant Contribution) Bill was drafted by Felicity Gerry KC, Nisha Waller and others, in discussion with Joint Enterprise Not Guilty by Association (JENGbA). JENGba are a collection of campaigning family members of those convicted through joint enterprise. They work extensively to raise awareness of the injustice, understand the data such as it exists and campaign for more meaningful appeals for those incarcerated.

The Accessories and Abettors Act 1861 specifies that anyone who "*shall aid, abet, counsel, or procure the commission"* of an offence shall be prosecuted as a principal offender. The Joint Enterprise (Significant Contribution) Bill would instead require that someone must make a "*significant contribution"* to an offence to be criminally liable as a secondary party. This should narrow the circumstances in which a person can be found to be liable for an offence committed by another person. It would not prevent the former person being prosecuted for alternative charges; nor would it prevent the prosecution of multiple people for a crime in which they all made a significant contribution. The Howard League supports Kim Johnson's Bill as mitigation against the unfairly broad application of the principles of secondary liability today and in the future.

Other work around joint enterprise in Parliament

The Criminal Appeal (Amendment) Bill

The Criminal Appeal (Amendment) Bill, presented by Barry Sheerman MP, was introduced to Parliament in September 2022. It sought to give a right to appeal to those convicted as secondary parties to a joint enterprise on the basis of an incorrect application of the law, but the Bill did not progress past first reading.

That the net of secondary liability had been cast too widely was recognised by the Supreme Court in 2016 in *Jogee*, which considered a particular type of secondary liability: "parasitic accessory liability". Under the doctrine of parasitic accessory liability, it had been held that it was sufficient if a secondary party *foresaw* that the principal party might intentionally kill or seriously harm the victim to themselves be guilty of that more serious offence. In *Jogee*, the Supreme Court clarified that a secondary party had to *intend*, not just foresee, that the other party might commit the relevant offence in order that they could be convicted of that same offence.

However, despite the law having taken this "wrong turn" for some 30 years, it has proved almost impossible for anyone affected by the incorrect application of the law to appeal their conviction successfully. The threshold adopted by the Court of Appeal for out of time appeals on the basis of a change in law – that the person must show a "substantial injustice" - is so high, that since *Jogee,* there has only been one successful appeal out of time, with the rest refused leave to appeal on the basis that no substantial injustice has been shown. What is more, the application of this test is so stringent that it is preventing referrals to the Court of Appeal being made by the Criminal Cases Review Commission (CCRC): our understanding is that only five cases have ever been referred back to the Court of Appeal, Criminal Division by the CCRC, with one further referral to the Northern Ireland Court of Appeal last year.

The Criminal Appeal (Amendment) Bill aimed to improve the substantial injustice test, through "*amend[ing] the Criminal Appeal Act 1968 to allow leave to appeal an unspent conviction where there has been a material change in the law, notwithstanding the date of conviction; and for connected purposes."* Broadly, the Criminal Appeal (Amendment) Bill sought to enable appeals against unspent convictions based on the incorrect understanding of the law pre-*Jogee*, without having to pass the strict criteria set by the substantial injustice test. It also sought to remove the 28-day time limit for such change of law cases.

Although the Criminal Appeal (Amendment) Bill did not progress, the Howard League agrees that it is important to create more opportunities for appeal for those convicted based on an incorrect understanding of the law would make a positive start at righting the wrongs caused by the Courts' "wrong turn" pre-*Jogee*. This could be done via a revived Criminal Appeal (Amendment) Bill or through another legislative proposal. It is worth noting that the Law Commission is presently conducting a review into Criminal Appeals, which will consider the substantial injustice test. A consultation paper will be published later this year, which will include provisional proposals for change.

Amendments to the Criminal Justice Bill

We note that an amendment was tabled to the Criminal Justice Bill by Peter Dowd MP which mirrored the measures of the Joint Enterprise (Significant Contribution) Bill. The amendment, however, was withdrawn during committee stage on 30 January 2024.

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