

## PENAL CODE: SECTION 34 AND PARTICIPATION

### P.P. v. *Tan Joo Cheng*<sup>1</sup>

THE decision in P.P. v. *Tan Joo Cheng* raises the interesting question as to what participation is required to bring an accused within the operation of section 34 of the Penal Code (the "Code")<sup>2</sup> which reads:

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.

Must a "section 34 accused" be present at the scene of the crime? And, must his participation be related to "the act constituting the offence" charged?

The three accused Tan Joo Cheng ("Joo Cheng"), Ong Ah **Lek** ("Ah Lek") and **Luah Kang Hai** ("**Kang Hai**") were charged with the murder of one Lee Juay Heng ("Lee") under section 302<sup>3</sup> read with section 34 of the Code. Thean J., delivering the judgment of the High Court, held Joo Cheng guilty of murder. However, his Honour held that the prosecution had failed to make out a case of murder against Ah Lek who then pleaded guilty to an amended charge of attempted robbery. The Court also held Kang Hai not guilty of murder but guilty of a lesser charge of attempted armed robbery.

It will be submitted that, on the evidence as accepted by the Court, both Ah Lek and Kang Hai should have been equally liable for murder (together with Joo Cheng) under section 302 read with section 34.

### *Position of Ong Ah Lek*

It was Ah Lek who master-minded the plan to rob Lee with Joo Cheng, Kang Hai and himself. According to the plan, Joo Cheng and Kang Hai were to confront Lee. Ah Lek procured a knife, which he handed to Joo Cheng, and a rope, which he handed to Kang Hai. He also rented a car

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<sup>1</sup> [1991] 1 M.L.J. 196.

<sup>2</sup> Cap. 224, 1985 Rev. Ed.

<sup>3</sup> "Whoever commits murder shall be punished with death." The accused were charged under s. 300(c) of the Code which reads: "... culpable homicide is murder - if it is done with

for the purpose of the robbery. Ah Lek was also to drive Joo Cheng and Kang Hai to the place where Lee lived and to wait for them in the car in order to drive them away after the robbery.

The Court accepted that the plan was for Kang Hai to go with Joo Cheng to confront Lee and hold him up. Joo Cheng was to use a knife for the hold up of Lee. Kang Hai was to use a rope to tie Lee up after the latter had been relieved of his cash and other possessions.

The Court also accepted the evidence that Joo Cheng confronted Lee with a knife just outside Lee's apartment, a struggle ensued, and Joo Cheng stabbed Lee at the base of his neck and the vein was cut. In consequence, Lee suffered a massive haemorrhage from which he died. The Court held that the wound so inflicted was intentional within the meaning of section 300(c) of the Code.

After Joo Cheng had stabbed Lee, he rushed to the car where Ah Lek was waiting and together they sped off. Kang Hai missed them as they drove off in haste.

Counsel for Ah Lek submitted that the prosecution had proved only that there was a plan by the three accused to commit robbery but that it had failed to prove the common intention to cause bodily injury to Lee. Counsel submitted that the event that led to the death of the victim did not show that there was a deliberate act on the part of the accused to cause any bodily injury to Lee; he relied on the evidence of a struggle between Joo Cheng and Lee in the course of which the latter was fatally stabbed.

On the evidence regarding the planned robbery as accepted by the Court, it was unfortunate that it held that the prosecution had not made out a case of murder by Ah Lek under section 302 read with section 34. The charge was amended to one of attempted robbery punishable under section 393 read with sections 397 and 34 of the Code (see *infra*, for comments).

It is not entirely clear why the Court reached this conclusion. It would appear that the Court was of the view that Ah Lek was not "acting in concert" within the ambit of section 34. Was the Court of this view because he was not at the scene of the actual killing but was waiting in the car by the roadside (see its findings on Kang Hai, *infra*)? Lee was killed outside his flat, which was on the second storey of Block 241, Hougang Street 22, #02-45, Singapore. The Court seems to have required as participation under section 34 that an accused must *be present* and participating, whether actively or *passively*.<sup>4</sup> The Court made this clear in respect of determining the liability of Kang Hai (see *infra*).

It is significant that Ah Lek *knew*, when he planned the robbery, that the knife which he handed to Joo Cheng would be used, if necessary, to

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the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; ..."

<sup>4</sup> *Supra*, note 1, at 202.

overcome any resistance to the planned robbery. Hence, it could be said that the killing of Lee by Joo Cheng was done *infurtherance of the common intention* of all the accused to rob Lee. His participation included not only procuring a knife and a rope, but also renting a car and being the "driver" to carry out the plan. As for his waiting in the car, Lord Summer in the Privy Council case of *Barendra Kumar Ghosh v. Emperor*,<sup>5</sup> which turned on section 34 of the Indian Penal Code (which is *inpan materia* with section 34 of the Code), said: "Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'."<sup>6</sup>

In that case, one of the accused was outside the room (where the deceased, the postmaster, was killed) on the doorstep in the court-yard. He did not fire at the deceased. It was the other three accused who fired at the postmaster. He was, nevertheless, held guilty of murder under section 302 by virtue of section 34 of the Indian Penal Code.

In the instant case, Ah Lek not only waited but had done much else besides: He had earlier identified the victim to Joo Cheng and Kang Hai and had actively participated by his various acts from the time he master-minded the planned robbery to his waiting in the car, ready to make away with the other accused. He did in fact drive off with Joo Cheng after the latter had killed Lee. He acted in concert in relation to the common intention to rob and the killing was done in furtherance of the common intention. He was indeed the directing mind.<sup>7</sup>

The Court said: "... we have no doubt that the proposal to commit robbery on Lee came from Ah Lek."<sup>8</sup> Having said that, and having regard to the above role played by Ah Lek, it is submitted that Ah Lek should have been held guilty of murder under section 302 read with section 34 of the Code.

### *Position of Luah Kang Hai*

As mentioned earlier, Joo Cheng stabbed Lee at the base of his neck when he resisted Joo Cheng. Lee died of a massive haemorrhage from the wound. The evidence was that when Joo Cheng confronted Lee with the knife and struggled with him, Kang Hai was at or near the landing staircase of the second floor, some distance away from them. (It will be recalled that Lee was stabbed outside his flat which was on the second storey of a block of flats.)

<sup>5</sup> A.I.R. 1925 P.C. 1.

<sup>6</sup> *Ibid.*, at 6.

<sup>7</sup> See *Chan Chun Lim & Anor v. P.P.* [1956] M.L.J. 34. See also *P.P. v. Neoh Bean Chye & Anor.* [1975] 1 M.L.J. 3, where the "section 34 accused" (the first appellant) had handed the loaded gun to the second appellant *before* they entered the bar to rob the proprietor. It was planned that the proprietor would be held up at gun point. See *infra*.

<sup>8</sup> *Supra*, note 1, at 201.

The Court accepted the following evidence:

- **Kang** Hai knew Joo Cheng carried a knife. He himself had a rope. Joo Cheng and he would confront and hold up Lee, Joo Cheng with the knife, and he with the rope.
- The knife was intended to be used by Joo Cheng to intimidate Lee, and, if Lee resisted, to counter and overcome **resistance**.<sup>9</sup>

However, having made these inferences, the Court came to the startling conclusion that:

But the fact remains that at the time when Lee was held up and confronted, Kang Hai *was not present* nor was he there at the time when the struggle took place when Lee was injured by Joo Cheng. There was *no participation* by him in any form - active or passive - in the holding up of Lee, the struggle with Lee and the stabbing of Lee. A person sought to be made liable by s. 34 must in some manner participate - whether actively or passively - *in the act constituting the offence*.<sup>10</sup>

The sort of participation required to bring an accused within the ambit of section 34, as envisaged by the Court, is some participation in the "act constituting the offence" - in the instant case, the actual killing itself. This would then appear to require the accused to be present (*i.e.*, "face to face") at the killing. Thus, the Court distinguished the instant case from the facts of two previous decisions of the (Singapore) Court of Criminal Appeal, *viz.*, *Mimi Wong & Anor. v. P.P.*<sup>11</sup> and *P.P. v. Neoh Bean Chye & Anor.*<sup>12</sup> In both these cases the accused, who were jointly liable by virtue of section 34 read with section 302, had actively participated in the respective killings.

In *Mimi Wong*, Mimi had asked her estranged husband, Sim Woh Kum, to assist her in the killing of one Mrs. Watanabe, who was stabbed by Mimi in her neck and in the abdomen, and died as a result of shock and haemorrhage from two of the stab wounds. Both Mimi and Sim were charged with and convicted of her murder. So far as the participation (under section 34) of Sim was concerned, the High Court and, on appeal, the Court of Criminal Appeal, held that Sim had brought a Glucolin tin containing detergent and had asked Mimi to lure the deceased to the bathroom on the pretext of inspecting the broken wash basin. He threw the detergent into the eyes of the deceased at the moment when Mimi was about to stab her.

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<sup>9</sup> *Ibid.*, at 202.

<sup>10</sup> *Ibid.* Emphasis added.

<sup>11</sup> [1972] 2 M.L.J. 75.

<sup>12</sup> [1975] 1 M.L.J. 3.

*Mimi Wong* is no doubt a clear-cut case where section 34 should operate together with section 302 of the Code to make Sim jointly guilty of murder. As the Court in the instant case observed:

In that case, there was no question that there was participation by Sim in the 'criminal act', though he did not inflict the fatal injuries on Mrs. **Watanabe**. In fact, Sim's participation was not in question, and the case was decided on the basis that he did **participate**.<sup>13</sup>

The second case, that of *Neoh Bean Chye*, is also an obvious case where section 34 operated together with section 302 of the Code. In that case the accused, Neoh Bean Chye and **Lim Kim Huat**, went to a bar to rob the owner, one Chew Liew Tee. It was Lim Kim Huat who shot Chew when he resisted. However, so far as Neoh Bean Chye was concerned, he was jointly liable for murder by virtue of section 34 read with section 302, although he did not shoot the deceased. However, he had loaded the revolver and had handed it to Lim Kim Huat. He knew that the revolver would be used, if necessary, during the course of the robbery. The Court of Criminal Appeal held that it was a well-planned operation and that the death of the deceased was an act done in furtherance of the common intention to rob. It is significant to note that in the instant case the Court observed that "there again [*i.e.*, *Neoh Bean Chye*] both *were present and* the deceased who resisted was shot and killed by him [*i.e.*, **Lim Kim Huat**]."<sup>14</sup> (Emphasis added.)

There is no doubt that Neoh Bean Chye had participated, one might add, actively - he had handed the revolver to Lim Kim Huat even though he did not do the actual killing. Hence, he was jointly convicted of murder under section 302 by virtue of section 34.

The Court distinguished Kang **Hai's** participation in the instant case from the above two cases. Kang Hai was not there when Joo Cheng confronted Lee and the struggle took place. He was at the landing of the staircase of the second floor of the block where Lee's flat was situated. It is submitted that, having regard to all the evidence, Kang Hai had participated for the purpose of section 34 read with section 302, even though he did not raise a single finger in the assault and the eventual killing of Lee. The killing by Joo Cheng was done in *furtherance* of the common intention of all. For Kang Hai did, together with Joo Cheng and Ah **Lek**, act in concert by participating in the pre-arranged plan to carry out the robbery and by setting out together to confront Lee.

While *Mimi Wong* and *Neo Bean Chye* were obvious instances where a "section 34 accused" participated in the "act constituting the offence",

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<sup>13</sup> *Supra*, note 1, at 203.

<sup>14</sup> *Ibid.*

the scope of the section is wider. The section speaks of the "criminal act" done by several persons *infurtherance* of the common intention of all. This does *not* require a "section 34 accused" to be *present* and actually to participate in the "act constituting the offence" charged - in the instant case, the assault resulting in the killing of Lee.

It is respectfully submitted that the Court appears to have confused section 34 with section 37 which reads:

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 those acts, either singly or jointly with any other person, commits *that offence*. [Emphasis **added**.]

Lord Summer in *Barendra Kumar Ghosh*<sup>15</sup> explained the distinction between section 37 and section 34 thus:

Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the **offence**.<sup>16</sup>

Speaking of section 34, Lord Summer pointed to the significance of the object of the section, which is to punish participants by making one man answerable for the "criminal **offence**"<sup>17</sup> of another *as if* it were done by himself alone, provided that what is done is in *furtherance* of a common intention.

As pointed out by Sir **Madhavan** Nair in another Privy Council case, *Mahbub Shah v. Emperor*<sup>18</sup> (an appeal from India):

To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by *one* of the accused persons *infurtherance* of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the manner *as if* the act were done by him **alone**.<sup>19</sup>

Therefore, there must first be a "common intention" before a person can be jointly liable for an "offence charged" by virtue of section 34. In

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<sup>15</sup> *Supra*, note 5.

<sup>16</sup> *Ibid.*, at 7.

<sup>17</sup> *Ibid.*, at 9.

<sup>18</sup> A.I.R. 1945 P.C. 118.

<sup>19</sup> *Ibid.* at 120.

the instant case, the common intention among the three accused was the pre-arranged plan *to rob* Lee. **Kang Hai** participated in the planned robbery by proceeding together with Joo Cheng up to the landing of the second storey of Block 241, **Hougang** Street 22 in order to confront Lee. He had a rope and knew that Joo Cheng was armed with a knife in order to overcome any resistance from Lee. The fact that Joo Cheng ran ahead of him, confronted Lee and killed him, while Kang Hai was still at the landing of the second storey, is irrelevant. What is important is that he acted in concert in the planned robbery and that the killing of Lee was done in *furtherance* of the common intention to rob. Kang Hai knew that Joo Cheng carried a knife and that it would be used, if necessary, to overcome any resistance by Lee. Indeed, the Court accepted that the killing of Lee by Joo Cheng was consistent with the common intention to rob.

It is submitted that Kang Hai should also have been jointly liable for murder by virtue of section 34 read with section 302.

#### *Section 34 Read with Sections 393 and 397*

Although both the second and third accused, Ah Lek and Kang Hai, were held not guilty of murder, they were found guilty of a lesser charge of attempted robbery punishable under section 393 read with sections 397 and 34 of the Code. Section 397 reads:

If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, such offender shall be punished with caning with not less than 12 strokes, in addition to any other punishment to which he may be liable under any other section of this Code.

It may be noted that the applicability of section 34 to section 397 has been the subject of some controversy under the Malaysian Penal Code<sup>20</sup> concerning the question of whether the language of the section precludes the application of section 34.<sup>21</sup> However, in Singapore it was held in *Yeo Kim Watt and Anor. v. P.P.*<sup>22</sup> that section 34 is applicable to section 397 (read with section 393 which deals with the punishment for attempted robbery).

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<sup>20</sup> Cap. 45, 1935 Rev. Ed. The Malaysian counterparts of sections 34 and 397 are *in pari materia* with those in the Singapore Code.

<sup>21</sup> See K.L. Koh, "Joint Liability and S. 397 of the Penal Code of Malaysia" (1977) 19 *Mal. L.R.* 383.

<sup>22</sup> (1946) 12 *M.L.J.* 155.

In the instant case, the Court appeared simply to assume that section 34 is applicable to section 397. Perhaps the Court should have mentioned *Yeo Kim Watt's* case, which was in fact binding on it.

On the facts of the instant case, the Court held that there was participation on the part of Ah Lek and Kang Hai by virtue of section 34 for the purpose of attempted robbery under section 393 **and** 397, but no participation for the purpose of the "offence charged", *i.e.*, the killing of Lee. This, as **we** have seen, is unfortunate. For the killing was in furtherance of the common intention to rob for which there was participation. This clearly brought Ah Lek and Kang Hai within the operation of section 302 read with section 34.

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