Criminal Cases Review Commission Second Lecture 2018[1]

"*Joint Enterprise Appeals:*

Have the Courts of England & Wales Lost Sight of Justice?[2]**"**

Professor Felicity Gerry QC[3]

Introduction and summary

I'd like to express my pleasure at being invited to deliver this potentially controversial Second Lecture for the CCRC, I would of course like to acknowledge the first speaker in this lecture series: Sir Brian Leveson, President of the Court of Appeal, Criminal Division (CACD) is a hard act to follow[4]. However, since his name will forever be linked to the drive for efficiency, it seems appropriate that we now take an evening to consider whether that drive is affecting the *pursuit of justice,* which was the very topic of his lecture.

Ameen Jogee was the subject of a miscarriage of justice. The judicial directions to the original trial jury in 2011 were wrong (going even further than parasitic cases by using a mens rea of foresight without even a base crime). It took me five years to see his conviction for murder quashed and the correct law restated but, for others affected by at least three decades of legal error, the senior courts seem reluctant to say sorry and desperate to keep those affected in prison. This lecture is designed to ask why.

[1] Thursday 12 July at 6:00pm: UCL Judicial Institute, Faculty of Laws, Bentham House, Endsleigh Gardens, London, WC1H

[2] This lecture is taken in part from three documents (i) the submissions made by our team on Mr Jogee's behalf in the Supreme Court. That team was made up of myself, Dr Matthew Dyson, Catarina Sjölin, Adam Wagner, Dr Beatrice Krebs, Diarmuid Laffan and Brian Chang with a thank you also to Stephen Odgers QC; (ii) Submissions. Peta -Louise Baggott and I have made on behalf of Asher Johnson and Alex Henry to the Supreme Court who have issued their applications de bene esse. and (iii)Some passages from a forthcoming book chapter: Felicity Gerry, 'Jogee – How did it happen?' in Beatrice Krebs (ed) *Accessorial Liability after Jogee* (forthcoming, Hart Publishing).

[3] Carmelite Chambers, London, Crockett Chambers, Melbourne, Deakin School of Business and Law

[4] Sir Brian Leveson The Pursuit of Criminal Justice CCRC Lecture 25th April 2018 < https://www.judiciary.uk/wp-content/uploads/2018/04/speech-leveson-ccrc-lecture-april-2018.pdf>

Together with some background to the *Jogee* appeal, I will consider the intersection between two complex topics – complicity and finality.

In summary, my views are fourfold:

- That the 'substantial injustice' test sets the appeal bar too high (effectively restoring the abolished proviso);
- That the Supreme Court is not functus in cases of public importance that also engage the Human Rights Act 1998.
- That there is a duty on Government to engage in justice issues and in particular to discover how many people have been affected by incorrect judicial directions on complicity.
- That the CCRC must be supported to function, to include referring points of law to the CACD[5].

In an audience which includes some senior judiciary and at least one member of the Justice Committee I am ever hopeful that someone will decide to do the right thing.

Warren E. Burger, 15th Chief Justice of the United States (1969–86) once said: "A far greater factor than abolishing poverty is the deterrent effect of swift and certain consequences: swift arrest, prompt trial, certain penalty and - at some point - finality of judgment"[6]. Aside from the impression this gives that he would wipe "defend the children of the poor and punish the

[5] Section 16C of the Criminal Appeal Act 1968 gives the Court of Appeal a power to dismiss appeals against conviction which are based only on a development of law point following a reference by the Commission, if the Court of Appeal would not have granted exceptional leave to appeal out of time (had the appellant been entitled to make such an application). Section 16C was inserted on 14 July 2008 by s.42 of the Criminal Justice and Immigration Act 2008 and SI 2008/1586. The corresponding legislation in respect of Northern Ireland is s.13B of the Criminal Appeal (Northern Ireland) Act 1980.

[6] Eduaces webworld <http://www.edu.aceswebworld.com/warren_burger.html>

wrongdoer" away from the door of the Old Bailey[7], it is a reminder that it is often the disadvantaged that are affected by finality. In this context the poor are the wrongly convicted prisoners.

It is said that Warren Burger took a pragmatic approach to complex and controversial legal issues, and he worked to improve the efficiency of the entire judicial system in the U.S. That is something that could be said of our Appellate Courts in the context of joint enterprise appeals following *R v Jogee*;[8] *Ruddock v The Queen*[9] *(Jogee)* . However, this lecture suggests that the 'substantial injustice' test is unjust and the right to a fair retrial must trump any policy of finality.

Whilst it may be inefficient to examine 30 years of legal error, a different approach to joint enterprise appeals is necessary to expose how justice miscarried, who was affected and how the system can properly apologise. The point at which finality lies has already moved to allow for second prosecutions which suggests a need for some balance[10]. In addition, in my view, aside from the duty of Government to identify affected prisoners, it is possible, without legislation, to provide a route to appeals which raise human rights issues such as a fair trial and/or race or disability discrimination in such a way that does not place the burden on the Appellant to prove that s/he would not have been convicted[11]

[7] The Old Bailey onine < https://www.oldbaileyonline.org/static/The-old-bailey.jsp>
[8] [2016] UKSC 8
[9] [2016] UKPC 7
[10] Part 10 of the Criminal Justice Act 2003 reforms the law relating to double jeopardy. It allows re-trials in respect of certain serious offences, where new and compelling evidence has come to light.
[11] We have argued in Johnson and Henry that all that has to be done to allow the Supreme Court to consider issues involving the liberty of a cohort of prisoners is to read section 33(2) of the Criminal Appeal Act as follows:…… leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision ***or*** [instead of and]it appears …..that the point is one which ought to be considered by the Supreme Court]…...

An appeal is a procedure that is governed by finality. It lies with permission under the Criminal Appeal Act 1968 or following a reference from the CCRC. The topic of finality inevitably asks what justice means, given that finality may block a worthy Appellant from having a wrongful conviction quashed: The origins of the law of procedure can be traced back to a situation where no human rules were necessary to determine disputed allegations. That was left in the hands of the Deity by various methods of ordeal, compurgation or trial by battle. Passing or failing the ordeal meant innocence or guilt as determined by God. Trial by inquisition was conducted without regard to any procedures at all. Our rules are now meant to flow from the principles of reasoning and the common sense of experienced members of the public – importantly, that reasoning is meant to be based on **accurate** legal directions.. As the CACD acts as judge and jury in joint enterprise appeals and the Supreme Court insist they are functus without a CACD certificate, there are questions to be asked as to whether we have a system of justice at all?

It is very easy to identify a miscarriage of justice on fresh evidence: Many miscarriages of justice are now household names – Sally Clark, Lindy Chamberlain, Timothy Evans, Derek Bentley, the Birmingham Six, Liam Allen and many many more. These were cases involving variously terrible science, dodgy witnesses, police corruption and non-disclosure. Where fault lies with the police or the prosecution, headlines fly and heads roll but, despite the high numbers of prisoners potentially affected by an error of law that ran for more than 30 years, the categorisation of joint enterprise cases is currently not the same: The language of miscarriage of justice not being used in this context. Nonetheless, an error of law is not a change in the law. The consequences of making a mistake (here a deliberate policy[12]) is the

[12] *Regina v Powell (Anthony) and Another; Regina v English* [1999] 1 AC 1

need to put it right. In the first day of the Jogee hearing I called joint enterprise a "dog's breakfast"[13]. Sadly, very little has changed.

Some background to the Jogee decision

At a conference in 2016 hosted by the Criminal Appeal Lawyers Association, the late Lord Toulson gave a keynote speech in which he asked the question '*Jogee – How did it happen*?' He recognised that this in fact contains two questions: how did the tangent of law known as 'joint enterprise' or parasitic accessorial liability (PAL) occur and secondly how did the opportunity arise for the UK Supreme Court (UKSC) - sitting historically for the first time at the same time as the JCPC - to correct it in *R v Jogee*;[14] *Ruddock v The Queen*[15] (*Jogee*)? Lord Toulson's answers were essentially that the tangent probably occurred via 'happenstance' and that the court used the *Jogee* and *Ruddock* cases as an opportunity to correct the law in England and Wales and those countries that still accept the jurisdiction of the Privy Council as a final appellate court. I am not as forgiving on the history. In my view, injustices had been perpetuated not by happenstance but by flawed policy and a failure to address (or sometimes even to read or cite) the foundations of law. My perspective also gives more recognition to those on my team involved in bringing the appeal[16], although, at the heart of it all was Lord Toulson himself whose book chapter in 2013[17], setting out the injustices of 'joint enterprise', 2 years after Ameen Jogee was convicted, gave us some hope that the UKSC would make some change.

[13] Thanks to Adam Wagner's submissions on Bentham's dog law.
[14] [2016] UKSC 8
[15] [2016] UKPC 7
[16] See fn2.
[17] Sir Roger Toulson "Sir Michael Foster, Professor Williams and complicity in murder" in Dennis Baker and Jeremy Horder (eds) *The Sanctity of Life and the Criminal Law: The legacy of Glanville Williams* (CUP 2013).

As we all now know, the law on complicity gave rise to frequent appeals, particularly in cases of murder.[18] The law incorrectly changed to a mens rea of 'foresight' which inevitably over-criminalised secondary parties[19]. I will never forget the gasp from the public gallery full of mothers whose sons (it is mostly sons) had been convicted by juries who had been wrongly directed on the law, recorded for posterity on the UKSC website[20]. Given the research that joint enterprise adversely affected black and minority ethnic youth[21], I had hoped expunging it (at least in the parasitic sense) was the last 'gasp' of systemic colonialism, but two years on it seems that there is still some way to go. The CACD is blocking appeals by those affected and still imprisoned, based on an unreasonably high bar of 'substantial injustice',[22] thus failing to fully correct their own error and arguably, in my view, restoring the abolished proviso.

Ameen Jogee was eventually acquitted of murder and convicted of manslaughter at a retrial, after the jury was given what has come to be known as '*Jogee*-compliant'[23] jury instructions on murder. Quite rightly criminal liability in England and Wales, once again, only applies to those secondary parties who act intending to assist or encourage a principal offender, not those who merely foresee something might happen. Put simply, the power of the State to over-criminalise is no longer facilitated by incorrect judicial directions. It is however

[18] Ibid

[19] The second ground of appeal that "joint enterprise overcriminalised secondary parties" allow the UKSC to consider the foundations of the law on accessorial liability. The expression was taken from A judicial contribution to over-criminalisation?: Extended joint criminal enterprise liability for Murder Luke McNamara: McNamara (2014) 38 Crim LJ 104.

[20] UK Supreme Court You Tube Video: R v Jogee and Ruddock v The Queen < https://www.youtube.com/watch?v=242Iy-Yrbss>

[21] Crewe, B. et al., 2015. Joint enterprise: the implications of an unfair and unclear law. Criminal Law Review, pp.1–16.

[22] At the time of writing, there has only been one successful 'out-of-time' appeal: *R* v *Crilly* [2018] EWCA Crim 168

[23] See e.g. R v Crilly [2018] EWCA Crim 168 .

remarkable that it took so long. From 2003, Kirby J in *Gillard v The Queen*,[24] in his dissenting judgment in *Clayton v The Queen*[25] and writing extra-judicially [26] spoke out, correctly asserting that "This part of the common law is in a mess. It is difficult to understand. It is very hard to explain to juries. It involves a portion of the law made by judges".[27] He questioned the development of the law across the Australian federation and raised the concern that the state of parasitic accessorial liability was guided by tactics rather than principle:

> "To hold an accused liable for murder merely on the foresight of a possibility is fundamentally unjust. It may not be truly a fictitious or 'constructive liability'. But it countenances what is 'undoubtedly a lesser form of mens rea'. It is a form that is an exception to the normal requirements of criminal liability. And it introduces a serious disharmony in the law, particularly as that law affects the liability of secondary offenders to conviction for murder upon this basis".

Australia was ultimately left with *Miller*[28] where the High Court refused to consolidate my case of *Spilios*[29] and then declined to follow *Jogee,* and in *Chan Kam Shing*[30] I was (perhaps unsurprisingly) unsuccessful in persuading the Hong Kong Court of Final Appeal to follow English Law. In asking whether the Appellate Courts of England and Wales have lost sight of justice, we at least have to accept they are doing rather better than Australia and China.

Without any empirical research or Parliamentary debate, the House of Lords in *R v Powell; English* held that "joint enterprise" was deliberately formulated to "deal with" the "important

[24] (2003) 219 CLR 1.
[25] [2006] HCA 58.
[26] Michael Kirby, 'Remote Justice' (2008) 1 NTLJ 6.

[27] *Clayton v The Queen* [2006] HCA 58;(2006) ALR 500;168 A Crim R 174, at 184, per Kirby J.
[28] *Miller* v R; *Smith* v R; *Presley* v DPP (SA) [2016] HCA 30
[29] *R v Spilios* [2016] SASCFC 6
[30] *HKSAR v Chan Kam Shing*, FACC 5/2016

social problem" where offences readily escalate. Lord Mustill recognised that "this does not mean that the established principle cannot be re-examined and if found to be flawed, reformulated"[31] Thus risking people's liberty on opinion rather than reason. Others in that judgment accepted PAL was an illogical approach but went on to impose it anyway. The Supreme Court in *Jogee* finally accepted that the solution to issues of alleged complicity was not to use 'policy' to find ways to convict various groups or to artificially substitute manslaughter but to follow long established legal principle.

The huge utility that PAL gave to the prosecution was dangerous and Jogee's case cried out for the solution to be spelled out: To hold an accused liable for murder or any other offence merely on the foresight of a risk was fundamentally unjust and only by focussing on when individuals know the essential facts is there precision on intentional participation or withdrawal.

Charles Haddon-Cave LJ went to the Supreme Court a lot when he was in practice. He told me at a dinner 'if you have a good point, say it slowly and say it twice' so on the day I did, pausing for their Lordships to write it down: the true test for accessorial liability was *knowledge of essential matters and acts which demonstrate an intention to assist and encourage that crime or that type of crime*. The test was rightly confined in *Jogee* to knowledge of 'essential facts' and acts which demonstrate an intention to assist and encourage 'that crime'. It is not hard. It depends on the evidence. It just requires prosecutorial precision. The two-part importance of *Jogee* - to get rid of PAL and put a simple, clear and historically justified test back for all of secondary liability - is easy to forget now we know the result.

[31] Per Lord Mustill *R v Powell; English* [1999] 1 AC 1.

It is hard for anyone to admit they are wrong but for a top court to admit an error for over three decades was extraordinarily brave. The justice of that part of the decision, in my view, cannot be faulted. However, it was a bittersweet moment. The law was corrected, but my client was pronounced guilty and the Court took up much of the judgment trying to block future appeals. The pronouncement in the judgment that "at a minimum, he [Mr Jogee] was party to a violent adventure carrying the plain objective risk of some harm to a person and which resulted in death; he was therefore guilty of manslaughter at least",[32] jeopardised his right to a fair retrial. The Court invited submissions on whether they should substitute a verdict of manslaughter or send him for a retrial. We wrote submissions that the court had caused an abuse of process by announcing him guilty but did not receive a reasoned reply. I am sure the UKSC made those observations because they were emphasising the position in relation to out-of-time appeals, not because they wanted to compromise my client's position but, frankly, they should not have been commenting on future appeals at all, about which they did not know the facts. The top down dictat applying 'substantial injustice' to a situation, where the injustice was created by the courts in the first place is, in my view, a significant problem.

Understanding the position of affected Prisoners

In understanding why the *Jogee* decision should lead to an examination of affected prisoners, it is important to understand that traditional accessorial liability (intentional acts to aid, abet, counsel and procure) was never abolished. It had been lost in the over-enthusiasm of prosecuting authorities and courts for PAL, also known as 'joint enterprise'. This led to a wide range of people on the periphery of group violence being convicted of murder for the unsupported acts of another; it also made differentiation between murder and manslaughter

[32] Jogee paragraph 107.

almost impossible. Frankly, almost anything can be foreseen, but only if there is evidence that a secondary party acts intending to support the principal will a verdict be safe.

What we still don't know is how many people were affected.

By the time of Mr Jogee's original trial 'joint enterprise' was a terrible instrument: Prosecutors would use foresight even in basic accessory cases and ordinary people could not possibly know where lawful activity ended and criminal liability began. Why the courts lost sight of injustice and miscarriages of justice in favour of an apparent desperation to keep people locked up, despite errors of law, I find hard to explain without policy being redefined as politics: Extending liability changed our language: think how 'groups' became 'gangs' and, 'protestors' became 'rioters'. People naturally hang around in groups or sports teams or at protest marches, and sadly, sometimes, people die. It does not follow that everyone participating intends that to happen or intends to assist and encourage, and they should not be treated as though they did[33].

The practical reality is that joint enterprise allowed the police to round up groups, and the courts would endorse this 'in it together' approach by ignoring whether someone acted intending to assist the principal in place of an assessment of what was foreseen at the time (which the prosecution did not struggle to prove because of the known outcome). It is no wonder that so few defendants gave evidence and so many want to appeal. Legal systems can affect behaviour (think drink driving or wearing seatbelts) but it is impossible to stop people associating with risky friends, especially if the secondary party is a youth. Joint enterprise was a parent's nightmare. Justice Committee reports made it clear that PAL was unclear to the

[33] Put simply, without acts of participation there is no criminal responsibility: *R v Coney* (1882) 8 QBD 534

general public[34] and the Law Commission reported on the concerns[35]. All was ignored for far too long. For those affected, it should not take another 30 years to sort out the mess.

The *Jogee* judgment set up too high a standard for those wrongly convicted as a result of legal error to seek leave to appeal out of time, so there is still work to do. The ongoing failure by the English CACD to recognise the need to allow fair retrials in the light of the miscarriage of law means that, save for John Crilly, people remain imprisoned for crimes where the jury never had the opportunity to consider their intention. The 'substantial injustice' test for out-of-time appeals is now levitated by the decision in *Johnson*[36] and other cases where the CACD (CACD) are flexing far too much power endorsed by the Supreme Court's obiter in *Jogee* which looks very much like a coordinated approach.

The Substantial Injustice Test

The CACD has defined the 'substantial injustice' test in Johnson as follows:

> We approach the issue by considering the strength of the case that Mr Johnson would not have been convicted of murder if the jury had been directed on the basis of the law as set out in Jogee[37].

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'. There is no legal basis for this definition of 'substantial injustice'. The Supreme Court in *Jogee* applied the 'change in law' test to an error of law' situation without asking for submissions on this point in advance. Mr Johnson and all the other affected prisoners are

[34] Justice Committee Eleventh Report of Session 2010–12 and Fourth Report of Session 2014–15

[35] CP131, LCCP131, LC300, LC305

[36] Neutral Citation [2016] EWCA Crim 1613

[37] Johnson para 55

required to satisfy the CACD that they *'would not have been convicted of murder'*. The test is higher than 'safety' required for 'in time' appeals and higher than a possibility or even a significant possibility that a properly directed jury, acting reasonably, would have acquitted the appellant and/or considered the alternative offence of manslaughter, which might be rather more sensible alternatives.[38]

The Supreme Court in *Jogee* stated *obiter* that the 'substantial injustice' test would apply to all future appeals affected by this fundamental correction of the law in the same way as general cases where the law had been clarified or changed.[39] Relying on the Supreme Court's *obiter* statements, in Mr Johnson's appeal, the CACD specifically rejected the submissions that the correction of the law of joint enterprise in itself demonstrated a 'substantial injustice'.[40] This was justified by "the wider public interest in legal certainty and ….you've guessed it……the finality of decisions .[41]

The policy reasons cited in support of the 'substantial injustice' test only provides a justification for the *existence* of an additional hurdle for appeals made out of time. This justification was given, in the absence of research as to the effect of the 'wrong turn' of law over the past three decades. If policy grounds are to be justified, they must be applied in a proportionate manner and not in an excessive or overly restrictive way, so as to impede access to justice, particularly where there is some evidence of discriminatory effect[42]. Here the balance that needs to be struck between the right to access a Court for a fair retrial and

[38]Notably Mr Jogee himself was acquitted of murder and convicted of manslaughter at a retrial. His sentence was one of 12 years for manslaughter having previously been life with a minimum term of 18 years when wrongly convicted of murder after erroneous jury directions on joint enterprise.
[39] *Jogee* §100.
[40]*Johnson* §21.
[41] *Johnson* §18.
[42] Crewe, B., Hulley, S., and Wright, S. (2014), *Written Evidence submitted to the House of Commons JusticeCommittee on Joint Enterprise*. Institute of Criminology: University of Cambridge. Available online <http://www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf>

finality has been lost.[43] The admissibility criteria of the Criminal Appeal Act 1968 impairs the very essence of the right to access to the courts – both to the full CACD and a retrial before a properly directed jury who hear the relevant evidence. It fails to strike a fair balance between ensuring that judicial decisions are final, and the rights of a person who has potentially been wrongly convicted on the other. Similarly, Parliament's restrictions on the CCRC's ability to refer issues of law inhibits the CCRC from having the necessary effect in miscarriage of justice cases or to play a role in identifying areas for legal development.

It is noteworthy that, Section 2(1) CAA 1968 used to contain, before it was abolished by the Criminal Appeal Act 1995, what was known as the "proviso". It read

> that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

This section enabled the Court to uphold a conviction even in the face of a material irregularity or a crucially wrong decision on a question of law. The mischief which led to abolition was bias - some judges found no error or applied the proviso more readily where they believed the appellant was guilty, given that the only alternative would have been to acquit.[44]

[43] *Ashingdale v UK* (1985) 7 EHRR 528, §57: "Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired […] Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

[44] Lord Goddard CJ observed to the House of Lords in 1952: 'I confess that there are cases when one is strongly tempted to apply the proviso, because one very often feels the moral conviction that the man appealing is guilty.': United Kingdom, Parliamentary Debates, House of Lords, 8 May 1952, 793.

The interpretation of the 'substantial injustice' test by the CACD echoes the abolished s.2(1) 'proviso' and has in effect brought it back surreptitiously.[45] It is significant that the Privy Council in *Casswell and another v R* (*Monsterratt)* [2016] UKPC 19 addressed the ambit of s.2(1) CAA 1968 (where the "provisio" provision remains in force):

> The test for whether a miscarriage of justice has actually occurred **is not simply whether the appellate court is itself persuaded of guilt. That would be to substitute trial by appeal judges for trial by jury.** True it is that the responsibility for applying or rejecting the proviso is laid squarely on the appellate court. That the appellate court is satisfied of guilt is certainly necessary, but is not by itself sufficient. The test is normally whether the appellate court is, further, satisfied that *any jury* acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred: see *Lundy v The Queen* [2013] UKPC 28.[46]

In joint enterprise appeals the application of the 'substantial injustice' test reverts back to that mischief –a trial by appeal judges imposing a disproportionate burden on the Appellant. [47] extinguishing the opportunity for a fair retrial, all under the guise of pursuing a legitimate aim - finality.

The Supreme Court refused Asher Johnson's application in July 2017. The following reasons were given in the letter:

> The jurisdiction of the Supreme Court is limited, particularly in criminal cases. Permission to appeal to the Supreme Court in a criminal case may only be granted if it is certified by the court below that a point of law of general public

[45] See *R v Cottrell* [2007] EWCA Crim 2016, [2008] Crim LR 50.
[46] §28 [emphasis added].
[47] [2000] 29 EHRR 210.

> importance is involved and it appears to that court or to the Supreme Court that a point is one that ought to be considered by the Supreme Court. As no certificate has been granted, this Court is unable to issue this application.

A similar response was received by Alex Henry where the CACD had not only suggested he had not reached the high bar of 'substantial injustice' but also rejected his expert's diagnosis of autism, apparently on their own assessment of whether he has autism or not. Both Mr Henry and Mr Johnson have since alleged that such refusals have resulted in a violation of their Convention rights and a failure to provide an effective remedy. We await the outcome of those applications.

Conclusion

If we continue in the current position we basically accept that a jury can reach a decision without being properly directed on the elements of an offence nor any defence of withdrawal, which amounts to not being properly directed at all. The Supreme Court should not be defunct on such issues. The European Court of Human Rights is supposed to be a Court of last resort, not a quasi-domestic Court in order to fill a lacuna on fair trial issues. In the absence of any independent domestic judicial scrutiny and accountability, the CACD can effectively self-regulate which means we, once again, reach a situation of fundamental injustice. The Supreme Court is the highest court in the United Kingdom for a reason – its role is more than merely decorative. It is supposed to deal with rights based issues. I am still hoping they will step in and that issuing the Henry and Johnson applications de bene esse is a good sign.

A fair trial before a properly directed jury is a fundamental human right and the foundation of the common law: Representing Mr Jogee, I was always surprised that anyone would want to

maintain extensions of criminal liability – what little research there is tends to suggest it has something to do with race and class in the criminal justice system, hence my term "systemic colonialism". I'm pretty sure David Lammy MP would call it institutional racism but that would be to ignore class and other issues such as gender or disability and the almost inevitable effect of bias. For me this was always about the mums who have watched their (often vulnerable) sons (usually it is sons) locked up because a privileged profession either failed to read the law or chose a policy to lock up people on the periphery of events for things they never intended. Some of those mums are here today and have waited far too long for their day in court.

The Supreme Court may not yet have recognised the rights-based arguments that support the opportunity for a fair retrial but they are the foundation of any sound criminal justice system. and a 'cardinal requirement of the rule of law[48]'. Fundamentally, a fair trial is designed to prevent innocent people being convicted of crimes. It protects liberty, property, reputation and other fundamental interests. Being wrongly convicted of a crime has been called a 'deep injustice and a substantial moral harm'[49]. Fairness also gives a trial its integrity and moral legitimacy or authority. Fair trials are presumed to be more likely to reach correct verdicts than unfair trials, and therefore they may not only help prevent wrongful convictions of the innocent, but also indirectly promote the prosecution and punishment of the guilty.[50].It is a right not to be tried unfairly. **This requires accurate legal directions.**

Reading the old cases has given me a perspective on the use of 'policy' which I will never shake: the cases highlighted the approach of the courts to poachers, the working class, the Irish and, more recently, black people. In my view, it contributes to the large numbers of

[48] Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.
[49] Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence and Proof* 241, 247:
[50] https://www.alrc.gov.au/publications/common-law-right-5

black people in prison in many Commonwealth countries, particularly those that retain the Felony Murder Rule[51] For example, as I write 100% of youths in prison in the Northern Territory of Australia (where I have lived and where there is a presumption of complicity for less serious offences) are Aboriginal and in the U.S (where felony –murder is retained), in April 2018, after police killed a burglary suspect in a shootout, the officer was not charged - instead a teenage accomplice who did not fire the gun was found guilty of murder. The logical force of the subjective approach in England and Wales is lost if its effect is not felt properly by all those affected.

Sadly, some pretty poor decisions have been made by the CACD in refusing out-of-time appeals that were brought post-*Jogee* thus failing to fully correct the legal error. Whatever the reasons for the application of a 'substantial injustice' test in cases of the utmost severity, where a jury was wrongly directed, the policy of finality should not take precedence over the right to a fair retrial. To make use of Warren Burger's words - the solution is to find a new point for finality with a more reasonable test of jurisdiction, a functioning Supreme Court, a Government that makes an effort to improve the criminal justice system and a CCRC that can deal properly with miscarriages of justice on both law and fact.

In the meantime, in pursuing the current agenda in joint enterprise appeals, in my view, the Appellate Courts in England and Wales have lost sight of justice.

[51] Lussenhop: *In the U.S. you don't have to kill to be a murderer* < https://www.bbc.co.uk/news/world-us-canada-43673331>