Neutral Citation Number: [2024] EWCA Crim 1101

Case No 202402744 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM A CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2024

Before:

THE HONOURABLE LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE MCGOWAN
and
MR JUSTICE BENNATHAN

- -

Between:

REX	**Appellant**
- and -	
ARU	**First Respondent**
AOC	**Second Respondent**
BHL	**Third Respondent**

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Jonathan Higgs KC and Claire Howell (instructed by **CPS Thames and Chiltern**) for the **Appellant**
David Jeremy KC and Warwick Aleeson (instructed by **Healey Colbon Solicitors**) for the **First Respondent**
Ignatius Hughes KC and Jordan Santos-Sindes (instructed by **Lawtons Solicitors**) for the **Second Respondent**
Michael Mather-Lees KC and Kevin Molloy (instructed by **AAA Solicitors**) for the **Third Respondent**

Hearing dates: 9 August 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. We consider that those provisions shall not apply so that our decision may be reported. We consider that this is appropriate because of the issues considered in the decision. The judgment will be anonymised. The defendants in the Crown Court will be referred to as ARU, AOC and BHL The details of the case will be set out in such a way as to prevent prejudice to other proceedings arising from the same facts.

We confirm that the direction made under section 45 of the Youth Justice and Criminal Evidence Act 1999 in relation to each of the defendants in the court below will continue until each defendant reaches the age of 18 or until the Crown Court makes an excepting direction whichever is the sooner. No matter relating to any one of the defendants may be published that would identify them, in particular their name, address, any educational establishment or workplace they attend or any image of them.

LORD JUSTICE WILLIAM DAVIS :

Introduction

1. On 3 June 2024 in the Crown Court the trial commenced of four young males. We are concerned with the case against three of them, namely ARU, AOC and BHL. We shall refer to the fourth defendant in the trial as TC. All four defendants were charged with the murder of Ashraf Habimana (count 1) with manslaughter charged in the alternative (count 2). AOC, BHL and TC were charged with the attempted murder of ARU (count 3) with an alternative charge of causing grievous bodily harm with intent (count 4). The defendants were also charged with violent disorder (count 5). We are not concerned with that count.

2. At the conclusion of the prosecution case submissions were made on behalf of all four defendants that there was no case for them to answer in respect of counts 1 and 2 and in relation to AOC, BHL and TC no case to answer in respect of count 3 and 4. On 24 July 2024 the trial judge handed down a written ruling consisting of 22 typed pages. He rejected the submission made on behalf of TC. He acceded to the submissions made on behalf of ARU, AOC and BHL.

3. The prosecution applied for and were granted an adjournment to consider whether to appeal against the judge's ruling of no case to answer. On 26 July 2024 the prosecution informed the court of their intention to appeal. They gave the required undertakings in respect of acquittal. They applied for an expedited appeal. This application was refused. The jury would not have been available to wait for the outcome of any appeal and, in the event of it being successful, to continue with trial of all four defendants to its conclusion. The judge discharged the jury from reaching any verdicts in relation to ARU, AOC and BHL. The judge ordered that the trial of TC should continue.

4. The prosecution applied for leave to appeal to this court pursuant to section 58 of the Criminal Justice Act 2003. In *ATT* [2024] EWCA Crim 460 the court considered the correct test for granting leave. Did the prosecution have to show a seriously arguable case (*B* [2008] EWCA Crim 1144) or was it sufficient to show that it was in the interests of justice that the appeal be heard (*A* [2008] EWCA Crim 2186)? On a proper reading of *A* the circumstances with which it was concerned were relatively unusual. In any event, the legal framework applicable at the time *A* was decided was changed by statutory amendment which came into force in July 2008. *B* related to a challenge to the exercise of a discretion by the judge. For the prosecution to succeed they had to demonstrate that the ruling was one which it was not reasonable for the judge to have made. In those circumstances the court held that a seriously arguable case that the judge was wrong had to be established.

5. Section 67 of the 2003 Act establishes the jurisdiction of this court to reverse a ruling of the judge in the Crown Court:

> *The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied—*
> *(a) that the ruling was wrong in law,*
> *(b) that the ruling involved an error of law or principle, or*

(c) that the ruling was a ruling that it was not reasonable for the judge to have made.

In this case the prosecution submission is that the ruling was not one reasonably open to the judge. In a circumstantial case where there was substantial agreement as to the underlying facts, the issue was whether a reasonable jury properly directed could draw inferences sufficient to convict the defendants. In many cases where that is the issue, it will be necessary for the prosecution to establish a seriously arguable case that the judge was wrong in their evaluative exercise. Here, as will become apparent, the way in which the prosecution put their case on the facts was unusual. We have had to consider the ambit of the decision of the Supreme Court in *Gnango* [2011] UKSC 59. In those circumstances we concluded that we should give leave to appeal irrespective of the arguability of the appeal. It was in the interests of justice we considered the appeal on its substantive merits.

6. At the conclusion of the hearing of the appeal on 9 August 2024, we announced that we gave leave to appeal but dismissed the appeal. We confirmed the ruling of the trial judge that the three defendants had no case to answer on counts 1 to 4. Pursuant to section 61(7) of the 2003 Act we ordered the acquittal of the defendants on those counts. We said that we would give reasons for our decision in writing at a later date. These are our reasons.

The evidence at the trial

7. The events with which we are concerned occurred on 29 September 2023 within a relatively small residential area in a large town. They were caught on CCTV cameras at various points during the afternoon and early evening of that day. The CCTV footage was generally of reasonable quality. Some of the footage included sound. The jury were provided with all the significant footage in a compilation and annotated form. The mobile telephones of those involved were analysed after the event. The jury had charts showing the traffic between those telephones. They also had the content of text messages where they were available. The prosecution case was entirely circumstantial in nature. There were no eyewitnesses of significance. Whether a reasonable jury properly directed could convict a defendant would depend on the extent to which proper inferences could be drawn as to that defendant's involvement and state of mind.

8. In September 2023 ARU was aged 16. He is now just 17. AOC was aged 15. He now is 16. BHL was 16. He is now aged 17. At some point on that day all three defendants were in possession of a knife. By the time of the trial ARU and AOC had pleaded guilty to having an article with a blade or point at around 15.26 at a park in the town in question. It was their home town. ARU and BHL had pleaded guilty to the same offence in relation to their possession of a knife later that day in a public house car park in the same town. This was less than half a mile from the park. The knife in BHL's possession in the car park was the same knife that AOC had had in his possession earlier in the day.

9. At around 15.10 on 29 September Athif Hussaindeen (to whom we shall refer as Athif) and Saqib Nawaz (whom we shall call Nawaz) were together in a road not far

from the park. They met up with four other young males. Shortly afterwards and not far away AOC met other young males including ARU and BHL. The latter group went into the park. ARU and AOC took short videos on their mobile telephones of themselves and others (who could not be identified from the videos) holding large knives. This was the evidence which led to the initial pleas of guilty to which we have referred. The group including ARU, AOC and BHL then left the park. They did so without any urgency. When they came onto the road running alongside the park, Athif and Nawaz and the four other young males were standing on the pavement of that road 50 to 100 metres away. By now it was around 15.47. ARU, BHL and other members of their group began to walk slowly along the pavement in the direction of Athif's group. As they neared Athif's group, Athif and others from his group walked towards ARU and BHL. As they came together members of the two groups exchanged greetings by way of fist bumps and the like. The atmosphere appeared to be friendly.

10. AOC had not walked with the main group. Rather, he had stopped to speak to someone on a bicycle. He then walked towards the two groups who were together on the pavement. As AOC approached, Athif went up to AOC. They stood face to face and close together. It appeared to be some kind of confrontation. Athif and AOC then walked together back towards the park before stopping on the pavement. Others joined them including BHL. There was conversation of some kind for a short time before a fist fight broke out between Athif and BHL. Each punched the other. BHL got the better of Athif to the extent that Athif's mouth was bleeding by the end of the fight. No-one else became involved even though other members of both groups were in close attendance. AOC and BHL, together with the other members of their group, walked off along the pavement away from the park from which they had come. For a short time ARU and Athif stood face to face. They appeared to have a conversation. ARU then followed his group and joined them as they moved away from the park. Athif and his group went in the opposite direction. They stood together near to the entrance to the park for a short time before going out of sight into the park.

11. At some point when the two groups were together AOC took a short video of Athif standing on the pavement with a bloody mouth. Shortly afterwards AOC sent the video by Snapchat to ARU and BHL. BHL saved the video on his telephone with a caption "next time ur getting Poked up". The jury had evidence that "poked up" was slang for being stabbed. There was no direct evidence that the video had been sent to Athif or any member of his group.

12. There was no evidence as to why the fight between BHL and Athif had occurred. It was not alleged to have been part of a continuing feud between the two groups. There are many cases in which the background to a violent incident between young males is gang rivalry. The evidence before the jury revealed no gang associations on either side.

13. Over the next 3 hours Athif was captured on CCTV footage at various points in and around the area between the park and the public house car park. At 16.30 he was with his brother, Althaf. There was no-one else with them. At around 16.55 they met Nawaz and a male on a bicycle. They had been part of the group who had been at the scene of the fight between Athif and BHL. Others including TC were in the same general area but not with Athif. It was not until 18.30 that Athif was seen again on CCTV. He was with those he had met at 16.55 together with TC and other young

males. Most of those present had not been at the scene of the earlier fight. The whole group went first to the public house car park and then to the vicinity of a nearby shop. Thereafter the group returned to the public house car park. They walked through the car park and into an area with benches used by customers. By now it was shortly after 19.00.

14. ARU, AOC and BHL remained together after the fight with Athif. AOC sent messages to someone identified in his telephone as "Ibti" and to someone named Mohammed Raman. In the messages to Ibti AOC said that Ibti's "elder" had embarrassed himself and that "I'll acc hurt u". From other material before the jury it was possible to infer that Ibti had been present at the fight between BHL and Athif. AOC's message to Raman included the words "got ur own boy smoked". Raman was in telephone contact with Althaf shortly after this message was sent. At 17.36 Althaf's telephone called AOC's telephone. There were two calls lasting 48 and 30 seconds.

15. Shortly after these calls ARU, AOC and BHL met Ashraf Habimana. They went to the area where the fight between BHL and Athif had taken place. Around this time AOC sent another message to Raman. This read "wherever u see pull up I got ma zk". The reference to "zk" properly could be inferred to mean zombie knife. Whilst at the area of the earlier fight, AOC created a short Snapchat video on his telephone of blood on the pavement. This probably was Athif's blood. AOC also attempted more than once to call a number associated with Athif. He did not connect with the number. Between those attempts AOC sent further messages to Ibti. They read "wheee is he" and "man's in gc waiting". Ibti responded with a message reading "man cut time ago".

16. ARU, AOC and BHL and others remained together. They went to the park. At 18.52 there was a further exchange between Ibti and AOC. Ibti messaged to say "were u mans at" and "athifs saying u mans not at gc". The shop to which Athif and those with him had gone after 18.30 was close to a café called Grilled Cottage. AOC responded with the message "where is he rn". The group of which ARU, AOC and BHL formed a part left the park shortly before 19.00. They made their way to the car park of the public house arriving at 19.04. This coincided with a message from Ibti to AOC saying "they are at gc waiting for you".

17. We have watched the CCTV footage of what happened in the next two to three minutes several times. We have read the commentary on the footage provided by the police officer responsible for collating and assessing the CCTV evidence. She watched the footage many times in order to prepare her commentary. Once they had arrived on the car park, the group stood in twos and threes on the car park for a short time. Some of the group then moved towards the wall separating the car park from the road. They appeared to have seen someone or something. At this stage Althaf was on a bicycle on the road next to the car park. It properly was open to the jury to infer that the group on the car park had seen him. Just before this Althaf had telephoned Nawaz. As some of the group were looking over the wall, TC approached from the area with benches. The CCTV footage is not of sufficient definition to allow the conclusion that he was holding a knife at this point. So far as the CCTV allows any conclusion, his arms appeared to be by his side. As TC walked towards the group standing on the car park, BHL ran towards him. BHL was holding a knife. TC ran off with BHL in pursuit. AOC walked after BHL for a short distance before stopping.

The other members of the group which had arrived at the car park with BHL did not join in this pursuit. Rather, they stayed close to the wall and shortly afterwards most began to leave the car park at some speed.

18. The departure of members of that group coincided with the arrival onto the car park of Athif followed by Nawaz. Athif was armed with at least one knife. The CCTV police officer said that ARU "appears to reach behind himself towards his back/waist area and appears indecisive about running forward". She said that Nawaz "throws something towards ARU, he then runs into him causing ARU to fall to the floor". He went to the ground close to the wall. Athif stabbed him three times with the large knife with which he was armed. Habimana had attempted to get away by jumping over the wall. In doing so he ran into Althaf who was on the pavement just beyond the wall. Althaf punched him repeatedly and held him against the wall. This happened close to the point at which ARU was on the ground. Having stabbed ARU, Athif leaned over the wall and stabbed Habimana five times. The injuries sustained by Habimana were fatal.

19. The incident on the car park last less than a minute. After the incident AOC sent various messages including to those apparently connected to Athif and his group. Amongst the messages he sent were "we bucked town man" "crashed them down rambos out" and "my nighha had his Rambo out ready to wet him up".

20. ARU, AOC and BHL were arrested in the days following the death of Habimana. ARU made no comment when interviewed. AOC provided a prepared statement denying that he had been involved in any unlawful activity. BHL initially denied presence at the car park of the public house. Thereafter he made no comment.

The course of the proceedings

21. In addition to the defendants with whom we are concerned, Athif, Althaf and Nawaz were charged with murder, attempted murder and violent disorder. The Crown Court to which the defendants were sent could not physically accommodate a single trial of all seven accused. Two trials were ordered. Athif, Althaf and Nawaz were tried first. Althif was convicted of murder, attempted murder and violent disorder. Althaf was acquitted of murder and attempted murder. He was convicted of manslaughter as an alternative to the count of murder and of violent disorder. Nawaz was acquitted of all counts save for the count of violent disorder of which he was convicted.

22. The prosecution case against the defendants in the first trial was straightforward. They alleged that those defendants had acted together in a murderous attack on Habimana and ARU. Athif had delivered the blows which were fatal or intended to be fatal. Althaf and Nawaz had encouraged and/or assisted Athif in his attacks. The verdicts demonstrated that the prosecution were not able to satisfy the jury that Althaf and Nawaz participated in the attacks on Habimana and ARU either with the relevant intent or at all whereas the jury were sure that Athif had intended to kill both victims.

23. In relation to ARU, AOC and BHL, the prosecution case was that they had gone to the car park for a prearranged fight with knives. They intended to kill or to cause really serious harm to those with whom they had agreed to fight. Part of the agreement was that they would be stabbed at by the other side. Therefore, when someone with whom they had gone to the car park was stabbed to death by the other side with murderous

intent, they were jointly liable for that person's murder. Alternatively, if the fight was not prearranged, it was a spontaneous joint fight involving the use of weapons. The prosecution alleged that the defendants intended to participate in the joint fight with the requisite intent for the offence of murder. As such, they were liable for the murder of Habimana. The same rationale applied to the attempted murder of ARU. ARU himself was not charged with his own attempted murder because that charge did not satisfy the public interest test.

24. The submissions of no case to answer were based on the proposition that the evidence did not support either the allegation of a prearranged fight or the alternative case of a spontaneous joint fight. The prosecution argued that the trigger for the arranged fight with weapons was the fist fight between Athif and BHL. Between the fist fight and the events in the car park, the messaging between AOC and individuals associated with Athif was capable of supporting the inference that the two groups deliberately met at the car park. The intention was to engage in a knife fight. That was what happened. The fact that the defendants and their group ran or attempted to run when confronted with Athif did not alter the position.

25. In his written ruling the judge summarised the evidence called by the prosecution. He set out the competing submissions in some detail. He identified the test he had to apply, namely whether, taking the prosecution evidence at its highest, a reasonable jury could convict the defendants. He then considered how defendants in the position of ARU, AOC and BHL could be convicted of murder and attempted murder. There had to be an agreement, either made in advance or occurring spontaneously, between individuals or groups to stab or be stabbed at. The judge cited a passage from *R v Seed and others* [2024] EWCA Crim 650 indicating the reciprocal nature of the agreement which had to be proved.

26. In his analysis of the applicability of a reciprocal agreement to stab and be stabbed at on the facts of the case, the judge began by expressing his reservations that those associated with Athif whether at the fist fight with BHL or at the car park could be considered to be a group. He noted that there was no evidence of any gang association. There was no evidence of pre-existing hostility between the defendants and those associated with Athif. There was very limited correlation between those present at the fist fight and those in the car park. The evidence of communication from Athif and/or those associated with him to the defendants was also very limited. Such evidence as there was did not support an inference that Athif and his supporters were suggesting a reciprocal knife fight to the defendants. The principal route of communication was someone named Ibti about whom there was no evidence as to his identity or any connection to Athif.

27. The judge found that the mere carrying of a knife was not probative without more of an agreement to engage in a knife fight with others. He said that there was no evidence of the defendants being informed or warned that Athif and others associated with him had armed themselves with knives. The messages sent by AOC could be interpreted as provocative threats. They did not amount to evidence that the defendants were aware that Athif and/or others now were armed.

28. Turning to the alternative basis for the prosecution case, the judge found that the evidence was insufficient to support an inference that there had been a spontaneous agreement to stab and be stabbed at. BHL chased after TC with a knife but this chase

was short lived. BHL gave up the chase and TC remained on the car park. When Athif ran at the defendants and the others with them, they tried to run away. That did not support the proposition that a spontaneous agreement was in being; rather the reverse.

29. In all of those circumstances, the judge concluded that no reasonable jury could find that the defendants were party to the type of agreement required for them to be liable for the murder of Habimana and/or the attempted murder of ARU.

The prosecution appeal

30. The prosecution argued that it was open to a reasonable jury to infer the following from the totality of the evidence:

(a) There was some unknown hostility between Athif and the defendants prior to the fist fight between Athif and BHL.
(b) The video of Athif bloodied as a result of the fist fight was circulated by the defendants in order to provoke a response, the video being accompanied by threats of stabbing.
(c) The defendants wanted Athif and his group to realise that they would be armed with knives for a further confrontation.
(d) The movements of the defendants before they arrived at the car park showed that they were looking for Athif with a view to fighting.
(e) The movements of Athif and his group demonstrated that they were looking for the defendants.
(f) When the defendants and those with them arrived in the car park, they waited. On seeing Althaf, they moved towards him. When TC approached, BHL chased him waving a knife. ARU was also carrying a knife. The movement of his arm as seen on the CCTV was consistent with attempts by him to take out his knife. This showed that the defendants were ready and willing to stab and be stabbed.

31. In relation to the analysis of the judge, the prosecution submitted that it was incomplete or flawed. Although there was no evidence of gang affiliation or membership, the two groups could properly regarded as cohesive within themselves over the course of the day in question. There may have been no evidence of the reason for the hostility between the two groups but there must have been pre-existing hostility given the speed with which violence erupted when the fist fight occurred. Whatever the correlation between the individuals with Athif at the time of the fist fight and those with Athif at the car park, the latter group had been assembled in response to the fist fight and its outcome. There was a sound basis for an inference that the provocative messages from AOC had been communicated to Athif via Ibti. The evidence of the police analyst in relation to telephone usage and messages was that Ibti (whoever he was) had been at the scene of the fist fight. Whilst there was no direct evidence that the defendants were aware that Athif had armed himself with a knife prior to the events on the car park, a reasonable jury properly could infer that they were so aware. The defendants would have expected to a high degree of certainty Athif and those with him to arm themselves in response to the challenge issued in the messaging.

32. The prosecution argued that the judge failed to address in any or any sufficient detail the messaging and the movements of the two groups. That failure meant that he did

not take account of matters which pointed to an agreement of the kind alleged by the prosecution. The judge also did not reflect what a reasonable jury properly could infer from the CCTV footage at the car park. The coincidence of the two groups being at or near the car park at the same time, the defendants remaining at the car park when they had seen Althaf and the behaviour of the defendants once TC had approached them gave rise to a proper inference that the groups expected a fight to take place. In that event and taking into consideration all of the other matters established by the evidence, there was sufficient for a reasonable jury to conclude at the very least that there was a reciprocal agreement between Athif and the defendants to stab and be stabbed. In acceding the submissions of no case to answer, the judge went beyond his remit. It was not for him to reach a judgment on the likelihood of the prosecution case being accepted. That in effect was what he had done.

The legal framework

33. The starting point for us is *Gnango*. Gnango was in dispute with someone known only as TC. On the day in question he went to a car park on an estate near to where he lived. He was armed with a loaded hand gun. He asked people in a parked car whether they had seen a man with a red bandana. He said that he had come to meet someone to handle some business. Shortly thereafter a man appeared on steps leading to the car park. This man's face was covered with a red bandana. He pulled out a gun and began shooting at Gnango. Gnango crouched down behind the parked car and began shooting at the man with the red bandana. One of the bullets fired by the man hit a lady who was walking through the car park as a result of which she died. The man with the red bandana was never identified though it was presumed that it was TC. Gnango was charged with the murder of the lady who was shot by that man.

34. At his trial the judge left the case to the jury on the basis of parasitic accessorial liability. Gnango and the man with the red bandana could be said to be party to a joint enterprise to use unlawful violence i.e. an offence of affray. On the facts of the case, firing a gun was the use of unlawful violence which constituted an affray. If Gnango realised that, in the course of the unlawful gunfight, the other man might kill someone with the requisite intent for murder, Gnango also would be guilty of the murder of the innocent passer-by. The jury convicted him of murder.

35. On appeal, the Court of Appeal quashed his conviction. The court concluded that there was no joint enterprise to use unlawful violence. Gnango and the other man were not acting together when they fired their guns. An affray arising from a fight between two people involves each person having the purpose of hitting the other whilst avoiding any blow from the other person. That purpose is not shared by the protagonists. We observe that the court's reasoning was such that, had there been a common purpose, the conviction could have stood on the basis of parasitic accessorial liability. That reasoning could not apply today in the light of the decision in *R v Jogee* [2016] 1 Cr App R 31.

36. The Supreme Court restored Gnango's conviction for murder. They did not do so on the basis of parasitic accessorial liability. Rather the court concluded that Gnango and the other man shared a common intention to shoot and to be shot at. That was the joint enterprise in which they engaged. When the other man shot the passer by, this was part of the joint enterprise. Had he been identified and tried for murder, he would have guilty of the lady's murder via the doctrine of transferred malice. Thus, the

same applied in Gnango's case. The members of the court did not agree as to whether Gnango was a principal or an aider and abettor, counsellor and procurer. That did not matter to the result.

37. In the course of his judgment, Lord Dyson at [100] said:

> *".....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."*

The other members of the court who agreed with the decision to restore the conviction also referred to the requirement of an agreement between the participants to shoot at each other and to the parallel to be drawn with the concept of a duel.

38. *Gnango* was an unusual case on its facts. Of the three subsequent decisions where the principles in *Gnango* were applied, two of them – *Morgan* [2021] EWCA Crim 895 and *Seed and others* – involved the use of guns. Morgan was a prosecution appeal. It is of little assistance in determining this appeal. The defendant had armed himself with a handgun in order to shoot at rival gang members. The defendant was aware that the rival gang members had guns. There was an exchange of fire between them. At some point one of the rival gang members shot an associate of the defendant who was sitting in a car. The defendant was tried for the murder of his associate. The trial judge withdrew the case from the jury on the basis that, although there was an agreement between the defendant and the rival gang members to shoot and be shot at, the shooting of the associate on the facts did not form part of the agreement. This court concluded that the judge was in error when he found that no reasonable jury could have decided that the relevant shooting was within the agreement. We have to deal with the issue of whether there was an agreement at all rather than whether the relevant act was part of the agreement.

39. In *Seed and others* four members of a gang referred to as the reds drove into an area known to be the territory of a rival gang, the blues. They were armed with at least one loaded handgun. They were "riding out" into the blues territory intending to cause at least serious injury to members of the blues. When they were in the blues territory, there was an exchange of gunfire with unidentified members of the blues. One of the member of the reds who had gone out with a view to shooting at blues members was

shot and killed by a blues member. The other members of the reds who had been with the man who was killed were charged with his murder. The trial judge left the case to the jury and directed them as follows:

> *"Where there are two opposing sides to a violent conflict, all those who share the same common purpose to use unlawful violence against each other may be criminally liable for injuries caused by the mutual, unlawful violence in which they intentionally participate. Historical examples might include a duel or a prize fight. Similarly, if an individual shares a common purpose with others to engage in the joint activity of shooting at each other, or intentionally assists or intentionally encourages others during a gun battle to fire shots at each other, intending that others in the line of fire (whoever they may be) should die or suffer really serious injury, he or she will be guilty of the murder of those who die. This is irrespective of whether the victim happens to be someone "on the other side", or someone "on his side" or an innocent passer-by. In this case, before you could convict, the Prosecution must make you sure that there was a shared common purpose to shoot and be shot at."*

The jury convicted those who had "ridden out" to the territory of the blues. This court approved the judge's direction. At [71] Lord Justice Holroyde said:

> *"....we take the view that the necessary agreement to shoot and be shot at may properly be inferred where two or more persons engage in, or assist or encourage, shooting at each other, each knowing that it was a virtual certainty that the other(s) would be armed and would either open or return fire, and each intending to kill or to cause really serious injury. It may or may not be helpful to refer to such a situation as a "shoot out": at best, that may be a convenient but imprecise shorthand description of a situation which will have to be analysed with care by a jury before the necessary agreement to shoot and be shot at can be inferred. It may be thought that the term implies the reciprocity which is a feature of the agreement which must be proved. But be that as it may, the whole purpose of each party shooting in such a situation is to kill or to cause serious injury, and it can be no defence for one party to say that the victim of the shooting was a member of his own side…. "*

There are two aspects of this passage which we emphasise. First, the requirement that knowledge of the other party's possession of weapons and their intention to use them had to be "a virtual certainty" for the necessary agreement to be inferred from the circumstances. Second, reciprocity must be demonstrated. In the course of the ruling with which we are concerned, the judge commented that the necessary reciprocity may be more readily inferred in cases involving the exchange of gunfire as opposed to an incident involving the use of knives.

40. The only reported application of these principles to a case involving knives is *Riley and Robinson* [2018] EWCA Crim 1000. Riley and Robinson were friendly with a young man named Mbye. Mbye was involved in a feud with a man named Stephens. The feud in the past had led to violence and the use of knives. On 17 April 2015 Riley, Robinson and Mbye had gone in Robinson's car to a shop in Northfield in South Birmingham. The shop sold knives. The three men spent ten minutes in the shop looking at knives. They bought five knives which were put into a carrier bag. After they left the shop, they encountered Stephens. Stephens had a knife. Stephens and Mbye engaged in a shouting match involving threats. Mbye, Riley and Robinson then went to Robinson's car where one of the knives was taken from the box in which it had been sold. Mbye and Stephens continued to shout at each other. Each was offering to fight the other one-to-one. A nearby side road was pointed out as the best venue. All of this was witnessed by people in the vicinity. Robinson drove his car into the side road and turned round so he could drive out without hindrance. At the back of the car, Mbye with Riley in close attendance retrieved something. Robinson remained in the driver's seat of the car. Mbye followed by Riley moved towards Stephens. Mbye and Stephens each was armed with a knife. They engaged in a knife fight. Each repeatedly stabbed the other. Both were wounded. Mbye's wounds were fatal. He was driven to the local hospital by Robinson with Riley also in the car.

41. Riley and Robinson were charged with the murder of Mbye. At the close of the prosecution case, Riley submitted that he had no case to answer on the basis that there was insufficient evidential basis for the proposition that Mbye had died in the course of an agreed consensual knife fight to which he had been a party. The judge rejected the submission. Riley's principal ground of appeal was that the judge was wrong. He submitted that the only proper conclusion to be drawn from the evidence was that Mbye and Stephens each intended to deliver a blow first without any agreement that they should be stabbed themselves. This court rejected that submission albeit without any detailed analysis of the nature of the agreement. The basis for the court's decision was expressed as follows at [33]:

> *"The evidence of what happened before and at the scene established a prima facie case that they both [i.e. Riley and Robinson] had participated in the planning and execution of a consensual knife fight."*

Mbye and Stephens were engaged a fight "analogous to a duel" to use the terminology used in *Gnango*. To continue the analogy Riley and Robinson at the scene acted as Mbye's seconds. They assisted and encouraged the fight which inevitably carried the risk of serious injury or death to both participants. The facts of the case were far removed from those with which we are concerned. No sensible parallel can be drawn between this case and *Riley and Robinson*.

Discussion

42. The violence which erupted on the car park shortly after 19.00 on 29 September 2023 sadly was not an unusual event. Young males in groups not infrequently resort to violence. Sometimes the reason for the violence is apparent. Often it is not. Because there is a tendency for young males to carry knives, knives may be produced by one or more of the young males. That is what happened in this instance. We can summarise the prosecution case at its highest in respect of the critical events on the

car park as follows. When TC approached the group with which these defendants were associated, BHL produced a knife and ran after TC before giving up the chase. Thereafter, Athif came towards the defendants' group. He was armed with a knife. He went towards ARU who did not have a knife in his hand albeit that he had one in his possession. When ARU went to the ground, he was stabbed by Athif. By this point Habimana, who had arrived at the car park with the defendants' group but did not have a knife, had jumped over a wall. Althaf was on the other side of the wall and held onto Habimana. That allowed Athif to lean over the wall and stab Habimana to death. By this time the defendants' group had run off save for ARU who was seriously wounded. On the face of it, the events were the consequence of individual actions by particular people. No-one sought to engage with BHL when he ran towards TC with a knife. When Athif approached, no-one took out a knife or other weapon to exchange blows with him.

43. It is against that factual background that the prosecution argued that a reasonable jury properly directed could have convicted the defendants of the murder of Habimana and, in the case of AOC and BHL, the attempted murder of ARU. In that event, it was argued, no reasonable judge could have concluded otherwise. We concluded that the prosecution argument was ill-founded. For a reasonable jury to convict, there had to be evidence of an agreement between Athif whether alone or with others in his group and the defendants and their group that they would stab and be stabbed at, the agreement either being made in advance or emerging spontaneously on the car park.

44. There was no direct evidence of any agreement such as existed in *Riley and Robinson*. The messages passing between AOC and Ibti initially amounted to threats towards or goading of Athif. Thereafter there were messages which provided some basis for inferring that the two groups were looking for each other. As the judge noted, the places referred to did not include the car park. More to the point, why they were looking for each other was not apparent. At no stage was there any message which indicated that either group was armed and ready to fight. Still less was there anything to indicate that there was an agreement to stab and be stabbed.

45. In determining whether such an agreement, be it made in advance or reached spontaneously, reasonably could be inferred from what those on the car park did and said, the judge was entitled to consider the following:

    i) The absence of evidence of prior enmity on the part of either group or individuals within each group, the suggestion by the prosecution that pre-existing hostility could be inferred from the fact that there was a fight at 15.47 being pure speculation.

    ii) The fact that no knives were used on either side in the fight which occurred at around 15.47.

    iii) The absence of any evidence that either group knew that the other was in possession of knives until events began to unfold on the car park.

    iv) The initial brandishing of a knife by BHL in the car park not being met with an armed response from TC; rather, TC ran away from BHL.

v) The response by the defendants' group to Athif coming across the car park with a knife, namely to run away rather than to engage in a knife fight with him.

46. All of those matters militated against a finding that the necessary agreement reasonably could be inferred by the jury. The prosecution set great store by what they said was apparent from the CCTV in relation to ARU. Having referred to ARU as "repeatedly reaching towards his waistband where he had the Rambo knife concealed", they said in terms that he was trying to remove the knife from his trousers. They put this proposition forward to show that more than one of the defendants' group was willing to produce a knife. How the prosecution put the position went well beyond the evidence of the police officer who had watched the CCTV footage for many hours. Moreover, nearly a minute passed between the arrival in the car park of TC and the point at which ARU was knocked to the floor. No reasonable jury could have inferred that ARU was struggling throughout that period to take out a knife to allow him to fulfil his role in an agreed fight with knives. The judge found that it was not a reliable inference from what could be seen on the CCTV footage that ARU was trying to get out his knife. That finding was wholly justified.

47. In his ruling the judge applied the law as set out in *Gnango* and *Seed and others.* He made no error of law or principle. For the prosecution to have succeeded in their appeal against the judge's ruling, they would have had to demonstrate that the ruling was not reasonably open to him on the evidence called by the prosecution. For all the reasons set out above, we had no doubt that it was reasonably open to the judge to conclude that the defendants had no case to answer. On the facts of the case we would go further. The contrary conclusion would not have been reasonable. So it was that we dismissed the appeal and ordered the acquittal of the defendants.

Conclusion

48. Cases in which opposing sides engaged in violence have a common purpose of the kind required to fix all participants with liability for the death of anyone resulting from the violence will be rare. The reported examples indicate the unusual factual background which will be required. *Gnango* involved the actions of two men involved in a continuing feud who agreed to shoot at each other in a residential area. We anticipate that such an archaic method of settling a dispute is very unlikely to recur. In *Riley and Robinson* the circumstances were akin to a duel. The appellants in that case assisted in and encouraged the agreed fight. A duel of the kind which occurred in that case is likely to be a rarity. Even the circumstances of *Seed and others* were anything but commonplace. Members of gangs do ride out into the territory of opposing gangs but it is unusual for such people to be armed with loaded firearms being carried with the intent to fire them to cause at least really serious harm. Moreover, the state of mind required of the gang member participating in the riding out was an appreciation that it was virtually certain that the opposing gang was similarly armed and that they would return fire with the relevant intent.

49. The circumstances which led to the death of Habimana sadly were less unusual. Groups of young males in towns and cities have a tendency to drift around the area where they live. Some will carry knives. When two such groups meet, violence can break out for no consequential reason. It would require very clear evidence of an agreement to stab and be stabbed for the participants in the violence to be fixed with

liability for a fatal outcome. The evidence in this case fell far short of that requirement. Any attempt to extend the principles in *Gnango* to incidents of the kind which occurred on 29 September 2023 should be avoided. As Lord Dyson said, a mere fight is to be distinguished from the unusual facts giving rise to the criminal liability which arose in *Gnango.*