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COMMON INTENTION AND MURDER UNDER THE PENAL CODES

This article contains a comparative study of the use of the doctrine of common intention to secure the conviction of joint offenders for murder where an homicide is committed in furtherance of their common intention. The cases appear to be in conflict but the conflicts can be explained on the basis of the policy objectives courts seek to achieve.

I. INTRODUCTION

THE doctrine of common intention enables the imposition of the same liability on participants in a crime as that incurred by the person who actually perpetrated the crime, provided the crime was the objective of their association or it was committed in furtherance of achieving that objective. It is an adjectival doctrine which has to be used in conjunction with a substantive crime. The most frequent use of the doctrine has been with a charge of murder. There are two usual situations in which the doctrine is used in cases involving murder. The first is where the object of the association is to assault the victim but the victim is killed as a result of the attack. The second is where the object of the association is the commission of robbery and in pursuance of that object a victim of the robbery or a person resisting its commission is killed. In both situations, the doctrine enables the conviction for murder of all the participants who shared in the common intention to commit robbery or assault, although the killing may have been committed by only one of them. The doctrine has use outside the situation of assault and robbery[1] but since these two situations constitutes the paradigm cases, discussion is confined to them, though the other situations are considered when relevant.

The use of the doctrine is justifiable on the policy ground that it enables the deterrence of group crimes of violence which cause greater social disquiet by imposing equal responsibility on all who associate in such crimes for the consequences of their association. The collective damage that organized groups of criminals could cause also justifies a harsher

[1] Thus, *eg*, the killing of the victim could take place in the course of a gang rape or in the course of acts of terrorism.

response. Further justification is provided by the fact that these consequences, including murder, should have been within the contemplation of the participants in the plan to commit violent crimes. Yet, the doctrine militates against the fundamental sense of fair play which requires that every offender's case should be considered separately and that his exact responsibility should be assessed in accordance with his own moral guilt for the offence. This would be particularly so if he is to be found guilty of so grievous an offence as murder which carries a mandatory death penalty. There are human rights considerations which militate against the idea that an individual offender should be sacrificed in order to promote general deterrence. The law has to balance these inconsistent interests. The achievement of this balance between societal interests and the interests of the individual offender lies at the basis of the law that has been developed by the courts which have been called upon to use the doctrine. The balance which is struck is never constant. It must, of necessity, keep shifting in accordance with the courts' appreciation of whether, in a given situation, societal interests or individual interests should be given primacy. Such a view makes the law uncertain. It is open to the criticism that criminal law, more than any other branch of the law, should have a degree of certainty. But, criminal law, most of all, is an instrument of social control and must hence be more responsive to social pressures and changes in them. Certainty is not the only criterion which shapes the development of the law. Once it is accepted that social policy dictates outcomes in the law, it is fluidity and flux, and not certainty, which characterizes outcomes in the law.

The extent to which courts have succeeded in striking a balance between societal and individual interests and the manner in which they have developed the law forms the basis of this article. The article makes this assessment having regard to the case law on the principle of common intention and murder both in the Penal Code jurisdictions of India, Singapore and Malaysian and in the common law jurisdictions of England and Australia. The law in Canada and New Zealand which also have codes based on the common law are referred to where relevant. The frequency with which decisions involving charges for robbery and murder and assault and murder has been considered in judgments of the Singapore courts in recent times justifies such a comparative survey of the law.[2] One major conclusion which results from the study is that the courts should draw a distinction between the cases of assault resulting in murder and cases of robbery resulting in murder. It is suggested that there is less justification

[2] Besides the situation of murder, common intention has been used in cases under the Misuse of Drugs Act, (Cap 185, 1985 Rev Ed) in recent times. See *Wong Wai Hung* v *PP* [1993] 1 SLR 927; *Ho So Mui* [1993] 2 SLR 59.

from the point of social policy for imposing common liability in the assault situation than in the robbery situation.

II. The Origin of the Doctrine

Though the doctrine of common intention may be a doctrine which could be found in general criminal law systems,[3] it has long been held in the Penal Code jurisdictions that it was derived from the English law. It would be too late in the day to contest this assumption which has taken deep hold in the law of these jurisdictions at least on this point.[4]

The doctrine of common intention has inherent in it a notion of constructive malice or intention for there is an artificial attribution of the intention of the actual offender to the other participants in the crime. For any supporter of a subjectivist theory of criminal liability which requires the careful weighing of each offender's exact state of mind in attributing responsibility to him, the existence of this degree of legal construction of intention makes the doctrine obnoxious and unjust. In its origins, the English law of homicide was so replete with such constructive doctrines that its presence in the doctrine of common intention did not cause much concern.[5] Even after the doctrine of constructive malice was abolished by the Homicide Act in 1957, there was no effort to do away with the attribution of the intention of the actual perpetrator of the offence to the other participants in the criminal venture. The Royal Commission on Capital Punishment, whose report preceded the drafting of the Homicide Act, had supported the retention of the doctrine of common intention and impliedly, the constructive notions contained within it, while recommending the removal of notions of constructive

3 For the penological basis of collective responsibility, see H Mannheim, "Collective Responsibility and Collective Punishment" in H Mannheim, *Group Problems in Crime and Punishment* (1955) p 42. In varying forms, the doctrine is recognized in all criminal law systems.

4 The present writer has argued against the use of this assumption. See M Sornarajah, "The Interpretation of the Penal Code" [1991] 3 MLJ cxxix. Mayne, who was an early commentator on the Indian Penal Code, took the view that s 34 was not based on the English law. But, this view has long been forgotten. It was discussed by the Calcutta High Court in *King Emperor* v *Barendra Kumar Ghose* AIR 1924 Calc 300. The difficulties inherent in the interpretation of s 34 have been admirably dealt with by Gillian Douglas in her article "Joint Liability in the Penal Code" (1985) 25 Mal LR 259. It is, of course, too late in the day to reopen these issues of interpretation. The section has to be read in the light of case law and case law has moved the doctrine of common intention under the Codes to a position similar to the one under the common law.

5 The favourite example of constructive malice in the English law is the one given in Coke's *Institutes* where it is stated that if a man throws a stone at another's fowl and the stone accidentally strikes and kills a boy, the man would be guilty of murder.

malice in murder. The Commission observed:[6]

> "It is right that those who jointly embark on a felony intending that some violence shall be used should share the consequences, if the violence actually used proved greater than was contemplated. In our view, considerations of both equity and public protection demanded the maintenance of the principle of the existing law that when two or more persons are parties to the common design for the use of unlawful violence and the victim is killed, the parties to the common design should be held responsible and all should be liable to the same punishment".

The Commission's view that equity is the basis of the doctrine is misplaced. It is certainly inequitable from the offender's point of view, if he has to be put in peril of a conviction for murder for participating in a crime without contemplating the possibility of a killing in the course of it. The better explanation is that the maintenance of the old law is justified by considerations of public interest.

The view that was stated by the Commission was in accordance with the law that had developed in England on the doctrine of common intention up to the time of its statement by the Commission. The old cases had established the doctrine on the idea that all those who associate in a felony the commission of which potentially involves the use of lethal violence should be found guilty of murder. In *Tyler and Price* which was decided in 1838,[7] Lord Denman used the doctrine to convict all members of a band involved in an attack on a judicial officer executing a warrant of murder as they "had armed themselves with dangerous weapons" and had associated themselves with the leader of the band who was a "dangerous and mischievous person". One finds the parameters of the doctrine being established in the judgment. The carrying of lethal weapons is an identifying factor for it evinced an open intention of the participants to use lethal violence and indicated the knowledge and acceptance of the use of such violence by each person who participated by the other on his behalf so that the purpose of the association could be achieved. The stress that has been placed on the types of weapons carried by the participants and the knowledge that such weapons were carried by the others was the basis of inferences that were drawn in later English cases.[8] The court refused to give any significance

6 Report of the Royal Commission on Capital Punishment (Cmnd 8932, 1965), p 43.

7 (1838) 8 C&P 616; 173 ER 643.

8 *Smith (Wesley)* (1963) 1 WLR 1200; *Betty* (1963) 48 Cr App Rep 6; *Morris* [1966] 2 WLR 1195; *Lovesey* (1969) 3 WLR 213.

to the defence of some of the accused that they were forced to join in the endeavour by the leader of the gang, who reportedly had a fearsome personality.[9] The case is also an early forerunner of the rule that a person who joins a gang knowing its reputation for violence cannot later plead duress.

The modern English law continues these ideas, though there is a greater willingness to treat each offender's case separately, particularly in situations of assaults resulting in murder. This more liberal trend can be seen in the more recent judgments of the English courts, though the signals continue to be somewhat mixed.

III. Section 34 of the Penal Code

Section 34 of the Penal Code contains a statement of the doctrine of common intention. It is an enabling provision which facilitates the imposition of joint responsibility on all participants in a criminal endeavour for any criminal act done in furtherance of their common intention by any one of them. The section reads:

> "When a criminal act is done in furtherance of the common intention of all each of such persons is liable for the act as if it were done by him alone."[10]

The provision has been interpreted and applied in several cases in India and other Code jurisdictions in relation to murder. Several rules have been formulated in connection with the application of the provision. One is that the best method of proof of common intention between the parties is the existence of a pre-arranged plan to commit a crime.[11]

[9] Thom, the leader of the gang, obviously had a psychopathic personality. He had been shot dead but had killed the companion of the officer who had come to serve a warrant on him. Lord Denman found Thom to be insane and held that the charge of abetting Thom failed as it was not possible to abet an insane person. However, he found them guilty of the crime on the basis of having a common object with Thom. The reasoning is curious. Is it possible to form a common intention with an insane person? Lord Denman's direction was that if they find that Thom "was a dangerous and mischievous person; that these two accused knew that he was so and yet kept with him, aiding and abetting him with their presence and concurring in his acts; and if you do so, you will find them guilty, for they are then liable as principals for what was done by his hands". It would be interesting to compare this case with the later cases involving the situation in Northern Ireland. *Eg, Maxwell* v *DPP for Northern Ireland* (1979) 68 Cr App R 128. In English law, the distinction between common design and principles of abetment are not too clearly drawn.

[10] The words "in furtherance of the common intention of all" did not exist in the original draft. They were added by the Amending Act of 1870 Indian Act.

[11] This was established in the Privy Council decision in *Mahbub Shah* AIR 1945 PC 118.

But evidence of a pre-arranged plan is not always necessary where circumstances indicate that a common intention had arisen between the parties. Thus, later cases talk of the possibility of a common intention arising between several offenders "within a twinkling of an eye"[12] or "on the spur of the moment".[13] Usually, the application of this rule occurs in cases of assault. The possibility of a common intention being formed between several accused on the spur of the moment has been stressed in several cases. But, cases have also cautioned that in these situations care must be taken to examine whether the accused had the same intention or a similar intention. In a case where the court finds that the accused had the same or similar intention with the actual perpetrator of the killing, the doctrine of common intention will not apply. However, where the primary offence that was contemplated by the parties was robbery, the existence of a pre-arranged plan between the parties will usually have to be established and the courts could then more readily infer that the common intention included the use of lethal violence.

The second rule is that the nature and degree of the participation in the offence of the others who participated in the plan was irrelevant, where common intention between them can be established. The mere passive presence of the participant will be sufficient. As Lord Sumner put it, in *Barendra Kumar Ghosh*,[14] "in crimes as in other things, they also serve who only stand and wait". An alternative explanation is that the participant in the robbery who killed the victim who resisted was authorized to do so by the other participants in the robbery as such a killing was within the scope of the plan to rob. There is a notion akin to agency which is said to operate in these circumstances.[15] Broadly speaking, the rules that have evolved as a result of interpretation of the provision is no different

The case has generally been followed in all Code jurisdictions. For a recent decision in Singapore citing and following the case, see Rubin J in *Wong Hai Hung* [1993] 1 SLR 927 at 946.

12 But, the Singapore court in *Lee Chin Guan* [1992] 1 SLR 320 at 327, following *Krishna* v *State of Maharashtra* [1963] 2 Cr LJ 351, showed considerable and commendable caution in drawing an inference of a common intention from the circumstances. There may, however, be clear circumstances in which such an inference may be drawn. See the Ceylon case, *R* v *Mahatun* (1959) 61 NLR 540 where one offender commenced running along with another who was chasing the victim with a bomb in his hand. Common intention was held to arise the moment there was a joining in the chase by the other accused.

13 See also the dictum of the Victorian Supreme Court in *Lowery and King* [1972] VR 560 at 563: "The understanding or arrangement need not be of long standing; it may be reached only just before the doing of the act or acts constituting the crime".

14 AIR 1925 PC 1.

15 This idea of authorization was suggested by Sir Robin Cooke in *Chang Wing-Siu* [1985] AC 168. The theory has been used in Australia and New Zealand but was not accepted by the English courts.

from the rules which have developed in other Commonwealth jurisdictions which contain similar principles.[16] It is also well-settled that the participants will be equally responsible not only for the primary offence which was the object of the common intention but for all offences incidentally committed by any one of them provided that the commission of these offences was necessary for the achievement of the object.[17] Conversely, no liability will arise in all for an offence committed by one of them which is unconnected with the object of the common intention.

IV. Common Intention: Objective or Subjective Theory?

A subjective theory of liability calls for a nice examination of each offender's mental state prior to the assessment of his liability. The subjective theory requires that account be taken of a whole host of factors, such as the intellectual make-up of the offender, his social and cultural environment and, in the view of some, more sophisticated factors such as his genetic constitution. The objective theory, on the other hand, is based on the imputation of the mental state of the ordinary person in the same situation as the accused to the accused and assesses liability after such imputation. The latter theory is based on the idea that punishment is for the failure of the offender to behave as a reasonable person would have in the circumstances and provides a deterrence for the future to any person faced with the same situation from adopting a similar course.[18] The offender can defend himself only by pleading the justifications and excuses recognized by the law.[19] Progress, at least within the law of homicide, has been in

[16] For the present writer's study of the law in Canada and the Australian code jurisdictions, see M Sornarajah, "Common Intention and Murder under the Criminal Codes" (1981) 59 *Canadian Bar Review* 727.

[17] This is a self-evident proposition resulting from the interpretation of the words added by the Amending Act of 1870. There was a misinterpretation of the provision in an early Singapore case, *R* v *Vincent Banka* (1936) 5 MLJ 66. In that case, it was suggested that common intention must be shown on the part of all the offenders to commit not only the primary offence but also the incidental offences. This was put right in *Mimi Wong* [1972] 2 MLJ 75 and *Neoh Bean Chye* [1975] 1 MLJ 3. The view taken in these cases that it is not necessary to establish which participant committed the offence in furtherance of the common intention is in accordance with the position in other code jurisdictions. But, see G Douglas, *supra,* note 4.

[18] The best rationalisation of the objective theory is still to be found in Chapter Two of OW Holmes, *The Common Law* (1881). J Hall, *General Principles of Criminal Law* (1947) pp 146-170 attempted a refutation of the theory, but the attempted demolition of Holmes theory was not successful. As a reviewer of Hall's book put it, when you strike at a king, you must kill him, see Wechsler, 49 Columbia LR at 428.

[19] There has been much theoretical discussion of the justification and defences to criminal liability resulting from the book on the subject by Fletcher. See *GP Fletcher, Rethinking Criminal Law* (1978).

the erosion of the extreme features of the objective theory. The structuring of a successful criminal law system depends on maintaining a nice balance between the safety of the community with the consideration of the interests of the individual offender.[20] The balance which is struck once cannot remain constant. It will vary in accordance with a court's assessment of the social need for deterrence in the context of social and other changes which take place within society. On this view, the much desired consistency within the criminal law becomes a fiction, at least in certain areas. If courts have to respond to social phenomena, they must of necessity be able to change the method of the application of the law, though the principles of the law remain the same. Consistency then is provided by the principles, not by the manner of their application.

The relevance of the two competing theories of criminal liability to the doctrine of common intention is that the results of the use of the doctrine would differ in accordance with the theory used in its application. Where there are several offenders and the use of the doctrine is sought by the prosecution, the court relying on a subjective theory will require a strict proof of each offender's intention and the coincidence of these intentions before applying the doctrine. It will not draw too many inferences from circumstances or rely on the reasonable person's assessment of what was within the contemplation of the participants when they set out on their venture. A court, relying on an objective theory on the other hand, will make ready inferences from the circumstances of the case and will be ready to dispense with individual variances in order to find all the participants guilty of what one or more of them did during the criminal venture.

In situations of a charge of murder against participants in a criminal venture, the courts of the Commonwealth jurisdictions have generally applied an objective test in determining whether the killing was within the contemplation of the parties. Thus, where lethal weapons were carried in the course of a robbery or assault by some of the participants to the knowledge of the other participants, a ready inference will be drawn that these weapons were to be used in overcoming resistance. Killings occurring during the robbery will then be attributable to all the participants.[21] It will be readily seen that the courts are using an objective test and attributing intention to offenders who may not have entertained such an intention at all. There is a sense of "unfairness" inherent in this attribution of intention through a legal construction.[22] The unfairness argument largely results from notions of subjectivity in the criminal law which do not favour the

[20] W Friedmann, *Law in a Changing Society* (1959) p 166.

[21] For the common law, see *Chang Wing-Siu* [1985] AC 168; *Ward* (1986) 85 Cr App R 252 but see M Giles, "Complicity: The Problems of Joint Enterprise" [1990] Crim LR 383.

[22] See, *eg*, A Ashworth, *Principles of Criminal Law* (1991) p 384.

imposition of criminal responsibility unless the mental element of the offender can directly support such imposition.[23] The notion of subjectivity requires that the offender be punished only to the extent of his moral guilt and it is important to ascertain his precise mental state at the time of the commission before this can be done.[24] The doctrine of common intention, on the other hand, is, to a large extent, not designed to achieve such a result. It seeks to impose the same liability on all the participants who engage in a common criminal venture and does not call for an examination of each offender's precise mental state.

There is, here, a tussle between the two opposing theories. The supporter of the objective theory will stress the deterrent objective of punishment and argue that all participants must be punished for offences which were within their contemplation at the time of the formation of their common intention. The social purpose of preventing crimes involving violence is facilitated by the espousal of such a rule. Punishment has an educational function to play.[25] Each time a person participating in a crime which has a potential for violence with others is made equally responsible with the others for all the violence that does take place, a message is clearly sent out that all who in future, participate in group crimes stand in like peril. In societies where there are subcultural groups intent on organized crimes of violence, the public insecurity will be assuaged by the formulation of rules which are intended to deter violent associations. Courts, in such jurisdictions, may be prone to support an objective formulation of the common intention doctrine in order to provide the deterrence and maintain an external standard of behaviour which calls for an avoidance of joining sub-cultural groups prone to violence. One sociological explanation of the adverse and possibly extreme judicial reaction to such violence is that the subcultural group is seeking to subvert the accepted norms of society at least temporarily by seeking to impose its own subcultural values and that a clear message should be given that such subversion should not be tolerated.

The subjectivist, on the other hand, is irked by the fact that the adoption of a stance which emphasizes the educational role of punishment sacrifices the individual for what is assumed to be for the greater good of society. Retributivist theories of punishment will require that the offender's responsibility accords precisely with the extent of his moral guilt.[26] In a sense,

[23] In England, there is greater support for such a subjective view. *Burr* (1989) 88 Cr App R 362; *Wakely* [1990] Crim LR 119.

[24] See, *eg,* the tenor of discussion in G Williams, *Textbook of Criminal Law* (1983) p 354.

[25] J Andenaes, "The General Preventive Effects of Punishment" (1960) 114 U Pa LR 949.

[26] The idea is strongest in the theory of limiting retributivism which arose as a reaction to indeterminate sentences. See H Hart, *Punishment and Responsibility* (1963). The limiting

this is an argument of individual human rights for there is a deep sense in the law that the individual be not sacrificed to profit society. For, the individual is the basis of all human society and the preservation of his rights is the essential basis of such society.

Courts have not consciously entered into this debate. There is no evidence that there has been much judicial thinking along these lines in using the doctrine of common design. But, courts react to social phenomena like the increase in group violence and there is every indication that at times or in places where there is a perception of an increase in group violence, the doctrine of common design is applied more as a social instrument to secure deterrence.[27] The courts are, at the same time, conscious of the need to ensure that unfairness to the individual accused does not occur. They have ensured this by requiring strict proof that there was a common intention as opposed to a similar or same intention or by requiring strict proof of the extent of each offender's intention.[28] The tussle that takes place between these two different aims marks the response of the courts to extensions which they have made to the doctrine of common intention particularly in the robbery-murder situation. The tussle also leads to decisions which can seldom be reconciled with each other.[29] The subsequent sections of this article identify the extensions which the courts have made to the paradigm situation of robbery-murder.

retributivist has human rights concerns at heart as he seeks to ensure that the offender is not punished for anything more than what he was morally responsible for. Rehabilitationists and supporters of general deterrence do not emphasize such limits to punishment.

27 This may provide an explanation for the approach of Australian High Court, which has consistently adopted a subjective theory of responsibility, seeking to dilute the distinction between the subjective and objective theories in situations involving common design. The dicta of the judges in *Johns* (1984) 54 ALJR 166 illustrate the dilution of the distinction between the theories. Thus, Mason, Murphy and Wilson JJ observed : "...a subjective approach to criminal liability has prevailed in more recent times. In any case, the subjective test may well involve an accused person in criminal liability for an act which is a probable consequence of the execution of the common purpose to which he is a party because, if the act is a probable consequence of the execution of the common purpose there is evidence from which a jury can conclude that it was within the parties' contemplation."

28 See, *eg,* Karthigesu J in *Lee Chin Guan* [1992] 1 SLR 320.

29 Thus, surveying the English case law, a writer concluded: "The question of the law's requirement of *mens rea* for a secondary participant in a joint enterprise case is still without a clear answer. It is not simply that there are several alternative answers dependent on which case and which interpretation one adopts. It is also that within each case wording is equivocal, supporting first one principle then another...": M Giles, "Complicity: The Problems of Joint Enterprise" [1990] Crim LR 383 at 392. This difficulty may be got over if the search for certainty is abandoned and the decisions are explained on the basis of the court's striving for a balance between competing interests.

V. THE SCOPE OF THE COMMON INTENTION IN ASSAULT SITUATIONS

Broadly speaking, there are two distinct situations in which the use is made of the doctrine of common design or common intention.[30] For purposes of analysis, it is best to keep these two broad categories distinct and not import principles developed in connection with one category into the other. The first category consists of situations where the object of the venture between the participants is to cause injury to the victim. In the second situation, the primary object of the participants is to commit some crime such as robbery but a killing of a victim who resists the robbery takes place in furtherance of the object of the robbery by one or more of the participants. The law that has been developed in connection with the first situation of assault is analyzed in this section.

Where a prearranged plan existed to assault a victim and the scope of that plan was clearly identified by the prosecution, few problems could arise in relation to the application of the doctrine of common intention. Where a killing takes place and such a killing was contemplated in the plan, then, there will be little difficulty in ascribing equal responsibility on all who participated in the plan irrespective of which one of them had actually killed.

In the absence of such evidence, common intention and its scope are usually inferred from circumstances.[31] There are two strands evident in the common law on the inference of a common intention. These strands are the result of the peculiar development of the common law and have little application under the Code. Yet, for the sake of comparison, they may be noted. The first strand is the one which characterizes any killing which occurs in the course of a venture involving an unlawful act as manslaughter and involving all the participants in the venture in responsibility for manslaughter, at the least. Participants could be individually guilty of murder, if the requisite intention could be proved against them. This result flows from the existence of the unlawful act-manslaughter rule in the common law. Under that rule, any killing which takes place in the course

[30] The existence of these two categories was recognized by Lord Lane in *Hyde* [1990] 92 Cr App Rep 131 when he observed:
"There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example to commit burglary. The victim is assaulted and killed as a (possibly unwelcome) incident of burglary".

[31] See Yong Pung How CJ in *Maniam s/o Rathinaswamy*, unreported, Criminal Appeal No 78 of 1993 who stated that "In this case, there was no direct evidence of any common intention, but like in most cases, the common intention here was a matter of inference from the surrounding circumstances...."

of an unlawful act, is characterized as manslaughter. This rule, which owes its origin to the doctrine of constructive malice in the common law, has no place in the code jurisdictions.

The second strand, which is more recent and was probably motivated by the preference of some courts to adopt a subjectivist stance, is closer to the position under the Code. This would require the assessment of the scope of the plan by having regard to each offender's knowledge as to the circumstances.

An early illustration of this strand is *Smith*.[32] Four men were involved in a brawl in a pub. One of them, Atkinson, stabbed the barman and killed him. All were found guilty of manslaughter. Smith appealed against conviction on the ground that the killing went beyond the common design of the four men, which was to cause damage to the bar. This argument was rejected. Slade J observed:

> "It must have been clearly within the contemplation of a man like the appellant who, to use one expression, had almost gone berserk himself, and who had left the public house only to get bricks to tear up the joint, that if the barman did his duty to quell the disturbance and picked up a night stick, anyone who knew that had he had a knife in his possession, like Atkinson, might use it on the barman as Atkinson did. By no stretch of imagination, in the opinion of this court, can that be said to be outside the scope of the concerted action in this case. In a case of this kind, it is difficult to imagine what would have been outside the scope of the concerted action, possibly the use of a loaded revolver, the presence of which was unknown to the other parties..."

There is a clear effort here to provide a justification for the imposition of equal liability on all by the drawing of an inference that there was knowledge on the part of the others that Atkinson possessed a knife and that he would use it to overcome resistance. The quick approval of the case in *Betty*[33] and its adoption as the basis of his judgment in *Anderson and Morris*[34] by Parker CJ established this strand. In all these cases, the crucial emphasis was on the type of the weapon used and the presence or absence of its possession by one of the participants. There was an inference made from knowledge of possession of a weapon by one of the participants that the others approved of its use or at least, that they

[32] [1963] 3 All ER 597.

[33] (1963) 48 Cr App R 6.

[34] (1966) 2 QB 110; for a discussion of the English cases, see R Buxton, "Complicity in the Criminal Code" (1969) 85 LQR 252.

contemplated its use. There is an objective recklessness which forms the basis of the conviction of the other participants. Alternatively, the argument is that where there was knowledge of possession of a lethal weapon by one of the participants, there was a ready inference that all participants agreed to the use of the weapon to overcome resistance and would be equally responsible for the killing. But, where there was no such knowledge or possibly, there was evidence that a participant indicated that he joined only on condition of its non-use, there will not be such liability for the killing.

But, more recent English cases seem to indicate that the courts are not prepared to travel too far along the subjectivist road. Cases like *Anderson and Morris* were premised on the idea of the existence of a knife or other lethal weapon being in the possession of one of the offenders. But, at a time when gang warfare had become common and victims could be killed with kicks and blows with fists, it had become artificial to make the law turn on the issue of the absence or presence of knowledge of the possession of a lethal weapon by one of the parties. In *Hyde*,[35] there was a brutal attack on a victim during a brawl in a pub. No weapons were used. During the brawl, one of the accused kicked the head of the fallen victim as if he were kicking a football, running five yards towards it. The kick was described as a "place kick or a penalty kick". The direction was that if the participants in the assault had foreseen the real possibility that during the excitement of the moment there could be a kick of the sort given, then all the accused who participated in the assault would be liable for murder as the man who kicked. The Court of Appeal approved the direction. The summing up that was approved is worth reproducing in full. It reads:

> "As I say ordinarily speaking if he does something which is beyond the scope of the agreement, that is as you might say the end of the agreement. But, what if the others anticipated that he might do some such thing? And here we have to apply common sense. Fights do get out of hand and escalate. A man who starts by punching may get excited and decide to kick. If there was a tacit agreement to punch and kick, a man who is kicking may decide to give a kick like that which was allegedly given by Collins and which has been described as a place-kick or a penalty kick, a description which if the basic facts are right is not a bad description of the kick. If either of the other two, and you have to consider the case of each of them separately, foresaw and contemplated a real possibility that one of his fellows might in

[35] (1990) 92 Cr App Rep 131; following *Slack* [1989] QB 775; *Chang Wing-siu* [1985] AC 168.

> the excitement of the moment go beyond the actual plan and intend to go and do grievous bodily harm, then you have to consider whether that man, the one who had the foresight, did not in truth intend that result himself."

Clearly, the direction leaves little scope for the differential treatment of the participants. Mere participation in an assault could give rise to an inference that any killing which took place was within the contemplation of the offenders if the level of violence escalated in degree and the participants continued to participate without withdrawing from the scene. The rationale of the application of the doctrine is that by remaining when the level of violence was increasing, the participants approved and gave encouragement to the actual perpetrator of the violence.

This second strand of cases comes closest to the approach which has been adopted in the Code jurisdictions. In the absence of a prearranged plan, there has been reluctance to conclude that the common intention doctrine applies. Although in appropriate circumstances the courts have held that a common intention could arise on the spur of the moment, the courts have also been cautious in determining whether there was only a similar intention as opposed to a common intention between the parties. This distinction between common and similar intention has been drawn from early cases, the most important of them being the Privy Council decision in *Mahbub Shah*.[36]

The law under the code has always recognized that a distinction must be drawn between similar intention and common intention. So, it is quite possible for one of the participants in a killing to be guilty of murder and others of causing grievous bodily harm or even of simple hurt, depending on the exact intention they had at the time of the commission of the crime and the extent of the participation in the crime.[37] Thus, where the participants came from different directions but joined in an attack launched on the victim by one of them, who had a murderous intention, their liability will depend on the exact nature of their intention and participation. A person joining in the attack with a twig will possibly be guilty of only simple hurt. No hard and fast rule can be laid down.

In *Lee Chin Guan*,[38] the High Court of Singapore agreed that there could be such different grades of responsibility among the participants to

[36] *Supra*, note 11. The Indian Supreme Court in *Dharampal* v *State of Haryana* AIR 1978 SC 1492 stated: "Common intention denotes action in concert and necessarily postulates a pre-arranged plan or prior meeting of minds and an element of participation in action".

[37] *In re Suyambu* [1991] Cri LJ 2506.

[38] Unreported Criminal Case No 45 of 1990 (High Court of Singapore, Karthigesu J and Rajah JC), 7 November 1991.

a crime in which a killing took place according to the share taken by each accused in the assault on the victim. Much would depend on the circumstances. If the person joining in with a twig did so after seeing the victim being attacked with an iron rod or a knife, the circumstances could as well give rise to the inference that he shared in the intention to kill the victim and had attacked with a twig only to show his encouragement and support to the other attackers.[39] The possibility, however, has always been open in the law of the Code jurisdictions for the differential treatment of the participants, a feature which was lacking in the common law, until the trend in cases like *Anderson and Morris*.[40] The cases in the Code jurisdictions show that there is a great scope for the assessment of the subjective intent of the offenders who participated in a killing resulting from a common object of assaulting a victim.[41] In this situation, unless there was a clear plan or a ready inference from circumstances which indicated that there was a common intention which included the killing of the victim, courts will show a greater willingness to assess each offender's case independently and apportion liability only in accordance with the mental element of each offender. The degree of his participation in the killing is an essential factor in making this assessment.

At the same time, it must be kept in mind that a common intention to commit a more serious crime than the one originally intended could arise in the course of the commission of the offence itself. Thus, the original plan of the participants of the assault may have been to cause simple hurt but in the course of the assault, there could be a common intention arising between the accused to cause grievous hurt. Such a common intention could be inferred from the circumstances. The Indian Supreme Court explained the situation thus:

> ...the common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan, *eg*, during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused.[42]

[39] The best discussion of this situation known to the author is in the Ceylon case, *Assapu* (1948) 50 NLR 324.

[40] *Supra*, note 34.

[41] See, *eg, Mohanan Nair* v *State of Kerala* [1989] Cr LJ 2106 where "clear and cogent evidence of common intention" was required, it being held that merely accompanying a group will not result in the application of the common intention doctrine.

[42] *Dharampal* v *State of Haryana* AIR 1978 SC 1492 followed in *Arbind Kumar Singh* v *State of Bihar* (1990) 1 BLJR 393. See also *Mohanan Nair* v *State of Kerala* [1989] Cri LJ 2106.

The English case, *Hyde*,[43] could have been explained as a situation of such a formation of a common design during the commission of the assault rather than in terms of the possibility of the contemplation of the other participants that something more than was originally intended could take place during the excitement of the incident. The Indian formulation leaves it open to the court to examine afresh whether each offender participated in the formation of a new common intention in the course of the assault.

VI. The Scope of the Common Intention in Robbery.

Whereas in the cases involving assaults in which joint participants were involved, courts show a greater willingness to assess the liability of each participant for a killing which occurred in the course of the assault in accordance with his mental state, this tendency is generally absent in cases involving a common intention to commit a robbery. There may be many reasons for this. The first is that robbery is usually preceded by a clear plan to commit it. Since by definition, robbery involves violence or the threat of violence,[44] all the participants in the plan contemplated the use of violence against any potential victim. Secondly, unlike in the situation of assault, where the victim is selected on the basis of the existence of some hostility between him and the participants, the victim of a robbery is entirely innocent. The element of victim precipitation of the offence is entirely lacking. Following from the last point, there would be greater societal disquiet following a robbery involving a killing than in the case of an assault resulting in a killing. There may be a greater justification of deterrence in such a situation.

Though some cases, pay lip service to subjectivity even in robbery situations, there is little room for doubt that the generally held view is that an application of an objective rule is called for in such a situation. There is a ready inference that participants contemplated the use of violence in the commission of the robbery and that where the victim was killed as a result of the violence, there will be equal liability in all the participants, irrespective of the extent of the participation in the robbery or the killing by individual participants. An exception may be where an offender participated in the endeavour on the expressed or implied condition that the group will eschew violence.

[43] *Supra*, note 35.

[44] Under the definition in the Penal Code, a threat of wrongful restraint is sufficient. See s 390. But, violence is involved in wrongful restraint as well.

The decision of the Privy Council in *Barendra Kumar Ghose*[45] is the *locus classicus* of the law on this point. Despite the political element which cast a shadow on the case, the law contained in it unexceptional, both from the point of view of the common law as well as from the point of view of the law under the Code jurisdictions. It has been followed by the courts of independent India as well as in other Code jurisdictions. It must be taken as containing the most authoritative interpretation of the phrase, "in furtherance of a common intention", in section 34.

The facts of the case were that Barendra Kumar Ghosh along with some other men had planned a robbery of a post office. The men had gone inside the post office while Barendra Kumar stood outside on guard, so that he could warn the others inside of anyone's approach. Inside the post office, the men had met with the resistance of the post master. One of them shot and killed the post master. The men then fled. Only Barendra Kumar Ghosh was caught. The issue was whether he was guilty of murder. The Privy Council formulated two propositions. The first was that it was immaterial which of the participants had killed, provided all of them shared a common intention to commit robbery and the killing occurred in furtherance of that common intention. The second was that there need not be any active participation in the killing by any of the participants for each of them to be equally guilty as the killer. As Lord Sumner put it, "in crimes as in other things, they also serve, who only stand and wait". There was no reference in the judgment as to whether the scope of the robbery included the murder of the post master. It was assumed that the overcoming of any resistance even through killing of the resister was within the contemplation of the participants and was therefore an act in furtherance of the common intention.

The principles stated by the Privy Council in *Barendra Kumar Ghose* have been accepted and followed by subsequent courts. There seems to be a greater readiness shown in these decisions to infer that a killing was within the contemplation of participants in a robbery even where weapons were not openly carried by the participants. This factor sets the robbery cases apart from the assault cases which call for a differential treatment of the participants except in situations where there was a clear evidence of contemplation of killing arising from such factors as the carrying of weapons openly or the knowledge of the participants of the nature of the weapons carried by one or more of their co-participants. In the robbery situations, it is more readily assumed that a killing was within the con-

[45] Barendra Kumar Ghosh was a young revolutionary who had espoused violence as the medium of struggle against the colonial power. The Indian National Congress had decided against violence. He was also a member of a distinguished Indian family which included Aurobindo Ghosh.

templation of the participants simply because of the fact that resistance is envisaged in a robbery and its successful completion can take place only if such resistance is overcome. It must be taken that the use of violence could result in the killing of the resister and that there would be equal liability in all the participants. The carrying of weapons or the knowledge of the carrying of weapons may not be necessary as the killing could be effected without the use of weapons, such as the intentional suffocation of the victim in order to stifle his shouts for help. There are a number of Indian cases which support such an analysis.

The law that has been stated is in complete accord with the law in common law jurisdictions where the doctrine of common design has been applied by the courts in a like manner. The Hong Kong case decided by the Privy Council, *Chang Wing-Siu*,[46] considered the case law in England, as well as Australia and New Zealand.[47] The case arose from a robbery planned by the three accused. The victim was stabbed while resisting the robbery. The issue was whether all were guilty. The defence contended that the killing should have been foreseen as a probable result of the robbery by the other accused. The argument of the defence was that the prosecution should prove that the other accused should have foreseen that it was more probable than not that the weapon which was being carried to their knowledge would be used if the contingency for its use arose. In Australian cases and writings, there had been discussion as to the nature of the risk of such lethal violence which has to be established prior to all the participants being found guilty.[48] The defence had sought to rely on these views in presenting the argument that the subjective perception of the probability of the killing had to be established prior to the finding of the equal guilt of all participants in the killing.

Sir Robin Cooke dismissed this argument. He observed:

> ...their Lordships regard as wholly unacceptable any argument that would propose, as any part of the criteria of the guilt of an accomplice, whether on considering in advance the possibility of a crime of the kind in the event actually committed by his co-adventurers he thought that it was more than an even risk. The concession that the contingency in which the crime is committed need not itself be foreseen as more probable that not, while virtually inevitable in the light of the reasoning

[46] [1985] 1 AC 168.

[47] Sir Robin Cooke, who gave the opinion of the Privy Council in the case, is a leading New Zealand judge and jurist. He was President of the Court of Appeal in New Zealand.

[48] *Johns* (1980) 143 CLR 108; *Miller* (1980) 55 ALR 23; Howard, *Criminal Law* (1967) p 276.

> in *Johns* v *The Queen*,[49] and the other cases, complicates the argument without improving it. What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic.

The defence had sought to introduce a further element of subjectivity by requiring the prosecution to establish that the killing was foreseen as a substantial probability by each of the offenders before equal liability was imposed on him.[50] The Privy Council refused to travel too far along this road to subjectivity.[51] The Privy Council acknowledged that public policy considerations will have to be taken into account in considering the law in this area. Public policy considerations will usually militate against the courts travelling the whole distance on subjectivity. They will dictate that a compromise is made by the balancing of the offender's interests with those of public interest in the deterrence of group crimes of violence.

VII. An Exception:

Two Singapore decisions, *Syed Abdul Aziz*[52] and *Tan Chee Hwee*[53] indicate an important exception to the view that a killing in the course of a robbery committed by one of the participants results in a conviction for murder of all participants sharing a common intention with him to commit the robbery. The decision of the Singapore Court of Appeal in *Syed Abdul Aziz*[54]

[49] (1980) 143 CLR 108.

[50] The defence also sought to address the same issue through an idea of remoteness. But, this was dismissed as an issue for the jury.

[51] The opinion insisted that the "test of *mens rea* is subjective. It is what the individual accused in fact contemplated that matters". But, where knowledge of weapons being carried is proved, there will be an almost irresistible conclusion that a killing was a foreseeable consequence of the criminal adventure. The Privy Council recognized as much when it observed: "...if the party accused knew that lethal weapons, such as a knife or a loaded gun, were to be carried on a criminal expedition, the defence should succeed only very rarely". *Supra*, note 44, at 179. In a later case, *Hui Chi-ming* [1992] 1 AC 38, the Privy Council lowered the degree of foresight of the antecedent crime from probability to a possibility. Lord Lowry said that "the accessory in order to be guilty must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight, still have participated in the enterprise".

[52] [1993] 3 SLR 534.

[53] [1993] 2 SLR 657.

[54] [1993] 3 SLR 534 (Thean JA, Rajendran and Khoo JJ).

may be reconciled with this proposition on the basis of the facts of the case. In that case, four men had collected at the void deck of a housing estate building and one of them had suggested that they rob a supermarket close to the building. The appellant had gone together with the person who used the knife to kill the victim without any knowledge of the possession of such a weapon by that participant. The trial judges had held that the others "knew or ought to have known that the knife carried by one of them would be used...". The Court of Criminal Appeal expressed "concern" with this finding. Rajendran J said that "there was no evidence before the trial court that prior to entering the supermarket Aziz knew that the male Malay with him was armed with a knife. Indeed, the evidence of Jumaat was that he did not see any of the robbers carry any weapon."

On the facts, the decision of the Court was supportable simply because there was no evidence to show that there had been any planning involved in the robbery but that it was a result of a casual coming together of the participants prior to the event. In these circumstances, a higher standard of proof of what was contemplated between the accused was necessary. The formulation of the exception was salutary, particularly in view of the fact that the accused in such circumstances stand in peril of a mandatory capital sentence. But, with respect, there should have been an articulation of a more refined category of exception and policy goals which support the exception. One may well argue that all offenders who even casually join in an escapade involving robbery should be taken as having contemplated the use of violence and the possibility of the killing of a resister and should on that account be equally guilty with the participant in the robbery who actually killed. The policy behind the argument is that this would provide deterrence to those who casually participate in such adventures. If this argument against the making of the exception is to be countered, the exception should be defined with greater precision, than the mere statement that the exception applies where there was no knowledge in the other participant that a weapon such as a knife was being carried. The absence or presence of a weapon is not conclusive for in situations where killing occurred as a result of a participant in a robbery intentionally strangling a victim in order to stifle his cries of help and thereby intentionally killing him, courts have held that this amounts to murder in all the participants. The knowledge of the presence of weapons plays a crucial role in situations of drawing an inference of common intention in assault cases. The role of such knowledge, though useful in establishing that common intention included the use of lethal violence, is not significant in cases of robbery involving murder as there is a ready assumption that the use of such violence was within the contemplation of the participants in the robbery. Unless this assumption can be displaced, the role for the exception that is contended for is limited.

The exception in *Syed Abdul Aziz* seems to operate on the basis that there was no evidence of any pre-arrangement of the robbery in any concrete sense. There was no opportunity provided to the participant to demarcate the extent of his participation or opportunity for any real meeting of the minds. The lapse of any meaningful period of time between the chance meeting and the robbery will be the best evidence which indicates this absence of a pre-arrangement. The joining in by the individual offender indicated merely a weakness of character, a momentary infirmity induced by feeling for bravado and some courage provided by company or liquor. The absence of any careful contemplation which is the basis for the application of the rule relating to common intention is lacking in a situation of this sort. There is a movement towards subjectivity in the making of this exception but this movement is justified by the situation in which there was little opportunity for forming a common intention which contemplated a killing. The existence of such an exception should be stated with cogency and refinement by the courts.

The decision in *Tan Chee Hwee* also supports the existence of an exception. In that case, the son of the family which lived in the house and his friends had planned a burglary. This itself provides a significant difference for what was planned was not a robbery but a burglary, an offence which does not involve the use of violence. The maid returned unexpectedly and one of the accused used the cord of an iron around her neck to stifle her cries. She was strangled as a result. The trial judge had found that all the participants were guilty of murder. The Court of Appeal disagreed with this finding. Karthigesu JA pointed out that the evidence only supported the conclusion that the principal offender had tried to silence the maid and had no intention to injure her. Had there been a plan to rob the house and the plan had included the use of force to overcome the resistance of any person in the house, the result of the case could have been different. The result would also have been different if the strangling had been intentional.[55] The incidental crime must have been intentionally committed. There is no responsibility for crimes accidentally committed by one of the participants.

The exception will also operate in circumstances in which there is a clear indication by the accused that there should be no resort to violence but that there should be flight if the attempt at robbery is resisted. The

[55] On this basis the facts of the Canadian case, *Puffer, McFall and Kizyma* (1976) 31 CCC (2d) 81 can be distinguished. There, one of the participants asphyxiated a victim with a pillow during the robbery. The court rejected the argument that the act went beyond the common intention. Compare also with *Santosh* v *State of Kerala* [1991] Cri LJ 570 where again the pressure was applied on the victim's throat to stop screams and the victim was suffocated. The court found the killing to be non-intentional. Common intention was held not to include the killing.

discussion of an example given by Lord Lowry in *Hui Chi-ming*[56] is appropriate. He takes the situation where two men embark on a robbery. One is carrying a gun to the knowledge of the other. To use Lord Lowry's own description of the example:

> The accessory contemplates that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even by discharging it, with a view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim. His act is clearly an incident of the unlawful enterprise and the *possibility*[57] of its occurrence was contemplated by the accomplice.

To adapt this example, if the accomplice had indicated that the gun should not be loaded and should be used only to frighten the victim or had insisted on flight on discovery, there is no logic for the use of the principle of common design against the accomplice.[58] On this view, the conviction of *Barendra Kumar Ghose* was clearly wrong as the evidence was that he participated in the venture on condition that no one was killed.

The English case, *Barr*,[59] is one which would be difficult to explain. The accused and two others, all unarmed, had gone into a house to steal. The two others used violence against the victim while the accused was in another room. When he came into the room the accused put a bag over the victim's head to keep her quiet. The victim died of suffocation. All were found guilty of her murder. The Court of Appeal reduced the conviction of the accused to manslaughter.[60] This seems to be based on the strict use of a subjective test. The court seems to have based liability on the basis of the act of the accused alone, which was aimed at keeping the victim quiet and not at killing her. To that extent, the killing was an accidental consequence but in the context of the whole incident, the issue was whether there was condonation and participation in the treatment of the victim by the accused. The accused surely joined in with the intention of the other men when he subjected the victim to further harm.

56 [1992] 1 AC 38.

57 Note again the use of the word "*possibility*" rather than "*probability*" which involves a lowering of the standard in some formulations of the law.

58 *Dunbar* [1988] Crim LR 693.

59 (1986) 88 Cr App Rep 362.

60 The case is criticised by Giles, [1990] Crim LR at 388.

There are several decisions in other jurisdictions which could be used to refine this exception. There is even a suggestion in a Canadian case that the exact nature of the participation of the offenders must be proved with greater precision in robbery cases, the doctrine of common intention being a doctrine intended to facilitate the imposition of liability in assault cases where it may not be possible to prove the degree of participation of each of the participants in the assault.[61] This reasoning, however, does not have general support. It is clear from the cases that responsibility for the incidental killing is readily inferred in robbery cases, a differential verdict based on the actual intention of a participant being an exception.

The cases which support the existence of an exception have isolated certain factors which enable the making of the exception. These factors could be isolated on their bases.

Syed Abdu Aziz correctly concludes that where the exception applies the actual perpetrator of the offence could be guilty of murder whereas the others could be guilty of lesser offences involving violence. Can the converse situation where the actual perpetrator is guilty of a lesser offence and the other participants are guilty of murder happen. This is more than a theoretical possibility both in English law as well as the law under the Penal Code. If contemplation is the basis of the application of the principle of common intention,[62] it is not impossible that the actual perpetrator could use an excusing or mitigating plea whereas the others could be guilty of murder as such a plea was not available to them.[63] In the Hong Kong case, *Hui Chi-Ming*,[64] there was a situation in which this occurred.

[61] *Lowery* [1972] VR 560. There are some cases which indicate a willingness to adopt a uniform subjective notion in robbery cases as well. But, this trend is not pronounced. For Australia, see *Brennan* (1936) 55 CLR 253 but this case was not followed in the later Australian case, *Stuart* (1974) 4 ALR 545. Compare also the extremely liberal view of the English court in *Lovesey* [1969] 3 WLR 213 where Widgery LJ observed: "There was clearly a common design to rob, but that would not suffice to convict of murder unless the common design included the use of whatever force was necessary to achieve the robbers' object (or to permit escape without fear of subsequent identification even if this involved killing or the infliction of grievous bodily harm...." Such a view has been soundly rejected in the Australian common law jurisdictions. See *Vandine* [1970] 1 NSWLR 252; *Walker* [1966] VR 553.

[62] *Chang Wing-Siu* [1985] 1 AC 168; *Hyde* [1990] 3 All ER 892; *Dunbar* [1988] Crim LR 693. Some English cases use the theory of authorization, suggesting that the actual perpetrator was authorized by the other participants to do what he did. See *Lovesey and Peterson* [1970] 1 QB 352. But, this idea does not accord with case law and the explanation based on contemplation was preferred in *Hyde*.

[63] As was indeed the case in *Tyler and Price*, *supra*, note 7, where the leader of the gang who actually killed was possibly entitled to the plea of insanity.

[64] [1992] 1 AC 48.

VIII. The Termination of the Common Intention to Rob

The common intention to commit robbery does not end upon the completion of the robbery but extends to successful flight from the place of the robbery. Courts have held that where the escape of the robbers is impeded by someone seeking to apprehend them and that person is killed by one of the participants, all the participants are equally guilty of the murder. The logic of this position lies in the fact that the successful escape after the robbery forms an aspect of the plan that was formed between the parties and must therefore be included in the common intention. The logic holds particularly where the participants make their escape together. The methods adopted during the escape would be known to each of the participants and must be taken as having been approved by all of them.

The logic becomes attenuated where the participants go separate ways in seeking their escape. One way of looking at the situation is to hold that the separation makes no difference and the participants continue to be liable for a killing committed by one of them several miles from where they were and which was completely unknown to them. The reasoning would be that the separation facilitated the escape of the participants as the pursuers would themselves have to separate and diversify their resources in pursuing the different participants who had gone their different ways. Since the separation was a common plan, there is liability for what each participant does in the course of his separate escape. The reasoning is bolstered by the fact that the common intention could be effectively terminated by each participant by surrendering to the officers who are in pursuit. Such an argument is also supported by policy in that it favours a participant surrendering to the pursuers if he wishes to avoid the risk of becoming liable for what the other participants do in effecting their separate escapes.

A further question which arises is whether the common intention is terminated where the participants who are together, drop the loot of the robbery in front of their pursuers. Is the common intention terminated for the intention was to make a successful getaway with the proceeds of the robbery? Since the proceeds of the robbery have been abandoned and it was the main object of the robbery, the argument is that the common intention should be regarded as terminated. Where the pursuers continue with the pursuit despite the relinquishment of the proceeds of the loot and one of them is killed by a participant, the issue is whether all the participants are equally guilty of murder. Though it may be logical to hold that the common intention has been terminated by the discarding and the recovery of the loot, courts have been reluctant to hold that this is so where a killing

takes place subsequently.[65] The pursuers are, in terms of the law, entitled to continue the pursuers in order to apprehend them for punishment. Indeed, if they are officers of the law, there may be a duty to continue pursuit by virtue of their office. The view that all participants will be guilty of murder if any one of them were to kill a pursuer ensures the protection of the pursuers and mandates the surrender of the pursued. There is a social value to be secured by holding that common intention is not terminated by the mere discarding of the proceeds of the robbery.

However, there is some authority for regarding that the escape is a separate transaction from the robbery itself and that the escape could not be regarded as a part of a transaction which is "*in furtherance of* the common intention" as required by section 34.[66] This authority does not have support in other Commonwealth jurisdictions. In English law, a killing, while retreating from a robbery, has been considered as being committed in the course of the robbery. The only direct English authority is an old case referred to in Hale. In *Jackson,*[67] five robbers were pursued "by the country upon hue and cry levied". Jackson stopped, fought with and killed one of his pursuers. It was held that Jackson and three of his associates were guilty of murder. The other was not guilty of murder for "when one of the malefactors was apprehended a little before the party was hurt, that person being in custody when the stroke was given was not guilty, unless it could be proved that after he was apprehended he had animated *Jackson.*"[68] In *Craig and Bentley*,[69] where the killing of a policeman took place after Bentley had been arrested, the arrest did not seem to make any difference. In any event, the issue whether it would, was not taken up in

[65] Indian courts have considered this issue largely in the context of s 396, the provision on dacoity. See *Punjab Singh* AIR 1933 Lah 977; *Khandu* (1900) 2 BLR 325; *Bhattachariya* AIR 1932 Cak 818; *Samunder Singh* AIR 1965 Cal 598. But, see *Cander* (1909) AWN 47.

[66] See Bhagwati J in *Shyam Behari* AIR 1957 SC 320 who found "force" in the argument that the retreat was a separate transaction from the dacoity. Later Indian decisions have disregarded the doubt created by Bhagwati J, see *Mahfooz* 1959 ALL LJ 700; *Kaley* AIR 1955 All 420.

[67] *Jackson* (1674) 1 Hale 464. There is no direct modern authority. But, see the dictum of Widgery LJ in *Lovesey* [1969] 3 WLR 213 at 216 who regarded "escape without fear of subsequent identification" as forming part of the object of robbery.

[68] This kindness towards the apprehended felon may be doubted for the termination of the common intention was not voluntary. There could be no termination through an involuntary act of capture.

[69] Unreported. The facts are stated in EH Hyde, *The Trial of Christopher Craig and Derek William Bentley* (1954). In this sad case which has haunted the English legal system for a long time, Craig who fired the shot was not hanged as he was under the specified age for such punishment but Bentley was. On the facts presented at the trial, Bentley was supposed to have shouted while in custody of the police, "let them have it".

the case at the trial. Perhaps, the issue was not considered relevant because the prosecution proceeded on the basis that Bentley had shouted encouragement to his co-accused after his arrest and thus, had "animated" him. A Canadian case, *Rowe*,[70] supports the view in *Jackson*.

The view taken by an American court in *Commonwealth* v *Doris*[71] takes the view that the capture of one of the accused makes no difference for his liability. The accused and three others, all armed with guns, had planned to rob a van carrying money. They drove up to the van and some kept up a continuous volley of bullets until the others returned with the money. A policemen fired into the motor of their car and disabled it. The accused was then captured by the policeman but the others, picturesquely, tried to escape in a horse-drawn milk wagon. A policeman who followed was shot and killed by one of the robbers. The question arose whether the accused who had been captured prior to the killing of the policeman was liable for murder. Sadler J held that he was liable. For the association to be terminated, "there must be an actual and effective voluntary withdrawal before the act in question has become so imminent that its avoidance is practically out of the question". This view is justifiable on the policy basis that it induces a felon to submit to arrest in order to escape guilt for any subsequent violence by his co-participants. The contrary view for which there is some support in the Indian cases may seem logical but it confers a benefit upon the arrested felon for no merit of his own and does not further any social policy.

IX. Conclusion

The courts in the Commonwealth have had to deal with the doctrine of common intention which involves a constructive doctrine unfair to the individual accused in a manner that balances the interests of the accused with social interests in the suppression of organized crimes of violence. The manner in which subjective factors are used to curtail the doctrine of common intention in assault cases whereas objective factors are used to give it a freer rein in robbery cases demonstrates this desire to retain a delicate balance between these interests. The extent to which extensions of the doctrine will be permitted will depend on the court's appreciation of the social factors surrounding the circumstances and its appreciation of the need of deterrence of certain types of conduct and not on sheer logic alone. Another complicating factor is the mandatory capital sentence. There will be an obvious reluctance on the courts which have to apply such a

[70] (1951) 4 DLR 238.
[71] (1926) 287 Pa 547.

sentence to use a constructive doctrine as the basis on which to impose the sentence upon several accused. A careful scrutiny of each offender's case is obviously preferable in such situations. Yet, the preponderance of social interests may outweigh such a consideration. But there will always be the moral reluctance to make an individual serve the social interest at the cost of his life. It is not an easy choice for the courts to make. Given this difficulty, the courts have indicated the manner in which they will effect the balance between social interest and the interest of the individual offender but each case will ultimately depend on its own facts.

The ultimate rationale for extensions of the doctrine in situations of robbery will be the need for deterrence of violence committed by groups of offenders. The theory that the imposition of constructive liability for any killings which occur in the course of robbery deters resort to violence during their commission rests on an untested hypothesis. But it is an hypothesis which has been accepted and acted upon. This is to make the law depend on a hunch. But logic alone is not the basis of the law or of judicial reasoning. As Cardozo pointed out:

> My analysis of the judicial process comes then to this and little more: logic, and history and custom, and utility and the accepted standards of right conduct are forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or the value of the social interests that will thereby be promoted or impaired.[72]

It is clear that in the area which has been studied in this article, courts have been prepared to disregard logic when they believe that public security will be promoted by taking a different course. It will be futile to analyze the cases, especially the extensions which have been made in the robbery situations merely on the basis of logic alone. Expediency and social utility may provide the better bases for the explanation of these trends.

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[72] B Cardozo, *The Nature of the Judicial Process*. This is almost a restatement of the aphorism of Oliver Wendell Holmes that "the life of the law is not logic but experience".

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