HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 45

on appeal from: [2007]EWCA Crim 342

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R *v* Rahman and others (Appellants) (On Appeal from the Court of Appeal (Criminal Division))

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

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LORD BINGHAM OF CORNHILL

My Lords,

1. On 4 March 2005 the four appellants were convicted in the Crown Court at Leeds before Wakerley J and a jury of murdering Tyrone Clarke on 22 April 2004. The indictment contained a second count, of violent disorder, on which no verdict was returned. It was not alleged or proved that any of the appellants had personally struck the fatal blow or blows and they were convicted as accessories or secondary parties to the joint enterprise which culminated in the death of the deceased. The Criminal Division of the Court of Appeal (Hooper LJ, Gibbs and Roderick Evans JJ) dismissed their appeals against conviction on 23 February 2007, for reasons given by Hooper LJ: [2007] EWCA Crim 342, [2007] 1 WLR 2191. Their appeals to the House raise a narrow but significant question on the direction to be given to the jury concerning the liability of an accessory on facts such as arose in the present case.

The facts

2. There was, it seems, a history of confrontation between the deceased and some of his friends on one side and a group of young Asians including two of the appellants on the other. In a chance encounter involving minor violence on 20 April 2004 some members of the latter group were worsted. There was talk of revenge, and on the afternoon of 22 April the deceased and some of his friends were sighted by the opposing group. A number of young Asians gathered. They were carrying a variety of weapons including baseball bats, a cricket bat, a scaffolding pole, a metal bar, a table leg and pieces of wood. Their

numbers increased, and as they walked through the streets there were two groups, one of 10 to 12 with a group of about 5 to 7 shortly behind. The deceased and his friend armed themselves with pieces of wood taken from a fence and fighting broke out between the two groups. A further group of Asian men arrived and the deceased and his friend were pursued as they sought to escape through lanes and a ginnel (the Rock ginnel), until they reached a grassy area at the back of some houses in Brett Gardens, Beeston in Leeds. The deceased tried to enter the rear gate of one of the houses, but was caught there and attacked by a group of between 7 and 15 persons. After he collapsed to the ground some members of the group were seen to assault him with blunt instrument weapons and kicks. The attack lasted a short time, estimated at less than a minute. The police arrived quickly at the scene, and the group dispersed and ran off, save for two of the appellants who were arrested at the scene. There was some evidence that one member of the Asian group had been seen with a knife.

3. On post mortem examination of the body of the deceased it was found that he had sustained three knife wounds. One of these, on the left side of the back between the shoulder blade and the midline, just to the right of the left shoulder blade, was made by a knife which entered the body relatively straight and penetrated to a depth of 8 centimetres, causing massive haemorrhage, rapid collapse, rapid unconsciousness and death. The evidence was that this wound required severe force and was the principal injury of the deceased, from which he stood no chance of survival. There was another knife wound in a similar position on the right side of the back, which penetrated to a depth of 9 centimetres. It also required severe force and was potentially a fatal wound. The third wound, to the left shoulder, penetrated soft tissue and did not penetrate the chest. The evidence was that the first two of these wounds were probably caused by the same knife in similar movements, and it was possible that one knife had been used to inflict all three wounds. The knife was estimated to have a blade of 8 to 9 centimetres and a maximum width of 1.5 centimetres at the hilt. Scientific evidence suggested that the deceased was still standing when stabbed. A number of recent soft tissue injuries were also found on the body of the deceased, but these were not significant and would not have required hospital treatment. Some of these injuries could have been caused by a blunt instrument such as a baseball bat or a piece of wood.

4. There was no evidence that any of the appellants inflicted the fatal injuries. The participant who did was probably not apprehended. The prosecution alleged that the role of each appellant in the attack involved either the deliberate and intentional infliction of serious

physical harm to the deceased or, by their conduct, the intentional encouragement of others to do likewise; that each appellant shared a common intention that serious bodily harm should be inflicted; and that the circumstances of the attack were such that each of them knew that weapons such as baseball bats, a scaffolding pole and a knife or knives might be used to inflict serious bodily harm.

5. The evidence of each appellant was that he had joined the enterprise with at most an intention to cause serious harm, without knowledge or foresight that anyone else involved in the assault intended to kill, that he did not have a knife and did not know or foresee that anyone else had a knife and that, accordingly, the acts of the primary offender were outside the scope of any joint enterprise to inflict serious bodily harm. The first, second and fourth-named appellants denied participation in the fatal assault. The third-named appellant admitted being present, wearing a balaclava, with intent to join in the assault, but said that before striking any blow he had been stunned by a blow to his head caused by a brick thrown by the deceased's friend.

6. It is accepted that the jury must have found that each appellant participated in the attack either (i) by using violence to the victim, or (ii) by surrounding him to enable others to use such violence, or (iii) by being present intending that his presence should encourage others to attack the victim.

The criminal liability of accessories

7. In the ordinary way a defendant is criminally liable for offences which he personally is shown to have committed. But, even leaving aside crimes such as riot, violent disorder or conspiracy where the involvement of multiple actors is an ingredient of the offence, it is notorious that many, perhaps most, crimes are not committed single-handed. Others may be involved, directly or indirectly, in the commission of a crime although they are not the primary offenders. Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.

8. English law has developed a small number of rules to address this problem, usually grouped under the general heading of "joint enterprise". These rules, as Lord Steyn pointed out in *R v Powell*

(Anthony), R v English [1999] 1 AC 1, 12, are not applicable only to cases of murder but apply to most criminal offences. Their application does, however, give rise to special difficulties in cases of murder. This is because, as established in *R v Cunningham* [1982] AC 566, the mens rea of murder may consist of either an intention to kill or an intention to cause really serious injury. Thus if P (the primary offender) unlawfully assaults V (the victim) with the intention of causing really serious injury, but not death, and death is thereby caused, P is guilty of murder. Authoritative commentators suggest that most of those convicted of murder in this country have not intended to kill.

9. As the Privy Council (per Lord Hoffmann) said in *Brown and Isaac v The State* [2003] UKPC 10, para 8,

> "The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability".

It is (para 13) "the plain vanilla version of joint enterprise". Sir Robin Cooke had this same simple model in mind when, giving the judgment of the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168, 175, he said:

> "… a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert".

Countless juries have over the years been directed along these lines, the example of a bank robbery in which the masked robbers, the look-out man and the get-away driver play different parts but are all liable being often used as an illustration. In this situation the touchstone of liability is the intention of those who participate.

10. But there is what Sir Robin Cooke in *Chan Wing-Siu v The Queen,* p 175, called a "wider principle". In *R v Powell (Anthony), R v*

English, above, as Lord Hutton made plain in the opening sentence of his leading opinion (p 16), the House had to consider a more difficult question: the liability of a participant in a joint criminal enterprise when another participant in that enterprise is guilty of a crime, the commission of which was not the purpose of the enterprise. In the first appeal, that of Powell and Daniels, three men (including the two appellants) had gone to the house of a drug dealer in order to buy drugs, but when he had come to the door one of the three men (it was not clear which) had shot him dead. Since neither Powell nor Daniels could be identified as the gunman, they could be convicted only as accessories, but it was submitted on their behalf that they could not be convicted as accessories unless it was proved against them, to the criminal standard, that they had had the mens rea necessary for murder, namely an intention to kill or to cause really serious injury. An accessory could not, it was argued, be convicted on a basis which would not suffice to convict the primary killer.

11. While acknowledging an element of anomaly in its decision (Lord Steyn, p 14; Lord Hutton, p 25), the House rejected that submission. Drawing on a strong line of authority which included *R v Smith (Wesley)* [1963] 1 WLR 1200; *R v Anderson; R v Morris* [1966] 2 QB 110; *Chan Wing-Siu v The Queen*, above; *Hui-Chi-ming v The Queen* [1992] 1 AC 34; and *McAuliffe v The Queen* (1995) 69 ALJR 621 the House held (p 21) that "participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise". Thus the House answered the certified question in the appeal of Powell and Daniels and the first certified question in the appeal of English by stating that (subject to the ruling on the second certified question in English) "it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm". Thus in this context the touchstone is one of foresight. In the case of Powell and Daniels the Crown case was that the two appellants knew that the third man was armed with a gun, and the Crown accepted that if the jury did not find that they knew this they would not be guilty of murder (p 17). Since the jury convicted, it may be inferred that they found the appellants did have this knowledge. Possession of the gun was not of itself conclusive, but it was evidence from which the jury could infer that the appellants foresaw (or "realised" or "contemplated") that the gun might be used to inflict, at least, really serious injury.

12. In the case of English there was what proved to be a significant factual variant. English and an associate, Weddle, combined to attack a police officer with wooden posts and cause injury to him. In the course of the attack, Weddle used a knife and stabbed the officer to death. The question was whether, as a participant in the joint enterprise to attack and injure the officer, English was liable for the fatal injury inflicted by Weddle with the knife. The factual variant was that, as the Crown accepted, English might have been unaware that Weddle had the knife (pp 10, 16, 30). The Crown contended that even if English did not know that Weddle had a knife, English foresaw that Weddle would cause really serious injury to the officer, and that this foresight was sufficient to impose criminal liability upon him for the murder (p 17). Thus the second certified question in his case was (p 17): "is it sufficient for murder that the secondary party intends or foresees that the primary party would or may act with intent to cause grievous bodily harm, if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by the secondary party?". The question on the facts of the case, as Lord Hutton said (p 17), was in essence whether the secondary party was guilty of murder if he foresaw that the other person taking part in the enterprise would use violence that would cause really serious injury, but did not foresee the use of the weapon that was used to carry out the killing.

13. In *R v Smith (Wesley)*, above, pp 1206-1207, it had been recognised that a radical departure by the primary killer from the foreseen purpose of an enterprise might relieve a secondary party of liability. This had also been accepted in *R v Anderson; R v Morris*, above, p 120, where Lord Parker CJ, giving the reserved judgment of a five-member court, said:

> "It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today".

The most recent and detailed consideration of this question was, however, found in the judgment of Carswell J in a non-jury trial in Northern Ireland in *R v Gamble and Others* [1989] NI 268.

14. In that case four members of the Ulster Volunteer Force had combined to inflict punishment on an allegedly delinquent member of the organisation. The punishment was to consist of knee-capping (the firing of a bullet or bullets into a knee or other joint, so as to cripple but not kill the victim) and a beating. In the event he was killed. A number of bullets were found to have caused wounds which could, but need not, have proved fatal. The cause of his death was the extremely forceful cutting of his throat. One of the four defendants (Gamble) pleaded guilty after his statements were ruled admissible, and another (Boyd) was found guilty by the judge. The substance of the judgment as reported concerns the other two defendants, Douglas and McKee. In their cases the judge was not satisfied to the requisite standard that they had in contemplation the possibility that the punishment squad would deliberately kill the victim (pp 276) or that the operation involved the murder of the victim (p 279). The issue, as the judge held (p 282) after reviewing the authorities, was whether the actions of Gamble and Boyd went beyond what was expressly or tacitly agreed as part of the common enterprise, with the consequence that their acts went beyond the contemplation of Douglas and McKee and the authority given by them. It was necessary in considering that to have regard to the nature of the act contemplated and that which was in fact committed. The Crown argued (p 282) that since there was an intention to inflict grievous bodily harm, and that satisfied the mens rea requirement of murder, the deliberate killing of the victim was not very different in kind from what Douglas and McKee contemplated. But Carswell J did not accept that. He said:

> "To accept this type of reasoning would be to fix an accessory with consequences of his acts which he did not foresee and did not desire or intend. The modern development of the criminal law has been away from such an approach and towards a greater emphasis on subjective tests of criminal guilt, as Sir Robin Cooke pointed out in *Chan Wing-Siu*. Although the rule remains well entrenched that an intention to inflict grievous bodily harm qualifies as the mens rea of murder, it is not in my opinion necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation. I do not think that the state of the law compels me to reach such a conclusion, and it would not in my judgment accord with the public sense of what is just and fitting."

Thus Douglas and McKee were acquitted of murder and convicted of wounding with intent to do the victim grievous bodily harm.

15. In *R v Powell (Anthony); R v English*, above, p 29, the House held this decision to be correct. The submission for English in that case (p 28) was that to be guilty under the principle in *Chan Wing-Siu v The Queen*, above, the secondary party must foresee an act of the type which the principal party committed, and that in English's case the use of a knife was fundamentally different to the use of a wooden post. It seems clear that counsel's use of the expression "fundamentally different" mirrors the language of the second certified question in English's case, quoted above in para 12, and counsel's submission was accepted as correct (p 28). But Lord Hutton thought it undesirable to formulate a precise answer to the second question. It is, however, clear that his answer to the question was in the negative. The trial judge's direction to the jury was held to be defective because (p 30)

> "he did not qualify his direction on foresight of really serious injury by stating that if the jury considered that the use of the knife by Weddle was the use of a weapon and an action on Weddle's part which English did not foresee as a possibility, then English should not be convicted of murder. As the unforeseen use of the knife would take the killing outside the scope of the joint venture the jury should also have been directed, as the Court of Criminal Appeal held in *Reg v Anderson*, that English should not be found guilty of manslaughter."

16. The decision of the House in *R v English* did not lay down a new rule of accessory liability or exoneration. Its significance lies in the emphasis it laid (a) on the overriding importance in this context of what the particular defendant subjectively foresaw, and (b) on the nature of the acts or behaviour said to be a radical departure from what was intended or foreseen. The greater the difference between the acts or behaviour in question and the purpose of the enterprise, the more ready a jury may be to infer that the particular defendant did not foresee what the other participant would do.

The trial judge's direction to the jury

17. The trial judge in this case gave the jury a very detailed and carefully considered direction on joint enterprise as applicable to the

case, which he reduced to writing and took the jury through orally with minimal alteration. He had previously, and very properly, discussed this direction with counsel, although the text was not agreed.

18. He concluded his direction in this way:

> "So you must decide what was the common purpose of those participating in the attack on Tyrone Clarke in Brett Gardens and to which a Defendant joined up (if, but only if, you are sure that he did participate in the attack). You may think that the attack on Tyrone Clarke was not entirely spontaneous, the result of a chance encounter in the Rock ginnel. Amongst those who had gathered at Sholay's; or who were in the group advancing up Hill Street, or who were seen at the bottom of Ladypit Lane or in Beeston Road or in the Rock ginnel, must there have been some comment or discussion as to what the group was about? And what the weapons on show were for? What matters should you have in mind in deciding whether the production and use of the knife which stabbed Tyrone Clarke were within the scope of the common purpose of the attackers in Brett Gardens? The question is entirely a matter for you but they may include: Is the character of a knife e.g. its propensity to cause death, fundamentally different from the other weapons being openly carried? If those other weapons were, in your judgement, equally likely to inflict fatal injury when used as the attackers implicitly agreed, then the mere fact that a different weapon, a knife, was used by one of them may be immaterial. Was the common purpose of the attackers to use lethal weapons so as to kill or to cause really serious injury by any such means at their disposal? If you are sure that the common purpose to which the Defendant whose case you are considering joined, included the use of lethal weapons to be used with the intention of killing the victim or causing him really serious injury, then it is open to you to conclude that the use of a knife in the attack was within the scope of the unlawful enterprise. But if you conclude that to stab with a knife in the back was in a different league to the kind of battering to which the attackers implicitly agreed upon by the use of those other weapons, then the others are not responsible for the consequences of the use of the knife unless in the case of the Defendant

whose case you are considering he actually foresaw the use of a knife to kill Tyrone Clarke.

> The mere fact that by attacking the victim together, each participant in the attack had an intention at least to cause really serious injury, is insufficient to make each responsible for the death of the victim caused by the use of a lethal weapon used by one of the attackers with the same intent. The prosecution must go further as I have indicated and prove in the case of each defendant, that he took some part in the attack on Tyrone Clarke in Brett Gardens and *either* that the use of lethal weapons, including a knife, was within the scope of that criminal enterprise which he joined as I have described above; *or* that because of circumstances within his particular knowledge, he himself realised that a knife might be used in the attack with the intention of killing Tyrone Clarke or causing him really serious injury.

Thus, if you are sure that the Defendant whose case you are considering:

- Was himself carrying a knife and produced it in the attack; or
- Knew before the stabbing that one or more of the attackers had a knife in his possession and realised that he or they might use it in the attack; or
- During the actual attack on Tyrone Clarke and before he was fatally stabbed, saw another attacker with a knife out ready to use it in the attack, yet he continued to play a part in it;

> any of these matters would, you may think, be powerful evidence of his joint responsibility for the death of Clarke by the use of a knife because, quite apart from the scope of the common purpose of the attackers, that defendant himself foresaw the use of a knife to kill in the attack.
>
> So your approach to the case should therefore be as follows:

1. Are you sure that the man, whoever he was, who stabbed Tyrone Clarke with a knife so as to cause his death, intended, at the very time of the stabbing, to kill him or to cause him really serious injury; i.e. was he guilty of murder?

If not sure: not guilty and go to Count 2 because as a matter of law, none of these defendants can be guilty of murder unless you are sure that the knifeman committed the offence of murder.

If sure: go to question 2.

2. Are you sure that the Defendant whose case you are considering took some part in the attack on Tyrone Clarke in Brett Gardens? Participation in the confrontation in the Rock ginnel is not enough; such participation, if proved, may or may not help you as to the facts of subsequent events in or on the way to Brett Gardens. Did the Defendant use violence to Tyrone Clarke at the rear of Brett Gardens? Did he chase and there, with others, surround Tyrone Clarke intending to enable others to use such violence? As I have directed you, mere presence at or very near the scene of the attack is not enough to prove participation. But if you find that a particular defendant was on the scene and intended and did by his presence alone encourage the others to attack Tyrone Clarke, that would amount to participation in it.

If not sure: not guilty and go to Count 2.

If sure: go to question 3.

3. Are you sure that in taking part in the attack on Tyrone Clarke, the Defendant whose case you are considering, *either* shared the intention to kill him or to cause him really serious injury; *or* that he realised that one of the attackers might use such violence by the use of lethal weapons to Tyrone

Clarke as to kill him with intent to kill or to cause him really serious injury?

If not sure: not guilty and go to Count 2.

If sure: go to question 4.

4. Are you sure *either* that the actions of the knifeman in producing the knife and stabbing Tyrone Clarke as he did with it were within the scope of the common purpose of those attacking him which that defendant joined; *or* that the Defendant whose case you are considering because of particular matters within his knowledge, realised that one or more of the attackers might produce and use a knife in the attack and that such attacker might kill with the intention of killing Tyrone Clarke or causing him really serious injury.

If not sure: not guilty and go to Count 2.

If sure: guilty of murder and go no further."

It has been pointed out, correctly, that the reference in the third question to sharing the intention to kill was too favourable to the appellants, since if any of them had had that intention he would have been guilty of murder on the simple basis described in para 9 above and the jury would have had no need to consider any further question.

The argument

19. The main argument for the appellants, persuasively advanced by Mr Michael Harrison QC, took as its starting point the pathological findings summarised in para 3 above. Those, it was said, showed that the stab wound which caused the death of the deceased was inflicted with the intention to kill and not merely to cause really serious injury. The location and direction of the wound, and the force with which it was delivered, showed that to be so, or at least raised a strong possibility that it was so. But the appellants intended and foresaw no more than the infliction of really serious injury. In consequence, it was strongly arguable that the principal's intention to kill, if found by the jury, took his (the principal's) action outside the scope of the common design and

rendered it fundamentally different from anything the appellants had foreseen or contemplated. These were not inferences which the jury would necessarily draw, but inferences which, properly directed, they might draw. The trial judge had, however, declined to direct the jury along these lines, and this non-direction was a misdirection which deprived the appellants of a chance of acquittal they should have enjoyed.

20. Mr Harrison relied on two authorities in particular to support this contention. The first was the passage from Lord Parker CJ's judgment in *R v Anderson*; *R v Morris*, p 120, quoted in para 13 above:

> "… one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect …".

Secondly Mr Harrison relied on a passage in the judgment of Beldam LJ (for the Court of Appeal) in *R v Uddin* [1999] QB 431, 441 where he said:

> "Notwithstanding these difficulties, we think that the principles applicable to a case such as the present are as follows:
>
> (i) Where several persons join to attack a victim in circumstances which show that they intend to inflict serious harm and as a result of the attack the victim sustains fatal injury, they are jointly liable for murder; but if such injury inflicted with that intent is shown to have been caused solely by the actions of one participant of a type entirely different from actions which the others foresaw as part of the attack, only that participant is guilty of murder.
>
> (ii) In deciding whether the actions are of such a different type the use by that party of a weapon is a significant factor. If the character of the weapon, e.g. its propensity to cause death, is

> different from any weapon used or contemplated by the others and if it is used with a specific intent to kill, the others are not responsible for the death unless it is proved that they knew or foresaw the likelihood of the use of such a weapon."

Mr Harrison also drew attention to *R v Gilmour* [2000] 2 Cr App R 407, 415, where Sir Robert Carswell LCJ, giving the judgment of the Court of Appeal in Northern Ireland, accepted it as conceivable that the nature of the principal's mens rea may change the nature of the act committed by him. Reference was also made to *Attorney General's Reference (No 3 of 2004)* [2005] EWCA Crim 1882, [2006] Crim LR 63. The plan in that case had been to discharge a firearm near the victim so as to frighten him, and in the event it had been fired at him and killed him. What had changed (Mr Harrison argued) was the intention of the principal, showing it to be relevant.

21. It was, inevitably, common ground between the parties that an accessory may only be criminally liable for a crime which the principal has committed, in murder unlawful killing with intent to kill or cause really serious injury. It was also common ground that the test of an accessory's liability under the wider principle explored in *R v English* is one of foresight. The crucial divide between the parties was: foresight of what? The appellants' answer would include foresight of the principal's intention. The respondent's answer, clearly given by Mr Robert Smith QC for the Crown, was: foresight of what the principal might do. On the Crown's analysis the principal's undisclosed intention is beside the point. It is his acts which matter.

22. The appellants' argument derives little assistance, in my opinion, from authority. In *R v Anderson; R v Morris*, above, the principle advanced by Mr Geoffrey Lane QC (pp 113-114) and accepted by the court (pp 118-119) concentrated on the unauthorised act of the principal and on "what was done". The case turned on the use of a knife, which the successful appellant denied knowing his associate had. In *R v Uddin* the facts were somewhat similar: the case did not turn on the intention with which the knife was used but on its unforeseen production and use. It is, with respect, clearly inappropriate to speak of a weapon's "propensity to cause death", since an inanimate object can have no propensity to do anything. But of course it is clear that some weapons are more dangerous than others and have the potential to cause more serious injury, as a sawn-off shotgun is more dangerous than a child's catapult. Sir Robert Carswell's observation in *R v Gilmour* cannot, I

think, be read as laying down any principle. In *Attorney General's Reference (No 3 of 2004)* it was the radically different nature of the act, not the principal's change of intention, which dictated the result.

23. I regard the respondent's submission as consistent with existing authority. In describing the wider principle in *Chan Wing-Siu v The Queen*, above, p 175, Sir Robin Cooke referred to "acts by the primary offender of a type which the former foresees but does not necessarily intend". In *R v Gamble*, above, p 282, Carswell J emphasised the need to have regard to "the nature of the act contemplated and that which was in fact committed". In *R v English*, above, p 28, the submission of counsel which Lord Hutton accepted was that "the secondary party must foresee an act of the type which the principal party committed …", and the judge's direction was defective (p 30) in failing to invite the jury's attention to the use of the knife by Weddle and the action on his part. As Laws LJ pithily observed in *R v Roberts, Day and Day* [2001] EWCA Crim 1594, [2001] Crim LR 984, para 52:

> "The subject matter of a joint enterprise is not a state of mind or intention but an objective act which it is contemplated will or might be done".

24. Authority apart, there are in my view two strong reasons, one practical, the other theoretical, for preferring the respondent's contention. The first is that the law of joint enterprise in a situation such as this is already very complex, as evidenced by the trial judge's direction and the Court of Appeal's judgment on these appeals, and the appellants' submission, if accepted, would introduce a new and highly undesirable level of complexity. Given the fluid, fast-moving course of events in incidents such as that which culminated in the killing of the deceased, incidents which are unhappily not rare, it must often be very hard for jurors to make a reliable assessment of what a particular defendant foresaw as likely or possible acts on the part of his associates. It would be even harder, and would border on speculation, to judge what a particular defendant foresaw as the intention with which his associates might perform such acts. It is safer to focus on the defendant's foresight of what an associate might do, an issue to which knowledge of the associate's possession of an obviously lethal weapon such as a gun or a knife would usually be very relevant.

25. Secondly, the appellants' submission, as it seems to me, undermines the principle on which, for better or worse, our law of

murder is based. In the prosecution of a principal offender for murder, it is not necessary for the prosecution to prove or the jury to consider whether the defendant intended on the one hand to kill or on the other to cause really serious injury. That is legally irrelevant to guilt. The rationale of that principle plainly is that if a person unlawfully assaults another with intent to cause him really serious injury, and death results, he should be held criminally responsible for that fatality, even though he did not intend it. If he had not embarked on a course of deliberate violence, the fatality would not have occurred. This rationale may lack logical purity, but it is underpinned by a quality of earthy realism. To rule that an undisclosed and unforeseen intention to kill on the part of the primary offender may take a killing outside the scope of a common purpose to cause really serious injury, calling for a distinction irrelevant in the case of the primary offender, is in my view to subvert the rationale which underlies our law of murder.

26. I would accordingly reject the appellants' submission on this point. I would also reject a subsidiary submission that the judge should have explained to the jury what was meant by "fundamentally different". This is not a term of art. It may, or may not, be regarded as a helpful turn of phrase, but its meaning is plain and cannot be misunderstood by a jury to whom the governing principle has been explained, as it was here. In any event, it is hard to see how the judge could have explained his meaning more clearly than when he said (in his direction quoted in para 18 above):

> "But if you conclude that to stab with a knife in the back was in a different league to the kind of battering to which the attackers implicitly agreed upon by the use of those other weapons, then the others are not responsible for the consequences of the use of the knife unless in the case of the Defendant whose case you are considering he actually foresaw the use of a knife to kill Tyrone Clarke".

27. The Court of Appeal dismissed the appellants' appeals for reasons with which I agree. In para 69 of their judgment they tentatively suggested a series of questions which a trial judge might invite a jury to consider in a case such as this. There is, and can be, no prescriptive formula for directing juries. Having made clear the governing principle, it is for trial judges to choose the terms most apt to enable juries to reach a just decision in the particular case. I would for my part, however, prefer the judge's four questions (amended to remove the overly favourable direction in question 3) to the questions proposed in para 69.

28. The Court of Appeal certified the following point of law of general public importance as involved in its decision:

> "If in the course of a joint enterprise to inflict unlawful violence the principal party kills with an intention to kill which is unknown to and unforeseen by a secondary party, is the principal's intention 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?"

I would answer both parts of the question in the negative, and would accordingly dismiss these appeals.

29. Since drafting this opinion I have had the benefit of reading the opinions of my noble and learned friends. I do not, with respect, share their doubts about the correctness of the decision in *R v Gamble and Others* [1989] NI 268, which on its special facts was unanimously approved by the House in *R v English*. There was nothing to suggest that either Douglas or McKee had any knowledge of a knife. Had they known of it, they would have been alerted to the fact that this was no ordinary knee-capping operation on which they were engaged: that requires a gun but not a knife. The use of a knife suggested something different and, potentially, even more sinister. The gun was of course to be used to cause really serious injury and might have had fatal consequences. But what, as I understand, was held to exonerate Douglas and McKee was that the violence in fact inflicted with the knife was of an entirely different character in an entirely different context from that which they had foreseen and, in that sense, bargained for. The result seems to me consistent with authority.

LORD SCOTT OF FOSCOTE

My Lords,

30. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill and for the reasons he gives, with which I am in full agreement I, too, would dismiss these appeals.

31. Having had the further advantage, however, of reading in draft the opinions of my noble and learned friends Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury I want to add a few words of my own on what I take to be the principal question in this appeal, namely, whether an intention by the primary party to kill must be either known to or foreseen by a secondary party if the secondary party is to be held criminally liable for the killing. The premise to this question is that the two parties have joined in an enterprise to inflict serious bodily harm to the victim. My noble and learned friends have referred to the authorities that bear upon this question and cited the important passages from the judgments and there is no point in my adding to the citations. I wish simply to say that that if parties join together in an enterprise to inflict serious bodily harm on some victim, bodily harm of a degree that makes the death of the victim a foreseeably possible consequence, and if the victim is killed in the carrying out of this joint enterprise, there is no doubt but that he, or she, who struck the killing blow is guilty of murder regardless of whether there was an intent to kill (*R v Cunningham* [1982] AC 566) and it seems to me just that the secondary party too should be held guilty. It seems to me beside the point that the secondary party may not have known the killer to have been carrying the weapon actually used to effect the killing and I do not understand how his criminality can be held to depend on whether the killing stroke was effected by the club the killer was known to have carried or by the knife that he was not known to have carried. It would, of course, be necessary that the killing stroke should have been an act within the scope of the joint enterprise on which the parties had embarked but if parties embark on a punishment exercise that carries with it the foreseeable possibility of death of the victim, the instruments used for that purpose seem to me of much less importance than the purpose itself. I share, therefore, Lord Brown's difficulty with *R v Gamble* [1989] NI 268 (para. 67 of his opinion) and concur in his suggested restatement of the *Hyde* principle ([1991] 1 QB 134) (para. 68 of his opinion).

32. The circumstances attending upon a murder may cover a very broad spectrum, and, since the abolition of the death penalty and the introduction of specified minimum terms of imprisonment to be served by those on whom the mandatory sentence of life imprisonment is passed, the degree of culpability and responsibility of those convicted of

an unlawful killing can be reflected by the length of that specified minimum term. This constitutes, in my opinion, a far more satisfactory means of dealing with those whose liability for the unlawful killing is secondary than a rule which would exonerate them from criminal liability on the ground that they did not know or suspect that the primary party was carrying the particular weapon that delivered the fatal blow.

LORD RODGER OF EARLSFERRY

My Lords,

33. If A and B agree to kill their victim and proceed to attack him with that intention, they are both guilty of murder, irrespective of who struck the fatal blow. In Lord Hoffmann's words, they are engaged in a "plain vanilla" joint enterprise. It can, in my view, make no difference if A and B agree to kill their victim by beating him to death with baseball bats, but in the course of the attack A pulls out a gun and shoots him. B must still be guilty of murder: since he intended to bring about the death of the victim, B cannot escape guilt on the ground that he did not foresee that A would kill him by using a gun instead of a baseball bat. The unforeseen nature of the weapon is immaterial. If, instead of a baseball bat, in the course of the attack A unforeseeably used an explosive and killed people in addition to the intended victim, then B would still be guilty of the murder of their intended victim - but not, I would think, of the murder of anyone else who was killed by the explosive.

34. Go to the other end of the spectrum. Half a dozen youths engage in a fist fight with another group, but one of their number suddenly produces a knife and stabs one of their opponents to death. If the others on his side did not know that he had the knife, then they are not parties to its use and are not guilty of murder or manslaughter: *Davies v Director of Public Prosecutions* [1954] AC 378, 401 per Lord Simonds LC, adopted by the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168, 177E-H; *R v Anderson; R v Morris* [1966] 2 QB 110, 120B, per Lord Parker CJ.

35. Moving up the scale of violence, if I attack someone with the intention of causing serious injury and I do in fact cause a serious injury from which he dies, then I am guilty of murder, even though I did not

intend to kill him. *R v Cunningham* [1982] AC 566 settled the point. It follows that, if, for instance, A and B agree to use baseball bats to inflict serious injuries on their victim and do so, and the victim dies as a result, then both A and B are guilty of murder, even though they did not intend to kill him.

36. What is the position, however, if in the course of the joint assault A produces a gun and shoots the victim with the intention of killing him? B's position depends on what he contemplated when deciding to take part in the joint enterprise. Suppose that, knowing what A is like and that he tends to carry a gun, B contemplates that A may take a gun and use it in the course of the attack on the victim. Then, even if B is vehemently opposed to the use of a gun and tries to dissuade A from carrying one, nevertheless, if, being aware of the risk, B takes part in the joint assault, he will be guilty of murder if A shoots the victim. As Sir Robin Cooke explained, when delivering the judgment of the Privy Council in *Chan Wing-Siu v The Queen* [1985] AC 168, 175G-H, B's liability depends on the principle

> "whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.
>
> That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight"

That principle was restated and applied by Lord Lane CJ in *R v Hyde* [1991] 1 QB 134, 139C-E:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and

> encouragement to A in carrying out an enterprise which B realises may involve murder."

Lord Hutton endorsed and applied that approach in dismissing the appeal of Powell and Daniels, *R v Powell* [1999] 1 AC 1, 25-26. Like my noble and learned friend, Lord Brown of Eaton-under-Heywood, I consider that a direction to the jury based on this approach will often be all that is required.

37. The report and the speeches in the appeal of Powell and Daniels reveal little about the facts – but, presumably, all that the House considered necessary for determining the appeal. Three men went to the house of a drugs dealer in order to buy drugs. When he came to the door, however, one of the men immediately shot the dealer dead. The Crown case proceeded on the basis that, if the third man fired the shot, Powell and Daniels had known that he was carrying a gun and had realised that he might use it to kill or cause really serious injury. In such a case, there is clearly a risk that the person with the gun will kill someone – perhaps in order to get the drugs, perhaps to overcome some opposition, perhaps so that the participants should get away undetected. Exactly when and how the gun will be used is unpredictable, but there is a real risk of a shooting of some kind in the course of the criminal enterprise - why else would the third man be carrying a loaded gun? By going along with the armed man and so lending themselves to the enterprise, Powell and Daniels ran the risk that, for some reason, in the course of the enterprise he would use the gun, with fatal results. So, when he shot the man dead the moment the door was opened, they were guilty of murder.

38. The circumstances in *R v Gamble* [1989] NI 268 were different. The victim was a member of the Ulster Volunteer Force who was apparently suspected of having given information about its activities to the police. He was shot twice, but died from having his throat cut. Four men were charged with his murder. One pleaded guilty and one was convicted of murder – the evidence pointed to his actual participation in the killing. The remaining two were acquitted. The judge, Carswell J, found that the two whom he acquitted had realised that, by way of punishment, the victim might be kneecapped with the use of a firearm or have his limbs broken, but not that he would be deliberately killed.

39. Carswell J was satisfied, of course, that these two defendants were party to an enterprise to inflict serious injury (grievous bodily harm): indeed, he convicted them both of assaulting the victim with the

intent to do him grievous bodily harm. His Lordship also accepted that it could be said that the two defendants must be taken to have had within their contemplation the possibility that the victim's life might be put at risk, even though he considered that death due to complications from kneecapping must be very rare. So, if the victim had died from injuries sustained in the kneecapping, Carswell J would have convicted the two defendants of murder. In fact, however, he acquitted them of murder because the victim's death had been caused by one of the other two participants deliberately cutting the victim's throat. Although the mens rea of murder included intending to inflict grievous bodily harm, at p 284B-C, Carswell J did not consider it "necessary to apply it in such a way as to fix an accessory with liability for a consequence which he did not intend and which stems from an act which he did not have within his contemplation." Citing the opinion of Lord Parker CJ in *R v Anderson; R v Morris* [1966] 2 QB 110, 120E-F, Carswell J proceeded, at p 284C-285A, on the basis that cutting the victim's throat amounted to "an overwhelming supervening event which is of such a character that it will relegate into history matters which would otherwise be looked upon as causative factors." So he concluded that "the killing did not follow directly as the result of the crime to which the [two defendants] lent themselves as accessories."

40. The facts of *Gamble* were unusual, involving a situation where the two defendants could point to a definite limited purpose for which they contemplated that violence would be used. Those unusual facts lent themselves to a possible conclusion, which Carswell J in fact reached, that there had indeed been a break in causation between the assault on the victim, with the intention of inflicting grievous bodily harm, and his murder by cutting his throat. In effect, for Carswell J, it was as if the two defendants whom he acquitted of murder had been about to kneecap the victim when two other men suddenly emerged from the undergrowth and cut his throat. The decision must be regarded as turning on the judge's assessment of the very special facts.

41. For the reasons I have given, no such approach would have been open to the defendants Powell and Daniels in *R v Powell* [1999] 1 AC 1: use of the gun to kill was a risk that was bound up with the whole enterprise on which the three men had embarked.

42. Along with the appeal of Powell and Daniels, the House considered the appeal of English. It arose out of circumstances where English and an older man, Weddle, had embarked on a joint enterprise to use wooden posts to attack and cause injury to a police officer. In the

course of the attack Weddle used a knife and stabbed the officer to death. So, as with the two defendants in *Gamble*, the evidence showed that English had been participating in an attack with the intention of causing serious injury to the victim. He would accordingly have been guilty of murder if the officer had died from injuries caused by a blow or blows with the wooden posts.

43. There was, however, evidence on which the jury could have concluded that English did not know that Weddle had a knife. Lord Hutton, with whom the other members of the committee agreed, referred with approval to the passage in *Gamble* [1989] NI 268, 283, 284, where Carswell J concluded that the two defendants should not be convicted of murder, even though they had participated in an assault with intent to inflict grievous bodily harm: [1999] 1 AC 1, 29B-30B. In the circumstances of English's case Lord Hutton held, at p 30C-E, that the judge should have directed the jury that, if they considered

> "that the use of the knife by Weddle was the use of a weapon and an action on Weddle's part which English did not foresee as a possibility, then English should not be convicted of murder. As the unforeseen use of the knife would take the killing outside the scope of the joint venture the jury should also have been directed, as the Court of Criminal Appeal held in *Reg v Anderson*, that English should not be found guilty of manslaughter."

44. As my noble and learned friend, Lord Bingham of Cornhill, has pointed out at para 16 of his speech, in reaching this conclusion, Lord Hutton was not purporting to set the law off on a new course. On the contrary, he emphasised, [1999] 1 AC 1, 30F, that the appropriate test was to be found in the judgment of Lord Parker CJ in *R v Anderson; R v Morris* [1966] 2 QB 110, 120B-D:

> "It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

It is for the jury to determine, by applying this test, whether the person who carried out the killing departed completely from the concerted action of the common design. In the case of English, all that the House decided was that, on the evidence, this issue should have been left to the jury. His conviction for murder was accordingly quashed. The House does not seem to have been asked to consider whether a retrial would be appropriate.

45. Lord Bingham has outlined the circumstances of the present case. In particular, there was evidence that the participants in the attack on the opposing group, which included Tyrone Clarke, knew that weapons such as baseball bats, a scaffolding pole and a knife or knives might be used to inflict serious bodily harm. There was also evidence on which the jury would have been entitled to conclude that the fatal stab wound was inflicted with the intention of killing Clarke. In these circumstances Wakerley J directed the jury that they could convict a particular defendant if they were sure that he realised that

> "one or more of the attackers might produce and use a knife in the attack and that such attacker might kill with the intention of killing Tyrone Clarke or causing him really serious injury."

46. Under reference to the decision in *English*, Mr Harrison QC submitted that this was a misdirection. The judge should have told the jury that, if they concluded that the principal had struck the fatal blow with the intention of killing the victim, then they should acquit the appellants if they considered that the intention to kill had taken the principal's action beyond the scope of the common design and rendered it fundamentally different from anything contemplated by the appellants.

47. I would reject that submission. It really rests on the proposition that, on a proper application of the approach in *R v Anderson; R v Morris* [1966] 2 QB 110, 120B-C, the deliberate killing of Tyrone Clarke by stabbing him with a knife could be regarded as a complete departure from anything which the appellants contemplated as part of their common design in attacking the opposing group of youths. But, in my view, the reference to the use of a different weapon is an integral part of Lord Parker CJ's formula in that passage. In other words, the change to a more deadly weapon is one of the essential elements which can make the killer's action a complete departure from anything

contemplated by the other participants. That is made clear in Lord Brown's formulation of the relevant approach in para 68 of his speech.

48. In the present case the simple fact is that the appellants knew that they were taking part in a joint attack with the purpose of causing serious injury, in which one or more of the participants were armed with a knife. Obviously, those participants would not have had a knife with them unless they were prepared to use it in the attack, if the occasion arose. In the absence of any evidence to the contrary, the jury would have been entitled to conclude that the appellants must have realised this when they joined in the attack. Moreover, the appellants were in no position to control what would be done with the knife or knives during the attack. So, in no sense could killing due to the use of a knife be regarded as a complete departure from what the appellants contemplated as being involved in the common design.

49. Suppose, however, that the appellants did not specifically contemplate that one of their number would use a knife with the intention of killing any of their opponents. Nevertheless, they participated in an attack in which, as they knew, they would have no control whatever over what those armed with a knife or any other weapon might do with it. In joining in the attack, the appellants therefore took the risk of anything that any of their number might do with the weapon at his disposal in the heat of the moment. In these circumstances any decision to kill did not "relegate into history" the events in which the appellants were involved. Rather, the killing flowed directly from the joint attack in which the appellants had decided to participate. The words of Sir Robin Cooke in *Chan Wing-Siu* [1985] AC 168, 177D-E, are apt to describe the appellants' predicament:

> "What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic."

The considerations identified by Lord Bingham in paras 24 and 25 of his speech support this approach.

50. For these reasons, and in agreement with your Lordships, I am satisfied that the appeals must be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

51. There are many more murderers under our law than there are people who have killed intentionally. The actus reus of murder is, of course, the killing of the victim; the mens rea (established in *R v Cunningham* [1982] AC 566) is the intention either to kill the victim or at least to cause him some really serious bodily injury—grievous bodily harm as it used to be called, gbh for short. As this appeal illustrates, moreover, there is a further group of murderers too, those who did not intend even gbh but who foresaw that others might kill and yet nonetheless participated in the venture.

52. If more than one person participates, in whatever capacity, in attacking a victim, each intending that he be killed, then, if he dies, all are guilty of murder. That is what Lord Hoffmann in *Brown & Isaac v The State* [2003] UKPC 10 (para 13) called "the plain vanilla version of joint enterprise". But what if one or more of the participants intends merely a beating—injury less than death, perhaps gbh, perhaps actual bodily harm, perhaps not even that—yet the attack results in the victim's death? Clearly, whichever assailant(s) inflicted the violence which actually caused the death, provided always he (they) intended at least gbh, will be guilty of murder. But what of the others, the secondary parties or accessories?

53. Subject to an important qualification (the *English* qualification as I shall call it, established as it was in the second of the two linked cases: *R v Powell (Anthony), R v English* [1999] 1 AC 1), the position of accessories to murder is as stated by Lord Lane CJ in *R v Hyde* [1991] 1 QB 134, 139 as follows:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent,

> kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder."

The reference there to Professor Smith was to his comments on a number of earlier decisions including *Chan Wing-Siu v The Queen* [1985] AC 168 and *R v Wakely* [1990] Crim LR 119. Sir Robin Cooke in the former (at p175) had spoken of:

> "the wider principle [wider than joint enterprise or common purpose liability] whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend . . . .The criminal culpability lies in participating in the venture with that foresight."

54. By the same token that if someone intentionally inflicts gbh he takes the risk that his actions may kill, whereby he will be held liable for murder, so too if he participates in a venture foreseeing that another may act so as to commit murder, he takes the risk that in that way also he may himself become guilty of murder.

55. The House in *Powell* (subject, again, to the *English* qualification to which I shall shortly turn) confirmed the correctness of the statement of principle in *Hyde.* The facts of *Powell*, indeed, exemplified its application. They are simply told. The two appellants together with a third man went to purchase drugs from a drug dealer. One of the three (assumed to be the third man rather than either appellant), to the knowledge of the other two, was carrying a gun and on arrival at the dealer's house shot him dead. The Recorder of London directed the jury in terms virtually identical to those set out above from *Hyde*. It was, of course, implicit in the appellants' conviction that the jury were satisfied they had foreseen at least that the gunman might intend gbh. The question certified for the House's opinion was:

> "Is it sufficient to found a conviction for murder for a secondary party to a killing to have realised that the primary party might kill with intent to do so or with intent

> to cause grievous bodily harm or must the secondary party have held such an intention himself?"

It was answered adversely to the appellants so that their appeal failed.

56. The qualification to that principle decided in *English* arose from a second question certified in these terms:

> "Is it sufficient for murder that the secondary party intends or foresees that the primary party would or may act with intent to cause grievous bodily harm, if the lethal act carried out by the primary party is fundamentally different from the acts foreseen or intended by the secondary party?"

57. The brief facts of *English* were that during the course of an attack by English (then aged 15) and another man (Weddle, aged 25) with wooden posts upon a police sergeant, Weddle suddenly drew a knife and stabbed the sergeant to death. The jury was directed that even if English knew nothing of the knife, providing he "joined in an unlawful attack on the sergeant realising at that time that there was a substantial risk that in that attack Weddle might kill or at least cause some really serious injury to the sergeant" he would be guilty of murder.

58. The House allowed English's appeal because:

> "[The judge] did not qualify his direction on foresight of really serious injury by stating that if the jury considered that the use of the knife by Weddle was the use of a weapon and an action on Weddle's part which English did not foresee as a possibility, then English should not be convicted of murder. As the unforeseen use of the knife would take the killing outside the scope of the joint venture the jury should also have been directed, as the Court of Criminal Appeal held in *R v Anderson* [*R v Anderson; R v Morris* [1966] 2 QB 110], that English should not be found guilty of manslaughter." (Lord Hutton at p 30 C-D)

59. The essential facts of *Anderson* and *Morris* were much like those in *English* save that until Anderson drew his knife no weapons at all had been used in the assault. The jury was directed that even if Morris had no intention to kill or cause grievous bodily harm to the victim (Welch) and knew nothing of Anderson having a knife, provided he took part in the attack on Welch he was guilty of manslaughter. Lord Parker CJ giving the judgment of a five judge Court of Appeal said this:

> "It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today."

60. An earlier allusion to the principle is to be found in the judgment of another 5 judge Court of Appeal in *R v Smith (Wesley)* [1963] 1 WLR 1200. Rejecting the appeal, the court found the fatal knifing there to have been "clearly within the contemplation of [the appellant]." Helpfully for present purposes, however, it added:

> "In a case of this kind it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties . . ."

61. Having decided to resolve English's appeal by the application of the principle stated by Lord Parker in *Anderson*, Lord Hutton thought it "undesirable to seek to formulate a more precise answer to the [second certified] question in case such an answer might appear to prescribe too rigid a formula for use by trial judges". In short, *English's* appeal, like *Morris's* before it, succeeded on the basis that in each case the killer had "used a weapon and acted in a way which no party to [their] common design could suspect" (*Morris* and *Anderson*)—"the use of the knife by Weddle was the use of a weapon and an action on Weddle's part which English did not foresee as a possibility" (para 58 above).

62. That, then, is the essential background to the present appeal. What is now postulated is that in the course of jointly attacking a victim

one of the participants intentionally kills him, that intention being unknown to and unforeseen by a secondary party. The certified question then asks whether that intention is relevant:

> "(a) to whether the killing was within the scope of a common purpose to which the secondary party was an accessory;
>
> (b) 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."

63. As it seems to me, the first question is misconceived. If the principal (the killer) was at all times intent on killing the victim and the secondary party was not, then it is simply unrealistic to talk in terms of their sharing a common purpose. But that matters nothing. Once the wider principle was recognised (or established), as it was in *Chan Wing-Siu* and *Hyde*, namely that criminal liability is imposed on anyone assisting or encouraging the principal in his wrongdoing who realises that the principal may commit a more serious crime than the secondary party himself ever intended or wanted or agreed to, then the whole concept of common purpose became superfluous. There really is no longer any need for judges to direct juries by reference both to whether the relevant actions were within the scope of the common purpose of those concerned and also by reference to whether the secondary party realised that the principal might commit the acts constituting the more serious offence. The second limb of such a direction effectively subsumes the first. If the relevant acts were within the scope of the principal's and accessory's common purpose, necessarily the secondary party would realise that the principal might thereby commit the more serious offence. And if the secondary party did not foresee even the possibility of the more serious offence, such could hardly have been within the scope of any shared purpose.

64. That, indeed, seems to me what Lord Hutton was saying at the conclusion of his opinion in *English* (p 31 B-D):

> "Trial judges have frequently based their directions to the jury in respect of the liability of a secondary party for an action carried out in a joint venture on the first passage [in *Anderson* and *Morris*, a passage pointing out that those engaged in a joint enterprise are liable for the acts done pursuant to it including liability for unusual consequences

> if they arise from the execution of the agreed joint enterprise, but not for the consequences of an unauthorised act if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise]. There is clearly no error in doing so. However in many cases there would be no difference in result between applying the test stated in that passage and the test of foresight, and if there would be a difference the test of foresight is the proper one to apply. I consider that the test of foresight is a simpler and more practicable test for a jury to apply than the test of whether the act causing the death goes beyond what had been tacitly agreed as part of the joint enterprise. Therefore, in cases where an issue arises as to whether an action was within the scope of the joint venture, I would suggest that it might be preferable for a trial judge in charging a jury to base his direction on the test of foresight rather than on the test set out in the first passage in *R v Anderson; R v Morris*."

65. I turn, therefore, to the second limb of the question certified for your Lordships' opinion which focuses on the all-important foresight test. I am of the clear view that the answer to it must be 'no'. The qualification to the *Hyde* direction established by *English* concerns simply the secondary party's foresight of possible acts by the principal constituting more serious offences than the secondary party himself was intending, acts to which he never agreed and which from his standpoint were entirely unwanted and unintended. But an act is an act and either its possibility is foreseen or it is not. I see no possible reason or justification for further complicating this already problematic area of the law by requiring juries to consider and decide whether the principal's intent when killing the victim was the full intent to kill or the usual lesser intent to cause gbh. Whichever it was, the act was the act of killing and the only question arising pursuant to the *English* qualification is whether the possibility of killing in that way (rather than in some fundamentally different way) was foreseen by the accessory—whether the act which caused the death was, as Sir Robin Cooke had put it in *Chan Wing Siu*, "of a type" foreseen by the secondary party.

66. Of course the secondary party can say in evidence that he was ignorant not merely of the principal's possession of a knife or gun or whatever it was but also of his murderous intent. But if the jury conclude that he knew about the weapon and foresaw the possibility of its use to cause at least grievous bodily harm then they must convict him of murder whether he knew of the killer's murderous intent or not.

Powell itself is surely directly in point on this issue: no one suggested there that it mattered whether the appellants realised that the third man was intent on killing the drug dealer; it was sufficient and fatal to their defence that they knew he had a gun and foresaw he might use it at least to cause gbh.

67. The one case amongst the many authorities discussed in *Powell* and *English* that I confess to having some difficulty with is *R v Gamble* [1989] NI 268 (considered by Lord Hutton at p 28 G-30B). It is not at first sight clear why, given that the bullet wounds would in any event have been fatal even had the two principals not then accelerated the victim's death by cutting his throat, the secondary parties (who foresaw and indeed intended the use of a gun to inflict gbh by knee-capping) were not liable for the victim's murder on precisely the same basis as the appellants in *Powell*. As, indeed, Lord Hutton himself observed (at p 30A-B), having just noted that the "action unforeseen by the secondary party" was the killing of the victim "by cutting his throat with a knife":

> "The issue . . . whether a secondary party who foresees the use of a gun to knee-cap, and death is then caused by the deliberate firing of the gun into the head or body of the victim, is guilty of murder is more debatable".

But why, I wonder, is that merely "debatable"? Why is the secondary party in those circumstances not plainly guilty of murder, just as the appellants in *Powell*? And if that be right, why should it make all the difference that in fact the victim's death was caused by a knife? After all, as Lord Hutton said just a few paragraphs later (at p 30 F-G):

> "if the weapon used by the primary party is different to, but as dangerous as, the weapon which the secondary party contemplated he might use, the secondary party should not escape liability for murder because of the difference in the weapon, for example, if he foresaw that the primary party might use a gun to kill and the latter used a knife to kill, or vice-versa."

68. *Gamble* to my mind stretches to breaking point the *English* qualification to the basic *Hyde* principle. As I have endeavoured to show, that qualification was founded squarely on *Anderson* and *Morris*

and there was certainly nothing in that case—nor, indeed, in the determinative passage in Lord Hutton's speech in *English* set out at para 58 above—to suggest any greater relaxation of the *Hyde* principle than was necessary for the success of *English's* own appeal. *Morris*, it will be recalled, knew nothing of any weapon and did not intend even gbh. And Geoffrey Lane QC it was, after all, as your Lordships will have noted, who in 1966 acted for Morris on his successful appeal and who in 1990, giving the Court's judgment as Lord Chief Justice in *Hyde*, applied *Chan Wing-Siu* and stated the basic principle governing the liability of secondary parties for murder as set out in para 53 above. It would be surprising if in those circumstances the basic *Hyde* principle required much in the way of modification. As now qualified it can surely be restated thus:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B.*" (The italicised words are designed to reflect the *English* qualification).

As I have indicated, I do not find the decision in *Gamble* easily reconcilable with this formulation.

69. Whether or not my doubts about *Gamble* are well-founded, however, it would assist the appellants here only if it were to be explained on the basis that the killer's intention actually to kill was indeed material to the assessment of whether the act was foreseen. Had that been Lord Hutton's view of the matter, however, he would hardly have been in two minds with regard to the shooting scenario envisaged at para 67 above.

70. On the narrow arguments now raised I am in full agreement with all that Lord Bingham of Cornhill says at paras 24 and 25 of his opinion. There is this further consideration too. At what point is it suggested that the killer's actual intention is to be determined? He may have embarked

upon the venture intending at most to cause gbh but later, in the heat of battle, for any one or more of a host of possible reasons, changed his mind and decided to kill or perhaps merely become reckless as to whether he killed or not. It is absurd that the criminal liability of secondary parties should depend upon such niceties as these.

71. For the reasons given I would decline to answer the first part of the certified question. I would, however, answer the all-important second part in the negative and, in common with all your Lordships, dismiss these appeals.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

72. The facts and issues in this appeal, and the judicial decisions bearing on them, have been fully described by my noble and learned friends Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood in their respective opinions which I have had the privilege of reading in draft. The central issue in this appeal arises out of the interrelationship of two important aspects of the English criminal law.

73. The first aspect concerns the constituents of the crime of murder, which of course involves the *actus reus* of killing the victim. Crucially for present purposes, the *mens rea* required for murder is not limited to an intention to kill the victim; it suffices if the intention is to cause him really serious bodily injury ("serious injury"). That was decided by this House in *R v Cunningham* [1982] AC 566.

74. The second aspect of criminal law relevant for present purposes is the law relating to accessories, that is, those who are liable for crimes primarily perpetrated by others. Accessory liability extends to render a person, B, criminally liable for an act primarily committed by another party, A, when B "participat[es] in a joint criminal enterprise [with A] with foresight or contemplation of [that] act as a possible incident of that enterprise" - per Lord Hutton in *R v Powell (Anthony); R v English* [1999] 1 AC 1, 21.

75. Accordingly, when A and B embark on a joint enterprise which B intends or foresees could involve killing (or to causing serious injury to) a victim, V, and A actually kills V as A intended (or, as the case may be, as a result of A intending to cause him serious injury) then B, as well as A, is guilty of V's murder, because B intended or foresaw that A would kill V (or, as the case may be, that A would cause V serious injury).

76. The fundamental issue raised on this appeal can be reduced to the following facts. A and B jointly attack V. B intends to cause V serious injury, but not to kill him. B believes that A has the same intention. In the course of the attack A kills V, intending to kill him. Can B avoid conviction for murder by saying that he should not be criminally liable for V being killed as a result of A intending to kill him, rather than as a result of A intending seriously to injure him?

77. Like many questions of principle, it may not be possible to answer this question in the affirmative or the negative without qualification. Having said that, I believe that, in the absence of special circumstances, the answer to the question should be in the negative. In other words, I consider that B should not be able to escape being convicted of murder in such a case, at least in the absence of special circumstances.

78. I propose first to approach the question as a matter of principle. I will then consider whether, in the light of the previous cases, there could be special circumstances which give rise to exceptions to, or which even call into question, the conclusion I have reached in principle.

79. When seeking to resolve a question of principle in criminal law, it appears to me that one should normally bear in mind legal coherence, protection of the public, fairness to defendants, and the realities of jury trials.

80. So far as the authorities are concerned, they indicate that, where A and B are engaged on a joint criminal enterprise, B should be criminally liable for A's acts, save insofar as any act of A involved his having "departed completely from the concerted action of the common design", to quote from Lord Parker CJ in *R v Anderson; R v Morris* [1966] 2 QB 110, 120 The same point was made in different words by

Beldam LJ in *R v Uddin* [1999] QB 431, 441B-C, where he referred to "the actions" of A being attributable to B, unless they were "of a type entirely different from actions which [B] foresaw". This reflected the language of the certified question in what has been the leading case on the topic at least so far as the crime of murder is concerned, namely *English* [1999] 1 AC 1, 17C, where the expression used was "fundamentally different".

81. Accordingly, the issue on this appeal resolves itself into whether, on the bare facts described in para 76, the difference between B's understanding of A's intention and A's actual intention could entitle a jury to conclude that A's action "departed completely", or was "entirely" or "fundamentally" different, from what B foresaw, and therefore justified B being acquitted of V's murder.

82. The effect of this House's decision in *Cunningham* [1982] AC 566 is that the law of murder is indifferent to whether a defendant intends to kill or to cause serious injury. That seems to suggests that, as a matter of legal consistency, an intention to kill, at least without more, should not be regarded as a "complete departure", or as being "entirely" or "fundamentally" different, from an intention to cause serious injury. In other words, given the definition of murder as established in *Cunningham* [1982] AC 566, it appears to me that it would be somewhat illogical if B could avoid liability for murder merely because he believed that A intended to cause really serious injury to V rather than to kill him.

83. Of course, as has been recognised in more than one case (for instance. by Lord Hutton in *Powell* [1999] 1 AC 1, 25F and by Lord Parker in *Morris* [1968] 2 QB 110, 120D), the criminal law cannot always be strictly logical: practicality and efficacy are also important. Nonetheless, the fact that a particular result is consistent with principle is plainly an important factor. Further, the result also appears consistent with the formulation of Lord Lane CJ in *R v Hyde* [1991] 1 QB 134, 139C-E, where he referred to B realising that A "may kill or intentionally inflict serious injury" (although the precise point at issue here was not there in contention or under consideration).

84. The result does not appear to me to be unfair to defendants in the position of B, at least in the normal run of cases. If, as in the present case, B joins with other parties in a violent attack which he appreciates involves one or more of those parties intending to cause serious injury to

V and V is killed, B is guilty of murder because, in a sense, he is to be treated as assuming the risk of liability for murder if V is killed. To put the point another way, in such a case, the law may be seen as effectively treating B as appreciating that V may be killed as a result of the attack. At least in the absence of special circumstances it appears to me that it reasonably follows that, if B foresees that A intends to cause V serious injury, he ought to appreciate that matters may escalate so that A may move from intending serious harm to V to intending to kill him. There is, in my view, nothing surprising or inappropriate that this eventuality should also be within the scope of the risk which B is deemed by the criminal law to accept by taking part in such an attack.

85. In a case such as the present, involving a concerted and relatively unplanned vicious attack., I consider that it would be unacceptable to most law-abiding people if B escaped conviction for murder, when he appreciated that A had a knife which would probably be used with a view to causing serious injury to V, purely because the jury thought it possible that, in the heat of the moment, A may have used the knife on V with the intention of killing, rather than seriously injuring, him. The essence of the matter is that B joined with A in attacking V with a view to causing V serious injury, and B knew that P had a knife for that purpose. It would seem unrealistic and over-indulgent to B, at least in the absence of other facts, if he were acquitted of murder on the ground that a jury concludes that he may have thought that A was bent on causing V serious injury (with the obvious risk of death) rather than killing him.

86. In my view, this conclusion also has the merit of simplicity and clarity, which is plainly desirable, both in itself and from the standpoint of a jury. Where A and B (often with others) have embarked on a joint enterprise of a criminal nature, the issues for the jury will often be demanding, in terms of number, complexity and inter-relationship, as is well demonstrated by the extract from the summing-up in this case, set out in para 18 of Lord Bingham's opinion. It would be unfortunate if juries in such trials also had routinely to consider precisely what B thought about A's intentions and precisely what A's intentions were at the time V was killed, and, if they differed, whether A's intention "completely departed" from what B had foreseen or intended. I agree with what Lord Bingham and Lord Brown say in this connection in para 25 and para 70 respectively.

87. Accordingly, in the absence of special factors, and subject to any good reason to the contrary, I consider that, even if the primary

perpetrator intended to kill the victim, an alleged accessory should not escape a murder conviction simply because he only foresaw or expected that the perpetrator intended to cause serious injury. The mere fact that the perpetrator intended to kill does not render his actions "entirely" or "fundamentally" different from what the alleged accessory foresaw or intended. It follows that, subject to any further arguments persuading me otherwise, I consider that Wakerley J's summing up in the present case cannot be impugned on this score.

88. Having reached that conclusion in principle, I now turn to consider whether, in the light of the cases to which your Lordships have been taken, there are or should be exceptions to this conclusion, and, indeed, whether such exceptions justify reconsidering that conclusion. The cases where B did not foresee or intend serious bodily harm to the victim can be put on one side: they are irrelevant for present purposes. As to the other cases, they establish one clear and significant class of exception to the conclusion I have reached, namely where the weapon used by A is different from and more lethal than any weapon whose use was foreseen by B. The obvious and leading example is *English* [1999] 1 AC 1, the facts of which have been examined by Lord Bingham and Lord Brown.

89. The fact that A uses a different and more lethal weapon to attack V from that foreseen by B is, as a matter of ordinary language and common sense capable of rendering the attack "entirely" or "fundamentally" differently from what was foreseen by B. Of course, it all depends on the facts of the particular case, and, at least normally, resolution of the issue would be appropriately left to the jury. But that is not inconsistent with the conclusion that the fact that A intended to kill, whereas B believed that he only intended to cause serious injury, cannot, without more, render A's attack "entirely" or "fundamentally" different from what was foreseen by B.

90. Unlike the issue in the present case, the issue in a case such as *English* [1999] 1 AC 1 does not cut across the definition of murder. Also unlike the issue in the present case, the issue in *English* [1999] 1 AC 1 requires consideration of the physical means of attack, not of the precise state of mind of A. In addition, it would, I think, rarely, if ever, lead to particular difficulties for juries if they had to decide whether the use of the weapon may have been unforeseen by B, and, if so, whether its use "completely departed", or was "entirely" or "fundamentally" different, from what he had foreseen. Nor, I think, would a verdict against B of

not guilty of murder, on appropriate facts in such a case, be thought to be inappropriate by most law-abiding citizens.

91. Greater difficulties arise, however, from the reasoning and decision in *R v Gamble and Others* [1989] NI 268 as discussed by Lord Hutton in *English* [1999] 1 AC 1, 28G – 30B. The facts of *Gamble* [1989] NI 268 are set out in para 14 of Lord Bingham's opinion. The victim in that case was killed by cutting his throat, whereas the two relevant defendants, Douglas and McKee, apparently foresaw, indeed intended, that he should be "kneecapped" and beaten. In those circumstances, the Judge sitting without a jury, Carswell J, held they were not guilty of murder.

92. At least at first sight, this decision can be justified on the classic ground that the primary perpetrators, Gamble and Boyd, "completely departed" from the actions foreseen and intended by Douglas and Mckee, because of the difference between the weapon actually used, a knife, and the weapons foreseen and intended, namely a gun and (presumably) fists. However, the actions foreseen and intended by Douglas and McKee plainly involved serious injury to the victim, and it is hard to say that a knife is more lethal than a gun. Indeed the two weapons were specifically equated in terms of potential lethalness by Lord Hutton in *English* [1999] 1 AC 1, 30F-G, and in the passage cited by Lord Brown from *R v Smith (Wesley)* [1963] 1 WLR 1200, 1206-7, it was, to my mind correctly, implied that by using "a loaded revolver" A could (not, I emphasise, would) render the murder of V "outside the scope of the concerted action", if B foresaw only the use of a knife. Accordingly, while the actual decision in *Gamble* [1989] NI 268 can be justified in theory, it seems to me to have been a rather generous outcome for Douglas and McKee on the facts

93. However, *Gamble* [1989] NI 268 was expressly said by Lord Hutton to have been rightly decided – see [1999] 1 AC 1, 29H. Although I am very doubtful about the point, it may just be that the difference in weapon can justify the acquittals in *Gamble* [1989] NI 268 because of the very limited and specific nature of the use of the gun foreseen by Douglas and McKee, namely to kneecap the victim. This analysis seems to me consistent with that proffered by Lord Rodger in paras 39 and 40 Having said that, it is only right to add that, despite its approval in *English* [1999] 1 AC 1, I share the strong reservations about the reasoning and outcome in *Gamble* [1989] NI 268 expressed by Lords Scott and Brown.

94. In that connection, I note that in *Morris* [1966] 2 QB 110, 120B-C, Lord Parker suggested that it would "revolt the conscience of people today" if A were convicted of manslaughter in circumstances where P "has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to [the] common design could suspect". That was an adverse comment on *Salisbury's case* (1553) 1 Plow 100. Insofar as it is relevant to the point at issue here, I think it goes no further than this: if B believed that he was accompanying A to assault V by "pistol whipping" him, and, to that end, A, to B's knowledge, had a gun, B may very well have a defence to murder if, unanticipated by him, A loaded the gun and shot V dead with it. B's case would be that he foresaw the use of the weapon, but as a bludgeon, not as a source of bullets. Although it may be a matter for the jury, I would have thought that, on such facts, there might be a strong case for saying that A had "completely departed" from what B had understood and foreseen. In truth, it would be an example of A using a different and more lethal weapon than that foreseen by B.

95. Beyond that, I do not consider that *Morris* [1966] 2 QB 110 assists in the present context, even though it was relied on by Lord Hutton in *English* [1999] 1 AC 1, 28E-F. First, Lord Parker's observations were made in connection with manslaughter, not murder: *Morris* [1966] 2 QB 110 was not a case where the defendant was said to have the *mens rea* appropriate for murder. Secondly, in the passage at [1966] 2 QB 110, 120B-C, where Lord Parker referred to A "us[ing] a weapon and act[ing] in a way which [B] could [not] suspect", the use of the conjunction "and" suggests that, if anything, a significant difference from the weapon foreseen by B was a necessary ingredient of the defence sought to be raised in the present case.

96. The contention that the acquittal of Douglas and McKee in *Gamble* [1989] NI 268 could be justified even if the victim had been killed by being shot in the head appears to have been left open by Lord Hutton in *English* [1999] 1 AC 1, 30A-B. However, it seems to me that if that were right, it would be hard to justify the conclusion I have reached. The contention could only be reconciled with my conclusion on the basis of the following argument. Where A and B had an expressly agreed and limited purpose (in *Gamble* [1989] NI 268, kneecapping), then a deviation by A, albeit with the contemplated weapon, from that purpose (in *Gamble* [1989] NI 268, shooting in the head) can be said to "depart completely", or to render the action "entirely" or "fundamentally" different, from what was foreseen or contemplated by B.

97. Having initially been attracted by that argument, I have reached the conclusion that it can and should be rejected. It can be rejected because, as I have mentioned, the point appears to have been left open in *English* [1999] 1 AC 1, having been described as "debatable" by Lord Hutton. It was unnecessary for it to be decided in that case, but I consider that it would be wrong not to face up to it in this case.

98. I turn to the reasons why the argument should be rejected. Where B joins with A in what he intends to be a kneecapping of V, he foresees, indeed intends, that V should be seriously injured with a gun. The "departure" he relies on is A's intention to kill with the gun combined with the fact that A aims at V's head rather than at his knees. On the face of it, that appears to be no more than a specific example of the type of case summarised in para 76, and not sensibly distinguishable from the facts as they are said to be by the appellants in the present case. Here, the jury must have found that the appellants foresaw that Tyrone Clarke would be attacked with a knife with the intention of seriously injuring him, and the alleged "departure" is said to be that the principal perpetrator intended to kill him, and that that is demonstrated by the nature of the wounds inflicted as described by Lord Bingham in para 3. Such reliance on the nature of the wounds appears to be no different in principle from the reliance on the shooting to the head rather than the knees in the kneecapping case.

99. The point of distinction is said to be that, in *Gamble* [1989] NI 268, what was foreseen by B resulted from an expressly agreed, specific and limited, if very violent, attack, whereas here there was no such express agreement. But all such an agreement does is to provide an outward justification or explanation for B's state of mind. It does not alter the facts that he foresaw A causing serious injury to V with a gun, and that A, intending to kill V, then did so with the gun.

100. To my mind, the conclusion that B is guilty of murder on facts such as those in this case and on facts such as those in *Gamble* [1989] NI 268 (on the assumption that V was killed by shooting him in the head) can be justified on the basis of policy and principle. As to the principle, I have already dealt with it: given that intention to cause serious injury is sufficient *mens rea* for murder, if B foresaw that serious injury will be caused to V by A using a particular weapon, he should not escape a murder conviction merely because A intended (or may have intended) to kill V when he attacked him with that very weapon.

101. As for policy, as already mentioned, it seems to me that the established principle is that, by embarking on a venture which he foresees involves A attacking V with a particular weapon with intent to injure him seriously, B is effectively treated as having accepted the risk of criminal responsibility for V's death as a result of A's attack on V with that weapon. If A remains motivated by an intention to cause V serious injury, B will be guilty of murder if A's attack unexpectedly or unintentionally leads to V's death, as a result of A's mistake, mischance, A's excessive violence, or V's unexpected vulnerability. In those circumstances, it seems far from illogical to conclude that B should be guilty of murder if V is killed as a result of A's intentions moving from causing V serious injury to killing V. Indeed, it appears to me to be a consistent and principled conclusion, as well as a practical one.

102. It does not seem to me that the cases to which your Lordships have been referred suggest that there is any other possible exception to, or difficulty with, the conclusion I have reached in principle over and above those I have discussed in paras 87 to 101. It is possible that the facts of a future case could give rise to a further arguable exception, (as was recognised in *Uddin* [1999] QB 431, 441B-D), namely a ground different from a change in the weapon which may justify a finding of "entire" or "fundamental" difference. If such a case arises, it will have to be dealt with on its merits, but, at least as at present advised, I cannot see how it would undermine the conclusion I have reached.

103. For the reasons I have tried to explain, in a case such as that summarised in para 76, B would normally be guilty of murder, in view of the decision in *Cunningham* [1982] AC 566 and of the law relating to accessories In other words, it appears to me that the conclusion I have reached flows from the fact that an intention to cause serious bodily injury is sufficient *mens rea* to found liability for murder, and from the fact that in cases such as these involving accessory liability, the touchstone is one of foresight, as Lord Bingham puts it in para 11. It is a matter for the legislature, not the courts, to decide whether to change this, or any other, aspect of the law relating to murder or accessories. As to the former, there is an impressive report from the Law Commission - Report 304, *Murder, Manslaughter and Infanticide* (2006) HC. 30.

104. Accordingly, I would dismiss these appeals and answer the certified questions in the negative. I should add that I agree with what Lord Brown says about the first question in para 63. While I agree with what Lord Bingham says in para 27 about directing juries and his

preference for the Judge's questions (subject to the small amendment) to those proffered by the Court of Appeal, I would respectfully endorse the restatement of the law proposed by Lord Brown in para 68.