JOINT LIABILITY IN THE PENAL CODE

SECTION 34 of the Penal Code[1] has proved remarkably complicated and difficult for courts having to consider whether an accomplice should be held liable for an offence actually perpetrated by another. It will be suggested here that the problems experienced in interpreting this section could have been avoided from the very inception of the Code, and that the current position is still unsatisfactory, notwithstanding attempts by the courts to settle the issue of interpretation. In the first part of this article, an outline of the background history of section 34 will be given, and it will be argued that the section was intended to be read in conjunction with the succeeding provisions set out in sections 35 to 38, rather than to stand by itself. An alternative construction of these sections will be offered in the light of this argument. In the second part, some consideration of the treatment the sections have actually received from the courts will be given. In the final part, the analysis offered will be compared with the current state of the law, in order to arrive at a conclusion as to what future interpretation should be placed on these provisions, and what reform of the law may be necessary.

I. HISTORY OF SECTION 34

The section provides:

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

The section is presumably designed to cover two situations. First, where the actual perpetrator cannot be distinguished from a group of persons who engaged in a criminal act; and secondly, where an accomplice has participated in the activity but has not himself committed the actus reus of the offence charged.

As originally drafted, the phrase "in furtherance of the common intention of all" was not included in the section. It was felt that without such a clause, the section was too wide, in that it would impose liability on an accomplice who was unaware of the real intentions of his fellows, and would thus be at variance with English law.[2] The provision in the Indian Penal Code was accordingly amended in 1870,[3] and in its amended form, was part of the Penal Code governing the Straits Settlements from the time that that Code came into force in 1872. It has often been remarked that far from clearing up the difficulties involved in section 34, the amendment added considerably to them. A large body of case-law has developed on the section which, it will be argued, was unnecessary.

1 Cap. 103 Singapore Statutes (1970 Revised Edition).
2 See Gour *Penal Law of India* 10th ed. Vol. I, p. 263 (1982).
3 Act XXVII of 1870.

Was the original draft too wide?

One may criticise the anxiety felt over the original section on two grounds. First, it is quite possible that the Code was intended to differ from English law on the issue of joint liability, just as it differs in many other respects. Secondly, it is contended that the Code itself contained a limitation on the ambit of section 34, by virtue of section 35. This section is still in the Code, and provides that:

> 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 such 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.

The Indian Law Commission has pointed out that this section "is complementary to the main rule in section 34, and the two have to be read together.. ."[4] Balasubrahmanyam has raised the question "whether section 34 has *necessarily* got to be read with section 35 or can be applied independently"[5] but gives no answer. Judges and most commentators do not seem to take the view that it has, and have largely ignored section 35.

It is submitted that just as one must consider a number of sections to determine whether, for example, the offence of voluntarily causing grievous hurt is made out,[6] so one should take into account sections 35 and 38 (and also, if applicable, sections 36 and 37) as well as section 34, before convicting an accomplice on the basis of joint liability. The suggested construction would be as follows.

Construction of the Provisions

(i) *Sections 34 and 35*

Section 34 as originally drafted would have provided for the *actus reus,* if one may call it that, of joint liability, since it dealt with the doing of the criminal act. It would certainly appear to be too wide in isolation. However, section 35 could be said to provide the *mens rea* element of the rule, by stipulating that where a criminal act requires a particular knowledge or intention in order to attract criminal liability, each accomplice must be proved to have had such knowledge or intention before being held liable.[7] Where the criminal act may be done negligently, and no knowledge or intention need be proved, then section 35 would not apply, and liability would attach simply by virtue of section 34. Such a construction would bring the Code broadly into line with English law, which would be consistent with what has been assumed to have been the draftsman's intention. Also, the reference to knowledge as well as intention would fit the circumstances of much group participation in crime, where it may be difficult to prove that an accomplice had the same intention as the perpetrator, but much easier to show that he did have knowledge of the likely events.

[4] Report No. 42, Vol. I, para. 2.64 (1971).
[5] "Group Liability" in *Essays on the Indian Penal Code* Indian Law Institute, pp. 94-106 at p. 100 (1962).
[6] Sections 319, 320, 322, 325, 335.
[7] Khundkar I. in *Ibra Akanda* v. *Emperor* A.I.R. 1944 Cal. 339, 362 adopts a similar view.

While section 34 is not expressly stated to be read subject to section 35, the similarity of language and of structure of the two sections certainly admits of the possibility of the construction being suggested here. V.B. Raju[8] points out that the marginal note to section 35 states: "When *such* an act is criminal by reason of its being done with a criminal knowledge or intention."[9]

The only act to which this can refer is the criminal act outlined in section 34. Of course, one cannot put much emphasis on the marginal note as an aid to construction, though it perhaps may help to tip the balance further in favour of a particular interpretation. Rather, it is suggested that without the interpretation offered here, it is hard to see when section 35 could operate, and it must surely have been drafted with some purpose in mind. Gour[10] suggests that section 34:

> is limited to offences which are independent of intention or knowledge, that is, those in which intention or knowledge is presumed, while... [section 35] is limited to those in which intention or knowledge cannot be presumed but must be expressly proved.

It is submitted that this view should not be supported. Gour apparently accepts that section 34 is applicable to cases of murder, for example, but murder is an offence where intention or knowledge must be proved by the prosecution and is not presumed.[11]

One argument against the suggested interpretation is that in section 35, the act is stated to be criminal *"only* by reason of its being done with a criminal knowledge or intention." It could be argued that an act may be criminal by reason of a particular circumstance or consequence *as well as* by reason of a particular knowledge or intention, in which case section 35 would not apply and section 34 would stand by itself. However, it is submitted that, for most offences under the Code, what makes an act criminal is the existence of the requisite knowledge or intention. For example, under the Code, even if not under the common law at the time when the Code was drafted, a killing is not culpable homicide *unless* it is done with the knowledge or intention specified in section 299. Acts may be *unlawful* independently of knowledge or intention, but not, it is suggested, criminal, except in the instance where the Code itself makes an offence one of negligence.[12]

(ii) *Section 38*

> Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by names of that act.

[8] *Commentaries on the Indian Penal Code* 3rd ed. Vol. I, p. 155 (1965).
[9] Emphasis added.
[10] *Op. cit.,* p. 345.
[11] See, for example, *Yeo Ah Seng* v. *P.P.* [1967] 1 M.L.J. 231. (Federal Court).
[12] As to whether it is possible to have strict liability offences in Singapore, in view of the General Exceptions in the Code, see Mckillop "Strict Liability Offences in Singapore and Malaysia", 9 Mal. L.R. 118. If it is possible, then section 35 would not apply and liability would be imposed by section 34 alone. If it is not possible, then section 35 should apply.

It may be noted that section 38, like sections 34 and 35, uses the term "criminal act", and it is convenient to deal with this section before considering sections 36 and 37.

The illustration to the section demonstrates that where a perpetrator would have a limited defence, such as provocation, to a charge of murder, the accomplice who has no such defence may be convicted of murder even though the former is convicted of culpable homicile only. The question arises as to whether this section applies to section 34, or whether all accomplices liable by virtue of that section must be held guilty of the same offence. While the Indian Law Commission saw no difficulty in the working of section 38, it seems that different courts and commentators do take different views on this question.[13]

Various arguments may be put forward to suggest that section 38 *does* apply to section 34 read with section 35.[14] First, it has been noted that this section refers to a "criminal act," just as section 34 does, suggesting that the similarity of working was intended to point out a connection between the two sections. Secondly, section 34 provides that each accomplice is liable for the criminal act "in the same manner as if the act were done by him alone." This may imply that if the accused had acted alone and would have had a particular *mens rea* or partial defence, he should be dealt with on the same basis when acting in concert. Thirdly, the illustration to section 38 seems to raise circumstances which would fit within section 34, for the two accused both do the criminal act and both have *mens rea* (which, on the suggested interpretation, is required by virtue of section 35).

On the other hand, it may be argued that section 38 is intended to apply when the requirements of sections 34 and 35 are not satisfied, that is, when the accomplice does *not* have the same knowledge or intention as the perpetrator and so cannot be convicted of the same offence.[15] This view would seem to do less violence to the argument that section 35 is intended to qualify section 34 and result in conviction for the offence actually committed, only of those with the *mens rea* for that offence, It would also seem to fit with judicial practice, which has certainly operated on the basis that use of section 34 results in conviction for the same offence. It may be that the working of section 34, stating that the accused is liable "in the same manner as if the act were done by him alone," simply explains that the accomplice is to be treated as if he were a perpetrator and not in some other way. This view also has the merit of making the scheme of the sections coherent. Sections 34 and 35 apply where the accomplice joins in the criminal act and has *mens rea.* Section 38 applies where he joins in but does *not* have the same *mens rea.*

There are two difficulties with this view. First, the illustration to section 38 may be taken as a case where *both* parties have the same *mens rea,* so that surely sections 34 and 35 should operate? However, the illustration may have been based on the assumption current in the nineteenth century, that an accused who has a limited defence such

[13] See Balasubrahmanyam *op. cit.,* p. 95.
[14] See the view of Lodge J. in *Ibra Akanda* v. *Emperor, supra* n. 7, at pp. 341 *et. seq.*
[15] See *Sultan* v. *Emperor* A.I.R. 1931 Lah. 749 where it was stated that section 38 is the *converse* of section 34.

as provocation, must *necessarily* have lacked *mens rea* for murder. This is not in fact invariably so. Yet, the application of section 38 to such a situation makes good sense for there is no reason why we should allow the more blameworthy accomplice to escape liability for the *mens rea which he actually had* — the *mens rea* for murder — whereas there is a reason, in order to do justice, to allow a less blameworthy accomplice to avoid liability for *mens rea* which he lacked. Secondly, it could be argued that if sections 34 and 35 require that each accomplice has *mens rea* for the actual offence committed, then the ambit of section 34 is unduly narrowed. It will be shown later that this has been a concern of the courts in their interpretation of section 34. However, it is submitted that so long as one remembers that section 38 is available as a back-up if liability under sections 34 and 35 cannot be sustained, there is no problem.

This interpretation may also help to settle an issue concerning the defence of diminished responsibility under Exception 7 to section 300. It has been argued that it is doubtful whether an accomplice who *abets* a perpetrator suffering from diminished responsibility, could be convicted of murder while the perpetrator is convicted of culpable homicide, because the wording of section 109 would seem to exclude this possibility.[16] However, the same restriction does not arise in relation to section 38, so that if the accomplice actually engages or is concerned in the commission of the criminal act, he could be convicted of murder even though the perpetrator could rely on diminished responsibility. Is it possible to arrive at different results simply depending on whether the accomplice participates in the criminal act or only abets it? The answer would be yes in English law, which distinguishes between the liability of an aider and abettor (participant in the criminal act) and an accessary before the fact (abettor under the Code) holding that the former can be convicted of a higher offence than the perpetrator, while the latter cannot.[17] It would be a shame if the Code perpetuated such an illogical and undesirable distinction, and it is submitted that it need not be interpreted as doing so. Section 110 provides that:

> Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

In other words, the abettor may be punished according to his own *mens rea,* just as in section 38 which is the corresponding section governing participants. Of course, as was pointed out in relation to section 38, a limited defence does not necessarily mean that the accused lacks *mens rea.* The language of section 110 is not as wide as that of section 38, but it could be applied in *some* cases of diminished responsibility or some other limited defence, to help obviate this problem.

[16] Brown "Diminished Responsibility" 3 Mal. L.R. 331, 334. The English Homicide Act 1957 expressly provides for it in section 2(4).
[17] See Smith and Hogan *Criminal Law* 5th ed. pp. 139-140 (1983). *R* v. *Richards* [1974] Q.B. 776.

(iii) *Sections 36 and 37*

> Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.
>
> When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of these acts, either singly or jointly with any other person, commits that offence.

Gour suggests[18] that section 36 would have been better placed after section 32 as an explanation to that section which provides that words which refer to acts extend also to illegal omissions. One may certainly agree that sections 36 and 37 do break up the scheme of the provisions contained in sections 34, 35 and 38. However, it is suggested that these two sections deal with a particular type of participation in crime, and section 36 acts as a preliminary to section 37. It indicates that an offence produced by means of an act *and* an omission is the same offence. The illustration deals with the situation where only one person produces the result. Section 37 then covers the position where *several* persons are involved in producing the offence, that is, they all actually perform part of the *actus reus* over a period of time and consisting of several acts (or omissions).

It could be argued that section 37 may apply to sections 34 and 35, and that it adds the requirement of intentional co-operation to those of participation and *mens rea.* This would lead ironically to the conclusion that section 37 itself supplies a "common intention" requirement to section 34. However, this would involve reading "offence" to mean the same thing as "criminal act," and it seems unlikely that the draftsman would have used a different word to mean the same thing when he then went on to revert, in section 38, to the phrase used in sections 34 and 35. The better view would seem to be that this provision covers a different situation from those within section 34. Under section 34, the accomplice's participation is not in the commission of the *actus reus* itself. In section 37, the accomplice must participate in the *actus reus.* The requirement of intentional co-operation may be present in order to rule out the possibility of an innocent agent being held liable.[19]

Gour[20] suggests that where two persons jointly attack another, one of them battering the victim's skull with a stick, while the other hurls a stone at his head, fracturing the skull, both are liable for the principal offence under section 37. It is submitted that this is only so if both injuries together caused the death; that is, that the murder or culpable homicide has been committed by several acts. If, however, it was the injury inflicted with the stick which caused the death, the fractured skull being a non-contributory factor, then the liability of the second attacker would derive from sections 34 and 35 or 38, and not from section 37, for the *offence* would have been committed by the first attacker only.

[18] *Op.cit.,* p. 348.
[19] The corresponding situation in abetment is covered by section 108, Explanation 3.
[20] *Op.cit.,* p. 351.

It might be objected that the effect of the construction suggested here of sections 34 to 38, is to impose not joint, but individual liability. However, since sections 34, 35 and 38 operate where the accomplice cannot be proved to have committed the *actus reus* himself, they in fact provide a device whereby he can be *deemed* to have committed the *actus reus* and be held liable. His liability is "joint" in that it derives from his participation with others in the criminal enterprise. It is "individual" only insofar as it varies according to his own *mens rea* and the availability of any partial defences. The scheme might seem unduly complicated, but this is one of the consequences of having to spell out the law in a Code rather than relying on implicit rules in case-law.

II. THE COURTS' INTERPRETATION OF SECTION 34[21]

It is now necessary to consider how the courts have interpreted section 34, with the inclusion, of course, of the all-important phrase "in furtherance of the common intention of all." As was pointed out earlier, the courts have experienced much difficulty in this exercise.

of "criminal act," the meaning of "common intention," and the related issue of whether the common intention must be to commit the crime actually committed or whether it could embrace some other, or wider objective.

(i) *"Criminal Act"*

The issue which has arisen is whether these words are a synonym for *actus reus* or for something else. The difficulty is that if they stand for *actus reus,* then the section requires that the *actus reus* be done by all of the accused. This situation is catered for by section 37 if the *actus reus* consists of several acts, and by the substantive law if it consists of one act, for all the accused are perpetrators anyway. The Privy Council pointed this out and settled dispute on the matter in *Barendra Kumar Ghosh* v. *The King-Emperor*[22] where they held that the words mean: "that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."[23]

The two situations for which section 34 is no doubt designed are accordingly covered. If it is impossible to prove which accused inflicted the fatal injury, then the unity of behaviour — the participation of all in the attack — enables all to be held liable. If the accused was definitely only an accomplice and not the perpetrator, yet his participation contributed to the result and he is accordingly liable for it, for "in crimes as in other things 'they also serve who only stand and wait.' "[24]

(ii) *"Common Intention"*

The Privy Council in *Mahbub Shah* v. *Emperor*[25] cast some light on the meaning of this phrase, holding that it: "implies a pre-arranged

[21] See Myint Soe "Some Aspects of Common Intention in the Penal Code of Singapore and West Malaysia" 14 Mal. L.R. 163-178.
[22] A.I.R. 1925 P.C. 1.
[23] At p. 9.
[24] At p. 6.
[25] A.I.R. 1945 P.C. 118.

plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."[26]

While the Judicial Committee noted that such a requirement might create difficulties of proof, they seemed to brush these aside. In later cases, Indian judges have sought to cope with them by holding that: "there is nothing in the section which requires that pre-arranged plan must come into existence before the acts are done and that it cannot come into existence whilst the acts are being committed... ,"[27] They have also held that there need not be "confabulation, discussion and agreement in writing or by word."[28] Consensus as to the criminal enterprise however remains a requirement of section 34, whereas in English law, consensus is not required if the participation in the criminal act takes the form of aiding.[29] Under the Code, in a case of aiding without a (prior) agreement, the accused could only be convicted if he came within the abetment provisions of sections 109 or 114.[30]

(iii) *Common Intention to Do What?*

The final difficulty in section 34 lies in determining if the common intention must have been to do the criminal act done, or something else. If the intention must be to do the criminal act, then an accomplice may argue that he did not intend or desire the consequence, and therefore is not liable for it, even if he knew it was likely. This narrow view of the section was taken in *R.* v. *Vincent Banka & Anor.,*[31] but is clearly provides an easy let-out for defendants and has been rejected in Singapore in recent cases.[32] Notably, in *Mind Wong & Anor.* v. *Public Prosecutor,*[33] the Court of Criminal Appeal said:

> If the nature of the offence [constituted by the criminal act] depends on a particular intention the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then section 34 applies to make the others vicariously or collectively liable for the same offence. The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless 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."[34]

[26] At p. 120.
[27] *Oswal Danji* v. *The State* A.I.R. 1961 Guj. 16, 18.
[28] *Bashir* v. *The State* (1953) Cr. LJ. 1505.
[29] See Smith and Hogan *op.cit.,* p. 123.
[30] He need not have been charged under these provisions, Criminal Procedure Code, Cap. 113 Singapore Statutes (1970 Revised Edition) s. 173.
[31] [1936] M.L.J. 66.
[32] Gour *op. cit.,* p. 297 still takes this view however, and the Indian authorities are conflicting.
[33] [1972] 2 M.L.J. 75. The court seems to have been influenced by *Bashir (supra* n. 28) though it does not refer to that decision.
[34] At p. 79F-G.

It is submitted that this statement raises certain problems. First, what is the position where it is not possible to prove which of several actors was the perpetrator? The Court says that it is the "intention of the actual doer" which determines the offence committed, but how does the Court know what this intention was if it cannot identify the doer? The Court seems to be ruling out the possibility of presuming an intention based on the "lowest common denominator" of all the actors. This would anyway come close to equating the intention required for the offence with the "common intention" which the Court clearly rejected. This problem did not arise in *Mimi Wong* where the evidence showed which of the accused was the perpetrator. It is submitted that the difficulty of proving which accused was the perpetrator justifies the argument presented above, that the court must consider the knowledge or intention of the *accomplice* under section 35 before holding him liable under section 34. It is precisely because the mens rea of the perpetrator may be unknown, that it is necessary to have regard to the *mens rea* of the accomplice.

Secondly, the Court implies that an act which is inconsistent with the common intention cannot be in furtherance of it. This need not be so. Suppose that two men plan to steal jewels from a house. While one opens the safe, the other keeps a look-out. He sees the householder coming to investigate the noise, and hits him on the head with a chair to avoid detection. As a result, the two make a successful getaway with the jewels. The householder dies. The safecracker argues that the plan worked out beforehand was that the lookout would simply warn him that someone was coming so that he could hide, and that no violence had ever been suggested. While perhaps not *consistent* with the common intention, the attack undoubtedly *furthered* its achievement.

Clearly, the Court was not envisaging liability based on such "objective" furtherance of the common intention, and it is submitted that the Court should accordingly be understood to have meant that the act must be both consistent with *and* in furtherance of the common intention. Certainly, other courts seem to have assumed that both requirements must be fulfilled. For example, in *Public Prosecutor* v. *Neoh Bean Chye,*[36] while the trial judges cited that case with approval, they seem to have been concerned, in their review of the evidence, to be satisfied that both accused knew of the likelihood of the victim of the robbery being shot. Their judgment was upheld on appeal.

III. Reconciling the Current Position With the Suggested Interpretation

It remains to consider what the position concerning section 34 would be, in the light of the accepted views of the courts and of the interpretation which has been offered here.

It would seem that if this interpretation is correct, then the courts have an extra burden to cope with, since they must be satisfied not only that the criminal act was in furtherance of the common intention, but also that the accomplice had the knowledge or intention required

[35] See Smith and Hogan *op.cit.,* p. 133 and cases cited therein.

[36] [1975] 1 M.L.J. 3. Also see *Lee Kok Eng* v. *P.P.;* [1976] 1 M.L.J. 125 (Federal Court). For earlier cases, see Myint Soe *op.cit.,* pp. 173-174.

for the offence committed. While the Privy Council decisions on the meaning of "criminal act" and "common intention" would remain binding, it is less certain that *Mind Wong* could be reconciled with this approach.

The Court of Criminal Appeal stated that it is not necessary to prove the *intention* required for the offence, of the accomplice, but only that of the perpetrator. Section 35, however, requires that intention *or knowledge* on the part of the accomplice be proved. It is probable that on the facts of *MM Wong* the knowledge or intention of the accomplice would have satisfied section 300 anyway, so that section 35 would have been satisfied. The example given by the Court to illustrate its dictum *may* also be consistent with the argument presented here, in that it postulates the accomplice intending to cause injury to the victim with a knife, and *knowledge* of the likelihood of death in such a case could be inferred. The requirement that the criminal act must be consistent with the common intention, also implies that the knowledge of the accomplice, at least, must be proved. It is submitted that this narrow view is preferable to the possibly wider ambit of the dictum, and is then consistent with section 35.

It is possible that the decision which comes closest to the practical result of following the suggested interpretation, is that of *R.* v. *Chhui* Yi.[37] There, the Court of Appeal of the Straits Settlements held that, in a case of murder, for example, there need not have been:

> a common intention actually to kill, but there must have been a common intention to do any of the acts which are described in sections 299 and 300 of the Penal Code and the doing of which, if death results, amounts to murder.[38]

Here, of course, the court was not relying on section 35, but its construction of "common intention" would produce the same result where the plan was to do the act actually committed, for then each accomplice would have the knowledge or intention required for the offence. Where the plan was to do something else, then the common intention would, of course, have to be proved as well as the knowledge or intention for the offence. If the latter requirement is not satisfied, the accomplice may be convicted under section 38 instead.

Is the Suggested Interpretation Acceptable on Policy Grounds?

It is necessary to consider whether the argument presented here is acceptable from a policy stand point. We have seen that the approach taken in *Vincent Banka* was too narrow, in that it may be difficult to prove that the accomplice had an actual intention to commit the crime in issue. It is also illogical to insist upon proof of such intention on the part of the accomplice, when a lesser *mens rea* would satisfy conviction of the perpetrator. The suggested construction avoids this problem, since it does not require proof of intention but is satisfied by proof of knowledge, which may be generally easier to satisfy. The argument of accomplices that they never intended the result is therefore sidestepped. Even if the requirement of knowledge cannot be satisfied, section 38 is available as a back-up, and the accomplice is

[37] [1936] M.L.J. 177.
[38] At p. 180.

convicted according to his own *mens rea,* (and any limited defence he may have) be it of a higher or lesser offence than the perpetrator.

We have also seen that the judgment in *Mimi Wong* may be too wide, if it is indeed unnecessary to prove either intention or knowledge on the part of the accomplice. This would raise the same anxiety as was felt in relation to the original section 34. Use of section 35 obviates this anxiety, for it requires proof of knowledge, at least, before the accomplice may be convicted of the offence and we have seen that it is possible to interpret *Mimi Wong* as being in line with such a requirement. However, it would still be necessary for the prosecution to prove the existence of the "common intention" in addition, thus placing an extra difficulty in their way. It is unlikely that the courts would be willing to require this of them, as it is probably felt that section 34 raises enough problems without adding another.

Reform

There are three options available to improve the unsatisfactory situation we have at present. First, there could be a thorough reform of the whole subject of participation in crime, producing a complete revision of the relevant parts of the Code. This is perhaps rather unrealistic. When the Indian Law Commission examined the entire Indian Penal Code, they suggested few major adjustments, seemingly satisfied that the courts had sorted out most of the difficulties of interpretation. They did, in fact, suggest a re-wording of section 34 but with no substantive change, and they recommended no changes with respect to sections 35 and 38.[39]

The other options are either to repeal section 35, which seems to serve no practical purpose at the moment anyway, or to restore section 34 to its original state by deleting the phrase which has caused so much trouble. That phrase probably comes from the English law on "common purpose" which has largely dropped from sight nowadays. R.J. Buxton[40] has characterised this doctrine as artificial and unnecessary, preferring instead reliance on knowledge or belief as to the details of the particular crime. Experience with section 34 shows that "common intention" has indeed produced artificial and unnecessary refinements in the case-law. It would be best, in the author's view, to drop it from the section, for a return to the original draft used in conjunction with section 35 would meet the demands of both practicality and justice.

An argument against deletion would perhaps be that the section would then overlap further with sections 109 and 114 (abetment) and section 149 (common purpose in unlawful assembly). It would overlap further with the former, because it would cover accomplices who aid the perpetrator even though there is no agreement between them to render such assistance. It would overlap further with the latter because, like section 149, liability could be imposed on the basis of knowledge rather than intention. However, these provisions address

[39] *Supra,* n. 4, paras. 2.61-2.66. Their revised section 34 would read as follows: Where two or more persons, with a common intention to commit a criminal act, do any acts in furtherance of such common intention, each of them is liable for the criminal act done as if it were done by him alone.

[40] "Complicity in the Criminal Code" 85 L.Q.R. 252.

different circumstances from those envisaged in section 34. The primary purpose of the abetment provisions is to impose liability for acts done prior to the committing of an offence, which section 34 does not cover. Section 149 requires that the accused be a member of an unlawful assembly as defined in section 141, hence it clearly differs from section 34. It is true that it has frequently been employed as an alternative to using section 34, but it is submitted that this was not, in all probability, the intention of the draftsman, and it has been done in desperation over the complexities of section 34. If that section were amended and construed in the way suggested, it would not be necessary to resort to the device of section 149.

CONCLUSION

It has been argued that the difficulties associated with section 34 might have been avoided by the simple act of reading the succeeding sections, rather than ignoring them. Failure to do so has brought the burden of having to wrestle with the requirement of proving a "common intention". The interpretation offered in this article adds another burden, and is therefore unlikely to prove acceptable. In order to remedy the situation, it is submitted that the troublesome phrase should be deleted, and the required limits on section 34 be found by relying on sections 35 and 38.

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