Singapore Journal of Legal Studies
[1999] 494 – 530

COMMON INTENTION AND THE ENTERPRISE OF CONSTRUCTING CRIMINAL LIABILITY

The doctrine of common intention, and allied concepts like common object, abetment, gang robbery and arms offences, which have the potential of imposing constructive criminal liability, have caused persistent problems. This discussion hopes to lay bare the complexity of the interpretative choice which has to be made. It goes on to suggest the direction which judges and law-makers ought to take with respect to constructive crimes in general.

I. Common Intention and Constructive Liability

ONE of the most puzzling doctrines in criminal law today is that of common intention. Its source is section 34 of the Penal Code.[1] The words are deceptively simple:

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

The particular context in which the most difficult problems arise is this: two or more persons agree to commit a certain crime (the primary crime), in the course of which another crime (the secondary crime) is committed by any member of the group (the actual doer). Under what conditions would the rest of the group (the common intenders) be liable for the secondary crime? The classic cases have been situations where a group of persons sets out to commit assault, robbery or kidnap, and in the carrying out of that venture, a member of the group kills the victim and therefore commits murder. Section 34 has the potential to make each and every member of the group liable for murder as well. It becomes crucial for those concerned in the criminal process to know precisely when section 34 kicks into action to fix the entire group with murder. What is clear is that the actual doer, standing alone, must of course be liable for murder – otherwise, there is

[1] Cap 224, 1985 (Rev Ed).

no question of imputing murder on the rest. It is also clear that the members of the group must be liable for the primary offence of assault, robbery or kidnap, as the case may be – without such a criminal enterprise, the application of section 34 does not arise. In other words, the assumption is that the actual doer satisfies the *mens rea* and *actus reus* requirements of the secondary offence, and that the common intenders satisfy the *mens rea* and *actus reus* requirements of the primary offence. The unanswered question is this: what *additional mens rea* and *actus reus* must the common intenders have before they can be held liable for the secondary offence which they did not themselves commit?

The crux of the problem with section 34 is that the words contain no precise prescription as to the extra bit of *mens rea* or *actus reus* which the common intenders must have to attract liability for the secondary offence. To put it bluntly, the courts have to choose from the entire array of possible *mens rea* and *actus reus* requirements known to the criminal law. It would have helped if section 34 itself had specified what these requirements are to be, but this the legislature has not chosen to do. We have had a steady stream of cases interpreting and applying section 34 since the 1930s, but it appears that the courts have not always been sufficiently aware of the sheer breadth of the (*de facto*) discretion they have been given to decide what the section requires. This is unfortunate because the application or non-application of section 34 to murder is, in Singapore, literally a matter of life and death.

II. The *Mens Rea* of Common Intention – The Cases

What do the cases say about the mental element of common intention? The old decision of *Vincent Banka*[2] pitched it high. The common intender must not only intend to commit the primary offence, but must also intend to commit the secondary offence as well. In a robbery-murder situation, the common intender must have the common intention to rob, and must also have the common intention to kill.[3] It was also stipulated that the common intenders need not have set out to kill – it is sufficient if they were willing to kill, if necessary, to achieve their criminal objective. In other words, a conditional intent to kill is sufficient. Not long after this, *Chhui Yi* expanded the *Banka* formula – intent or conditional intent to kill was not required, so long as the group members commonly shared any of the *mens rea* sufficient

2 [1936] 1 MLJ 53.

3 *Ibid*. It was held that the jury had to be "satisfied as to the existence of a common intention between the robbers not merely to commit robbery but, if necessary, to kill the deceased".

to found a murder charge.[4] For example, a common intention to cause such bodily injury as would in the ordinary course of nature be sufficient to cause death (section 300(c)) is sufficient. Presumably, the additional *mens rea* need not be an intention at all, for a commonly held knowledge that the enterprise is so imminently dangerous that it must in all probability cause death (section 300(d)) must also be sufficient. The import of these two cases is clear – the common intender cannot be liable for the secondary offence, unless he or she also possessed the *mens rea* required (even if it is only conditional) for the secondary offence. From the viewpoint of constructive crimes, this interpretation does not allow the *mens rea* to be constructed at all. Section 34 allows only the *actus reus*, and not the *mens rea*, to be constructed or imputed to the common intenders. The common intenders must actually have the *mens rea* required for murder (or the relevant secondary crime).

There, matters stood for almost 40 years – those were the days of the jury trial and the judges routinely gave directions faithful to the *Chhui Yi – Banka* formula.[5] For reasons which are not entirely clear, this seemingly settled position was, all of a sudden, overthrown by the case which can perhaps be described as the mother of all recent decisions on common intention – *Mimi Wong*.[6] Although the evidence would have clearly satisfied the *Chhui Yi – Banka* test,[7] the Court of Appeal said that the intention of the actual doer must be distinguished from the common intention of all.

4 [1936] 1 MLJ 142. The court held:

> That does not, of course, mean that, in the case of murder, there need have been a common intention actually to kill; but there must have been a common intention to do any of the acts which are described in ss 299 and 300 of the Penal Code and the doing of which, if death results, amounts to murder.

5 *Eg, Santa Singh* [1938] MLJ 58; *Tng Ban Yick* [1940] MLJ 153; *Lee Yoon Choy* [1948-49] MLJ Supp 167; *Gui Hoi Cham* [1970]1 MLJ 242. In Singapore, the orthodoxy seems to have survived the abolition of the jury – *Lee Choh Pet* [1972] 1 MLJ 187 (kidnap-murder, common intention to kidnap and murder); *Kee Ah Tee* [1971] 2 MLJ 242 (robbery-murder, common intention to use knives, if necessary, to inflict s 300(c) injuries). The subsequent shift is all the more surprising because it was the same judge, Wee CJ, who delivered these two later judgments and the judgment in *Mimi Wong, infra,* note 6.

6 [1972] 2 MLJ 75.

7 The finding of fact was that there was a common intention either to kill the victim or to inflict a s 300(c) injury, *ibid*, at 78. The same can be said of almost all decisions advocating the *Mimi Wong* interpretation – *eg*, *Neoh Bean Chye* [1975] 1 MLJ 3 (robbery-murder, conditional intent to shoot at victim); *Tan Hung Thiam* [1991] SLR 101 (robbery-murder, common intent to inflict s 300(c) injuries).

The two intentions need not be the same, but they must be "consistent".[8] What is clear is that the *Mimi* formula does not require the common intenders to possess any of the *mens rea* of the secondary offence. What is not clear is the precise requirement which has taken its place.[9] All we have is the word "consistent", an unhappily ambiguous term in the context of the need for certainty in the criminal law. The major contending interpretations are these. Consistency could mean common intenders actually knowing that one of their number may kill (recklessness); or it could mean that the common intenders could have reasonably foreseen that one of them might kill (negligence); or it could also mean that the killing causally flowed from the commonly intended crime, regardless of the mind of the common intenders (strict liability).

What followed was a series of decisions which seem to adopt one or even more of these alternative theories of liability, but surprisingly, without attempting to resolve the inherent ambiguity of the *Mimi* formula. Very striking are the group of robbery decisions, of which *Syed Abdul Aziz* is the principal example,[10] which acquitted the common intender of murder, apparently on the ground that there was insufficient evidence that the common intender knew that the actual doer had brought along the murder weapon. While these cases clearly rule out the strict liability theory (*ie*, we do not care what was in the mind of the common intender), they do not clearly decide whether it was the test of (subjective) recklessness or knowledge, or the test of objective foreseeablity or negligence. Absence of knowledge of the murder weapon is probative of the absence of knowledge that death might occur (on a subjective theory); or absence of knowledge of the knife might lead the court to infer that a reasonable man in the common intender's position would not have been able to foresee that death might occur (on

8 The context was this, *supra*, note 6, at 79:

> The intention that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention...

9 There is a rather cryptic illustration given in *Mimi Wong, supra,* note 6, at 79. If A and B form a common intention to "cause injury to C with a knife", and A holds C whilst B stabs him in a manner which satisfies s 300(c), then both B, the actual doer, and A, the common intender, is liable for murder. Surely it could not have been intended that if the common intention was to nick the victim on the thumb, that would be sufficient. We still have to ask what kind of injury was commonly intended.

10 [1993] 3 SLR 534. See also *Mazlan bin Maidun,* 23 May 1992, (HC). A similar dynamic is evident in the recent decision of *Too Yin Sheong* [1999] 1 SLR 682 where "consistency" seemed to hinge on the common intenders knowing that the actual doer had a weapon.

an objective theory). Nevertheless the language of these cases seem to incline towards the subjective knowledge theory – the courts were impressed with the absence of *actual* knowledge of the murder weapon. They did not go on to inquire whether a reasonable person should have known that his accomplice would have a weapon, as they ought to have done under an objective foreseeability theory.[11] The latest Court of Appeal decision in *Shaiful Edham* seems rather more explicitly to endorse the subjective knowledge theory. The Court held:[12]

> The participants must have *some knowledge* that an act may be committed which is consistent with or would be in furtherance of the common intention. (emphasis added)

On the other hand, the language of objective foreseeability was favoured in *Tan Lay Heong*.[13] The Court there seemed to emphasise, in acquitting the alleged common intender, that the secondary crime was "not something that was either contemplated or *done ordinarily* in furtherance of a common intention" to commit the primary crime. A clearer advocate of the objective foreseeability theory is the High Court decision in *Too Yin Sheong*.[14] In rejecting the subjective knowledge theory, the court appeared to say that the correct test is whether the "acts of the main offender could reasonably be foreseen or contemplated by the secondary party".

A decision which seemed to use neither the subjective knowledge nor the objective foreseeability theory was *Asogan Ramesh*.[15] After pointing out that common intention was a "wide principle open to the prosecution", the Court concluded, in convicting the common intender of murder, that it was the commonly intended assault which "ultimately *led* to the death of the deceased", and that the killing was the "prolonged *result* of the unified intent". (Emphasis added.) This is the language of causation and strict liability. We do not care what was known, or what could have been known,

[11] S 5 of the Arms Offences Act, Cap 14 (1998 Rev Ed), *infra*, note 95, in comparison, does indeed employ the language of objective knowledge or foreseeability.

[12] [1998] 3 SLR 736. It is unfortunate the court did not tell us exactly what knowledge is required.

[13] [1996] 2 SLR 150.

[14] 24 Aug 1998, (HC). The judgment is not easy to reconcile internally. The first part of it seems to adopt the language of objective foreseeability, but the remaining portions seem to veer towards strict liability.

[15] [1998] 1 SLR 286 (CA). Again, the facts were such that it was unnecessary to use a strict liability theory to implicate the common intenders. Three common intenders had ganged up to beat and stab the deceased, which they did. They would have clearly been guilty of murder even under a theory of subjective knowledge, or even on a *Banka-Chhui Yi* test.

so long as the commonly intended criminal activity led to or resulted in the secondary crime. The High Court decision in *Too Yin Sheong*,[16] after seemingly adopting the objective foreseeability theory (as we have seen), veered toward a decidedly strict liability theory. The court declared immaterial what the common intenders knew, expected, contemplated or foresaw. It is the "subjective intention of the *actual doer* to further" the common intention which is the focus. The court continued:

> [S]o long as the doer of the act had done (*sic*) the act in furtherance of the common intention of them all, then the liability for that act automatically extends to the rest of the secondary offenders.

In short, there is no additional *mens rea* requirement for the common intenders. All the *mens rea* they need to have is the *mens rea* for the primary offence. The intention of the actual doer takes over from there. It is strict liability theory with a rider that the actual doer intended the primary crime to further the common intention.

While all this is going on, there remains a persistent lot of cases which, notwithstanding *Mimi Wong*, continue to use the *Banka* formula. Examples may be found in *Tan Bee Hock* and *Hasan*.[17] In *Tan Bee Hock*, the court held that, in addition to the *mens rea* to commit the primary offence of armed robbery, there must also be a common intention to use the weapons brought along to overcome resistance. *Hasan* is even more direct – there must be a common intention to kill, no less. In *Tan Joo Cheng*, the judges thought it incumbent on them to decide whether it was commonly intended that the knife brought along was to be used to overcome resistance.[18] Dare we assume that even the seemingly discredited *Banka* formula lives on?

There is another set of interesting assault-murder cases which reveal the uncertainty of the precise *mens rea* requirements for common intention. The majority of these cases require, in addition to the common intention to assault, the intention to cause serious bodily injury to the victim. The recent case of *Mansoor Abdullah*,[19] for example, inquired whether the common intenders intended to "cause *grievous* hurt" to the deceased. If we are trying to fit these cases into our scheme, they could conceivably

[16] *Supra*, note 14.

[17] Respectively, 22 May 1993, (HC), and *Hasan*, 31 Oct 1998, (HC); The *Banka-Chhui Yi* test seems to have survived in Malaysia: *Lee Kok Eng* [1976] 1 MLJ 125.

[18] [1991] 1 MLJ 196, at 202-3;

[19] [1998] 3 SLR 719 (CA). See also *Samlee Prathumtree*, 21 Aug 1996, (CA); *Asokan* [1995] 2 SLR 456; *Andrew Gerardine* [1998] 3 SLR 736.

satisfy even the *Banka* formula – an intention to cause grievous hurt is not easily distinguishable from the section 300 (c) requirement of an intention to cause bodily injury which (objectively) leads to death in the ordinary course of nature. Equally, an intention to cause grievous hurt is potent evidence from which subjective knowledge of the likelihood of death may be readily inferred. Similarly, a reasonable man having the intention to cause grievous hurt should foresee that death is a distinct possibility. The test is slightly, but significantly, different in *Ng Beng Kiat*.[20] It is distinctly harder on the common intenders. It appears to be sufficient if the common intenders simply intended to cause any kind of hurt to the victim. This slips into strict liability theory – if the common intenders intended to assault the victim in the first place, of course there must also be a common intention to cause some sort of hurt. Thus, in fact, no additional *mens rea* is required.

However, looking at these cases from another angle, they perhaps reveal the existence of a hidden variable in the equation. We have till now simply assumed that whatever the additional *mens rea* required is to be, the object of that state of mind is death or killing. In the world of constructive crime, this need not be so. One could presumably construct liability for murder from an intention to cause a lesser harm, *eg*, grievous hurt or simple hurt.[21] One could also construct it from recklessness or negligence as to grievous or simple hurt.

Yet another hitherto undiscussed variable which has cropped up in other jurisdictions is the degree of probability that death (or other sufficient injury) will happen.[22] This further complication does not, of course, exist for the *mens rea* of intention or strict liability, but it becomes important if we are talking of recklessness or negligence. Must the event of death be known or reasonably foreseen as a mere possibility, a significant possibility or a more-likely-than-not possibility?

There are, then, not just one set of variables, but three: the mental element, the particular harm, and the probability of it occurring. Even if we lay aside

[20] [1995] 3 SLR 335.

[21] See a similar debate in Canada in the context of unlawful act manslaughter in *Creighton* [1993] 3 SCR 3, where the judges disagreed over whether there had to be foreseeability of death or merely of significant harm. The English common law now seems to require foresight of murder as a consequence of the joint criminal purpose: *Powell and English* [1997] 4 All ER 545, House of Lords.

[22] See the discussion in Australia over the question of whether there has to be foresight of probable or merely possible consequences of the joint criminal enterprise in *McAuliffe* (1995) 130 ALR 26. The English common law has settled on the test of "real possibility", whatever that may mean: *Powell and English, ibid*.

the second and third variable (of degree of harm and probability),[23] a surprising number of alternatives, all ostensibly supported by some authority, are now on the table. In increasing order of "constructiveness" they are:

(1) Intent/Conditional intent to kill OR any other *mens rea* sufficient for murder (*Chhui Yi/Banka*)

(2) Subjective knowledge of the likelihood of death (*Shaiful Edham*)

(3) Objective foreseeability of the likelihood of death (*Tan Lay Heong*)

(4) Strict liability plus intention of actual doer to further common intention (*Too Yin Sheong*)

(5) Strict liability *per se* (*Asogan Ramesh*)

The overwhelming weight of authority is in favour of alternatives (2) and (3), but, in view of the continuing uncertainty, we have to make the normative inquiry – how *should* we interpret section 34? But before that we need to look at the state of law on the *actus reus* of common intention, for the two elements intertwine.

III. The *Actus Reus* of Common Intention – The Cases

Section 34 does not bite unless "a criminal act is *done* by" the common intenders. It is important now to distinguish between two different uses of the doctrine of common intention. We have seen its application in a situation where a commonly intended primary crime leads to the commission of a secondary crime. The other less complicated context is the single-crime context.[24] A group of persons commonly intend to commit, say, theft. Different members of the group are involved in the joint enterprise in different ways. The prosecution wishes to make them all liable for the offence of theft. The question is, the common intention to commit theft having been

[23] These are difficult questions which we must one day resolve, but for the purpose of this discussion, we may assume that these variables are fixed in accordance with current English common law, *ie*, there must be foresight (subjective or objective) of a real possibility of murder as a consequence of the joint criminal enterprise.

[24] In recent cases the context is almost invariably illicit drugs offences: *eg, Ho So Mui* [1993] 2 SLR 59; *Foong Seow Ngiu* [1995] 3 SLR 785; *Lee Yuan Kwang* [1995] 2 SLR 349.

established,[25] how much must each member of the group have do (to effectuate the intended theft) to engage the operation of section 34?[26] First, all the cases are agreed in that the common intender to be liable under section 34 must have somehow *participated* in the crime. The Indian Supreme Court in *Ramayya* said:[27]

> The antithesis is between the preliminary stages, the agreement, the *preparation*, the planning, which is covered by section109 (abetment), and the stage of *commission* when the plans are put into effect and carried out. Section 34 is concerned with the latter. (Emphasis added.)

Criminal lawyers will immediately recognise the similarity between this formulation and the mainstream view of what is required as the *actus reus* of criminal attempt.[28] This question of sufficient "proximity" in the law of attempt is a much-vexed one.[29] It is not possible to deal comprehensively with the distinction between preparation and commission in the law of attempt, but one can expect the same kind of inconsistency and uncertainty to exist in the context of section 34 as well. One can also expect considerations of *mens rea* to seep into calculations of *actus reus* – where evidence of *mens rea* is strong, any hint of participation will do; where evidence of

[25] In practice, the difficult problem is whether or not there is sufficient proof of common intention. For most of these cases little more need be said except that it is question of fact in all the circumstances, no different from any other question of fact. The slight bit of law involved is the principal in *Mahbub Shah* [1945] AIR PC 118 that there has to be a "pre-arranged plan", which has been applied in *Lee Chin Guan* [1992] 1 SLR 320, and which has, more recently been tweaked into "a meeting of minds" in *Shaiful Edham, supra*, note 12. The headnote of this last case is a trifle misleading in saying that *Mahbub Shah* was not followed. In fact all that was meant was that a common intention may be formed on the spot, a position which has not for many years been thought to be incompatible with *Mahbub Shah* which was anxious only to say that coincidental but spontaneous action does not amount to common intention.

[26] It is not easy to fathom why the common intention route is preferred over abetment. I have not been able to find any situation in which abetment liability would not have served just as well. Surely a "meeting of minds" to commit a crime (plus participation) is at least abetment by conspiracy. Perhaps it is felt by prosecutors that it is easier to obtain joint trials *via* common intention, but I do not see why this should be so. S 176 of the Criminal Procedure Code, Cap 68, 1985 (Rev Ed), expressly allows the court to order a joint trial for the principal offender and the abettor.

[27] [1955] AIR SC 287, 293.

[28] *Eg, Wong Wai Hung* [1993] 1 SLR 927.

[29] *Eg, Kee Ah Bah* [1979] 1 MLJ 26, where it is not easy to settle the difference of opinion between the trial judge and the appellate judge.

mens rea is weak, courts tend to require a heavier degree of participation.[30]

That which has occasioned sharp disagreement in both India and here is the requirement of physical *presence* at the scene of the crime. The Supreme Court of India could not agree whether physical presence was a hard and fast requirement in addition to participation, or whether it was merely (albeit cogent) evidence of participation.[31] Neither, it appears, can our Court of Appeal. The earlier case of *Ibrahim Masod*[32] which seemed to adopt the presence-as-evidence view has been contradicted in *Andrew Gerardine*[33] which held that presence is a precondition.

A slightly different set of problems arise where the common intender is present at the scene – does presence invariably mean participation? Where the *mens rea* of common intention to commit the crime is not clear, mere presence may not amount to participation. Under these circumstances, the evidential import of presence is ambiguous – it may be probative of participation or merely of being a "hanger-on". Even where the *mens rea* is clear, the cases diverge. Some, such as *David Quak*,[34] hold that common intention plus presence is tantamount to participation, perhaps on the ground that the common intender's presence facilitates or encourages the commission of the crime. Others, such as *Chew Cheng Lye*,[35] seem to require more than mere presence.

Now we are ready to address the problem of *actus reus* in twin-crime situations. In single-crime contexts, we have seen that the requirement is participation (and perhaps presence).[36] Where there are two distinct crimes involved, the law has to decide the additional question of whether the pre-condition of participation pertain only to the primary crime, or whether it also applies to the secondary crime as well. For example, in a robbery-murder situation, is it sufficient if the common intender participates in the primary crime of robbery, or must the common intender also participate

[30] See *eg, Mohd Ali Jaafar* [1998] 4 MLJ 210 which tried to distinguish the earlier case of *Thiangiah* [1977] 1 MLJ 79 on grounds of *actus reus*, but which perhaps could be more convincingly explained by a difference in the quality of evidence of the *mens rea.*

[31] *Ramayya, supra*, note 27, insisted that physical presence at the scene must be proved, but *Desai* [1960] AIR SC 889 held that presence, though evidential of participation, was not invariably required.

[32] [1993] 3 SLR 873.

[33] *Supra*, note 19.

[34] [1999] 1 SLR 533.

[35] [1956] MLJ 240.

[36] Unless the context otherwise requires, I use the word "participation" to include presence, if that indeed is the law. Although our latest judicial pronouncement (*Andrew Gerardine, supr*a, note 19) is in favour of the requirement of presence, I doubt if it will be the last word.

in the murder as well? For a long time criminal lawyers thought that the Privy Council decision of *Barendra Kumar Ghosh*[37] had settled the matter in favour of the view that participation in the in the primary crime of robbery was enough. It was in this context that the famous "unity of criminal behaviour"[38] speech was made – participation in the robbery is participation in the unity of criminal behaviour, which includes the murder. Then came the case of *Tan Joo Cheng*[39] which threw this state of affairs into considerable doubt. It was the classic robbery-murder situation, and the common intenders had planned to rob their victim using a rope and a knife, but the actual doer had accosted the victim and killed him on the second floor of an HDB apartment block whilst the common intender was still at the staircase landing. In acquitting the common intender, the court said:[40]

> There was no participation by him in any form – active or passive – in the holding up of Lee (the victim), the struggle with Lee *and* the stabbing of Lee. A person sought to be made liable by section 34 must in some manner participate – whether actively or passively – in *the act constituting the offence*. (Emphasis added.)

This sounds very much like a requirement that the common intender must participate in the secondary crime of murder as well. It was a departure from the prevailing orthodoxy which drew academic gasps from Professor Koh Kheng Lian who labelled the decision "unfortunate" and continued:[41]

> For the killing of Lee (the victim) was in furtherance of the *common intention to rob for which there was participation*. This clearly brought the [common intenders] within the operation of ...section 34.

Ibrahim bin Masod[42] followed shortly. This time, the primary crime was kidnap, which was successfully carried out by the common intenders. The problem was that the victim was murdered by one of the group when his accomplice, the common intender, was nowhere near the scene of the murder. One might have thought that the common intender could not have possibly participated in the murder, as he must under the *Tan Joo Cheng* principle. Yet the Court of Appeal found him guilty of murder by virtue of section

37 [1925] AIR PC 1.
38 *Ibid*, at 9.
39 [1991] 1 MLJ 196.
40 *Ibid*, at 202.
41 "Penal Code: Section 34 and Participation" [1992] SJLS 232, at 239.
42 [1993] 3 SLR 873.

34. Interestingly, the Court did not re-embrace *Barendra* or Professor Koh's critique. Instead, it confirmed the position in *Tan Joo Cheng* and held:[43]

> There is ample evidence...that [the common intender] had *passively* if not actively *participated in the killing* of [the victim], notwithstanding his absence when the actual act of strangling [the victim] was committed by [the actual doer]. (Emphasis added.)

How could the common intender in *Ibrahim*, many kilometres away, be said to have participated in the murder without reducing the meaning of 'participation' to vanishing point? A closer examination of the two cases reveals a nuance which may not be obvious on first impression. The common intender in *Ibrahim* was party to a "pre-arranged plan to kidnap [the victim] for ransom *and to do away with him*".[44] (Emphasis added.) The common intention, right from the start, was not only to kidnap, but to kill as well. Thus participation in the kidnap, given the ultimate and settled murderous intent was, at the same time, participation in the murder. The common intender in *Tan Joo Cheng* was not quite so evil – although the common intention was to use the knife to "intimidate [the victim], and if [the victim] resists, to counter the resistance",[45] there was no settled intention to kill. It was a conditional intent only, and because of that participation in the robbery was not also participation in the killing. If this reading is correct, then it appears that the element of "participation" has not only an "act" element, but a "mind" component as well. In short, if the common intention contains a settled plan to kill, the act of killing starts with the primary offence (of either kidnap or robbery); if the common intention contains only a conditional intent (or other lower form of *mens rea*), the killing does not start with the primary offence, and participation at a later stage becomes necessary.

So far so good, but along comes the latest pronouncement of the Court of Appeal in *Andrew Gerardine*.[46] Before this case, no one ever thought that the common intender must be physically present to attract section 34.[47] If this decision holds, then for single-crime common intention, the position now is that the common intender must be physically present. In twin crime contexts, the question arises whether the common intender must be physically

[43] *Ibid*, at 882.
[44] *Ibid*, at 881.
[45] *Supra*, note 42, at 202.
[46] *Supra*, note 19.
[47] Excepting the Indian decisions discussed earlier.

present, not only at the scene of the primary crime (of robbery or kidnap), but also at the scene of the secondary crime (of murder). The Court in *Andrew Gerardine* is quite wrong to conclude that *Tan Joo Cheng* "required an accused to be physically present when the act constituting the offence (*ie*, the secondary offence of murder) was committed".[48] My reading of *Tan Joo Cheng* is that the court never considered physical presence to be a precondition, but only as evidence of participation. The Court was probably right when it said that *Ibrahim* took the "contrary position" (*ie*, that physical presence is not a precondition, provided there is participation). Yet *Andrew Gerardine* is original when it ruled that the common intender must be physically present both at the commission of the primary crime and also at the commission of the secondary crime. It concluded:[49]

> In our view, therefore, in order for an accused person to be liable under section 34, there must be a requirement that he was physically present when the commission of the (presumably secondary) offence took place. (Parenthesis added.)

It is unfortunate that the Indian authorities which the Court thought to be supportive of this position were not concerned at all with twin-crime situations. Even if the requirement of presence for single crime cases is sound, there is no compulsion that presence must also be required for the secondary offence in twin crime situations. Would the common intender in *Ibrahim* have been convicted or acquitted of murder by the *Gerardine* court? It would appear that he would have escaped a murder charge because he was not present when the killing took place, unless the Court chooses, as I think the *Ibrahim* court did, to treat both the kidnapping and the killing as one unified act in view of the settled intention to kill. If the court chooses to telescope the kidnap and the murder, the requirement of presence would be met by the common intender's attendance at the kidnap. This route is, however, unlikely as the Court was not even aware that this may well have been the real dynamics of *Ibrahim*. Would *Tan Joo Cheng* have been decided the same way? Probably not. The common intender was present, as defined by the court in *Gerardine* – for he need not be present at the "immediate site" but only "at the scene".[50] Presence at the scene is potent evidence, many cases tell us, of participation, even he had no other role than to encourage the actual doer by his mere presence.

[48] *Supra*, note 19.
[49] *Supra*, note 19.
[50] *Supra*, note 19.

In summary, these are the alternative renditions of *actus reus* on the table:

(1) Participation in the primary offence (*Barendra*)

(2) Participation in primary and secondary offence (*Tan Joo Cheng*)

(3)(a) Where common intention includes a settled intention to kill, participation in primary offence will do
(b) Where common intention does not contain a settled intention to kill, participation in the secondary offence (in addition to the primary offence) is required.
(My reading of *Ibrahim*)

(4) Presence and participation in both primary and secondary offence, whatever the common intention (*Andrew Gerardine*)

As the matter has not, I think, been sufficiently considered by the Court of Appeal, we must again embark on a normative inquiry – what should the *actus reus* of common intention be? The answer obviously depends on what we decide the *mens rea* to be.

IV. Constructing Common Intention – The Words, the Principle and the Policy

As all good students of statutory interpretation must do, we must first look to the words of the section. The troublesome phrase is "in *furtherance* of the common intention of all". Unfortunately the words make us no wiser. It really depends on which particular word in the phrase the interpreter wishes to emphasise. If the focus is thus: "in *furtherance* of the common intention of all", then the *Mimi Wong*[51] progeny, *ie*, no need for common intender to have the same level of *mens rea* as actual doer, looks plausible. Although the killing is not within the common intention, it was in furtherance of it. On the other hand, if the phrase is rendered thus: "furtherance of the *common* intention of *all*", then *Banka*[52] seems to make more sense. Anything not within the common intention cannot be in furtherance of it. Looking at it another way, it is the word "furtherance" which is problematic. The Oxford English Dictionary defines it with words such as "help forward,

[51] *Supra*, note 6.
[52] *Supra*, note 2.

assist, to promote". There is no telling when an act is simply in furtherance of a joint enterprise, and when it has gone beyond the scope of such an enterprise. "Help forward" yes, but how far? Moreover, if the words cannot break the deadlock between *Mimi* and *Banka*, all the more can it not decide which of the *Mimi* progeny should prevail.

We fare no better for the *actus reus*. The key words are, "where a criminal act is done by several persons". True, the "criminal act" may be a series of acts,[53] but there is no indication where the series starts and where it ends. Needless to say, human behaviour does not occur in neat chapters like a well-written novel. One event shades into the next. Or to put it another way, we know that the criminal act must be done, but how much must the common intender do to qualify? The words do not say.

Then we must look further afield. Section 34 is located in a series of provisions dealing with group crimes, principally sections 34, 35, 37 and 38. The most inconvenient provision for adherents of the *Mimi* group of cases is section 35. Perhaps it should be given in full:[54]

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

[53] S 33, Penal Code.

[54] Since the writing of this article, my colleague Chan Wing Cheong, who is doing some historical work on the Penal Code, has pointed out to me that the original version submitted by Macaulay did not have section 34 at all, but only a provision very similar to the present s 35:

> Wherever the causing of a certain effect with a certain intention, or with a knowledge of certain circumstances, is an offence, it is to be understood that if more persons than one jointly cause that effect, every one of them who has that intention, or that knowledge, commits that offence.
>
> Illustrations
>
> (a) A, digs a pit, intending or knowing it to be likely that he may thereby cause a person's death. B, puts turf over the mouth of the pit, intending or knowing it to be likely that he may thereby cause a person's death. Here, if Z, falls in and is killed, both A and B have committed voluntary culpable homicide.
>
> (b) A and B are joint gaolers, and as such have the charge of Z, alternately, for six hours at a time. Each of them, during his time of attendance, illegally omits to furnish Z with food, intending or knowing it to be likely that he may thereby cause Z's death. Z dies of hunger. Both A and B have committed voluntary culpable homicide.
>
> (clause 3, Indian Law Commissioners, 1837, Parliamentary Papers 1837-38, Vol XLI, at 463).

If section 34 means what the *Mimi* cases say it means, *ie*, that the common intender is liable for murder although he or she does not possess the *mens rea* for murder, then section 35 flatly contradicts that suggestion. The participant (or common intender) is liable, so decrees section 35, only if he or she possessed "such knowledge or intention" as would qualify the participant for murder. Advocates of *Mimi* would be driven to say that section 35 applies only in cases where there is no common intention, *ie*, situations of spontaneous similar action. If so, section 35 is hardly worth enacting – in the absence of group criminality, of course each individual "participant" is liable only for his own *mens rea* and *actus reus*. Yet even this meagre recourse may not be open – for section 35 also contains the phrase "done by several persons" (as does section 34), and this would mean that spontaneous, unconfederated action does not fall under section 35. The section would, in that event, mean nothing at all – an event which is anathema to all good interpreters. *Banka* yields a much more convincing account of the two sections. Section 34 does not construct any *mens rea* at all, it constructs the *actus reus*.[55] Every member of the criminal enterprise is "liable for that *act* (of any of the members) in the same manner *as if the act were done* by him alone". Being "liable for that act" does not necessarily mean being liable for the same crime, for there is another component to be satisfied before an act becomes a crime – this is the *mens rea*. It is here that section 35 comes in to specify that there is to be no reduction of or construction for the normal requirement of *mens rea*. A particular member is liable "in the same manner" only if he or she had "*such* criminal knowledge and intention" as would be necessary for the primary or secondary crime, as the case may be.

There is another thing about the structure of the Penal Code which, I think, inclines in favour of *Banka*. This is the existence of elaborate provisions which deal with abetment in Chapter V. The very scenario which we have been talking about – *ie*, a criminal confederation to commit a primary crime, in the course of which a secondary crime is committed – is specifically dealt with in two provisions. Section 111 reads:

> When an act is abetted and a *different act* is done, the abettor is liable for the act done, in the same manner, and to the same extent, as if he had directly abetted it:
>
> Provided the act done was *a probable consequence* of the abetment, and was committed under the influence of the instigation, or with the

[55] This point was made some time ago in Douglas, "Joint Liability in the Penal Code" (1983) 25 Mal LR 259.

> aid or in pursuance of the conspiracy which constituted the abetment. (Emphasis added.)

It is convenient to set out section 113 as well:

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

We need not spell out the illustrations to these sections, but they quite clearly deal with the sort of problem we are addressing.[56] Section 111 seems tailor-made for the kind of robbery-murder situation we have been discussing. Section 113 describes precisely the assault-murder situation. That which might be peculiar to modern eyes is the prescription of different additional *mens rea* depending on whether the variation from the agreed criminal plan pertains to the act or the effect. "Act" variations must be a "probable consequence" (or in modern language, objectively foreseeable) before the abettor is fixed with liability. "Effect" variations require knowledge of likelihood (or in modern terms, subjective recklessness). There are two problems here. First, it may not be so easy to decide whether a particular variation pertains to the act or to the effect.[57] But more important, there seems to be no reason why such a distinction ought to be made.[58] If objective foreseeability is sufficient for robbery-murder, so must it be for assault-murder. If subjective recklessness is required for assault-murder, so must it be for robbery-murder. My guess is that the different wording is not so

[56] The Court of Appeal came to a similar realisation in *Andrew Gerardine, supra*, note 19, except that its response was to create out of thin air, as it were, the rather arbitrary requirement of "presence" to distinguish between the two sections.

[57] An example which comes to mind is where murder is committed as a consequence of a common intention to rape – is murder a different "act" or a different "effect" of rape.

[58] Professor Sornarajah in "Common Intention and the Murder Under the Penal Codes" [1995] SJLS 29, detects the phenomenon where "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". It is probably true that the difference may be explained by the desire of the courts to "retain a delicate balance" between objectivist and subjectivist theories of liability, but one cannot help feeling that to strike the balance in this fashion does seem rather arbitrary.

much a product of sloppy drafting but a reflection of the world of criminal jurisprudence in the 19th century – the sharp distinction which we now draw between subjective and objective theories of criminal liability did not exist then. It was a time when one was presumed to intend the natural and probable consequences of one's acts – all the more, it may be supposed, was one to be presumed to know the probable consequences of his acts.

How can section 34 add to this scheme? The only difference is that while section 34 has the potential of imposing liability (as a principal) for the secondary crime itself, sections 111 and 113 only attaches liability for the *abetment* of the secondary crime. Yet the difference is merely formal, for section 109 declares that if the act abetted is committed in consequence of the abetment (as it always must be in the scenario we are concerned with), the punishment for abetment is to be the same as the punishment for the crime itself. If section 34 is what *Banka* says it is, then its conceptual reach does not intrude into the province of sections 111 and 113. Section 34 deals with situations where things go according to plan. Sections 111 and 113 are concerned with situations where things do not go according to plan. If however section 34 is what *Mimi* says it is, then a strange relationship arises between the two sets of provisions. First we compare the pre-conditions. The abetment provisions require the primary crime to be abetted, but a common intention to commit the primary crime (and participation therein) is at least abetment by conspiracy or intentional aiding.[59] Second, we have to decide what the precise *mens rea* content of *Mimi Wong* is. If it is negligence or recklessness, as the preponderance of cases say it is, then there is no difference from sections 111 and 113 – there would no practical import to the existence or absence of section 34. If it is a stricter form of liability, then it would be odd indeed that the ambiguous section 34 should be allowed to outflank the very clear abetment provisions. True it is that there will be that rare instance where an abetment occurs without there being a common intention (*eg,* where the abettor intentionally aids a principal who does not know that the abettor is so doing), but in the vast majority of cases, this expansive reading of section 34 (as strict liability with respect to the secondary offence) will leave sections 111 and 113 with little practical significance. Third, we need to examine the *actus reus*. Again we need to decide what the precise *actus reus* requirement for section 34 is. If, as the latest cases seem to say, there must be participation and presence, not only for the primary offence, but also the secondary offence, then again the abetment provisions, even without sections 111 and 113, will impose liability on the common intender. Surely if the accused is present at and

[59] S 107, Penal Code.

participating in the secondary offence, he or she must be abetting that offence. Indeed, if the abettor is present at the scene of the crime abetted, even the formal distinction between abetment and commission evaporates by virtue of section 114. In short, the only way to give section 34 a functional meaning different from the abetment provisions would be to say that: firstly, all the *actus reus* that is required there is participation in (and presence at) the primary offence only; and secondly, there is no additional *mens rea* for the secondary offence (*ie*, strict liability). This combination of *actus reus* and *mens rea* is the most "constructive" of all the possible interpretations of section 34 – it is a situation where the connection between the common intender and the secondary crime is most tenuous and distant. To summarise, we have a choice – either to adopt *Banka* and let section 34 drop out altogether from the realm of unintended consequences, or to mutate it into a general imposition of strict liability for almost all unintended consequences of any criminal enterprise. There is no middle ground, because sections 111 and 113 are already occupying that position.

I suppose no harm is done if section 34 is consistently interpreted to require no less than abetment provisions. Indeed if the courts were to opt for a recklessness/negligence *mens rea* plus participation and presence at the scene of the secondary offence (as it appears to have done on the balance of authorities), then section 34 becomes more stringent than the abetment provisions, which do not require participation or presence for the secondary offence. But unfortunately it would perhaps be unduly optimistic to expect the present state of the cases to be the final word on section 34. So if section 34 is to be held to do no more than the abetment provisions, then let it not be involved at all, lest the judges in days to come be confused as to what it means. Simply say that such situations must be analysed under the rubric of sections 111 and 113, and the abetment provisions.

Should we opt then for strict liability? The overwhelming majority of our cases have refused to do so. The reason is not hard to find – the fruit from the tree of strict liability is too bitter to swallow. The garden of our criminal law does, and I think regrettably, have such a tree, but the reality is that section 34 is used almost exclusively to sow liability for murder all round. To impose the mandatory sentence of death on a theory of strict liability goes far beyond what our sensibilities should, and, I believe, would allow. Take the recent suggestion in favour of strict liability in *Too Yin Sheong*.[60] All that is required is a common intention and participation by two or more persons concerning any offence known to the law. Then whatever

[60] *Supra*, note 14.

any member of the criminal enterprise does which, *in his or her view*, advances that common intention will be imputed to all. A slightly fantastic illustration will suffice. Two persons, one the driver, the other a passenger who is in a desperate hurry to transact some business, commonly intend and participate in a criminal enterprise to park a car illegally on a double yellow line. Just as about the car is to be reversed into the space, a pedestrian appears and stands right there. The passenger is not looking and does not know the pedestrian is there. The driver gets it into his head that it is necessary to run the pedestrian down to advance the common intention to park there. He proceeds to run him down. The pedestrian dies. The driver is guilty of murder and must hang, but so too must the passenger. I do not think there is any way of avoiding this (I hope, obviously unpalatable) result without working in some sort of calculation of what the commonly intending passenger knew or should have known. This sort of analysis is precisely what must be done under sections 111 and 113. We do not need section 34 to achieve this. On the facts in *Too Yin Sheong* (and indeed in almost all other common intention cases), it would not have mattered even if section 34 did not exist, for the judge went out of his way to find that the common intender did know that his robber confederates might well kill to advance their criminal aims. Section 111 (or 113) adequately covers this ground.

Could it be that the drafters intended section 34 to be strict liability? I can find no evidence of such an intention. Indeed, the clues which we do have point quite the other way. Whatever the doctrine of common purpose in common law (presumably the parent of common intention in the Code) meant in the distant past, it seems clear that by the 19th century the days of strict liability was already over – in 1866[61] the concept of (what Professor KJM Smith describes as) "collective felony-murder"[62] was already long outdated and discarded by the common law. This illuminating label of "collective felony-murder" for the strict liability theory of common purpose is itself another clue. All students of the Penal Code know that one of Lord Macaulay's greatest achievements in drafting the Code was to reject completely

[61] This is the year *Skeet* 4 F & F 931 was decided. Pollock CB describes how the original strict liability conception of common purpose "arose on the part of the old lawyers to render all parties who are jointly engaged in the commission of a felony responsible for deadly violence committed in the course of its execution", and declares that the prevailing understanding of common purpose applied only where "all the parties are aware that deadly weapons are taken along with a view to inflict death or commit felonious violence, if resistance is offered".

[62] Smith, *A Modern Treatise on the Law of Criminal Complicity* (1991), Ch 8. The doctrines of common purpose and common intention is of course not limited to a situation where the secondary offence is murder, but then as now, the focus of both doctrines, in practice, has been joint liability for murder.

the doctrine of felony-murder.[63] His writings show that he was entirely unconvinced by any of the supposed rationale for felony-murder – it was punishment grossly disproportionate to fault,[64] and had but little utilitarian benefit.[65] If it is the underlying felony that is sought to be deterred then, Macaulay says, increase the penalty for that felony. Little purpose is served by the capricious imputation of murder on all members of the group regardless of their individual culpability.[66] His views must apply with equal force to "collective felony murder". If we wish to deter group crime, then increase the penalty for the (primary) group crime. I have little doubt that Macaulay will turn over in his grave to find out that it has even been suggested that section 34 imposes liability so akin to felony-murder. But, to the credit of the vast majority of our cases, that venerable personage may, for the moment, rest in peace.

Students of section 34 may then point out that there was an early amendment to the section to include the words "in furtherance of the common intention of all".[67] My researches have not been able to determine for sure why the amendment was thought necessary. What I have been able to gather is that the phrase was included to reflect the views of an early pre-amendment decision on section 34, *Gora Chand Gopee*.[68] My reading of it is that, far from wishing to expand the original meaning of section 34, Peacock CJ was anxious to ensure that section was *limited* only to those acts done "in furtherance of the common intention of all".[69] Indeed there is evidence in the judgment to show that the Chief Justice's views on section 34 was very similar to *Banka* – he uses the language of "consent" and "assent" to the secondary crime.[70]

63 Macaulay, *Introductory Report on the Indian Penal Code in The Works of Lord Macaulay* (1903), Vol II, at 128-132. See, however, note 54.

64 Macaulay writes, *ibid*, at 129, that the underlying felony was undoubtedly to be punished accordingly, but "to pronounce him (the felon) guilty of one offence (murder) because a misfortune befel him while he was committing another offence...is surely to confound all the boundaries of crime".

65 Macaulay says, *ibid*, at 130, "[t]o punish as a murderer every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life".

66 *Ibid*, at 131.

67 This was the Indian Penal Code Amendment Act XXVII of 1870.

68 [1866] 5 Suth WR Crim 45. See also *Ratanlal and Dhirajlal's Law of Crimes*, 1997 Ed, at 99-100.

69 *Ibid*, at 48, where it was declared:

> It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the other, commits an offence, the others *will not be involved* in the guilt, *unless* the act was done was in some manner in furtherance of the common intention (Emphasis added.)

70 *Ibid*.

A word about the oft described tension between the need to deter group crime and the need to be true to individual criminal responsibility is perhaps necessary, as it appears to have impressed both judges and academic observers alike.[71] That this tension exists is not in doubt, but the question is not whether section 34, standing alone, should reflect the proper "balance". The balance has already been struck by the abetment provisions (notably sections 111 and 113). The question is whether section 34 has anything useful to add. Unless one is inclined to extend a sort of strict liability to all members of any criminal enterprise, then section 34 has nothing more to contribute.

There is however one piece of unfinished business. Although I have argued for a revival of the abetment provisions in favour of section 34, there is one serious conceptual problem which the abetment provisions themselves must resolve. The "different act" – "different effect" dichotomy is not satisfactory. Whether it is an act variation or an effect variation, we have to decide whether we wish to rest liability on a subjective or objective theory. The subjectivist will favour section 113 with its formulation in terms of knowledge and recklessness. The objectivist will side with section 111 with its "probable consequences" language. Why the drafters chose different words for the two sections we may never know for sure. Perhaps, as I have suggested, in the 19th century, one was presumed to intend the natural and probable consequences of one's actions. Perhaps it merely reflected the uncertain state of the English common law contemporaneous with the advent of the Indian Penal Code.[72] Observers say that there existed no less than

[71] See *eg,* Sornarajah*, supra*, note 58; *Andrew Gerardine, supra*, note 19.

[72] See the comprehensive discussion in Smith, *supra*, note 62, at 210-214. At one point, Smith, at 212, talks of "disputed and disparate case law and underlying uncertainty". My colleague, Chan Wing Cheong has, once again, alerted me to the fact that the Macaulay's original draft contained only one provision, which closely resembles the present s 113, embracing the subjective theory:

> Wherever in an attempt to commit an offence, or in the commission of an offence, or in consequence of the commission of an offence, a different offence is committed, then whoever by instigation, conspiracy or aid, was a previous abetter of the first-mentioned offence shall be liable to the punishment of the last-mentioned offence, if the last-mentioned offence were such as the said abettor knew to be likely to be committed in the attempt to commit the first mentioned-offence, or in the commission of the first-mentioned offence, or in consequence of the commission of the first-mentioned offence; and if both offence be actually committed, and the person who has committed them be liable to cumulative punishment, the abettor shall also be liable to cumulative punishment.
>
> Illustrations
>
> (a) B, with arms, breaks into an inhabited house at midnight, for the purpose of robbery. A watches at the door. B being resisted by Z, one of the inmates, murders Z. Here, if A considered murder as likely to be committed by B in the attempt

three theories of liability[73] – agency (for which there is no liability unless the actual doer was authorised by his confederates;[74] subjective knowledge (now reflected in section 113); and probable consequences (now in section 111). Indeed this confusion in the common law was not until very recently resolved in favour of subjective knowledge of a significant possibility of death.[75] The majority of jurisdictions in the common law world use the recklessness theory of liability, *ie*, that the common intender knowingly risked a significant possibility of death by partaking in the criminal enterprise.[76] That does not mean we cannot choose an objective theory, but do we want such a basis? There is no clear-cut answer to this,[77] but I can say for myself that I have tremendous reservations about imposing liability for murder[78] (perhaps our highest crime) which attracts the penalty of mandatory death (our most severe punishment) on the basis of mere negligence.[79]

to rob the house, or in the robbing of the house, or in consequence of the robbing of the house, A is liable to the punishment provided for murder.

(b) A instigates B to resist a distress. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting legal process and the offence of voluntary causing grievous hurt, B is liable to cumulative punishment for these offences; and if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to cumulative punishment. (cl 82, Indian Law Commissioners, 1837, Parliamentary Papers 1837-38, Vol XLI, at 463).

It does appear that the muddle-headedness we now find in the simultaneous existence of ss 111 and 113 is not Macaulay's doing, but the result of misguided tampering by legislators. Interestingly, the present position at common law, and what I have suggested here, was presaged about 170 years ago by Macaulay.

73 See Smith, *ibid*, at 218-222.

74 This is similar to, if not the same as, the *Banka* interpretation of s 34.

75 *Powell and English,* House of Lords, *supra*, note 21. Smith, *supra*, note 62, at 220, criticises, with some force, the "mystifying" language used in earlier cases like *Chan Wing-Siu* [1985] AC 168, and *Johns* (1980) 143 CLR 108 where the judgments switch from one theory to another, quite unaware that they are different.

76 In England, *Powell and English*, *ibid*; in Australia, *McAuliffe* (1995) 69 ALJR 621; in South Africa, *Safatsa* (1988) 1 SA 868 (A), but not before a spirited debate, see Rabie, "The Doctrine of Common Purpose in Criminal Law" (1971) SALJ 227.

77 An example of joint liability on an objective foreseeability theory can be found in the *Pinkerton* (1945) 328 US 640 doctrine in the United States which fixes liability on co-conspirators for reasonably foreseeable consequences.

78 Again, the focus on murder is excusable in the light of the almost exclusive use of constructive liability to impose liability for murder.

79 The Canadian Supreme Court has agonised long and hard over this very question. S 21(2) of the Canadian Criminal Code imposes common purpose liability on the basis of both subjective recklessness and objective foreseeability. However, the Supreme Court has ruled that while objective foreseeability may be justified under the Charter of Rights for the constructive imposition of other crimes (*Creighton* [1993] 3 SCR 3), constructive murder

What is so wrong with the requirement of subjective recklessness? Does the negligent common intender get away too lightly? No, he is still liable for the primary crime of, for example, robbery; the punishment for which is no tea party. Is the law unheeding of the need to deter group crimes? No, reckless death is normally punishable only under section 304A or as culpable homicide not amounting to murder (unless the possibility of death is a virtual certainty, for which it is section 300(d) murder) – so the group crime element does have some "constructive" effect. Whether or not this sufficient "constructiveness" must be left for the reader to decide, but the requirement of subjective knowledge of the risk of death is no inconvenient "obfuscation" of the law (as the court seems to suggest in *Too Yin Sheong)*[80] – it is an expression of a fundamental tenet of our conception of fairness in the criminal process – *ie*, that criminal labelling and punishment must be proportionate to fault. One simply does not describe one who kills through negligence as a "murderer" and such a person, though he may well be punished in other ways, certainly does not deserve death. Nor does the need to deal with group crimes necessitate such a result.

V. A Slightly Bold Suggestion

It is interesting to stand back and watch how the courts seem to have embraced the watered-down *Mimi Wong* version of the *mens rea*, but at the same time tightened up considerably the requirement of *actus reus*. The old *Banka-Barendra* position was that section 34's only function was to impute the *actus reus* of the secondary crime to the common intender. The common intender had to be proved to have the required *mens rea* for the secondary crime, without aid. Yet, once that is proved, the only *actus reus* requirement is that the common intender participate in the primary crime. He or she

can be countenanced only on a theory of subjective foresight of death (*Logan* (1990) 58 CCC (3d) 391, in the context of common purpose; *Martineau* (1990) 58 CCC (3d) 353, in the context of felony-murder). The result is a two-tier system where a subjective theory applies to murder, but an objective theory suffices for other offences. A similar approach for Singapore would attract peculiar difficulties in the light of the more generous use of the death penalty, the retention of corporal punishment, and the significantly longer terms of imprisonment meted out here. The line between murder and other offences may not be so convincingly drawn here. See also the earlier discussion in Sornarajah, "Common Intention and Murder Under the Criminal Codes" (1981) 59 Can Bar Rev 727, where it was observed on the state of law then that "the subjective theory...has generally been rejected". This bears some reconsideration in the light of later cases under the Canadian Charter of Rights.

80 *Supra*, note 14.

need not have done anything else. In short, the only function of section 34 is to construct the *actus reus* of the secondary crime out of participation in the primary offence (once the requisite *mens rea* is proved). The *Mimi-Gerardine* result is quite the opposite. The common intender need not have the full *mens rea* of the secondary crime, but must be proved, without aid, to have participated in the secondary crime. Not only that, he or she must also be present at the scene of the secondary crime. Essentially participation in the *actus reus* of the secondary crime must be proved. Section 34 then operates to construct the full *mens rea* of the secondary offence from something less, for example, in the case of murder, from recklessness or negligence. Yet the final result of both approaches is not very different. We have seen that the element of participation contains a mental component. One does not participate in something unless one has the intention (or something very close to it) of participating in that activity. A simple example will suffice. I am asked by a friend to deliver some sealed packages to a third party. I do just that. Unknown to me, they contained dried horns of the Asian rhinoceros, a substance proscribed by legislation.[81] Have I *participated* in the trafficking of that banned aphrodisiac? Of course not. One might say that I unwittingly or unknowingly participated, but that merely emphasises the point that the word "participation" standing by itself implies knowledge. Similarly one does not participate in murder, for example, in a robbery context, unless one either intends to kill or knows that what one is doing is likely to kill. A little more difficult is the question of whether one may participate through negligence. I did not know that the package contained a banned substance, but I should have deduced that it was. Even so, I do not think any ordinary usage of the word "participation" would include the negligent acts. Another example: I send out a file attachment by electronic mail. Unknown to me it contained a virus which enables me to break into the recipients private files. I ought to have checked it for viruses before I sent it out, but it slipped my mind. Did I participate in the propagation of that computer virus? I think not.

In a single stroke, the latest *actus reus* decisions seemed to have overtaken the *mens rea* debate regarding section 34. Participation and presence in the secondary offence rules out both strict and negligent liability. It has also taken the debate out of the realm of unintended consequences – surely the common intender who has participated in murder is liable for murder under the theory of abetment by intentional aiding, quite apart from sections 111 and 113. In other words, this latest rendition of section 34 makes it more difficult for the prosecution to found liability than sections 111 and

[81] Endangered Species (Import and Export) Act, Cap 92A, (1985 Rev Ed).

113 (both of which do not require either presence or participation for the secondary offence). I am not sure the Court of Appeal realises that this is what it has done, or indeed intends that this should be the result. In short section 34 is in a mess.

My slightly bold, but not altogether original,[82] suggestion is this. Section 34 has had its fun in the sun, it is time to retire it to its rightful place.[83] It has nothing to do with unintended consequences. It deals with things going according to plan. Where a group of people plan to commit a series of crimes and participates in any of them, and in accordance with that plan, the crimes are committed, all are liable for all the crimes regardless of the precise part they played, provided they possess the required *mens rea* (in accordance with section 35). When things depart from the planned criminal conduct, then it falls to be analysed under the rubric of sections 111 and 113 – was the departure or variation from the plan either known or ought to have been foreseen. I also make the further suggestion that sections 111 and 113 be unified into a common theory of liability regardless of the nature of the variation from the plan. Because of the potential seriousness of liability for the secondary crime, that theory should be actual knowledge of a significant possibility (which no reasonable person would discount) that the secondary crime would be committed. This would also bring us in line with the majority of the major common law jurisdictions. A degree of constructiveness is preserved in that a person may be liable for murder without possessing the full *mens rea* for murder. But the difference, although significant, is narrow; and perhaps it is a necessary sacrifice on the altar of the need to placate those who feel that we must indulge in constructive liability to deter group crime.[84]

[82] See *Douglas, supra*, note 55.

[83] Sornarajah, *supra*, note 58, at 31 thinks it is "too late in the day to reopen these issues of interpretation". Perhaps so, but if the case law has "moved the doctrine of common intention under the Codes to a position similar to the one under the common law", it has so moved again in the recent cases – what enterprise is this but one of reopening issues of interpretation?

[84] I do not count myself as one who believes there is such a need. I see no need to depart from the relentless logic and good sense of s 35 – liability should be in accordance with fault. If you participate in a criminal enterprise possessing one of the four alternative *mens rea* for murder (s 300), you should be liable for any resulting murder. If you participate possessing only one of the *mens rea* for culpable homicide not amounting to murder (s 299), then you are punished for complicity in the primary crime and also liable for culpable homicide not amounting to murder. If you possess only the *mens rea* for causing death by a rash or negligent act, then the only additional liability is under s 304A. This is deterrence enough.

VI. Beyond Common Intention – Common Object

Regrettably, the foregoing does not exhaust our discussion of constructive liability. There are other doctrines which seem to have the same effect, namely, common object, gang robbery and firearms offences. Although they have not attracted the same kind of attention as common intention, our courts have had the occasion to comment on them. I propose to compare the law of common intention with these other doctrines. Perhaps our experience with common intention will help us to construe these provisions. Perhaps also our understanding of these provisions may help cross-fertilise the way we approach common intention.

The doctrine of common object arises in this fashion. When a group of 5 persons or more assemble with the intention of committing any but the most trivial of offences,[85] all members of that assembly are liable for any (further) offence which any member commits if it is:[86]

> in prosecution of the common object of that assembly, *or* such as the members of that assembly knew to be likely to be committed in prosecution of that object. (Emphasis added.)

Both the language and conception of common object and common intention are very similar. Both devices attempt to fix common criminal liability for the consequences of a criminal enterprise. Two differences ought to mentioned at the outset. For common object, there must be 5 or more people,[87] and offences of the lowest level[88] are excluded from its purview. But apart from these rather technical distinctions, it is difficult to see in what way common object is significantly different from common intention. Both involve a primary crime (the object of the unlawful assembly) and a secondary crime (that which is committed in prosecution thereof). The members of the group must have assembled for the purpose of committing the primary crime – they must surely have satisfied the parallel requirements of common intention

[85] S 141 lists the kinds of common object encompassed by the concept of unlawful assembly (which in itself is a crime by s 143). The only point of contention has been the "catch-all" clause in subsection (c), "any other offence". S 40 defines "offence" to mean any crime "punishable ... with imprisonment for a term of 6 months or upwards". It has now been settled by a rare court of 5 judges (*Tan Meng Khin* [1995] 2 SLR 505) overruling an earlier decision (*Fo Son Hing* [1994] 2 SLR 561) that "offence" means literally any offence for which imprisonment for 6 months is possible. The only offences excluded are those with a maximum penalty of less than 6 months.

[86] S 149, Penal Code.

[87] For common intention, two persons will do.

[88] Offences punishable with a maximum of less than 6 months, *supra*, note 85.

and participation for the primary crime.[89] It is a mystery to me why the decisions on common object keep on repeating the assertion that common object and common intention are different.[90] They are literally indistinguishable. Indeed the old common law cases use both words interchangeably.[91] No one has yet been able to come up with a fact situation for which there is common object, but no common intention.

What additional *mens rea* and *actus reus* regarding the secondary crime must the member of the unlawful assembly have? Unlike common intention, common object has two alternative limbs. The first resembles the "in furtherance of the common intention" language, and by itself would suffer from the same ambiguities. The second limb is knowledge of the likelihood of the secondary offence (*ie*, recklessness). This alternative *mens rea* requirement is illuminating, although it does not solve our problems entirely. It appears that a strict liability rendition of the first limb is ruled out, for what possible reason could there be to include the second limb if the first limb already declares the particular knowledge of the individual members irrelevant?

[89] The recent requirement of presence (see the discussion above) would also be satisfied – one has to be present to be part of an assembly. Although, as we have seen, presence is not always participation, to be present for the purpose of committing a crime must surely be the kind of "facilitative presence" which qualifies as participation.

[90] See *eg, Francis* [1960] MLJ 40; *Tan Kheng Ann* [1965] 2 MLJ 108; *Chandran* [1992] 2 SLR 265; *Lim Thian Hor* [1996] 2 SLR 258. These cases seem to have been inspired by a common source – some dicta in *Barendra Kumar Ghosh, supra*, note 37, to the effect that "though their object is common, the intentions of the several members may differ". This remark makes *logical* sense only if we read either "intention" or "object" to mean "motive" – but the problem is that this does not make any *legal* sense – neither common intention or common object is concern with motives. It is irrelevant to both concepts (for the purpose of liability) why the participants decided to join the criminal enterprise. Both common intention and common object come into existence the moment there is a decision (however motivated) to participate. A more recent attempt in *Lim Thian Hor* to explain the supposed difference is equally unconvincing. It was there said, at 264, that unlike common intention, common object requires no "prior meeting of minds or preconcert" and could "develop suddenly". This line of argument rests on a misunderstanding that common intention requires some sort of prolonged brooding between the decision to embark on the enterprise and the carrying out of it. See now the pronouncements in *Shaiful Edham*, *supra*, note 12. The bottom line is that had our common object defendants in the decided cases been charged with common intention instead, I doubt very much if the result would have been different.

[91] *Eg, Macklin* 2 Lewin 225 (common intent); *Harrington* [1851] CLC 231 (common object); *Jackson* [1857] CLC 357 (common object). There are other synonyms: *Skeet* 4 F & F 931 (common purpose); *Price* [1858] CLC 96 (common design).

Equally, the first limb cannot mean recklessness as well, for it would be pointless to repeat it in the second. We are left with two principal possibilities, either the *Banka-Chhui Yi* interpretation or objective foreseeability. Although I would not put it beyond the draftsman of the 19th century to place objective foreseeability and subjective knowledge side by side in section 149, functionally that does not make sense. The objective foreseeability limb will simply swallow up the subjective knowledge alternative – why ever bother to prove knowledge when it is sufficient to show that a reasonable person ought to have foreseen? In my opinion, the interpretation which is most appealing is this. The first limb ("in prosecution of the common object") is the exact mirror of the *Banka-Chhui Yi* reading of common intention – it means intent or conditional intent to commit the secondary crime, and is meant for situations where things go according to plan. The second limb ("knew to be likely") deals with undesired variations to the plan – the member of the unlawful assembly is only liable if he knew of the likelihood of the secondary offence being committed, but persisted in the criminal enterprise nevertheless. There is yet another comparison to be made – with the abetment provisions. Whatever common object under section 149 might mean, it will be outflanked by the principle of objective foreseeability under section 111. It seems clear that where someone is a member of an unlawful assembly, he or she will surely also be guilty of abetment of the primary offence. Thus no entirely satisfactory solution is possible unless sections 111 and 113 are united under a common theory of subjective knowledge, as I have suggested earlier. The second limb of section 149 would then be the exact mirror of the abetment provisions, and would, like common intention, be no longer necessary.

We turn to the *actus reus*. If, as our latest cases on common intention say, there must be participation in the secondary crime, a significant distinction emerges. It is quite clear that under the doctrine of common object, the member of the unlawful assembly need not participate in the secondary offence – he or she need only be a member of the assembly. Is this difference coherent? The only possible justification is this. Liability for common object should be easier to establish because we want to discourage larger criminal groups (five and above) more than smaller criminal groups. I am uneasy with the importance placed on the number of people in the group. It is true that the very concept of unlawful assembly trades on that distinction, but the consequences are relatively minor – the maximum penalty for unlawful assembly is only 6 months imprisonment.[92] Liability for things done in prosecution thereof is potentially much more serious, and may well

[92] S 143, Penal Code.

extend to the sentence of death. To allow an arbitrary numerical difference to be the deciding factor is too slender a thread to hang on. The original *Barendra* position on the *actus reus* of common intention (*ie*, participation only in primary offence), would dovetail with the doctrine of common object and with the abetment provisions. To me, this would be more sensible.

The common object cases also reveal a facet of constructive liability which does not seem to have been obvious in the common intention decisions or in the abetment provisions – this is the idea that one can withdraw from a criminal enterprise so that one is no longer responsible for the acts of the remaining participants. The early case of *Ong Chin Seng* held:[93]

> No doubt there may be cases in which an accused person may either by *injury*, or by *removing himself* from the scene, have been sufficiently dissociated from the common object of the unlawful assembly. (Emphasis added.)

The reason why withdrawal is a defence is that the person is no longer a member of the unlawful assembly. The question is whether such a defence is available in the face of a common intention charge. Although our judges do not seem to have addressed this issue, I do not see how it can be coherently maintained that such a defence exists for common object but not for common intention.[94] The words of section 34 are opaque as to this, but it is possible that the common intention which the provision speaks of must exist at the time the secondary offence is committed. One should be permitted to withdraw from a common intention, as one is from a common object. The abetment provisions are more difficult. As they are written, one is liable for probable or known consequences if one abets the primary offence. One cannot withdraw from an abetment. Liability attaches and sticks once the abetment is committed. It is quite irrelevant to liability what one does after that. To be consistent,

[93] [1960] MLJ 34.

[94] There is language in at least one decision, *Kraisak Sakha* [1996] 2 SLR 713, which may support the existence of a defence of withdrawal for common intention. It was the usual robbery-murder situation, but one of the accomplices escaped a constructive murder charge under s 34 because reasonable doubt was raised as to "his continued participation in the robbery after he discerned a show of violence...and he was prevented [by other accomplices]...from disassociating himself with the robbery thereafter". The difficulty is that there was another point in the accused's favour – the court appeared to have accepted that he did not know of the existence of the murder weapon. So on the facts, the significance of his attempts to dissociate himself could be only an evidential one – *ie*, the attempts merely fortified the court's conclusion that he did not know the weapon was brought along. It remains unclear whether the accused could have successfully dissociated himself if he had known all along that a weapon would be used.

if we allow withdrawal for common object, we must allow withdrawal for constructive liability arising from abetment. I do not see any other way to do this but to insert a fresh section expressly affording the defence of withdrawal.

But before such a section can be drafted, we must first decide what the defence of withdrawal should mean. Broadly, there are two positions we can take. The first is the *Ong Chin Seng* idea that by "removing himself" from the scene, the participant may effect a withdrawal. The second finds expression in section 5 of the Arms Offences Act,[95] where constructive liability is avoided only if the accomplice has "taken all reasonable steps to prevent" the use of the firearm by the principal offender. As the Court of Appeal held in *Remli Senallagam*,[96] "the act of running away" is not quite enough. The choice would, I think, depend on what we select to be the *mens rea* of constructive liability. If it is a lower form like objective foreseeability or strict liability, then it might be fair to permit the easier defence of "removal". If however it is subjective knowledge, as I have suggested, it might be justifiable to impose a stricter defence of taking "reasonable steps". Someone who participates in a criminal enterprise knowing of the significant possibility of the secondary crime occurring, should be under a duty to take reasonable steps to prevent it from happening if he or she wants to escape liability for the secondary crime.[97] Surely that is not too much to ask. Such a defence would also build in an incentive for the members of the enterprise to stop the criminal activity from escalating beyond the original plan. There are other problems. Apart from the evident difficulty of deciding what would amount to "reasonable steps", what are we to do with a situation where the participant is knocked unconscious or injured.[98] He or she cannot (and not will not) take any steps. Does this

[95] *Supra*, note 11. There is a further discussion of this provision below.

[96] [1992] 1 SLR 628.

[97] Perhaps this is the sentiment behind some words in *Too Yin Sheong* [1999] 1 SLR 682 to the effect of "where one's act puts another in peril, that person is under a duty to prevent the harm in question from arising". As a statement of general liability for criminal omissions, it is problematic. S 32 does not, as the court appears to say, state that the omissions mentioned in s 33 "are to be illegal". What it does state is that omissions to be on par with acts must be "illegal", which s 43 defines as something "prohibited by law, or which furnishes ground for a civil action". The "principle" that a duty arises when one's act puts another in peril cannot stand alone – it must derive from an independent provision of criminal or civil law.

[98] *Ong Chin Seng, supra*, note 93, seems to countenance withdrawal "by injury". This means that there is not just a defence of withdrawal, but the defence of the lack of an opportunity to withdraw. Again the language in *Kraisak, supra*, note 94, may support such a view when it thought significant that the accused was prevented by his accomplices from dissociating himself from the enterprise.

entitle the participant to the defence, or does it disqualify him or her from it? Again, the fine-tuning of the content of this defence will depend on the precise level of *mens rea* we impose in the first place.

VII. Specific Constructive Crimes – Gang Robbery and Arms Offences

We turn from the two general concepts of constructive liability, common intention and common object, to two specific ones, gang robbery and arms offences. First is section 396 which provides:[99]

> If any of 5 or more persons who are conjointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for life, and if he is not sentenced to death, shall also be punished with caning with not less than 12 strokes.

Like common object, the section requires a criminal enterprise of five persons or more. Unlike either common intention or common object, this device is very specifically targeted at the situation where the primary offence is robbery and the secondary offence is murder.[100] Section 396 is also peculiar in that a discretion is given to the judge whether or not to give the sentence of death. One can surmise that gang robberies resulting in murder were a particularly serious problem in colonial India, where the provision originated.[101] Since the result of the operation of section 396 is notionally less severe than that of common intention or common object (for which the sentence is mandatory death), the rough logic must be that it should be

[99] Penal Code. S 394 also provides for a sort of constructive liability for robbery-hurt situations along the lines of s 396.

[100] Since s 394 deals with constructive liability for robbery-hurt and s 396 concerns robbery-murder, there appears to be a lacuna for robbery-grievous hurt situations because s 397 talks only of increased penalty for the actual doer. The cases are divided on whether s 34 can be employed to plug the gap (Koh, Clarkson and Morgan, *Criminal Law in Singapore and Malaysia* (1989), at 564-571. I do not think any amount of linguistic analysis can resolve the matter which is at bottom a question of policy. While the logic of the robbery provisions makes the use of s 34 to impose constructive liability for s 397 attractive, the understandable moral hesitation with further extensions of constructive liability can lead one to reason that as the Legislature has bothered to spell out expressly constructive liability for ss 394 and 396, the silence in s 397 ought to be interpreted as a considered decision not to impose constructive liability for that situation.

[101] The problem of robbery in the early days of the Code has spawned a number of rather peculiar provisions. *Eg*, ss 400 and 401 come very close to creating crimes of pure association with habitual robbers.

somehow easier to found liability under the gang robbery provision. Indeed the pronouncements in the cases seem to bear this out. Like the common object decisions, the gang robbery cases stress that there is no need to prove common intention (or I suppose, common object).[102] Yet on closer examination, it is again difficult to understand what this means. The participants must be "conjointly committing gang-robbery".[103] The words seem to convey precisely what is required for common intention – the *mens rea* of a joint purpose in committing robbery, and the *actus reus* of participation in commission of the robbery. Perhaps the difference is with respect to the secondary offence. It has been held that the gang-robber need not have contemplated the killing.[104] Yet the murder must have been committed "in so committing gang robbery". Another case explains that the murder must be "incidental to" the gang robbery,[105] but this merely begs the question of when it is "incidental". Could it be that we have finally located a case of genuine strict liability? I am not so sure.[106] I hesitate to agree with the view that so long as the murder was committed in the same time frame and place as the robbery, all members of the gang are liable for murder. For example, M has a personal vendetta against V. He tells no one about it, but gathers a group of five desperados to rob V in order to provide the opportunity for M to kill him. M lies to his colleagues and tells them that no weapons will be used and that no one should be hurt. In the course of the robbery, M whips out a concealed gun and, to the consternation of his confederates, kills V. In the world of true strict liability, all are liable under section 396. Tough luck, or should it be as tough as this? So we try to work in another condition – the killing must be thought by the actual killer to be advancing the cause of robbery (*a la Too Yin Sheong*). But again why should the liability of the accomplices be dependent on the possibly capricious mind of the actual killer? Another example – five people rob a defenceless old woman. Anyone in his right frame of mind would see that there is absolutely no need to

[102] *Wong Kim Wah* [1948-49] MLJ Supp 134; *Prasong Bunsom* [1995] 3 SLR 433; *Panya Martmontree* [1995] 3 SLR 341; *Ang Eng Beng* [1990] 3 MLJ 321 (context of s 394).

[103] Or in the words of s 394, "jointly concerned in committing or attempting to commit such robbery". The cases do not reveal any inclination to make anything of the difference of language and neither will I.

[104] *Prasong Bunsom, supra*, note 102, at 447.

[105] *Panya Martmontree, supra*, note 102, at 354.

[106] In all the decided cases on s 396, *supra*, note 102, the facts would have clearly satisfied the s 34 requirement of either subjective knowledge or objective foreseeability. *Eg*, in *Panya Martmontree* and *Prasong Bunsom*, the court found as a fact that the accomplices all had a conditional intent to kill, a state of affairs which would have even satisfied the more stringent test in *Banka*.

hurt, let alone kill the victim. One of them, let us say, unknown to the others, is unusually excitable and kills the victim, thinking, quite unreasonably, that it was necessary. Again, I hesitate to agree to section 396 having the effect of making them all liable. We are driven yet again to the same sort of negligence/recklessness calculus required for common intention. Nor do I think that the notional discretion to avoid the death penalty is presently of much significance. Our latest cases show a distinct preference for the death penalty regardless of the part played in the criminal enterprise.[107] Is there some extraordinary reason of policy why gang robbery-murder situations should be treated differently? I think not. Wherever this kind of crime may have ranked in colonial India or the Straits Settlement, no policeman or politician would list such crimes as being the more pressing of our criminal justice problems. Indeed in two of the most important prosecutions under section 396 in the recent past, the facts would have well supported a conviction under common intention, or even the *Banka-Chhui Yi* reading of common intention.[108] When we turn to the *actus reus*, there is a real distinction if we accept the present position for common intention. Section 396 does not require participation or presence in the murder. The requirement of presence is not normally of much significance given the very broad reading given to it in the common intention cases. The absence of the requirement of participation in the killing is important. But is there any reason why we want to impose the participation requirement on one but not the other? We come back to the same question whether any reason of policy justifies this. I have said that I do not think there is. The conclusion that I reach is this. Section 396 is devoid of any justification for an independent existence apart from the general provisions for constructive liability (such as common intention and common object). Whatever we decide for other situations, the same must hold for gang robbery-murder situations.

Now the final provision – section 5 of the Arms Offences Act.[109] This section reveals a sophistication absent in the Penal Code. The conditions of constructive liability are crystal clear, as they should be. A bit of explanation is necessary. The Act makes it a capital crime to either use a firearm with intent to cause injury or damage, or to use a firearm at the time of commission of a scheduled offence (whether or not there was intent to injure or damage).[110] Section 5 extends this liability to all accomplices in this manner:

[107] *Panya Martmontree* and *Prasong Bunsom, supra,* note 102.
[108] *Supra*, note 106.
[109] *Supra*, note 95.
[110] Ss 4(1) and 4A.

> Where any arm is used by any person in committing or in attempting to commit any offence or where an offence under section 4A (use of arm at time of commission of scheduled offence) has been committed by any person, each of his accomplices present at the scene of the offence who may reasonably be presumed to have known that that person was carrying or had in his possession or under his control the arm, shall, unless he proves that he had taken all reasonable steps to prevent the use of the arm, be guilty of an offence and shall on conviction be punished with death. (Parenthesis added.)

Under the rubric we have used, there are two sets of primary crimes possible. First, complicity in any offence, if a firearm is used with intent to injure. Second, complicity in a scheduled offence where a firearm is used (with or without intent to injure). The section also spells out clearly what the additional *mens rea* with respect to the secondary (arms) offence is – it is reasonably presumed knowledge, a sort of objective foreseeability. Like the recent trend of common intention cases, section 5 expressly imposes the requirement that the accomplice must be present at the scene. But unlike the recent common intention cases, there is no need for the accomplice to participate in the use of the firearm. We have seen how section 5 also affords a clear defence of withdrawal.[111]

This provision is evidence that it is not impossible to draft a constructive liability provision with the clarity it deserves. There is no reason why the more general constructive liability sections cannot be treated similarly. But we must go further to look at the substance of section 5. It uses an objective foreseeability theory. I have expressed my preference for a subjective knowledge criterion, especially when the consequences are as grave as a mandatory death penalty. I see no reason to change that view. There have not been many decisions on this provision, but the facts of these cases would have quite comfortably supported a finding that the accomplice had actual knowledge of the firearm.[112] The requirement of presence is problematic.[113] In days gone by, "presence" may indeed have been a reliable proxy for degree of participation in the criminal enterprise, but now that is not invariably reliable.

[111] See discussion above.

[112] *Eg, Talib bin Haji Hamzah* [1976] 2 MLJ 2, where the court found it "extremely improbable" that the accomplice did not know of the existence of the firearm; *Chang Bock Eng* [1979] 2 MLJ 149, where it was held that the accomplice "knew (of the gun) long before [it] was 'used'". (Parenthesis added.)

[113] The Court of Appeal in *Chang Bock Eng, ibid,* at 152, seemed to interpret "presence" in much the same manner as the cases on common intention – presence "at the scene" is sufficient.

It is quite possible that the mastermind, who is perhaps the most culpable of all, does not appear at the scene of the crime. In this regard, the abetment provisions have never required presence. If we couple it with the objective knowledge criterion, some strange results follow. The mastermind who has actual knowledge of the firearm, but who stays away, perhaps to supervise proceedings from afar, escapes; but a hapless minion, who actually did not know of the firearm (but who the court says ought to have known), but who is present, is caught. This is not liability proportionate to fault. I think it is far better to beef up the *mens rea* to actual knowledge and to reduce *actus reus* to participation in the primary crime. It should be obvious that we have reached the exact position that I have suggested for constructive crimes in general. There is no need for a special regime for firearms.

VIII. Conclusion: A Unified Theory of Constructive Liability

Our law now contains no less than five sources of constructive liability. Three of them, common intention, common object and the abetment provisions, are general. Two, gang robbery and arms offences, are specific. The first problem is that a number of sections are insufficiently clear. Worse, well-used ones like common intention have suffered from uncertain judicial shifts and changes. The second problem is that the multiplicity of provisions have the potential of harbouring differing conceptions of constructive liability not supported by any apparent reasons. We need a consistent theory of constructive liability and we need to decide what that theory should be. There are a number of ways it can be done, but I have suggested that a suitably renovated section 111 and 113 will do nicely. These should be its elements:

(1) Abetment in the primary crime.

(2) Knowledge of the likelihood of the secondary crime occurring.

(3) Defence of withdrawal.

(4) Sentencing discretion.

I have already considered the first three elements. A word is perhaps needed for the fourth. All our present sections on constructive liability, except section 396 (gang robbery), seek to impose on the accomplice the same liability as the actual doer. Where the liability of the actual doer is merely a sentencing maximum within which the precise punishment is to be decided as an exercise of judicial discretion, the court has the power to distinguish between the relative culpabilities of actual doer and the

accomplice, and the accomplices *inter se*. The problem arises when the punishment for the actual doer (*eg*, in murder or arms offences) is mandatory. These provisions inflexibly impose the same liability on all the participants as well. Perhaps this is the result that section 396 wished to avoid. The law might want to hold the accomplices liable, but not to exactly the same extent. Our renovated constructive liability provision should allow the court to punish the accomplice to a maximum of what the actual doer deserves, but should also give the court a discretion to hand down a lesser sentence according to the relative culpabilities of the parties involved.

The remaining question is whether particular crime situations require special constructive liability provisions. It could perhaps be argued that especially alarming crimes like arms offences and gang robbery-murder need extraordinary measures dispensing with the normal requirements of constructive liability. The logical way to do it is to lower the *mens rea* from subjective knowledge to either objective or strict liability. Whatever rhetorical force such suggestions might have, the reality is that the facts in all our reported arms and gang robbery decisions would have amply supported a finding of subjective knowledge. Our experience has not shown that the criterion of subjective knowledge is insufficient to deal with our crime situation.

It is a sad fact of legal life that reform is often painfully slow. In the meantime, I would suggest that the best thing our courts can do is to try, as far as the words will permit, to begin the task of moving towards a single coherent theory of constructive liability. This they can do by resolving ambiguities in favour of harmony with the other provisions on constructive liability.[114]

MICHAEL HOR*

[114] I thank the several generations of criminal law students who have had to digest various versions of the arguments presented in this article, and my colleague Chan Wing Cheong, who provided valuable information on the historical aspects of the Penal Code.

* LLB (NUS); BCL (Oxon); LLM (Chicago); Associate Professor, Faculty of Law, National University of Singapore.