

# Criminal Law Update

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Supreme Court judgment in joint enterprise case of Gnango found liability in a re-analysis of the “victim rule” rather than alter existing joint enterprise law, as had been feared.

The Supreme Court today handed down judgement in the case of **R v Gnango [2011] UKSC 59**, a case heard in July 2011 on appeal by the prosecution from the Court of Appeal, Criminal Division [2010] EWCA Crim 1691. [judgment](#)

The defendant's conviction for murder was quashed by the Court of Appeal in July 2010. In a case which was legally and factually unique in UK law, and by a majority, The Supreme Court today allowed the prosecution's appeal and reinstated the murder conviction. (Lord Phillips, Lord Judge, Lord Wilson, Lord Brown, Lord Clarke and Lord Dyson; Lord Kerr dissenting).

Although the Supreme Court allowed the prosecution appeal, their Lordships endorsed much of the crucial reasoning, if not the ruling, of the Court of Appeal. There had been concern that the Supreme Court might adopt the approach of the trial judge, further broadening existing joint enterprise principles to permit a “common purpose” to be established between parties who, in fact, act with diametrically opposed purposes.

In the event, their Lordships took a very different route to establish liability in this case, clearly acknowledging the fact that public policy issues informed their decision. A re-analysis of what is commonly referred to as “the victim rule” enabled them to find that Gnango had been a party to his own attempted murder; therefore, in the context of a gunfight, where a bullet intended for him actually fatally injured a passerby, he shared the transferred malice liability of his attacker.

## The basic principles and certified question

Established principles of joint enterprise liability make D2 liable for a murder committed by D1 in the course of their common venture to commit another crime, where D2 foresees the possibility of a killing by D1 with the requisite intent for murder. By associating himself with a foreseen

murder, D2 shares liability with D1, not only if the target is killed but also if a 3<sup>rd</sup> party is accidentally killed instead (transferred malice). The unique feature of this case in UK law was that the intended target of D1 was D2 (Gnango) himself.

The certified question for the Supreme Court was :

*“If (1) D1 and D2 voluntarily engage in fighting each other, each intending to kill or cause grievous bodily harm to the other and each foreseeing that the other has the reciprocal intention, and if (2) D1 mistakenly kills V in the course of the fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?”*

## The trial

At the respondent's trial before Cooke J and a jury at the Central Criminal Court in 2008, Gnango had been convicted of the murder of Magda Pniewska, a Polish care worker who had received a fatal gunshot wound whilst walking home across the car park of a residential housing estate in South East London. The respondent was found by the jury to have engaged in a ‘shoot-out’ with another man (known as “Bandana Man” because of his attempted disguise). Gnango was convicted of the attempted murder of Bandana Man and this conviction was not appealed. Ms. Pniewska was killed by a single shot, accepted by the prosecution to have been fired from the gun of “Bandana Man” whilst he was trying to shoot Gnango. Bandana Man was clearly guilty of Ms. Pniewska's murder according to the established principles of transferred malice and both Bandana Man and the respondent were also guilty of attempting to murder the other (Crime A), but how could Gnango be liable for Bandana Man's fatal shooting of Ms. Pniewska?

At trial, Cooke J had ruled that Gnango and Bandana Man were joint participants in the common venture of an affray. The possibility that a passerby could be fatally injured was a foreseeable consequence of this affray and both shooters had the requisite intent for murder. By application of this principle (termed “parasitic accessory liability” by Sir John Smith) Gnango's joint enterprise affray meant that he shared liability for Bandana Man's foreseeable acts; thus he was liable for the transferred malice shooting of the victim by Bandana Man despite the fact that the two had contrary rather than common purposes.

## Court of Appeal

The Court of Appeal disagreed with Cooke J.'s ruling. The judgment, to which all 5 judges contributed, was handed down by Thomas LJ on 15th July 2010. Liability cannot exist without a joint enterprise to commit crime A (i.e. the attempted murder of the other). No affray founded on a common purpose existed; the two shooters had equal but opposing, not common, purposes. Gnango could not, therefore, be held liable for the foreseen act of Bandana Man in killing a passerby. The murder conviction was quashed.

The prosecution conceded at this stage (as they had at trial) that Gnango could not be party to his own attempted murder by Bandana Man. The Court of Appeal did not rule on the correctness of this concession, but discussed, obiter, whether an agreement "to shoot and be shot at" existed on these facts.

## The Supreme Court

### "Parasitic Accessory Liability" (the affray route)

The appellant submitted that the "parasitic accessory liability" route of Cooke J., founding liability on the joint enterprise of the affray had been correct.

The Supreme Court forcefully rejected the argument that liability could be founded on the common enterprise of affray in this case. Lord Phillips endorsed the CCA conclusion that an affray does not, of itself, necessarily involve a common purpose, although it may do so depending on the facts of the case (e.g. as in a duel). However, no issue of 'parasitic accessory liability' arose on these facts.

*"Here there was no crime A and crime B. It cannot be said that the two protagonists had a joint intention to commit violence of a type that fell short of the violence committed. Either Bandana Man and the respondent had no common intention, or there was a common intention to have a shoot out. If they intended to have a shoot out, then each necessarily accepted that the other would shoot at him with the intention to kill or cause serious injury. Neither intended that the other should kill him but each accepted the risk that he might do so.... It is artificial to treat the intention to have an affray as a separate intention from the intention to have a potentially homicidal shooting match"* [per Lord Phillips @ 43].

Lord Dyson was of the opinion that, in principal, liability for murder committed by one in the course of an affray could make all participants liable. This is unarguable; in fact his

example does no more than re-state existing *Powell, English and Rahman* joint enterprise principals relating to participation, knowledge and foreseeability.

Practitioners should note the comments of Lord Phillips, President, @ 41 *"We would consider it undesirable, however, if a practice developed of relying on the doctrine of parasitic accessory liability to charge with murder parties to an affray who had not themselves **intended** that it would result in serious injury"* (added emphasis).

### Gnango's protection from liability given his status of "victim"

The prosecution had conceded at trial that the combined effect of the *Criminal Law Act 1977 s.2(1)* (no liability for a conspiracy of which you are the victim) and *"the victim rule"*, derived from the case of *R v Tyrrell* [1894] 1 QB 710, made it impossible for Gnango to be a party to his own attempted murder by Bandana Man. Subsequent to this offence (and the trial) a further statutory provision, more narrowly limiting the liability of victims, has been enacted (*Serious Crimes Act 2007 s. 51*, in force from 1<sup>st</sup> October 2008). The Court of Appeal had questioned, but not ruled upon, the prosecution's concession on this issue [ @ 37 & 73].

Before The Supreme Court, the appellants adopted, as an alternative route to liability, *"a change of tack... a radical change of case"* [per Lord Phillips @ 28-29] by reviving their long-abandoned submission that Gnango had been a secondary party, by encouragement, to his own attempted murder.

The Supreme Court noted that the prosecution had been keen to adopt the "parasitic accessory liability" (affray) route because they had (wrongly) perceived that *"the victim rule"* presented a barrier to direct liability. It did not. The "victim" protected from liability in criminal law should be narrowly defined, confined to the class of persons that a relevant offence is designed to protect. There is no statutory or common law rule (nor should there be) which precluded the conviction of Gnango, albeit that he was the intended victim in this case. He had aided and abetted by encouragement Bandana Man's attempt to kill him or cause him really serious injury and was therefore liable on standard transferred malice principles for the unintended death of Ms. Pniewska.

Their Lordships were divided in their views as to whether his role should be characterised as that of a principal or a secondary party. However, Lord Phillips made it clear that such a distinction was *"irrelevant to his guilt... the offence is the same offence and the defendant is guilty of it...there may be occasions when it is important to distinguish between the principal and the accessory but this is not such*

a case. On the jury's verdict, both men agreed to the joint enterprise of having a shoot-out. Whether, on strict analysis, that made the respondent guilty as a principal to Bandana Man's actus reus of firing the fatal shot, or guilty as one who had 'aided, abetted, counselled or procured' his firing of that shot creates no practical difficulty on the facts of this case and does not affect the result" [per Lord Phillips @ 62-64].

Practitioners may wish to take note of the potential of this judgement to impact upon conspiracies involving the participation of intended 'victims' (e.g. the failed suicide bomber).

*"It is no doubt appropriate for prosecuting authorities to consider carefully whether there is justification for prosecuting anyone as party to a crime where he is the victim, or intended victim of that crime, but that is not to say that the actual or intended victim of a crime should on that ground alone be absolved from criminal responsibility in relation to it."* [per Lord Phillips @53].

#### Causation and R v Pagett

Lord Clarke's judgement contains analysis of the respondent's potential liability being founded on his causation of the fatal shot, in that Bandana Man's act of shooting did not operate to break the chain of causation. Although recognising that the instant case was not on all fours with *R v Pagett* (1983) 76 Cr App R 279 (Goff LJ), Lord Clarke found that case instructive. As this consideration had never been left to the jury, Lord Clarke did not allow the appeal on this basis, but stated :

*"..the case could have been left to the jury on the basis that it was open to them to hold that the respondent was guilty of murder if they were sure that his act in shooting at Bandana Mann was a cause of Bandana Man shooting at him with intent to kill him or cause him serious harm and the victim was killed as a result. It seems to me to be very likely that the jury would have concluded, as Robert Goff LJ put it, that the respondent's act in shooting at Bandana Man contributed significantly to Bandana Man shooting at him with intent to kill or seriously injure him and thus to his killing the victim. [ @91].*

Fortunately, there were no other supporters of this approach.

#### Reinstatement of the murder conviction

Considering whether the original murder conviction should or could be reinstated, their Lordships ruled that it was not Cooke J's ruling of law that was in issue but the effect of his actual directions to the jury. Contrary to the Court of Appeal judgment, the directions had required the jury to consider

whether they were satisfied that the respondent and Bandana Man had a common plan or agreement to shoot at each other and be shot at. If they were so satisfied, and their verdict must indicate that they were, this was a proper basis for finding that the respondent was guilty of murder. Thus, despite the fact that the jury had been clearly directed on a legal basis rejected by both the Court of Appeal and The Supreme Court, it was held that the verdict must, in fact, have reflected a jury decision which was consistent with the correct legal position as now decided.

The reasoning on this issue is strained, does not bear close analysis and is clearly policy driven. Lord Kerr's well-reasoned dissenting judgement is particularly forceful and cogent on this point [ @114-122].

[Nina Grahame](#) of GCN, led by Sallie Bennett-Jenkins QC, appeared for the respondent, instructed by Mackesys Solicitors, London.

### Informal Advice

If you are struggling with a problematic point of criminal law or procedure please bear in mind that barristers at GCN are always available to give informal advice on such matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

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