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The four appellants (hereafter referred to as R) were convicted of the murder of Tyrone Clarke (V) at Leeds Crown Court on 4 March 2005. They had been a part of a group of individuals who had chased and attacked V and others with a variety of weapons which included metal bars and at least one knife. In the course of the attack, V sustained three stab wounds, the evidence suggesting that the first two wounds were probably caused by the same knife using similar movements and that it was possible that one knife had been used to inflict all three wounds. One of the wounds penetrated to a depth of 8 cm, requiring severe force and causing 'massive haemorrhage, rapid collapse, rapid unconsciousness and death' (at [3]). This was stated to be the principal injury of the deceased and one from which he stood no chance of survival. One of the other wounds was also stated to be a potentially fatal wound whilst the third was to the soft tissue in his left shoulder. It was not alleged that any of the appellants had inflicted the fatal injuries; they were convicted for their part in the joint enterprise that had led to the murder of V.

The appellants appealed to the Court of Appeal ([2007] EWCA Crim 342, [2007] 1 WLR 2191) who upheld their convictions on 23 February 2007. In the instant case, they appealed this decision to the House of Lords.

The appellants argued that they would only be guilty of murder if they had foresight of the principal's intention to kill, adopting the approach as advocated in *R v Powell and English* [1999] 1 AC 1. The respondents on the other hand argued that foresight was only relevant as to the principal's actions as opposed to his thoughts at the time.

The question posed to the House of Lords was as follows:

If in the course of a joint enterprise to inflict unlawful violence a principal party killed with an intention to kill which was unknown to and unforeseen by a secondary party, the principal's intention was relevant:

(i) to whether the killing was within the scope of a common purpose to which the secondary party was an accessory;

(ii) to whether the principal's act was fundamentally different from the act or acts which the secondary party foresaw as part of the joint enterprise.
Held, dismissing the appeal and upholding the convictions, the answer to both (i) and (ii) was 'No'.

If A, in embarking on a joint enterprise with B, realised that B might kill, with the mens rea for murder, and continues to participate in that joint venture, the general principle would be that A has a sufficient mental element to be guilty of that murder should B perform the killing. This would not be the case should B either produce a weapon that A knew nothing about and was more lethal than anything contemplated and was therefore fundamentally different from anything foreseen (R v Powell and English [1999] 1 AC 1 and R v Hyde [1991] 1 QB 134 applied; Chan Wing-Siu v The Queen [1985] AC 168 considered; R v Gamble [1989] NI 268 doubted).

The House of Lords was of the view that if, to hold R criminally liable for the murder of V, it had to be proved that R must have known or foreseen the intention of the primary party to kill (rather than to cause serious injury), this would introduce a 'new and highly undesirable level of complexity' into such cases (at [24]). It was safer to focus on foresight of what the primary party might do, a relevant issue being the knowledge of possession of a lethal weapon.

In the instant case, R knew they were taking part in a joint attack, with at least one of them armed with knives, with the intention of causing serious injury. Using a knife or knives to kill could not be said to be a complete departure from what had been contemplated as part of the joint enterprise.

Comment

Although the majority of their Lordships support Lord Brown's restatement of the principle in R v Hyde [1991] 1 QB 134, the overwhelming impression given by Lord Bingham of Cornhill's judgment is that there is not a model direction that should be given to juries in cases such as this one and each case should be judged on its individual facts. There should be no prescriptive formula—in order to accord justice in each and every case a jury direction should be tailored to the facts of that case. It could be argued that this is a just and pragmatic approach and circumvents the difficulties of interpretation and the setting of a one-size-fits-all direction as a precedent which has historically proved difficult in other areas of the criminal law (for example, murder, criminal damage, provocation).

Following Lord Bingham's approach, the basic principles of joint enterprise stand. Evidence such as who had what weapon and what the defendant foresaw as going to happen or might possibly happen are evidential issues which can be properly dealt with by the judge in his summing-up and direction to the jury.

Much of the discussion in this case centres around the Northern Ireland case of R v Gamble [1989] NI 268. In this case, the four co-defendants, Gamble, Boyd and two others, agreed to beat and knee-cap 'so as to cripple but not to kill the victim' (at [14]). The cause of the victim's eventual demise was the forceful cutting of his throat by either Gamble or Boyd. The Court of Appeal in effect separated the mens rea elements required for murder, i.e. intention to kill and intention to cause grievous bodily harm, saying whereas either will suffice for a principal offender, it 'would not accord with public sense of what is just and fitting' to fix an accessory with liability for a consequence which he did not intend or foresee (quoted at [14]). Thus the co-defendants were acquitted of murder and convicted of wounding with intent to cause the victim GBH by knee-capping.

Turning now to the assenting judgment of Lord Scott of Foscote, there are a number of other points worthy of discussion. Lord Scott doubts the correctness of Gamble, focussing (at [31]) on the purpose of the attack rather than the instruments used to carry out that purpose, arguing that the weapon used does not affect criminality. It is submitted that this is an over-generalisation—whilst in some cases, this evidential issue could have a bearing on the direction to the jury, it would be a dangerous precedent to set if it was applied universally. The dangerousness of a weapon and the manner in which it is used will obviously have implications in particular cases but could be of little relevance in others. Lord Scott states that he believes that the existence of the life sentence for murder allows the degree of culpability and responsibility to be reflected in the length of the minimum term given which he finds a 'far more satisfactory means' of dealing with secondary party liability (at [32]). The arguments as to whether life does or should mean life have been well rehearsed elsewhere and these arguments will no doubt continue. We do not intend to reopen these
here save to note the fact that the life sentence extends beyond the custodial period. It is however contended that sentencing occurs as a result of a conviction that has been made according to existing legal principles rather than a justification for conviction for a particular offence. Lord Scott appears to see conviction for murder as the only alternative to exoneration whereas a defendant participating in an enterprise such as that in the instant case could readily be found guilty of other offences such as violent disorder or those under the Offences against the Person Act 1861.

Lord Rodger of Earlsferry also supported the restatement of the principles in *Hyde*. He distinguishes *Gamble* on its own specific facts (at [47]). His main argument focuses on public policy and the desire to punish for the knowledge that ‘murderous weapons’ are being carried (at [49]). His stance on the current knife-crime issues, high on the public and court agenda, is made apparent by his statement when, it is submitted, he over-generalises somewhat by suggesting that participants would only have a knife in their possession if they intended to use it (at [48]).

Lord Brown of Eaton-under-Heywood has, it is contended, difficulty with the reasoning in *Gamble* due to a misconception of the fact that the bullet wounds to kneecaps would inevitably lead to death. We would respectfully submit that this is not necessarily the case as acknowledged by Carswell J in *Gamble* itself. Lord Neuberger of Abbotsbury also dwells on *Gamble* and focuses on the different use of weapons and the specific and limited nature of the use contemplated by the defendants. This adds support to the contention that each case rests on its own specific facts, based on accepted legal principles, and that an overly prescriptive jury direction is a dangerous precedent to set.

In conclusion, it is respectfully submitted that issues of causation were perhaps more relevant in *Gamble* than their Lordships, other than Lord Bingham of Cornhill, gave them credit for.