Case Note

RECENT DEVELOPMENTS IN COMMON INTENTION

Lee Chez Kee v PP
[2008] 3 SLR 447

The Court of Appeal recently delivered an important judgment on liability for common intention. This criminal law doctrine has demanded clarification for some time, especially in regards to what is commonly known as "twin crime" situations, *ie*, situations where there is a *primary* criminal act as well as a *collateral* criminal act incidental to the main goal of the participants to the primary crime. In the "twin crime" situation, the participants would have intended to commit the primary criminal act but not all would have shared in the intention of one or more unidentified members of the group to also commit the collateral criminal act. This note considers if the court came to an appropriate conclusion on the law.

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I. Introduction

1 The law on criminal liability for common intention has long been contentious in Singapore,[1] even with many decades of judicial interpretation of the concept. The much-maligned s 34 of the of the Penal Code,[2] Singapore's statutory foundation for criminal liability for common intention, states:

> **34.** When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is

1 Professor Michael Hor, for instance, described the doctrine of common intention as "one of the most puzzling doctrines in criminal law today": see Michael Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" (1999) Sing JLS 494 at 494.

2 Cap 224, 1985 Rev Ed.

liable for that act in the same manner as if the act were done by him alone.

2 Liability for common intention under s 34 has often been invoked by the Prosecution for what is commonly known as "twin crime" situations, *ie*, situations where there is a *primary* crime as well as a *collateral* criminal act incidental to the main goal of the participants to the primary criminal act. In the "twin crime" situation, the participants would have intended to commit the primary criminal act but not all – those who may be described as "secondary offenders" – would have shared in the intention of one or more unidentified members of the group – those who may be described as "primary offenders" – to also commit the collateral criminal act. More often than not, twin crime situations that are prosecuted would be crimes of violence culminating in murder. In such cases, s 34 would affix liability on participants who claim to only have had the *mens rea* to the common initial violent crime (such as robbery) but not the ensuing murder. In cases where the evidence is inconclusive as to which member of a group inflicted the fatal wound, s 34 has been invoked as well. While a draconian interpretation of s 34 can be justified on the policy of deterring (and indeed punishing) group crimes of violence, as once opined, "it is certainly inequitable from the offender's point of view, if he has to be put in peril of a conviction of murder for participating in a crime without contemplating the possibility of a killing in the course of it".[3]

3 The Court of Appeal recently delivered an important judgment on s 34 in *Lee Chez Kee v PP*.[4] Although the judgment also accorded substantial treatment to the issue of the admissibility of statements pursuant to s 378(1)(*b*)(i) of the Criminal Procedure Code,[5] this note focuses solely on the subject of common intention. To that end, it considers whether the unhappy spectre over this area of criminal law has now been properly laid to rest. Before that, however, a summary of the facts and findings of *Lee Chez Kee v PP* is apposite.

II. Facts

4 On 14 December 1993, the police found the body of the deceased ("D") in his house which appeared to have been ransacked. D was found with a pillow over his face. His wrists were tied together

3 M Sornarajah, "Common Intention and Murder under the Penal Codes" (1995) Sing JLS 29 at 32.

4 [2008] 3 SLR 447. The judgment referred to is the leading judgment of V K Rajah JA. Although the other two judges who made up the Coram, Choo Han Teck J and Woo Bih Li J, delivered separate judgments, they concurred with Rajah JA's views on s 34.

5 Cap 68, 1985 Rev Ed.

with an electrical cord, and his feet bound by a belt. Another electrical cord was found across the front of his neck. A bent knife was found beneath his body, and a chopper was also found in the hall. In total, 18 external injuries (including stab wounds) were caused to D. The cause of death was asphyxia due to strangulation; the stab wounds were not acutely fatal. After the robbery, D's cash-on-line ("COL") card was used to make multiple bank withdrawals and purchases.

5 Three people were involved in the robbery-cum-murder: Too Yin Sheong, Ng Chek Siong and the appellant, Lee Chez Kee. Too and Ng were convicted in 1998. Too was convicted of murder, and Ng was convicted of robbery, theft and cheating, all with common intention. Lee was only arrested in 2006 and his trial proceeded without the oral testimonies of Too and Ng as the former had been sentenced to suffer death and had been executed and the latter had been repatriated.

6 Too had befriended D at a coffee shop some time in 1993. Their friendship grew. One day, Too accepted his invitation to visit his house. However, after D had showed Too the valuable antiques in his house, he started touching the latter's body and thighs. Too felt uneasy and left. He then met up with his friends, Ng and Lee, and they came up with a plan to rob D at his house. The original plan was to tie D up and threaten him with a knife. Ng, however, volunteered only to drive them to D's house.

7 On 12 December 1993, the trio carried out their plan. Too had called D on the pretext of wanting to introduce a friend to him. D agreed to meet them. Lee was extremely worried from the outset about being arrested after the robbery, given that D was seemingly well acquainted with Too. Lee even quarrelled with Too *en route* to D's house, but decided to carry on with the robbery nonetheless. Upon reaching the house, Too and Lee chatted with D over drinks. What happened after that was the subject of conflicting accounts.

8 Too said that when D chatted with Lee, he slipped into the kitchen and found himself a knife. When he returned, Lee brandished his knife. Too did likewise and they demanded information from D as to where they could get money. They took D to the second storey and tied him up in his room and ransacked the house. Before they left, Lee stabbed D. The knife did not penetrate well so he used a cord to strangle him. Lee only released his grip after D began frothing at the mouth. Too and Lee continued searching for valuables and, at some point, Lee hit D's head. Too and Lee then left the house.

9 Lee's account differed. According to him, while Lee was chatting with D, Too had taken a knife from the kitchen and passed it to him, whereupon he used it to threaten D. D struggled, and Lee stabbed his

abdominal region twice, but the knife did not penetrate successfully. He also rained a few blows on D. After that, Too and Lee led D upstairs to a bedroom. They tied him up. Lee ransacked the house while Too remained in the room. Lee eventually went downstairs, and on his way, he saw Too covering D's face with a pillow. Ng came into the house to search for more valuables before the trio escaped.

10 After the robbery, D's COL card was used to make multiple bank withdrawals and purchases. At no point after leaving D's house did Lee ask Too what happened to D or discuss with him what they would do if D freed himself.

III. The trial judge's views on liability under s 34

11 The Court of Appeal provided a succinct summary on the trial judge's views on liability for common intention under s 34 of the Penal Code:[6]

> 34 … First, the trial judge stated that the evidence, considered in its totality, gave rise to the irresistible inference that [D] had been murdered in furtherance of the common intention among Too, [Lee] and Ng to *commit robbery* … To begin with, the Prosecution had established beyond a reasonable doubt that [D] had died as a result of asphyxiation with the black cord and, further, that the event of strangulation had occurred in the course of the robbery committed on the material date.
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> 35 … The trial judge placed considerable emphasis on the events which had occurred *after* the robbery … Apart from [Lee's] own admission that he had shared in the spoils of the robbery, the trial judge accepted that the independent evidence adduced by the Prosecution also identified [Lee] as having been party to the subsequent usage of [D's] COL card …
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> 36 In the trial judge's view, this inference was also supported by the events which had taken place *before* the robbery …:
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> > On [Lee's] own admission, he was, prior to the robbery, afraid of being recognised … These fears were sufficiently compelling to cause [Lee] to get into a quarrel …
> >
> > … The complete lack of any discussion regarding what would happen when [D] was freed, coupled with the calm and calculated manner in which they went about repeatedly exploiting [D's] COL card … could only support the conclusion that [Lee] and his accomplices were not worried about being identified because they knew [D] was dead.

6 Cap 224, 1985 Rev Ed; *Lee Chez Kee v PP* [2008] 3 SLR 447 at [34]–[40].

> 37 … [The trial judge], however, did not yet find that [Lee] had *in fact* inflicted the fatal strangulation … [Lee's] evidence at trial that he had merely observed Too placing the pillow on [D's] face from a distance while he was going downstairs was clearly inconsistent with his prior evidence …
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> …
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> 39 … the trial judge stated that, in his view, it was not necessary to establish the identity of the person who actually strangled [D] as the requirements of s 34 were satisfied …
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> 40 … the trial judge also opined that *even if* one were to accept that it was Too, and not [Lee], who was solely responsible for [D's] death, the rest of the evidence showed that Too's conduct to this effect was in furtherance of their common intention to rob [D] …
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> [emphasis in original]

IV. The Court of Appeal's decision

12 The Court of Appeal dismissed Lee's appeal, but applied a markedly different interpretation of s 34 of the Penal Code,[7] with particular attention paid to "twin crime" situations.[8] It observed that there was little difficulty in relation to "single crime" situations, as in such situations, the parties to the enterprise would all share the common intention to commit the criminal act that was eventually perpetuated even though only one or more of them may have physically perpetuated the offence itself. Section 34 would clearly apply to render all the participants criminally liable if it could be established that the remaining participants participated in the criminal act. In contrast, in a "twin crime" situation, the participants would have intended to commit a primary criminal act but not all of the participants (*ie*, the secondary offenders) would not have shared in the intention of one or more unidentified members of the group (*ie*, the primary offenders) to also commit a collateral criminal act incidental to the main goal of the participants.

13 In postulating the correct interpretation of s 34, the court re-examined what it perceived to be the four elements for liability for common intention under s 34 to be established: (a) a criminal act; (b) participation in the doing of the act; (c) a common intention between the parties; and (d) an act done in furtherance of that common intention. Summarily, the following "restatements" on s 34 were made:

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7 Cap 224, 1985 Rev Ed.

8 The appeal was dismissed by a majority (Choo Han Teck J dissenting) although all three judges were *ad idem* on the interpretation of s 34.

(a) "Criminal act" refers to all the acts done by the persons involved which cumulatively result in the criminal offence in question. It does not only refer to the actual crime committed.[9]

(b) Presence at the scene of the criminal act, whether the situation is a single or twin crime situation, need not be strictly insisted on – the key is participation, but participation in the primary criminal act suffices for liability to fix.[10]

(c) To infer common intention, it must be shown that the criminal act was done pursuant to a pre-arranged plan, although it is possible to form a common intention just before the offence is committed. The circumstances that can lead to an inference of a common intention are non-exhaustive and cover both the antecedent and subsequent conduct of the parties.[11]

(d) The secondary offender must subjectively know that one in his party may likely commit the collateral offence in furtherance of the common intention of carrying out the primary offence.[12]

14 A preliminary point ought to be made at this juncture. Section 34, if constructed *literally*, may *not* arguably break down into the four elements as propounded by the court. However, on a closer perusal of s 34, the semantic differences cannot be said to be material.[13] The restatements on s 34 will now be considered *in seriatim*.

V. Dissecting the elements for liability under s 34

A. A criminal act

15 The first element concerns the question of what constitutes a "criminal act". The court emphasised that "criminal act" in this context does not refer solely to the actual offence committed; the term "offence" was distinguished from an "act" with reference made to s 40 of the Penal Code, which states that the former "denotes a thing made punishable by this Code".[14] Reference was also made to the Indian Penal Code (XLV of 1860) which stated that the expression "criminal act" encompasses the whole of the criminal enterprise in which the parties engage themselves

9 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [137].
10 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [146]–[147] and [157].
11 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [161].
12 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [253].
13 See also Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 35.14.
14 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [136].

by virtue of their common intention,[15] and *Barendra Kumar Ghosh v Emperor* ("*Barendra Kumar*") which stated that a "criminal act" refers to the "unity of criminal behaviour" that results in an outcome for which an individual would be punished if he had done it alone.[16]

16 The authors are of the opinion that the court rightly adopted the established view.[17] It is important to remember too that it is not necessary for the conduct of each party to the criminal act to be the same. The "criminal act" may consist of different acts, as would be the case for a gang rape where one person rapes the victim while the others keep watch, or housebreaking where some persons conduct the actual burglary and others act as lookouts. As stated pithily in *Barendra Kumar*:[18]

> It is impossible to conceive two individuals doing identically the same act. Such a thing is impossible. Therefore to have any meaning, the expression 'criminal act done by several persons' must contemplate an act which can be divided into parts each part being executed by a different person, the whole making up the criminal act which was the common intention of all. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all.

B. Participation in the criminal act

17 The second element is that the criminal act must be done by several persons. Two apparent propositions emerge. First, if the criminal act is done by one person, s 34 would not apply, even if it consists of a series of acts. Secondly, the criminal act must be "done" by the parties; *ie*, each party who is made liable under s 34 must have *participated* in the criminal act. It was rightly observed that the mere agreement between parties to commit a certain criminal act would not be enough for the purposes of s 34.[19] Instead, such persons may be committing criminal conspiracy, but they would not fall foul of s 34.[20]

18 The court then noted that past cases were divided on the issue of what constitutes participation.[21] Some cases have held that participation can be active or passive, and where participation is passive,

15 W W Chitaley & VB Bakhale, *The Indian Penal Code (XLV of 1860)* vol 1 (The All India Reporter Ltd, 3rd Ed, 1980) at p 160.
16 AIR 1925 PC 1 at 9.
17 See also Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 35.15.
18 *Emperor v Barendra Kumar Ghose* AIR 1924 Cal 257 at 312.
19 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [138].
20 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [138].
21 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [139].

mere presence suffices. Recent cases such as *PP v Gerardine Andrew*,[22] however, propagated the view that presence is the *only* possible indication of participation rather than only being *indicative* of participation.

19 After surveying the case law, the court held that presence at the scene of the criminal act should not be insisted upon, regardless of whether it is a single or "twin crime" situation.[23] The key issue is whether there was *participation*, not presence, and participation need not always be established by way of physical presence; whether there was participation should be a question of fact in each case as to whether the accused person had participated to such a degree that he could be deemed to be as blameworthy as the primary offender.[24]

20 In that connection, the court referred to the Malaysian Court of Appeal case of *Sabarudin bin Non v PP*, wherein it was said:[25]

> In our judgment, presence in every case is not necessary for s 34 to apply. In our judgment, s 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development.

21 It is undoubtedly true that modern science has reached the stage where assistance can be easily given to the perpetrating of an offence from afar. The old view, that presence is a requirement for finding participation, may lead to injustice in certain scenarios. There was a recent case where a person planned a robbery but engaged three persons to carry it out.[26] Express instructions were given to the three robbers to beat the deceased, a lorry driver for a delivery company, till he was unconscious. The deceased was eventually beaten with a baseball bat at the scene of the robbery. The planner met up with the three robbers shortly after the victim had been beaten to assist in transporting away some of the loot. While this was going on, the deceased lay dying in his lorry. The three robbers were charged with murder committed in the furtherance of a common intention. The planner, whose culpability may well be viewed as equally high, was charged with, *inter alia*, abetting armed robbery with hurt, and was sentenced to 15 years' imprisonment

22 [1998] 3 SLR 736.
23 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [147].
24 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [146].
25 [2005] 4 MLJ 37 at [31].
26 *PP v Daniel Vijay s/o Katherasan* [2008] SGHC 120.

and 24 strokes of the cane for that charge.[27] It can be safely assumed that one of the major reasons as to why the planner did not face a similar capital charge as the robbers was the fact that he was not present at the scene of the robbery. Now that presence explicitly need not be established for participation to be found, the requirement of participation may be met in cases similar to that of the planner; thus, the possibility of such travesties of justice occurring in the future may be ameliorated.

22 Having said that, caution should be exercised in drawing an inference of participation where there is no presence. The basis of liability for common intention includes the fact that accomplices assist the perpetration of the criminal act in question in no small way by giving the main perpetrator support and encouragement. In most cases, this would be where the accomplice was present at the scene of the criminal act. As stated in *Too Yin Sheong v PP*, "the *presence* of accomplices gives encouragement, support and protection to the person actually committing the act" [emphasis added].[28] Drawing from the foregoing, however, the threshold for a finding of participation where there is no presence should also be fixed to situations where there is encouragement, support or protection.

23 The court then opined that *PP v Gerardine Andrew*[29] wrongly decided that there was a need for participation in the collateral criminal act as well as in the primary criminal act.[30] It held that an insistence on participation in the collateral criminal act is likely to mean that the common intenders all intended the commission of the collateral criminal act in the first place.[31] Accordingly, participation in the primary criminal act would be sufficient for liability to be found.[32]

24 With respect, whether participation in a collateral criminal act is indicative of the common intenders having intended the commission of the collateral criminal act in the first place would depend on the facts or how wide participation is construed. If the secondary offenders joined the first perpetrator in stabbing a victim, then it is likely that they had intended the commission of the collateral criminal act from the outset. However, it is hard to see how a lookout for a robbery, who by his role can also be construed as participating in the collateral criminal act, can be said conclusively to have intended the commission of the collateral criminal act such as murder from the outset, without more.

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27 *PP v Arsan s/o Krishnasamy Govindarajoo* (Criminal Case No 16 of 2007).
28 [1999] 1 SLR 682 at [27].
29 [1998] 3 SLR 736.
30 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [157].
31 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [157].
32 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [157].

25 Notwithstanding that, there is no apparent reason to say that the court was wrong in its opinion that no participation in the collateral act is required. The wording of s 34 indicates that the participation required is participation in the "criminal act". If the established view is that a "criminal act" refers to all the acts done by the persons involved which cumulatively result in the criminal offence in question, it follows that participation in the primary act would be sufficient for there to be liability under s 34. In this regard, it must also be remembered that s 34 punishes a person for his participation in the "unity of criminal behaviour" rather than his participation in discrete acts.

C. Proving common intention

26 This element is fairly uncontroversial. It is apposite to begin with the court's prefatory statement:[33]

> Common intention refers to the common design of two or more persons acting together. It is the reason or object for doing the acts forming the criminal act. This is different from the intention to commit the *offence* which is the result of the criminal act committed. [emphasis in original]

27 The court examined the jurisprudential history and concluded that this aspect of s 34 was well settled. In the earlier days, to infer common intention, one had to prove that the criminal act was done pursuant to a pre-arranged plan.[34] As the cases developed, the view was that common intention could also be formed: (a) only a moment before the commission of the offence; (b) on the spot; or (c) during the course of the commission of the offence.[35]

28 The court noted, however, that in most situations, it is "virtually impossible to directly prove a pre-arranged plan between the parties".[36] While the usual circumstances that can lead to the inference of common intention are the (antecedent and subsequent) conduct of the parties, the weapons used and the nature of the wounds inflicted, these circumstances are non-exhaustive. The totality of the circumstances must be considered in determining whether there was a common intention.[37] At the same time, an inference of common intention should not be made unless it is "a necessary inference deducible from the circumstances of the case".[38]

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33 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [158].
34 *Mahbub Shah v Emperor* AIR (32) 1945 PC 118.
35 *Bashir v State* AIR (40) 1953 All 668 at [13].
36 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [161].
37 *Ram Tehal v State of UP* AIR 1972 SC 254 at 257.
38 *Mahbub Shah v Emperor* AIR (32) 1945 PC 118 at 121.

29 One point which the court did not touch upon though is the possibility of conflating *same* and/or *similar* intention with *common* intention. Eminent Indian publicists have written:[39]

> Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin, nevertheless, the distinction is real and substantial and if overlooked will result is miscarriage of justice. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must be pre-arrangement and premeditated concert.

30 A simple example of a situation where there may be same or similar intention but no common intention is where members of a mob come together with weapons. Each member of the mob may have the intention to kill, but none may have a common intention as required as there was no pre-arranged plan. In such an instance, "each is individually liable for the injury he … caused but he … cannot be held vicariously liable for the injuries inflicted by the acts of the others".[40]

D. Common intention in "twin crime" situations

31 The court identified two problems in the final element of s 34. It first noted that the issue of the mental state of the secondary offender in a "twin crime" situation has troubled courts in the past.[41] Locally, however, the position has remained rather stable. The second problem was identifying "when it can be said that the collateral offence is in furtherance of the common intention".[42]

32 Regarding liability for common intention in "twin crime" situations, the court observed that in the first important reported ruling in Singapore relating to liability for common intention, *Rex v Vincent Banka*,[43] it was held that "there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'".[44] Thus, in a robbery-murder situation, the common intention must not merely be to commit robbery, but murder as well. Not long after, it was decided in *Rex v Chhui Yi* that an accused can be liable for the murder committed

39 Justice Y V Chandrachud & V R Manohar, *Ratanlal & Dhirajlal's The Indian Penal Code* (Wadhwa and Company, 31st Ed, 2006) at p 134.

40 Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 35.21.

41 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [162].

42 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [175].

43 [1936] MLJ 53 at 56.

44 See also Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 35.26.

by his confederates even if he did not intend the consequences, provided that he possessed the requisite *mens rea* for murder.[45]

33 *Mimi Wong v PP*,[46] however, set a new precedent for years to come. Wong was a waitress who came to know a Japanese engineer, Watanabe, and they became intimate. Subsequently, Watanabe's wife arrived in Singapore. Two weeks later, she was stabbed and killed by Wong. Wong's husband assisted in this crime by throwing detergent in her eyes; it was his idea to throw the detergent. He was charged with having the common intention to murder. The Court of Appeal held that the common intention need not be the intention to commit the criminal act constituting the offence actually committed. Rather, as long as the intention of the primary offender was *consistent* with the common intention of the secondary offenders, all will be liable for the eventual criminal act committed.[47] The court provided the following illustration:[48]

> … if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying s 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of that common intention and as their 'criminal act', ie that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302. A is also guilty of murder.

34 The preponderance of cases thereafter followed the so-called wider interpretation of s 34 laid down in *Mimi Wong v PP*.[49] The court in *Lee Chez Kee v PP*, however, was cognisant that objections against *Mimi Wong v PP* have been raised by Professor Michael Hor in his writings. Specifically, he wrote that:

> (a) Sections 34 and 35[50] of the Penal Code must be read together. The latter provides that the common intender is only liable if he possessed "such knowledge or intention", thus contradicting *Mimi Wong v PP*.

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45 [1936] MLJ 142 at 144, *eg*, where a "secondary party knew that the act was imminently dangerous and would in all probability cause death".

46 [1972–1974] SLR 73.

47 [1972–1974] SLR 73 at [25].

48 [1972–1974] SLR 73 at [25].

49 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [175].

50 Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of the persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

(b) Sections 111[51] and 113[52] of the Penal Code, two provisions concerning abetment, are otiose if *Mimi Wong v PP* is correct. The existence of a common intention to commit a primary offence is at least abetment by conspiracy or intentional aiding. If the *mens rea* required to hold secondary offenders liable for the collateral offence is either negligence or recklessness, then this is also aptly covered by ss 111 and 113. If the *actus reus* required is participation in the collateral offence, then the abetment provisions will once again be satisfied since participation in the collateral offence must be abetment of the collateral offence.[53]

35 The court examined briefly the jurisprudence in India and Malaysia and concluded that neither jurisdiction yielded convincing accounts on this aspect of s 34.[54] It decided that it needed to delve into the historical underpinnings of s 34 to determine if Professor Hor's objections were valid. Its conclusion was that *Mimi Wong v PP* was correct, as justified by the following points:

(a) In Lord Macaulay's original draft Indian Penal Code, there was no equivalent of s 34 as it exists today but there was a clause very similar to the present s 35.[55] However, the illustrations to that clause demonstrated that there was *no contemplation* of a common intention. Accordingly, s 35 applies to a situation where there is no common intention.[56]

(b) In Lord Macaulay's final draft, the then s 34 did not contain the expression "in furtherance of the common intention of all". The expression was added much later, in consequence of

51 When a act is abetted and a different one is done, the abettor is liable for the act done, in the same manner, and to the same extent, as if he had directly abetted it: provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

52 When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner, and to the same extent, as if he had abetted the act with the intention of the causing that effect, provided he knew that the act abetted was likely to cause that effect.

53 Michael Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" (1999) Sing JLS 494 at 509.

54 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [182]–[187].

55 Wherever the causing of a certain effect with a certain intention, or with a knowledge of certain circumstances, is an offence, it is to be understood that if more persons than one jointly cause that effect, every one of them who has that intention, or that knowledge, commits that offence.

56 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [189]–[190] and [213]–[215].

either one or both of two Indian cases,[57] *The Queen v Gorachand Gope*[58] and *Ganesh Singh v Ram Raja*.[59]

(c) Before this expression was added, English and Indian law differed on liability for common intention. Under the latter, a person, even though not party to the evil intent of his companions, could be held liable for murder. The present s 34 was enacted (in 1870) to incorporate into the Penal Code the English law doctrine of common purpose.[60]

(d) Common purpose, as it stood in 1870, was confronted with various approaches: (i) objective foresight; (ii) subjective knowledge; and (iii) actual intention to hold the secondary offender liable in a twin crime situation. However, on a further inspection of Lord Macaulay's drafts, he clearly intended to impute only a subjective knowledge test to the Indian Penal Code for the doctrine of common purpose. Sections 111 and 113 should be read similarly to embody a subjective knowledge approach.[61]

(e) Although ss 34 and 35 are similarly worded, the historical underpinnings of s 34 mean that the better reading would be that s 35 applies to situations where there is no common intention. The words "in furtherance of the common intention of all" showed the intent of the Legislature to use s 34, rather than s 35, to give expression to the doctrine of common purpose in the Penal Code. Moreover, the predecessor to s 35 – cl 3 of the (draft) Indian Penal Code – clearly supports the argument that s 35 was intended to apply in the absence of a common intention.[62]

(f) Section 107(*b*) contemplates an abetment where the principal and the abettor are not clearly defined; when this is read with ss 111 and 113, a s 34 type of situation is seen. Therefore, there would be no injustice in interpreting s 34 as requiring no less than ss 111 and 113; both provisions give effect to the doctrine of common purpose.[63]

(g) The argument that s 34 should be reserved for intended consequences and the abetment provisions for unintended consequences is flatly contradicted by s 109 of the Penal Code. Section 109 covers the situation where there must be the

57 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [191]–[193].
58 (1866) Bengal LR Supp 443 at 456.
59 (1869) 3 Bengal LR 44 at 46.
60 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [194]–[195].
61 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [196]–[212].
62 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [213]–[215].
63 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [216]–[217].

> intention to commit the offence committed, *viz*, the *Rex v Vincent Banka*[64] situation. If the abetment provisions cover such a situation, it would not be correct to state that s 34 is reserved for such a situation.[65]

36 The court's counter-arguments are compelling but two further comments can be made. First, complicity by aiding and abetting are conceptually very distinct from complicity by joint enterprise. This much is true for many of the major Commonwealth jurisdictions.[66] Any interpretation of s 34 that renders it indistinguishable from aiding and abetting should therefore be avoided. Secondly, s 38[67] of the Penal Code could have been discussed by the court to provide valuable *dicta*, given that it is now clear that all the joint enterprise provisions are conceptually contiguous. Section 38 basically states that several persons engaged in the commission of a criminal act may be guilty of different offences – and be affixed with different grades of responsibility.[68] The question is what role does s 38 *now* play? It has been suggested before that ss 34 and 35 apply where the accomplice joins in the criminal act and has the *mens rea*, whereas s 38 applies (as a "backup" provision) where the accomplice does *not* have the same *mens rea*.[69] *Lee Chez Kee v PP* implicitly refutes this suggestion, but more could have been said.

E. In furtherance of the common intention

37 The remaining issue for the court to address was when it can be said that the collateral offence is *in furtherance* of the common intention:[70]

> [I]f the *mens rea* required of the secondary offenders is not that of the collateral offence, what is the additional *mens rea* that is required then, apart from the *mens rea* to commit the criminal act constituting the primary offence?

38 While it was clear that *Mimi Wong v PP* did not require secondary offenders to possess any of the *mens rea* for the collateral offence, the additional *mens rea* required *vis-à-vis* the likelihood of the collateral offence happening remained ambiguous. Academics have pointed out before that the idea that the collateral offence must be

64 [1936] MLJ 53.
65 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [218].
66 See A P Simester, "The Mental Element in Complicity" (2006) 122 LQR 578 at 594–598.
67 Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.
68 *PP v Lee Chin Guan* [1992] 1 SLR 320 at [45].
69 Gillian Douglas, "Joint Liability in the Penal Code" (1983) 25 Mal LR 259 at 262–263.
70 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [175].

"consistent" with the carrying out of the common intention of the parties was not very helpful.[71] Compounding this problem was that cases after *Mimi Wong v PP* took widely differing positions on the required *mens rea*. The following provides a sampling:

(a) *Shaiful Edham bin Adam v PP* took the "subjective foresight" approach, *viz*, the participants must have some knowledge that an act may be committed which is consistent with, or would be in furtherance of, the common intention.[72]

(b) *PP v Tan Lay Heong* held that the collateral crime must be something that was "either contemplated or done ordinarily in furtherance of a common intention" to commit the primary crime.[73]

(c) *PP v Too Yin Sheong* effectively adopted the strict liability approach, *viz*, "so long as the doer of the act had done the act in furtherance of the common intention of all of them, then the liability of that act automatically extends to the rest of the secondary offenders".[74]

(d) *Asogan Ramesh s/o Ramachandran v PP* took a purely strict liability approach.[75]

39 Ultimately, the court held that the *mens rea* required of the secondary offender is that he must subjectively know that one in his party *may likely* commit the criminal act constituting the collateral offence in furtherance of the common intention of carrying out the primary offence; there is no need to have known of the actual method of execution in a murder situation.[76] This approach would be consistent with the UK[77] and Australian[78] approach, as well as the current judicial interpretation[79] of the common object provision in the Penal Code (s 149).[80]

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71 *Eg*, Yeo, Morgan & Chan, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2007) at para 35.38.

72 [1999] 2 SLR 57 at [57].

73 [1996] 2 SLR 150 at [46].

74 [1998] SGHC 286 at [119]–[121] and [132].

75 [1998] 1 SLR 286 at [35].

76 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [236]–[253].

77 *Eg*, *Regina v Powell* [1999] 1 AC 1 at 27. The UK position was recently restated and reaffirmed by the House of Lords in *R v Rahman* [2009] 1 AC 129.

78 *Eg*, *Clayton v R* (2006) 231 ALR 500.

79 *PP v Fazely bin Rahmat* [2003] 2 SLR 184.

80 If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of committing of that offence is a member of the same assembly, is guilty of that offence.

40 The foundations upon which this restatement of the law is built are difficult to assail. Indeed, as the court said,[81] "by forming a joint enterprise, the accessory perpetrates an independent and discrete wrong, and the collusion justifies the extension of liability of the principal's crime on the accessory for what is said to be a reduced *mens rea* of subjective knowledge".[82] Indeed, it is submitted that the imposition of the requirement of subjective knowledge would allow for the perception that the secondary offender is being held liable for *recklessness*. The secondary offender who subjectively knows that one in his party may likely commit the criminal act constituting the collateral offence can be interpreted as having turned a blind eye to the obvious. This is akin to recklessness, which has been described as "the deliberate acceptance of a risk actually foreseen".[83] In this respect, it has been said that, in general, no accused should be convicted "for any act or omission or for bringing about any prohibited state of affairs unless he is morally blameworthy".[84] Moral blameworthiness can be conceptualised to be a state of mind of the accused as opposed to the state of mind of the reasonable man.[85] There are two states of mind which can be said to be morally blameworthy. These would be intention and recklessness.[86] The approach taken by the court *vis-à-vis* the *mens rea* required of the secondary offender would therefore allow the morally guilty to be punished, rather than to merely impose legal guilt.

41 To round up this analysis, one statement which was quoted earlier is referred to, *viz*, "it is certainly inequitable from the offender's point of view, if he has to be put in peril of a conviction of murder for participating in a crime without contemplating the possibility of a killing in the course of it".[87] On the court's express imposition of the requirement that the secondary offender subjectively knows that one in his party may likely commit the criminal act constituting the collateral offence, the fears of such inequitable convictions should be put to rest. Only the morally guilty, *viz*, those who are guilty according to their state of mind, will be convicted from henceforth.

VI. Conclusion

42 *Lee Chez Kee v PP* is a welcome decision with its thoroughness and logic in its analyses. Further questions will surely be asked in due

81 *Lee Chez Kee v PP* [2008] 3 SLR 447 at [250].
82 Citing A P Simester, "The Mental Element in Complicity" (2006) 122 LQR 578 at 599.
83 G H Gordon, "Subjective and Objective Mens Rea" (1974–1975) 17 CLQ 355 at 355.
84 G H Gordon, "Subjective and Objective Mens Rea" (1974–1975) 17 CLQ 355 at 355.
85 G H Gordon, "Subjective and Objective Mens Rea" (1974–1975) 17 CLQ 355 at 355.
86 G H Gordon, "Subjective and Objective Mens Rea" (1974–1975) 17 CLQ 355 at 355.
87 M Sornarajah, "Common Intention and Murder under the Penal Codes" (1995) Sing JLS 29 at 32.

course,[88] but *Lee Chez Kee v PP* has largely disambiguated the proper interpretation of s 34 – an interpretation that arguably strikes the right balance in ascertaining individual criminal responsibility in group crimes.

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88 Further guidance by the Court of Appeal on how s 34 applies in relation to murder under s 300(*c*) of the Penal Code Cap 224, 1985 Rev Ed may be in the offing, as appeals have been filed against the High Court decisions of *PP v Daniel Vijay s/o Katherasan* [2008] SGHC 120 and *PP v Ismil bin Kadar* [2009] SGHC 84.