

Joint enterprise: Putting the law right

Celia Marr and **Diana Czugler** discuss the recent judgment reforming elements of the law on joint enterprise, the latest on disclosure of criminal records, and the revised allocation guidelines



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In the latest case on disclosure of criminal records, the High Court held that the current enhanced disclosure regime is incompatible with article 8 of the European Convention on Human Rights (ECHR). *R (on the application of G) v Chief Constable of Surrey Police and others* [2016] EWHC 295 (Admin) considered the proportionality of disclosing on an enhanced disclosure check a reprimand given to G, aged 13, under section 13 (in conjunction with section 9) of the Sexual Offences Act 2003.

The applicant in this case did not dispute that offences under that section ought properly to be disclosed under the enhanced disclosure regime but disputed the 'justification for and proportionality of the statutory scheme' where he had no mechanism to argue that its disclosure was irrelevant or unnecessary.

G relied on, and Mr Justice Blake accepted, the reasoning of Lord Justice McCombe in the recent decision of *R (on the application of P and A) v Secretary of State for Justice* [2016] EWHC 89 (Admin), in which the court reached the conclusion that the Police Act 1997 in its current form failed to satisfy the requirements of article 8 of the ECHR. McCombe LJ concluded that the existing disclosure scheme did not have sufficient safeguards in place to assess the relevance and proportionality of disclosure.

In handing down judgment, Blake J referred to the extensive number of enhanced disclosure and barring service (DBS) checks made in recent years and highlighted that labelling G as a sexual offender would likely have a 'fatal' impact on his employment prospects. He referred to the

comments of the disclosure officer employed by the chief constable: 'This is a strange situation in that it is the automatic disclosure of the [Police National Computer] record that would likely provide an unfair picture of events causing the potential adverse effect on the applicant. In view of the lack of a specific risk this potential adverse effect is disproportionate when viewed alongside the applicant's rights.'

While Blake J made no determination as to whether disclosure would have been unjustified and disproportionate if the current disclosure regime was flexible enough to accommodate a proper consideration of the facts, he concluded: 'I am satisfied the absence of any procedure enabling these matters to be examined by the decision maker before the case proceeds to this court results in the statutory regime being incompatible with the claimant's rights. I, therefore, propose to grant declaratory relief.'

Joint enterprise law

The Supreme Court and the Privy Council handed down their joint judgment in the cases of *R v Jogee (Appellant)* [2016] UKSC 8 and *Ruddock (Appellant) v The Queen (Respondent) (Jamaica)* [2016] UKPC 7 on 18 February 2016, reforming elements of the common law on joint enterprise. Both appeals concerned intent in cases where a defendant was accused of being a secondary party to a criminal offence other than the one they had originally set out to partake in.

The doctrine of joint enterprise is a well-established form of secondary liability under English criminal law, used to prosecute secondary

parties who assist or encourage another to commit a criminal act. Under joint enterprise law, a secondary party, also referred to as an accessory or an accomplice, may be held liable for the substantive offence, alongside the main or principal offender who physically commits the act.

The cases of *Chan Wing-Siu v The Queen* [1985] AC 168 and *R v Powell and R v English* [1999] 1 AC 1 extended the doctrine of joint enterprise to cover cases where the secondary defendant foresaw the possibility that the principal offender might commit the criminal offence being tried, irrespective of whether the secondary defendant had actually intended for the offence to be committed.

Professor Sir John Smith coined the phrase ‘parasitic accessory liability’ (*Law Quarterly Review* [1997] 113 LQR 453) to describe instances where an accessory’s conduct without intent for the specific criminal offence was brought within the scope of joint enterprise law using the foresight principle. Parasitic accessory liability has been used to establish *mens rea* in cases where the defendants had set out together to commit a certain offence, but the principal offender ended up committing another offence.

The appellants in *Jogee* and *Ruddock* were each convicted of murder through the joint enterprise doctrine, after the respective trial judges had handed down directions to the jury on foresight being sufficient to establish secondary liability, in line with *Chan Wing-Siu*.

Jogee was convicted of the murder of a former police officer, which took place while he was encouraging the principal offender to assault the victim from outside the crime scene in Leicester. *Ruddock* was found guilty of murder in Jamaica, following his participation in a robbery where his co-defendant had already admitted to cutting the victim’s throat.

The appellants argued that the court had taken a wrong turn in *Chan Wing-Siu* in holding that foresight was sufficient to establish *mens rea* for secondary defendants in murder cases, and that subsequent decisions erred in following the parasitic accessory liability principle. The respondent disputed the appellants’ propositions and argued that, in any case, it should be a matter for the legislature to decide whether to make any changes to well-established legal principles.

The Supreme Court and the Privy Council unanimously allowed the appeals, holding that the law did indeed take a wrong turn with *Chan Wing-Siu*. The courts laid down the correct rule as foresight being ‘simply evidence (albeit sometimes strong evidence) of intent to assist or

encourage, which is the proper mental element for establishing secondary liability’. However, the courts emphasised that the change in law only affects a ‘narrower sub-part’ of the joint enterprise doctrine, where a second, unintended criminal offence takes place, with the basic rule standing unchanged.

The new interpretation of parasitic accessory liability will apply to England, Wales, and Northern Ireland, as well as most UK overseas common law territories.

Revised allocation guidelines

The Sentencing Council has issued revised guidelines for allocation, effective from 1 March 2016. The guidelines state that either way offences should be tried summarily, unless ‘the outcome would clearly be a sentence in excess of the court’s powers for the offence(s) concerned after taking into account personal mitigation and any potential reduction for a guilty plea; or for reasons of unusual legal, procedural, or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a very substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific; the court will rely on the submissions of the parties to identify relevant cases.’

While the underlying message of the guidelines remains unchanged, the revision emphasises that either way offences should, in general and where appropriate, be tried in the magistrates’ court.

Additionally, the magistrates’ courts are instructed that ‘in cases with no factual or legal complications the court should bear in mind its power to commit for sentence after a trial and may retain jurisdiction notwithstanding that the likely sentence might exceed its powers’.

The magistrates’ courts’ power to commit to the Crown Court for sentence after a conviction on summary trial remains available where ‘the court is of the opinion “that the offence or the combination of the offence and one or more offences associated with it was so serious that the Crown Court should, in the court’s opinion, have the power to deal with the offender in any way it could deal with him if he had been convicted on indictment”’. This highlights that, in cases where a summary trial is deemed appropriate, defendants will still need to bear in mind that the final sentence imposed may be in excess of the powers of the magistrates’ court.

Finally, the new guidance does not restrict the ability of defendants to elect for their case to be sent to the Crown Court for trial, and therefore the number of either way offences tried on indictment may not ultimately be affected. **SJ**



The court held that the current enhanced disclosure regime is incompatible with article 8