

THE FINAL TWIST IN COMMON INTENTION?

*Daniel Vijay s/o Katherasan v. Public Prosecutor*¹

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It was only in 2008 that the Court of Appeal made a seminal restatement of the law on common intention, particularly with respect to liability in so-called ‘twin crime’ situations.² The question posed then was posed again recently in *Daniel Vijay*: what exactly is the required *mens rea* for the secondary offender in such situations? In 2008, the Court of Appeal said that the secondary offender had to subjectively know that one in his party might likely commit the collateral offence in furtherance of the common intention of carrying out the primary offence. Now, in *Daniel Vijay*, the Court of Appeal has said that the secondary offender must have had the intention to commit the collateral offence. Has there been a change in the law, and if so, is this for the better?

I. ESTABLISHING THE CONTEXT

For many years, the law on criminal liability for common intention remained a contentious issue.³ The relevant statutory provision for common intention can be found in s. 34 of the *Penal Code*⁴:

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.

A provision introduced almost 140 years ago and unchanged in its language ever since,⁵ its most controversial use by the prosecution has probably been in the imputation of *mens rea* in ‘twin crime’ situations, *i.e.*, where there is a primary offence

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¹ [2010] 4 S.L.R. 1119 (C.A.) [*Daniel Vijay*].

² *Lee Chez Kee v. Public Prosecutor*, [2008] 3 S.L.R.(R.) 447 (C.A.) [*Lee Chez Kee*].

³ *Daniel Vijay*, *supra* 1 at para. 3; Michael Hor, “Common Intention and the Enterprise of Constructing Criminal Liability”, (1999) Sing. J.L.S. 494 at 494; Nathaniel Yong-Ern Khng & Chen Siyuan, “Recent Developments in Common Intention”, (2009) 21 Sing. Ac. L.J. 557 at 557.

⁴ Cap. 224, 2008 Rev. Ed. Sing. [*Penal Code*].

⁵ *Daniel Vijay*, *supra* note 1 at para. 2.

as well as a collateral offence committed incidentally to the main goal of the participants of the primary offence.⁶ In such situations, while the participants would have intended to commit the primary offence, not all (*i.e.*, the secondary offenders) would have shared in the intention of the ‘actual doer’ in committing the collateral offence—but the secondary offenders may nevertheless be found guilty of committing the collateral offence.⁷ Perhaps one of the most commonly invoked illustrations is that of a planned robbery that eventually leads to an unplanned murder of the robbed victim as well.⁸

In 2008, the Court of Appeal, led by V.K. Rajah J.A. in *Lee Chez Kee*, undertook an extensive survey on the law of common intention. It decided that the correct interpretation, based on the legislative history (of s. 34) and the most plausible harmonisation of the cases,⁹ was that there were four conjunctive elements to be proven for s. 34:

- (1) a criminal act;¹⁰
- (2) participation in the doing of the act;¹¹
- (3) a common intention between the parties;¹² and
- (4) an act done in furtherance of that common intention.¹³

Most pertinently, it ruled that in a ‘twin crime’ situation, the secondary offender must, subjectively, know that one in his party might likely commit the collateral offence in furtherance of the common intention of carrying out the primary offence.¹⁴ Two years after *Lee Chez Kee*, *Daniel Vijay*—a Court of Appeal decision led by Chan C.J.—came about, and declared that despite the extensive efforts by *Lee Chez Kee* to clarify the law, s. 34 remained a “troubling provision”.¹⁵

II. THE DECISION IN *DANIEL VIJAY*

A. *The Facts of the Case*

A quick summary of the facts in *Daniel Vijay* is in order. Ragu and Babu had planned to rob some cargo transported by Sterling Agencies. Ragu was a driver employed by

⁶ *Ibid.* at paras. 5 and 41; Khng & Chen, *supra* note 3 at paras. 2 and 12; Kumaralingam Amirthalingam, “Clarifying Common Intention and Interpreting Section 34: Should There be a Threshold of Blame-worthiness for the Death Penalty?”, (2008) Sing. J.L.S. 435 at 435-436. A less controversial use—as confirmed in *Daniel Vijay* itself—was in the imputation of *actus reus*; for instance, where the evidence is inconclusive as to which member of a crime inflicted the fatal wound in a group murder.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Lee Chez Kee*, *supra* note 2 at paras. 162-218.

¹⁰ That is, all the acts done by the persons involved which *cumulatively result in the criminal offence* in question; it does not refer to the actual crime committed: *Lee Chez Kee*, *ibid.* at para. 137.

¹¹ That is, presence at the scene of the crime (regardless of whether it is a single or twin crime) need not be strictly insisted on; rather the key is *participation in the primary offence* (and not necessarily in the secondary offence): *Ibid.* at paras. 146-157.

¹² That is, the criminal act was done pursuant to a *pre-arranged plan*, although it is possible to form a common intention just before the offence is committed. The circumstances that can lead to an inference of a common intention cover both the antecedent and subsequent conduct of the parties: *Ibid.* at para. 161.

¹³ *Ibid.* at para. 136.

¹⁴ *Ibid.* at paras. 236 and 253.

¹⁵ *Daniel Vijay*, *supra* note 1 at para. 4.

Sterling Agencies. The duo roped in Bala, who in turn roped in the appellants, Daniel and Christopher;¹⁶ Bala was supposedly a “father figure” to the appellants.¹⁷ After Babu and Bala had surveyed the cargo loading point, Babu, Bala, and the appellants met to discuss the robbery plan. A day after the meeting, Ragu told Babu that a cargo of mobile phones worth more than a million dollars was being delivered. Babu conveyed this to Bala, who was with the appellants. Bala and the appellants then rented a vehicle and headed for the cargo loading point. The appellants brought a baseball bat along—a weapon that Daniel had previously placed in his own car while it was serviced at a workshop. At trial, it was disputed as to whether there was any sort of agreement (during the meeting) to beat up the driver of the cargo lorry to the extent that he could not identify the assailants later on,¹⁸ though Babu admitted to being the first person to come up with such an idea.¹⁹

When Bala and the appellants arrived at the loading point, Babu informed them of the lorry’s registration number. Soon after, the appellants saw the lorry emerge and under Bala’s instruction, they tailed the lorry in their vehicle. Along the way, Daniel drove in front of the lorry and caused it to stop by the roadside. The driver of the lorry alighted and spoke with Christopher. Bala then came and repeatedly assaulted the driver with the baseball bat, hitting him on the head and other parts of the body.²⁰ The driver was carried by Bala and the appellants and placed in their rented vehicle. The appellants drove their vehicle to a car park, with Bala following behind in the lorry. After the trio looted the cargo, the lorry was left at the car park with the victim inside. The victim was found and brought to a hospital and underwent emergency surgery on his head, but died a few days later.²¹

B. *The Judgment*

The Court of Appeal first noted that the trial judge in the High Court had applied s. 34 to convict the appellants on a joint charge of murder (under s. 300(c) of the *Penal Code*) arising from Bala’s act of assaulting the lorry driver, despite the fact that the appellants had *not planned to kill the driver or cause his death*, but only had the *common intention to rob him of the cargo*, and despite the fact that it was Bala alone who had caused the death of the driver by intentionally inflicting blows on his head with the baseball bat.²²

The Court of Appeal considered this to be “harsh” and “unjust”.²³ It thought that s. 34 had been misinterpreted for a long time, and identified the “expansive interpretation” of s. 34 *vis-à-vis* ‘twin crime’ situations to have stemmed from *Wong*

¹⁶ Bala originally appealed as well against his conviction for murder, but later decided not to proceed: *Ibid.* at para. 1. So while Bala was considered as one of the ‘appellants’ in the judgment, he will not be considered as one of the appellants in this piece.

¹⁷ *Ibid.* at paras. 6 and 19. Bala was 48 years old, as compared to the appellants, who were both 23 and had been absent without official leave from their National Service.

¹⁸ *Public Prosecutor v. Daniel Vijay s/o Katherasan*, [2008] SGHC 120 at paras. 28-29.

¹⁹ *Daniel Vijay*, *supra* note 1 at para. 7.

²⁰ *Ibid.* at para. 10. There were at least 15 blows in total.

²¹ *Ibid.* at para. 12.

²² *Ibid.* at para. 4.

²³ *Ibid.* at para. 5.

Mimi v. Public Prosecutor,²⁴ a Criminal Court of Appeal decision.²⁵ The prosecution in *Daniel Vijay* had purportedly interpreted *Mimi Wong* using a “putative” approach, *i.e.*, to impute liability to secondary offenders pursuant to s. 34, there does not need to be a common intention between the actual doer and the secondary offenders to commit the act done by the actual doer that gives rise to the offence that all the offenders are charged with; all that is required is that the said act is in furtherance of, and not inconsistent with, the criminal act commonly intended by all the offenders.²⁶ According to the Court of Appeal in *Daniel Vijay*, such an interpretation ignored the latest test on s. 34 as set out in *Lee Chez Kee*.²⁷

The Court of Appeal then reiterated certain important findings of fact made by the trial judge:

- (1) The appellants had a “common intention to rob [the driver]”;
- (2) They knew violence would be necessary and be used to incapacitate the driver in facilitating the commission of the robbery, but did not know the “actual method of execution”;
- (3) Bala brutally assaulted the driver “in furtherance of the [a]ppellants’ common intention to commit robbery”;
- (4) Daniel “participated in the robbery by staging the near accident... and by acting as a lookout while [the driver] was being assaulted”;
- (5) Christopher “participated in the robbery by directing [the driver] to Bala after [the driver] had alighted” knowing Bala would assault him; and
- (6) The appellants “had not planned to kill” or cause the death of the driver.²⁸

The Court of Appeal also noted that the trial judge:

- (1) Did not find the appellants had a common intention to knock the driver unconscious, “let alone a common intention to do so by (specifically) hitting him on the head”; and
- (2) Only made “express findings of participation by [the appellants] only in relation to the robbery, and *not* in relation to the assault on [the driver]”.²⁹

The Court of Appeal had no doubt that Bala was rightly convicted of murder under s. 300(c) of the *Penal Code* (“s. 300(c) murder”).³⁰ For the appellants, however, it saw two key issues that needed to be resolved: (1) “whether Bala’s assault... was in furtherance of the [a]ppellants’ common intention to rob [the driver]”; and (2) whether, on the evidence, the test in *Lee Chez Kee* was satisfied with respect to the appellants.³¹

With respect to the first issue, the court held that the trial judge was wrong to hold that Bala’s assault was in furtherance of the appellants’ common intention to rob the driver just because it facilitated the robbery. This was because the appellants

²⁴ [1971-1973] S.L.R.(R.) 412 [*Mimi Wong*].

²⁵ *Daniel Vijay*, *supra* note 1 at para. 5.

²⁶ The Court of Appeal called it the “putative *Mimi Wong*” test: *ibid.* at para. 35.

²⁷ *Ibid.* at para. 42.

²⁸ *Ibid.* at para. 44(f).

²⁹ *Ibid.* at para. 45 (emphasis in original).

³⁰ *Ibid.* at paras. 55-56.

³¹ *Ibid.* at para. 57.

only had a common intention to rob and not to kill the driver, and there was no finding of fact that they had a common intention to cause any specific injury to the driver.³² Although the assault probably contributed to the robbery's success, the appellants might not necessarily have agreed to carry out the robbery at all costs, and indeed there was no finding that the appellants had a common intention with Bala to assault the driver in the way he actually did (*i.e.*, hitting the driver with a baseball bat on the head and other parts of his body); at worst, they stood by while Bala assaulted the driver.³³ In support of its conclusion, the court cited *Ike Mohamed Yasin bin Hussin v. Public Prosecutor*³⁴ as the principal authority.³⁵ Finally, the fact that the appellants knew that Bala would assault the driver did not suffice, because knowledge could not be equated with intention.³⁶

With respect to the second issue, the court held that although the appellants knew that violence would be necessary to facilitate the commission of the robbery, and that they knew the driver would be assaulted as part of the robbery, given that they had not planned to kill the driver or cause his death, the test in *Lee Chez Kee* was not satisfied.³⁷ That is, there was no finding that the appellants had subjective knowledge that Bala might, in furtherance of the common intention to commit robbery, be likely to commit the act (an injury under s. 300(c) ("s. 300(c) injury")) which resulted in the offence (a charge under s. 300(c)) that the appellants were charged with.³⁸ Moreover, since they had no intention to kill the driver or cause his death, there would have been no reason for the appellants to suspect or subjectively know that Bala might likely inflict s. 300(c) injury on the driver in furtherance of the common intention to rob.³⁹ The appellants' passivity when Bala assaulted the driver did not mean that they subjectively knew Bala might inflict s. 300(c) injury on him in furtherance of the common intention to commit robbery.⁴⁰

But the second issue also had a subsidiary question: "how specific must be the secondary offender's subjective knowledge of the collateral criminal act which might likely be committed by the actual doer be" to satisfy the test in *Lee Chez Kee*?⁴¹ Insofar as s. 300(c) of the *Penal Code* was concerned (*i.e.*, the offence in question in *Daniel Vijay*), the test in *Lee Chez Kee* would only be satisfied if "the secondary offender ha[d] subjective knowledge of the likelihood of the victim receiving, specifically, s. 300(c) injury".⁴² It will therefore *not* suffice if the secondary offender merely had subjective knowledge that the victim might likely suffer an injury *per se*—even

³² *Ibid.* at paras. 58-59.

³³ *Ibid.* at para. 59.

³⁴ [1974-1976] S.L.R.(R.) 596 (P.C.) [*Yasin*].

³⁵ *Daniel Vijay*, *supra* note 1 at para. 61-63. The court focused on the outcome of *Yasin* in the High Court.

³⁶ *Ibid.* at paras. 64-65 and 87-90.

³⁷ *Ibid.* at para. 66. In *Lee Chez Kee*, *supra* note 2, the victim was robbed by a friend. That friend brought along two accomplices (one of whom was the appellant). During the robbery, the victim was assaulted, stabbed, and strangled to death. The appellant had assaulted and stabbed the victim, but did not strangle him. The Court of Appeal held that the appellant must have known the victim would have to be killed to protect the identities of the assailants.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.* at para. 67. The use of the language associated with the test in *Lee Chez Kee*, *viz.*, "subjectively knew", remains puzzling.

⁴¹ *Ibid.* at para. 68.

⁴² *Ibid.* at para. 74 (emphasis in original).

if that injury is subsequently shown to be of a type which is sufficiently serious to amount to s. 300(c) injury.⁴³ Accordingly, the court added⁴⁴:

Section 34 imputes *constructive* liability to a secondary offender by reference to the doing of a criminal act by the actual doer in furtherance of a common intention shared by both the actual doer and the secondary offender, whereas s. 300(c) imputes *direct* liability to the actual doer by reference to an intentional act done by him. Different policy considerations apply when imputing direct liability for murder and when imputing constructive liability for that offence. It may be just to hold the actual doer liable for the offence arising from his own actions, but, in our view, it may not be just to hold the secondary offender constructively liable for an offence arising from the criminal act of another person (*viz.*, the actual doer) if the secondary offender does not have the intention to do that particular criminal act. This is especially true of serious offences like murder or culpable homicide not amounting to murder.

In the premises, the court held that the test in *Lee Chez Kee* was not satisfied,⁴⁵ and the appellants' convictions for murder were set aside; instead, they were convicted of robbery with hurt under s. 394 of the *Penal Code*, read with s. 34.⁴⁶

III. SOME COMMENTS ON *DANIEL VIJAY*

Daniel Vijay, like its predecessor *Lee Chez Kee*, is obviously a very rich judgment that contains, *inter alia*, a very detailed examination of the legislative and jurisprudential history of common intention. By necessity, this note can only focus on a couple of broad areas in its commentary, though within each broad area, several distinct points are made.

A. *Whether the Law has Changed/Reconciliation of Precedents*

Perhaps the most immediate question that comes to mind after reading the judgment is: has the law on common intention (in particular, in the 'twin crime' context) now changed? This is important insofar as future reliance on precedent is concerned: for instance, should one rely exclusively on *Daniel Vijay*, or read *Lee Chez Kee* in the light of *Daniel Vijay*? A most telling indication may well be in the following passage in *Daniel Vijay*⁴⁷:

In our view, the requirement of *common intention* is, in principle, a *more exacting requirement* than the [*Lee Chez Kee*] requirement of subjective knowledge for the purposes of imposing constructive liability. If A and B have a common intention only to rob C but not to physically harm C, and A joins B in robbing C even though

⁴³ *Ibid.* This was in reference to the established rule that to prove a s. 300(c) murder, one need only show an intention to cause a bodily injury that is sufficient to cause death in the ordinary course of nature: see *Virsa Singh v. State of Punjab*, All India Reporter 1958 Supreme Court 465, and *ibid.* at para. 76.

⁴⁴ *Ibid.* at para. 76 (emphasis in original). See also *ibid.* at para. 168.

⁴⁵ *Ibid.* at para. 77.

⁴⁶ *Ibid.* at para. 78.

⁴⁷ *Ibid.* at para. 87 (emphasis in original).

he has subjective knowledge that B has a history of using violence, it does not follow—assuming B does indeed use violence against C in the course of carrying out the robbery—that A had a common intention with B to use violence against C; A might simply have been callous about or indifferent to the fate of C. Even if A was aware that B was carrying a knife with him when they set out together to rob C, a court would be more likely to infer merely that A had subjective knowledge that B might likely use the knife to hurt or kill C in the course of carrying out the robbery, as opposed to inferring that A, by going along with B to rob C in those circumstances, spontaneously formed a common intention with B to rob and, if necessary, to use the knife to hurt or kill C so as to carry out the robbery.

The preceding passage, coupled with the conclusion drawn in the second issue (and its subsidiary question) identified by the court in *Daniel Vijay*, stand in stark contrast to the following passage by Rajah J.A. in *Lee Chez Kee*⁴⁸:

I propose to lay down with this judgment a determinative pronouncement on the additional *mens rea* required of the secondary offender for him to be liable for the collateral offence which was eventually committed...the additional *mens rea* required is that of a subjective knowledge on the part of the secondary offender in relation to the collateral offence likely happening. To be more precise, the secondary offender must subjectively know that one in his party *may likely commit* the criminal act constituting the collateral offence in furtherance of the common intention of carrying out the primary offence. In this regard, in connection with the expression “criminal act”, I do not think it is necessary for the actual method of execution (in murder) to have been known by the secondary offender. The expression “criminal act” is to be given a wide interpretation and I think that it is sufficient, in the case of murder, that the secondary offender knew that one in his party might inflict a bodily injury which was sufficient in the ordinary course of nature to cause death.

If indeed *Daniel Vijay* demands a different (and not merely more specific or more exact) test than *Lee Chez Kee*, *vis-à-vis* the required *mens rea* of the secondary offender, then unlike *Lee Chez Kee*, *Daniel Vijay* is probably going to effectively confine the most convenient use of s. 34 to cases where imputing *actus reus* to every participant is a problem for the prosecution.⁴⁹ This seems to be confirmed in the latter parts of the judgment as well.⁵⁰ That *Daniel Vijay* demands a different test is also demonstrated by the fact that it represents a closer (and maybe even direct) endorsement than *Lee Chez Kee* of the (almost unanimous) position advocated by

⁴⁸ *Lee Chez Kee*, *supra* note 2 at para. 236 (emphasis in original). See also paras. 210-211.

⁴⁹ See also Stanley Yeo, “Criminal Law”, (2008) 9 Sing. Ac. L. Ann. 247 at para. 11.12; Hor, *supra* note 3 at 495:

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.

⁵⁰ *Daniel Vijay*, *supra* note 1 at para. 168.

local criminal law academics in the most recent times. One had suggested that⁵¹:

[Section 34] 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*.

Another had suggested, after *Lee Chez Kee* was decided, that⁵²:

While [*Lee Chez Kee*'s] subjective knowledge interpretation of [s. 34] is welcome, as it is a vast improvement from the earlier situation where accused persons had been hanged on the strength of a strict liability-based murder charge... [*Lee Chez Kee*] does not go far enough... [For a charge] that could result in the mandatory death penalty, the courts should require nothing less than intention to commit the secondary offence, or at least the moral equivalent thereof.

Three further points can be made on whether *Lee Chez Kee* is still (*de facto*) good law. First, *Lee Chez Kee* itself recognised that there were at least five possible (judicially recognised) distinct requirements of *mens rea*. They were, as ranked from the most stringent to the least stringent⁵³:

- (1) An intention to commit the collateral offence;
- (2) Subjective knowledge of the likelihood of the collateral offence being committed;
- (3) Objective foreseeability of the likelihood of the collateral offence being committed;
- (4) Strict liability *per se*; and
- (5) Strict liability plus an intention of the actual doer to further the common intention.

Considering that *Lee Chez Kee* falls squarely within (2)⁵⁴ and *Daniel Vijay* falls squarely within (1), it should be clear by now that the law has unequivocally changed in a fundamental sense,⁵⁵ and this is corroborated by the fact that there does not seem to be any authority to suggest that (1) and (2) are interchangeable or synonymous.

The second point concerns the past and latest characterisation of *Mimi Wong*. To recapitulate, *Daniel Vijay* characterised the prosecution's understanding of *Mimi*

⁵¹ Hor, *supra* note 3 at 519. In fact, while *Lee Chez Kee* cited Professor Hor many times, it never expressly agreed with his views on this specific issue of the required *mens rea* (though it did expressly reject his views on s. 35 of the *Penal Code: Lee Chez Kee*, *supra* note 2 at paras. 177-180 and 213-215).

⁵² Amirthalingam, *supra* note 6 at 444. For other earlier viewpoints, see *e.g.*, Gillian Douglas, "Joint Liability in the Penal Code", (1983) 25 Mal. L.R. 259, which advocated for a middle ground between intention to commit the collateral offence and (*de facto*) strict liability; M. Sornarajah, "Common Intention and Murder Under the Penal Codes", (1995) Sing. J.L.S. 29, which advocated for the conceptualisation of common intention to depend on the judicial balance struck between human rights considerations and the promotion of general deterrence.

⁵³ Yeo, *supra* note 49 at para. 11.20, citing *Lee Chez Kee*, *supra* note 2 at paras. 162-167 and 224-235.

⁵⁴ *Ibid.* at para. 11.22. In fact, Rajah J.A. had categorically rejected the Malaysian and Indian position, *viz.*, the required *mens rea* being that of intention to commit the collateral offence: *Lee Chez Kee*, *supra* note 2 at paras. 183-186.

⁵⁵ All this is without first explicating the fact that *Lee Chez Kee* and *Daniel Vijay* took disparate views of the amount of *stare decisis* adhered to by the courts presiding over s. 34 decisions over the years.

Wong as the “putative” approach, *viz.*, to impute liability to secondary offenders pursuant to s. 34, there does not need to be a common intention between the actual doer and the secondary offenders to commit the act done by the actual doer that gives rise to the offence that all the offenders are charged with; all that is required is that the said act is in furtherance of and not inconsistent with the criminal act commonly intended by all the offenders.⁵⁶ The Court of Appeal in *Daniel Vijay* said that this was *also* the understanding of the bench in *Lee Chez Kee* (and indeed the majority of cases post-*Mimi Wong*),⁵⁷ and this is correct, for it was declared in *Lee Chez Kee* that “the [putative] *Mimi Wong* approach is thereby justified by the historical underpinnings of the Indian Penal Code and the doctrine of common purpose in English law”.⁵⁸ The irreconcilable aspect arises when (1) *Daniel Vijay* holds the putative approach to be the wrong characterisation of *Mimi Wong*;⁵⁹ but (2) categorically affirms that *Lee Chez Kee* accepted the putative approach to be good law; though (3) characterising *Lee Chez Kee* to be a narrower reading of *Mimi Wong*;⁶⁰ and (4) itself propounding a modified *Lee Chez Kee* test for common intention, *all at the same time* in the *same judgment*. It is submitted that this is plainly a logical impossibility and too valiant an attempt at harmonising all three cases. The semantic struggle is apparent (in how all three cases offer tests using different words and phrases), let alone the conceptual struggle. It would have been more internally consistent and logical if *Lee Chez Kee* was put to rest (though it is not suggested that *Lee Chez Kee* proposed an incorrect test).

The third point that can be made is that a hypothetical involving a robbery-murder ‘twin crime’ was raised recently by a local academic, and it in effect was directed at the sort of concern raised by the court in the subsidiary question to the second issue, *viz.*, the knowledge of the specificity of injury inflicted, based on the policy surrounding constructive liability.⁶¹ In that hypothetical, a young adult girl joins her older boyfriend to steal cigarettes from a store. The boyfriend ends up stabbing the storekeeper to death. The girl knew that her boyfriend had violent tendencies and often carried a knife. She also knew that it was possible her boyfriend could turn violent and, in this instance, use the knife on the storekeeper in some form. She, however, stopped short of contemplating him killing the storekeeper. The academic concludes that if *Lee Chez Kee* applied, the girl would have been “found to have foreseen as a possibility that [her boyfriend] was likely to inflict an injury sufficient in the ordinary course of nature to result in death” and be guilty of murder under s. 302 (of the *Penal Code*) read with s. 34. The academic opined that this outcome (*i.e.*, a death sentence for the girl) put the moral blameworthiness of the girl and her criminal responsibility at variance.⁶² It can be said that this hypothetical would probably yield a different outcome under *Daniel Vijay*, unless of course the girl had actual knowledge that the knife would likely have caused a s. 300(c) injury—thus furnishing further proof that *Lee Chez Kee* and *Daniel Vijay* say fundamentally different things. But *Daniel Vijay* only went as far as to say that *Lee Chez Kee* did

⁵⁶ *Supra* note 26.

⁵⁷ *Daniel Vijay*, *supra* note 1 at paras. 70 and 85.

⁵⁸ *Lee Chez Kee*, *supra* note 2 at para. 212.

⁵⁹ *Daniel Vijay*, *supra* note 1 at paras. 112-184.

⁶⁰ *Supra* note 27.

⁶¹ Amirthalingam, *supra* note 6 at 443.

⁶² *Ibid.*

not resolve the unsettledness of s. 34, and it did not categorically say that *Lee Chez Kee* will now be superseded.⁶³ In fact, as seen above, it employed the *Lee Chez Kee* test several times in the judgment, suggesting that it was merely disambiguating and modifying the *Lee Chez Kee* test.⁶⁴ This conundrum as to whether the two cases can be reconciled and whether the law has changed therefore remains unresolved for now.

B. Some Issues with Two Hypotheticals Raised

The other broad comment deals with two of the many different hypotheticals raised by the Court of Appeal in *Daniel Vijay*.⁶⁵ Both hypotheticals involve the court's illustration of how 'common intention' can be conceptualised, and indeed, are part of a much larger group of hypotheticals raised by the court to quell any remaining uncertainty about common intention. In one such hypothetical, A and B plan to abduct C with a common intention to rape her. They abduct her successfully and confine her in a flat. A ends up molesting C instead of raping her. The court considered the molestation to be "consistent" with the original "common intention to rape".⁶⁶ If A sodomises C, the court considered this to be also *arguably* consistent with the common intention to rape, "if the common intention to commit rape is pitched at the level of abstraction of a common intention to commit an offence of a sexual nature".⁶⁷ But, if A, in the course of raping C, suffocates her with a pillow while trying to stop her from screaming, the court was of the view that "it *cannot* be said that A's act of suffocating C furthered the rape of C. Instead, the suffocation of C would be inconsistent with or, at least, in excess of the criminal act commonly intended by A and B (which was the rape of C)".⁶⁸

A problem with the reasoning of this particular hypothetical is that rape almost always involves violence against the victim, perhaps more so in this hypothetical involving abduction. By any account, rape traumatises, both physically and mentally. It is undoubtedly one of the worst crimes to commit against another person—but, unlike robbery, which is another crime typically associated with violence, an act of rape is not over in a flash. The whole process can last for minutes, or it can conceivably last for many hours over many days (especially if the victim has been abducted, and if there is more than one rapist involved). A rape victim, even if she is physically disadvantaged as compared to the rapist, will probably at some point resist his attempt to rape her. At the very least, she is legally entitled to defend herself

⁶³ *Daniel Vijay*, *supra* note 1 at paras. 3 and 79. The fact that Rajah J.A. and Choo J.—who concurred with Chan C.J. in *Daniel Vijay*—were on the unanimous panel (*vis-à-vis* s. 34) in *Lee Chez Kee*, cannot of course be totally overlooked.

⁶⁴ *Ibid.* at para. 57.

⁶⁵ *Ibid.* at para. 60. See also para. 168 for a list of (some) other hypotheticals.

⁶⁶ The term 'consistent', of course, is evidently (and intentionally) synonymous with *Mimi Wong*, *supra* note 24—the very case that was supposed to have muddled the waters on the law of common intention (see Hor, *supra* note 3 at 496), though this contention was strenuously denied by the court in *Daniel Vijay* at paras. 100-143. As argued above, however, whether such reconciliation was indeed achieved demands further discussion.

⁶⁷ *Daniel Vijay*, *supra* note 1 at para. 60.

⁶⁸ *Ibid.* (emphasis in original).

by some use of force and violence.⁶⁹ What will the rapist do in response? In his quest to complete the sexual crime he had set out to do, he will fight back any violent reactions from the victim. He may also want to keep her quiet if she screams. In either situation, he is very likely to use extreme violence to accomplish this. Returning to the hypothetical of a group rape, suppose A, being the first in line to rape C, ends up killing her somehow because she resisted in a violent way and/or started screaming to attract attention. Throughout, B stands by and watches—presumably, A and B would have ‘taken turns’ to rape C, so they would not have (though theoretically they could have) been raping C at the same time. As such, B does not (fortuitously) get to rape C because she is now dead and A was the first to ‘have a go’.

But surely, before the rape, unless they were intending to drug her surreptitiously, A and B would likely have known *and* intended collectively that a similar and substantial degree of violence would be used against C to first physically subdue her (such is the nature of rape)—their common intention should be considered to have surpassed the general and abstract plan to merely “commit an offence of a sexual nature”.⁷⁰ One may consider this to be just a matter of proof and level of abstraction (*i.e.*, the evidence in which the prosecution is able to extract to pitch the actual level of the common intention),⁷¹ or a matter of facts (*e.g.*, the situation may be different if C had reacted violently against A and B and they attacked her with even more violence), or straddling the line between knowledge and intention (*e.g.*, it may be said that B *should* have known that death was foreseeable, but B never intended death to be a result),⁷² but the point is that if *Lee Chez Kee*—as properly understood⁷³—applies, there is a *significantly better chance* that there will be fairness to the (deceased) rape victim and a more proportionate amount of moral blameworthiness to be attached to B.⁷⁴ If it seems harsh to contemplate that all group rape-murders may then result in ss. 302 and 34 (read together) being used against all the confederates, this concern is ameliorated if one bears in mind the actual requirements of *Lee Chez Kee* (*inter alia*, subjective knowledge)⁷⁵ and accords more weight to the rights of the

⁶⁹ See *e.g.*, *Penal Code*, *supra* note 4, s. 96: “Nothing is an offence which is done in the exercise of the right of private defence”.

⁷⁰ *Daniel Vijay*, *supra* note 1 at para. 60.

⁷¹ Aptly, the Court of Appeal in *Lee Chez Kee*, *supra* note 2 at para. 161 observed that it is “virtually impossible to directly prove a pre-arranged plan between the parties”. Likewise, see *Daniel Vijay*, *supra* note 1 at para. 97: “it is often difficult, if not impossible, for the Prosecution to procure direct evidence that a common intention existed between all the offenders. Thus... such a common intention must frequently be inferred from the offenders’ conduct and all the other relevant circumstances”.

⁷² See also *Daniel Vijay*, *supra* note 1 at paras. 88 to 89.

⁷³ It is noted too that (per *Lee Chez Kee*) the ‘criminal act’ element of s. 34 can entail a series of different acts; the ‘participation element’ of s. 34 can include passive behavior; and the ‘common intention’ element of s. 34 can extend to common intention being formed only moments before, or even during, the commission of the offence: see Khng & Chen, *supra* note 3 at paras. 15-30.

⁷⁴ See also *ibid.* at para. 42: *Lee Chez Kee* “arguably strikes the right balance in ascertaining individual criminal responsibility in group crimes”.

⁷⁵ See also Andrew Simester, “The Mental Element in Complicity”, (2006) 122 Law Q. Rev. 578 at 599: “by forming a joint enterprise, the accessory perpetrates an independent and discrete wrong, and the collusion justifies the extension of liability of the principal’s crime on the accessory for what is said to be a reduced *mens rea* of subjective knowledge”; Khng & Chen, *ibid.* at 573: “the imposition of the requirement of subjective knowledge would allow for the perception that the secondary offender is being held liable for *recklessness*” (emphasis in original).

victim.⁷⁶ As a local academic once remarked⁷⁷:

The use of [common intention] is justifiable on the policy ground that it enables the deterrence of group crimes of violence which cause greater social disquiet by imposing equal responsibility on all who associate in such crimes for the consequences of their association. The collective damage that organized groups of criminals could cause also justifies a harsher response. Further justification is provided by the fact that these consequences, including murder, should have been within the contemplation of the participants in the plan to commit violent crimes ...

The extent to which extensions of [common intention] will be permitted will depend on the court's appreciation of the social factors surrounding the circumstances and its appreciation of the need of deterrence of certain types of conduct and not on sheer logic alone.

Also, ironically, in drawing the line at "the level of abstraction adopted in defining the common intention that is alleged to be furthered by the criminal act done",⁷⁸ the test in *Daniel Vijay* actually potentially allows for a wider net (than *Lee Chez Kee*) to be cast in terms of the extent of the constructive liability. The consequence is that s. 34 can potentially be used to 'catch' a wider range of confederates, which is the opposite of what the court intended. This is exemplified in another hypothetical it raised⁷⁹:

Consider, however, the case where the common intention of A and B is characterised as, specifically, a common intention to disfigure C's face with a sharp instrument: if A, in a fit of jealousy or rage, stabs C with a knife and kills C, it cannot reasonably be said that A's criminal act in stabbing C is consistent with A and B's common intention to disfigure C. In contrast, if we characterise A and B's common intention more broadly as a common intention to cause injury to C without setting any limitation on the type of injury which might be inflicted on C, then A's act of stabbing C *fatally* can be said to be consistent with the common intention to cause injury to C. Consistency is, therefore, not a fixed concept.

On the one hand, it may be said that the "true legislative purpose" of s. 34 is "to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention".⁸⁰ As such, a "criminal act which is not commonly intended by all the offenders is inconsistent with or, at least, outside the scope of the offenders' common intention ... cannot be regarded as having been done in furtherance of that common intention".⁸¹ On the other hand, we have already seen that the characterisation of the actual common intention (or the ascertainment of the actual pre-arranged plan) operate under substantial evidentiary

⁷⁶ Perhaps even more so when the victim(s) was/were completely outnumbered by a gang of criminals.

⁷⁷ Sornarajah, *supra* note 52 at 29-30 and 54-55. But Professor Sornarajah also added at 55 that "there will always be the moral reluctance to make an individual serve the social interest at the cost of his life [in capital cases]".

⁷⁸ *Daniel Vijay*, *supra* note 1 at para. 138.

⁷⁹ *Ibid.* (emphasis in original).

⁸⁰ *Ibid.* at para. 166, citing *Barendra Kumar Ghosh v. Emperor*, All India Reporter 1925 Privy Council 1 at 9.

⁸¹ *Ibid.*

difficulties.⁸² Under such evidentiary difficulties, the judge will have to accept in good faith that the prosecution is not intentionally pitching the level of abstraction of the common intention at an unreasonably general level, if indeed the purpose of *Daniel Vijay* is to ensure greater fairness to confederates. No doubt the judge would in certain cases be able to discern if the level of abstraction is the correct one, but the room for prosecutorial exploitation remains. Alternatively, as the hypothetical on the group rape demonstrates, one may conceptualise the common intention based on the nature of the primary offence. Even so, the problem of such a route is plain: if rape conceivably leads to murder, so does, arguably, robbery, kidnapping, and any other violence-related crimes. More problematically, this route detracts from the clear line drawn by the court in *Daniel Vijay* between knowledge and intention.⁸³

IV. CONCLUSION

Daniel Vijay, being the latest landmark decision on common intention, looks to have superseded *Lee Chez Kee* as the leading authority rather than merely supplementing or modifying it, contrary to what the court in *Daniel Vijay* suggested. If so, the implications will not be light and will likely affect prosecutorial strategies and arguments from henceforth.⁸⁴ Be that as it may, this piece was only able to pose a limited number of general comments, so perhaps commentators will want to further specifically examine which authority (*i.e.*, *Lee Chez Kee* or *Daniel Vijay*) comports better with our legislative history and precedents (since both cases dug deep into those aspects), and also current societal attitudes and philosophies towards crime and punishment. *Lee Chez Kee* was intended to settle the matter (of s. 34) authoritatively, but with more questions than ever posed by *Daniel Vijay*, perhaps we have yet to reach the final twist in the tale of common intention in Singapore.⁸⁵

⁸² See *supra* note 71.

⁸³ See *supra* note 72.

⁸⁴ It may be argued of course that a wide interpretation of s. 111 of the *Penal Code*, *supra* note 4:

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 aid or in pursuance of the conspiracy which constituted the abetment.

may in certain situations still render the current stricter interpretation of s. 34 futile (for the accused): see Hor, *supra* note 3 at 509-517; Yeo, *supra* note 49 at para. 11.25. See also ss. 107 and 113 of the *Penal Code*.

⁸⁵ At the time of writing, the latest pronouncement on this is *Kho Jabing v. Public Prosecutor*, [2011] SGCA 24 where the court held at paras. 32-33:

It is clear from *Daniel Vijay* ... that, in order for [an accused] to be convicted of murder under s 302 read with s 34 of the Penal Code, the common intention that [the accused] must have shared with [his confederate] is a common intention to do the criminal act by the actual doer which results in the offence charged ... *i.e.*, a common intention to commit murder ... When murder is committed in the course of robbery by two or more persons, a secondary offender is constructively liable for the murder actually committed only if he has the common intention with the actual doer to commit murder ... Such a common intention may... be inferred if the secondary offender is found to have subjective knowledge that “one in his party may likely commit the criminal act (murder) constituting the collateral offence in furtherance of carrying out the primary offence (robbery)” (emphasis in original).