Constructing the dangerous, black, criminal 'other'

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In an article recently published (Squires, 2016), following presentations at the BSC conference in Plymouth, Brighton Social Science Forum and the Oñati International Institute for the Sociology of Law, I explored a number of the issues raised by the contentious principle of 'joint enterprise' prosecution.

The issue remains a 'live' one: while I was making revisions to the final draft of the paper, the Supreme Court in *R v Jogee* (2016) upheld an appeal against a life sentence murder decision originally reached in 2011 (Squires, 2016). Although the Supreme Court determined that the 'foresight test' (by which criminal accessories could be deemed equally guilty of the principle offence if juries could be convinced - on the evidence presented - that they ought to have had foresight of their companion's violent intentions) would no longer, by itself, be sufficient to establish joint liability (or what is technically referred to as 'parasitic accessorial liability'), the Court did not go as far as campaigners had hoped in dismantling the central assumptions of this invidious law. An investigation by the Bureau of Investigative Journalism in 2014 found that there are close to 500 people serving mandatory life sentences, convicted under this law of joint enterprise murder, many of them young and of BAME backgrounds, and substantially more people serving lesser sentences (McClenaghan et al., 2014).

A first tranche of 13 appeals heard during October 2016 in the Court of Criminal Appeal following the Supreme Court's decision led to no convictions being overturned (Bowcott, 2016), the Appeal Court Judges ruling that the evidentiary test related to the evidence *as a whole*, without privileging the principle of foresight. These verdicts were in some way anticipated by Beatrice Krebs, who has written extensively on the limitations of the joint enterprise principle (Krebs, 2010; 2015) although her particular concern has centred upon the 'rather undemanding mens rea standard' (2015: 502) adopted in joint enterprise cases, trumped as it is by contrived assumptions about the 'foresight' available to other members of the group - or 'gang' (and, as Hallsworth and Young (2008) have noted, the latter concept unleashes a great deal of presumptive ideological baggage, which police and CPS seem keen to load into the prosecution story). For Krebs, then, speaking at a day conference in September 2016, it was a case of: '*Joint enterprise murder is dead: long live joint enterprise manslaughter*'.[1]

There have been further fundamental critiques targeted at joint enterprise prosecution, supplemented, of late, by the insightful work of Williams and Clarke (2016). Echoing Hallsworth and Young (2008), Williams and Clarke show beyond doubt the racist assumptions built into anti-gang enforcement practices and the institutional racism of the

[1] From a day conference at the University of Liverpool in London, 'Joint Enterprise' after Jogee: Reconsidering Law and Policy' Sept 1st 2016.

JE prosecutorial strategy. Thus, violent offending by groups was three-to-four times more likely to be described as 'gang related' where young black men were involved than if young white offenders were involved. Secondly, the prosecution introduced evidence indicating gang involvement in nearly 80% of trials involving young black or mixed race suspects and less than 40% of the time when young white males were on trial (Williams & Clarke, 2016: charts 1 and 7).

It was this aspect that my own analysis was especially concerned with, for opening the doors to gang identifications in the trial of black suspects was in practice the route by which 'bad character' evidence was put before juries already charged with the difficult but highly loaded task of determining foresight with the benefit of hindsight. Bad character evidence and 'gang identifications' ushered the defendants, according to Krebs, across a normative line between 'us' and 'them' thereby justifying negative inferences being drawn about a defendant's state of mind. As John Pitts (2014) has demonstrated, a wealth of circumstantial data 'produces' the gang. In court, police evidence might comprise CCTV footage, RAP videos, phone trace records and intercepts, downloads of texts and photographs, social media records and observations from local beat officers or PCSOs working in gang affected neighbourhoods all in order to establish *connection*, *reputation* and *affiliation* (Pitts, 2014). Observation of other enforcement processes has shown that, working at the softer end of gang disruption, in order to secure evidence for gang injunctions, officers are guided by templates requiring three pieces of evidence to establish a 'reasonable suspicion' regarding gang involvement. Further up the scale of enforcement similar evidence is serving a more draconian purpose.

And it was this above all that led to the adoption and adaptation Jock Young's (2004) conception of 'voodoo criminology' in the notion of 'voodoo liability'. Whereas *voodoo criminology* entailed the construction of doubtful principles of precautionary risk management and pre-crime, *voodoo liability* entailed the companion and entirely self-fulfilling idea that criminal responsibility could be presumed, legally inferred or juridically established by proximity, appearance, and implied normative association. When it looks like a gang - and especially when the police call it a gang - it *must be* a gang.

A second concept, encountered only more recently, helped reinforce this interpretation of pre-emptive case and guilt construction. It came in the form of Julian Roberts' conception of 'alchemy in sentencing' (Roberts, 2002). While Roberts was not concerned with joint enterprise, or, indeed, case construction, his critical analysis sought to demonstrate the ways in which contrasting registers for determining seriousness ('just deserts' proportionality versus previous offending/recidivism) might be reconciled in a single consistent sentencing framework. In short, he felt it could not be. But in regards to fixing liability, joint enterprise invokes a similar alchemy. While it is recognised that young offenders are often poorly equipped in cognitive reasoning about responsibility and future consequences (it is after all, why many of the youth offender programmes address these very issues), yet, as regards 'joint enterprise' prosecutions, they are frequently attributed with pronounced foresight and an ability to predict the consequences of essentially fluid, often fleeting and unpredictable, sometimes unwitting, transitory or spontaneous social interactions.

Voodoo liability, fabricated in the alchemy of legalism and the arcane language of case construction, played out in the theatre of the courtroom, routinely endorses the guilt of a familiar parade of the unfortunate: the 'others' and the 'usual suspects'. Voodoo liability plays handmaiden to criminal injustice, sustaining a fundamentally unequal power to punish the most marginal and deprived for *who* they are, *who* they know, *where* they were and *what* they should have foreseen, rather than for what they did. Overlain by the racism already described, joint enterprise represents a pernicious, continuing, criminal injustice.

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