

CRIMINAL LAW SEMINAR



23 March 2016

Jogee [2016] UKSC and the effect on joint enterprise liability
Emily Cook

FNC [EWCA] Crim 1732 concerning DNA evidence and
submissions of no case to answer **Richardo Childs**

Serious Crime Prevention Orders **Rupert Taylor**

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23 March 2016

4.30 pm – 5.00 pm

Refreshments & Registration

5.00 pm – 5.30 pm

Jogee – joint enterprise liability

Emily Cook

5.30 pm - 6.00 pm

FNC - DNA evidence

Richardo Childs

6.00 pm – 6.15 pm

Interval

6.15 pm – 6.45 pm

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JOGEE [2016] UKSC 8
AND THE EFFECT ON JOINT
ENTERPRISE LIABILITY

Emily Cook



Emily Cook

Email address:

Core Practice Area: Criminal Defence

Call: 2002

Education: Cambridge University

Memberships: Criminal Bar Association

Emily recently joined chambers having moved from London to Devon. In London Emily undertook pupillage and then tenancy at 25 Bedford Row Chambers, one of London's top criminal defence sets.

In her 10 years at 25 Bedford Row Emily built up a reputation as a tenacious defender, described by the Court of Appeal as 'feisty', 'eloquent' and 'forceful'. She has experience in sexual offences, serious violence, drugs importation and supply, firearms, arson and child cruelty.

She was also instructed for her interest and experience in complex legal arguments with regard to historic sexual offences, abuse of process, exclusion of evidence and appeal against conviction.

Cases

Serious Violence

- R-v- Turner – Led Junior in first trial of a murder case. Responsible for legal argument in which key low copy DNA evidence was successfully excluded. Defendant subsequently convicted at retrial with different representation.
- R-v- Amoah – Led Junior in murder trial involving large-scale gang fight with multiple eyewitnesses.
- R v Sajadi & Others –Led junior for 1st Defendant – multi-handed kidnapping and firearms conspiracy with cut throat defences run by two co-defendants against our client.
- R –v- Aston & Ors –Led Junior for first defendant in trial of large-scale public order incident and hammer attack. Case involved multiple defendants and multiple eyewitnesses.
- R v B - Counsel for youth client allegedly involved in a serious stabbing on a bus.
- R –v- S – Counsel for young man acquitted of stabbing his brother in s18 trial originally charged as attempted murder.
- R –v- P – Counsel in two trials (s18 robbery / ABH) representing same defendant with severe learning difficulties. Successfully argued defendant fit to plead despite his learning difficulties (contrary to view of prosecution expert) to enable him to put forth his positive defence. Represented him at both trials in which he successfully gave evidence and was acquitted.
- R v Popoola - Counsel in multi handed false imprisonment case running cut throat defence.

Firearms

- R-v-Simpson Counsel for first defendant in multi handed conspiracy to supply firearms representing individual described by police as key supplier of firearms to North London (eventual guilty plea).

- R v Anicotte Instructed to represent defendant with mental health problems who had accidentally shot friend with illegally held firearm (guilty plea).
- R v M Instructed in trial involving violent gunpoint robbery at a residential address.

Sexual Offences

- R-v-Mc Led junior in historic sexual offences case involving multiple allegations of sexual abuse of younger siblings. Specifically requested to prepare abuse arguments with regard to delay in prosecution.
- R v M Led junior in historic sexual offences case involving 3 separate complainants alleging 'buggery', indecent assault and false imprisonment. Prepared abuse of process arguments and legal arguments on rebuttable / irrebuttable presumptions arising from historic nature of case and young age of defendant at time of the allegations.
- R-v- R & Ors – Instructed for first defendant with multiple counts of sexual assault against multiple complainants, all taking place in care home (prepared trial including legal arguments but case had to be returned because of an overrunning trial).
- R v V - Counsel in trial involving allegations of sexual assault and attempted rapes.

Drug Importation

- R –v- Rekhoun & Ors – Led junior for Defendant acquitted at retrial of large-scale, repeated cocaine importation via Federal Express.

Associated Work

- Worked as an intern for NAACP Legal Defence Fund in New York working on death penalty cases with a focus on confessions by those with learning difficulties.
- Undertook research for the Foreign and Commonwealth Office regarding state constitutionality of the death penalty in New York State and consequences of Vienna Convention violations in New York courts.
- Lectured on asylum defences with regard to illegal entry into the UK and the use of false identity documents and abuse of process arguments against prosecuting the victims of human trafficking.

Joint Enterprise

On 18th February 2016 Judgement handed down by House of Lords in Jogee was said to make genuine legal history.

There was talk of an 'audible gasp' as Lord Neuberger said that law had been wrongly interpreted for decades.

Is there a real change?

What impact will it have?

History

Principle of joint enterprise - secondary party guilty of same offence as principal offender.

Are debates as to foundation of joint enterprise.

Prosecuting aristocrats ?

Prosecuting carters?

Logic of it, and the policy considerations underlying it, are clear.

Embedded in statute :- Accessories and Abettors Act 1861 s8 'Whosoever shall aid abet counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender'.

This was not a new development rather a restatement of law developed in previous statutes.

Summary only equivalent s44 of the Magistrates Courts Act 1980

Once encouragement / assistance is given prosecution don't have to prove it had a positive effect on the actions of the principal (R v Calhaem [1985] QB 808).

However a withdrawal prior to the commission of an offence can negate it (see para 13 of Jogee).

Additionally don't have to be intent to encourage / assist a specific offence - could be one of a range of offences (DPP for NI v Maxwell [1978] 1 WLR 1350).

These principles remain unchanged by Jogee.

What has changed?

NOT simple joint enterprise cases -

INSTEAD is those that involve parasitic accessory liability

Parasitic Accessory Liability

Where two defendants (D1 and D2) agree to commit crime A, but in the course of that D1 also commits crime B.

The question arises whether D2 is guilty of crime B.

Most dramatic example of this is murders committed during an agreement to commit a different crime - was in this area that problem arose.

Privy council case Chan Wing Siu v The Queen [1985] AC168

In delivering judgement Sir Robin Cooke noted that *'The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied'*.

This was followed in Powell and English [1999] 1 AC 34 in which Court of Appeal answered in the affirmative the question 'Is it sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm'.

Problem was that actually required a lesser mens rea for the secondary than for the principal

Jogee made clear this is wrong.

Principle re-stated

Jogee made clear what is required is two elements:-

Firstly that the defendant was a participant ie assisted or encouraged the commission of the crime.

Secondly that he intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1. If the crime requires a particular intent , D2 must intend (it may be conditionally) to assist D1 to act with such intent (see para 89 -90 of Jogee).

New JSB guidelines are expected on coming weeks to deal with directions to the jury.

How many it effect?

Joint enterprise is said by some to have been involved in significant number of cases

April 2015 study by Bureau of Investigative Journalism showed that in preceding 8 years more than 4,500 people were prosecuted for homicides involving two or more defendants. That is 44% of all homicides

In the same period, 1,800 people were prosecuted for homicides involving four or more defendants.

Has disproportionate impact on certain sectors of population.
One research project found that 37.2% of those serving long terms for joint enterprise offences were black – 11 times the proportion in the general population and almost three times as many as in the overall prison population.

Those figures note those involving joint enterprise but not necessarily parasitic accessory liability.

Even in those cases not a get out of jail free card.

House of Lords in Jogee stressed that it doesn't render invalid all convictions arrived at by faithfully applying the principles laid down in Chan Wing-Siu and Powell and English (see para 100 of Jogee).

To appeal out of time would need to seek exceptional leave, will be granted only if can show substantial injustice.

Also made clear that foresight may be evidence of intent.

Many of those cases would be guilty of manslaughter as some harm envisaged.



FNC [2015] EWCA CRIM 1732
DNA EVIDENCE AND SUBMISSIONS
OF NO CASE TO ANSWER

Richardo Childs



Dr Richardo Childs

Email address: rchilds@devonchambers.co.uk

Core Practice Area: Civil, Regulatory and Disciplinary, Crime

Call: 2013

Inn: Gray's Inn

Education: Cardiff Law School - Bar Professional Training Course, Outstanding (2013)

Cardiff University - PhD, Fetal Gene Therapy, Balancing of Ethical Theory, Scientific Progress and the Rights of Others (2013)

Cardiff University - Legal Aspects of Medical Practice, Distinction (2007)

University of Sheffield - LLB (Hons) Law, 2:1 (2006)

Awards: Gray's Inn - Gerald Moody BPTC Named Award (2012).

Economic and Social Research Council PhD award (2008-2012).

Before his pupillage and during his PhD Richardo was employed by Cardiff University as an associate lecturer. During this time he taught criminal and contract law in addition to post graduate teaching on the Legal Aspects of Medical Practice LLM.

Since September 2013 Richardo has practised in the County Courts as a solicitor's agent. He has represented lay clients in a variety of hearings including small claims, possession and MOJ stage 3 hearings.

Richardo joined chambers in October 2015 after successful completion of his pupillage at Devon Chambers. Richardo is developing a mixed practice.

Civil

Personal Injury

Richardo accepts instructions in all areas of personal injury law including employer's liability claims, road traffic accidents, and slipping/tripping claims. Richardo has represented clients at Small Claimant, Stage 3 and Infant Settlement hearings and accepts instructions to advise on liability and quantum. He is happy to undertake work on a Conditional Fee Agreement basis.

Mental Health, Court of Protection, Inquests

Richardo accepts instructions to advise and represent clients in all aspects of mental health and court of protection law. His recent instructions include representing a respondent in the Court of Protection.

Housing/Anti-Social Behaviour

Richardo accepts instructions on behalf of claimant and defendants in possession hearings, anti-social behaviour injunctions. He has represented defendants in breach of injunction proceedings and in housing disputes.

Chancery and Commercial

Richardo accepts instructions to advise, draft and represent clients across a wide range of chancery and commercial matters to include contentious probate issues and contractual claims.

Regulatory and Disciplinary

Richardo accepts instructions within this area, in particular with a focus upon the regulation and disciplinary aspects of healthcare law.

Crime/Prison Law

Richardo is regularly instructed on behalf of both the prosecution and defence in the Magistrates and Crown Courts.

Previous Appointments

Childs. 'Fetal Gene Therapy: Balancing ethical theory, scientific progress and the rights of others.' PhD Thesis 2013 Available at <http://orca.cf.ac.uk>.

Chadwick and Childs. 'Ethical issues on the diagnosis and management of fetal genetic disorders' Best Practice & Research Clinical Obstetrics & Gynaecology, Volume 26, Issue 5, October 2012, pages 541-550.

Childs. 'Muddying the waters: Fetal gene therapy and confidentiality'. Cardiff University Law Society Student Law Journal, Issue 4 2012, pages 9-16.

Other Interests

Richardo has a keen interest in many sports including rugby, football and athletics having previously competed nationally in long jump and the 60m sprint.

Richardo represented GB Under 23 in long jump and has won national medals in the event. He also enjoys cooking and gardening in his spare time.

R v FNC [2016] 1 Cr. App. R. 12

DNA evidence and submissions of no case to answer

Dr Richardo Childs
Devon Chambers

Overview

- ▶ Brief facts
- ▶ Decision at first instance
- ▶ Grounds of Appeal
- ▶ Judgment
- ▶ Application to Prosecutors
- ▶ Application to Defence Counsel
- ▶ Conclusion

Brief Facts

- ▶ Alleged indecent assault in May 2003.
- ▶ Unknown male ejaculated upon the complainant's trousers on a busy train.
- ▶ Only description given at the time was that the male was 'white with brown hair'.
- ▶ No DNA match at the time.
- ▶ Defendant arrested on unrelated matter 10 years later and matched the DNA profile.

Brief Facts

- ▶ Prosecution evidence consisted of
 - Complainant's witness statement,
 - DNA, and
 - No comment interview.
- ▶ No evidence of:
 - when the Defendant had entered the UK,
 - where he was living in 2003,
 - his employment was at the time, and
 - whether he had any brothers in the UK.
- ▶ Before any evidence was given, the defence (with the Prosecution in agreement) submitted that the DNA evidence was insufficient to give rise to a case to answer.

Decision at First instance

Mr Recorder Day QC:

- ▶ The law was still the same;
 - R. v Lashley unreported 8 February 2000, R. v Grant [2008] EWCA Crim 1890 and R. v Ogden [2013] EWCA Crim 1294.
- ▶ No unique position had been reached in relation to DNA.
- ▶ DNA profiles could not provide absolute proof of identity.
- ▶ No other evidence linking the defendant, apart from the DNA profile.
- ▶ Therefore no case to answer.

Grounds of Appeal

- ▶ The Recorder had erred in law and there was case to answer; and
- ▶ The defendant's failure to answer questions could be relied on as an adverse inference of pursuant to section 34 (2)(c).

Appeal Allowed

- ▶ The Judge at first instance had erred in law as there was a case to answer.
- ▶ Difficult to see how an adverse inference under the [Criminal Justice and Public Order Act 1994 s.34\(c\)](#) could be drawn, given the way that the case had proceeded.
- ▶ Although the Judge erred in law by hearing the submissions the appeal did not succeed on this point as the Prosecution agreed to that course of action.

Drawing an adverse inference

- ▶ R. v Hart, unreported, 23 April 1998, Lord Bingham at [25] and [34]
 - "The sort of circumstances we conceive to which paragraph (c) of subsection (2) [of s.34] applies are, for example, where the defence has involved putting a positive case on behalf of the appellant, perhaps supported by documents or whatever it may be, or, a more likely example perhaps, where the Defendant has chosen to refuse to answer questions when initially interviewed but some time later, after consulting his solicitor, has produced a prepared statement or has given later answers. It does not apply in circumstances such as obtained in the present case where nothing had been relied on by the defence which could bring the section into play."
 - "Since s.34(2)(c) permits the court to draw proper inferences when determining whether there is a case to answer, the section may apply at a stage of the trial when the defendant has had no opportunity to give or adduce evidence, and when it will not be known (perhaps not even decided) whether the Defendant will give or call evidence or not. But the court is likely to know, from questions put to prosecution witnesses, what (if any) positive case the Defendant advances. It would be surprising if sub-section (2)(c) were intended to apply only when, unusually, specific suggestions put to a prosecution witness are accepted by the witness."
- ▶ "[...] prosecution had not called any witnesses and therefore no opportunity had been afforded to see if the defendant would put a positive case" Lord Thomas [18]

A case to answer

- ▶ *R. v Sampson (Albert)* [2014] EWCA Crim 1968 and *R. v Adams (Denis John) (No.2)* [1998] 1 Cr. App. R. 377 applied.
- ▶ Distinguished from *R. v Grant* [2008] EWCA Crim 1890, *R v Lashely* (2000)(unreported) and *R. v Ogden* [2013] EWCA Crim 1294.

A Case to Answer

- ▶ “27. It is clear from the decision in *Sampson and Kelly* and the approach of Lord Bingham CJ in *Adams (No.2)* that, where DNA is directly deposited in the course of the commission of a crime by the offender, a very high DNA match with the defendant is sufficient to raise a case for the defendant to answer. There is a clear distinction, as the authorities stand, between such a case and cases such as *Lashley* where the DNA was deposited on an article left at the scene.
- ▶ 28. In the present case, there can be no doubt that the DNA was deposited in the course of the commission of the offence by the person who committed the offence. As the match with the defendant was one in a billion, there was accordingly a very strong case against the defendant and plainly a case for him to answer that the DNA deposited on the trousers was his. The decision of the recorder was wrong in law, the appeal must be allowed and a trial to take place in the Crown Court before a circuit judge.”

▶ Lord Thomas

Application – Prosecution perspective

- ▶ Avoid agreeing to submissions of ‘no case to answer’ before the end of the Prosecution evidence (see paragraph 9).
- ▶ Implications for CPS policy.
 - *Guidance on DNA Charging, 2004, para. 5.4,*
- ▶ Discuss reliability of DNA evidence (CPR 19A.6).
- ▶ Raise issues regarding any adverse inference from no comment interviews.
- ▶ If possible obtain statistical basis for DNA match.

Application– Defence perspective

- ▶ Tactical burden on defence ([29]).
- ▶ Statistical basis.
 - *Lashley vs* one in a billion,
 - Grant vs partial match, and
 - DNA database and multiple matches.
- ▶ Examine reliability of DNA evidence (CPR 19A.6).
- ▶ Difference between direct and indirect links.
- ▶ *R v Hookway* [1999] Crim. L.R. 750.

Conclusion

- ▶ One in a billion DNA match on DNA deposited in commission of crime is enough for a case to answer.
- ▶ Distinction between DNA deposited during commission of the crime and DNA deposited on article left at the scene.
- ▶ Burden on defence to raise factual issues.
- ▶ Submissions for no case to answer at halftime save for limited exceptions
- ▶ Need a positive case put forward by the Defendant before any adverse inference can be drawn.

Questions?



**SERIOUS CRIME PREVENTION
ORDERS**

Rupert Taylor



Rupert Taylor

Email address: rtaylor@devonchambers.co.uk

Core Practice Area: Crime

Call: 1990

Inn: Gray's Inn

Education: LLB (Hons), L.L.M (Lond)

Memberships: Criminal Bar Association

Following his pupillage in London, Rupert joined Devon Chambers in 1990 and has, over the years, developed an extensive practice in heavy-weight criminal defence. He is deputy Head of Chambers.

He is a particular favourite with a large number of defence solicitors in Devon and Cornwall. His practice encompasses all areas of criminal law with a particular emphasis on murder and manslaughter, serious violence, sexual offences, drug importations and fatalities arising from road traffic collisions.

He is a jury advocate in the best traditions of the Bar; his calm, persuasive and charming manner lend him a formidable presence in the court room. He is very popular with clients and has a natural feel for the tactical and strategic approach towards cases.

His heavy workload means that his practice is predominantly focused in Devon and Cornwall but he is always prepared to travel to other areas to suit professional or lay client. Rupert prides himself on being available for conferences, whether by telephone, video-link or in person, to assist solicitors in the full preparation of a case.

He regularly provides seminars to solicitors as part of Chambers' well-respected CPD team; he recently lectured on the implementation of section 28 of the *Youth Justice and Criminal Evidence Act 1999*, [click here to read in full](#).

Rupert is listed as a recommended Counsel in Legal 500.

Notable cases

R v B and others: representing a man charged with manslaughter arising out of an alleged restraint by doormen of a man in a nightclub.

R v E, Truro Crown Court: defending a man charged with serious sexual offences against his two step-sons over a period of several years.

R v P, Plymouth Crown Court: defending a man charged with the rape of a 14 year old girl.

R v M, Truro Crown Court: defending a man charged with sexual offences against 2 females, the allegations being so extreme that the media could not publish the details.

R v C, Plymouth Crown Court: defending a man charged as part of a multi-handed conspiracy to inflict grievous bodily harm involving alleged drug-dealers.

R v T, Exeter Crown Court: defending a Polish national charged with rape and section 18; the victim subsequently died; the investigation was one of the largest ever undertaken by the Devon and Cornwall Police.

Other Interests

Rupert enjoys water sports, in particular sea kayaking, and is RYA Coastal Skipper qualified. Rupert holds a current HGV qualification and previously served in the Royal Naval Reserve.

Serious Crime Prevention Orders



and
Participating In The Activities Of
An Organised Crime Group.

