10. CRIMINAL LAW

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Common intention

10.1 In the case of *PP v Lim Poh Lye* [2005] 2 SLR 130 (HC), [2005] 4 SLR 582 (CA), two respondents (Lim and Koh), together with a third man who is still at large, planned to abduct a second-hand car dealer and force him to sign cheques in their favour. The victim later died from various injuries inflicted on him, including a stab wound in the leg. The two respondents were charged with committing murder under s 302 read with s 34 of the Penal Code (Cap 224, 1985 Rev Ed). In this part, the court's application of the doctrine of common intention under s 34 is considered while the court's analysis of the murder provision in s 300 is considered below at paras 10.32–10.38.

10.2 The Court of Appeal accepted the trial judge's finding that the two knives which were brought along by the two respondents were meant to be used to frighten the victim into submission if he proved difficult (at [52]). Hence, killing the victim was not part of the original plan agreed to by the trio and there was no evidence that the respondent, Koh, had used a knife on the victim. In such a situation, the doctrine of common intention must be used in order to find Koh liable for murder as well. The trial judge found (at [18]) that:

> [T]he common intention of the trio was to rob [the victim], and to that end, the plan was to drug their victim, and threaten him with knives if it became necessary to do so. I am satisfied that there was no common intention to kill, and I would give the benefit of doubt to Lim that the gang did not have the common intention to use the knives for injuring [the victim], but merely to frighten him. It appears to me that the decision to stab [the victim] was formed by Lim on his own and not in concert with the others.

10.3 The Court of Appeal accepted the Prosecution's submission that the trial judge had misapplied the law on s 34. There was no need to show that the trio had agreed beforehand to stab the victim. All that was needed was proof that the stabbing of the victim was carried out in furtherance of a

common intention of the trio to rob the victim with knives. It was held (at [56]) that:

> [W]hat s 34 means is that where the actual crime committed is not what the participants had planned, then for the other participants to be vicariously liable for the act of the actual doer the actual offence must be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.

10.4 However, academic commentaries have shown that "consistency" between the actual offence and the common intention of the parties is an uncertain guide as to when a joint participant can be liable for an offence committed by another which is not part of their plan (see Michael Hor Yew Meng, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] Sing JLS 494). Some cases have suggested that the joint participant must have subjectively known that the other offence might be committed (*Syed Abdul Aziz v PP* [1993] 3 SLR 534; *Shaiful Edham bin Adam v PP* [1999] 2 SLR 57), while other cases have suggested that it is sufficient if the other offence is objectively consistent with the parties' common intention (*PP v Tan Lay Heong* [1996] 2 SLR 150; *PP v Too Yin Sheong* [1998] SGHC 286).

10.5 In this case, the Court of Appeal noted (at [59]) that:

> [T]he decisive question to ask in each case is what nature of criminal acts could be considered to have been committed in furtherance of the common intention. *Ratanlal & Dhirajlal's Law of Crimes* vol 1 … identifies three categories of such criminal acts, namely:
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> (a) acts directly intended by all the confederates;
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> (b) acts which the circumstances leave no doubt that they are to be taken as included in the common intention, although they are not directly intended by all the confederates; and
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> (c) acts which are committed by any of the confederates in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention.

This classification was also adopted by the Court of Appeal in the cases of *Too Yin Sheong v PP* [1999] 1 SLR 682 at [33] and *Shaiful Edham bin Adam v PP* (at [59]).

10.6 The inclusion of the third category suggests that criminal liability under s 34 can extend to acts which are not intended by a joint participant so

long as the acts are found to have objectively furthered their common intention. On the facts of this case, it was found that the situation could fall within either the second or the third category (at [60]):

> While it may well be that the knives were brought to frighten [the victim], it must have been within the contemplation of the trio to use them if [the victim] should turn out to be difficult which was, in fact, the case. In any event, we do not see how it could seriously be argued that using the knife to inflict physical injury … would not be in furtherance of the common intention to rob.

10.7 It is submitted that the court should have analysed the scope of liability under s 34 a little more. No attempt was made to explain its earlier decisions which have suggested that s 34 can only be used against a joint participant if he had subjectively known that the further offence might be committed. The extension of s 34 into the realm of objective foreseeability can also be argued to be contrary to the rejection of the felony-murder rule in the Penal Code and undercuts its abetment provisions (see Michael Hor, *supra* para 10.4).

Defences

Diminished responsibility

10.8 Three cases decided in 2005 have an important bearing on the scope of mental disorders as a defence to a criminal charge in Singapore. Two of these cases dealt with the defence of diminished responsibility and the third case touched on the relevance of mental disorders in general.

10.9 In the first case of *PP v Took Leng How* [2005] 4 SLR 472 (HC) and *Took Leng How v PP* [2006] 2 SLR 70 (CA), the accused was charged with the murder of an eight-year-old girl from China. When the defence was called, the accused put forward the defence of diminished responsibility based on his claim of schizophrenia at the time of the offence. The High Court (at [58]) as well as the Court of Appeal (at [46]) pointed out that in order to establish the defence of diminished responsibility, the accused must prove, on a balance of probabilities, that:

> (a) he was suffering from an abnormality of mind at the time he caused the victim's death;
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> (b) his abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes, or was induced by disease or injury; and

(c) his abnormality of mind substantially impaired his mental responsibility for his acts and omissions in causing the death.

10.10 The High Court pointed out (at [61], see also the Court of Appeal at [46]) that:

> The first and third elements of the defence are essentially questions of fact, to be decided by the court (trier of fact) with the assistance of medical evidence; the court is however not bound by the medical evidence. The court can rely on other non-medical evidence in coming to its conclusion. Only the second element concerning the cause of the abnormality of mind is to be determined in accordance with expert medical evidence. In deciding the issue of diminished responsibility, the court must examine the conduct of the accused before, at the time of, and after the killing. In considering all the evidence, the court is to adopt a broad common-sense approach.

10.11 This is a point well worth noting in view of the fact that expert witnesses often express an opinion as to whether the accused was suffering from an abnormality of mind and whether his mental responsibility for his acts was substantially impaired (see also Stanley Yeo Meng Heong, "Improving the Determination of Diminished Responsibility Cases" [1999] Sing JLS 27).

10.12 On the facts of this case, the High Court rejected the submission that the accused was suffering from schizophrenia or mental disorder of any kind. He was, therefore, found not to be suffering from an abnormality of mind at the time of the offence. Thus, there was no need to go further to enquire into the cause of the abnormality, and whether his mental responsibility was substantially impaired (at [71]).

10.13 The implicit link made by the High Court is that mental disorders such as schizophrenia do amount to an abnormality of the mind. However, this is not necessarily true as it will also depend on the *extent* of the mental disorder suffered at the time of the offence (see *Wong Mimi v PP* [1972–1974] SLR 73).

10.14 As argued by Stanley Yeo (*supra* para 10.11), a better approach is to firstly, establish if the accused was suffering from a mental disorder; and secondly, whether the alleged mental disorder was of such nature as to amount to an abnormality of mind as defined in *Regina v Byrne* [1960] 2 QB 396. This was the approach adopted by the Court of Appeal (at [47]):

> [L]imb (a) requires the court to be satisfied not only of the fact that the accused was suffering from a condition that a reasonable man would

> consider abnormal, but further that the abnormality was of such a degree as to impair the accused's cognitive functions or self-control. This latter requirement focuses on the "extent" of the alleged abnormality. It is necessary because a person who suffers some sort of malady that may be deemed as abnormal need not necessarily suffer from any impairment of his or her cognitive functions or ability of self-control. Limb (a) should never be deemed satisfied unless the extent of the purported abnormality is also established.

10.15 With respect to the accused, the Court of Appeal found that "[t]he absence of any mental symptoms prior to the offence and the lack of any disorganised or catatonic behaviour subsequent to the killing preclude any finding that the accused had lost the ability to control his physical acts" (at [58]). There was no dissent from the approach of the majority of the Court of Appeal with regards to the diminished responsibility defence or how it was applied in this case (see [111]).

10.16 The second case, *PP v Juminem* [2005] 4 SLR 536, would have been decided on a sounder basis if the points above were followed. In this case, two Indonesian maids were charged with the murder of the employer of one of them. Both of the accused admitted to the killing but relied on the defence of diminished responsibility, and the first accused relied, in addition, on the defence of grave and sudden provocation.

10.17 The psychiatrist called by the first accused gave evidence that she was suffering from "a Reactive Depression of quite moderate severity for about at least a month prior to the [offence]" (at [7]). This was supported by a letter she wrote to her parents and entries in a journal that she kept while working in Singapore. The psychiatrist called by the second accused gave evidence that she suffered from a depressive disorder "developed over months of enduring chronic traumatic stress characterized by scolding, slapping and denigrating remarks/insults" (at [18]). The Prosecution disputed the diagnosis. It was also pointed out that the murder was planned which showed that the two accused were not suffering from any mental disorders.

10.18 The trial judge accepted the Defence's submission that the first accused was suffering from "a psychiatric disorder of a depressive nature" (at [28]) and he proceeded to consider if her mental responsibility was substantially impaired. It is submitted that the decision would be much improved if the judge had identified the basis on which the "depressive disorder" amounted to an abnormality of mind and which of the specified causes it satisfied. From the judgment, it is not clear at all if it is the first

accused's cognitive functions or volitional control which were impaired so as to bring the case within the scope of "abnormality of mind" (at [32] and [33]):

> The medical evidence that was presented to me did not indicate that a person with depressive disorder would be incapable of thinking or functioning normally. A person with a depressive disorder does not have to be a person who is stark raving mad … In this case, I am of the view that loneliness, and the young age of the first accused, as well as the unfamiliar place and nature of work, troubled her mind, and magnified words and actions by other people such as her employer, to unrealistic proportions. And that ultimately caused her to form the decision to kill. … [A] depressive disorder is a mood disorder that affects the mood, and not the intellect or the motor skills of the afflicted person. It was the disaffected mood that drew the accused to a course of action that she would not otherwise have followed. I am persuaded that, due to the illness, the individuality, and circumstances of the accused, she was unable to distinguish or appreciate irrational urges (such as killing) from more rational ones (such as complaining to the maid agency). Some parts of her rational self were, in my view, distorted by the depressive disorder.
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> … It appeared that her mind, constantly disturbed by loneliness and despair, became fragile and overly sensitive to the comments and physical contact by [her employer]. … The evidence of her thought processes in the months preceding the offence showed that any introspection that she might have, revolved around negative thoughts. Thus, taking into account all the circumstances, I am of the view that the first accused suffered from an abnormality of mind, which substantially impaired her mental responsibility at the time of the crime.

10.19 On the one hand, it was said that the depressive disorder did not affect "the intellect or motor skills of the afflicted person", on the other hand, it was said that "she was unable to distinguish or appreciate irrational urges … from more rational ones" and that her "thought processes" were affected. Perhaps, all that was meant by the above statements – that the first accused was able to think normally or that her intellect was not affected – is that although she was able to cognitively perceive what she was doing, she, nevertheless, could not "form a rational judgment as to whether the act was right or wrong"; in which case it would come within the definition of an abnormality of mind as stated in *Regina v Byrne* (*supra* para 10.14).

10.20 With respect to the second accused, the trial judge found that she had "a propensity … to mental disorders due to stress" (at [37]). He added (*ibid*):

> On the whole of the evidence, I am satisfied that the second accused found herself incapable of coping with the change in environment between her home and her working place, and that failure to cope, in turn, became an increasing stress on her mental stability. Thus, on the balance, I find that the second accused was suffering from an abnormality of mind at the time of the offence. In her own circumstances, the second accused's ability to rationalise or will herself out of the crime was impaired by her youth, sedate personality, low intellectual capacity, and depressive illness. I am therefore satisfied that this abnormality of mind had substantially impaired her mental responsibility at the time of the offence.

10.21 The same comments above can be made of the judge's decision here. It is not clear in what way the second accused had satisfied the requirement of an abnormality of mind and which of the specified causes for the abnormality that her condition fell into.

10.22 With regards to the proof of diminished responsibility, the words of an Australian judge in *R v Whitworth* [1989] 1 Qd R 437 are well worth remembering (at 446–447):

> In this area [of diminished responsibility] we are dealing essentially with persons who have deliberately killed another human being. Prima facie he (or she) is guilty of murder. It does not become manslaughter merely because, in layman's terms, the killer cracked under environmental strains. It is far from satisfactory in my opinion to bridge the chasm by means of a conclusion … that the killer must have had an inherent weakness such as "vulnerability to stress" and that the loss of control must have been the result of a state of abnormality of mind arising from inherent causes. What is the difference between vulnerability to stress and lack of moral fortitude? …
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> There is little doubt that juries and judges alike look for a test that gives the defence to the harassed and the incapable, and denies it to the wicked and the callous.

10.23 But it does not mean that factors such as youth, sedate personality, low intellectual capacity and stress (broadly termed psycho-social factors) are not relevant. Although by themselves, they cannot amount to a condition of the mind, they can interact with or contribute to an abnormality of mind which can support the defence of diminished responsibility (see *R v Whitworth* and compare with the case of *Lim Chin Chong v PP* [1998] 2 SLR 794 where the defence was rejected). What is important is that there must be positive evidence of an abnormality of mind.

10.24 The third case, *Goh Lee Yin v PP* [2006] 1 SLR 530, is not a case on diminished responsibility *per se* but is yet another case concerning the limited nature of defences involving mental disorders under Singapore law. In this case, the appellant pleaded guilty to two charges of shoplifting and consented to four other charges of shoplifting to be taken into consideration for the purposes of sentencing. The appellant was originally sentenced to two and a half months' imprisonment but her appeal was allowed and her sentence varied to 24 months' supervised probation instead.

10.25 It was not in dispute that the appellant suffered from a form of mental disorder. Both psychiatrists called by the Prosecution as well as the Defence stated that she suffered from kleptomania, an impulse control disorder (her shoplifting habits, in fact, started since she was nine years old).

10.26 What distinguished this case from the others was that the appellant had exceptional support from her family and other caregivers who crafted an elaborate plan to ensure that she would take her daily medication and that there would always be someone to accompany her when she was out of her home. Thus, unlike the case of *Siauw Yin Hee v PP* [1995] 1 SLR 514 where the prospects of rehabilitation were dim, Yong Pung How CJ noted that "[a]s long as the appellant remained faithful in taking her daily dose of medication, her prognosis for complete recovery was positive" (at [51]).

10.27 In particular, the Chief Justice pointed out that the present sentencing options for those with mental disorders were too limited (at [53] and [59]–[61]):

> [I]t was clear to me that bundling the appellant off to prison, while an apparently convenient and instant panacea, was no solution to her problem. Incarceration would not serve to deter the appellant, whose offences were a manifestation of her mental affliction. It would instead exacerbate her condition and estrange her from the persons crucial to her rehabilitative progress. It would destroy the very last hope for her recovery.
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> …
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> [T]he courts are ill-equipped to deal with mentally afflicted offenders such as the appellant. The court was unfortunately saddled in this instance with having to choose between imprisonment and probation, neither of which represented a truly satisfactory or appropriate solution.
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> The appellant was singularly fortunate to have the kind of support she received. The sad truth is that, without the benefit of such support, the appellant could not even begin to perceive the possibility of probation. She would have been invariably sent to prison, despite the fact that

> incarceration was hardly a suitable punishment for someone of her mental constitution.
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> All offenders coming before the courts are dealt with within the confines of the law. If the courts are to properly adjudicate on cases where the offender suffers from some medical condition, the courts must be vested with the requisite sentencing discretion. Alternatively, it is to be greatly preferred if the Attorney-General's Chambers would, after proper verification, refer mentally ill or otherwise deficient offenders to the appropriate Ministry or government agency where such cases may be more fittingly administered.

10.28 It is certainly hoped that a thorough review of the scope of mental disorders as a defence to criminal liability as well as sentencing options available will be carried out by the authorities soon (see my earlier commentaries in (2001) 2 SAL Ann Rev 160 at para 10.34 and (2003) 4 SAL Ann Rev 178 at para 10.22).

Provocation

10.29 In the case of *PP v Juminem* (*supra* para 10.16), the first accused also relied on the defence of grave and sudden provocation under Exception 1 to s 300 of the Penal Code. The trial judge dismissed the defence on the following basis (at [4]):

> The test of whether an act [of provocation] was grave and sudden is an objective one and not based on whether the accused, no matter what her state of mind was, perceived it to be grave and sudden. The court can take into account the sensitivities of an accused person, and the special circumstances of his or her case, in determining whether the act was grave and sudden. In the circumstances of this case, I do not think that there was any grave or sudden provocation by [the victim]. If the accused had laboured under some mental distress or disorder that warped her sense of the nature of the act, then the appropriate defence would be one [of diminished responsibility] under Exception 7 [to s 300 of the Penal Code].

10.30 This case illustrates the confusion that can arise when the two defences of provocation and diminished responsibility are taken together. Both relate to the reduced capacity of the accused to control her actions in the circumstances of the case such that her moral culpability is significantly reduced. It is difficult to separate the different roles played by the two defences (provocation – a mix of excuse and justification; diminished responsibility – an excuse) since the state of mind of the accused (described here to be "fragile and overly sensitive" at [33]) is also relevant in deciding if the defence of grave and sudden provocation is made out.

10.31 It is submitted that it would be clearer if the trial judge had kept the two requirements in the so-called "objective" test of grave and sudden provocation separate. The characteristics of the accused, including mental infirmities and the emotional state of mind of the accused, can be taken into account in deciding on the gravity of the provocation; but only age, sex and ethnicity of the accused can be considered in assessing the level of self-control to be expected of an ordinary person in the situation (see *Lau Lee Peng v PP* [2000] 2 SLR 628 at [29] and [30]). In the latter part of the test, individual peculiarities or abnormal mental conditions which may affect the level of self control cannot be considered and, as the trial judge rightly held, are only relevant to the defence of diminished responsibility.

Specific offences

Murder

10.32 The case of *PP v Lim Poh Lye* (*supra* para 10.1) ("*Lim Poh Lye*") also examined the interpretation of s 300(*c*) of the Penal Code, an issue that has spawned several academic commentaries over the years. A proposal made in one of those commentaries (the "qualified subjective approach" by Victor V Ramraj, "Murder without an Intention to Kill" [2000] Sing JLS 560) has now been rejected by the Court of Appeal (at [47]).

10.33 In trying to prevent the victim from escaping, the two respondents inflicted various injuries on him, including a fatal one where the victim's left femoral vein in his leg was cut. The issue posed in this case is whether the respondents were liable for murder when the act of stabbing the victim was only intended by them to prevent him from escaping.

10.34 Section 300(*c*) of the Penal Code has the potential to extend liability for murder to cases where death is not intended or known to be probable. According to the 1958 Indian Supreme Court case of *Virsa Singh v State of Punjab* AIR 1958 SC 465 (at [12]), a case which has been consistently cited by the Singapore courts, the only subjective requirement on the part of the accused is that he intended "to inflict that particular bodily injury … that … was not accidental or unintentional, or that some other kind of injury was intended" which on an objective assessment is sufficient to cause death in the ordinary course of nature. In *Lim Poh Lye*, the trial judge held that s 300(*c*) would not apply in a case such as this where the injuries were "inflicted for a specific non-fatal purpose" (at [15]). In other words, the motive or purpose of the act is relevant in determining liability under s 300(*c*). He based this on a reading of the earlier case of *Tan Chee Hwee v PP* [1993] 2 SLR 657 which

involved two persons who strangled a maid to her death. In that case, the Court of Criminal Appeal held that the accused persons had only intended to stop the maid from screaming and struggling and not to "silence her forever", and their convictions for murder were therefore quashed. The trial judge, therefore, held that the accused persons in *Lim Poh Lye* similarly could not be convicted of murder.

10.35 The Court of Appeal disagreed. It was explained that as the accused persons in *Tan Chee Hwee v PP* had taken hold of a cord of an electrical iron to tie up the maid and not to strangle her, "[t]he resulting fatal neck injury was, therefore, not intentionally but accidentally or unintentionally caused" (at [34]). In *Lim Poh Lye* itself, the stab wounds to the legs were intended. It may be that the accused persons did not know that there was a major blood vessel running through the leg and therefore did not know the full gravity of the act, but this was of no consequence under s 300(*c*): "What is essential is that the particular injury which eventually caused death in the normal course of nature was inflicted by the accused intentionally and not accidentally" (at [37]).

10.36 On the other hand, if the accused had only intended to cause a "minor injury" which would not, in the normal course of nature, cause death; but in fact had caused a different injury which proved sufficient in the ordinary course of nature to cause death, then s 300(*c*) would not apply. Statements which appeared to put this principle in doubt in *Tan Joo Cheng v PP* [1992] 1 SLR 620 at 625, [18] and *Tan Cheow Bock v PP* [1991] SLR 293 at 301, [30] were clarified.

10.37 In a recent commentary on s 300(*c*) by Alan Tan Khee Jin, "Revisiting Section 300(*c*) Murder in Singapore" (2005) 17 SAcLJ 693, it was said (at paras 53 and 55):

> Ultimately, the crux of the problem lies not with the courts, but with the wording of s 300(*c*) itself. … Whatever interpretation we lend to it, the provision remains antithetical to the retributivist ideal that a man should never be convicted beyond what he is morally culpable for. If he intended an injury that appears serious to the rest of the world, though not to himself, his moral culpability should in principle not approximate that of accused persons charged under the more serious limbs of s 300 (which require intention to cause death or knowledge that death was [highly probable]).
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> …

> In the final analysis, the Court of Appeal's readiness … to reinstate the requirement for a serious intended injury appears to strike a balance between the wording of s 300(*c*) and the retributivist argument. In many ways, this is as good as it gets – the best possible compromise arising out of a provision that is inherently incompatible with its sister provisions in s 300, but yet does not appear to be a priority for legislative reform. Even then, the problem of inconsistent outcomes will persist, not least because of the practical difficulty in distinguishing between "relatively minor" intended injuries and fatal actual injuries, and between intended injuries and unrealised consequences.

10.38 When the Legislature does get round to remedying the problems, one rather simple solution proposed is raising the sentencing level of s 304A and thereby relieving the pressure on the Prosecution to bring borderline cases within s 300(*c*) of the Penal Code (Chan Wing Cheong, "What's Wrong with Section 300(c) Murder?" [2005] Sing JLS 462).

Abetment of an offence

10.39 The case of *S Balakrishnan v PP* [2005] 4 SLR 249 involved two appellants who were respectively the course commander and supervising officer of the 80th Combat Survival Training Course. As a result of dunking in a water tub practised in the course, one trainee died and another trainee suffered serious injuries. Both appellants were charged with causing the death of the first trainee by a rash act under s 304A of the Penal Code; and causing grievous hurt to the second trainee by doing a rash act as to endanger his life under s 338 of the Penal Code. In the case of the first appellant, the offences were alleged to have been committed by abetment by intentional aiding through illegal omission; and in the case of the second appellant, by abetment by instigation.

10.40 Although it was accepted that abetment by instigation must be proven by "active suggestion, support, stimulation or encouragement" of the offence (at [66]), it was also held that the second appellant's *failure* to intervene when he witnessed the conduct of the instructors in dunking the trainees and preventing them from catching their breaths, "was tantamount to his encouragement and support of the offences" (at [69]). There was some dispute at the trial as to whether the second appellant was present at the time when the water treatment was given to the two trainees, but it was admitted that he did observe the treatment given to other trainees. As such, it was held (at [73]) that:

> [The second appellant's] very presence that afternoon, coupled with his indifference to the sadistic treatment meted out to the trainees, signified

> (a) his intention that his instructions be carried out; and (b) his support and encouragement of the instructors' actions, which may well have stimulated them to greater heights. … [T]hese factors were more than sufficient for a finding of abetment by instigation.

10.41 Thus, omissions can sometimes be considered as positive acts of instigation – although on the facts, the omissions can no doubt qualify as "illegal omissions" such that the charge can be one of abetment by intentional aiding (which can be by acts or illegal omissions) as well.

10.42 The second appellant also sought to argue that he had fulfilled the duties incumbent upon him by telling the instructors "to dunk each trainee three or four times for not more than 20 seconds each time" (at [51]). Furthermore, the acts of the instructors in blocking the nostrils and mouths of the trainees to prevent them from catching their breaths and dunking the trainees more than four times were beyond the scope of his instructions such that he should not be held responsible for the results.

10.43 The court rejected these arguments. The expert evidence given was that even if the trainees were dunked according to the instructions and the nostrils and mouths were not blocked, the same harm was likely to result owing to the conditions in which the dunking was carried out where the trainees were bound, blindfolded, and in fear (at [77] and [78]). Furthermore, the second appellant did not tell the instructors to give the trainees time to recover their breaths after each dunking (at [82]).

10.44 In any case, the acts of blocking the victims' mouths and noses and refusing to allow them time to catch their breaths were a probable consequence of the second appellant's instructions and he was still liable for their acts under s 111 of the Penal Code as if he had directly abetted them (at [81]).

10.45 As for the requirement of rashness, it was found (at [101]) that:

> [The second appellant] was conscious of the danger inherent in the manner of dunking stipulated by him but still instructed his subordinates to carry on with the act in that particular manner. He may have believed that he had minimised or even averted the danger by setting down certain guidelines for the instructors, but his criminality lay in his running the risk of doing the act. His failure to supervise the water treatment, or to stop the instructors from going beyond the guidelines he set, exhibited a recklessness or indifference as to the consequences of the dunking.

10.46 It had been questioned in my earlier commentary whether persons who believed that the perceived danger had been eliminated by his actions should be considered as "rash" ((2002) 3 SAL Ann Rev 178 at para 10.27; see also Victor V Ramraj, "Criminal Negligence and the Standard of Care" [1999] Sing JLS 678 at 684–685). It is unfortunate that the court appeared to suggest in the passage quoted above at para 10.45, that rashness can be proved even if the second appellant believed that he had averted the danger. The last sentence in the quoted passage ("exhibited a recklessness or indifference …"), however, suggests that the court may not have accepted that the second appellant truly believed that the guidelines had averted the danger – in which case, he would still be subjectively aware of the danger and was, therefore, rash.

10.47 With respect to the first appellant, it was held that the requirements of abetment by illegal omission were "that the accused intentionally aided the commission of the offence by his non-interference, and that the omission involved a breach of legal obligation" (at [112]). The *mens rea* required for abetment by illegal omission is therefore an "intention [to aid] the doing of the thing" (at [113]). Thus, "mere presence at or near the water tub without [an] awareness that an offence was being committed would not in itself amount to abetment by aiding" (at [113]).

10.48 It was held that it can be inferred that the first appellant's failure to intervene showed an intention for the treatment given to the victims to continue. As for the argument that the use of the water tub had been approved by the first appellant's superiors, it was held (at [116]) that this:

> … did not detract from [the first appellant's] basic responsibility as a Course Commander, which was … to prevent training accident and injury, as well as to administer the discipline and general conduct of the instructors. His abysmal failure to exercise control of his instructors and to prevent the sadistic treatment meted out to the trainees could not be overlooked, let alone justified.

10.49 There was no difficulty in finding that the first appellant was rash since the evidence he relied on to show otherwise could not be supported or was insufficient (at [120] and [121]). The final ground of argument raised by the first appellant was that he was entitled to the defence of mistake under s 79 of the Penal Code. This argument was rejected as he could not prove that he was acting under a mistaken belief that his acts were justified by law (at [124]).

10.50 In *Hwa Lai Heng Ricky v PP* [2005] SGHC 195, the appellant, who was the assistant sales manager of Yamazaki Mazah Singapore Pte Ltd ("Yamazaki"), was charged with abetting two others by conspiracy to cheat the Development Bank of Singapore Ltd ("DBS") into disbursing money to Yamazaki. In late 2001 and early 2002, a company called Sin Yuh Industries Pte Ltd ("Sin Yuh") purchased 47 machines from Yamazaki and it applied for a loan from DBS where DBS agreed to finance 60% of the valuation or purchase price of 31 machines. A precondition before the loan would be disbursed was that Sin Yuh had to furnish satisfactory evidence to DBS that 40% of the purchase price of the 31 machines was paid to Yamazaki.

10.51 The two others involved were Roger Cheong Sing Whee ("Cheong"), the managing director of Sin Yuh; and Joyce Tia Hui Yee ("Joyce"), the finance manager of Sin Yuh. Even though Cheong knew that the precondition was not satisfied, he asked Joyce to seek such a letter from Yamazaki confirming that it had been met. Joyce e-mailed the request to the appellant, and the appellant prepared and signed a letter to DBS stating that the money had been paid.

10.52 The court noted the difficulty in proving a conspiracy since it was nothing more than an agreement to do the act. Such inferences of an agreement must be drawn from the surrounding circumstances and conduct of the parties. However, "[a]n inference of conspiracy would be justified only if it was inexorable and irresistible, and accounted for all the facts of the case" (at [33]).

10.53 On the facts of this case, the only evidence to support an alleged agreement was the appellant's knowledge that the 40% deposit had not been fully paid up by Sin Yuh and that Joyce's request to prepare the letter to DBS was accepted by the appellant. It was held that this did not inexorably lead to an inference that there was an agreement between the appellant, Joyce and Cheong to cheat DBS. Instead, it was held that the parties had independently intended to cheat DBS. In particular (at [35]):

> [T]o find that such separate intentions which coincide can constitute conspiracy is perhaps overextending the law and should be rejected. One can most certainly establish a conspiracy if there was an inference of an agreement, but a tacit (unspoken) agreement on its own is insufficient to constitute a conspiracy.

10.54 However, on the facts of the case, it was found that a charge of abetment by intentionally aiding would succeed since the appellant had "played an active role by supplying Joyce with the necessary supporting

document to *facilitate* the cheating scam" [emphasis in original] (at [36]). Hence, the original charge was amended and the appeal against conviction dismissed.

10.55 This case, as well as the earlier case of *Jimina Jacee d/o C D Athananasius v PP* [2000] 1 SLR 205, shows us that abetment by intentional aiding is far broader than abetment by instigation and abetment by conspiracy. A case which does not fall within the latter two can fall within the first type of abetment.

Corruption

10.56 *Ong Beng Leong v PP* [2005] 1 SLR 766 concerned a charge under s 6(*c*) of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) which reads:

> [I]f an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false … in any material particular, and which to his knowledge is intended to mislead the principal, he shall be guilty of an offence …

10.57 The appellant was the commanding officer of the SAF Training Resource Management Centre ("TRMC"). In breach of an SAF directive which required three quotations from independent contractors for maintenance work before it can be awarded, TRMC regularly allocated the work to a particular company which prepared two other forged quotations as well. The false quotations were handed over to TRMC which prepared and backdated the Approval of Requirements ("AORs") to conceal the fact that the prescribed procedures had not been followed. The appellant, during his tenure as the commanding officer, had signed several AORs and work orders relating to the maintenance works.

10.58 At the appeal, the appellant argued that the word "use" in s 6(*c*) should mean "submitted to a third party". Although it was accepted that the words "or other document" in s 6(*c*) referred only to other documents *inter partes* (following *Regina v Tweedie* [1984] QB 729), this did not mean that the word "use" should also be restricted to usage directed at a third party (at [34]):

> To my mind, there is no justification for limiting the word "use" in s 6(c) to situations in which the false documents were actually submitted to a third party. In the context of the provision, the plain and ordinary meaning of the word is clear: to employ to the purpose of misleading the principal. On

> the facts, the appellant and his staff had plainly "used" the false quotations to regularise the paperwork to disguise from the SAF their breach of SAF guidelines. The fact that the appellant was the final approving authority under [the directive] did not mean that the SAF would never be misled – the appellant was fully aware that the quotations could be subject to future inspections or audits.

In any case, the quotations were *inter partes* documents within the scope of s 6(*c*) since third parties (the sole proprietor and the secretary of the company) were actively involved in generating the false documents (at [36]).

Misuse of drugs

10.59 *PP v Mohd Halmi bin Hamid* [2005] 4 SLR 200 (HC) and *Mohd Halmi bin Hamid v PP* [2006] 1 SLR 548 (CA) involved three accused persons who were charged with offences under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed). The first and third accused persons were charged with abetting the second accused to traffic in diamorphine. At the end of the trial, the first and second accused persons were convicted of their respective charges but the third accused was acquitted in view of the unsatisfactory nature of the evidence against him. The first and second accused persons appealed against their convictions. The Court of Appeal dismissed the appeals and in the process, explained clearly the operation of the presumptions under ss 17 and 18 of the Misuse of Drugs Act.

10.60 It would be useful at this point to set out the relevant provisions of the Act:

> **17.** Any person who is proved to have had in his possession more than —
>
> [the stipulated amounts of various controlled drugs]
>
> … shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose.
>
> **18.**—(1) Any person who is proved to have had in his possession or custody or under his control —
>
> (*a*) anything containing a controlled drug;
>
> (*b*) the keys of anything containing a controlled drug;
>
> (*c*) the keys of any place or premises or any part thereof in which a controlled drug is found; or

(*d*) a document of title relating to a controlled drug or any other document intended for the delivery of a controlled drug,

shall, unless the contrary is proved, be presumed to have had that drug in his possession.

(2) Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug.

10.61 With respect to the second accused, there was no difficulty in proving that he was in possession of the diamorphine. He admitted that he had collected the bag from the first accused on the instructions of the third accused and that at the time, he suspected that what he had collected was indeed drugs. His act of transporting the drugs for delivery was clearly trafficking. Despite this rather straightforward scenario where neither ss 17 and 18 of the Misuse of Drugs Act were needed in convicting the second accused of the charge of trafficking, the learned trial judge, nevertheless, suggested in the course of his judgment that it is possible to apply the presumption in s 18(2) together with s 17 (at [34]):

> The presumption under s 17 cannot ride on the back of a presumption under s 18(1) because the s 17 presumption only arises when possession is *proved* and not when possession is presumed under s 18(1). However, the presumption under s 18(2) can apply together with a presumption under s 17. [emphasis in original]

10.62 This approach is clearly against earlier case law. The Court of Appeal was quick to reject the suggestion (at [7]• [9]):

> The presumption under s 17 … is a presumption in respect of trafficking; whereas, the presumptions under s 18 … are presumptions in respect of possession. …
>
> … It is contrary to the principles of statutory interpretation, and even more so, the interpretation of a criminal statute, especially one in which the death penalty is involved, to combine presumptions from two sections in an Act each serving a different function – in this case, shifting the burden of proof in one with regard to possession and the other, in regard to trafficking. Possession and trafficking are distinct offences under the Act, although possession may lead to the more serious charge of trafficking, while, trafficking itself might conceivably be committed without actual possession. …
>
> [I]t could not have been the Legislature's intention to have a crossover application of the presumptions under ss 17 and 18(2). Section 18(2) was a logical and direct complement to s 18(1); it is not an auxiliary provision to

> s 17. … If [the accused person] fails to rebut the s 18 presumptions he would be liable to a conviction for possession, unless an act of trafficking, as defined in s 2, is proved against him, in which event, he would be liable to a conviction for trafficking. If, a person is proved to know (as opposed to presumed to know) the nature of the drugs in his possession, then the presumption under s 17 applies and he would be liable to a conviction for trafficking even though he did not commit any act constituting the act of trafficking defined in s 2.

10.63 Interestingly, the Malaysian Federal Court was also struggling, at roughly the same time, with the issue as to whether the offence of trafficking in drugs can be proven by a double presumption in *Public Prosecutor v Tan Tatt Eek* [2005] 2 MLJ 685. It is submitted that the decision of the Singapore Court of Appeal and the Malaysian Federal Court in reading the respective provisions as strictly as possible – especially where a conviction leads to the mandatory death penalty – is the correct one to take.

10.64 The only real argument made by the second accused against the charge is that he was not instructed as to whom he was to hand the drugs. The Court of Appeal dismissed this argument when it was repeated at the appeal (at [6]):

> [The defence counsel] argued before us that there was no specific or named recipient because the second appellant was waiting for instructions as to who he should deliver the drugs to. … In the case of delivery [of drugs], all that is envisaged is that there was an intention to hand the drugs to another person, but there is no requirement that the recipient must be known or identified.

10.65 This approach is a sensible one to take and is in line with *Ong Ah Chuan v PP* [1980–1981] SLR 48. Transporting drugs from one place to another in order to transfer possession of it to another person, amounts to trafficking. There is no need to show who it is that the drug is to be given to. Otherwise, a drug pusher who intends to sell his drugs to potential (and therefore, unidentified) buyers will not be liable for drug trafficking.