1. As an academic lawyer who researches the law of joint enterprise, my evidence focuses on the second of the Select Committee’s two questions. I am unable to comment specifically on the impact of the CPS Guidance on Joint Enterprise Charging Decisions on prosecutorial policy. However, anecdotal evidence following discussions with practitioners in the field suggests that the CPS Guidance has had little obvious impact on prosecutorial policy.

2. Of course, as the Select Committee identified in its 2012 report, one of the difficulties in this area arises from the lack of official statistics about joint enterprise prosecutions and convictions. The report of the Bureau of Investigative Journalism on *Joint Enterprise* in 2014 has provided some statistical evidence relating to convictions for homicide involving what might be joint enterprise cases, with reference to cases of homicide involving two or more defendants and cases involving four or more defendants.

3. One of the problems with the law on joint enterprise concerns the blanket use of that phrase to cover cases involving two principals who both commit murder, cases of assisting or encouraging murder and cases of an agreement to commit one crime where there is a departure from it by one party to commit murder. My concern with the inadequacy of the law focuses primarily on the latter context, which is especially important in respect of gangs. The two-handed homicide cases are just as likely to involve joint principals and particularly assisters and encouragers as well as cases involving departure from a common purpose. This is less likely to be the case with the four-handed homicides, which I consider are more likely to involve gangs, and so are more likely to involve the doctrine of joint enterprise liability.

4. The focus of my written evidence will, however, be on the second question asked by the Select Committee, relating to whether it is appropriate for the Committee to consult on implementation of the Law Commission recommendations for reform in this area. That question is premised on a prior question, namely whether the law of joint enterprise is unsatisfactory so that reform is required.

5. The Select Committee considered the state of the law on joint enterprise in its 2012 report. Just before that report was published the Supreme Court delivered judgment in *Gnango* [2011] UKSC 59. Although the Select Committee was able to include reference to this decision in its report, this was inevitably only a brief reference, at p. 11. The Committee concluded that the ‘case illustrates the difficulties that can arise for courts and juries considering the cases based on joint enterprise.’ This statement actually reflects the fundamental confusions which beset this area of the law, especially because *Gnango* did not actually concern the technical doctrine of joint enterprise liability.
6. The decision in *Gnango* does, however, reflect the significant difficulties which beset the law of accessorial liability generally. The decision of the Supreme Court reflects fundamental confusion about the ambit, definition and function of accessorial liability. Generally the reaction to the different approaches of the Justices in that case has been met with significant criticism from academics and practitioners. I have tried to defend the result, but not the reasoning in the case, in an article which was published in the Criminal Law Review: ‘Joint Enterprise Liability is Dead: Long Live Accessorial Liability’ [2012] Crim LR 275.

7. One of the key arguments in my article was that it is important to understand the doctrine of joint enterprise in the context of accessorial liability more generally.

8. In my opinion, when deciding whether the Committee should consult on implementing reforms in this area, there are two particular issues which need to be confronted.

**Ambit of joint enterprise**

9. There is a great deal of confusion about what is meant by ‘joint enterprise’ liability, which often results in those discussing this area speaking at cross-purposes. In the 2012 Report the Committee quoted me as defining joint enterprise liability strictly, to distinguish it from accessorial liability more generally. This was then undermined by the Committee’s analysis of *Gnango* as involving joint enterprise liability. The Justices in *Gnango* identified three distinct senses of what was identified as joint enterprise liability:

   (i) Liability as joint principals – but this simply concerns the individual liability of each of those who have brought about the relevant harm with the necessary *mens rea*. It is not useful to characterise this as joint enterprise liability.

   (ii) Liability as an accessory where the defendant assists or encourages the principal to commit a crime. This is sometimes described as ‘plain vanilla accessorial liability’.

   (iii) Liability for departure from a common purpose to commit crime A whereby the principal commits crime B. This is the doctrine of (departure from) joint enterprise liability (unfortunately described as ‘parasitical accessorial liability’ by the Supreme Court).

10. But whilst accessorial liability and joint enterprise liability can be distinguished, they are clearly closely related, both as regards the nature of liability (with the accessory being convicted of the same offence as the principal) and as regards the *mens rea* required to establish liability, namely foresight of the commission of the substantive offence. The difference between them appears to turn on what the accessory needs to do for liability to be established. For general accessorial liability there must be proof of an act of assistance or encouragement. For joint enterprise liability there simply needs to be proof of a common purpose to commit crime A.
10. My own view is that accessorial liability and joint enterprise liability can be brought even more closely together by recognising that liability is founded on the accessory’s association with the principal’s crime. I emphasise this only because the Law Commission’s recommendations for statutory reform recognises a distinction being drawn between the two forms of liability. I am not convinced that that is appropriate. But this disagreement at least reveals that any consideration of the operation of joint enterprise liability must also have regard to its relationship with accessorial liability more generally. By acknowledging the close relationship between accessorial and joint enterprise liability, I do not consider that the statutory model suggested by the Law Commission is appropriate.

**Mens rea requirements where murder is committed by the principal**

11. But even if the focus is maintained on the adequacy of the specific doctrine of joint enterprise liability strictly defined, I have no doubt that the law creates injustice in that, at least as defined if not necessarily as prosecuted, the gang member who is on the periphery of criminal conduct which results in murder might also be convicted of that murder by virtue simply of being associated with it. The case studies identified by the Bureau of Investigative Journalism alone reveals how this causes injustice.

12. It is vital to emphasise in this debate that, although many of the most controversial cases involve the commission of murder, the concern is not about the conviction of the principal for murder, but is with the treatment of those on the periphery as murderers, even though they did not cause death and had a lesser mens rea relating to the commission of any crime. I should emphasise that I would not wish to argue that those on the periphery should not be convicted of anything; rather, they should not be convicted of murder with the imposition of the mandatory life sentence. This makes a mockery of the criminal law which is founded on fundamental principles of the rule of law, namely the need to identify degrees of criminality and to reflect this in the hierarchy of offences and the sentence which is imposed.

13. Since the publication of the Committee’s report in 2012 there has been one development in the case law which illustrates how unsatisfactory and confused is the law in this area. The orthodox approach to joint enterprise liability is that the accessory (D2) will be convicted of the same offence as the principal (D1) where D2 foresees the commission of the crime committed by D1 (crime B) as a possibility. This has been taken to mean that D2 foresees as a possibility that D1 will commit the actus reus of crime B with the relevant mens rea: Powell and Daniels; English [1999] AC 1; A, B, C and D [2010] EWCA Crim 1622, [2011] QB 841. However, the House of Lords in Rahman [2008] UKHL 45, [2009] 1 AC 129 appeared to suggest that it is sufficient that D2 foresaw the commission of the harm without needing to foresee that D1 might have the necessary mens rea. This was adopted by the Court of Appeal in Bristow [2013] EWCA Crim 1540. Such confusion and contradiction about even the basic requirements for liability is sufficient at the very least to demand
further investigation of the need for statutory reform. This matter cannot be left to the judiciary to resolve.

14. It follows from Bristow that a gang member who goes along with other members of the gang suspecting that one of them might have a knife and might use that knife to kill will be guilty of murder himself if the knife is used to kill. Of course, establishing such foresight will depend on the evidence adduced at trial. I have no doubt that evidence that gang members carried knives with them might well be sufficient for the jury to conclude that D2 must have foreseen that there might be knives and that they might be used. I reiterate that I do not doubt that there might well be a justified conviction for D2 going along with the gang in such circumstances. The injustice relates to the use of the blunderbuss of joint enterprise liability to murder such that D2 is convicted of murder, with the imposition of the mandatory life sentence.

15. In my opinion the solution in the context of joint enterprise liability where D1 commits murder is to convict D2 of manslaughter where he has foreseen that D1 might kill or cause serious injury with the intention to do so. This ensures that gang members are held responsible for their conscious association by presence, but that the nature of their liability and the sentence imposed reflects their much reduced responsibility in comparison to that of D1.

The way ahead

16. It follows that statutory reform is required, but this would be relatively easy to implement. Statutory reform needs both to clarify the mens rea for joint enterprise liability and to require conviction for manslaughter rather than murder where D1 and D2 have a common purpose to crime A and D1 commits murder.

17. Rather than consulting on the adoption of the Law Commission’s previous proposals, the Law Commission should be instructed to review either:

(a) the particular problem of the law relating to joint enterprise liability in so far as it applies to murder; or
(b) the law of accessorial liability more generally, ideally with a view to seeking coherent codification of the whole of the law.

18. Option (b) is a significant project. The law on joint enterprise liability as regards murder is not fit for purpose and is unjust, so reform is needed as matter of some urgency. It follows that option (a) should be progressed as soon as possible, with the Law Commission reviewing the law, prosecution policy and process in the particular context of joint enterprise and murder, with a view, I would hope, to make recommendations of focused and relatively brief statutory reform.

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