R v Gnango [2011] UKSC 59

Preliminary

Gnango was supposed to be a very big case on *joint enterprise liability* in the criminal law. It turned out to be nothing of the kind.

In order to understand *Gnango*, you have to understand that there is no offence of being an accessory to an offence committed by someone else. If I commit murder, and you are an accessory to my committing murder, then you are guilty of murder just as much as I am. I am guilty of murder *as a principal*; you are guilty of murder *as an accomplice*. We are both guilty of murder, and both liable to the mandatory life sentence for murder.

Facts

Gnango was a 17 year old who lived in South London. He was in dispute with another youth called 'TC' and went looking for him one day, armed with a gun. He approached some people in a car park, asking them if they had seen a man in a red bandana, saying that the man owed him money. Shortly afterwards, such a man – known thereafter as 'Bandana Man' – entered the car park and started shooting at Gnango. Gnango pulled out his gun and started firing back. Subsequently, a shot fired by Bandana Man at Gnango hit and killed a 26 year old woman who was walking through the car park. Bandana Man – who was thought to be 'TC' (but 'TC' was never charged) – was guilty of the woman's murder because of the doctrine of transferred malice: by firing his gun he had caused the death of the 26 year old; and when he fired the gun he had intended to kill someone. The fact that he had intended to kill Gnango, and not the woman, was irrelevant. The question that the Supreme Court had to resolve in *Gnango* was whether Gnango was also guilty of murder. The Supreme Court ruled, by a majority of 6:1, that he was.

Theories

There were three *possible* ways in which a case that Gnango was guilty of murder could have been constructed:

(1) *Murder as principal*. Gnango was guilty of murder as a principal. By firing back at Bandana Man, he ultimately caused the death of the 26 year old (because – presumably – Bandana Man wouldn't have carried on shooting had Gnango not fired back) and when Gnango fired at Bandana Man, he did so with an intent to kill.

(2) *Murder as an accessory: joint enterprise*. Gnango was guilty of murder as an accessory under the common law doctrine that where A and B are embarked on a joint criminal enterprise (to commit crime X), and B commits crime Z, A will also be held to have committed crime Z as an accessory if it was foreseeable that B would commit crime Z when A and B embarked on their joint criminal enterprise. By starting their gun fight, Gnango and Bandana Man were embarked on a joint course of conduct that involved committing the crime of affray (defined under s 3 of the Public Order Act

1986 as using or threatening unlawful violence towards another, when doing so would cause a person of reasonable firmness present at the scene to fear for his personal safety), and it was reasonably foreseeable that when they embarked on that joint course of conduct that Bandana Man would commit murder.

(3) *Murder as an accessory: aiding, abetting, counselling and procuring*. Gnango was guilty of murder as an accessory under section 8 of the Accessories and Abettors Act 1861, which provides that 'Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence...shall be liable to be tried, indicted and punished [in the same way as the] principal offender.' By firing back at Bandana Man, Gnango was encouraging (a concept which covers 'counselling' and some cases of 'procuring') Bandana Man to commit murder (of Gnango).

All these theories were deeply problematic.

(1) doesn't seem to work as Bandana Man broke the chain of causation between Gnango's firing at him, and Bandana Man's firing the fatal shot at the 26 year old woman, by deliberately, unreasonably, informedly and voluntarily carrying on the gun fight.

(2) doesn't seem to work as Gnango and Bandana Man were hardly engaged in a *joint enterprise* by firing at each other: they were opponents (and not willing opponents either, like players in a football match), not team-mates.

(3) doesn't seem to work as –

(i) Gnango was hardly *encouraging* Bandana Man to kill him when he fired back at Bandana Man: provocation is not encouragement.

(ii) The *Tyrell* principle says that where an offence exists for the protection of V, V cannot be charged with that offence as an accessory when D commits that offence in relation to V. So if a 12 year old girl encourages her 15 year old boyfriend to have sex with her, and the boyfriend is convicted of committing the offence of raping a child under 13 (contrary to s 5 of the Sexual Offences Act 2003), the girl cannot be convicted of the same offence as an accessory. The offence exists for her protection, not for her conviction. So even if Gnango was encouraging Bandana Man to kill him when he fired back at Bandana Man, that could hardly make him an accessory to murder, as that would violate the *Tyrell* principle: Gnango would end up being found guilty of an offence that existed for his protection.

The case in the Supreme Court

Of these three possible ways of deciding the case, (1) and (3) seemed the most unlikely, and most attention at first instance and in the Court of Appeal focussed on (2), with the first instance judge finding Gnango guilty of murder as an accessory under the joint enterprise rule, and the Court of Appeal setting aside Gnango's conviction on the basis that the joint enterprise rule did not apply here.

So everyone anticipated that when the case was heard by the Supreme Court, that the Court would also focus on the joint enterprise rule. There was an additional reason for thinking that the law on joint enterprise liability would be the main subject of discussion in the Supreme Court: this area of law has attracted a lot of adverse

comment and attention recently, particularly in connection with its being used to convict people of murder based purely on the fact that they foresaw that someone they were involved in a criminal joint enterprise with would kill someone in the course of that enterprise. When you can only be found guilty of murder as a principal if you had an *intent to kill*, it seems strange that you can also be found guilty of murder (as an accessory) if you merely *foresaw* that your partner in crime *might* kill someone while you were up to no good with him. And it seems even stranger that you and your partner in crime both end up serving a mandatory life sentence in prison, when your partner's responsibility for what happened was so much greater than yours. So there have been increasingly vocal calls in recent years for the law on joint enterprise liability to be reformed, particularly in murder cases. And it was thought that the Supreme Court might leap on this bandwagon in *Gnango* and do something to change the law on joint enterprise.

However, as it turned out the Supreme Court Justices were *unanimous* that the law on joint enterprise was *irrelevant* to Gnango's case. And not for the reason stated above: that Gnango and Bandana Man were not engaged in a joint enterprise. But because, the Supreme Court Justices insisted, the law on joint enterprise *only* applies where A and B are engaged in a joint criminal enterprise to commit crime X, and B *departs* from the plan and commits the quite different crime Y – something A foresaw B might do, but which was not part of A and B's plan. The Supreme Court held that the law on joint enterprise did not apply in *Gnango* because Bandana Man never departed from the joint plan that they found that Gnango and Bandana Man had – to have a shoot-out. If there was no depature from the plan, there was no room for the law on joint enterprise to apply.[1] And that was all the Supreme Court had to say about joint enterprise. Very disappointing.

Instead, the Supreme Court focussed on theories (1) and (3) as ways of establishing that Gnango was guilty of murder.

Four of the Justices (Phillips, Judge, Wilson, and Dyson) found that Gnango was guilty of murder as an accessory on the basis that he had encouraged Bandana Man to commit the crime of murder (of Gnango) by shooting back at Bandana Man when Bandana Man started shooting at Gnango.

Two of the Justices (Brown and Clarke) said that if there was (as Phillips etc seemed to suggest) an agreement between Gnango and Bandana Man that they should each try to murder the other, then if one of them succeeded in murdering someone, then the other should be found guilty of murder as a principal; though Brown said that it didn't much matter to him whether Gnango was found guilty as a principal or an accessory – the important thing was that Gnango be found guilty of murder.[2] Clarke went on to suggest that it might be possible to argue that Gnango was guilty of murder as a principal on the basis that he had caused the death of the 26 year old woman by shooting at Bandana Man with an intent to kill.

The final Supreme Court Justice (Kerr), basically said – don't be stupid: Gnango didn't cause the death, and didn't encourage murder either. So he's not guilty.

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[1] See *Gnango* at [42], [98]

[2] *Gnango*, at [71].

Encouragement

The law pre-*Gnango* on when D would be guilty of an offence O (as an accomplice) on the basis that he had encouraged that offence to be committed by P seemed to be as follows: (1) D must done something (*x*) that had the effect of encouraging P to commit offence O; (2) D must have intended to do *x*; (3) foreseeing that if he did *x* P would be encouraged to commit offence O (or something like offence O).

It is difficult to make the facts in *Gnango* fit these requirements. (2) is the least problematic requirement. Gnango intended to shoot at Bandana Man. The difficulty comes in when we attempt to argue that Gnango's shooting at Bandana Man had the effect of *encouraging* Bandana Man to commit murder, and that Gnango foresaw that if he shot at Bandana Man, Bandana Man would be *encouraged* to commit murder (or something like it, like attempted murder). The difficulty is that the concept of encouraging someone to do something involves the idea of approving that action; in the same way, if someone feels encouraged to do something, they are made to feel as though their conduct is approved of by the person who they think is encouraging them to act in their way. Gnango's shooting at Bandana Man did not convey any sense that Gnango approved of Bandana Man's shooting back at him.

But maybe focussing on 'encouraging' is the wrong thing to do. Why couldn't we argue that Gnango was guilty of murder as an accessory under the 1861 Act not because he *encouraged* or *assisted* Bandana Man to commit murder, but because he *induced* Bandana Man to commit murder? The trouble is that there is clear authority that if you want to convict a defendant of a crime as an accessory on the basis that he induced (or 'procured') P to commit that crime, you have to show that he *intended to induce* P to commit that crime (or something like it): *Attorney General's Reference (No 1 of 1975)* [1975] QB 779 (secretly lacing P's drinks with alcohol with the result that P ended up drink driving). It is *not* enough to show that: (1) he did something that had the effect of inducing P to commit the crime; and (2) he intended to do that thing; and (3) he foresaw when he did what he did that P would be induced to commit that crime (or something like it) as a result. And it's clear that in shooting at Bandana Man, Gnango did not intend to induce Bandana Man to commit murder (or something like it, like attempted murder).

So we are back to encouraging and the basic problem that *Gnango* is not a case where the defendant did anything to encourage the principal to do what he did. There are only four ways forward:

(1) Lords Kerr and Clarke were right, and the other Supreme Court Justices were simply wrong to find accessory liability under the 1861 Act.

(2) The majority Justices had in mind a different definition of what amounts to 'encouraging' for the purposes of the 1861 Act, one which doesn't involve leading the principal to feel that he has some approval for his actions.

(3) The majority Justices took the peculiar view that Gnango *was* egging Bandana Man on to shoot back at him when he fired at Bandana Man, and so Gnango's act in shooting at Bandana Man did actually indicate some approval to Bandana Man of his shooting at Gnango, and Bandana Man was emboldened by this to continue shooting at Gnango.

(4) The majority Justices viewed this as an 'inducing' case, but disregarded/overruled the authority requiring that in an inducing case you have to intend to induce the principal to commit an offence like the one he committed, and instead took the view that all you need to do is foresee that your actions are likely to have the effect of inducing someone to commit an offence like the one they ended up committing.

I think (4) isn't consistent with the judgments, which talk pretty exclusively in terms of 'encouraging'. There isn't much support in the judgments for (2): in fact, the Justices go out of their way to distinguish 'encouraging' from 'provoking',[3] and the only difference between those seems to be the fact that you indicate your approval of someone's course of conduct when you encourage it, but not when you provoke it. That leaves us with (1) and (3). I think there is some support in the judgments of the majority Justices for (3),[4] and if that's the way they read the case, then (1) is true as well – it's simply not correct to say that Gnango was encouraging Bandana Man to fire on him when he shot at Bandana Man, and so Gnango should not have been found guilty of murder as an accessory under the 1861 Act.

The Tyrell *principle*

In order to find Gnango guilty of murder as an accessory under the 1861 Act, the majority Justices also had to get round the *Tyrell* principle, as the only thing Gnango seemed to have encouraged/induced was his *own* murder or his *own* attempted murder. Making him an accessory to murder on that basis seemed to make him guilty of a crime that existed for his protection. The way the majority Justices got round the *Tyrell* principle is very likely to play a part in the end of year exam, because it does have wide-ranging implications. Basically, the majority Justices said that the *Tyrell* principle only applies to offences which exist for the protection of a *specific or limited class* of people (such as under 13 year olds in the example we were considering earlier).[5] So the *Tyrell* principle does not apply in murder cases because the offence of murder is not intended to protect a specific or limited class of people.

This is a pretty big thing to rule, because it implies that D will commit an offence in the situation where D is in great pain due to his being terminally ill with cancer. He asks P to put him out of his misery by giving him an injection of some poison. P attempts to do so, but fails. P will be guilty of attempted murder. D – seemingly – will be guilty of attempted murder (of himself!) as an accessory because the *Tyrell* principle does not apply in his case.

What about this situation? D is in great pain due to his being terminally ill with cancer. He asks P to help him put himself out his misery, by handing him a syringe filled with some poison. P hands D the syringe, but D changes his mind and does not use it. P will be guilty of attempting to assist someone to commit suicide (combination of the Criminal Attempts Act 1981, and the Suicide Act 1961). Will D

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[3] *Gnango*, at [76]: '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'; [99]: 'the judge [at first instance in *Gnango*] was right to distinguish between encouragement and provocation.'

[4] See *Gnango*, at [57] ('there was a common intention to shoot at one another, which can only mean to shoot and be shot at'), [66] ('the gunfight was agreed, either pre-arranged or resulting from a spur of the moment decision by both'), [103] ('the jury must...have been satisfied that there was an agreement between [Gnango] and Bandana Man to shoot and be shot at and that they encouraged each other to carry that agreement into effect').

[5] See *Gnango*, at [49].

will be guilty of the same offence as an accessory (even though he is the one being helped!)? Yes, unless the *Tyrell* principle applies in his case. But does it? For whose protection does the offence of assisting someone to commit suicide exist? Does it exist for the protection of people wanting to commit suicide – in which case, is this class of people limited or specific enough for *Tyrell* (as interpreted in *Gnango*) to apply? Or is it the case that the offence of assisting someone to commit suicide does not exist for the protection of anyone, but is a so-called 'victimless' crime, created for moralistic purposes?

Causation

As already noted, Lord Clarke was attracted to the idea that Gnango might be guilty of murder as a principal, on the basis that he had caused the death of the 26 year old woman by shooting back at Bandana Man, thereby provoking Bandana Man into continuing to shoot at Gnango.[6] The relevant authority is *Pagett* (1983) 76 Criminal Appeal Reports 279, where D was holding a hostage, V, in front of him as a human shield while he emerged out of a block of flats, where armed police were waiting for him. D started shooting at the police and they returned fire. Unfortunately, a police bullet hit and killed V. D was found guilty of manslaughter on the ground that he had caused V's death by firing at the police. (Evidently, he had not fired at the police with the intention of killing anyone: if he had, he would have been guilty of murder.)

The trouble with applying *Pagett* to *Gnango* is that it was *reasonable* for the police to return Pagett's fire in Pagett. So the decision of the police to fire back at Pagett did not break the chain of causation between Pagett's shooting at the police, and V's being shot by the police, in returning Pagett's fire. In contrast, in *Gnango* it was unreasonable for Bandana Man to continue shooting at Gnango once Gnango started firing back at him, and so Bandana Man's deliberate, voluntary, informed *and unreasonable* act of returning Gnango's fire broke the chain of causation between Gnango's shooting at Bandana Man, and the 26 year old being shot by Bandana Man.

Which is *not* to say that Gnango could not have been convicted of a homicide offence as a principal in this case. My own view is that consideration should have been given to prosecuting Gnango, not for murder, but *gross negligence manslaughter*. The idea would be that when Bandana Man started firing at Gnango, Gnango owed other people who might be using the car park a duty to take care not to fire back, because it was reasonably foreseeable that doing so might provoke Bandana Man into continuing to fire at Gnango and endanger the other people in the car park. When Gnango did fire back at Bandana Man, he breached that duty of care, and his conduct in breaching that duty of care was so outrageous as to be worthy of punishment (*Adomako* [1995] 1 WLR 52). While we would not normally say that his breach of that duty of care caused the death of the 26 year old woman who was shot by Bandana Man – because Bandana Man's unreasonable decision to carry on firing at Gnango broke the chain of causation between Gnango's breach of his duty of care, and the death of the 26 year old – on this occasion, we would *not* allow Gnango to say that Bandana Man's actions broke the chain of causation as that would make Gnango's duty of care completely illusory: Gnango would be free to breach it without any consequences at all (*Reeves* v *Commissioner of Police of the Metropolis* [2000] AC 360).

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[6] *Gnango*, at [83]-[91].

Focussing on whether Gnango was guilty of gross negligence manslaughter would have allowed the court to deal with the issues at the heart of *Gnango*: was it so bad what Gnango did, and why was it was bad? In justification of Gnango's conduct in *Gnango* it might be asked – What are you supposed to do when someone starts shooting at you in a car park, and you happen to have a gun on you? The effect of *Gnango* is to say that returning fire, as a way of warning off your assailant, is a very risky strategy: if he continues to shoot at you and one of his shots hits someone else and kills them, *you* will be guilty of murder. So *Gnango* says that if you are shot at, and you have a gun on you, you *must not* draw your gun and return fire (for fear of incurring a murder conviction as a result) – you must try to run away, and if that is not possible, simply allow your assailant to continue firing at you as you, Gandhi-like, just sit there, enduring the violence. (Though there must come a point where it would count as reasonable force – and therefore self-defence – for you to draw your gun and attempt to take down your opponent. It seems that that point was never reached in *Gnango*, and that the gun fire was pretty wild and random.) This seems very harsh, but not unacceptably so once we take into account the danger to passers by of carrying on the gun fight. It is the danger to passers by that allows us to say that what Gnango did, in turning Bandana Man's assault on him into a fully fledged shoot out, was bad and worthy of punishment. But if it is the physical danger created by Gnango's conduct that made his conduct bad, then gross negligence manslaughter would seem to be a more appropriate charge.

Policy

As we have seen, neither of the bases for finding Gnango guilty murder relied upon by the majority Justices in *Gnango* were at all satisfactory. There is enough in the case to make us wonder whether the majority decisions were influenced less by a principled application of the law and more by a desire to see that Gnango be punished for what happened in this case. Consider the following from Lord Brown (characteristically to the point):

> 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?... A's liability for C's murder seems to me clear and I would regard our criminal law as seriously defective were it otherwise. (*Gnango*, at [68], [71].)

Considerations of policy could account for (though not justify) Gnango's being found guilty, in two ways.

First, we shouldn't forget that Bandana Man was never identified and convicted of murder himself. Had he been, then the desire to make Gnango pay for what happened to the 26 year old woman in this case might have been a lot less strong, and the Supreme Court might not have bent over backwards to find Gnango guilty of murder in this case.

Secondly, the fact that Bandana Man was never identified may also account for why Gnango was charged in the first place. This is an important point to consider, in

thinking about joint enterprise liability and its justifiability as a ground for finding that someone has committed a crime (as an accessory). In a lot of the cases where it seems injustice has been done as a result of a defendant's being found guilty of a crime (particularly murder) under the law on joint enterprise (see, for example, the cases mentioned in this short video publicising the work of a committee calling for reform of the law on joint enterprise: http://www.youtube.com/watch?v=LsQLnJ8r5c4), one wonders why the defendant was charged in the first place. One explanation I have heard is that the Crown Prosecution Service operates in a robotic, machine-like manner – if it can get you for a crime, then it will try to, no matter how unjust that might be. But a more interesting explanation is that the Crown Prosecution Service are using the law on joint enterprise as a means of putting pressure on people to identify who the principal who committed a particular offence was. It may be that had Gnango given up the name of Bandana Man and offered to give evidence against him, that he would never have been charged with murder himself. And I'm told that even now, Gnango is being visited in jail by police officers who are telling him that if he will identify 'TC' (or whoever) as being Bandana Man, then he will end up serving less time in prison for murder.

However, we should also consider an alternative explanation of the Supreme Court Justices' desire to find Gnango guilty in this case that does not rely at all on any considerations of policy. There is a strain of thought within the criminal law that if you set out to do something bad, and things go wrong, and some harm occurs that you weren't setting out to produce, then you can be justly held liable for the occurrence of that harm. We can see this in the law on constructive manslaughter, the law on assault occasioning actual bodily harm, the law on murder (in the form of the 'gbh rule'), and the law on joint enterprise itself. In all these cases, a defendant is held accountable for some harm occurring that he was not trying to produce, but which resulted (and foreseeably resulted) from his doing something bad in the first place (an unlawful and dangerous act, a criminal assault or battery, wounding or causing gbh with intent, embarking on a joint criminal enterprise with someone else). The same form of reasoning might apply to Gnango's case. Getting involved in a gun fight is a bad thing to do. If things go wrong and someone ends up being murdered as a result, then you can be justly held accountable for that murder. It may be rough justice, but it is still justice. As Lord Phillips and Lord Judge (with whom Lord Wilson agreed) observed:

> 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. (*Gnango*, at [61].)