Assessing the impact of the Supreme Court’s decision in *R v Jogee* through an exploration of the Jury’s Assessment of ‘Inferring Intention’ in Joint Enterprise cases.

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Introduction

Part 1
• Overview of the doctrine of Joint Enterprise in English Law, and the UK Supreme Court’s decision in *R v Jogee*.

Part 2
• Inferring intention and the concept of intentionality.
• Psychological and social factors impacting on a juror’s assessment of evidence to infer intention.
Part 1

Overview of the doctrine of Joint Enterprise in English Law, and the UK Supreme Court’s decision in *R v Jogee*. 
The Doctrine of Joint Enterprise

• The England and Wales Crown Prosecution Service in 2012 recognised three main types of joint enterprise:

1. Where 2 or more people embark on a joint venture to commit a single crime – joint principals (Anderson and Morris [1966]).

2. Where D (defendant) assists or encourages P (principal offender) to commit a crime – general accessory liability.

3. Where P and D participating together in committing a crime (crime A) and in the course of committing crime A, P commits a further offence (crime B) which D had foreseen as a possibility – parasitic accessory liability (PALs) (Chan Win-Siu [1985], and Powell and Daniels; English [1999])
## Pre-Jogee Criticisms of PALs

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<tr>
<th>Criticisms</th>
<th>Support</th>
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<td>Lack of clarity enabled the CPS to <strong>over-charge especially in gang related crimes</strong>, creating uncertainty and injustice.</td>
<td><strong>Widening the scope of the doctrine of joint enterprise was necessary to <strong>reduce the social problems of gang related crimes</strong></strong></td>
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<td>Created the potential to convict and sentence people on the basis of <strong>peripheral involvement</strong> in the crime due to the <strong>lower threshold of mens rea</strong> being applied.</td>
<td><strong>The doctrine of gang related crimes acts as a deterrent</strong> to young people joining or getting involved in gang-related crimes.</td>
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<td>Juries were <strong>overly willing to find foresight</strong> in PAL cases.</td>
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<td>Disproportionately used against young people and Black, Asian and Ethnic Minority groups.</td>
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Supreme Court’s Decision [2016]

• Held that:

(1) the Privy Council in *Chan Wing-Siu* and the House of Lords in *Powell and Daniels; English* had taken a **wrong turn in equating foresight with intention**.

(2) D will only be liable for the further offence if he **intended to assist or encourage P in committing the offence**. Foresight of the possibility that the further crime may be committed is not sufficient to satisfy the *mens rea* of secondary participation. **Foresight is merely evidence** from which the jury can infer that D intended to assist or encourage the commission of the further offence with the requisite *mens rea*. In reaching this decision the Supreme Court has returned the law to its position before the ‘wrong turn.’
Part 2

• Inferring intention and the concept of intentionality.

• Psychological and social factors impacting on a juror’s assessment of evidence to infer intention.
Inferring Intention

- Concept of intention in English law is complicated.
- Lack of clarity of the judge’s instructions on the meaning of intention.
- Juror’s ability & willingness to understand the Judge’s instructions
- Influence of non-legal factors.
What does the lay person understand by “intentionality”? 

• Intention, belief, desire, skill and awareness (Malle and Knobe 1997)

• Character of the accused (Sripada 2010)

• Seriousness of outcome, type of act, possible precautions (Duff 1990)
Blame and Moral Considerations

• Solan (2001) recognised that imposing blame hinges on whether:
  • the person’s act or outcome was viewed to be good or bad;
  • the person could be said to be responsible for the act or outcome.

• Knobe’s (2003) empirical study on intention and the influence of moral considerations - belief as to whether the behaviour itself was harmful or helpful.
Judicial Instructions and Weight

• Sommer, Horowitz and Bourgeois (2001)
  
  • Compliant & non-compliant jurors
  
  • Maximising & minimising evidence
Influence of Specific Evidence

- Gambetti, Nori and Giusbertu’s (2016)
  
  (i) motive,
  (ii) skill in use of weapons,
  (iii) previous violence against the victim.
Gang Evidence

- Eisen, Dotson and Olaguez (2014)
  
  - It is highly likely that affiliation or suggested affiliation with a gang will have a prejudicial effect on the juries determination of culpability.
  
  - This was even true when there was clear evidence of reasonable doubt.
Implicit Racial Bias

- *Implicit* racial bias exists within individuals regardless of their *explicit* racial attitudes.
- Jurors do not leave their implicit racial bias at the doors of the courtroom (Kang et al 2012)
- Racial bias may result in a juror forming a decision on guilt *prior* to hearing the evidence, and filtering the evidence heard during the trial *through that preconception*. 
Conclusions

• Juries are likely to continue to infer intention in joint enterprise cases where all or a combination of these factors are present:
  
  • Involvement in the joint venture to commit a different offence.
  • Knowledge or suspicion that an additional offence may be committed by P.
  • Bad character.
  • Experience at using weapons.
  • Race and/or class.
  • Affiliation with a gang.
What next?

• Mock jury study:
  • Juror’s comprehension of the judges’ direction on intention in joint enterprise cases.
  • Juror’s likelihood of convicting based on the type common purpose agreed.
  • Juror’s reliance on proper evidence e.g biases.
  • Juror’s consideration of other variables.
  • The effect of juror’s heuristic reasoning i.e. hindsight bias on inferring intention in joint enterprise cases.
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