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COMMON INTENTION AND THE PRESUMPTION OF JOINT POSSESSION IN THE *MISUSE OF DRUGS ACT*

Muhammad Ridzuan bin Md Ali v Public Prosecutor[1]

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In 2010, the Singapore Court of Appeal thoroughly reviewed the doctrine of common intention under s 34 of the *Penal Code*[2] in the landmark decision of *Daniel Vijay s/o Katherasan v Public Prosecutor*.[3] The present case is the first drug trafficking case involving this provision to reach the Court of Appeal since then. For the most part, *Ridzuan* reads like a straightforward and unremarkable case. The appellant Ridzuan was convicted at the High Court[4] with his partner-in-crime Abdul Haleem for trafficking in an amount of heroin large enough to attract the mandatory death penalty under the *Misuse of Drugs Act*.[5] Abdul Haleem did not appeal his conviction because he had received a certificate of cooperation from the prosecution and benefited from the attendant discretion given to the trial judge to commute his sentence to life imprisonment with caning.[6] Ridzuan, however, did not qualify for the certificate, and consequently filed this appeal which the Court of Appeal dismissed.[7] The judgment itself contains little by way of uncertainty or controversy over the applicable law on common intention, as the court readily dealt with the issue by following its earlier

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1 [2014] 3 SLR 721 (CA) [*Ridzuan*].

2 Cap 224, 2008 Rev Ed Sing [*PC*]. The section states: "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."

3 [2010] 4 SLR 1119 (CA) [*Daniel Vijay*].

4 *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] 3 SLR 734 (HC) at paras 60, 61 [*Abdul Haleem*].

5 Cap 185, 2008 Rev Ed Sing [*MDA*]. A conviction for trafficking in more than 15 grams of heroin (referred to as diamorphine) attracts the mandatory death penalty under ss 5, 33 and the Second Schedule of the Act.

6 *Abdul Haleem*, *supra* note 4 at para 57. Under the recently added s 33B of the *MDA*, the Public Prosecutor is given the sole discretion to issue a certificate of cooperation to an accused person if the Public Prosecutor deems that the person has "substantively assisted" the Central Narcotics Bureau in their anti-drug operations (ss 33B(2)(b) and (4)). If an accused person who is so certified is also able to prove on a balance of probabilities that he played only a limited role in the illicit drug activity that he was involved in (s 33B(2)(a)), the court has the discretion to sentence him to life imprisonment and a minimum of 15 strokes of the cane instead of death (s 33B(1)(a)).

7 *Ridzuan*, *supra* note 1 at paras 1-5.

pronouncements in *Daniel Vijay*.[8] The appeal also did not turn on this issue as the court was thorough enough to find Ridzuan not only constructively liable for his complicity in Abdul Haleem's act, but also liable as a principal offender for satisfying the elements of the offence of trafficking.[9] There is ultimately very little in the judgment to support any serious argument that the outcome for Ridzuan, unfortunately for him, could have been any different.

For all these reasons, *Ridzuan* may slip under the academic radar. This note hopefully ensures that it does not, because despite its apparent simplicity, this case illustrates a difficulty with applying the doctrine of common intention to *MDA* cases. Specifically, the scenarios in *MDA* cases where common intention is applicable are very similar to those where the presumption of joint possession in s 18(4) of the *MDA* also applies. This presumption is one of several in the *MDA* that the prosecution can rely on to prove possession, a required element in the offence of trafficking.[10] Section 18(4) provides that:

> Where one of 2 or more persons with the knowledge and consent of the rest has any controlled drug in his possession, it shall be deemed to be in the possession of each and all of them.

The cases show that an accused person is generally equally liable or not liable under both common intention and the s 18(4) presumption, and *Ridzuan* is no exception to this trend.[11] Yet these doctrines are conceptually different—while the former pertains to the intention that the accused person shares with the principal offender to commit the particular offence, which in this case is trafficking in heroin, the latter concerns the accused person's knowledge and consent of the illicit drugs in the principal offender's possession. It follows that these doctrines should be treated separately in any factual matrix to avoid confusion. The courts, however, have not had the opportunity to pay much attention to this distinction as it is rarely a live issue. But the prosecution has also not helped matters with its habitual reliance on common intention in *MDA* cases, even where the facts do not warrant its use, or where either the presumption under s 18(4) or some other presumption in the *MDA* would suffice to secure a conviction. Furthermore, there is virtually no commentary on common intention that specifically examines *MDA* cases. Instead, academic discussion has revolved around cases concerning what is known as the 'twin-crime' scenario.[12] The paradigm case is where a group of people commit a commonly intended crime, such as kidnap or burglary, and in the course of committing this crime, one member of

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[8] *Ibid* at para 34.

[9] *Ibid* at paras 59-84.

[10] Other available presumptions of possession are given in ss 18(1), 20 and 21 of the *MDA*, *supra* note 5.

[11] See *infra* notes 40, 41 and accompanying text.

[12] Michael Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] Sing JLS 494 [Hor, "Common Intention"]. See also Michael Hor, "Vicarious Liability" in Wing-Cheong Chan, Barry Wright & Stanley Yeo, eds, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Burlington, VT: Ashgate, 2011) 155; Chen Siyuan, "The Final Twist in Common Intention?" [2011] Sing JLS 237; Chan Wing Cheong, "Criminal Law" (2011) 12 Sing Ac L Ann Rev 227 at 236-239; Nathaniel Yong-Ern Khng & Chen Siyuan, "Recent Developments in Common Intention" (2009) 21 Sing Ac LJ 557; Kumaralingam Amirthalingam, "Clarifying Common Intention and Interpreting Section 34: Should There Be a Threshold of Blameworthiness for the Death Penalty?" [2008] Sing JLS 435; Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2d ed (Singapore: LexisNexis, 2012) at para 35.9.

the group commits an additional crime, typically murder, consequently subjecting the rest of the group to potential liability for his collateral offence. Such scenarios have been the subject of numerous important cases over the years, including *Daniel Vijay*.[13] In comparison, as *MDA* cases typically feature only one offence, they are not perceived as conceptually challenging for the doctrine of common intention.[14]

Ridzuan brings to the fore all these theoretical and practical matters surrounding the use of common intention in *MDA* cases. An examination of this case suggests that the failure to properly distinguish common intention and the presumption of joint possession results in flawed reasoning, and that the inappropriate use of common intention in prosecutions for *MDA* offences fuels this confusion.

I. The Facts and Judgment

Ridzuan and Abdul Haleem agreed to work together to sell heroin. They decided that Ridzuan would procure a pack of heroin for the both of them to repack into smaller sachets and resell for profit. Accordingly, Ridzuan arranged to buy a pack of heroin from a supplier known as Afad, who put him in touch with one Gemuk to arrange the transaction. Gemuk called Ridzuan to inform him that a courier would deliver the heroin in two separate bundles over two days. Ridzuan relayed this arrangement to Abdul Haleem and tasked him with collecting the first of the two bundles from Gemuk's courier. He also gave Abdul Haleem enough cash to pay for the drugs. The first transaction took place without incident, and the two men proceeded to repack the bundle that they received into 21 sachets.[15] Gemuk then called Ridzuan again the next day to confirm that the second transaction was to proceed as planned, but with a twist: Ridzuan would also receive additional bundles meant for Gemuk's other customers. Ridzuan and Abdul Haleem were to keep what was theirs and hold on to the rest until arrangements could be made for the other intended recipients to collect their bundles.[16]

The prosecution and defence gave slightly different interpretations of this new arrangement. Ridzuan claimed that when he spoke with Gemuk, he did not inquire into either the nature or quantity of the proposed additional bundles. He claimed to have been under the impression that he would receive only "one or two" additional bundles of drugs of some kind, not necessarily heroin.[17] It was later found at trial and confirmed on appeal that Ridzuan did in fact understand that he was going to receive additional bundles of heroin and not just any drugs, although there was insufficient evidence to prove that he knew exactly how many additional bundles were involved.[18] The prosecution, on the other hand, maintained that the evidence

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[13] *Supra* note 3. See *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR (R) 447 (CA) [*Lee Chez Kee*]; *Public Prosecutor v Gerardine Andrew* [1998] 3 SLR (R) 421 (CA); *Ibrahim bin Masod v Public Prosecutor* [1993] 3 SLR (R) 438 (CA); *Wong Mimi v Public Prosecutor* [1971-1973] SLR (R) 412 (CA); *Ike Mohamed Yasin bin Hussin v Public Prosecutor* [1974-1976] SLR (R) 596 (PC).

[14] Hor, "Common Intention", *supra* note 12 at note 24 and accompanying text.

[15] *Ridzuan*, *supra* note 1 at paras 8-11.

[16] *Ibid* at paras 38, 39.

[17] *Ibid* at para 44.

[18] *Ibid* at para 53.

clearly indicated that Ridzuan had expressly agreed to collect any amount of drugs of any kind from Gemuk.[19]

In any case, after speaking with Gemuk, Ridzuan sent Abdul Haleem to collect the drugs once again, while he waited in his flat where they were operating from. This time, Abdul Haleem was tailed by officers from the Central Narcotics Bureau (CNB) as he was returning with the drugs. When he noticed several CNB officers approaching him, Abdul Haleem panicked and ran towards and into the flat, leading the officers straight to Ridzuan. The CNB officers seized all the drugs they found in the flat, including those that Abdul Haleem had been carrying, and arrested both men.[20] It subsequently transpired that Abdul Haleem had collected not just "one or two" but a total of eight bundles of heroin—far in excess of the 15 grams required to attract the mandatory death sentence.[21] The prosecution did not dispute Ridzuan's claim that he had not seen or handled those bundles of heroin until Abdul Haleem ran into the flat with the CNB at his heels.[22] But it was also not disputed that one of those eight bundles constituted the second half of the pack of heroin that Ridzuan had arranged to purchase from Afad. Accordingly, the prosecution included one of the bundles with the earlier 21 sachets and charged both Ridzuan and Abdul Haleem for that particular transaction on a non-capital charge for trafficking in a combined amount of not more than 14.99 grams of heroin.[23] The remaining seven bundles amounting to 72.5 grams of heroin thus became the subject of a separate charge, which was capital.[24]

Ridzuan and Abdul Haleem were convicted at trial on both charges. While Abdul Haleem did not file an appeal, Ridzuan appealed only his conviction on the capital charge. Ridzuan argued before the Court of Appeal that his common intention with Abdul Haleem to traffic in heroin did not extend to the seven additional bundles.[25] In other words, Abdul Haleem's act was not done in furtherance of any common intention between the two of them, and constructive liability cannot be imputed to Ridzuan. To support this argument, Ridzuan relied primarily on his claim that when he agreed to receive additional bundles of heroin from Gemuk, he had expected only "one or two" additional bundles, not seven. As an illustration of this point, Ridzuan's counsel offered the court the hypothetical scenario where two drug traffickers agree to obtain only one bundle of heroin, but one of them goes out and obtains a hundred bundles instead. In such a situation, the defence counsel argued, liability cannot be imputed to the secondary accused person for the hundred bundles of heroin.[26]

The Court of Appeal rejected this argument. The judges observed that there was no evidence that Ridzuan was unwilling to accept more than a certain number of additional bundles from Gemuk.[27] There was also no discussion between Ridzuan and Abdul Haleem about the number of additional bundles Abdul Haleem was supposed

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[19] *Ibid* at para 40.
[20] *Abdul Haleem*, *supra* note 4 at paras 8, 9.
[21] See *MDA*, *supra* note 5.
[22] *Ridzuan*, *supra* note 1 at para 23.
[23] *Ibid* at para 15.
[24] *Ibid* at para 3.
[25] *Ibid* at para 39.
[26] *Ibid.*
[27] *Ibid* at para 54.

to collect.[28] These two findings led the court to infer that the two men had simply not "addressed their minds" to the additional amount of heroin involved, which sets the facts of the case apart from the defence counsel's hypothetical scenario where two people expressly agree to obtain only a specific amount of heroin.[29] The court concluded on this basis that:

> All along, the common intention of both Ridzuan and Abdul Haleem had been to collect any number of bundles of heroin [from Gemuk]. This common intention clearly *encompassed* the intention to commit the very criminal act done by Abdul Haleem, *ie*, the possession of the said seven additional bundles of heroin for the purpose of trafficking. Hence, the criminal act was carried out in furtherance of their common intention and [s 34 of the *PC*] was therefore satisfied.[30]

As the Court of Appeal was relying on its pronouncements on common intention in *Daniel Vijay*, it was crucial that constructive liability could only be imputed to Ridzuan if he was found to have commonly intended to commit "the very criminal act" that was actually committed.[31] It would not have sufficed if the court had found that the common intention that Ridzuan shared with Abdul Haleem had only been to commit the offence in general terms, *ie* trafficking in some heroin without specific agreement on the amount to be trafficked, even if it was found that Ridzuan had known of the likelihood of Abdul Haleem returning with seven bundles. The Court of Appeal in *Daniel Vijay* clearly overruled this lower threshold of subjective knowledge, which was the law as articulated in the earlier case of *Lee Chez Kee,*[32] in favour of the "more exacting requirement" of the intention to commit the precise collateral offence committed.[33] This is why it was important for the court in the present case to infer that Ridzuan had commonly intended with Abdul Haleem to collect *any* number of additional bundles of heroin. Doing so enabled the court to deduce that the two men must logically have also commonly intended to commit the very act actually committed, namely, trafficking in exactly seven additional bundles of heroin.

But this inference from the facts is problematic. While Ridzuan did not address his mind to the exact number of additional bundles he was supposed to receive, he apparently understood from Gemuk that there were only going to be "a few more"[34] or "some more"[35] of them, and he relayed as much to Abdul Haleem. It is conceivable that Ridzuan would have been surprised in the unlikely but not impossible event that Abdul Haleem had returned with not seven additional bundles, but a lorry full of them. It therefore seems that the court dismissed the defence counsel's hypothetical scenario too readily. The absence of an agreement to obtain a specific number of bundles of heroin is not equivalent to an agreement to obtain absolutely any number of bundles. There was simply insufficient evidence to prove that Ridzuan and Abdul Haleem had made the latter sort of agreement. Instead, their agreement was to collect

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[28] *Ibid* at para 57.
[29] *Ibid.*
[30] *Ibid* [emphasis in original].
[31] *Ibid*. See also *Daniel Vijay*, *supra* note 3 at para 166.
[32] *Supra* note 13.
[33] *Daniel Vijay*, *supra* note 3 at para 87.
[34] *Abdul Haleem*, *supra* note 4 at para 18.
[35] *Ridzuan*, *supra* note 1 at para 12.

an unspecified number of bundles within the meaning of "a few", however vague that may be. Of course, none of this would have mattered in Ridzuan's case. The court was quick to emphasise that considering the size of the bundles of heroin involved, any two of them would have weighed over 15 grams.[36] Ridzuan's liability was therefore never in doubt. But had the numbers involved been different, the court's reasoning might have led to an unjust outcome.

It also seems that the Court of Appeal did not have to make such a bold inference at all. While subjective knowledge of the likelihood of the collateral offence being committed is no longer sufficient by itself to impute constructive liability under the *Daniel Vijay* formulation of s 34 of the *PC*, such knowledge, if coupled with acquiescence, can still serve as evidence for an inference that there was a common intention to commit the collateral offence.[37] Accordingly, the court in this case could have found that Ridzuan knew that Abdul Haleem was likely to return with seven additional bundles. This would have been a reasonable finding on the facts of the case. And as Ridzuan was willing to allow Abdul Haleem to return with seven additional bundles, the court could have inferred that he had in fact intended for Abdul Haleem to do so. The advantage of this line of reasoning is that it is sensitive to the actual amount of drugs involved in any factual matrix. In this case, the inference as to Ridzuan's intention would be strong because the amount of drugs Abdul Haleem returned with was arguably within the range of "a few" that Ridzuan had been expecting. Conversely, if Abdul Haleem had returned with some ridiculously large amount of heroin, the inference that Ridzuan had known of and acquiesced to that eventuality would be much weaker. In other words, the strength of the inference as to Ridzuan's intention is inversely proportional to the number of bundles Abdul Haleem actually returned with. Applying s 34 in this manner also describes the actual arrangement between the two men more accurately and naturally than the syllogistic reasoning that the court employed.

II. Between Common Intention and the Section 18(4) Presumption

After dealing with the issue of common intention, the Court of Appeal proceeded to find Ridzuan principally liable as he had satisfied the elements of the offence of trafficking under the *MDA*.[38] It is in this part of the judgment that the unhappy relationship between common intention and s 18(4) of the *MDA* manifests itself. As mentioned, while the s 18(4) presumption of possession is functionally similar to common intention, it prescribes a different mental element—it requires that the accused person knows of and consents to the illicit drugs in question, not that he intends to commit the offence (of trafficking, possession, manufacturing, *etc.*) actually committed by the principal offender. It is noteworthy that the requirement of consent in s 18(4) blurs the conceptual difference between these two doctrines. As the Court of Appeal noted in *Ridzuan*, the relevant authorities stipulate that for an accused person to be deemed to have consented to the principal offender's possession of the illicit drugs, he must have exercised some measure of authority or control over

[36] *Ibid* at para 55.
[37] *Daniel Vijay*, *supra* note 3 at para 168(f).
[38] *Ridzuan*, *supra* note 1 at para 84.

them, or actively dealt with the principal offender in some way as regards the drugs.[39] This element of "active" consent instead of mere passive acquiescence brings the ambit of s 18(4) closer to common intention, insofar as a person's intention is often inferred from evidence of conduct resembling such "active" consent. The functional similarity between these two doctrines is confirmed in practice by the existence of numerous cases in which they were either both proved, leading to the conviction of the accused person or persons,[40] or not proved, leading to acquittal on the charge in question.[41]

The overlap between these two doctrines makes it all the more important to properly and explicitly distinguish between them. The failure to do so can give rise to flawed reasoning, as the judgment in *Ridzuan* illustrates. In this case, the Court of Appeal inadvertently allowed its earlier finding on the issue of common intention to interfere with its treatment of s 18(4). In deciding whether the presumption in s 18(4) applied, the court found that:

> In our view, ultimately, the question to be determined is what the accused person had knowledge of and consented to… On the particular facts of this case, the quantity and nature of the drugs in Abdul Haleem's possession did not matter as Ridzuan had known and consented to Abdul Haleem being in possession of drugs of any nature or quantity.[42]

The wording of this passage suggests that the court was reiterating its earlier finding on the issue of common intention, and applying it to this context. The court appears to be implying that since Ridzuan had commonly intended with Abdul Haleem for the latter to collect any amount of heroin, Ridzuan must therefore have known of and consented to the same. But this cannot be correct. Even if it can be said that Ridzuan had consented (within the s 18(4) meaning of the word) to Abdul Haleem's possession of any amount of drugs of any kind, it cannot be said that he had known about it. Ridzuan either knew or did not know the exact number of bundles of heroin Abdul Haleem had in his possession. To say that Ridzuan knew that Abdul Haleem possessed *any* amount of heroin is to say that Ridzuan did not know anything at all. In fact, all Ridzuan knew was that he sent Abdul Haleem to collect *some* heroin. He might have had certain suspicions or expectations as to how much heroin Abdul Haleem would collect. More likely, he simply did not bother to hazard a guess. But neither a vague notion nor indifference as to the number of bundles Abdul Haleem would collect is equivalent to actual knowledge. Contrary to the court's conclusion, then, the quantity of drugs in Abdul Haleem's possession did matter conceptually to the application of s 18(4), even if it did not matter to the outcome of the appeal.

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[39] *Ibid* at paras 62-64.

[40] See *Public Prosecutor v Kang Wee Lee* [2011] SGDC 82 [*Kang Wee Lee*]; *Public Prosecutor v Syed Abdul Mutalip bin Syed Sidek* [2002] SGHC 24 [*Syed Abdul Mutalip*]; *Tong Chee Kong v Public Prosecutor* [1998] 1 SLR (R) 591 (CA) [*Tong Chee Kong*]; *Foong Seow Ngui v Public Prosecutor* [1995] 3 SLR (R) 254 (CA) [*Foong Seow Ngui*]; *Hartej Sidhu v Public Prosecutor* [1994] 2 SLR (R) 541 (CA); *Don Promphinit v Public Prosecutor* [1994] 2 SLR (R) 1030 (CA).

[41] See *Tan Chuan Ten v Public Prosecutor* [1997] 1 SLR (R) 666 (CA); *Goh Kim Hong v Public Prosecutor* [1996] 2 SLR (R) 923 (HC); *Public Prosecutor v Ho So Mui* [1993] 1 SLR (R) 57 (CA) [*Ho So Mui*]; *Public Prosecutor v Lim Ah Poh* [1991] 2 SLR (R) 307 (HC).

[42] *Ridzuan*, *supra* note 1 at para 68.

A more charitable reading of the court's reasoning in the above passage is that because Ridzuan had intended for Abdul Haleem to be in possession of drugs of any quantity or nature, his lack of knowledge of the actual quantity of heroin in Abdul Haleem's possession is immaterial. In more general terms, s 18(4) is read to mean that where the quantity and nature of the drugs in the principal offender's possession fall within the ambit of the secondary offender's intention, the presumption applies even if the secondary offender does not have precise knowledge of the quantity and nature of those drugs. This line of reasoning still works in the present case if one were to accept my argument that Ridzuan had intended for Abdul Haleem to collect only some and not any amount of additional heroin, as seven bundles arguably falls within the ambit of that intention. It is entirely possible that the court meant to interpret s 18(4) in this way. This interpretation is at least more feasible than the crude equation of intention with "knowledge and consent". But if this was indeed the court's position, it was not articulated clearly. Ultimately, this lack of clarity stems from the conflation of the s 18(4) issue with common intention.

Yet even with this interpretation of s 18(4), it remains unclear how the issue relating to the quantity of drugs should be addressed in cases where the intention of the accused cannot be ascertained. Common sense dictates that there must obviously be a limit as to how precise the accused person's knowledge must be as regards the weight or amount of drugs in the principal offender's possession. Otherwise, the s 18(4) presumption would only operate against an accused person with a psychic weighing scale as precise as those at the CNB. Conversely, some degree of precision must be demanded, or the presumption would apply unjustly to an accused person who agrees to participate in trafficking in a small amount of drugs only to find out upon his arrest that the principal perpetrator actually had a whole crate in his possession. The Court of Appeal in *Ridzuan* explicitly recognised that it would be "highly artificial" to find the accused liable in such a scenario.[43] If the problem is one of degree, then the courts should simply confront it directly and resolve it on a case-by-case basis, keeping in mind the high stakes involved for accused persons facing the prospect of the death sentence. Suffice it to say for our present purposes that the solution does not lie in importing—advertently or otherwise—concepts and lines of reasoning from the doctrine of common intention.

The confusion between common intention and the s 18(4) presumption in *Ridzuan* is made even more remarkable by the fact that the Court of Appeal's decision on the latter issue was made almost as an afterthought. The court turned to the s 18(4) issue only after having found Ridzuan liable under s 34 of the *PC*, for the sake of completeness and to ensure that he would not be sent to the gallows for merely being constructively liable.[44] While the court's thoroughness is certainly laudable, one cannot help but wonder why the prosecution thought it necessary to rely on common intention in formulating the charges against Ridzuan in the first place, when the s 18(4) presumption would have sufficed. It does not seem that the prosecution's case would have been much weaker without the benefit of the doctrine, especially as another presumption of possession, under s 18(1)(c) of the *MDA*, also applied to Ridzuan as the owner of the premises where the heroin was found. Ridzuan did

[43] *Ibid* at para 67.
[44] *Ibid* at para 58.

not attempt to rebut this second presumption.[45] Evidently, the *MDA* itself provided the prosecution with more than enough means from the outset to secure Ridzuan's conviction.

Interestingly, prosecutors make frequent use of common intention in cases similar to *Ridzuan*. A reference to s 34 of the *PC* is typically included in a joint charge against two or more accused persons even when the prosecution apparently does not have to rely on the provision, especially against the principal offender.[46] In *Ridzuan*, for example, s 34 was formally invoked against Abdul Haleem as well,[47] even though it was clearly irrelevant. It therefore seems that the use of common intention in such cases has been a matter of standard procedure that prosecutors have not given serious thought to changing. Though unsatisfactory, this practice is perhaps unsurprising as common intention generally presents few problems for the courts in *MDA* cases. In many cases where the accused persons are arrested together, participating in the same illegal activity at the same location where the drugs are seized, there is little need for a detailed analysis of constructive liability. The courts in such cases typically dispose of the issue of common intention without much trouble. Consider the following passage from the case of *Syed Abdul Mutalip*,[48] which is representative of this point:

> [B]ased on my finding that both accused were indeed present in room 406 at the material time, handling and repacking the drugs, their common intention to traffic in those drugs could be clearly deduced. In my determination, their acts and deeds inside the room… were decidedly in furtherance of their common intention to traffic in the drugs mentioned in the charge. There could be no other conclusion.[49]

While the conclusion here is undeniably correct, the other irresistible conclusion is that common intention adds nothing of value to the analysis when both (or indeed all) the accused persons can be connected to the criminal act in exactly or almost exactly the same manner. In these cases, the accused persons can simply be charged and convicted separately as principal offenders under the *MDA* itself.[50] Even in cases where the prosecution secured convictions exclusively by way of common intention, it is arguable that the *MDA* presumptions, had they been used, would have worked just as well.[51] Furthermore, given how common intention and the s 18(4) presumption tend to operate in tandem, the usefulness of common intention as a fallback in the event that s 18(4) fails is also limited. The following finding from the case of *Ho So Mui*[52] is particularly telling of both the ineffectuality of the doctrine and its tendency to get entangled with s 18(4). In that case, the prosecution

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[45] *Abdul Haleem*, *supra* note 4 at para 35.

[46] See generally the cases cited in *supra* notes 40, 41.

[47] *Abdul Haleem*, *supra* note 4 at para 1. Abdul Haleem's charges were in fact identical to Ridzuan's.

[48] *Supra* note 40.

[49] *Ibid* at para 76.

[50] For further examples, see *Kang Wee Lee*, *Tong Chee Kong*, and *Foong Seow Ngui*, *supra* note 40, and the recent Malaysian case of *Lee Boon Siah v Public Prosecutor* [2014] 2 MLJ 652 (CA), where five people were arrested together at a methamphetamine packing facility.

[51] See *See Chee Beng v Public Prosecutor* [1999] SGCA 67; *Shamsul Kahar bin Ja'afar v Public Prosecutor* [1999] SGCA 54.

[52] *Supra* note 41.

abandoned their initial reliance on the s 18(4) presumption in an attempt to argue in common intention instead,[53] but apparently to no avail, as:

> [The prosecution] could not assert, without first proving joint possession or joint custody of the [bag containing the heroin], that the common intention [between the co-accused] was to carry drugs…[54]

Finally, even if the unnecessary use of common intention is justifiable in most cases as a harmless prosecutorial insurance policy, the use of the doctrine in cases where it is unsuitable for the factual matrix is entirely a different matter. Take for example the case of *Chin Siong Kian v Public Prosecutor*,[55] where the appellant Chin and another man, Wan, were convicted on a joint charge for trafficking in heroin in furtherance of a common intention to do so.[56] The prosecution formulated the charge as such despite the fact that Chin and Wan had not known or even heard of each other before the physical transaction of the drugs took place. Chin was a drug mule from Malaysia who was paid to carry the heroin into Singapore. He was instructed by his handler to pass the drugs to a man, who turned out to be Wan, at a predetermined time and place. Wan was told separately by his handler (possibly the same one) to receive the package at the same time and place.[57] Therefore, while Chin and Wan were individually undeniably guilty of trafficking in heroin, they did not exactly make a pre-arranged plan to do so. The actual plan, the details of which they were not privy to, was hatched by their handler or handlers. Nevertheless, the Court of Appeal in this case affirmed the decision of the trial judge without doubting the use of common intention.[58] Of course, as is the case with *Ridzuan*, the outcome in *Chin Siong Kian* is hardly controversial. It is the peculiar role that common intention played in the reasoning that is questionable.

III. Conclusion: Common Intention in *MDA* Cases

If a single conclusion can be drawn from this brief survey, it might be that easy cases are just as capable of making bad law as hard cases—they just do so gradually and surreptitiously. Consequently, the confusion between common intention and the s 18(4) presumption is only revealed when a case like *Ridzuan* arises where a combination of the right facts and suspect reasoning sets us on the path towards the source of the problem. Against the backdrop of earlier decisions, *Ridzuan* suggests that the doctrine of common intention can in fact be more trouble than it is worth in *MDA* cases. In doing so, *Ridzuan* will hopefully encourage the adoption of a more selective approach towards the use of this notoriously unwieldy *Penal Code* provision.

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[53] *Ibid* at para 15.
[54] *Ibid* at para 33.
[55] [2000] 1 SLR (R) 239 (CA) [*Chin Siong Kian*].
[56] *Ibid* at paras 21-23.
[57] *Ibid* at paras 16-20.
[58] *Ibid* at paras 52, 53.