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THE REQUIREMENT OF CONCURRENCE OF *ACTUS REUS* AND *MENS REA* IN HOMICIDE

Shaiful Edham bin Adam v *PP*[1]

A basic principle in criminal law is expressed by the oft cited Latin phrase "*actus non facit reum nisi mens sit rea*", loosely translated as "an act does not make a man guilty of a crime, unless his mind be also guilty".[2] This means that criminal liability not only requires proof of the presence of both the *actus reus* and the *mens rea*, but also that there must be coincidence or concurrence of *mens rea* with the act which causes the *actus reus*.[3] Although this principle of concurrence is not found in the Singapore Penal Code, there is no doubt that it is part of the law in Singapore.[4]

In relation to result crimes such as homicide, where the death itself may involve a protracted process, a problem arises where there are several acts committed by the defendant which eventually lead to the death of the victim. In the classic case of *Thabo Meli* decided by the Privy Council,[5] the appellants took their victim to a hut, got him drunk and then attacked him, intending to kill him. The appellants believed that they had killed him[6] when he was, in fact, only rendered unconscious. They disposed of the victim's "corpse"

1 [1999] 2 SLR 57 (Court of Appeal).

2 The use of the Latin phrase has been criticised in *R* v *Smith* [1975] AC 476, at 491-492 *per* Lord Hailsham and in *R* v *Miller* [1983] 2 AC 161, at 174 *per* Lord Diplock.

3 *Fowler* v *Padget* (1798) 101 ER 1103, at 1106: "The intent and the Act must both concur to constitute the crime".

4 Affirmation of this principle can be found in a recent statement of the Court of Appeal in *Abdul Ra'uf bin Abdul Rahman* v *PP* [2000] 1 SLR 683, para 28, that: "It was undisputed that the appellant must possess the requisite *actus reus* and *mens rea* at the time the offence was committed before he could be convicted of the offence." The principle has been codified in some jurisdictions, see *eg,* California Penal Code, § 20: "[i]n every crime .. there must exist a union, or joint operation of act and intent, or criminal negligence."

5 [1954] 1 WLR 228. See also the earlier US case of *Jackson* v *Commonwealth* (1896) 38 SW 422 and the Indian cases referred to, *infra*, note 9.

6 This was assumed by their Lordships for the purposes of the appeal in *Thabo Meli*, *supra,* note 5, at 230.

by rolling it down a cliff. Medical evidence established that the cause of death was exposure and not the initial attack at the hut.[7]

If the principle of concurrence requires the presence of the requisite mental element at the time of the immediate act which causes death, a defendant cannot be held liable for murder in such circumstances, since at the time of disposing of the body in *Thabo Meli*, the appellants thought that the victim was already dead.[8] The same problem arises where it is not possible to pinpoint the exact time of death. It will be open to the defence in such cases to suggest that it was the later act of disposal of the body that caused the death and not the earlier unlawful assault. To require that the prosecution show beyond reasonable doubt that death was caused at a particular time when the requisite mental element co-existed with the necessary physical act may prove to be an impossible task.

This problem of non-concurrence was recently analysed by our local courts in *Shaiful Edham bin Adam*. The Court of Appeal made certain tentative conclusions after surveying decisions from other jurisdictions on the matter.[9] This note will first assess the proposals of the Court of Appeal and then, analyse other possible solutions to this problem. It is hoped that the solution proposed can provide the level of clarity and certainty demanded of the criminal law.

Crime and Punishment

The appellants in *Thabo Meli* argued that their acts were separate and that, while the first act (the attack in the hut) was accompanied by *mens rea*, it was not the cause of death. The second act (the disposal of the body), which was the cause of death, was not accompanied by *mens rea.* On behalf

7 *Supra*, note 5, at 229.

8 This argument has been criticised as being based on a mistaken view as to what amounts to the *actus reus* of an offence. It has been suggested that the *actus reus* need not be limited to the act which most immediately brought about the result. Hence, murder should not be identified with, or even be regarded as including, the death of the victim. Murder requires death to take place, but this is different from saying that murder *is* death of the victim or that it *includes* the death of the victim. Murder is, instead, the initial act of shooting, stabbing, poisoning and so on where death results. See Alan R White, "The Identity and Time of the *Actus Reus*" [1977] Crim LR 148.

9 The following cases in addition to *Thabo Meli* were discussed: *Queen-Empress* v *Khandu Valad Bhavani* (1890) 15 Bom 194; *Palani Goundan* v *Emperor* (1919) 42 Mad 547; *Kaliappa Goundan* v *Emperor* AIR 1933 Mad 798; *King-Emperor* v *Nehal Mahto* (1939) 18 Pat 485; *Re Thavamani* AIR 1943 Mad 571; *Lingaraj Das* v *Emperor* AIR 1945 Pat 470; *R* v *Chiswibo* (1961) SR FC 714; *R* v *Church* [1966] 1 QB 59. See *supra*, note 1, paras 72 to 85.

of the Privy Council, Lord Reid dismissed the argument in the following way:

> It appears to their Lordships impossible to divide up what was really one transaction[10] in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. ...there could be no separation such as that for which the accused contend, so as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time being during the completion of their criminal plot.[11]

This approach has been described thus by our Court of Appeal in *Shaiful Edham bin Adam*:

> [A] series of distinct acts may in some circumstances be regarded as forming part of a larger transaction; and it will suffice if the accused had the necessary *mens rea* at some point in the transaction, even if it did not coincide precisely in time with the *actus reus*, the act which caused death.[12]

But what are the circumstances which justify regarding distinct acts as part of the same "transaction"? Other phrases used include "parts of the same sequence of events",[13] and "acts so closely following upon and so intimately connected with each other that they cannot be separated".[14] They fail to explain *when* the distinct acts can be regarded as being in the same "transaction", "parts of the same sequence of events" or "so intimately connected with each other". If these phrases only mean that the acts can be said to be continuous because they are committed in quick succession, then it is not truly an exception to the requirement of concurrence. It only

[10] In the All England Reports, the words "one series of acts" are used instead of "one transaction", [1954] 1 All ER 373, at 374.
[11] *Supra,* note 5, at 230-231.
[12] *Supra*, note 1, para 74.
[13] *Le Brun* [1992] 1 QB 61, at 68.
[14] Q*ueen-Empress* v *Khandu Valad Bhavani*, *supra*, note 9, *per* Parsons J (dissenting).

becomes a matter of significance if the acts of the defendant are read together even though they may be separated by a period of time.[15]

Their Lordships in *Thabo Meli* did not provide any statement of principle as to how or when this requirement of concurrence can be overcome.[16] The justification for the concurrence requirement is, on the other hand, fairly straightforward. Without this general requirement, a person can be punished for his evil thoughts alone. For example, if *A* intended to cause hurt to *Z*, but before he did so, *A* knocked *Z* over accidentally, the elements of the offence of causing hurt would both be present, though not at the same point in time. To convict *A* of causing hurt would be to punish him for his bad character only, a position which no civilised system of law can accept.[17]

The only indication given by their Lordships with respect to the requirement of concurrence is that the criminal law ought not to be frustrated by an over-refined application of general principles. Glanville Williams has also reasoned that "[o]rdinary ideas of justice and common sense require that such a case shall be treated as murder".[18]

Particular emphasis seems to have been given to the need to punish the defendant for his wrongful conduct. However, this overlooks the fact that the defendant is no doubt liable for other lesser offences such as attempted murder or causing grievous hurt. Unless a coherent basis can be found to justify an exception to the general requirement of concurrence, there is a great danger in distorting the criminal law to effect justice in individual cases.

[15] *Cf Fagan* v *Commissioner of Police* [1969] 1 QB 439 and the Court of Appeal in *Miller* [1982] 1 QB 532, where the problem of non-concurrence was overcome by stretching the *actus reus forwards* to a time when the *mens rea* was present.

[16] *Cf* Stanley Yeo, "Killing a supposed corpse: in search of principle" (1998) 31 CILSA 350. In that article, he offers a choice of three principles to explain the result in *Thabo Meli*. He terms them "the fault transaction principle", "the causal transaction principle", and "the causation principle".

[17] Andrew Ashworth in *Principles of Criminal Law* (2nd Ed, 1995) at 155 expresses it thus: "the function of criminal law is not to judge a person's general character or behaviour over a period of time".

[18] Glanville Williams, *Criminal Law: The General Part* (2nd Ed, 1961) at 174 (footnote omitted); see also Note, "Locality of Crime" (1897-98) 11 Harvard L Rev 57, at 58: "... it would be a strange anomaly if it were law that the wicked state of a man's mind ceases as soon as he believes in the death of his victim, so that he is not responsible for the actual harm resulting from continued indignities." *Cf* JW Cecil Turner, *Russell on Crime* (12th Ed, 1964) Vol 1, at 58 footnote 87: "'Ordinary' ideas of justice and common sense are often misconceived".

The Thabo Meli *Approach*[19]

In the local case of *Shaiful Edham bin Adam*, the two appellants were charged with murder committed "sometime between 10 pm on 11 January 1998 and 5.19 pm on 13 January 1998".[20] According to the statement of agreed facts, multiple injuries were inflicted on the deceased by one or the other of the appellants[21] before she was finally thrown into a canal sometime past 12 midnight on 13 January.[22] The forensic pathologist estimated the time of death as at least 24 hours before the body was examined, that is, before 8.30 pm on 12 January 1998.[23] This conclusion presented a problem since fluid was discovered in her chest cavity indicating that she was still alive when she was submerged in water.[24]

This led the first appellant to make the classic argument that he lacked the requisite *mens rea* at the crucial time: "he thought the deceased was already dead when he and the second appellant threw her body into the canal and thus could not have had any intention to kill the deceased thereby, because he thought he was disposing a corpse".[25]

The appellants' story was plausible given that most of the twelve external injuries found on the victim's body were shallow wounds and not life-threatening.[26] Four of the wounds in the neck region were however more significant. Yet these did not cut the muscles or major blood vessels. It was found that "[t]he deceased would have bled slowly for hours, lapsed into unconsciousness and appeared to be dead before dying, and the whole process could have taken hours".[27]

[19] This is the expression used by the Court of Appeal, *supra*, note 1, para 82. The expression will also be used to describe the approach of the Indian cases where actions of the accused are considered so closely linked that no division is possible even though these cases pre-dated *Thabo Meli*. This approach is advocated by *eg,* CC Turpin, "The Murdered Corpse – *Thabo Meli* Extended" [1969] CLJ 20; and by Stanley Yeo, *supra*, note 16.

[20] The wording of the charge itself indicates the difficulty in ascertaining the exact time and cause of death.

[21] The principles of joint liability will not be explored in this note. See *eg,* Michael Hor Yew Meng, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] SJLS 494.

[22] *Supra*, note 1, para 5.

[23] *Ibid*, para 6.

[24] *Ibid*, paras 7 and 13.

[25] *Ibid*, para 47. The second appellant did not raise this point, but the Court of Appeal dealt with it in common since it would have affected his appeal equally (paras 49, 71). The second appellant also gave evidence that he threw the deceased into the canal in the belief that she was already dead (para 37).

[26] *Ibid,* paras 7-14.

[27] *Ibid,* para 13.

After examining cases from other jurisdictions, the following conclusions were drawn by the Court of Appeal from these authorities:

> First, where there is a pre-conceived plan not only to kill the deceased but also to dispose of the body, the *Thabo Meli* approach should be applied .... This would also be the case where there was a pre-conceived plan to kill, even though the decision as to the method of disposal of the body was only arrived at later .... Second, the *Thabo Meli* approach should also be applied where there is a clear intention to kill, even if it is formed on the spur of the moment .... Third, where, however, there is only an intention to inflict bodily injury under section 299 limb 2 and section 300(c), or knowledge under section 299 limb 3 and section 300(d), it is unclear if the *Thabo Meli* approach is appropriate.[28]

In other words, a limited exception to the general requirement of concurrence of *actus reus* and *mens rea* may be made so long as one of two conditions are present: (a) there is a pre-conceived plan to kill; or (b) there is a clear intention to kill. The conclusions of the Court of Appeal may perhaps be supportable on the basis that the general requirement of concurrence should be upheld in all cases except where the accused is the most blameworthy.[29] This high degree of fault is manifested when either of these two conditions is present.[30]

Some support for the requirement of a pre-conceived plan to kill may

[28] *Ibid,* para 82 (cases cited omitted). The Court of Appeal expressly left the last point open since it was unnecessary to dispose of the appeal. The court found that the first appellant did have the intention to kill the deceased, *ibid*, para 84.

[29] I am grateful to Michael Hor for pointing out that an analogy can be drawn with the Penal Code (Cap 224, 1985 Rev Ed), s 301. This provision embodies the common law doctrine of transfer of malice where if *A* intends to kill *B* but kills *C*, whose death he neither intends nor knows himself to be likely to cause, the intention to kill *C* may be attributed to him. The scope of this section seems to be limited to cases where the doer either intends to cause death or knows to be likely to cause death. It cannot apply where the doer only has the intention to cause bodily injury as is likely to cause death (s 299 limb 2) or bodily injury as is sufficient in ordinary course of nature to cause death (s 300(c)). However, it is questioned whether s 301 is truly restricted to the most blameworthy of cases since it covers situations falling within s 299 limb 3. Furthermore, the distinction between s 299 limb 3 and s 300(c), if any, must be extremely narrow; see *eg*, *PP* v *Ow Ah Cheng* [1992] 1 SLR 797 and *Tan Chee Hwee* v *PP* [1993] 2 SLR 657.

[30] Koh, Clarkson, Morgan, *Criminal Law in Singapore and Malaysia* (1989) at 431. The query posed by the author is still unanswered: would the *Thabo Meli* approach be used if there was an intention to kill but the offence was mitigated to culpable homicide not amounting to murder by one of the special exceptions?

be found in an *obiter dictim* of Mason CJ in the Australian case of *Royall* v *The Queen*.[31] In *Ramsay*,[32] the New Zealand Court of Appeal also came to the conclusion that the *Thabo Meli* approach may only be applied where the accused is charged with the intention to cause death and not where it is merely knowledge of likelihood of causing death. Where the statutory provision requires proof of knowledge of likelihood of consequences, this must be ascertained at the time of the act causing death.

It can be pointed out that although the formulation by the Court of Appeal is that the two conditions are in the alternative, they will in fact collapse into one. Whether there is a pre-conceived plan to kill in the sense of a premeditated intention to kill is superfluous since an intention to kill, even if formed on the spur of the moment, is sufficient to dispense with the concurrence requirement.

On the other hand, several reasons may be advanced for suggesting that a broader approach is preferable. The distinction in moral culpability between an intention to kill on the one hand, and an intention to cause bodily injury or knowledge that the act is so imminently dangerous that it must in all probability cause death on the other hand is razor thin.[33] To make a distinction on this ground would, using the words of the Privy Council in *Thabo Meli*, be "too refined a ground of judgment".[34] Indeed, the English courts have come to a position where a result foreseen as virtually certain is now equated with an intended result.[35]

Furthermore, it should be noted that no difference in culpability is made in the Penal Code between each of the states of mind in subsections (a) to (d) of section 300. A person who causes death with any of these states of mind commits murder, and the mandatory death sentence follows upon such conviction.[36]

Stanley Yeo has commented:

> It is difficult to appreciate why the *Thabo Meli* ruling should be restricted to cases of an intention to kill. A proper understanding of the nature

[31] (1991) 172 CLR 378, at 393. This was also initially the position in South Africa, *Chiswibo* 1960 (2) SA 714, until disapproved of in *Masilela* 1968 (2) SA 558, at 572. See Stanley Yeo, *supra*, note 16, at 364-367.

[32] [1967] NZLR 1005. This is strongly approved of in Brent Fisse, *Howard's Criminal Law* (5th Ed, 1990) at 55.

[33] See Koh, Clarkson, Morgan, *supra*, note 30, at 58.

[34] *Supra*, note 5.

[35] *R* v *Woollin* [1998] Crim LR 890; Smith and Hogan, *Criminal Law* (9th Ed, 1999) at 55; *cf* Peter Mirfield, "Intention and Foresight of Virtual Certainty" [1999] Crim LR 246.

[36] Penal Code (Cap 224, 1985 Rev Ed), s 302.

> and operation of the ... principle would reject such a restriction. That principle emphasises the fault element for murder as permeating through all the acts performed by the accused including the final act which actually caused death. The principle does not depend on a particularly high degree of fault for this permeation to happen. So long as the law of murder of the jurisdiction in question recognises the particular form of fault for murder which the prosecution has relied on, that should be sufficient for the operation of the principle.[37]

Although the Court of Appeal noted that "there appear to be no local cases in which the issue [of the lack of concurrence between *actus reus* and *mens rea* in homicide] has been discussed",[38] the issue was in fact raised in the earlier case of *Muhammad Radi* v *PP*.[39]

The appellant in *Muhammad Radi* was convicted of the murder of the deceased, committed sometime between 8 and 12 September 1989. The appellant admitted that on 10 September 1989 he had an argument with the deceased when he accused the deceased of stealing from him. He intentionally struck her several times with a stick.[40] After she fell, he dragged her into a kitchen and forcibly pushed her into a crouching position under the kitchen ledge.[41] He covered the body with a canvas sheet and abandoned her in the vacant quarters. The trial judge was unable to find on the evidence whether the deceased was already dead or was merely unconscious when she was dragged into the kitchen. Her body was discovered on 12 September 1989 in a badly decomposed state.

Two major injuries were found on her body, one of which was a gaping laceration on the left forehead. Both injuries were consistent with having been caused by a blunt object like a stick with mild to moderate force. The cause of death was certified to be due to multiple blows to the head. However, as there was no fracture in the skull and owing to the advanced

37 *Supra*, note 16, at 368 (footnote omitted).

38 *Supra*, note 1, para 72.

39 [1994] 2 SLR 146. Two of the learned appellate judges, Yong Pung How CJ and Thean JA, also heard the appeal in *Shaiful Edham bin Adam*. Stanley Yeo, *supra*, note 16, at 358 refers to *Muhammad Radi* as an illustration of the "causal transaction principle" where it is the causal link that enables the acts to be linked together. It is submitted that no distinction should be made between the "causal transaction principle" and the "causation principle" because liability for homicide cannot follow in either case if there is no causal link between the death and the initial act.

40 This was admitted in court and in a statement given to the police, *ibid*, at 147.

41 See findings of the trial judge, *PP* v *Muhammad Radi Bin M Said* (CC 19/1991, 1 November 1993, unreported).

state of decomposition of the body, the forensic pathologist could only state that it was *possible* that the multiple blows to the head had caused brain injury which led to death. He could not confirm or exclude the possibility of death by asphyxiation, that is, death as a result of actions quite apart from the blows to the deceased's head.

The appellant in effect raised the issue of non-concurrence between the *actus reus* and *mens rea*. He argued that since the cause of death could not be conclusively identified, he could not be liable under section 300(c) of the Penal Code, which required the injuries inflicted be sufficient in the ordinary course of nature to cause death. He had not intended to inflict any further injuries when he concealed and abandoned her, and it could very well have been these acts which killed her.

Although the Court of Criminal Appeal did not refer to the case of *Thabo Meli,* the following language reminiscent of the approach in that case was used:

> The appellant's acts of pushing the deceased under the kitchen ledge and covering her with a canvas could not be isolated from his acts of hitting the deceased on her head. ... the appellant's acts of concealing and abandoning the body of the deceased were so intimately connected with his act of striking the deceased that all the acts must be treated as one transaction. ... We were, therefore, of the view that the appellant's acts of striking the deceased and his subsequent acts of concealing and abandoning the deceased constituted one single transaction and had resulted in the injuries suffered by the deceased which led to her death. On the totality of the evidence, he had intended to inflict the injuries on the deceased, and the acts with the injuries taken together were sufficient in the ordinary course of nature to cause death.[42]

Hence, the *Thabo Meli* approach has been applied where there was only an intention to cause bodily injury and not a clear intention to cause death.[43] As *Thabo Meli* itself and other cases were not referred to in the judgment, it may be argued that the Court of Appeal may now have doubts on the width of the approach. However, for the reasons given above, it is submitted that the conclusion of the Court of Criminal Appeal in *Muhammad Radi*

[42] *Supra*, note 39, at 148-149. See also Koh Kheng Lian, "Trends in Singapore Criminal Law" in *Review of Judicial and Legal Reforms in Singapore* (1996) 318, at 360.

[43] Although the prosecution had urged the trial judge to convict the accused under s 300(a) of the Penal Code in the alternative, the conviction and appeal was on the basis of s 300(c).

is correct. It is difficult to understand why the *Thabo Meli* approach should be limited to instances where there is a clear intention to kill only.[44] It can also be noted that in *Muhammad Radi* the lack of a pre-conceived plan to kill or to dispose of the body was not an obstacle to conviction.

On the other hand, the present approach of the Court of Appeal in *Shaiful Edham bin Adam* may be too broad. Suppose that the two appellants in that case, after inflicting the injuries on the victim, had mistakenly thought that they had killed her, but had tried to get her to hospital anyway. In their haste, they had crashed their vehicle into the canal. She had died when submerged in the water.

Arguably, the appellants would still have been liable for murder since they would have had a pre-conceived plan to kill and/or a clear intention to kill at the time of the initial attack.[45] Yet, we may instinctively feel that the appellants in this scenario would not have deserved to be held liable for murder. It is submitted that the present analysis of the Court of Appeal does not provide a satisfactory basis for an exception to the concurrence requirement.

The Causation Approach

In the penultimate paragraph of its judgment, the Court of Appeal in *Shaiful Edham bin Adam* proposed another analysis to uphold the appellants' conviction:

> The neck wounds alone would have caused death from loss of blood although death would have occurred more slowly, over a prolonged period of time. In other words ... drowning in these circumstances was an additional cause of death superimposed on the neck wounds and not an intervening cause of death. To adopt the language of causation, the neck wounds were still an operating cause and a substantial cause, and death can properly be said to have resulted from them, albeit that

[44] The approach has also been similarly extended in other jurisdictions, *eg* to manslaughter as well in England, see *Moore and Dorn* [1975] Crim LR 229; *Church*, *supra*, note 9; and *Le Brun*, *supra*, note 13; and to culpable homicide not amounting to murder in India, see *Khubi* AIR 1923 All 545. The latter was apparently overlooked by the Court of Appeal in *Shaiful Edham bin Adam*.

[45] Stanley Yeo, *supra*, note 16, at 356-357, argues that such a case would not come within the principle, since the later acts were not tainted by the fault accompanying the initial act. However, this requirement of fault to bind the acts together is not apparent from their Lordships' judgment in *Thabo Meli* or from *Shaiful Edham bin Adam.*

> some other cause of death (drowning) was also operating. The neck wounds were not merely the setting in which another cause operated so that it could be said that death did not result from them ....[46]

This seems to have been proposed as an alternative approach to the earlier *Thabo Meli* approach.[47] In the case of *Le Brun*, the English Court of Appeal also opined that the problem of non-concurrence could be expressed as one of causation.[48] In *Attorney-General's Reference (No 3 of 1994)*, Lord Mustill in the House of Lords expressed the following as a rule of law:

> The existence of an interval of time between the doing of an act by the defendant with the necessary wrongful intent and its impact on the victim in a manner which leads to death does not in itself prevent the intent, the act and the death from together amounting to murder, so long as there is an unbroken causal connection between the act and the death.[49]

Causation offers an alternative approach for the attribution of criminal liability. Where there is more than one contributory cause of death, there is no need, and it may not be possible, to identify one particular event as *the* cause of death. By not having to identify the effective cause of death, the court is also spared from focussing on the state of mind of the accused at that one point in time only. The initial attack is a cause of death, even though the subsequent event may also be a cause of death. There can be more than one cause of death.[50]

In other words, the causation approach identifies the act which causes

46 *Supra*, note 1, para 86, referring to the English case of *R* v *Smith* [1959] QB 35.

47 *Supra*, note 1, paras 84, 86; see also the decision of the High Court, CC No 27 of 1998, 5 November 1998 (unreported), para 80. The learned High Court judge in *Muhammad Radi*, *supra*, note 41, also approached it in terms of causation: "Here, I would add that as the deceased's body was found under the kitchen ledge hidden by the canvas which the accused had used to conceal her, there was no question of any novus actus interveniens of the accused's acts which had caused her death."

48 *Supra*, note 13, at 68. See also *S* v *Masilela*, *supra*, note 31. Stanley Yeo classifies *Le Brun* (and would probably do the same for *AG's Reference (No 3 of 1994)*) as an illustration of the "causal transaction principle" and not as one applying the "causation principle". See *supra*, note 16.

49 [1997] 3 WLR 421, 427, citing *R* v *Church*, *supra*, note 9, and *R* v *Le Brun*, *supra*, note 13.

50 This is supported by the Penal Code (Cap 224, 1985 Rev Ed), s 33: "The word "act" denotes as well a series of acts as a single act...".

the death as the original unlawful injury (which was accompanied by *mens rea*) rather than the immediate act which brought about death (where *mens rea* was absent). The defendant will be liable for murder or culpable homicide not amounting to murder depending on his *mens rea* at the time of the initial attack.

Using the causation approach would certainly avoid some of the problems posed by the concurrence requirement. Under this approach, the factual scenario in *Thabo Meli* may be interpreted as an earlier assault which rendered the victim unconscious, and which eventually led to his subsequent death from exposure:

> In *Thabo Meli's* case, the real cause of death was not the mere act of leaving the victim where he lay. But for the injuries previously inflicted he could have walked away; and what really killed him was the fact that those injuries rendered him incapable of escaping from exposure to the cold.[51]

In the type of case under the present discussion, it can hardly be said that the act of the defendant in disposing of the body was an independent intervening cause or was the result of an unforeseeable consequence, the two situations recognised in the law which can "break" the chain of causation.[52] This would certainly not be the case where his later actions were done to conceal what had happened: it is by no means an *independent* act in that it was done by the defendant; and it is not unforeseeable in that it can only be expected that murderers will try to conceal the bodies of their victims to avoid detection. Even an "accident" may not break the chain of causation if it can reasonably be expected, such as the body of an unconscious victim slipping from one's grasp while one is attempting to carry it.

On the other hand, where the earlier act is not medically likely to cause death, there can be understandable reluctance to hold the defendant liable for homicide.[53] This may partially explain two of the Indian cases where

[51] Francis Boyd Adams, "Homicide and the Supposed Corpse" (1968) 1 Otago LR 278, at 287.

[52] Rollin M Perkins, Ronald N Boyce, *Criminal Law* (3rd ed, 1982) at 790-818. Although this is an American textbook, it would be wrong to think that this represents only the state of American case law. The authors in fact draw substantially on English authority.

[53] See *Attorney-General's Reference (No 4 of 1980)* [1981] 1 WLR 705 where the Court of Appeal suggested that in order to sustain a conviction for manslaughter, there must be the requisite *mens rea* at each of the acts which caused the victim's death. This decision has been criticised, see *eg,* Smith and Hogan, *supra*, note 35, at 77; and Andrew Ashworth, *supra*, note 17, at 157.

the appellant was not convicted either of murder or of culpable homicide not amounting to murder even though there was arguably an intention to cause death.[54] In *Palani Goundan* v *Emperor*,[55] the accused struck his wife on the head, rendering her unconscious. Believing her to be dead, and in order to fabricate evidence as to the cause of death, he hanged her on a beam by a rope, and thereby caused her death by strangulation. In *Queen-Empress* v *Khandu Valad Bhavani*,[56] the accused struck his father-in-law three blows on the head with a stick. In order to conceal the crime, and thinking that his father-in-law was dead, he set fire to the hut where the father-in-law lay unconscious. In both cases the actual blows struck to the heads of the victims were not shown to be likely to cause death.

Although the causation approach has the support of many commentators,[57] there is danger in extending criminal liability to an unacceptable degree. But for the act of the defendant which rendered his victim unconscious (a necessary precondition in the "supposed corpse" cases), the victim would not have submitted to being decapitated, thrown into the river or canal, set on fire and so on. A conviction for homicide will thus follow in every case. Moreover, Glanville Williams has rightly pointed out that the causation approach may sometimes be inappropriate:

> The causation approach is itself open to the objection that it would often be unrealistic to assume that the deceased, who is set on by several armed men... and (after being incapacitated by a blow) is thrown over a cliff, could have saved himself if he had not first been incapacitated.[58]

[54] *Supra*, note 1, paras 80-81.

[55] *Supra*, note 9, as pointed out in *Kaliappa Goundan* v *Emperor*, *ibid*, at 801.

[56] *Ibid*, as explained in *Shaiful Edham bin Adam* v *PP*, *supra*, note 1, para 81.

[57] Proponents favouring the causation approach include: *R* v *McKinnon* [1980] 2 NZLR 31; Brent Fisse, *supra*, note 32, at 54; Francis Boyd Adams, *supra*, note 51; PMA Hunt, "Murdering a 'Body' by Disposing of It" (1968) 85 SALJ 383; Geoffrey Marston, "Contemporaneity of Act and Intention of Crimes" (1970) 86 LQR 208; Celia Wells, "Goodbye to Coincidence" (1991) 141 NLJ 1566; Peter W Edge, "Contemporaneity and Moral Congruence: *Actus reus* and *Mens rea* Reconsidered" (1995) 17 Liverpool Law Review 83; Elizabeth Macdonald, "The Twice Killed Corpse – A Causation Issue" (1995) 59 Journal of Criminal Law 207.

[58] Glanville Williams, *Textbook of Criminal Law* (1st Ed, 1978) at 220.

Furthermore, the limits to the causation approach, as can be expected where unarticulated policy considerations are present, are far from clear.[59] The following passage from Smith and Hogan, *Criminal Law*, was approved by the English Court of Appeal in *Le Brun*:

> An intervening act by the original actor will not break the chain of causation so as to excuse him where the intervening act is part of the same transaction; but it is otherwise if the act which causes the *actus reus* is part of a completely different transaction. For example, D, having wounded P, visits him in hospital and accidentally infects him with smallpox of which he dies.[60]

The example given may be clear enough, but the concept of "the same transaction" fails to give an adequate guide as to when the chain of causation may be broken. In *Shaiful Edham bin Adam*, the learned High Court judge even went so far as to say that the appellants "are liable even if the deceased drowned from being thrown into the canal by a third party".[61] This dictum of course cannot be right if the act of the third party cannot be foreseen, but it only serves to indicate the uncertainty that is generated if unarticulated policy choices are the instruments on which liability is based.

It should also be noted that applying the causation approach does not, as implied by the Court of Appeal, always lead to the same results as the *Thabo Meli* approach. The causation approach may lead to wider liability, since it is not restricted to instances where there is a pre-conceived plan to kill or a clear intention to kill as accepted by the Court of Appeal in interpreting the *Thabo Meli* approach.[62] The question to be considered under the causation approach is only whether the initial injury, accompanied by *mens rea*, can be said to be "an operating and a substantial cause"[63] of

[59] Rollin M Perkins, Ronald N Boyce, *supra*, note 52, at 776 (footnotes omitted) comment: "The matters of policy which determine just where the limitations of juridical recognition shall be placed upon a broad field of actual cause, are grounded partly on expediency and partly upon notions of fairness and justice .... Since the boundary lines of proximate cause are governed by these considerations they may, and in fact do, vary according to the jural consequences of the particular kind of case involved. The line of demarcation between causes which will be recognised as proximate and those which will be disregarded as remote 'is really a flexible line'."

[60] Smith and Hogan, *supra*, note 35, at 341 (footnotes omitted).

[61] *Supra*, note 47, para 81, citing *R* v *Smith*, *supra*, note 46.

[62] See *Masilela*, *supra*, note 31, at 572.

[63] *R* v *Smith*, *supra*, note 46.

death.

Where the later act can be shown to be the sole cause of death, the choice of approach may determine whether liability for homicide will follow. On the causation approach, the initial act of the defendant (accompanied by *mens rea*) would no longer be the "operating and substantial cause" of death. On the *Thabo Meli* approach on the other hand, a conviction may still follow as it does not matter if the later act was the sole cause of death so long as the acts stand in some relation to each other such that they can be said to be in the same "transaction".

Hence, it is submitted that the causation approach, on its own, does not offer a satisfactory solution to the problem of non-concurrence either. So we will turn next to examine the moral congruence approach advanced by GR Sullivan.[64]

Moral Congruence Approach

In the English case of *Le Brun*, the appellant and his wife had an argument on the way home. The wife made it known to the appellant that she refused to follow him home. He hit her, rendering her unconscious. While attempting to move her, he accidentally dropped her, striking her head on the pavement. The question posed was whether the appellant could be guilty of manslaughter when his wife died from a subsequent injury accidentally inflicted.

The English Court of Appeal's decision was predicated on the nature of the appellant's subsequent conduct. The court determined that his motive in picking up his wife was either to carry her home, to which she had made known her wish not to return, or to conceal the commission of the unlawful assault.[65] Hence, the appellant's initial unlawful assault and his subsequent acts which caused his wife's death (accidentally dropping her on the pavement) may be considered as "parts of the same sequence of events" because the later acts were "designed to conceal his commission of the original unlawful assault".[66] The direction of the trial judge was held by the English Court of Appeal to be correct in:

> ... drawing a sharp distinction between actions by the appellant which were designed to help his wife and actions which were not so designed: on the one hand that would be a way in which the prosecution could

[64] GR Sullivan, "Cause and the Contemporaneity of *Actus Reus* and *Mens Rea*" (1993) 52 CLJ 487.

[65] *Supra*, note 13, at 65 and 68.

[66] *Ibid*, at 68.

> establish the connection if he was not trying to assist his wife; on the other hand if he was trying to assist his wife, the chain of causation would have been broken and the nexus between the two halves of the prosecution case would not exist.[67]

Thus, it has been suggested that "the causal status of the assault was a function of the morality of the subsequent conduct".[68] In other words, the moral character of the subsequent conduct is the basis on which an exception is made to the concurrence requirement. The defendant's earlier culpability may be joined to his subsequent conduct provided they are morally congruent. Drawing on the factual circumstances of *Le Brun*, it was suggested by Sullivan that the subsequent conduct will be morally congruent to the offence of homicide in two situations: if it were perpetrated in order to gain some advantage (such as taking the victim to a place where she did not wish to go to) or if it manifested an indifference to the welfare of the victim.[69]

The moral congruence approach serves to limit the possible extensive criminal liability of the *Thabo Meli* approach, but more importantly, it requires the court to identify the hitherto implicit culpability judgment at work. Consideration of *why* the defendant did what he did, which eventually led to the death of the victim, is crucial. Under the *Thabo Meli* approach, the initial act only has to stand in relation to the later act such that they can be said to be in a single transaction. However, under the moral congruence approach the defendant who only succeeds in inflicting minor injuries on his victim cannot be found liable for murder if he later, by accident, kills him while attempting to render medical aid or while trying to flee from the scene. The subsequent conduct of the accused is open to criticism, but this criticism falls short of the culpability required by the offence of homicide.

Following the moral congruence approach would not lead to a different result in the cases mentioned, considering the circumstances in which the further acts were perpetrated. It should be pointed out that the fact of covering up the earlier wrongdoing on its own is not sufficient to overcome the concurrence requirement. The covering up must demonstrate an indifference to the victim's welfare.[70] Our Court of Criminal Appeal appeared to allude to this requirement in *Muhammad Radi*:

[67] *Ibid*, at 71.

[68] *Supra*, note 64, at 497.

[69] *Ibid*, at 497-500. Peter W Edge, *supra*, note 57, argues that this approach is still too uncertain.

[70] *Supra*, note 64, at 499. Indifference to the victim's welfare when one's actions puts the victim in peril may amount to an illegal omission under our law, see Penal Code (Cap 224, 1985 Rev Ed) ss 33, 43 and *Too Yin Sheong* v *PP* [1999] 1 SLR 682, but this is not sufficient for criminal liability for homicide unless the requisite mental state exists at the time of the illegal omission.

> This was not a simple case where the appellant simply fled from the scene without giving any aid to the deceased. The appellant in the present case took careful and calculated steps to ensure that the deceased would not be easily discovered by any third parties, and left her in that position without taking any further interest in her.[71]

The Way Forward

Although the Court of Appeal in *Shaiful Edham bin Adam* was rightly concerned with making only a limited exception to the principle of concurrence, it is submitted that the moral congruence approach is doctrinally more satisfactory.

The criteria used to judge moral congruence may appear open and subject to interpretation, but this will be cured in time through the development of case law. As a starting point for analysis, it is submitted that the factors the court should look for in deciding what actions warrant sufficient criticism to impose liability for homicide include whether the defendant *knew* that the victim required immediate medical treatment and whether *deliberate* steps were taken to hinder discovery of the victim. In considering the former, whether the injuries were intentionally inflicted, the nature of the injuries, and medical evidence as to the likelihood of the injuries resulting in death if left untreated are all relevant but not determinative in deciding whether an exception to the concurrence requirement should be made.

For the sake of completeness, we could return to the two Indian cases mentioned earlier. If the moral congruence approach had been used in both *Palani Goundan* and *Khandu Valad Bhavani*, the proper analysis would have been whether an exception to the concurrence requirement would have been justifiable based on the moral congruence of the earlier and later acts. Given that the later actions of the accused persons in both cases were not only meant to conceal their own crimes but, in addition, demonstrated a complete indifference to the welfare of their victims, convictions for murder would have been appropriate.

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[71] *Supra*, note 39, at 149.

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