Michaelmas Term
[2011] UKSC 59
On appeal from: [2010] EWCA Crim 1691

JUDGMENT

R *v* Gnango (Respondent)

before

Lord Phillips, President
Lord Brown
Lord Judge
Lord Kerr
Lord Clarke
Lord Dyson
Lord Wilson

JUDGMENT GIVEN ON

14 December 2011

Heard on 11 and 12 July 2011

Appellant
Brian Altman QC
Mark Heywood QC
(Instructed by Crown Prosecution Service)

Respondent
Sallie Bennett-Jenkins QC
Nina Grahame
(Instructed by Mackesy's Solicitors)

LORD PHILLIPS AND LORD JUDGE (WITH WHOM LORD WILSON AGREES)

Introduction

1. Permission to appeal was granted in this case in order to enable this Court to consider the following point of law, certified by the Court of Appeal as being of general public importance:

> "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 facts of this case are unusual, but the importance of the point of law lies in the implications that it may have in respect of the scope of potential liability of those who permit themselves to become involved in public order offences.

2. No previous decision in this jurisdiction provides a clear indication of how the point of law should be resolved. The principles of law that fall to be applied are those of the common law, albeit that it will be necessary to consider a degree of statutory intervention. The particular areas of criminal law that will have to be considered are (i) joint enterprise; (ii) transferred malice; (iii) exemption from liability where a party to what would normally be a crime is a victim of it. No precedent indicates the result of the interaction of these three areas of law on the facts of this case. In resolving the point of law it will be appropriate to have regard to policy.

The facts

3. The following account of the facts is taken from the Agreed Statement of Facts and Issues. This reproduces almost verbatim the summary of the facts in the judgment of the Court of Appeal, delivered by Thomas LJ but to which all members of the court had contributed. The other members were Hooper, Hughes and Gross LJJ and Hedley J. Together the court brought to the problem very wide experience in the field of criminal law.

4. Shortly after 6 pm on Tuesday, 2 October 2007, a 26 year old Polish care worker, Magda Pniewska, was walking home from a nursing home through a car park for blocks of residential accommodation in New Cross, South London and up steps towards an open piece of ground. She was on the telephone to her sister when she was killed by a single shot to her head. That shot was fired in an exchange of fire between two gunmen one of whom was the respondent.

5. The respondent, who was born on 26 May 1990, and was 17 years of age at the time, had a dispute with another youth ('TC'). At about 5 p.m. on 2 October 2007 he went with a friend, Nana Acheampong, by car to the home of his ex-girlfriend, Roxanne Landell. Shortly thereafter Nana Acheampong and the respondent drove round to a car park elsewhere on the same estate from where the respondent went on foot to an adjacent car park. He had armed himself with a gun which was silver in colour and he had several rounds of live ammunition. Nana Acheampong had remained in the car.

6. A red Volkswagen Polo was already in the car park. There were four occupants of the car, one of whom was pregnant. The respondent spoke to the occupants of the Polo, as they were about to leave. According to two of them he told them that "he had come to meet someone to handle some business". He asked if they had seen a man in a red bandana, saying that that man owed him some money.

7. Very shortly thereafter the occupants of the red Polo saw someone come down the steps towards the car park. His face was covered with a red bandana. At the trial, he was referred to as "Bandana Man" and I shall so describe him in this judgment. He pulled out a gun, black in colour, and started shooting at the respondent. The respondent crouched down behind the red Polo, pulled out his gun and returned the fire. The respondent fired two or three shots over the roof of the car. He then went to the front of the car and started shooting over the bonnet whilst the other man shot back. The clear evidence of those in the red Polo was that the respondent was shooting at Bandana Man.

8. It was in that crossfire between the respondent and Bandana Man that Magda Pniewska was killed. Scientific examination showed that the single bullet to the deceased's head did not come from the respondent's gun; it had come from the gun held by Bandana Man.

9. Both the respondent and Bandana Man fled from the scene. TC, who was believed to be Bandana Man was arrested, but never charged. The respondent was arrested four days later.

10. The car park, in which the gun fight took place, was surrounded by closely built, modern residential blocks in multiple occupation. All had windows facing the parking area.

The areas of common law in play.

11. At this point we propose to summarise quite shortly the areas of common law in play. It will be necessary to revert to these in greater detail when we come to consider their application to the facts of this case.

Joint enterprise

12. Section 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977, provides:

> "Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

13. This section does not specify what is encompassed by the words "aid, abet, counsel, or procure". That question is determined by the common law. There is no need in this case to attempt a comprehensive definition. In particular we can ignore any complications that may arise in relation to the accessory before or after the fact, who is not present when the criminal act is committed. Having regard to the facts of this case we can start with this simple proposition. Where two persons, D1 and D2 agree to the commission of an indictable offence, where both are present at the place where the criminal act is to be performed and where one of them, D1, commits that act, both will be jointly liable for the crime. The act will have taken place pursuant to their joint criminal purpose and D2 will be equally guilty with D1, having aided, abetted, counselled or procured D1 to commit the crime.

14. The law becomes more complicated where, in the course of committing, or attempting to commit the criminal act which is their common purpose, D1 commits a further criminal act which goes beyond that purpose. The example that is usually given is the following. D1 and D2 break into a house with the common intention of committing a burglary. They are surprised by the householder, whereupon D1 hits him on the head with a jemmy and kills him. D2 had had no intention, or wish, that either of them should inflict injury in the course of the burglary but had foreseen the possibility that D1 might inflict serious injury in the course of it. The situation exemplified by these facts has been repeatedly

considered in different factual contexts by the Court of Appeal and the House of Lords. These authorities were recently analysed by Hughes LJ when giving the judgment of the Court of Appeal in *R v A* [2010] EWCA Crim 1622; [2011] QB 841. His conclusion, which we would endorse, appears in the following passage from para 27 of his judgment:

> "…the liability of D2 …rests, as all these citations show, on his having continued in the common venture of crime A when he realises (even if he does not desire) that crime B may be committed in the course of it. Where crime B is murder, that means that he can properly be held guilty if he foresees that D1 will cause death by acting with murderous intent (viz either intent to kill or intent to do GBH). He has associated himself with a foreseen murder."

15. Professor Sir John Smith coined the phrase "parasitic accessory liability" to describe this form of liability arising out of participation in a joint criminal enterprise. While this is not the most elegant phraseology we propose to adopt it in this judgment by way of convenient shorthand.

Transferred malice

16. The principles that we are about to describe have long been recognised by commentators on the common law of crime, but there is a dearth of actual cases to illustrate them. 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. The basis of this liability is customarily described as "transferred malice", although a better description might be "transferred mens rea"– see *Archbold* 2011 ed at 17-24; *Blackstone's Criminal Practice* 2011 at A2.13. The doctrine applies to secondary parties as it does to principal offenders. Thus if D2 attempts to aid, abet, counsel or procure D1 to murder V1 but D1, intending to kill V1, accidentally kills V2 instead, D2 will be guilty of the murder of V2 – see *Smith & Hogan, Criminal Law*,12th ed (2008) at p 205.

Exemption from liability where a party to what would normally be a crime is a victim of it

17. In an article on "Victims and other exempt parties in crime" in (1990) 10 Legal Studies (1990), at p 245 Professor Glanville Williams identified a principle that he described as the "victim rule." He defined this as follows:

> "…where the courts perceive that the legislation is designed for the protection of a class of persons. Such people should not be convicted as accessories to an offence committed in respect of them when they co-operate in it. Nor should they be convicted as conspirators."

18. Professor Glanville Williams stated that the principle was founded on a single English decision, but was widely accepted in common law countries. That decision was *R v Tyrrell* [1894] 1 QB 710. Section 5 of the Criminal Law Amendment Act 1885 made it an offence for a man to have carnal knowledge of a girl between the age of 13 and 16. The defendant, a girl whose age fell within that bracket, was convicted of (1) aiding, abetting, counselling and procuring the commission of that offence by a man upon herself and (2) of inciting the man to commit the same offence. On appeal these convictions were robustly quashed. Lord Coleridge CJ, giving the leading judgment, said at p 712:

> "The Criminal Law Amendment Act 1885 was passed for the purpose of protecting women and girls against themselves. At the time it was passed there was a discussion as to what point should be fixed as the age of consent. That discussion ended in a compromise, and the age of consent was fixed at sixteen. With the object of protecting women and girls against themselves the Act of Parliament has made illicit connection with a girl under that age unlawful; if a man wishes to have such illicit connection he must wait until the girl is sixteen, otherwise he breaks the law; but it is impossible to say that the Act, which is absolutely silent about aiding or abetting, or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves. I am of the opinion that this conviction ought to be quashed."

In *R v Whitehouse* [1977] QB 868 the Court of Appeal reluctantly held that this principle precluded the conviction of a father for inciting his daughter, who was under 16, to aid and abet him to commit incest with her.

19. Section 1 of the Criminal Law Act 1977 created a statutory offence of conspiracy to commit a crime. Section 2(1) provides:

> "2. – (1) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence if he is an intended victim of that offence.

> (2) A person shall not by virtue of section 1 above be guilty of conspiracy to commit any offence or offences if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say –
>
> > (c) an intended victim of that offence or of each of those offences."

Blackstone comments at A6.38 that section 2(1) appears designed to apply the principle established by *Tyrell.* It will be necessary to consider in due course the scope of this provision and whether, by analogy, the common law should prohibit the conviction of a defendant for aiding and abetting an offence against the person where he is the victim of the offence. Relevant to these questions is the more restricted wording of section 51 of the Serious Crime Act 2007:

> "(1) In the case of protective offences a person does not commit an offence under this Part by reference to such an offence if-
>
> > (a) he falls within the protected category; and
> >
> > (b) he is the person in respect of whom the protective offence was committed or would have been if it had been committed.
>
> (2) 'Protective offence' means an offence that exists (wholly or in part) for the protection of a particular category of persons ('the protected category')"

The judge's ruling on the defence submission of no case to answer and the case subsequently advanced by the Crown

20. At the end of the prosecution case Miss Bennett-Jenkins QC for the defence submitted that there was no case to go to the jury. Mr Altman QC for the Crown argued that there were two possible bases upon which the jury could convict. It was common ground that Bandana Man had been guilty of murder of Miss Pniewska, applying the principle of transferred malice in that he had plainly been attempting to kill or cause serious bodily harm to the respondent. The first basis upon which the jury could convict was that the respondent had aided and abetted this murder, in that he had encouraged Bandana Man to fire at him with homicidal

intent. When, however, the judge asked whether he was submitting that the respondent aided and abetted his own attempted murder he replied that he could not so submit. He argued that the liability of the respondent flowed "on a wider basis" from the implicit agreement between himself and Bandana Man that they should meet in a public place, each with an intent to kill or cause serious harm to the other.

21. The judge rejected this argument. He observed that there was difficulty in an analysis of a joint enterprise where the defendant was himself the intended victim of the other gunman:

> "He neither intended nor consented to bodily injury to himself at the hand of the other, nor could he truly be said to be a party to a joint enterprise to kill or cause grievous bodily harm to himself as the intended target of the other.
>
> Even if he contemplated that the other might shoot at him with the necessary intent, he not being a party to the enterprise to cause harm to himself, would not be liable for the unintended consequences on that basis alone.
>
> About this, in my judgment, there can be no doubt. There is no possible joint enterprise involving the killing of himself to which the defendant was privy as such. If he and Bandana Man had a common enterprise to kill a third party, and Magda was killed by a bullet from Bandana Man's gun, then the doctrine of transferred malice could operate to make Bandana Man guilty as a primary party to the murder of Magda, and in as much as the defendant was privy to a joint enterprise to kill someone in common with Bandana Man, sharing that common intention, he would also be liable as a secondary party.
>
> Here, however, there was no common intention to murder any particular person. Each of the protagonists had a separate intent to kill or to seriously injure the other. Their intentions were parallel but running in opposite directions."

He later added

> "Here, however, it cannot be said, in my judgment, that the defendant actively encouraged Bandana Man to shoot at him, and

> even if he did, it would be a real oddity for a victim of an attempted murder to be a secondary party to that attempt. In reality on the evidence, the defendant fired at Bandana Man in the hope of killing him or causing him grievous bodily harm, frightening him, or arguably, in self-defence. He cannot be said to have encouraged the other to fire back, whatever the order of shots as the jury might ultimately find them to be. He might have provoked further firing, but he did not encourage it."

In the light of this ruling, Mr Altman did not pursue this way of putting his case.

22. The alternative case that Mr Altman advanced was one of parasitic accessory liability. The judge accepted that this alternative was viable. He held that it was open to the jury to find that the respondent and Bandana Man were subject to a joint enterprise to commit an affray and that, if the jury then found that the respondent foresaw and envisaged that Bandana Man might shoot and kill an innocent passer-by this would found a verdict of murder on the part of the respondent.

The judge's direction to the jury

23. The judge crafted his direction to the jury with great care. He founded it on the principle of parasitic accessory liability. For reasons that we shall explain we do not consider that this principle could properly be applied on the facts of this case. None the less it is necessary to set out a large part of his direction in order to decide whether the jury must have been satisfied that the relevant elements of the crime of murder, as we shall identify them, were proved:

> "Now what the prosecution say about the defendant's role in this murder is that the defendant was involved in a joint enterprise, that is a term which I will explain to you in a moment and which again will appear in the piece of paper that I am going to give you. It was a joint enterprise because it had a gunfight and both the defendant and Bandana Man, say the prosecution, each took part in that gunfight, realising that the other was likely to shoot, and might, in shooting, with the intention of killing or causing really serious injury, kill someone other than himself who was the immediate target of the shots. And the prosecution say, in those circumstances, the defendant is jointly responsible for the murder with Bandana Man on the basis of this joint enterprise. "…

"Joint enterprise: that is a word I need to explain to you. Let me explain that concept. It arises in the ordinary way where people jointly commit an offence. Where a criminal offence is committed by two or more people, each of them may play a different part in that offence, but if they are in it together as part of a joint plan or joint agreement to commit it, each is guilty of the planned offence.

The words 'plan' or 'agreement' that I have just used do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod or a wink or just a knowing look or by taking the first step in committing an offence in which the other person then joins, so that it can be inferred from their behaviour.

The essence of joint responsibility for a criminal offence is that each person shared the intention to commit the offence and took some part in it so as to achieve that aim, so in the ordinary way, you would consider each person said to be involved, and if you are sure that he took part in committing the offence with any intention necessary for that offence, he would be guilty.

But there is a further element in the concept of joint enterprise, and it is this: if two people agree or plan in the sense I have mentioned to commit one offence, one type of offence, but during the course of it, one of them commits another offence, both may still be responsible for that other offence. Of course, the person who actually does the offence, the act which constitutes that further offence will be guilty of it, but the other person will also be guilty of it if he realised that the act done was something which the first person might do with the necessary intent as part of their planned offence."…

"Now here it is said by the prosecution that Bandana Man and the defendant planned to use unlawful violence towards another by having a shoot-out, whether that plan was made beforehand and the meeting was pre-arranged or was made on the spur of the moment when they saw each other and fired at each other from the steps and the car respectively."…

"If you are sure that Bandana Man and the defendant joined together to commit such unlawful violence by having a gunfight, whether pre-planned or whether on the spur of the moment on the top of the steps

> and the side of the car, and that this joint enterprise came into being before Magda was killed by a shot from Bandana Man, then the defendant would be guilty of murder also, along with Bandana Man, provided the other requirements are satisfied.
>
> So if you are sure that Bandana Man and the defendant were in a joint enterprise to cause an affray, to use unlawful violence against each other by having a gunfight and by firing at each other, whether this joint enterprise was the result of a pre-planned meeting or arose on the spur of the moment when they saw each other, and that in the course of that joint enterprise fight, Magda was murdered by Bandana Man on the basis of transferred malice, as I have explained it to you, and that the defendant realised – and the prosecution say that he must have realised -- that in the course of their joint enterprise gunfight, Bandana Man might kill with the requisite intention for murder, then the defendant would also be guilty of murder."

The decision of the Court of Appeal

24. Before the Court of Appeal Mr Altman made no attempt to revive the first way that he had sought to put the Crown's case. He sought to uphold the judge's direction on the basis of parasitic accessory liability. Miss Bennett-Jenkins submitted that this case was not viable. The starting point for parasitic accessory liability was a joint enterprise. There had been no joint enterprise. The respondent and Bandana Man had each been engaged on a separate, individual and diametrically opposed enterprise, for each was out to harm the other. So far as foresight of Bandana Man's conduct was concerned, all that the respondent could have foreseen was that Bandana Man would try to kill him. Parasitic accessory liability was founded on encouragement to commit the further offence, implicit in pursuing the original joint venture. The judge had rightly found that the respondent had not encouraged Bandana Man to shoot at him. Thus the further essential element of encouragement was missing.

25. The Court of Appeal accepted this argument. Its reasoning was complex and spanned paras 48 to 70 of its judgment, but we believe that we can summarise it quite shortly. Parasitic accessory liability has to arise out of a joint enterprise that involves the two parties acting together, or in concert, or for a common purpose. Where an affray is alleged to have arisen from a fight between two people it does not ordinarily involve a joint enterprise or common purpose. Ordinarily the purpose of each protagonist to such an affray is the individual purpose of striking the other and avoiding being struck himself. Such purposes are not shared by the two protagonists, they are reciprocal, or equal and opposite purposes. It was none

the less possible to envisage a scenario in which two persons shared a common purpose to strike *and be struck* – a prize-fight or a duel were examples of this. On the facts of the present case there might have been a common purpose to shoot *and be shot at*, as in a duel, but the judge had never asked the jury to consider that possibility. The reasoning of the court was summarised in para 59 of its judgment:

> "What is at issue here is secondary liability. The essence of secondary liability is that the parties are acting *together* or, as it is often put, *in concert*. For what we have described as the third type of joint enterprise liability they must be acting together or in concert in crime A, here affray. Two people who voluntarily engage in fighting each other might, exceptionally, be acting together or in concert, but ordinarily they are not. It is not realistic to say that they acted in concert to cause fear; they acted independently and antagonistically in a manner which did so. Absent a shared purpose to shoot *and be shot at*, the submission made by the appellant was correct that there was no room on the facts for any other common purpose. The jury was never asked to confront the question whether the shared common purpose was not only to shoot, but to be shot at."

26. The Crown had accepted that the respondent could not be convicted on the basis that he had been party to a joint enterprise with Bandana Man to shoot at each other, with the intent to kill or cause really serious bodily injury for the following reason (para 33):

> "The difficulty … on the facts of the current case is that the appellant himself was the intended victim of the other man. The appellant neither intended nor consented to bodily injury to himself at the hand of the other man nor could he truly be said to have been party to a joint enterprise to kill or cause harm to himself (being the intended target of the other man). Even if he had contemplated that the other man might shoot at him with the necessary intent, he not being a party to the enterprise to cause harm to himself, could not be liable for any unintended consequences on that basis alone."

The Court of Appeal referred to this concession and emphasised at para 37 that it had not considered whether it was correctly made.

27. However the Court of Appeal returned to the concession in a post-script to its judgment and set out the following arguments that raised a question mark over the concession.

"73. …

> (i) If two persons agree to a duel with the use of guns, they have agreed to shoot at each other with the intention of killing or seriously harming the other. That activity, as a matter of ordinary language, could be described as an agreement to shoot and be shot at. To that extent it is arguable that they have a shared common purpose.
>
> (ii) Clearly an agreement to a duel or to shoot at each other is illegal, as no-one can consent to run the risk of being killed in such a way. As Lord Templeman pointed out in *R v Brown (Anthony)* [1994] 1 AC 212, 231, the defence of consent never availed a person who maimed the other participant in a duel: *Hawkins' Pleas of the Crown* 8th ed (1824), vol 1, ch 15. In *Attorney General's Reference (No 6 of 1980)* [1981] 1 QB 715, it was made clear that 'it is not in the public interest that people should try to cause or should cause each other harm for no good reason. … It is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended or caused.'
>
> (iii) There can be an agreement to use unlawful violence by two opposing and antagonistic persons, illegal though it is. In *R v Coney* (1882) 8 QBD 534, all the judges were agreed that both prize fighters were guilty of an assault on each other. Although each would be guilty as a principal of a separate offence, it is arguable that the two prize fighters have a simple agreement to exchange blows and to that extent share a common purpose to hit and be hit.
>
> (iv) The question would then arise, if it was accepted that two prize fighters can have an agreement to hit and be hit, as to whether the use of lethal weapons made a difference. If there really is an agreement to shoot *and be shot at*, it is arguable that it does not. Just as in the case of prize fighters, each hoped that the other would be wounded or killed, but that he would not be. But the fact that each hoped for a different outcome, did not necessarily mean that they did not share a common purpose of shooting and being shot at." (emphasis added)

28. The Court of Appeal went on to consider issues of policy:

> "74 There is at the heart of this issue a question of policy. Does the justice and effectiveness of the criminal justice system require the imposition of liability in cases of genuinely agreed duels by acceptance that there can be a joint enterprise of the first type between opposing persons if they agree not only to hit but to be hit?
>
> 75 But there is also a second question. At para 58, we referred, in the context of the judge's directions to the jury, to the wider implications for criminal liability for death or injury or damage that occurs in the course of a fight between two gangs. Spelling that second question out may assist.
>
> > i) Say a 'home' group meet an 'away' group, each seeing that the other is armed with sticks and bars. They begin a fight.
> >
> > ii) In the course of the fight members of the 'home' group use bars intentionally to cause really serious injuries to a member of the 'away' group and in the course of doing so injure an innocent bystander; each receives really serious injuries from which he dies.
> >
> > iii) It could readily be inferred that all those engaged in the fight foresaw that there was a real possibility that one of those engaged in the fight or an innocent bystander might be caused serious bodily injury by being intentionally struck by one of those fighting with a bar in the course of the fight.
>
> What are the circumstances in which the members of the 'away' group bear criminal responsibility for the death of the member of their group or the innocent bystander caused by the 'home' group?"

The court commented that both of these issues of policy were questions for the future. Because of a change of tack by the Crown in this court the time has now come to consider them.

The Crown case before this Court

29. Before this Court Mr Altman QC for the Crown has sought to revive the case that he had abandoned at the trial and had not sought to advance before the Court of Appeal. Paras 30 to 48 of his written case are devoted to arguing that the respondent had been an accessory to Bandana Man's attempt to kill him and thus shared Bandana Man's liability, as a result of the doctrine of transferred malice, for the murder of Miss Pniewska. This radical change of case is perhaps inspired by the obiter comments of the Court of Appeal and by commentary on those comments in [2011] Crim L R 151, 156.

30. In the alternative Mr Altman has sought to rely upon the doctrine of parasitic accessory liability that had been rejected by the Court of Appeal.

Discussion: Parasitic accessory liability in public order offences

31. We propose to start by considering Mr Altman's attempt to rely upon the doctrine of parasitic accessory liability. We shall first of all explore the reasoning of the Court of Appeal in concluding that this was not a viable route to convicting the respondent of murder. We shall then draw attention to a further significant difficulty that Mr Altman faces in seeking to rely upon this doctrine.

The nature of the offence of affray

32. Affray was a common law offence with its origin many centuries ago. By the middle of the twentieth century it had been lost from sight, for as Lord Goddard CJ remarked at p 559 of *R v Sharp; R v Johnson*, [1957] 1 QB 552, the first case in which the offence resurfaced, there seemed to be no reported case which dealt with it. That case involved a fight between the two defendants in a public place in the presence of a large number of spectators. They were jointly indicted on a charge of affray and convicted. On the basis of distinguished and venerable commentaries Lord Goddard identified the offence of affray as one committed where two or more persons fought in a public place to the terror of the King's subjects. In that case the convictions of the two appellants were quashed on the ground that each claimed to have been acting in self-defence, and this defence had not been left to the jury. Lord Goddard held at p 561:

> "If two men are found fighting in a street one must be able to say that the other attacked him and that he was only defending himself. If he was only defending himself and not attacking that is not a fight and consequently not an affray."

33. This comment proved to be an over-simplification. Having been rediscovered, affray became a very popular charge, being used on literally thousands of occasions, and in due course received consideration by the House of Lords. In *R v Button; R v Swain* [1966] AC 591 the issue was whether an affray had to take place in a public place. The House held that it did not. Lord Gardiner LC, giving the only reasoned speech, held at p 625 that the essence of the offence was that two or more fought together to the terror of the Queen's subjects. In *R v Taylor (Vincent)* [1973] AC 964 the House of Lords, disapproving the dictum of Lord Goddard in *Sharp* and *Johnson*, held that a single defendant could be guilty of affray if he fought with another, who lawfully defended himself. Lord Morris of Borth-y-Gest put the matter as follows at p 991:

> "But if two men are seen to be "fighting in a street" with the result that terror is caused to the Queen's subjects and if it has all come about because one is an aggressor while the other was merely defending himself I see no reason why the aggressor should be immune from conviction for affray. Those who see the fighting may have no means of deciding how it came about or whose fault it was. They may not be able to appreciate that one man is merely defending himself and doing his best to disengage. The terror and alarm caused to them by the fighting will not be any the less because the fact may be that one man of the two was only of necessity engaged in the fighting."

34. In 1983 the Law Commission published a report, HC 85; Law Com No 123, on Offences Relating to Public Order. They recommended that the common law offence of affray should be preserved in an Act that would replace the common law offences of riot, unlawful assembly and affray. In the draft Bill appended to the Report they defined the offence of affray as follows:

> "3(1) Where two or more persons use or threaten unlawful violence against each other, or one or more persons use or threaten unlawful violence against another, and their conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of those persons commits the offence of affray."

35. This was followed by a White Paper, May 1985 Cmnd 9510, entitled Review of Public Order Law. This stated at para 3.15 that the Government was content to accept the Law Commission's proposed statutory definition of affray. Unfortunately the draftsman of what was to become the Public Order Act 1986 appears to have thought that he could improve on the drafting of the Law Commission. Thus the definition of affray in section 3 of that Act is as follows:

> "(1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety.
>
> (2) Where 2 or more persons use or threaten *the unlawful violence*, it is the conduct of them taken together that must be considered for the purposes of subsection (1)."

36. We have emphasised the words *the unlawful violence* because they gave rise to considerable debate on this appeal. They are hard to reconcile with the passage that we have quoted from the speech of Lord Morris in *R v Taylor.* More significantly, if given their natural meaning, they would appear to suggest that two defendants can only be jointly liable on a single count of affray if they join in using violence towards another; if they fight each other each commits an individual offence of affray, but they are not guilty of a joint offence.

37. This would be nonsensical. We do not consider that the Act has altered the common law offence of affray in this way. The joint offence of affray can be founded on the common product of individual conduct, viz violence capable of causing fear, and does not require any common intention or purpose on the part of the joint participants. Section 6(2) sets out the mens rea of the offence as follows:

> "A person is guilty of violent disorder or affray only if he intends to use or threaten violence or is aware that his conduct may be violent or threaten violence."

38. Thus an affray need not involve any common enterprise or common purpose. The Court of Appeal rightly held that parasitic accessory liability must be founded on a common unlawful enterprise or purpose. It is joining in this common enterprise that renders the conduct of the accomplice an encouragement to the principal to commit the additional offence, thereby justifying the conviction of the accomplice. Because affray does not necessarily involve any common purpose it cannot automatically constitute a foundation for parasitic accessory liability.

39. The Court of Appeal left open, however, the possibility that, on the facts of an individual case, affray may be the product of a common purpose or enterprise capable of providing a foundation for parasitic accessory liability. A duel was given as an example of such a situation. So might the facts of the present case if they evidenced an agreement to shoot *and be shot at.* The court held, however, that this possibility had not been left to the jury.

40. Many public order offences constitute a spontaneous outburst of reciprocal violence, often fuelled by alcohol. They can, however, involve a common purpose – indeed such a common purpose is an element of the offence of riot. It is not uncommon for groups of youths, supporters of rival football clubs for example, to plan to meet in order to do battle. It may be that most involved in such a skirmish have no wish to cause serious injury. There will, however, be an obvious possibility that one or more of those involved may go beyond the common intention of the majority of the combatants and deliberately cause serious injury. If such an event occurs and a victim suffers serious injury, or even dies, are all who were present guilty of causing grievous bodily harm, or murder where the victim dies, by reason of the doctrine of parasitic accessory liability? It is this question that the Court of Appeal raised, but left unanswered.

41. For reasons that we shall explain the facts of this case do not require an answer to the question, despite the reformulation of the Crown's case. 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.

No issue of parasitic accessory liability arises in this case

42. Parasitic accessory liability arises where (i) D1 and D2 have a common intention to commit crime A (ii) D1, as an incident of committing crime A, commits crime B, and (iii) D2 had foreseen the possibility that he might do so. 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.

43. The Crown sought to suggest that there was a joint intention to have an affray, which was crime A, and that the killing by Bandana Man was crime B, for which the respondent was liable as an accessory because it was within his contemplation as a possible, albeit unintended, incident of crime A. The fallacy of this argument is that, if there was a joint intention to have an affray, that intention was to have an affray by shooting at each other with homicidal intent. 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.

The victim rule

44. Why was the Crown so keen to establish liability under the doctrine of parasitic accessory liability? The answer is, we believe, that the Crown believed that this route would enable it to by-pass what was perceived to be a barrier to the direct route to the respondent's liability for murder. The direct route was as follows:

i) Bandana Man attempted to kill the respondent;

ii) By agreeing to the shoot out, the respondent aided and abetted Bandana Man in this attempted murder;

iii) Bandana Man accidentally killed Miss Pniewska instead of the respondent. Under the doctrine of transferred malice he was guilty of her murder.

iv) The doctrine of transferred malice applied equally to the respondent as aider and abetter of Bandana Man's attempted murder. He also was guilty of Miss Pniewska's murder.

45. The Crown believed that there was a barrier to this direct route to the respondent's liability for murder. This was the application of the victim rule. Mr Altman, when discussing the law with the judge, stated that the respondent could not aid and abet his own attempted murder. If this proposition correctly represents the law, we do not see how the Crown can avoid its effect by invoking the doctrine of parasitic accessory liability. Parasitic accessory liability does not differ in principle from the more common basis for finding someone guilty of aiding, abetting, counselling or procuring the commission of a crime. In so far as the law precludes conviction for aiding and abetting a crime in respect of which the defendant is the victim, it must surely do so whatever the route by which the defendant would otherwise be held to have been an accomplice.

46. We turn then to consider the Crown's new case, which is that the conviction of the respondent can be justified on the basis that the respondent aided and abetted the commission of the murder by actively encouraging Bandana Man to shoot at him. In relation to this case it seems to us that the issues for the Court are as follows:

i) Does the victim rule preclude the conviction of a defendant for aiding and abetting a crime in respect of which he is the victim, even where the crime is not designed to protect a particular class of which the victim is a member? If yes,

ii) Does the victim rule preclude the conviction of a defendant for aiding and abetting a crime in respect of which he was the intended victim, but where the actual victim is a third party?

iii) If the victim rule did not preclude the respondent's conviction for aiding and abetting the murder of Miss Pniewska, was the judge's direction to the jury a sound basis for the jury's guilty verdict?

The scope of the victim rule

47. The first question to consider under this head is whether there is any statutory bar to prosecuting the respondent for being party to a crime in respect of which he was the intended victim. So stated this perhaps begs the question, for it presupposes that the respondent was a prospective "victim" for the purpose of the victim rule. If the first question produces a negative reply, it will then be necessary to consider whether there either is, or should be, a victim rule under the existing common law, or the common law as this court should develop it.

48. The origin of the victim rule appears to lie in the decision in *Tyrrell* – see para 18 above. The decision in that case can best be interpreted as being based on a term to be implied into the Criminal Law Amendment Act, based as the reasoning was on the implied intention of Parliament. The decision does, however, illustrate the application of the general rule defined by Professor Glanville Williams, as set out at para 17 above.

49. Section 2(1) of the Criminal Law Act 1977, set out at para 19 above, applies a wider principle than Glanville Williams' formulation of the victim rule, if "victim" is given the wide meaning of any person who will be harmed by the offence. The scope of the word "victim" in that context has not, however, received judicial consideration so far as we are aware. If it is given the wide meaning it would seem to produce the surprising result that a conspiracy by two persons that one will commit a terrorist atrocity as a suicide bomber, or to set fire to a house owned by one of them in furtherance of some ulterior motive, would appear not to subject either to criminal liability. There is a case for confining the meaning of "victim" to persons of a class that the relevant Act is intended to protect, thus bringing section 2(1) into accord with the victim rule, as defined by Glanville Williams. At all events, section 2(1) is confined to the crime of conspiracy and can have no direct application to the facts of this case.

50. The case for giving a narrow construction to "victim" in section 2(1) of the Criminal Law Act 1977 is perhaps strengthened by the limited exemption from

criminal liability conferred by section 51 of the Serious Crime Act 2007, which we have set out at para 19 above. This section gave effect to a recommendation of the Law Commission that the principle in *Tyrrell* should apply to proposed offences of encouraging or assisting crime – see 12(4) of Halsbury's Statutes, 4th ed, at paras 401 and 408. This provision also has no application to the facts of this case.

51. It follows that there is no applicable statutory victim rule that precludes conviction of the respondent on the basis that he aided and abetted Bandana Man's attempt to kill him or cause him serious injury. Is there, or should there be a common law rule that does so?

52. The fact that Parliament found it necessary to enact section 2(1) of the 1977 Act and section 51 of the 2007 Act is cogent indication that there is no common law rule that precludes conviction of a defendant of being party to a crime of which he was the actual or intended victim. We are satisfied that there is no such rule. This is evident from the fact that, under common law, attempted suicide was a crime, as was aiding and abetting suicide. The victim of a successful suicide attempt could not, of course, be prosecuted, but if in an attempt to commit suicide, the defendant killed a third person, he committed the crime of murder under the doctrine of transferred malice – see *R v Hopwood* (1913) 8 Cr App R 143 and *R v Spence* (1957) 41 Cr App R 80.

53. We can see no reason why this Court should consider extending the common law so as to protect from conviction any defendant who is, or is intended to be, harmed by the crime that he commits, or attempts to commit. Such an extension would defeat the intention of Parliament in circumscribing the victim rule in section 51 of the 2007 Act. In *R v Brown (Anthony)* [1994] 1 AC 212 sado-masochists were held to have been rightly convicted of causing injury to others who willingly consented to the injuries that they received. There would have been no bar to conviction of the latter of having aided and abetted the infliction of those injuries upon themselves. 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. As Lord Lane CJ observed in *Attorney-General's Reference (N0 6 of 1980)* [1981] QB 715, 719:

> "…it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason "

The victim rule and transferred malice

54. In the light of the conclusion that we have just reached, no question arises as to the application of the victim rule where, although the intended victim of the crime to which the defendant is party is the defendant himself, the actual victim proves to be a third party.

Was the judge's direction to the jury a sound basis for their guilty verdict?

55. If the respondent aided, abetted, counselled and procured Bandana Man to shoot at him he was, on my analysis, guilty of aiding and abetting the attempted murder of himself. Had he been killed by Bandana Man, he would have been a party to his own murder. Although he had not intended that Bandana Man should succeed in hitting him, complicity in his attempt to do so would have rendered him a party to the successful achievement of that attempt. As it was, Bandana Man accidentally shot Miss Pniewska. Under the doctrine of transferred malice he was liable for her murder. Under the same doctrine, the respondent, if he had aided abetted, counselled and procured the attempt, was party to the murder that resulted. Does it follow that, having regard to the terms of the judge's directions, the jury must have been satisfied that the respondent had aided, abetted, counselled and procured Bandana Man to shoot at him with murderous intent? If so, his conviction can stand. If not, the Court of Appeal correctly quashed it.

56. In his ruling that there was a case to go to the jury the judge ruled that that it could not be said that the defendant actively encouraged Bandana Man to shoot at him. He could not be said to have encouraged Bandana Man to fire at him, although he might have provoked this. Perhaps it was with this passage of his ruling in mind that the Court of Appeal observed at para 59 that the jury was never asked to confront the question whether the shared common purpose was not only to shoot but be shot at. In the next paragraph the Court of Appeal observed that, the judge was, in effect, leaving to the jury a limited common purpose – limiting it to an exchange of gun fire which did not extend to the gunman being hit.

57. Having carefully considered the passages in the judge's summing up that we have set out at para 23 above we do not consider that they support the Court of Appeal's conclusion. It may well be that the intention of the judge was to direct the jury to consider whether there was a common intention to have an affray that fell short of an intention to shoot at each other and be shot at. For the reasons that we have given this would have been an incredible scenario. Either there was no joint plan or agreement at all, or there was a common intention to shoot at one another, which can only mean to shoot and be shot at. What matters, however, is not the route that the judge considered would lead to a conviction, but the direction that he gave to the jury. He directed the jury that, in order to convict they had to be satisfied that there was a plan or agreement to "have a shoot out"… "whether made

beforehand…or made on the spur of the moment when they saw each other and fired at each other from the steps and the car park respectively".

58. This direction did not permit the jury to convict if they believed that one of the protagonists might have been the aggressor and the other merely responding in self defence. It was an unequivocal direction that the jury could convict only if they were satisfied that the protagonists had formed a mutual plan or agreement to have a gun fight in which each would attempt to kill or seriously injure the other. If the jury were satisfied of this, the consequence in law was that each of the protagonists was party, not merely to his own attempt to kill or seriously injure the other, but to the other's attempt to kill or seriously injure him. Contrary to the finding of the Court of Appeal, the direction of the judge 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 indicates that they were, this was a proper basis for finding that the respondent was guilty of murder.

59. In arguing at the close of the prosecution case that there was a case of simple aiding and abetting to go to the jury Mr Altman sought to draw an analogy with a duel. There is indeed a close analogy between a consensual gunfight and a duel. In the case of a duel all who are present and who lend encouragement to the duel will be guilty of aiding and abetting each of the protagonists in his attempt to kill or injure the other. If one is killed, all who gave encouragement will be guilty of murder, and this includes the seconds on each side – see *R v Young and Webber* (1838) 8 C & P 644. It logically follows that each protagonist will be party to the violence, or attempted violence, inflicted on himself by his opponent. The same is true of a prize fight. In *R v Coney* (1882) 8 QBD 534 each protagonist was held guilty of assaulting the other and a number of bystanders were held to have encouraged, and thus to have been guilty of aiding and abetting, the assaults of both. Once again each protagonist could properly have been held guilty of aiding and abetting the assault by the other upon himself.

60. A guilty verdict in this case involves a combination of common law principles in relation to aiding and abetting and the common law doctrine of transferred malice, In *Attorney General's Reference (No 3 of 1994)* [1998] AC 245, 261 Lord Mustill commented of the latter doctrine:

> "Like many of its kind this is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis. But it is another matter to build a new rule upon it."

61. We have considered whether to hold the respondent guilty of murder would be so far at odds with what the public would be likely to consider the requirements of justice as to call for a reappraisal of the application of the doctrine in this case. We have concluded to the contrary. On the jury's verdict the respondent and Bandana Man 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. In other circumstances it might have been impossible to deduce which of the two had done so. In these circumstances it seems to us to accord with the demands of justice rather than to conflict with them that the two gunmen should each be liable for Miss Pniewska's murder.

62. We have considered the judgments of Lord Brown and Lord Clarke. They essentially agree with our conclusions. Each, however, considers that the defendant was liable as a principal to the agreed joint activity of shooting with intent to kill or cause serious injury, rather than as an accessory to the act of firing the shot. This is not a difference of substance. It may well be that, in terms of the common law, Bandana Man was a principal in the first degree and the respondent was a principal in the second degree – see *Archbold*, 2011 edition, para 18-1. But as *Archbold* remarks at para 18.6:

> "the distinction between a joint principal and an abettor is sometimes difficult, and unnecessary, to draw."

Whether the respondent is correctly described as a principal or an accessory is irrelevant to his guilt. In *R v Giannetto* [1997] 1 Cr. App. 1 the appellant was convicted of murdering his wife. The Crown was unable to say whether he had inflicted the fatal injuries himself or, at the very least, had arranged for someone else to do so. On this basis however he was guilty of her murder either as a principal or as an accessory. Following his conviction the appellant argued that the judge had erred in law when he failed to direct the jury that they must be unanimous as to which of the two versions of events advanced by the Crown they accepted.

63. If the jury were not sure which of the two alternatives they found proved, then the appellant was entitled to be acquitted. After an examination of the authorities, the submission was rejected.

> "If the jury does convict it may do so with some jurors satisfied that the defendant was actually the killer, but all will be satisfied that if not himself the killer at least he encouraged and by reason of the

> statutory provision in the 1861 Act … no more is necessary to prove the offence". (per Kennedy LJ at 5)

This decision simply reflects the reality that whether an offence is committed as a principal or as an accessory, the offence is the same offence and the defendant is guilty of it. There may be many situations in which it will be important to distinguish between the principal and the accessory, but this is not such a case.

64. 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.

65. For these reasons we would answer the certified question in the affirmative, allow this appeal and restore the respondent's conviction for murder.

LORD BROWN

66. The central question for decision on this appeal can be shortly posed. Two armed men (let us call them A and B) confront one another in a south London car park and there engage in an unlawful gunfight, each with the intention of killing or at least seriously injuring the other. Neither is acting in self defence. Rather the gunfight was agreed, either pre-arranged or resulting from a spur of the moment decision by both. Neither in fact succeeds in hitting his adversary but in the course of their crossfire a passerby (C), one of several people in the vicinity, is accidentally killed. B it was who fired the fatal bullet and indisputably he is guilty of C's murder: the principle of transferred malice so dictates. But is A too guilty of C's murder? That is the critical question before us.

67. A here is the respondent, Mr Gnango (the successful appellant below), B is "Bandana Man" (as he has been called throughout these proceedings), and C is an unfortunate Polish careworker, killed on her way home from work.

68. Although the facts of this case are more fully described in Lord Phillips' judgment, the appeal to my mind must necessarily be decided by reference to the bare scenario already outlined, not the many surrounding details that can all too easily obscure rather than clarify the real issue arising. And to my mind the all-important consideration here is that both A and B were intentionally engaged in a potentially lethal unlawful gunfight (a "shoot-out" as it has also been described) in

the course of which an innocent passerby was killed. The general public would in my opinion 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, indeed, it would not always be possible to determine). Is he alone to be regarded as guilty of the victim's murder? Is the other gunman really to be regarded as blameless and exonerated from all criminal liability for that killing? Does the decision of the Court of Appeal here, allowing A's appeal against his conviction for murder, really represent the law of the land?

69. To my mind the answer to these questions is a plain "no". Realistically this case is indistinguishable from the succession of authorities establishing criminal liability on the part of anyone who willingly involves himself in the use of unlawful violence between protagonists intent on killing or seriously injuring each other, be they duellers, prize-fighters or sado-masochists – see respectively *R v Young & Webber* (1838) 8 C & P 644, *R v Coney* (1882) 8 QBD 534 and *R v Brown* (*Anthony*) [1994] 1 AC 212. It is the very purpose of those engaging in these various activities that injuries will occur. The suggestion that certain of the perpetrators of such consensual violence, merely because they are also its prospective victims, cannot be liable for it, whether as principals or accessories by virtue of the decision in *R v Tyrrell* [1894] 1 QB 710 (discussed by Lord Phillips and Lord Judge at para 18 of their judgment), cannot be right. The principle underlying criminal liability for duelling, prize-fighting and so forth is not to be understood simply as the protection of those most directly at risk of the injuries intended. Rather it is the protection of society generally from the damaging consequences of such injuries and the discouragement of violent conduct as a whole. Another powerful illustration of the principle (discussed by Lord Phillips and Lord Judge at para 52) is the law with regard to suicide (modified although that now is).

70. Such being the rationale for criminal liability in this line of cases, how could the principle not encompass also the present case? Insofar as there are factual differences between this case and an old-fashioned duel – most notably the absence here of the civilities and formalities characterising a duel and the spur of the moment nature (if such it was) of the decision here to engage in a gunfight (ie to shoot and, inevitably, be shot at) – none of these suggest any lesser criminality for whatever injuries may result than in the case of a duel itself. Quite the contrary, indeed. The public interest in criminalising the violence engaged in is yet more obvious: here there were others about so that the risk of harm was by no means confined merely to the protagonists themselves.

71. For my part I am not disposed to analyse A's liability for C's murder here in accessory terms – as the aider or abetter, counsellor or procurer of B's attempt to kill him (A himself) whose liability for C's death thus arises, *Tyrrell* constituting no obstacle, under the doctrine of transferred malice. Rather it seems

to me that A is liable for C's murder as a principal – a direct participant engaged by agreement in unlawful violence (like a duel, a prize-fight or sado-masochism) specifically designed to cause and in fact causing death or serious injury. But whichever analysis is adopted, A's liability for C's murder seems to me clear and I would regard our criminal law as seriously defective were it otherwise.

72. Does it follow that criminal responsibility for death would attach as widely as was envisaged by the Court of Appeal in this case, and which so plainly concerned them as a matter of policy (see paras 74 and 75 of the judgment below, cited in full by Lord Phillips and Lord Judge at para 28 of their judgment)? In my judgment not. In the scenario there described it could not be said, as here clearly it can, that the very purpose of such a fight is that death or serious injury shall result.

73. For these reasons I too would answer the certified question in the affirmative, allow this appeal and restore the respondent's conviction for murder.

LORD CLARKE

74. Lord Phillips and Lord Judge have set out the facts in some detail. I shall not therefore repeat them.

75. Lord Brown says at para 68 that the all-important consideration here is that both the respondent and Bandana Man were intentionally engaged in a potentially lethal unlawful gunfight or shoot-out, in which each intended to kill or seriously injure the other. I agree that there was evidence upon which the jury could so conclude. It is not in dispute that if they had agreed to fight a duel with guns and either had inadvertently shot and killed a passer-by in the course of the duel they would both be guilty of murder. It follows, as I see it, in agreement with Lord Phillips, Lord Judge and Lord Brown, that if the respondent and Bandana Man agreed to the shoot-out, they were both guilty of murder, even though the victim was killed by a shot fired by Bandana Man and not by the respondent and even though Bandana Man intended to kill or seriously injure the respondent who was the other party to the agreement. In so far as the trial judge, Cooke J, reached a different conclusion, I respectfully disagree.

76. As I see it, this analysis does not depend upon a conclusion that the respondent was aiding, abetting, counselling or procuring Bandana Man but simply on the proposition that the victim was shot and killed in the course of the respondent carrying out the agreement between the two men as principals to shoot and be shot at, just as in a duel. In a passage quoted by Lord Phillips and Lord Judge at para 21 the trial judge, Cooke J, rejected the submission that the

respondent actively encouraged Bandana Man to shoot at him. He concluded that, by shooting at Bandana Man, the respondent might have provoked further firing but he did not encourage it. I agree that there is a distinction in principle between provoking a person to do something and encouraging or aiding and abetting him to do it.

77. The question is whether the judge directed the jury correctly. That depends upon the language he used. The relevant passage is quoted by Lord Phillips and Lord Judge at para 23. The whole passage is important but the critical parts seem to me to be these:

> "Where a criminal offence is committed by two or more people, each of them may play a different part in that offence, but if they are in it together as part of a joint plan or joint agreement to commit it, each is guilty of the planned offence.
>
> The words 'plan' or 'agreement' that I have just used do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod or a wink or just a knowing look or by taking the first step in committing an offence in which the other person then joins, so that it can be inferred from their behaviour.
>
> …
>
> Now here it is said by the prosecution that Bandana Man and the defendant planned to use unlawful violence towards another by having a shoot-out, whether that plan was made beforehand and the meeting was pre-arranged or was made on the spur of the moment when they saw each other and fired at each other from the steps and the car respectively.
>
> …
>
> If you are sure that Bandana Man and the defendant joined together to commit such unlawful violence by having a gunfight, whether pre-planned or whether on the spur of the moment on the top of the steps and the side of the car, and that this joint enterprise came into being before Magda was killed by a shot from Bandana Man, then the defendant would be guilty of murder also, along with Bandana Man, provided the other requirements are satisfied.
>
> So if you are sure that Bandana Man and the defendant were in a joint enterprise to cause an affray, to use unlawful violence against

> each other by having a gunfight and by firing at each other, whether this joint enterprise was the result of a pre-planned meeting or arose on the spur of the moment when they saw each other, and that in the course of that joint enterprise fight, Magda was murdered by Bandana Man on the basis of transferred malice, as I have explained it to you, and that the defendant realised – and the prosecution say that he must have realised -- that in the course of their joint enterprise gunfight, Bandana Man might kill with the requisite intention for murder, then the defendant would also be guilty of murder."

78. As Lord Phillips and Lord Judge have explained, the judge had ruled that it was open to the jury to find that the respondent and Bandana Man were engaged on a joint enterprise to commit an affray and that, if the jury found that the respondent foresaw that Bandana Man might shoot and kill an innocent passer-by this would found a verdict of murder on the part of the respondent. I agree with Lord Phillips and Lord Judge (at para 42) that no issue of what they call parasitic accessory liability could arise here because 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 they had no common intention, or the common intention was to have a shoot-out, which involved each necessarily accepting that the other would shoot at him with the intention to kill or cause serious injury. It was thus open to the jury to find that there was an agreement to that effect which may have been made on the spur of the moment but was in any event made before Bandana Man shot and killed the victim, Miss Pniewska.

79. My only concern has been whether, in the light of the judge's ruling, he intended to direct the jury that they could convict if the common intention fell short of an intention to shoot and be shot at. However, I agree with the conclusion of Lord Phillips and Lord Judge at para 57 that it is not realistic to think that the jury could have found such a common intention and with their conclusion at para 58 that the direction the judge in fact gave was an unequivocal direction that the jury could only convict if they were sure that the protagonists had formed a mutual plan or agreement to have a gun fight in which each would attempt to kill or seriously injure the other. It follows that I would not accept the conclusions of the Court of Appeal to the contrary.

80. At paras 55 to 60 Lord Phillips and Lord Judge return to the relevance of aiding and abetting. For the reasons I have given, I do not think that this is a case of aiding and abetting. It is a case of an agreement to shoot and be shot at just like the agreement between the principal protagonists to a duel. It does not seem to me that any assistance is to be gained by a consideration of the position of the seconds at a duel or of those present at a duel or a prize fight.

81. In reaching these conclusions, I entirely agree with Lord Brown's conclusions at paras 69 to 71. Like him, I am not disposed to analyse the respondent's liability for murder in accessory terms but as a principal to a joint enterprise (that is an agreement) to engage in unlawful violence specifically designed to cause death or serious injury, where death occurs as a result. I would be inclined to describe this as a form of principal and not secondary liability, but if it is a form of secondary liability, so be it. I also agree with Lord Brown that such a conclusion is consistent with public policy and, for the reasons he gives at para 72, does not extend criminal responsibility for death as widely as the Court of Appeal envisaged at paras 74 and 75 of their judgment.

82. For these reasons, I too would allow the appeal and restore the respondent's conviction for murder.

83. By way of postscript I would like to mention another possible basis of liability for murder which was touched upon in argument. It arises out of a consideration of the decision of the Court of Appeal in *R v Pagett* (1983) 76 Cr App Rep 279 to which Lord Judge drew attention in the course of the argument. It appears to me to be at least arguable that it was or would have been open to the jury to conclude that one of the effective causes of the death of the victim was the respondent shooting at Bandana Man. This is on the basis that it provoked (or caused) Bandana Man to shoot back with intent to kill or cause serious harm to the respondent as a result of which the victim was shot and killed. This analysis does not depend upon the respondent and Bandana Man being parties to a joint enterprise.

84. The argument to the contrary would be that the sole cause of the death of the victim was that she was shot by Bandana Man and that the fact that he may have been returning fire directed at him by the respondent is irrelevant. The argument would be that, even if Bandana Man would not have shot and killed the victim if he had not been shot at by the respondent, the deliberate and criminal act of Bandana Man in shooting back and killing the victim was a *novus actus interveniens* which broke the chain of causation between the shots fired by the respondent and the death of the victim.

85. In *Pagett* the appellant shot at police officers who were attempting to arrest him for various serious offences. The appellant had with him a 16 year old girl who was pregnant by him. Against her will he used her body to shield him from any retaliation by the officers. The officers returned his fire and as a result the girl was killed. The appellant was charged with her murder. The trial judge left both murder and manslaughter to the jury. The appellant was acquitted of murder but convicted of manslaughter. In the Court of Appeal, which comprised Robert Goff

LJ and Cantley and Farquarson JJ, the appellant challenged the judge's directions on causation. The judgment of the court was given by Robert Goff LJ.

86. It was held that it was for the judge to direct the jury as to the relevant principles relating to causation and then leave it to the jury to decide whether or not, in the light of those principles, the relevant causal link had been established. In the rare case in which it was necessary to direct the jury's minds to the question of causation, it was usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that the act contributed significantly to that result.

87. However, Robert Goff LJ said this at p 288:

> "Occasionally … a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a *causa sine qua non* of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention, if it has such an effect, has often been described by lawyers as a *novus actus interveniens*. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused. At the risk of scholarly criticism, we shall for the purposes of this judgment continue to use the Latin term."

88. The decision in *Pagett* is however instructive: see pp 291-292. The judge directed the jury that, in order to convict the appellant, it was necessary that they should find *both* that he fired at the police officers and thereby caused them to fire back *and* that he used the girl as a shield by force and against her will. The court held that that direction was generous to the appellant because either of those acts would have constituted the *actus reus*, whether of murder or manslaughter causing the victim's death. So, as Robert Goff LJ put it at p 291, if the jury were sure that, if the victim was killed by a shot fired from the gun of a police officer who, acting in reasonable self-defence, fired his gun in response to a lethal attack by the appellant, it would be open to them to convict him of murder or manslaughter as the case may be.

89. This case is not on all fours with *Pagett* because Bandana Man was not acting in reasonable self-defence. However, once the respondent became aware that Bandana Man had a gun and was willing to use it, even assuming that there was no joint enterprise, it was undoubtedly foreseeable that, if the respondent continued shooting at Bandana Man, he would shoot back with intent to kill him or cause serious harm. Indeed, the jury's verdict shows that the respondent foresaw precisely that. In these circumstances, it was open to the jury to conclude that the respondent's firing at Bandana Man was a cause of the latter shooting back. It was the very thing that might have been expected.

90. There are of course many cases in the books which consider the correct approach to the suggestion that there has been a *novus actus interveniens*. Many of them are claims in tort but the principles seem to me to be much the same. I refer only to the well-known judgment of Lord Wright in the Court of Appeal in *The Oropesa* [1943] P 32. After noting at p 37 that human action does not itself sever the chain of causation and referring to a number of the cases, Lord Wright said at p 39:

> "To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that."

To my mind, the decision by Bandana Man to shoot at the respondent was not extraneous or ultroneous but the very thing that the respondent must have expected.

91. The mere fact that the immediate cause of the death was a criminal and deliberate act on the part of Bandana Man does not as a matter of law break the chain of causation: see eg, in the context of tort, *Gray v Thames Trains Ltd* [2009] EWHL 33, [2009] 1 AC 1339 per Lord Hoffmann at paras 27-29 and *Corr v IBC Vehicles Ltd* [2008] UKHL 13, [2008] AC 884. All depends upon the circumstances of the particular case. In these circumstances, as I see it, 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 Man 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.

92. However, since the case was not put to the jury on this basis, I would not allow this appeal on the basis of causation but on the basis discussed in paras 74 to 82 above.

LORD DYSON

93. The facts have been fully set out by Lord Phillips and Lord Judge. Several possible bases for upholding the respondent's conviction call for consideration. The first is the basis on which the case was left by the judge to the jury and on which they convicted. This is that the respondent and Bandana Man participated in the commission of an affray and that in the course of it Bandana Man committed an offence (murder) which the respondent had foreseen he might commit. Like Lord Phillips and Lord Judge, I shall adopt Sir John Smith's phrase of "parasitic accessory liability" for this. The second is that the respondent aided and abetted Bandana Man to shoot at him (by encouraging him to do so). This is a basis on which Lord Phillips and Lord Judge would uphold the conviction, although in his ruling the judge said that his view of the facts was that the respondent did not encourage Bandana Man to shoot at him and that accordingly he would not leave the issue of aiding and abetting to the jury. The third basis is that the respondent and Bandana Man were liable as joint principals for the murder. This is the basis on which Lord Brown and Lord Clarke would uphold the conviction. Lord Clarke has suggested a fourth possible route, namely that the respondent caused Bandana Man to shoot at him and therefore to kill Magda Pniewska.

Parasitic accessory liability

94. The ingredients for parasitic accessory liability are that two parties participate in the commission of crime A and, in the course of committing it, D1 commits crime B which D2 foresees that he might commit. The Court of Appeal rejected this as a basis for upholding the conviction in the present case on the grounds that it was necessary to show that the respondent and Bandana Man agreed to commit the affray "and shared a common purpose in committing it" (para 51). They said (para 59) that it was "not realistic to say that they acted in concert to cause fear; they acted independently and antagonistically in a manner which did so. Absent a shared purpose to shoot *and be shot at*, the submission made by the appellant was correct that there was no room on the facts for any other common purpose. The jury was never asked to confront the question whether the shared purpose was not only to shoot, but to be shot at."

95. I agree with the comments by Professor Ormerod in *R v Gnango* [2011] Crim LR 151 and by Professor Virgo in "The doctrine of joint enterprise liability"

Archbold Review, Issue 10, 14 December 2010 that, in order to establish parasitic accessory liability, there was no need for the prosecution to prove that there was a common purpose that each man intended to shoot and to be shot at. It was sufficient to establish a common purpose to commit an affray. Consequently, a common purpose to fight or threaten a fight in a public place would be a sufficient common purpose to engage the parasitic accessory liability principle.

96. But at paras 42 and 43, Lord Phillips and Lord Judge have identified a different flaw in the parasitic accessory liability argument. They say that there is no room for the application of this principle in the present case, because on the facts of this case it is artificial to treat the intention to have an affray as separate from the intention to have a potentially homicidal shooting match. I agree.

97. There is no reason in general why the parasitic accessory liability principle cannot be applied where crime A is affray and crime B is murder. All that is required is proof of (i) a common purpose to commit an affray which is shared by D1 and D2 in the sense that they have agreed to commit the offence and (ii) a murder committed by D1 in the course of the affray the commission of which is foreseen as a possibility by D2. Suppose, for example, that a group of youths is involved in a fist fight in a public place and they are all aware that one member of the group is armed with a knife. Let us further suppose that they are all guilty of causing an affray and that the youth who has the knife uses it with the intention to kill or cause really serious harm to kill another member of the group. All the members of the group who foresee that he might use the knife to commit a murder would also be liable for the murder. The fact that they were also guilty of an affray would be no bar to their liability for murder.

98. On the facts of this case, however, the Crown chose to put their case on the basis that the affray was the use of unlawful violence in a public place "by having a gun fight and by firing at each other" (summing up p 15-16). I agree with Lord Phillips and Lord Judge that the way that the Crown chose to put its case left no room for the application of the parasitic accessory liability principle here.

Aiding and abetting

99. The Crown sought to persuade the judge to leave the case to the jury on the alternative basis that, by shooting at Bandana Man, the respondent encouraged him to shoot back at him and fire the fatal shot; and that he was guilty of the murder of Ms Pniewska as an accessory and by application of the transferred malice principle. The judge's view of the facts was that this was not a route open to the jury to finding the respondent guilty of murder. As he said in his ruling, "in reality on the evidence, [the respondent] fired at Bandana Man in the hope of killing him

or causing him grievous bodily harm, frightening him, or arguably, in self-defence. He cannot be said to have encouraged the other to fire back, whatever the order of shots as the jury might ultimately find them to be. He might have provoked further firing, but he did not encourage it."

100. Despite the judge's declared intention (as expressed in his ruling) not to leave aiding and abetting to the jury, Lord Phillips and Lord Judge say that a basis on which the jury's verdict can be upheld is that they must have found that the respondent aided and abetted Bandana Man to shoot at him with intent to kill or cause really serious harm. At para 59 they draw an analogy with a duel and a prize fight. If the jury's view of the facts was that this case was indeed analogous to a duel (ie that the respondent and Bandana Man had a common purpose to shoot and be shot at), then I agree with the reasoning of Lord Phillips and Lord Judge. It is important to distinguish between a combat which is analogous to a duel and a mere fight. An essential element of the former is an *agreement* by the combatants to fight each other. They encourage each other to fight. The judge was right to distinguish between encouragement and provocation. If A shoots back at B because he has been provoked by B's shooting to do so, that is very different from saying that A shoots back at B because he has been encouraged to do so pursuant to an agreement to have a shoot out.

101. The question is whether the jury must have decided that the respondent and Bandana Man had a common purpose to shoot and be shot at and that by their words and/or conduct they encouraged each other to that end. The Court of Appeal's view of the facts was that the respondent and Bandana man had no such common purpose: in other words, that this was not analogous to a duel. That was also the view of the judge as expressed in his ruling. But what matters, of course, is what the jury decided. That can only be determined by a consideration of their verdict in the light of the summing up, which must be interpreted in a sensible way and without regard to any ruling that preceded it (of which the jury would have been ignorant). What counts is what the judge said in his summing up, and not what he intended to say or what he intended the words that he used to mean. But where it is suggested that a summing up bears a meaning which differs from what the judge intended, it must be scrutinised with particular care.

102. In his summing up, the judge did not direct the jury on aiding and abetting. He did not ask them in terms to consider whether, by shooting back, the respondent encouraged Bandana Man in turn to shoot back at him with intent to do so. In view of his ruling, these omissions on the part of the judge were not by an oversight: they were quite deliberate. But the question is whether, although the issue of aiding and abetting by encouragement was not before the jury in terms, they showed by their verdict on the issue that was before them (parasitic accessory liability) that they were sure that the respondent and Bandana Man had a common

purpose to shoot and be shot at and encouraged each other to give effect to that purpose.

103. This question has caused me considerable anxiety, not least because (i) this was a murder charge, (ii) a finding of aiding and abetting by encouragement did not accord with this careful judge's assessment of the facts and (iii) he did not direct the jury explicitly on the aiding and abetting issue. But I have been persuaded by the reasoning of Lord Phillips and Lord Judge that the jury must nevertheless have been satisfied that there was an agreement between the respondent and Bandana Man to shoot and be shot at and that they encouraged each other to carry that agreement into effect. The jury were directed that they had to be sure that the respondent and Bandana Man planned to use unlawful violence towards each other "by having a shootout whether that plan was made beforehand and the meeting was pre-arranged or was made on the spur of the moment when they saw each other and fired at each other from the steps and the car respectively". The judge gave the standard direction for joint enterprise (in the context of parasitic accessory liability) that the offence (in this case affray by gunfight) had to be the joint commission of an offence by two or more people who are "in it together as part of a joint plan". In my view, a shootout *pursuant to a plan* must mean an exchange of fire pursuant to an agreement to shoot and be shot at; and persons who *agree* to shoot at each other must by virtue of their agreement intend to encourage each other to do so. It differs from a simple exchange of fire. Nor is it relevant that each of the participants hopes that his shot will prove fatal and that there will be no return of fire. The fact that the jury convicted the respondent of the murder of Ms Pniewska following the judge's directions must mean that, if they had been asked in terms whether the respondent and Bandana Man (i) agreed to shoot and be shot at and (ii) thereby encouraged each other to that end (intending to do so), they would have answered both questions in the affirmative. In other words, the jury showed by their verdict that they considered that this was analogous to a duel.

104. I would, therefore, uphold the conviction on the basis that the jury must have been satisfied that the respondent aided and abetted the murder of Ms Pniewska by encouraging Bandana Man to shoot at him in the course of the planned shootout.

Liability as a joint principal

105. This is the route favoured by Lord Brown and Lord Clarke and accepted as an alternative by Lord Phillips and Lord Judge. They say that the respondent is liable by reason of his participation "by agreement in unlawful violence specifically designed to cause and causing death or serious injury". For the reasons that I have given, I am persuaded that the jury must have been sure that Bandana

Man and the respondent exchanged fire pursuant to an agreement to have a shoot out, ie an agreement to shoot and be shot at. That is why in my view Lord Phillips and Lord Judge are right to say that in this case the difference between holding the respondent liable as a principal to an agreed joint activity rather than as an accessory is not a difference of substance. Either way, the Crown had to prove that the respondent and Bandana Man agreed to shoot and be shot at with the necessary intent. It follows that, for the reasons I have given, the jury must have been sure that the respondent participated with Bandana Man in an agreed shoot out or agreement to shoot and be shot at with the necessary intent. Accordingly, if the jury had been asked whether the respondent was guilty of the murder of Ms Pniewska on the basis that he had acted in concert with Bandana Man in shooting at each other pursuant to an agreement to shoot and be shot at, in my view, in the light of the terms of the summing up, they would have answered that question in the affirmative. I would, therefore, uphold the conviction on this basis too.

Causation

106. Lord Clarke has suggested, as an alternative, that the respondent caused Bandana Man to shoot back at him and thereby contributed to the death. This way of putting the case was not left to the jury and causation was a matter for the jury to determine. Furthermore, we heard very little argument on this point. It seems to me that, if Bandana Man's act of shooting at the respondent was a free, deliberate and informed act, it broke the chain of causation between the respondent's shooting at him and his shooting and killing Ms Pniewska: see *R v Kennedy (No 2)* [2007] UKHL 38; [2008] AC 269. As Professor Ormerod points out in his article (loc cit), it might be argued that Bandana Man's act of shooting was not a free, deliberate and informed act because he was acting in self-defence. But that seems very difficult on the facts of this case. It might also be argued that, even if Bandana Man was acting in a free, deliberate and informed manner, that is irrelevant if he and the respondent were acting in concert: see *R v Latif* [1996] 1 WLR 104, 115. None of these issues was explored by the jury. I agree with Lord Clarke that we cannot uphold the conviction on the basis that the respondent caused Bandana Man to fire the fatal shot.

Conclusion

107. I would, therefore, allow the appeal and restore the conviction. In doing so, I wish to emphasise that the judge is not to be criticised for directing the jury in the way that he did. This was a very difficult case. I would add that, although I have disagreed with the analysis of the Court of Appeal, it contains a most useful discussion of some of the complex issues that arise in this area of the law.

LORD KERR

108. The respondent to this appeal, Armel Gnango, was convicted of the murder on Tuesday, 2 October 2007, of a 26 year old Polish care worker, Magda Pniewska. She had been walking home from her place of employment when she was killed by a single shot to the head. She was an entirely innocent young woman. Her death is an appalling tragedy.

109. The shot which killed Ms Pniewska was fired by a person known throughout the proceedings by the somewhat unfortunate soubriquet of 'Bandana man'. I shall refer to him as 'B'. He and Gnango had exchanged fire and it was in the course of this that Ms Pniewska was shot. In their judgment, Lord Phillips and Lord Judge have outlined all the relevant facts and I need not dilate further on them. The Court of Appeal quashed the murder conviction. It certified a point of law of public general importance. Its terms have been set out by Lord Phillips and Lord Judge in para 1 of their judgment and it is unnecessary to repeat them.

110. Various bases on which Gnango might – or should – be found guilty of the murder of Ms Pniewska have been canvassed in the course of argument and in the judgments of the other members of the court. I have had the great advantage of reading these judgments in draft form.

Joint affray

111. In paras 32-35 of their judgment, Lord Phillips and Lord Judge have traced the evolution of the statutory offence of affray from its common law origins. As he has pointed out, the Law Commission had recommended that the common law offence of affray should be preserved in an enactment and had suggested that it should be defined as the use or threat of unlawful violence by two or more persons *against each other* or by the use or threat of such violence by one or more persons against another. Although the government expressed satisfaction with this definition, there was a significant omission in the final form of the provision that appeared in the legislation from that proposed by the Law Commission. It contained no reference to the use or threat of violence by two persons against each other. Instead, section 3(1) dealt only with the basis of a single individual's guilt. A person was to be guilty if he used or threatened unlawful violence *towards another*.

112. Lord Phillips and Lord Judge consider that the use of the words "unlawful violence" in subsection (2) of section 3, if given their natural meaning, would lead to the conclusion that two defendants could only be jointly liable of affray if they

join in using violence against another. But it seems to me that this conclusion is the consequence not so much of the use of the words "unlawful violence" in subsection (2) as the unavoidable result of the requirement in subsection (1) that, for a person to be guilty of affray, he must have offered violence *to another*. Therefore, I have difficulty with Lord Phillips' and Lord Judge's conclusion that the joint offence of affray can be founded on the common product of individual conduct, if this is to be applied to the use of violence by two persons against each other. Using or threatening violence *towards another* must mean that in the case of a joint offence of affray the violence of those guilty of it is directed towards another person or other persons, not against each other.

113. This may produce an anomalous result, as Lord Phillips and Lord Judge have suggested, but it seems to me to be the inescapable conclusion that section 3(1) impels. For a joint offence of affray to occur, the person represented by the word "another" in s 3(1) of the 1986 Act must be someone other than the person offering the violence. It may be correct, as Lord Phillips and Lord Judge have stated (in para 38), that there does not need to be a common intention for a joint offence of affray but the activity comprising the actus reus of the offence, to be capable of giving rise to joint liability, must be directed towards the same target. This is the unavoidable consequence of the stipulation that the violence must be used or threatened to another. On this analysis, Gnango and B committed separate offences of affray. A joint affray is not, in my opinion, available as a source of liability for Gnango.

114. In any event for parasitic accessory liability to arise, Gnango and B *would have to have a common intention* to commit an affray, if affray is the crime on which Gnango and B are to be said to have jointly embarked. Whether or not a common intention is required for a joint offence of affray, it is most certainly required for parasitic accessory liability. Even if it were possible, therefore, for them to be convicted of joint affray without a common intention to commit that offence, for the offence to provide the basis of parasitic accessory liability, it would have to be proved that they had a shared intention. As Lord Phillips and Lord Judge stated in para 38, the Court of Appeal was right to hold that this form of liability depends on the existence of a common unlawful enterprise or purpose. Although I disagree with Lord Phillips and Lord Judge that there can be a joint affray based on violence offered by two protagonists to each other, I do agree with him that participation in a joint affray cannot automatically constitute a foundation for parasitic accessory liability. The essence of parasitic accessory liability is that there is a common purpose and in the course of furthering that common purpose, the principal goes beyond what was agreed but the secondary participant foresaw the possibility of this occurring. The sine qua non of parasitic accessory liability, therefore, is the existence of an common purpose.

Aiding and abetting

115. Lord Phillips, Lord Judge and Lord Dyson have concluded that, although it was not left to the jury by the trial judge, the effect of their verdict is that Gnango was guilty because he aided and abetted B to fire at him. This was on the basis that both shared a common intention to shoot at one another. In particular, each intended to shoot at the other and to be shot at by him. The Court of Appeal concluded that the jury was "never asked to confront the question whether the shared common purpose was not only to shoot, but to be shot at" (para 59 of the Court of Appeal's judgment). This is unquestionably correct. The jury was not invited at any time during the judge's carefully composed charge to address the question whether the shared intention included what seems to be the supremely important element of the avowed aiding and abetting of this offence – the agreement to be shot at.

116. The judge had refused to allow aiding and abetting to go to the jury because he considered that it could not reasonably be concluded that Gnango had encouraged B to fire at him. The mens rea of aiding and abetting is an *intention* by one's act to assist the principal in the commission of his offence. Thus at para 18-18 of Archbold 2011 edition:

> "To establish aiding and abetting on the basis of encouragement, it must be proved that the defendant intended to encourage and *wilfully* did encourage the crime committed. Mere continued voluntary presence at the scene of a crime, even though it was not accidental, does not of itself necessarily amount to encouragement; but the fact that a person was voluntarily and purposely present witnessing the commission of a crime and offered no opposition, though he might reasonably be expected to prevent it and had the power to do so, or at least express his dissent, might in some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted, but it would be purely a question of fact for the jury whether he did so or not: *R v Clarkson, 55 Cr App R 445, Ct-MAC*."

117. Since mere presence at the scene of a crime can in certain circumstances be enough to justify a finding of guilt, it is perhaps difficult to see why Gnango's remaining at the scene and firing the gun at B could not amount, in law, to encouragement. It seems likely, however, that the judge considered that the notion of someone encouraging another to fire at him was so at odds with common experience as to be unbefitting of the jury's consideration as a possible basis of liability for in his ruling he observed: "it cannot be said, in my judgment, that the defendant actively encouraged [B] to shoot at him, and even if he did, it would be a real oddity for a victim of an attempted murder to be a secondary party to that attempt". Be that as it may, the above passage from Archbold makes clear that, to be satisfied that Gnango intended to assist or encourage B to shoot at him, the jury

would have to address directly not only the question whether his actions *did* encourage B to do so, but also whether he *intended* that B should do so – see also Archbold at 17-67, "what needs to be proved is an intention to render assistance to another". If the jury was not invited to consider whether Gnango had that intention, the conclusion that their verdict admits of no view other than that Gnango intended to assist B in firing at him is somewhat startling and one which could only be reached after very careful examination of possible alternative explanations for the verdict.

118. The judge told the jury that the prosecution case was that there was a plan on the part of Gnango and B to have what he described as a "shoot-out":

> "Now here it is said by the prosecution that Bandana Man and the defendant planned to use unlawful violence towards [one] another by having a shoot-out, whether that plan was made beforehand and the meeting was pre-arranged or was made on the spur of the moment when they saw each other and fired at each other from the steps and the car respectively."

119. A little later in his charge he gave this critical direction:

> "If you are sure that Bandana Man and the defendant joined together to commit such unlawful violence by having a gunfight, whether pre-planned or whether on the spur of the moment on the top of the steps and the side of the car, and that this joint enterprise came into being before Magda was killed by a shot from Bandana Man, then the defendant would be guilty of murder also, along with Bandana Man."

120. At para 58 Lord Phillips and Lord Judge have said that this amounted to an unequivocal direction that the jury could only convict if they were satisfied that Gnango and B had planned to have a gun fight in which each would attempt to kill or seriously injure the other. He suggests that if the jury was satisfied of this, it meant in law that both were party not merely to his own attempt to kill or seriously injure the other but to the other's attempt to kill or seriously injure him. Lord Dyson expressed essentially the same view at para 101 where he said:

> "In my view, a shootout *pursuant to a plan* must mean an exchange of fire pursuant to an agreement to shoot and be shot at; and persons who *agree* to shoot at each other must by virtue of their agreement intend to encourage each other to do so."

121. The terms of any "plan" are critical to any conclusion that the parties to it must be taken to have encouraged each other to shoot. But an anterior question must be addressed. Can it be said that solely because there was an exchange of fire, this must be on foot of a plan? Agreement to shoot it out with an opponent, if reached in advance, would be such a plan although there is no evidence that this is what happened here. But where there has been what has been described as a "spontaneous agreement" to engage in a shoot-out, the question arises whether this can truly be said to be the product of an agreement in any real sense. Is it not at least as likely to be the result of a sudden, simultaneously reached, coincident intention by the two protagonists to fire at each other? I do not consider that because there was a shoot-out (whatever that term may mean) and because the jury were asked to consider that Gnango and B "joined together … to commit … unlawful violence", by returning a verdict of guilty, the jury must be taken to have concluded that there was a plan in the sense of an agreement between them.

122. But even if the jury's verdict can be taken as evidence of their conclusion that there had been a plan or agreement between Gnango and B, does it follow that an element of that plan *must* be that they agreed to be shot at, as well as to shoot? Agreeing to a shoot-out does not necessarily mean agreeing to be shot at. This is particularly so where the plan takes the form of (and here it could only take the form of) an instantaneous meeting of minds between Gnango and B on their first catching sight of each other on the occasion of the gunfight. That type of situation is quite different from a duel where participants meet at a pre-arranged place and an appointed time. The essence of a duel conducted with firearms is that there should be an exchange of fire. The parties to the duel anticipate – and may be said to impliedly consent to – being fired on as well as firing. But there is no basis on which to infer that such was the intention of the two protagonists here, much less to conclude that the jury's verdict can only be consistent with such implicit intention on the part of Gnango and B. It is at least just as likely that neither agreed to be fired on and that both hoped that they would avoid that unpleasant eventuality by hitting the target with their own shot. Put shortly, when the only material that the jury had to go on was that there was a shoot-out, it is, in my view, impossible to conclude that the finding of guilt can only be explained on the basis that it had been proved that there was a plan between Gnango and B to shoot and be shot at.

123. Even if it were possible so to conclude, however, it does not follow that this amounted to an intention on the part of Gnango or B to assist or encourage each other to shoot. One might be alive to the very real risk that firing, if the target was not hit, would prompt return fire, but that is a significantly different thing from saying that this was encouragement to fire back. Being prepared to run the risk does not equate with encouraging an opponent to fire at you. Before, therefore, one could be confident that the jury's verdict meant that they had found it established that Gnango had intended to encourage B to fire, it would have been necessary for

them to receive directions about that vital component of aiding and abetting. As the judge said, when ruling that he would not allow this to go to the jury as a possible basis of liability, “on the evidence, the defendant fired at Bandana Man in the hope of killing him or causing him grievous bodily harm, frightening him, or arguably, in self-defence”. Being shot at was hardly likely to have been a desired outcome on the part of Gnango. Intending to encourage B to fire at him was even less likely.

124. This point was made by Graham Virgo in an article, “The Doctrine of Joint Enterprise Liability”, on the Court of Appeal’s decision in this case which appeared in Archbold Review 2010 Issue 10, p 6:

> “… if the appellant had, by his act of shooting at the opponent, encouraged him to shoot back, if the appellant had foreseen that the opponent might shoot with the intention for murder and then the opponent's shot had accidentally hit and killed a third party, the appellant could be guilty of murder as an accessory by virtue of the transferred malice doctrine …
>
> The only difficulty with this analysis relates to whether the appellant's shooting at the opponent could have been regarded as a positive encouragement to shoot back. Did the appellant want the opponent to shoot back at him or did he only want to kill or seriously injure the opponent? This is why the Court of Appeal's analysis of an intent to shoot and be shot at was relevant, but it was relevant to accessorial liability and not to the identification of a common purpose. On the facts it would have been difficult to establish such encouragement of the opponent to shoot back, but it is conceivable that such encouragement could be identified if the appellant intended some kind of duel.”

125. It is, of course, true that, in considering whether there was an intention to encourage, intent must be clearly distinguished from desire or motive. In a trilogy of cases, *R v Moloney* [1985] AC 905; *R v Hancock* [1986] AC 455; and *R v Woollin* [1999] 1 AC 82 the House of Lords held that intention is not restricted to consequences that are wanted or desired, but includes consequences which a defendant might not want to ensue, but which the jury find (a) are the virtually certain result of the defendant’s actions (barring some unforeseen intervention); and (b) are consequences which the defendant appreciated were virtually certain to occur. Before such an oblique intention could form the basis of a jury’s verdict, of course, precise directions to this effect would have to be given. In the absence of a specific direction on Gnango’s intention to encourage B to shoot at him, I do not consider that the verdict of the jury can be upheld on the basis that it was founded

on their conclusion that he either had the requisite intention or that the virtually certain result of his firing at B was that he would return fire and that Gnango knew that this was virtually certain to occur.

126. This is particularly so because there is an obvious explanation for the jury's verdict other than that they concluded that there had been a plan which included an intention on the part of Gnango and B to encourage the other to shoot at him. The judge had put to the jury that if they were satisfied that Gnango and B had participated by agreement in an affray, in the course of which Gnango foresaw that B might commit intentional grievous bodily harm or kill, he could be found guilty on that account. For the reasons given by Lord Phillips, Lord Judge and Lord Dyson, with which I agree, this form of parasitic accessory liability was not a basis on which the jury could convict. But it seems to be likely in the extreme that this is the basis on which they did convict. That being so, there was no occasion for them to consider whether the requisite intention on the part of Gnango to found a verdict of guilty on the basis of aiding and abetting was present. Nor can their verdict be considered to supply the necessary ingredients of liability on that basis.

Liability as a joint principal

127. It is important at the start of this discussion to recognise the clear distinction that must be drawn between the concepts of joint principal liability and joint enterprise. Joint principal offending is a species of primary liability. In *Smith & Hogan's Criminal Law* (2011) 13th ed the following definition of joint principals is given: "D1 and D2 are joint principal offenders where each does an act which is a cause of the actus reus". Unlike the position in a joint enterprise, no common purpose is required in order to render those who cause or contribute to a cause of the actus reus guilty as joint principals. What is required is that each must contribute by his own act to the commission of the offence with the necessary mens rea.

128. By contrast, the doctrine of joint enterprise arises in situations where there are two offences, the first being that which has been jointly embarked on and the second the unplanned but foreseen offence committed by one of the participants alone. It is therefore par excellence a species of secondary liability as Hughes LJ explained in *A, B, C and D (Joint Enterprise)* [2010] EWCA Crim 1622; [2011] QB 841 where he said at para 37:

> "It is necessary to remember that guilt based upon common enterprise is a form of *secondary* liability. The principle is that D2 is implicated in the guilt of D1 not only for the agreed crime A but for the further crime B which he foresaw D1 might commit in the course

> of A. This form of liability therefore arises only where D1 has committed the further crime B."

129. The two models are therefore, if not mutually exclusive, at least conceptually distinct. To speak of joint principal offenders being involved in a joint enterprise is, at least potentially, misleading. The essential ingredient for joint principal offending is a contribution to the cause of the actus reus. If this is absent, the fact that there is a common purpose or a joint enterprise cannot transform the offending into joint principal liability.

130. The actus reus in this case was the killing of Ms Pniewska. To be guilty of that offence as a joint principal, it would have to be shown that Gnango caused or contributed to a cause of her death. With great respect to the views of Lord Brown and Lord Clarke, it is not sufficient that he be shown to be engaged by agreement in violence designed to cause death or serious injury. The crucial question is whether he caused or contributed to the death of the victim. This is not an issue which was put to the jury and a conclusion as to whether Gnango's actions caused or contributed to Ms Pniewska's death cannot be inferred from their verdict.

131. In any event, major difficulties of proof lie in the way of a case that Gnango's actions were an effective cause of the killing of the victim. As a thesis it depends on the proposition that B fired the fatal shot because he was caused to do so by Gnango firing on him. That proposition faces the immediate problem that B fired on Gnango first. It is, one might suppose, possible to assert that, notwithstanding this, B's continued firing at Gnango was caused by the latter's return of fire. But that claim encounters the difficulty that was identified by Lord Bingham in *R v Kennedy No 2* [2008] 1 AC 269 where he said at para 14:

> "The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act … Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article 'Finis for Novus Actus?' [1989] CLJ 391, 392, Professor Glanville Williams wrote:
>
> > 'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will

> pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new "chain of causation" going, irrespective of what has happened before.'

In chapter XII of *Causation in the Law*, 2nd ed (1985), p 326, Hart & Honoré wrote:

> 'The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'

This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104, 115. The principle is fundamental and not controversial."

132. If B fired at Gnango first, it seems to me highly questionable (at least) that Gnango's returning fire *caused* B to fire again. The first shot surely betokened an intention on the part of B to fire at and to hit Gnango, irrespective of whether Gnango fired back. It might be said, to borrow the words of Professor Glanville Williams, that Gnango's firing on B made it much more likely that B would fire again, but that is not enough to show that B was caused to fire because of Gnango's shot. I do not consider, therefore, that Gnango can be guilty of the murder of Ms Pniewska as a joint principal.

Conclusion

133. I would dismiss the appeal.