



The impact of *R v Jogee*: An examination of applications to the Criminal Cases Review Commission (CCRC)

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Executive Summary

The focus of this research is to advance an understanding of the applications that the CCRC receives where the applicant has been convicted under joint enterprise liability. This involved reviewing 247 applications made between 2009 and 2020 from individuals convicted under joint enterprise, for convictions that ranged from 1978 to 2020.

This study explored:

- the type of joint enterprise that is the subject of applications to the CCRC;
- how the corrected law in *Jogee* is being used in applications;
- the number of applicants that had legal representation; and
- the demographic characteristics of applicants.

The conclusions, in summary are:

1. Individuals convicted as secondary parties to a joint enterprise form the highest number of applicants to the CCRC.
2. A low number of applications sought to use the corrected law in *Jogee* and argue a substantial injustice according to *Johnson*.
3. Although applicants are able to find legal representation, the quality of it varies and some advice appears misguided. This is especially true where *Jogee* is referred to for individuals convicted as joint principals or used alone without reference to substantial injustice.
4. A low number of applicants identify as Black British, where existing data suggests this demographic has the highest conviction rate as secondary parties.

As a result of these conclusions the recommendations made concern: the statutory real possibility test being placed in a framework of developing Court of Appeal Criminal Division (CACD) jurisprudence concerning substantial injustice, which specifically affects applications from secondary parties convicted using joint enterprise; how the CCRC should provide an advisory note to legal representatives where they use the corrected law from *Jogee* incorrectly; and the need for further research into the low number of applications from Black British men convicted as secondary parties despite existing research showing they are disproportionately represented in conviction rates.

Introduction

The Supreme Court's correction of the law concerning parasitic accessory liability (PAL) in the 2016 case *R v Jogee*¹ has had very little practical impact, especially for those individuals whose convictions used PAL prior to it being abolished. The Supreme Court made it clear that a faithful application of the law can only be set aside by showing a substantial injustice, but not on the basis that "the law applied has now been declared to have been mistaken".² The Court of Appeal Criminal Division (CACD) in the subsequent case of *Johnson and Others* addressed what constitutes a substantial injustice for out of time appeals resulting from the corrected law in *Jogee*, including those brought through the Criminal Cases Review Commission (CCRC).³ The CACD has bound the CCRC to carry out an examination of this legal approach taken by the court on the basis that it "predicts a real possibility of a successful appeal" so there is a requirement to demonstrate a "substantial injustice before an appeal should be permitted to progress".⁴

Following the abolition of PAL, the Crown Prosecution Service (CPS) placed a defendant's legal liability when two or more people are involved in a joint enterprise into two categories: principal liability and secondary liability.⁵ The New York Times recently suggested this was a rebrand of the joint enterprise principle.⁶ The Supreme Court was highly critical of the use of the term "joint enterprise" which in its view, is not a legal term of art and has been subject to public misunderstanding,⁷ but the phrase continues to be used by the CACD.⁸ A narrow interpretation of the term was attributed to situations that described PAL, but the CPS, as stated above refers to two categories. The research associated with this report examined applications made to the CCRC from individuals convicted where an aspect of joint enterprise was applied, predominantly before *Jogee* was decided. So as not to make an unnecessary distinction between applicants whose cases were heard after *Jogee*, this report will use the term joint enterprise. Where different aspects of joint enterprise liability are identified, these will be referred to as principal, joint principals, and secondary parties. It is, therefore, helpful to briefly discuss each of these.

A principal is someone who carries out the conduct element of the substantive offence. If two or more people do this together, they are identified as joint principals. As joint principals, the CPS need to prove that the offence was committed as a joint agreement. This need not be formally expressed verbally and can amount to a nod or behaviour from which an agreement can be inferred.⁹ A secondary party can also be prosecuted and punished as if they were a

¹ *R v Jogee* [2016] UKSC 8

² *Jogee* at [100]

³ *R v Johnson and Others* [2016] EWCA Crim 1613 [15]

⁴ *The Queen (on the Application of Anthony Davies) v The Criminal Cases Review Commission* [2018] EWHC 3080 (Admin) at [59]

⁵ Crown Prosecution Service Secondary Liability: Charging Decisions on Principals and Accessories <https://www.cps.gov.uk/legal-guidance/secondary-liability-charging-decisions-principals-and-accessories>

⁶ Bradley J, (2022) "The UK Doubles Down on a Tactic Disproportionately Targeting Black People" 12 November New York Times

⁷ *Jogee* [2016] at [77]

⁸ *R v Garwood* [2017] EWCA Crim 59 [2] and [17], *R v Brown* [2017] EWCA Crim 167 [41] and [54] and *R v Aradour* [2017] EWCA Crim 605 [16]

⁹ Crown Prosecution Service Secondary Liability: Charging Decisions on Principals and Accessories

principal offender under s8 Accessories and Abettors Act 1861.¹⁰ As will be seen from that legislation, other terms often used for these parties are “accomplices” or “accessories”.

A secondary party is described by the CPS as someone who aids, abets, counsels, or procures (often referred to as assists or encourages) someone to commit the substantive offence, without being the principal offender. A secondary party can also be prosecuted and punished as if they were a principal offender under s8 Accessories and Abettors Act 1861.¹¹

The liability of secondary parties in specific circumstances where a “person who agrees to commit a crime with another becomes liable for all criminal acts committed by the other person (the principal offender) in the course of their joint criminal venture”¹² used to be referred to as PAL. Prior to the decision in *Jogee*, the law was that if you were involved in the first crime and foresaw the possibility of the second crime being committed then you were also guilty of the second crime. It was parasitic because the second crime arises from the conduct of the first crime, the liability is dependent on the first crime. The Supreme Court corrected the law by reversing an earlier decision in the case of *Chan Wing-Sui*,¹³ effectively abolishing PAL. The test for secondary liability is now that the secondary party has encouraged or assisted the commission of the offence by the principal offender and intended the offence take place. Foresight returned to evidence of intention, rather than proof of common purpose.

Whilst initially the decision in *Jogee* was celebrated,¹⁴ its impact on those convicted using PAL has been minimal. In its 2017/18 Annual Report, the CCRC said it received 103 applications concerned with directions to the jury about joint enterprise following the decision in *Jogee*.¹⁵ In the same report, the CCRC also said it was considering the same arguments in a further 104 applications submitted before the Supreme Court’s ruling.¹⁶ From these 207 applications, the CCRC referred one case back to the CACD in 2017/18.¹⁷ In 2018/19 it referred a further three cases back to the CACD.¹⁸ These four referrals indicate that the remaining applications have fallen short in overcoming the “substantial injustice” test. The CCRC has stated that only in “the rarest of circumstances” will the high threshold be crossed.¹⁹

¹⁰ Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

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¹² House of Commons Justice Committee Joint Enterprise, Eleventh Report of Session 2010–12 at [7]

<https://publications.parliament.uk/pa/cm201012/cmselect/cmjust/1597/1597.pdf>

¹³ [1985] AC 168

¹⁴ Stark, F., 2016. The Demise of “Parasitic Accessorial Liability”: Substantive Judicial Law Reform, not Common Law Housekeeping. *The Cambridge Law Journal*, 75(3), pp.550-579; Knight, S., 2017. Joint enterprise in the wake of the *Jogee* verdict. *Socialist Lawyer*; Sjolín-Knight, C., 2016. Killing the Parasite in *R v. Jogee*. *Nottingham LJ*, 25, p.129; Dyson, M., 2017. Ever working in practice, but never in theory? The new English law of criminal complicity. *Zeitschrift für die gesamte Strafrechtswissenschaft*, 129(1), pp.232-263.

¹⁵ CCRC Annual Report and Accounts 2017/2018 p.20 https://ccrc.gov.uk/ccrc-annual-report-2017-18_web-accessible/ accessed on 2 November 2022 at p 20

¹⁶ CCRC Annual Report and Accounts 2017/2018 p.20

¹⁷ CCRC Annual Report and Accounts 2017/2018 pp 21-22

¹⁸ CCRC Annual Report and Accounts 2018/2019 p16

¹⁹ CCRC Annual Report and Accounts 2017/2018 p 21

The following research study was conducted in partnership with the CCRC. It seeks to advance an understanding of the applications that the CCRC receives where joint enterprise liability was applied. The study breaks down the type of joint enterprise that was used in the applicant's conviction, providing detail as to whether they used the decision in *Jogee* and argued a substantial injustice under *Johnson*. It examines the demographic characteristics (e.g. age at conviction, ethnicity) of applicants in addition to the number that were supported by lawyers. This is the first study to examine how the corrected law in *Jogee* and the application of substantial injustice from *Johnson* is being used in applications to the CCRC. It adds to and compliments the existing body of literature and reports that have drawn upon data from the CACD, CPS, Home Office and Ministry of Justice.²⁰

Joint Enterprise: The decision in *Jogee*

Joint enterprise has been and is applied to a number of wide-ranging situations, specifically where two or more people are parties to an offence and can be identified as principals and secondary parties.

The liability of secondary parties in specific circumstances “where D1 and D2 participate together in one crime (crime A) and in the course of it, D1 commits a second crime (crime B) which D2 had foreseen he might commit”²¹ used to be referred to as PAL. Prior to the decision in *Jogee*, the law was set down in a case called *Chan Wing-Siu*.²² In short, if you were involved in the first crime and foresaw the possibility of the second crime, then you were also liable for the second crime. It was parasitic because it was easier to convict someone of a second crime after the first, because the second was reliant on the first being committed. The Supreme Court corrected the law by reversing an earlier decision that had been made in *Chan Wing-Sui*, effectively abolishing PAL. Currently, the test for secondary liability is now that the secondary party has encouraged or assisted the commission of the offence by the principal offender and intended to encourage or assist it. Foresight returned to the role the Supreme Court said it should always have been: evidence of intention, rather than a sufficient standard on its own.

The decision did not invalidate convictions that had applied the law since 1984.

The Supreme Court stated that a faithful application of the law as it stood at the time could only be set aside by “seeking exceptional leave to appeal to the CACD out of time”.²³ This could only be done if a substantial injustice was demonstrated, but not because “the law applied has now been declared to have been mistaken”.²⁴ The decision to apply the test for

²⁰ Joint Enterprise, Murder and Substantial Injustice: The First Successful Appeal Post-Jogee: *R v Crilly* [2018] EWCA Crim 168. In The Journal of Criminal Law; Mills H, Ford M and Grimshaw R, “The usual suspects: Joint enterprise prosecutions before and after the Supreme Court ruling, (April 2022) Centre for Crime and Justice Studies; The Bureau of Investigative Journalism ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’ available at <https://www.thebureauinvestigates.com/stories/2014-03-31/read-the-report-joint-enterprise-an-investigation>.

²¹ *R v ABCD* [2011] QB 841 per Hughes LJ at [9]

²² [1985] AC 168

²³ *Jogee* at [100]

²⁴ *Jogee* as above

substantial injustice results from the public interest in “legal certainty and the finality of decisions made in accordance with the then clearly established law.”²⁵ In the subsequent case of *Johnson*, the CACD addressed what constitutes a substantial injustice for out of time appeals concerning individuals convicted as secondary parties, including those brought through the CCRC.²⁶ In making this determination, the CACD said it would “have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference”.²⁷ The correction of the law in *Jogee* did not demonstrate a substantial injustice,²⁸ as Felicity Gerry described in 2018:

“Put another way, appellants have to satisfy the CACD that they would have been found not guilty on the basis of the law in *Jogee* to demonstrate that they have suffered a ‘substantial injustice’.”²⁹

Joint Enterprise: Existing literature

The Supreme Court’s actions have been described as substantive law reform that was not made explicit because it would have raised concerns as to judicial activism,³⁰ although this perspective is contested.³¹ However, the decision was not followed by common law jurisdictions outside of England and Wales.³²

Prior to and at the time that *Jogee* was decided, there was very limited data regarding the use of joint enterprise for murder convictions, on the basis that there are no active records by either the CPS or the Home Office of prosecutions that use the principle.³³ Research undertaken by the the Bureau of Investigative Journalism in 2014 obtained data from appeal judgments from the CACD, the CPS and Home Office.³⁴ As an indicator for joint enterprise, the study analyses the number of convictions where more than one person was convicted of the same crime during the same trial.³⁵ The research showed 1,853 individuals were prosecuted by the CPS between 2005 and 2013 for homicides that involved four or more

²⁵ *R v Johnson and Others* [2016] EWCA Crim 1613 [18]. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim’s family), particularly in cases where death has resulted and closure is particularly important.

²⁶ *Johnson and Others* at [15]

²⁷ *Johnson and Others* at [21]

²⁸ *Johnson and Others* at [17] and [18]

²⁹ Professor Felicity Gerry QC, Criminal Cases Review Commission Second Lecture 20181 “Joint Enterprise Appeals: Have the Courts of England & Wales Lost Sight of Justice?” Thursday 12 July at 6:00pm: UCL Judicial Institute, Faculty of Laws, Bentham House, Endsleigh Gardens, London, WC1H p. 11

³⁰ For a detailed analysis see Stark, F. ‘*The Demise of “Parasitic Accessorial Liability”: Substantive Judicial Law Reform, not Common Law Housekeeping*’ (2016). *The Cambridge Law Journal*, 75(3), 550-579 at 579

³¹ Dyson, M. (2018). Principals without distinction. *Criminal Law Review*, 2018(4), 296–320 at [233]

³² The Hong Kong Court of Final Appeal held that the law did not take a wrong turn, *HKSAR v Chan Kam Shing* [2016] see also Jackson M, “HKSAR V Chan Kam Shing: CFA Finds “No Wrong Turning”” *Hong Kong Lawyer*, March 2017; *Miller v The Queen* [2016] HCA; Dyer, A., 2018. The “Australian position” concerning criminal complicity: Principle, policy or politics?. *Sydney Law Review*, 40(2), pp.289-318.

³³ The Bureau of Investigative Journalism ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’ available at <https://www.thebureauinvestigates.com/stories/2014-03-31/read-the-report-joint-enterprise-an-investigation>.

³⁴ The Bureau of Investigative Journalism (April 2014) ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’ available at <https://www.thebureauinvestigates.com/stories/2014-03-31/read-the-report-joint-enterprise-an-investigation>.

³⁵ The Bureau of Investigative Journalism ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’

defendants.³⁶ For the same time period, there were 4,590 prosecutions for homicides involving two or more defendants, accounting for 44% of all homicide prosecutions in those years.³⁷ A smaller study of 61 CPS case files involving multiple-defendant prosecutions for robbery, violence, and homicide identified that a third of cases resulted in two or more people being convicted of the principal offence.³⁸ The vast majority of the cases in this study concerned defendants acting as joint principals, with only three cases concerning PAL.³⁹

Also in 2014, the Institute of Criminology at the University of Cambridge collated figures concerning the race of individuals convicted of murder where joint enterprise was applied. The study used a questionnaire aimed at male prisoners who were convicted at 25 years old or younger and given sentences of 15 years or more, exploring their experiences.⁴⁰ The research identified that of those convicted under joint enterprise, 57.4% were BAME (37.7% Black/Black British, 4.7% Asian and 15.5% mixed race) compared to 38.5% who were White.⁴¹ In 2016, a study by Williams and Clarke examined the extent to which gang associations influence the prosecution of young Black men in joint enterprise cases.⁴² The report identified that convictions of BAME individuals under joint enterprise have been premised on gang rhetoric. Survey results showed that 69% of BAME prisoners said the gang narrative was introduced in the court room, compared to 30% of white prisoners.⁴³ David Lammy carried out a review in 2017 which aimed to reduce the proportion of BAME offenders in the criminal justice system.⁴⁴ A survey of prisoners suggested that half of those convicted under joint enterprise identify as BAME.⁴⁵

More recently, in April 2022, the Centre for Crime and Justice Studies published the report “The Usual Suspects: Joint Enterprise Prosecutions Before and After the Supreme Court Ruling”.⁴⁶ This was the first research study that used national data to assess the use of joint enterprise in prosecutions and serious violence in England and Wales over the last 15 years. The report acknowledged the lack of data in the public domain about the use of joint

³⁶ The Bureau of Investigative Journalism ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’. Joint enterprise can be applied to any type of crime, involving two or more defendants but it is most controversial in homicide because of the minimum tariff sentences, are usually in the realms of 20-30 years.

³⁷ The Bureau of Investigative Journalism ‘Joint Enterprise: An Investigation into the legal doctrine of joint enterprise in criminal convictions’

³⁸ Jacobson, J., Kirby, A. and Hunter, G. (2016) *Joint Enterprise: Righting a wrong turn?*, Prison Reform Trust. This was an exploratory study of the application of the doctrine of joint enterprise in the prosecution of serious offences, conducted by the Institute for Criminal Policy Research in partnership with the Prison Reform Trust, and funded by the Nuffield Foundation at p25; Jacobson, J. (2016), ‘Joint enterprise after Jogee: Implications for sentencing’, *Sentencing News*, Accessed 18.07.18 from <http://eprints.bbk.ac.uk/16447/3/16447.pdf>.

³⁹ Jacobson et al (2016) *Joint Enterprise: Righting a wrong turn?*, Prison Reform Trust at [V]

⁴⁰ Crewe, B., Hulley, S. and Wright, S. (2014), ‘Written submission on joint enterprise’, Institute of Criminology: University of Cambridge, available at: www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf

Written submission to the House of Commons Justice Committee on Joint Enterprise can be found here: <http://reshare.ukdataservice.ac.uk/851739/2/Evidence%20to%20Justice%20Committee%20-%20Crewe%20Hulley%20Wright.pdf>

⁴¹ Crewe et al (2014), ‘Written submission on joint enterprise’.

⁴² Williams, P. and Clarke, B. (2016) *‘Dangerous associations: Joint enterprise, gangs and racism’*. Centre for Crime and Justice Studies: London

⁴³ Williams and Clarke, *‘Dangerous associations: Joint enterprise, gangs and racism’* at p.15

⁴⁴ Lammy D, (2017) *The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*

⁴⁵ Lammy D, (2017) *The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* p19: Crewe, B, Hulley, S and Wright, S. Written submission on joint enterprise (2014) – http://www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf

⁴⁶ Mills H, Ford M and Grimshaw R, (April 2022) “The usual suspects: Joint enterprise prosecutions before and after the Supreme Court ruling, Centre for Crime and Justice Studies.

enterprise, and similar to the method used by the Bureau of Investigative Journalism in 2014, submitted Freedom of Information requests to the Ministry of Justice, the CPS and the Home Office. This study looked at the number of people who had been prosecuted and convicted for serious violent offences⁴⁷ through joint enterprise, and the impact the Supreme Court ruling had on trends in the use of joint enterprise. It was not a surprise based on knowledge from previous studies, albeit years before, that the results showed over 1,000 people had been convicted of murder or manslaughter as a secondary suspect⁴⁸ in the 10 years prior to 2020. Over 2,000 people had been convicted of murder in cases involving four or more defendants in the 15 years prior to 2020. Young men were the recipients of many of these convictions, with young Black men being over-represented in the figures.⁴⁹ In relation to the impact of the Supreme Court ruling, the study made it clear that it appeared to have “no discernible impact” on the number of people prosecuted or convicted of serious violence as secondary suspects.⁵⁰

The research to date has been based on convictions for homicide and serious violent offences where joint enterprise was applied in the period both before and after the Supreme Court decision in *Jogee*. In the absence of any records by the CPS as to the use of joint enterprise, a number of reports have been forced to use data based on prosecutions and convictions for multiple defendants convicted of the same crime in the same trial. This means both joint principals and secondary parties have been captured in the same data, identified most recently as secondary suspects.⁵¹ Only by reading the case papers can there be an accurate identification as to what role the defendant was said to have played, especially in relation to that of a secondary party. The overwhelming outcome from the existing research is a disproportionate number of BAME men have been convicted of offences where an aspect of joint enterprise was used.⁵² The implication is that hundreds of individuals continue to serve long sentences for serious violence committed in circumstances where joint enterprise liability was applied, and that in reality, the correction in the law has not led to anything that can be described as a significant number of appeals. This report from the corresponding study with the CCRC adds to the existing body of work, by providing data that shows the impact of *Jogee* on applications to the CCRC. It also highlights the impact that the test in *Johnson* has had on the CCRC’s use of the real possibility test on applications from secondary parties to a joint enterprise.

Method

The CCRC provided access to 247 applications made between 2009 and 2020 from individuals convicted where joint enterprise liability had been applied. These include the 207

⁴⁷ The report states that the term serious violence is used to refer to murder, manslaughter and homicide

⁴⁸ The report uses this term to refer to those convicted as joint principals as well as those convicted as secondary parties, which is derived from the Homicide index applied by the Home Office, which is one source of the data used in the research.

⁴⁹ Mills H, Ford M and Grimshaw R, (April 2022) “The usual suspects: Joint enterprise prosecutions before and after the Supreme Court ruling, (April 2022) Centre for Crime and Justice Studies.

⁵⁰ Mills et al, *The Usual Suspects* p19

⁵¹ Above n48

⁵² Young T et al, (2020) “A ‘Good Job’ in difficult conditions: Detectives, reflections, decisions and discrimination in the context of joint enterprise” *Theoretical Criminology* Vol 24(3) 461-481 at 463

applications referred to in the CCRC's annual report of 2017/18.⁵³ The initial objective of the study was to review the 207 applications referred to in the 2017/18 CCRC annual report; however, due to the Covid pandemic, the study started slightly later than was hoped and additional applications were provided. This study received ethical approval from the University of Greenwich.

The initial design of this study identified two primary aims which were to 1) identify points of commonality in the applications, and 2) construct a statistical portrait of applicants, focusing on key demographic characteristics. When the research began and upon reading the applications, it became clear that to achieve the first aim, a separate research study would be required based on the variation in documents submitted, as well as the split in applications that had legal advice and those that did not. The focus of the current study was consequently reframed as a statistical portrait of applicants to the CCRC, with the primary aims to explore a) the type of joint enterprise that was the subject of applications to the CCRC, b) how the corrected law in *Jogee* was being used in applications, c) the number of applicants with legal representation, and d) the demographic characteristics of applicants.

To examine these points, each application form, Judge's summing up and/or appeal papers (judgment or grounds for appeal) had to be read to understand the type of joint enterprise liability under which the applicant had been convicted, for example, as a principal, joint principal or secondary party. It was not sufficient to rely solely on the application forms, as applicants often mischaracterised or misunderstood their involvement. Information was taken from the application forms and accompanying documents, and anonymised. Documents that accompanied each application varied and could range from no case files to a witness statement, to a relatively full set of documents.

This research was initially approved by the CCRC in 2020, but the pandemic caused problems with access to the relevant data. Where collection was proposed to start in February 2020, I was able to access the relevant data from 1 March 2021.

The Findings

Of the 247 applications reviewed, 160 were convicted as secondary parties, 57 were convicted as joint principals and 14 were convicted as the principal. Figure 1 shows these. The remaining 14 applications included nine applicants convicted in a multi-defendant trial or under the Accessories and Abettors Act 1861 but where no aspect of joint enterprise was applied; three applications where the paperwork had been destroyed so it was not possible to determine what type of joint enterprise the applicant had been convicted under, and in two

⁵³ CCRC Annual Report and Accounts 2017/2018 p .20 https://ccrc.gov.uk/ccrc-annual-report-2017-18_web-accessible/ accessed on 2 November 2019

applications it was unclear as to whether the applicant was convicted as a secondary party or joint principal.

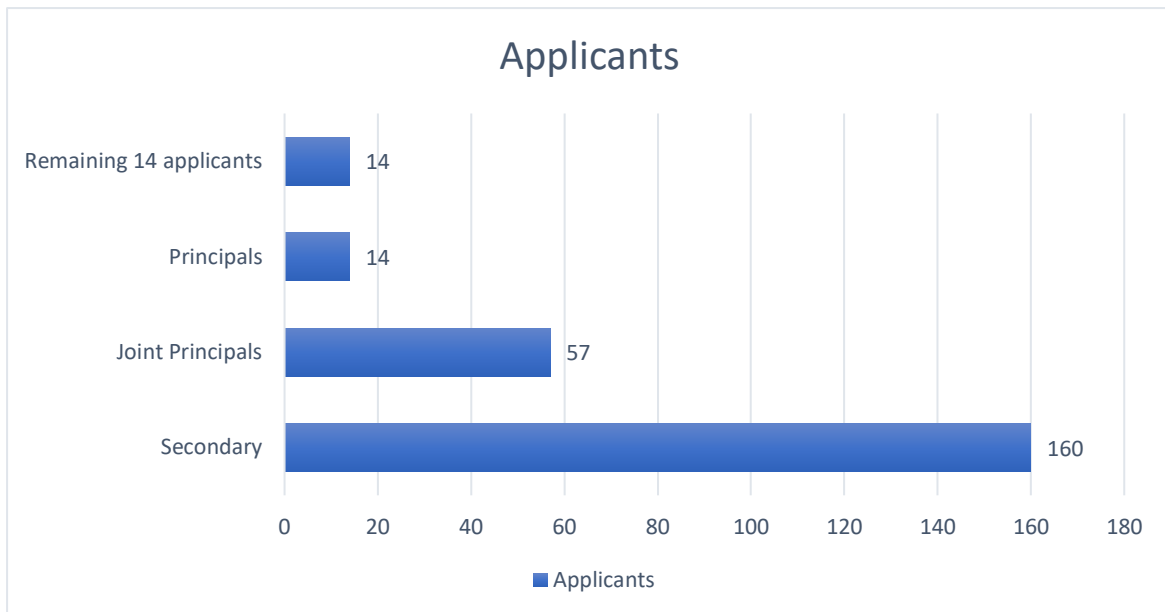


Figure 1: Numbers of applicants listed as principals, joint principals or secondary parties.

Of the 247 applicants, 125 had been convicted of murder, whilst 58 had been convicted of murder and another offence such as robbery or Actual Bodily Harm. Twelve applicants had been convicted of offences relating to Grievous Bodily Harm (GBH) and, three had been convicted of GBH together with other offences. Six applicants had been convicted of conspiracy to commit robbery and nine applicants had been convicted of conspiracy to commit robbery and another offence. The remaining applicants had been convicted of rape, theft, hijacking and other offences. Figure 2 shows these below.

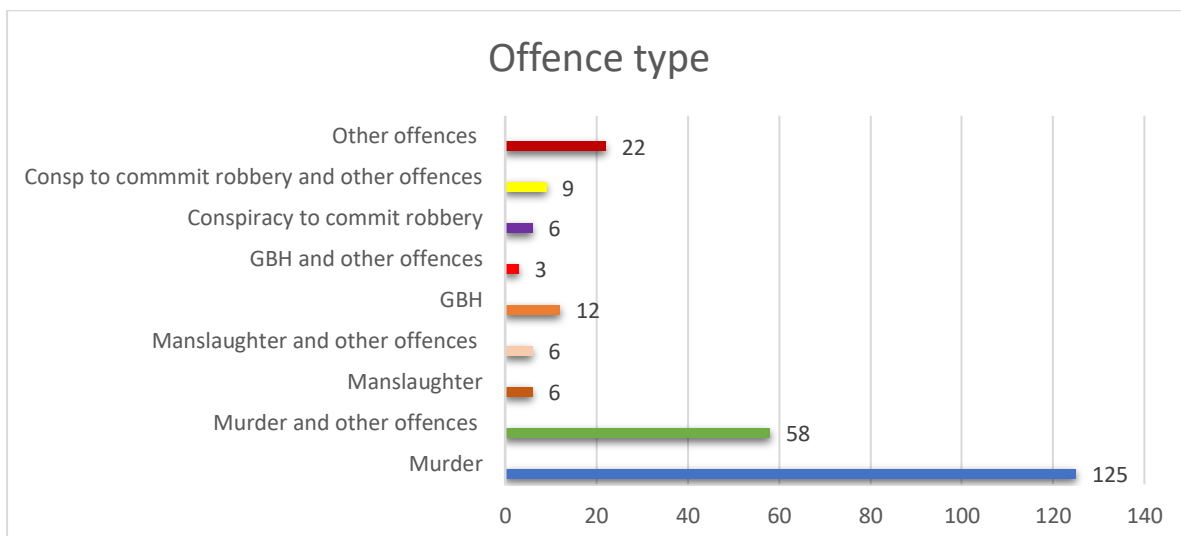


Figure 2: Type of offence applicants were convicted of.

Of the 160 applicants that were convicted as secondary parties, 65 that referred to the corrected law in *Jogee* also argued substantial injustice using *Johnson*. In 75 applications, *Jogee* and *Johnson* were not referred to and one application solely referred to *Johnson*. Nineteen applications referred solely to *Jogee*, and six of these were made after *Johnson* was decided but did not argue a substantial injustice. 50% of the latter applications were represented by a lawyer. Figure 3 shows this. Of the 160 secondary party applicants, 91 applied after *Jogee* was decided and 44 of these applications were represented by lawyers. Thirty-eight of the 91 applications were made after *Johnson* and 20 of these were represented by a lawyer.

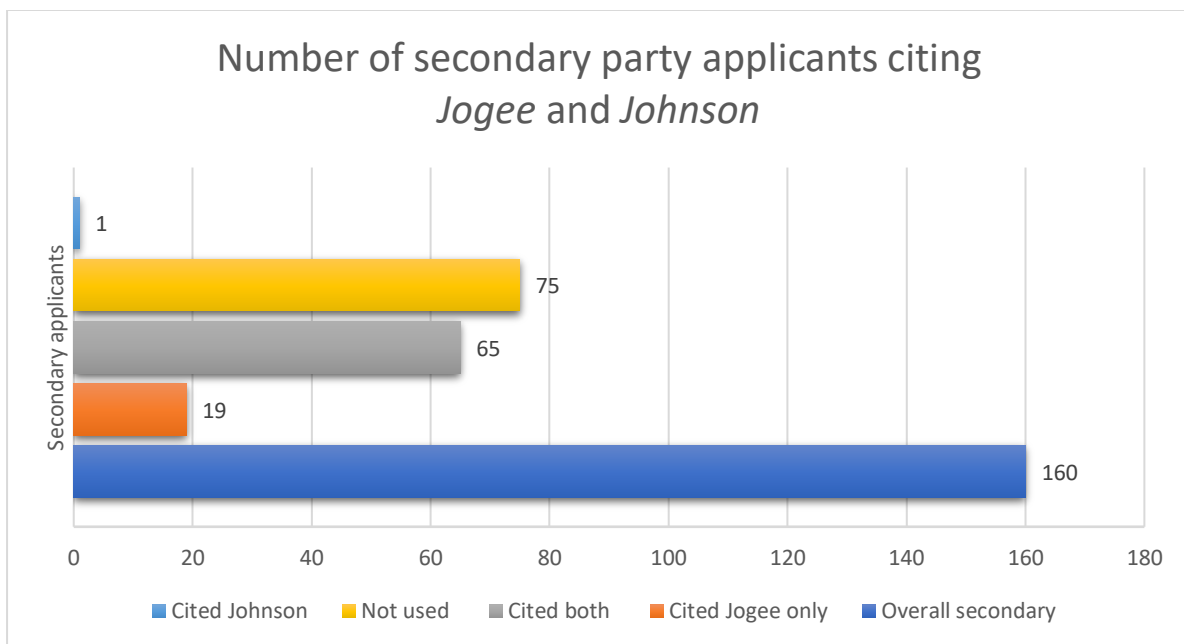


Figure 3: Secondary party applicants citing corrected law in *Jogee* and arguing substantial injustice under *Johnson*.

30% of applicants convicted as joint principals referred to the corrected law in *Jogee* in their applications, despite this type of joint enterprise not engaging the principles arising from the Supreme Court decision. This is shown in Figure 4 below.

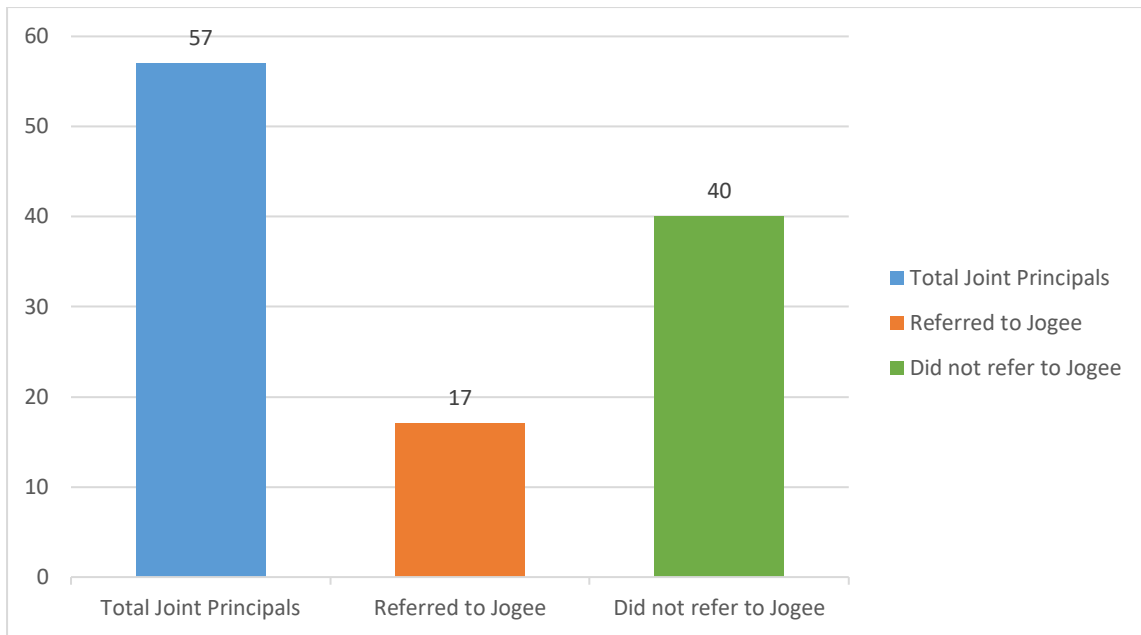


Figure 4: Applicants convicted as joint principals referring to corrected law in *Jogee*.

Dates of applicants' convictions

The date of conviction for applicants ranged from 1978 to 2020. The highest number of convictions occurred between 2011 and 2015 (18 in 2011, 30 in 2012, 26 in 2013, 25 in 2014 and 16 in 2015). Ten applications concerned convictions for offences that had taken place after *Jogee* was decided. Figure 5 below shows this.

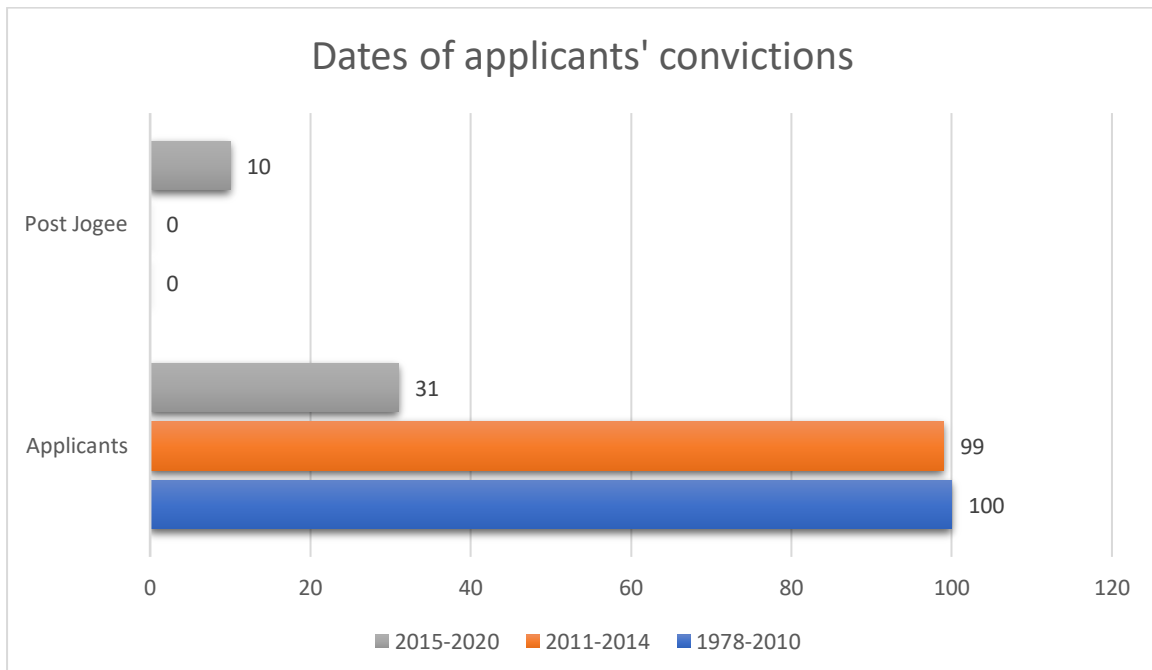


Figure 5: Dates of applicants' convictions.

Demographics of applicants

This study also collected data on the demographics of applicants. In terms of ethnicity, 79 applicants (32%) identified as White British, 38 applicants (15%) identified as Black British and 7 (3%) identified as British Mixed. 15 applicants (6%) identified as Asian and 24 applicants (10%) identified their ethnicity ranging as Irish, Chinese, Jamaican, Lithuanian, Romanian, etc. 85 (34%) people did not identify any ethnicity.

Of the 219 applicants (89%) that were male, 64 (29%) identified as White British and 38 (17%) identified as Black British. Of the 27 (11%) female applicants, 15 (56%) identified as White British and none identified as Black British, although one identified as Black mixed race. This is shown in Figure 6.

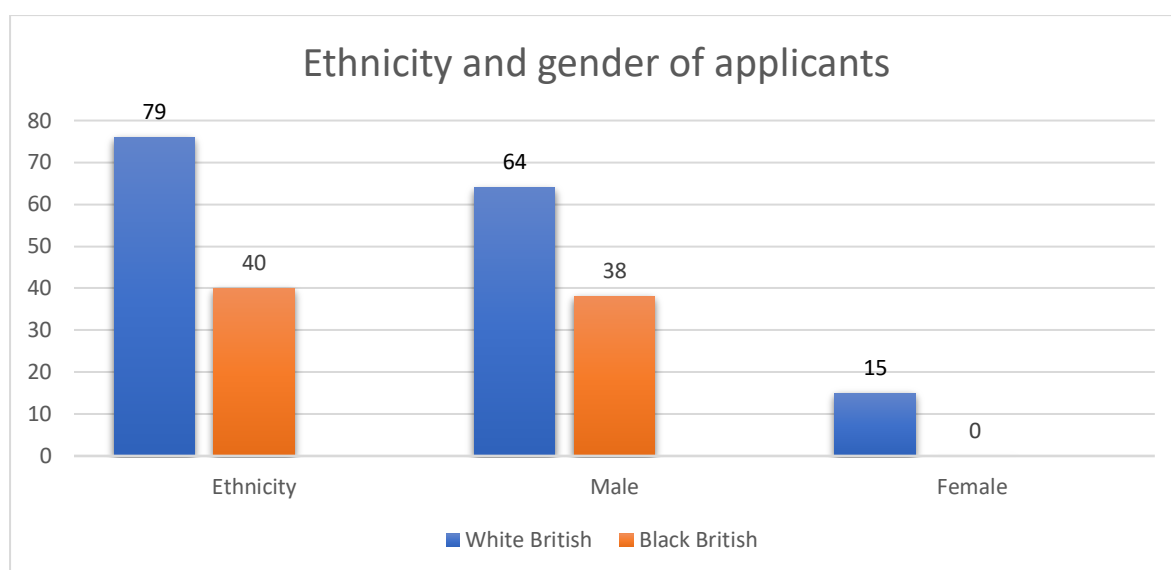


Figure 6: Ethnicity and gender details of applicants.

From the data examined, Black British and White British applicants were the two most represented groups, which led me to explore these two categories further in terms of type of offence, type of joint enterprise, age at conviction and legal representation.

Out of the Black British applicants, 26 (65%) were convicted as secondary participants and six (15%) were convicted as joint principals. Of the secondary parties, 19 (73%) had been convicted of murder or murder plus another offence and 17 (65%) were convicted of offences ranging from GHB, robbery, manslaughter, conspiracy and s.18 offences against the person. Sixteen of the Black British secondary participant applicants (62%) were supported by lawyers. Of the joint principals, five (83%) were convicted of murder or murder plus another offence. Four of the Black British joint principals (67%) were supported by a lawyer. This is shown in Figure 7.

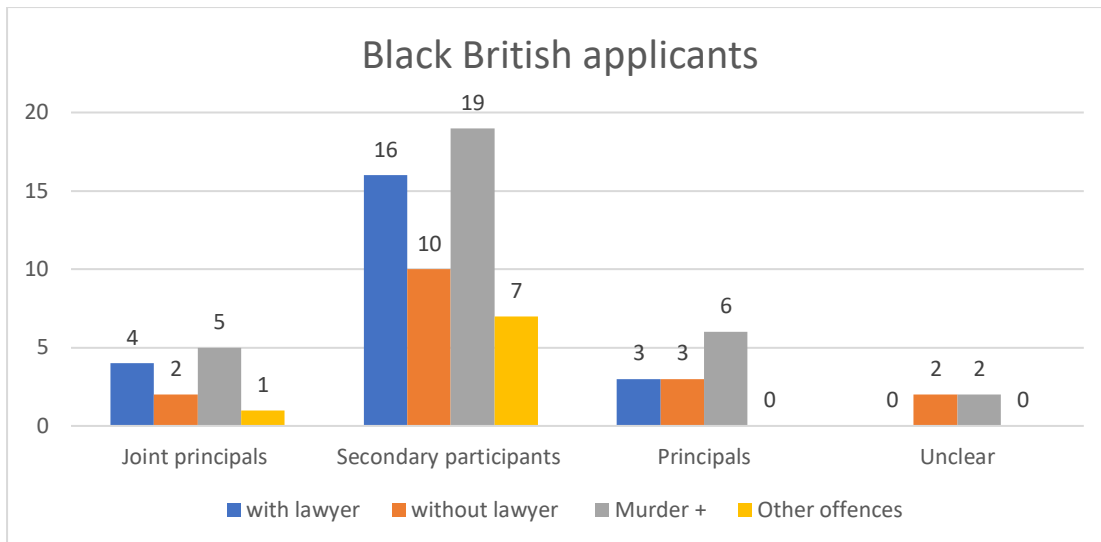


Figure7: Black British applicants, offence type and joint enterprise type

Shown in Figure 8, 57 (75%) of the White British applicants were convicted as secondary parties, 49 (86%) of these were convicted of murder or murder and another offence. 30 (53%) of the applicants were represented by a lawyer. Twelve (16%) of the White British applicants were convicted as joint principals, and 11 (92%) of those were convicted of murder or murder and another offence, and six (50%) were represented by a lawyer. The remaining seven (9%) White British applicants were convicted as the principal offender; five (71%) of these had been convicted of murder or murder and another offence. Four (57%) were represented by a lawyer.

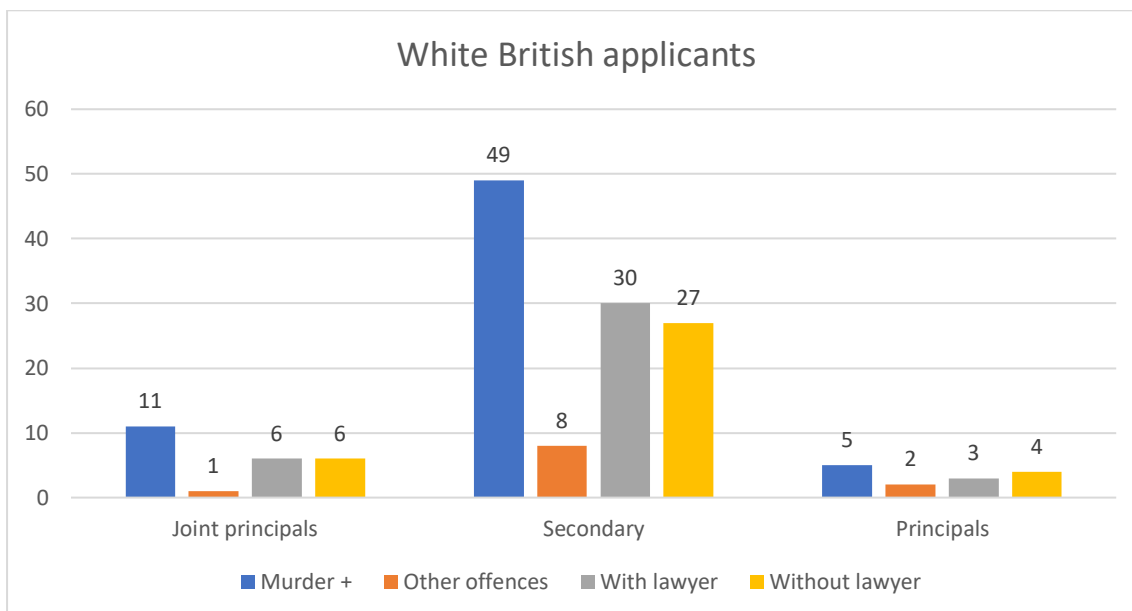


Figure 8: White British applicants, offence type and joint enterprise type.

Turning to the age of applicants at the time when the offence for which they were convicted took place, 59 applicants (24%) were aged 19 or under, 97 (39%) were aged between 20-29 years old and 44 (18%) were aged between 30-39 years old. Twenty (8%) were aged between

40-49 years old when the offence took place, 5 (2%) were aged between 50-59 years old and for 22 applicants (9%) it was not possible to ascertain this information. This is shown in Figure 9.

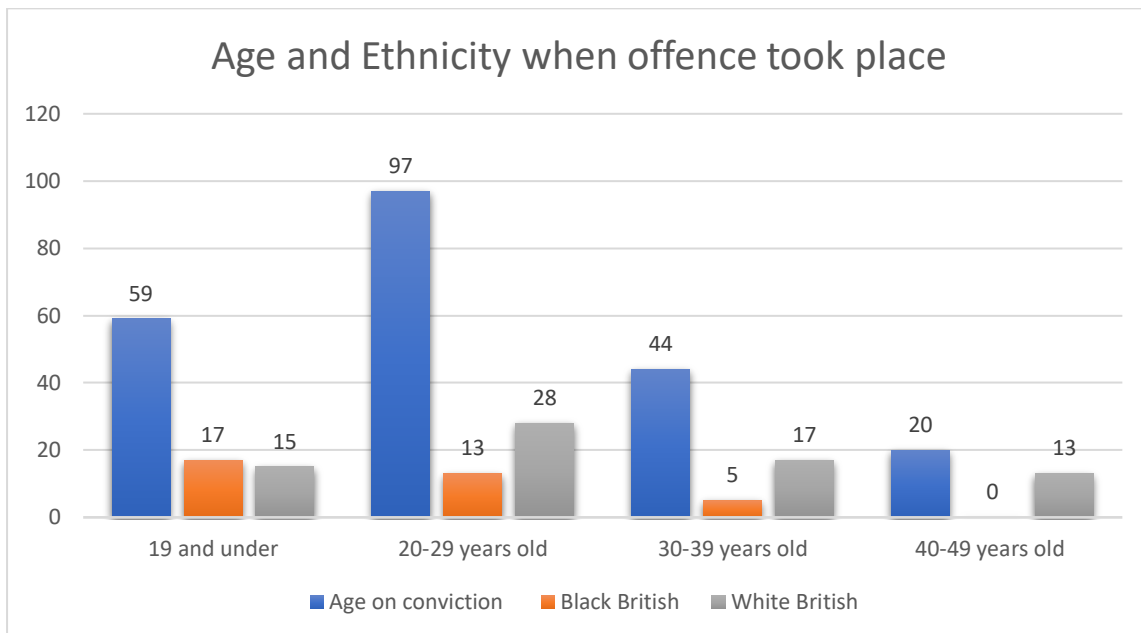


Figure 9: Age at time of offence took place broken down by ethnicity

Ninety-eight (40%) applicants were aged 25 or under at the time the offence for which they were convicted was committed. Twenty-five (26%) of these identified as Black British, 37 (38%) identified as White British and 36 (37%) identified as other ethnicities.

Conclusions and recommendations

This study aimed to explore:

- the type of joint enterprise that are the subject of applications to the CCRC;
- how the corrected law in *Jogee* was used in applications;
- the number of applicants that had legal representation; and
- the demographic characteristics of applicants.

The findings will be discussed in these categories. The first two points will be discussed together as the findings are intrinsic to both areas.

Ultimately, the study shows that individuals convicted as secondary parties to a joint enterprise are the highest number of applicants; there is a low number of applications that sought to use the corrected law in *Jogee* and argue a substantial injustice according to *Johnson*. Although applicants are able to find legal representation, the quality varies and some advice appears misguided, especially where *Jogee* is referred to for individuals convicted as joint principals or used alone without reference to substantial injustice. There is a low number of applicants identifying as Black British, which is interesting when existing data suggests this demographic has the highest conviction rate as secondary parties.

As a result of these conclusions, I am making recommendations concerning a) the statutory real possibility test being placed in a framework of developing CACD jurisprudence concerning substantial injustice (which specifically affects applications from secondary parties convicted using joint enterprise), b) how the CCRC should provide an advisory note to legal representatives where they use the corrected law from *Jogee* incorrectly, and c) advising on further research into the low number of applications from Black British men convicted as secondary parties, despite existing research showing they are disproportionately represented in conviction rates.

The components of joint enterprise that were the subject of CCRC applications and the use of *Jogee*

The majority of applicants (160) were convicted as secondary parties, with the second highest category of applicant from joint principals (57) and the lowest number coming from applicants convicted as principal offenders (14). The largest number of applicants were convicted of murder (125) followed by murder and other offences (58), which is consistent with the findings from the Bureau of Investigative Journalism in 2014, and more recently from the Centre for Crime and Justice studies report in 2022. Only 40% of applicants convicted as secondary parties used both *Jogee* and *Johnson* in their applications, and this number accounted for only 4% of all the total cases examined. 12% of secondary parties used *Jogee* only in their applications, and 6% of these were made after *Johnson* but did not argue a substantial injustice. There was a higher number of secondary party applicants (48%) that did not refer to either case, because the applications focused on new evidence, new legal arguments or the case law was not applicable to the conviction. With less than half of secondary parties using both *Jogee* and *Johnson*, it is evident that the corrected law is not a routine feature of applications to the CCRC.

The requirement for a substantial injustice to be demonstrated for an out of time appeal based on a change in the law is not new. Section 16C Criminal Appeals Act 1968⁵⁴ gave the CACD the power to dismiss CCRC referrals summarily if based solely on a change in the law. In *Cottrell and Fletcher*⁵⁵ the CACD made it clear that,

“... we cannot conceive of any circumstances in which the law and practice laid down in this Court can be ignored by the Commission when it is exercising its judgment whether to refer a conviction to the court. They are "so obviously material" to the decision to be made by the Commission that it would be contrary to the intention of Parliament for them to be disregarded...It would indeed be disturbing, and we believe productive of public disquiet, if the Commission were to adopt an approach to change of law cases which conflicted with the approach of the court.”

⁵⁴ Inserted by Criminal Justice and Immigration Act 2008

⁵⁵ [2007] EWCA Crim 2016 at [54] to [56]

The argument that the substantial injustice test diverted from the statutory real possibility test failed.⁵⁶ The CACD held that the substantial injustice test was intrinsic to and required by the statutory test. It follows that the CCRC is bound to adopt a starting point that examines the legal approach taken by the CACD when considering whether a substantial injustice has been demonstrated in applications from individuals convicted as secondary parties.⁵⁷ The decision is one justified by the wider public interest in legal certainty and finality of decisions.⁵⁸ Consequently, the statutory real possibility test has been placed in a framework of developing CACD jurisprudence concerning substantial injustice, which specifically effects applications from secondary parties convicted using joint enterprise.⁵⁹ Previous criticisms of the CCRC have referred to it being deferential to the CACD and second guessing what the court may decide,⁶⁰ and the requirement of substantial injustice has not helped. The court confirmed that the threshold for substantial injustice is higher than that of the safety of the conviction,⁶¹ and consequently the CCRC has no choice but to review such applications to this higher threshold than it would otherwise do for cases where joint enterprise was not used and the law had not been changed. As Felicity Gerry KC said in her evidence to the Westminster Commission, the substantial injustice requirement “effectively neuters the CCRC”,⁶² a position that the CCRC is not happy with.⁶³ Placing the statutory real possibility test in a framework of developing CACD jurisprudence concerning substantial injustice which only applies to secondary party joint enterprise applications has created a two-tier approach. More broadly, the CCRC is clearly not independent of the CACD if it can mandate it to use a test it created through its own case law.

Recommendations

- The Law Commission has announced a review into criminal appeals.⁶⁴ The terms of reference include the conditions for allowing a referral to the CACD by the CCRC. My recommendation is that the effect of the test in *Johnson* on the statutory test used by the CCRC for applicants convicted as secondary parties should be at the forefront of the review concerning that aspect of the consultation.
- The CCRC should continue to be vocal about its dissatisfaction concerning the use of the test in *Johnson* impeding the statutory test they apply for secondary party applicants, as mandated by the CACD.

⁵⁶ *R (on the application of Davies) v CCRC* [2018] EWHC 3080

⁵⁷ *R (on the application of Davies) v CCRC*

⁵⁸ *R (on the application of Davies) v CCRC*

⁵⁹ Section 13 Criminal Appeals Act 1995

⁶⁰ In the Interests of Justice: An inquiry into the Criminal Cases Review Commission by the Westminster Commission on Miscarriages of Justice, February 2021 at pp 33-43

⁶¹ *Johnson & Others* [2016] EWCA Crim 1613 at [20]

⁶² In the Interests of Justice: An inquiry into the Criminal Cases Review Commission by the Westminster Commission on Miscarriages of Justice, February 2021 at pp 33-43 written evidence from Felicity Gerry QC at p4.

⁶³ In the Interests of Justice: An inquiry into the Criminal Cases Review Commission by the Westminster Commission on Miscarriages of Justice, transcript of the oral evidence of Helen Pitcher pp7-8

⁶⁴ The Law Commission, Criminal Appeals Project <https://www.lawcom.gov.uk/project/criminal-appeals/#:~:text=The%20Commission%20review%20of%20the.and%20appropriate%20resolution%20of%20appeals> accessed 11 February 2023

Applications that had legal representation

The study indicates that individuals convicted under joint enterprise are being represented by lawyers in applications to the CCRC. 61% of Black British secondary parties and 66% of Black British joint principals were represented by a lawyer in their applications to the CCRC. This is similar to White British secondary party applicants where 53% of them and 50% of joint principal applicants had legal representation. This can be considered in the context of firstly, an increase in overall applications, from around 1,000 per year between 2006 and 2011 to around 1,500 per year between 2012 and 2019;⁶⁵ secondly, the suggestion of an increase in unrepresented clients;⁶⁶ and thirdly, the limited funding that a solicitor can claim for each application based on ten hours of work.⁶⁷ A recent study found that 42% of lawyers who participated in the research were no longer willing to accept publicly funded CCRC cases⁶⁸ due to the low remuneration rates for what is a demanding area of work.

In the absence of in-depth consideration of each applicant's case documents (see recommendations for additional research below), there exists a suggestion that lawyer-led applications were better structured and organised than those that were not represented.⁶⁹ Existing studies have considered the quality of representation pertaining to applications being sent for review by the CCRC,⁷⁰ yet in the context of this research, it is perhaps easier to base a judgment on quality in terms of how the relevant case law has been used. Three applicants all represented by lawyers referred solely to *Jogee* and did not argue a substantial injustice under *Johnson*, despite the applications being made after both cases had been decided. Citing the correction of the law in *Jogee* alone does not demonstrate a substantial injustice, meaning that there is no scope to base an application solely on that decision.⁷¹ The CCRC, however, did apply the test in *Johnson* regardless of the application only referring to the former case. Seventeen applicants convicted as joint principals referred to the corrected law in *Jogee*; eight of these were represented by a lawyer. This aspect of joint enterprise does not engage the corrected law and in the majority of responses, the CCRC stated this in the statement of reasons, using a comment similar to the one below:

The Jogee judgment relates only to secondary parties in simple terms where people are convicted of helping the principal (or main) offender commit an offence. For example if A gives B a knife or shouts encouragement and B stabs someone, B is the principal offender and A is a secondary party. Jogee only relates to the mental state that must be proved against A.

⁶⁵ CCRC, Annual Report and Accounts 2018/19 (2019)

⁶⁶ CCRC, Annual Report and Accounts 2019/20 (2020)

⁶⁷ Clarke, A. and Welsh, L., (2022) "F** k this game... I'm off": financial and emotional factors in declining legal representation in miscarriage of justice cases" *Journal of Law and Society* at 527

⁶⁸ Clarke, A. and Welsh, L., (2022) "F** k this game... I'm off": financial and emotional factors in declining legal representation in miscarriage of justice cases. *Journal of Law and Society* at 534-536

⁶⁹ Hodgson, Jacqueline S. and Horne J., The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC) (October 6, 2009). Available at SSRN: <https://ssrn.com/abstract=1483721> or <http://dx.doi.org/10.2139/ssrn.1483721>

⁷⁰ Hodgson et al., The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC): R. Vogler R et al, (2021) The Criminal Cases Review Commission: Legal Aid and Legal Representatives. Final Report https://sro.sussex.ac.uk/id/eprint/99153/1/210420_CCRC_FinalReport%20%281%29.pdf

⁷¹ Professor Felicity Gerry QC, Criminal Cases Review Commission Second Lecture 20181 "Joint Enterprise Appeals: Have the Courts of England & Wales Lost Sight of Justice?" Thursday 12 July at 6:00pm: UCL Judicial Institute, Faculty of Laws, Bentham House, Endsleigh Gardens, London, WC1H p.11

This finding implies that there is a lack of understanding amongst some lawyers as to what the corrected law in *Jogee* applies to. Whilst existing research indicates a positive association between applications with legal representation, the use of *Jogee* in this way is misguided and normally associated with applications that do not have the benefit of legal advice.⁷² In one application, the trial Judge indicated that the applicant was a joint principal, but where the CCRC could not be certain, it erred on the side of caution and considered both *Jogee* and the test in *Johnson* to the applicant as a joint principal and secondary party. A study in 2009 concluded that there was a need to improve the quality of representation in CCRC cases,⁷³ and a more recent study in 2021 highlighted that the consensus amongst interviewees was a deterioration in the overall quality of lawyer-led applications.⁷⁴ This is easy to suggest when, as highlighted above the funding for these applications is nearly non-existent.

Recommendation

- The CCRC should continue to explain in detail to applicants where the decision in *Jogee* does not apply to them because they have been convicted as joint principals or a principal in the offence. They could go further to provide the same advisory note to the representing lawyer.

Ethnicity and age of applicants

The data shows that the largest number of applicants came from those who identify as White British (31%), with 29% of them aged 20 years old or older when the offence for which they were convicted took place. For those aged 19 and under, there are more Black British applicants than White British applicants. 85 applicants did not identify any ethnicity which obviously impacted this aspect of the data significantly. Proceeding on the basis of the data that was recorded concerning ethnicity however, there remains a lower number of applicants to the CCRC convicted under joint enterprise liability identifying as Black British, when considered in the context of existing sources that show the disproportionate representation of Black secondary suspects convicted of murder and/or manslaughter.⁷⁵ The CCRC compares its diversity statistics with those of the general prison population where 24% of the prison population is from minority ethnic groups. In the CCRC annual report for 2021/22, 24.4% of applicants describe themselves as being from an ethnic minority group, which is an increase from 19.8% in 2020/21⁷⁶ where the number of applicants identifying as from ethnic minority groups had dropped below the normal average of 24%.⁷⁷ The report in 2020/21 also stated that 43.8% of applicants were White.⁷⁸ Annual reports from previous years did not include information as to the ethnicity of applicants.

⁷² Vogler R et al, (2021) The Criminal Cases Review Commission: Legal Aid and Legal Representatives above n65.

⁷³ Hodgson et al, The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC) above n64 at p.64

⁷⁴ Above n 64 at p.24

⁷⁵ Mills H, Ford M and Grimshaw R, (April 2022) "The usual suspects: Joint enterprise prosecutions before and after the Supreme Court ruling, Centre for Crime and Justice Studies, p18.

⁷⁶ Page 36

⁷⁷ Page 34 2019/20

⁷⁸ Page 36 2020/21

This is the first study to advance an understanding of the applications that the CCRC receives where the applicant has been convicted and joint enterprise liability applied; consequently there is no data on which to base a prediction as to the expected number of Black British applicants. David Lammy's review in 2017 highlighted the disproportionate representation of BAME groups as youth prisoners between 2006-2016⁷⁹ and concluded that there is a lack of trust in the Criminal Justice System (CJS) from BAME defendants.⁸⁰ If Black British people do not trust the system when they enter it at the time of being charged with an offence, then there is very little to suggest they will start trusting it after exhausting the appeals process with only an application to the CCRC as their last point of call. Further research is needed to explore this point and is something the CCRC should consider carrying out to ensure that potential cases that could be referred back to the Court of Appeal are not being missed on the basis that people are not making applications.

Recommendation

- The CCRC should commission research into Black British applicants convicted of joint enterprise as secondary parties to understand whether there is an issue of trust extending to the CCRC.

Additional and further research

This study has identified that the statutory real possibility test has been placed in a framework of developing CACD jurisprudence concerning substantial injustice, which specifically effects applications from secondary parties convicted using joint enterprise. There is clearly a need to advance an understanding of the legal basis for applications to the CCRC from individuals that have been convicted of an offence labelled as a joint enterprise. Additional research could examine a) when and how the corrected law from *Jogee* has been used in applications, b) how evidence is used in applications, c) the impact of legal representation on applications, and d) the impact of the substantial injustice test on applications.

The findings also indicate a low number of joint enterprise applicants to the CCRC who identify as Black British. Further research could explore whether trust in the criminal justice system is an issue for this group of applicants and whether this extends to the CCRC, but more broadly why this group are not applying to the CCRC.

⁷⁹ Lammy D, (2017) The Lammy Review An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System

⁸⁰ Above n71 at p.69