



14 December 2011

PRESS SUMMARY

R v Gnango [2011] UKSC 59

On appeal from [2010] EWCA Crim 1691

JUSTICES: Lord Phillips (President); Lord Brown; Lord Judge; Lord Kerr; Lord Clarke; Lord Dyson; Lord Wilson

BACKGROUND TO THE APPEALS

The facts of this case were extraordinary and tragic. On 2 October 2007, a 26 year old Polish care worker, Magda Pniewska, was walking home from a nursing home through a car park in New Cross, South London. She was on the telephone to her sister when she was shot in the head and killed. The shot was fired in an exchange of fire in the car park between two gunmen, 'B' and Mr Gnango, neither of whom had been aiming at Magda. They had been shooting at each other. Scientific evidence showed that the single bullet to Magda's head had come from B's and not Mr Gnango's gun. B was clearly guilty of murder under the doctrine of 'transferred malice'. B however was never caught.

Mr Gnango was charged with and convicted of murder following trial aged 17. On his appeal, the Court of Appeal overturned his conviction. The Court held that 'joint enterprise' liability for murder, the basis on which the Court considered his conviction to rest, could not arise on the facts.

In considering the appeal by the Crown, the Supreme Court was asked to address the following question: "If 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 D1 mistakenly kills V in the course of the fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?"

JUDGMENT

The Supreme Court allows the appeal by a 6-1 majority (Lord Kerr dissenting) and restores Mr Gnango's conviction for murder.

REASONS FOR THE JUDGMENT

Lord Phillips and Lord Judge together give the leading judgment of the Court, with which Lord Wilson agrees. The trial judge had directed the jury that, in order to convict, they had to be satisfied that there was a plan or an agreement to have a 'shoot-out', whether made beforehand or on the spur of the moment when Mr Gnango and B saw and fired at each other in the car park [23, 57]. This was an unequivocal direction that the jury could convict only if they were satisfied that Mr Gnango and B had formed a mutual plan or agreement to have a gunfight, i.e. to shoot at each other and be shot at, in which each would attempt to kill or seriously injure the other. The jury's verdict indicates that they were so satisfied. Accordingly, this is a proper basis for finding that Mr Gnango aided and abetted the murder of the deceased by aiding and abetting B to shoot at him (i.e. Mr Gnango) [55-60].

The trial judge's direction had properly been given on application of the principle of 'transferred malice': where a defendant intends to kill or cause serious injury to one victim, V1, but accidentally kills another, V2, he will be guilty of the murder of V2 [16, 60]. The application of this principle in the circumstances accords with the demands of justice: Mr Gnango and B had chosen to indulge in a gunfight in a public place, each intending to kill or cause serious injury to the other, in circumstances

where there was a foreseeable risk that this result would be suffered by an innocent bystander. It was a matter of fortuity which of the two fired what proved to be the fatal shot [61].

There is no applicable statutory or common law bar that precludes conviction of Mr Gnango on the basis that he aided and abetted B's attempt to kill *him* (i.e. Mr Gnango) or cause *him* serious injury [51-52]. Further, the Court can see no reason why it should extend the common law to protect from conviction any defendant who is, or is intended to be, harmed by the crime that he commits or attempts to commit [53].

Finally, whether Mr Gnango is correctly described as a principal or an accessory to the murder of the deceased is irrelevant to his guilt [62]. This is not such a case where it is important to distinguish between the principal and the accessory: the offence is the same offence and the defendant is guilty of it [63].

Lord Brown gives a concurring judgment. He holds that the all-important consideration here is that both Mr Gnango and B were intentionally engaged in a potentially lethal unlawful gunfight. The general public would be astonished and appalled if in those circumstances the law attached liability for the death only to the gunman who actually fired the fatal shot (which it would not always be possible to determine) [68]. Lord Brown characterises Mr Gnango's liability for murder as that not of an accessory but a principal: a direct participant engaged by agreement in unlawful violence specifically designed to cause and in fact causing death [71].

Lord Clarke gives a concurring judgment. He agrees with Lord Brown that Mr Gnango is guilty of murder not as an accessory but as a principal to an agreement to engage in unlawful violence specifically designed to cause death or serious injury, where death occurs as a result [81].

Lord Dyson gives a concurring judgment. He holds that the jury must have been satisfied that there was an agreement between Mr Gnango and B to shoot at each other and be shot at [103], and that Mr Gnango aided and abetted the murder of the deceased by encouraging B to shoot at him in the course of the planned shoot-out [104].

Lord Kerr gives the sole dissenting judgment of the Court. He holds that the jury was not invited at any time during the trial judge's summing-up to address the question of whether the shared common purpose between Mr Gnango and B included the important element of the avowed aiding and abetting: the agreement to be shot at [115]. The exchange of fire between the gunmen was at least as likely to be the result of a sudden, simultaneously reached, coincident intention by them to fire at each other as it was to be the result of an agreement to shoot and be shot at [121]. If the jury did not conclude that there was an agreement to shoot and be shot at, there is no sound basis of accessory liability on which to uphold their verdict [126]. In any event, an agreement to shoot and be shot at does not necessarily amount to an intention to assist or encourage the other to shoot. The jury would have needed to receive specific directions – which they did not – about this vital component of aiding and abetting [123].

Further, Lord Kerr considers that there is no sound basis for holding that Mr Gnango is liable for murder as a principal, since he had not by his own act caused or contributed to the commission of the offence with the necessary mens rea [127, 130]. Accordingly, Lord Kerr would dismiss the appeal.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.gov.uk/decided-cases/index.html