

## Joint enterprise: review sentencing, not law

The culpability of defendants who play peripheral roles is lower than is reflected in punishment, writes Edward Brown, QC

Jimmy McGovern's play *Common*, broadcast on BBC1 on July 6, put the spotlight on the law of joint enterprise, which allows the conviction of those who are proved to have encouraged a crime. There is a strong public interest in retaining this law for cases from murder to theft. Taking no direct part in a crime should not exclude anyone from criminal responsibility. Someone can encourage a crime without any physical participation.

The prosecution must prove a case to a jury; any doubt will benefit the defendant. If, for example, a defendant claims to have been unaware that the killer had a knife, then the prosecution must prove beyond reasonable doubt that the defendant did know about the knife,



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knew that the killer might use it, and encouraged the killer in that knowledge.

If the defendant claims the killer went outside what he agreed or contemplated and was "on a frolic of his own", again the prosecution must prove the defendant did contemplate such an action by the principal and intentionally encouraged it.

However, the law of joint enterprise does in theory allow the net to be cast wide. Police and prosecutors have a responsibility to make sure that the net is not cast so wide as to allow for or even encourage an injustice. If a suspect claims to be a mere bystander, they have a duty to refuse to charge unless they are satisfied that evidence proves

the claim to be wrong.

Thereafter the evidence at trial will determine whether the prosecution case is proved. It is sometimes said that the law is too complex. It need not be.

The best legal directions provided to juries are the simplest ones. Judges are given guidance on how best to sum up the law of joint enterprise and in serious cases the jury are given written directions as to the law to take with them when they retire. If care is taken to emphasise where the burden lies, and that, for example, a mere bystander is not guilty by his/her presence alone, then there should be no joint enterprise injustice.

To my surprise, most of those who have been caught up in knife or gun crime to whom I speak in an effort to steer them away from it know what joint enterprise means (some even approve of it). Juries in my experience also understand the limits to its scope.

Where there can be injustice is in the area of sentence, particularly regarding homicide. Sentences for murder have in-

creased markedly over the past ten years and judges are given too little discretion, in my view.

Parliament dictates that those over 18 face life imprisonment and a minimum term of 25 years as a starting point if they are the principal in a "joint enterprise" knife murder. In practice, a secondary party, ie, the person encouraging the principal, will attract a minimum term of between 15 and 18 years. One should remember that there is no "serve half and get released". These are real years. Many believe that the principal deserves his 25 years, but in my view the culpability of (often young) defendants who play a peripheral role, following a decision taken in a trice, is much lower than is reflected in the present level of sentencing.

In 2006 the Law Commission recommended wholesale reform of the law of homicide. Successive governments have declined the invitation. Reform would enable juries to reflect the true extent of culpability, which would allow a judge to sentence for that level of culpability.

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