SOME ASPECTS OF COMMON INTENTION IN THE PENAL CODE OF SINGAPORE AND WEST MALAYSIA*

The recent case of *Mimi Wong & Anor.* v. *P.P.*[1] decided by the Court of Criminal Appeal of Singapore on 22nd July, 1972, once again brings out the importance of the principles relating to common intention under the Penal Code.[2] The pronouncements of the Court in the case are valuable as they also reflect to some extent the development of the law relating to common intention up to the present day. It is therefore hoped that it might be worthwhile to review at this stage some aspects of the law in Singapore and West Malaysia on the subject.

Common intention and "criminal act"

The first important reported ruling in Singapore relating to common intention is that of *Rex* v. *Vincent Banka and Anor.*[3] decided by the Court of Criminal Appeal of the Straits Settlements. The facts of the case were briefly that in the course of a robbery committed by the two accused on a man named Chua Jin Sui, a stab wound was inflicted on him which later proved to be fatal. It was clear that one of the accused carried a knife, but the prosecution was unable to prove who it was. One of the accused (Teng Koh) however stated in his evidence that it was the other accused (Vincent Banka) who had a knife with him and that it was with this knife that the deceased was stabbed. At the trial both the accused were convicted of murder and robbery. On appeal the conviction was challenged on the ground, *inter alia*, that there was no evidence that it was one of the accused who caused the death, and that there was no intention common to the accused to cause the death of the deceased.

Huggard C.J., in the appeal, relied on the Burmese case of *The Emperor* v. *Nga Aung Thein & Anor.*[4] The question before the Full Bench in that case was: when less than five people go out armed to commit robbery without any pre-arranged intention to commit murder, but in the course of the robbery one of the robbers does commit murder, are all the robbers liable to be convicted under section 302 read with

* Singapore Penal Code, Cap. 103; Penal Code (F.M.S.), Cap. 45.

1. [1972] 2 M.L.J. 75.
2. Singapore Statutes, Rev. Ed. 1970, Cap. 103 - s. 34: "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. (1936) 5 M.L.J. 66.
4. A.I.R. 1935 Ran. 89.

section 34 of the Penal Code?[5] The Full Bench of the Rangoon High Court answered this question by saying that in effect no hard and fast rule could be laid down, as the existence of the common intention is a question of fact to be determined on a consideration of the facts of the case. The Full Bench also quoted with approval the case of *Barendra Kumar Ghosh* v. *The Emperor*[6] which was a decision of the Privy Council. After referring to these two cases and some English cases[7] on the subject, the Court of Criminal Appeal observed in *Vincent Banka's* case as follows:

> it is necessary to remember that there is a very important difference between the law as enacted in s. 34 of our Penal Code and the common law of England as to the evidence necessary to establish a common intention. Under our Code it is essential that there should be evidence of a common intention, or evidence from which such a common intention can properly be inferred, *to commit the act actually committed.* In England that is not essential.[8]

The Court of Criminal Appeal then stated that it was in complete agreement with the observations of the Rangoon High Court in *Nga Aung Thein* and further stated:

> it follows that it is the duty of the trial judge, in cases where s. 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed.[9]

It will be noted that in the above two paragraphs the words used by Huggard C.J. are "to commit the criminal act actually committed". The Court of Criminal Appeal then proceeded to criticise the learned trial Judge's summing up relating to the paraphrase of s. 34 and remarked as follows:

> Under the terms of that section, as has already been pointed out, there must exist a common intention to commit the crime actually committed.[10]

It is interesting to note that the Court of Criminal Appeal here used the phrase "crime actually committed".

It therefore seems clear that the Court of Criminal Appeal in *Vincent Banka's* case failed to distinguish between "criminal act" (used in section 34) and "crime". Thus, the case seemed to lay down that the common intention must be "to commit the crime actually committed". Such an interpretation is obviously more in favour of the accused and it is no surprise therefore that Vincent Banka and Teng Koh were acquitted of murder. The conviction for robbery however stood.

5. These sections of the Burmese Penal Code are identical with ss. 302 and 34 of the Singapore Penal Code.
6. (1925) 52 I.A. 41.
7. The English cases referred to are: *R.* v. *Jackson & Anor.* 7 Cox C.C. 357; *R.* v. *Harrington* 5 Cox C.C. 231; *R.* v. *Bridmore* 6 Cr. A.R. 195; *R.* v. *Short* 23 Cr. A.R. 170; *R.* v. *Betts & Ridley* 22 Cr. A.R. 170.
8. (1936) 5 M.L.J. 66, at p. 69.
9. *Ibid.*
10. *Ibid*., at p. 70.

The above view expressed by the Straits Settlements Court of Criminal Appeal in *Vincent Banka* was probably influenced by the case of *Nga Aung Thein* and the other Burmese cases quoted in *Nga Aung Thein.* In this Burmese case, Page C.J. stated as follows:

> if the persons by whom the criminal act was done had expressly agreed beforehand that they would endeavour to commit the offence, that, no doubt would be cogent evidence that the act, if committed, was done in furtherance of the common intention of the conspirators.[11]

These words are certainly suggestive of the idea that the common intention should be to *commit the offence* or the "crime" actually committed. The same view is also borne out in certain passages from *Nga E* v. *Emperor*[12] referred to with approval in *Nga Aung Thein's* case. Carr J. in *Nga E's* case, remarked:

> The general effect of the cases discussed is that the common intention referred to in s. 34 I.P.C. is an intention to commit the crime actually committed, and that each accused person can be convicted of that crime only if he has participated in that common intention.[13]

Vincent Banka's case was followed soon after in *Rex* v. *Chhui Yi.*[14] While purporting to follow the case, Whitley, Ag. C.J. attempted to explain the phrase "common intention to commit the crime actually committed" and said:

> That does not, of course, mean that, in the case of murder, there need have been a common intention actually to kill; but there must have been a common intention to do any of the acts which are described in s. 299 and s. 300 of the Penal Code and the doing of which, if death in fact results, amounts to murder.[15]

It is a matter of some regret that the fine distinction pointed out in this case has not been given due attention in later cases. One of the few cases in which this case has been referred to and followed is that of *Santa Singh* v. *P.P.*[16] The following passage which appears in the case may be quoted:

> If the assessors believed in the evidence of Karnail Singh that he saw the Appellant strike the deceased with the knife and that Naranjan Singh struck him also with his knife; then the learned judge's direction (which follows the principle laid down by the Court of Appeal in *R.* v. *Chhui Yi*) was a perfectly correct statement of the law on the subject. The intention of an accused person can only be judged by his acts; and if one or more persons attack another, who is unarmed, with knives in such a manner that death results, it may be presumed that they did so with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death.[17]

11. A.I.R. 1935 Ran. 89, at p. 90.
12. A.I.R. 1931 Ran. 1 (F.B.).
13. *Ibid.*, at p. 6.
14. (1936) 5 M.L.J. 177.
15. *Ibid.*, at p. 180.
16. (1938) 7 M.L.J. 58.
17. *Ibid.*, at p. 59.

However, it is only fair to note that the view propounded in *Vincent Banka's* case that the common intention should be to commit the crime actually committed, has also been expressed in subsequent cases both in Singapore and West Malaysia, and also elsewhere.[18] In the well-known Indian case of *Ibra Akanda & Others* v. *Emperor*,[19] Das J., in summing up the propositions propounded in the celebrated case of *Barendra Kumar Ghosh*,[20] stated as one of his deductions:

> That to come within s. 34, the "criminal act" so understood must be done by several persons in furtherance of their common intention to do that very 'criminal act' which is made up of each and all the separate acts, that is to say, their common intention must be to commit the very offence which is ultimately and actually committed.

Here again, we find the equation of "criminal act" to "offence". This, in a way is unfortunate, as Das J. in analysing the judgments in *Barendra Kumar Ghosh* did consider the now famous passage of Lord Sumner which was in the following words:

> In other words 'a criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were done by himself alone, that is, in a criminal offence.[21]

This passage, though somewhat vague, does imply that a "criminal act" is different from a "criminal offence".[22] Das J. obviously did not see the implication contained in the above passage.[23]

The same view has found acceptance in later Indian decisions. For example, in *Kamaraj Gounder*,[24] the following judicial statement appeared:

> It is therefore clear that there would be no liability by reason of s. 34 except in a case where there was a common intention to commit the particular offence which resulted; a similar intention would not be enough to bring the case within the meaning of the section.

Again, this deduction was made after quoting that famous passage of Lord Sumner. It is therefore apparent that many judges in India have construed Lord Sumner's words as equating "criminal act" to "criminal offence".

18. This view is also accepted by certain text-book writers. (See e.g. Nigam, *Law of Crimes in India* Vol. I p. 186.

19. A.I.R. (1944) Cal. 339, at p. 350.

20. (1925) 52 I.A. 41.

21. *Ibid*., at p. 56.

22. It is interesting to note that Wee Chong Jin C.J. in the recent case of *Mimi Wong & Anor.* v. *P.P.* is one of the few judges who saw the implication in Lord Sumner's judgment. Some judges and text book writers in India took the view that Lord Sumner's words in *Barendra Kumar Ghosh* quoted above, meant that whatever acts are done by several persons in furtherance of the common intention of all constitute as a whole the particular criminal act for which each person will be liable. See for *e.g. Nazir & Others* v. *Emperor* A.I.R. (1948) All. 229.

23. For the various views as to the meaning of common intention, see the article "Group Liability", by V. Balasubrahmanyam, in *Essays on the Penal Code*, Indian Law Institute, New Delhi, p. 95.

24. A.I.R. 1960 Mad. 125, at p. 128.

In Singapore and West Malaysia, the principle laid down in *Vincent Banka's* case had been expressly or impliedly followed in many cases. Thus, in *Lee Yoon Choy and Others* v. *P.P.*[25] the Federation Court of Criminal Appeal said with regard to *Vincent Banka:* "We respectfully agree that judgment lays down the correct construction of s. 34 of the Penal Code".

In some cases where *Vincent Banka* was not expressly mentioned, the principle therein mentioned was impliedly acted upon by the Court in making a finding of fact that the common intention was to commit the offence actually committed. For example, in *Chan Chun Ling & Anor.* v. *P.P.*[26] where both appellants agreed to commit robbery on a cashier whom they took in a car and who in the course of robbery was fatally assaulted by the second appellant (the first appellant being the driver of the car), the Federation Court of Appeal found that:

> [The second appellant's] whole course of conduct from the moment that he arrived at the roundabout, points to nothing other than a pre-arranged plan to effect the robbery by killing the cashier.

It is however interesting to note that in recent years Singapore and West Malaysia cases have ceased to cite *Vincent Banka's* case. This omission may have been either deliberate or inadvertent. It is however significant that though *Barendra Kumar Ghosh*[27] and *Mahboob Shah*[28] were cited in the recent case *Mimi Wong & Anor.* v. *P.P.*[29] no mention was made of *Vincent Banka.* It may well be that judges in Singapore and West Malaysia now feel that the pronouncements in *Vincent Banka* that common intention means the common intention to commit the crime actually committed is a little too narrow in the light of *Chhui Yi*[30] and other later Indian decisions like *Nazir* v. *Emperor*[31] and *Bashir* v. *State.*[32]

In *Nazir* v. *Emperor,* the Allahabad High Court, after referring to *Barendra Kumar Ghosh* and *Mahboob Shah,* pointed out that:

> [The Privy Council] have not expressed in any of these cases their opinion that the common intention of all must be to commit the particular offence which is the result of the criminal act.[33]

In *Bashir* v. *State,* which is one of the most provocative Indian judgments relating to common intention, we find the following passages in the decision of the Allahabad High Court:[34]

25. (1948-49) M.L.J. Supp. 167, at p. 169.
26. (1956) 22 M.L.J. 34.
27. *Op. cit.* (fn. 6).
28. A.I.R. 1945 P.C. 118.
29. *Op. cit.* (fn. 1).
30. *Op. cit.* (fn. 14).
31. *Op. cit.* (fn. 22).
32. 1953 Cr. L.J. p. 1505.
33. *Op. cit.*, at p. 233.
34. *Op. cit.*, at pp. 1507 and 1508-9.

> The 'criminal act' mentioned in the section is the physical act that has been done. It must be distinguished from the effect or result or the consequence of it.
>
> If the common intention contemplated by the section were the intention to do the criminal act actually done, then that by itself would mean that the criminal act was done in furtherance of the common intention and the words 'in furtherance of the common intention' would be without any content. These words were added by the legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons, acting in concert, liable for an act, which is not exactly the act jointly intended by them, but has been done in furtherance of their common intention.

Common intention and pre-arranged plan

The case of *Mahboob Shah*, decided by the Privy Council, has not only been quoted from time to time in India, but also received recognition in many cases in Singapore and West Malaysia. The importance of the case lies in the following passage from the speech of Sir Madhavan Nair:

> Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of s. 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has often been observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.[35]

Thus, among other things, *Mahboob Shah's* case lays down the necessity of a "pre-arranged plan". That case was first quoted by the Federation Court of Criminal Appeal in *Abu Bakar Bin Inam Idris* v. *P.P.*[36] It was however quoted not in connection with the necessity of a pre-arranged plan but with regard to the point that the fact, by itself, of the acts by the different accused being joint is not sufficient. There must be a common intention and it must be shown that the criminal act was committed in furtherance of that intention.

In *Chan Chun Ling & Anor.* v. *P.P.*, the facts of which have been noted earlier,[37] the case of *Mahboob Shah* was considered with regard to the necessity of a pre-arranged plan. It was argued that the pre-

35. *Op. cit.*, at p. 35.

36. (1947) 13 M.L.J. 133.

37. At p. 167, above.

arranged plan was to frighten and rob, and that the killing of the deceased was not pre-arranged. However, the Chief Justice found with regard to the second appellant that his whole course of conduct from the moment that he arrived at the round-about pointed to nothing other than a pre-arranged plan to effect the robbery by killing the cashier.

The idea of a "pre-arranged plan" has also been judicially resorted to in the case of *Kee Ah Tee and Anor.* v. *P.P.*,[38] decided by the Court of Criminal Appeal of Singapore. The following passage from the judgment of the learned Chief Justice may be quoted:

> By their own admissions, they were at the scene of the killings; they had gone there to commit robbery with Ah Choon; they knew two knives were carried; they knew that these knives were necessary to carry out their planned object.[39]

Here the expression used is "planned object", which is apparently synonymous with a "pre-arranged plan".

Lastly, *Mahboob Shah* has been quoted, as already mentioned, in the recent case of *Mimi Wong & Anor.* v. *P.P.* In this case, the first appellant Mimi Wong, who was a waitress, came to know a Japanese engineer called Mr. Watanabe, and in due course they became intimate and a few months later were living together. Mimi Wong had a husband, the second appellant, who was apparently quite fond of her and the children of their marriage. As events show, the husband allowed himself to be a tool in her hands inspite of her infidelity. In the meantime, Mrs. Watanabe arrived from Japan. This must have upset Mimi Wong. Two weeks after her arrival Mrs. Watanabe was stabbed and killed at her home in Singapore where she was living with her husband and children. It was established that the stabbing was done by Mimi Wong, and that she was helped in the crime by her estranged husband. The question of common intention arose with regard to her husband who was held guilty under section 302 by both the trial Court and the Court of Criminal Appeal.

The evidence of the eight years' old eldest daughter of the deceased revealed that the second appellant had held one hand of Mrs. Watanabe during the stabbing. The second appellant himself made a statement before a magistrate (later retracted at the trial) that the first appellant had asked him about four days before the murder to assist her in killing "a certain person", and that she would give him money in return for his assistance. He admitted that on the fateful day, he accompanied her to Mrs. Watanabe's house. The first appellant told Mrs. Watanabe that he was a plumber and had come to repair the broken wash basin. He said that, after the first appellant had taken out a knife from her handbag, he threw some toilet cleansing liquid which was in a Glucolin tin into the eyes of Mrs. Watanabe who was then stabbed by the first appellant. Later they ran out of the house and boarded a

38. [1971] 2 M.L.J. 242.

39. *Ibid.*, at p. 246.

taxi. The first appellant who retracted her confession at the trial admitted that she had a fight with the deceased in the bathroom and that while they were fighting the second appellant threw some liquid from a Glucolin tin at the deceased causing the deceased to scream.

The trial Court found, as a finding of fact, that the idea of throwing the detergent came from the second appellant; that he brought the Glucolin tin containing the detergent; that it was he who asked the first appellant to lure the deceased into the bathroom on the pretext of inspecting the broken wash basin; that he mixed water with the detergent; that he wrapped a towel round the Glucolin tin to prevent his leaving finger prints on it; that he threw the detergent into the eyes of the deceased when the first appellant was ready to stab the deceased and that he was clearly a party to the stabbing.

The appellate Court endorsed these findings and held that section 34 had been properly applied against the second appellant. Though no direct mention was made of a "pre-arranged plan", it was clear that it existed if the prosecution evidence was to be believed.

With regard to the concept of "pre-arranged plan", it ought to be realised that this phrase may be misused. Though there are no Singapore or West Malaysian decisions elaborating this concept, there are Indian rulings subsequent to *Mahboob Shah* which contain some explanation of the phrase.

In *Bashir* v. *State*,[40] it has been observed that:

> "In *Mahboob Shah* v. *Emperor*, 'common intention' was held to imply a 'pre-arranged plan'. This does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act. The Judicial Committee in the case of *Mahboob Shah* did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act.[41]

In *Rishi Deo Pande* v. *State of Uttar Pradesh*,[42] the Supreme Court of India declared that common intention may develop on the spot and may be inferred from the facts and circumstances of the case and the conduct of the accused. In that case, the two accused, who were brothers, were seen standing near the cot of the victim who was sleeping. One of them was armed with a gandasa (long knife) and the other with a lathi. They ran away when a hue and cry was raised. According to the medical evidence, the deceased died of an incised wound on the

40. *Op. cit.* (fn. 32), at p. 1508.

41. See also *State* v. *Saidu Khan & Another* A.I.R. 1951 All. 21, at p. 37, where Sankar Saran J. said:

> "A pre-arranged plan does not mean that there should be a conference where resolutions are moved and decisions arrived at to commit a particular crime. All that appears necessary in such circumstances is that before the actual criminal act is performed, an agreement, not necessarily vocal, should be arrived at amongst those who participate in the crime."

42. A.I.R. 1955 S.C. 331.

neck which was necessarily fatal. Both the trial Court and High Court inferred the common intention to cause death, and the Supreme Court confirmed the decision.

Common intention of all — Intention of actual wrongdoer and others

The academic importance of *Mimi Wong's* case lies not in the findings of fact relating to common intention which clearly showed preparation, planning and acting in concert by the appellants, but in certain remarks by the Chief Justice as to the nature of common intention required under section 34. The Chief Justice stated:

> If the nature of the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered. What this intention is will decide the offence committed by him and then s. 34 applies to make the others vicariously or collectively liable for the same offence. The intention which is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention; otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.[43]

The above statement brings out the following points:

(a) where the offence depends on a particular intention, the intention of the actual doer of the criminal act has to be considered;

(b) the intention of the actual doer will decide the offence committed by him, and it is for this same offence that the others may be made vicariously liable under s. 34.

(c) the intention of the actual doer is however to be distinguished from the common intention of the doer and his confederates.

(d) the intention of the actual doer may be identical with the common intention or it may not.

(e) where the intention of the actual doer is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention.

The statement made by the Chief Justice, as may be noted, bears a remarkable similarity to the following passage from *Bashir* v. *State*:[44]

> If the nature of the offence depends on a particular intention or knowledge, the intention or knowledge of the actual doer of the criminal act is to be taken into account. That intention or knowledge will decide the nature of the offence committed by him and the others will be convicted of the same offence, because, as pointed out above, they cannot be convicted of a different offence. The intention of the actual doer must be distinguished from the common intention as already pointed out. It is an ingredient of the offence said to be constituted by the criminal act.. .. Though the intention of the actual doer is to be distinguished from the common intention, the intention must not be foreign to or inconsistent with the common intention. It must be consistent with the carrying out of the common intention, otherwise the criminal act done will not be in furtherance of the common intention.

43. *Op. cit.*, at p. 12.
44. (1953) Cr. L.J. 1505, at pp. 1511-1512.

The remarks made by the learned Chief Justice in *Mimi Wong's* case are therefore supported by authority. So far no decision can be found expressing a contrary view.

Common intention and participation

It is settled law that in view of the phrase "Where a criminal act is *done* by several persons" in section 34, there must be "participation" by a person in the criminal act before that section can be used against him. Some judges have felt that the accused should be physically present at the actual commission of the offence.[45] This view was later qualified in *J.M. Desai and Another* v. *State of Bombay*[46] in which it has been pointed out that:

> As explained by Lord Summer in *Barendra Kumar Ghosh* v. *King Emperor*[47] the leading feature of s. 34 of the Indian Penal Code is 'participation in action'. To establish joint responsibility for an offence it must of course be established that a criminal act was *done* by several persons; the participation must be in doing the act and not merely planning. A common intention — a meeting of mind — to commit an offence and participation in commission of the offence in furtherance of that intention invite the application of s. 34. But the participation need not in all cases be by physical presence. In offences involving physical violence, normally presence on the scene of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places.

With regard to the question of participation, reference may be made to the Singapore case of *Chew Cheng Lye* v. *R.*[48] The appellant was convicted with another person of the theft of a bicycle in North Bridge Road. The appellant and the other person were found by detectives to be walking along Victoria Street and examining bicycles and conversing together. They then entered North Bridge Road. The other person walked along a five-foot way and when he came in front of House No. 359, he placed his hand on a bicycle and pushed it along. He was then arrested. Meanwhile, the appellant, who had been walking on the road near the drain, started to run and was also arrested by the detective. The District Judge convicted both the appellant and the other person by applying section 34. One of the points against the appellant was that he was "present at the scene". On appeal, the learned judge, Whitton J., held that even if there was a common intention to steal bicycles, there was no common intention to steal this specific bicycle which was the subject of the charge. The learned judge remarked:

> There would, of course, be no difficulty had it been shown that the respondent had kept watch or otherwise assisted Chiang in the removal of the bicycle. But when the action is confined to a single act of pushing a bicycle

45. See *e.g. Shreekantiah Ramayya Munipalli* v. *State of Bombay,* A.I.R. 1955 S.C. 287.

46. A.I.R. 1960 S.C. 889, at p. 892.

47. 42 I.A. 40 at 52.

48 (1956) 22 M.L.J. 240.

> by one of the accused, it seems to be straining the language to say it is something done by several persons, even bearing in mind the definition in s. 33.[49]

He further noted:

> But can it be said that mere presence on the roadway, even if one is planning the theft of a bicycle and knows one's companion has a similar intention, renders one a party under s. 34 to an actual theft, in which one does not assist in any way, by one's companion ? In my opinion, before the section applies there must be on the construction of its language more than a joint venture to commit a crime. I would say it must be established that more than one person participated in the commission of the criminal act, which forms the subject of the charge, although in certain circumstances, mere presence may constitute participation.

Accordingly, the appellant was acquitted.

While it is accepted that participation is necessary, the further question remains as to whether it is necessary to find out the part played by each individual accused. This would be most difficult in many cases, especially when the accused persons tell different stories and try to put the blame on each other. In *Chin Hon & Ors.* v. *P.P.*[50] Pretheroe Ag. C.J. pointed out that the view in Ratanlal, *Law of Crimes* [51] that it was necessary to prove exactly what part was played by each of the accused, was based on the head-note to *Fazoo Khan & Others* v. *Jatoo Khan and Another.*[52] The Judge further pointed out that there was nothing in the judgment in that case to support that part of the head-note relating to the necessity for the Court to arrive at a finding as to the part played by each individual accused. Relying on *Mahboob Shah*,[53] the Judge held in the case that the conviction of the appellants was correct as they were all present when the act was carried out and there was evidence that each appellant took an active part in the murder.

Inference of common intention — Use and knowledge of weapons

It is often said by judges that common intention is a question of fact and that in many cases direct evidence will not be available. Therefore common intention is to be inferred from the facts and surrounding circumstances. One of the facts which has been given considerable prominence in Singapore and Malaysian case law is whether the accused had knowledge that the other accused persons had in their possession the weapons used.

In *T'ng Ban Yick* v. *Rex*,[54] the appellant and another person attempted to rob one Ong Chow Yee, and in the course of the struggle the other person stabbed Ong Chow Yee in the side, piercing the spleen

49. *Ibid.*, at p. 241.
50. (1948) M.L.J. 193.
51. 16th ed., at p. 72.
52. A.I.R. (1931) Cal. 643.
53. *Op. cit.* (fn. 28).
54. (1940) 9 M.L.J. 153.

and inflicting a wound likely to cause death. Ong Chow Yee died fourteen hours later. That other person absconded. The appellant was convicted of murder on the ground that he had a common intention with the absconder that the deceased should be stabbed fatally in the event of his refusing to stand and deliver. In the summing up the trial judge emphasised that one of the questions the jury had to consider was whether the prisoner knew that the other person was armed with a knife. If so, whether the knife would be used, if necessary, to cause death or injury likely to cause death. The Appellate Court held that the trial Judge's directions to the jury were correct, and affirmed the conviction.

In *Tan Ser Siong* v. *P.P.*,[55] the appellant was convicted for murder in the course of a robbery in which four conspirators participated and one of them fatally stabbed the deceased. The appellant admitted participating in the robbery, but denied knowledge of a lethal weapon in the possession of the person who did the stabbing. A wrist watch belonging to the appellant was found on the premises where the robbery took place and the trial judge took that as "independent corroborative evidence". The Federation Court of Appeal set aside the conviction for murder and altered it to one under section 457, holding that

> In our view that direction was wrong. The crucial point in the whole case was the state of knowledge of the Appellant. Did he know that among the paraphernalia there was a knife ? There was no doubt as to his being present. That was fully admitted. The only question was the question of his knowledge and it is hardly necessary to observe that the finding of the watch had no bearing whatsoever on that crucial question.[56]

It will thus be seen that knowledge of the existence of the weapon was regarded as the "crucial question" in the case.

Recently, in *Kee Ah Tee and Another* v. *P.P.*,[57] both the appellants were convicted for murder. It was established on the facts that they planned to rob the proprietor of a feathers factory in Upper Bukit Timah Road, Singapore. Each of them carried a knife to the factory. In the process of the robbery, the knives were used on the proprietor and a female worker of the factory, both of whom died of the injuries received. The trial court found as a finding of fact that the appellants entered the factory building each armed with a knife and that each also knew that the other was so armed. In dismissing the appeal, the Court of Criminal Appeal stated:

> ...there was sufficient direct and circumstantial evidence for the trial judges to be satisfied beyond reasonable doubt that the death of the two deceased victims was caused by the acts of the appellants in circumstances which amount to murder read with s. 34 of the Penal Code. By their own admissions they were at the scene of the killings;... they knew two knives were carried; they knew that these knives were necessary to carry out their planned object.[58]

55. (1963) 29 M.L.J. 265.

56. *Ibid.*, at p. 266.

57. [1971] 2 M.L.J. 242.

58. *Ibid.*, at p. 246.

Some Procedural Points

One interesting procedural point is whether a person who is not charged under section 34, can be convicted under that section. There are authorities which indicate that when a person is charged with an offence read with section 149 of the Penal Code,[59] then in such a case, he can be convicted under section 34. There are no rulings which indicate that the reverse can be done. At the same time the authorities seem to be conflicting as to whether a person can be convicted under section 34, when he is charged only with a substantive offence and no other section involving group liability is used.

In *Sheo Ram* v. *Emperor*,[60] the Allahabad High Court, after considering the decision in *Barendra Kumar Ghosh* v. *King Emperor* and certain previous Indian decisions, concluded that:

> A person can. . be convicted of an offence with s. 34, Penal Code, if the facts of the case justify it and if the accused has not been misled in his defence and if there has been no failure of justice, irrespective of the fact whether the charge framed against him mentioned s. 34, Penal Code, or not, or the charge framed against him was a charge of an offence read with s. 149, Penal Code.

According to this view, it is immaterial whether there is a charge under section 149 or not, and section 34 can be used in the circumstances mentioned above.

A somewhat different view is to be found in *Tan Chin Keng* v. *Public Prosecutor*.[61] In that case, the appellant and another person were charged with attempted extortion under section 384 of the Penal Code, and both were convicted thereunder. One of the issues raised in the appeal was whether, where the prosecution invokes the aid of section 34, it is necessary to frame a charge under that section. The learned Judge, Ismail Khan J., observed that:

> The appellant is on firmer ground in his other objection which in effect is that when the prosecution invokes the aid of s. 34 for holding one person responsible for the result produced by the act of another, it is necessary to frame a charge under that section.[62]

He then pointed out that:

> There is nothing in the charge to indicate with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from, or threatened the complainant with injury, but that he, the 1st accused and others still at large were acting together with a common intention.

59. S. 149: "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

60. A.I.R. 1948 All. 162.

61. (1964) 30 M.L.J. 316.

62. *Ibid*., at p. 317.

The learned judge distinguished the case before him from *Osman Bin Abdullah* v. *P.P.*[63] in which the following statement occurs in the judgment of Thomson C.J.:

> We do not find it necessary to lay down any general rule as to whether, when the prosecution proposed to invoke the provision of s. 34, it is necessary to specify that section of the Code in terms. On grounds of common fairness however, where the prosecution are proposing to invoke the section the charge should make this clear to the accused.[64]

In *Osman Bin Abdullah's* case, it was ultimately held that failure to specify section 34 in the charge did not occasion any failure of justice, as the accused knew perfectly well what the case for the prosecution was going to be and what in fact it was. Moreover, that case was tried in the High Court where the appellant was represented by counsel who had ample time to study the depositions in the case. However, in *Tan Chin Keng's* case, it was pointed out that these considerations cannot apply to a trial in the Sessions Court. Thus in this later case the appellant's conviction was quashed.

It must be admitted that the *ratio decidendi* in *Tan Chin Keng's* case is not a very happy one. It appears that where section 34 is not specified in a charge in a trial before the Sessions Court, the conviction using section 34 will be quashed, whereas it may not be if the trial were before the High Court.

The authorities are however clear and unanimous with regard to the point that where an accused person or persons are charged for a substantive offence together with section 149 of the Code, a conviction under section 34 (in lieu of section 149) can be substituted, though the section is not mentioned in the charge.

In *Francis and Others* v. *P.P.*[65] a peculiar situation arose. It seemed that because of some antecedent family squabble, the four appellants and five other persons (nine in all) formed the common object of causing hurt to another family, and in consequence, one person was killed. Accordingly, all the nine persons were charged under sections 302 and 149 of the Penal Code. The jury found the four appellants "guilty of unlawful assembly and manslaughter", and found one female accused "not guilty of murder or manslaughter but guilty of unlawful assembly". After putting certain questions to the jury to clarify their verdict, the trial judge acquitted the female accused and found the four appellants guilty as charged.

On appeal, the convictions were attacked on the sole ground that they were bad in law as the jury's verdict, as elucidated by the Judge's questions, meant that the jury found as a matter of fact that only four persons were involved in the attack on the deceased, and that four persons could not constitute an unlawful assembly under section 141

63. (1958) 24 M.L.J. 12.

64. *Ibid.*, at p. 16.

65. (1960) 26 M.L.J. 40.

of the Penal Code. Thomson C.J. held that the term "common intention" used in section 34, may sometimes overlap with "common object" used in section 149, and quoted Indian authorities to show that section 34 can be substituted in proper cases for section 149. He also relied on sections 166 and 169 of the Criminal Procedure Code to show that a person can be convicted of an offence for which he has not been charged, if the evidence justifies that a charge might have been made.

The connection between section 34 and section 149 was again in issue in the famous case of *Tan Kheng Ann & Ors.* v. P.P.[66] concerning the uprising of the detainees at the Pulau Senang Settlement. In that case, it was argued on appeal that section 34 and not section 149 should have been used against the accused persons. Thomson L.P. referred to the case of *Francis and* Ors.,[67] and repeated the observation that "common intention" in section 34 and "common object" in section 149 may overlap. He stated:

> Here it was a case for the prosecution that the common object of the alleged unlawful assembly and the common intention of its members were the same, that is to say, to kill and to destroy, and in the circumstances it was open to the prosecution to proceed, either by virtue of section 34 or by virtue of section 149. The consideration that in the event they proceeded under the latter section cannot in itself be said to have prejudiced the accused in any way to vitiate the convictions.

So far no case has yet arisen in Singapore or West Malaysia as to whether section 149 can be substituted where an accused person has been charged and convicted under a substantive section read with section 34. The Supreme Court of India refrained from deciding this point in *Pandurang* v. *State*[68] but intimated that they would require "strong reasons" for using section 149 where the accused has not been charged under it. This reluctance is probably due to the fact that section 34 does not create a specific offence, whereas section 149 does.

Applicability of English Law to "common intention"

Inspite of the dicta in *Vincent Banka*[69] and other decisions that section 34 of the Penal Code is different from the common law of England, it is still an open question as to whether English law on the matter is to be entirely excluded from consideration. Thus, in *Barendra Kumar Ghosh*,[70] while admitting that the criminal laws of India and England differ in "sundry" respects, and that the Penal Code must first be given its natural meaning, the Privy Council observed:

> It is however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of

66. [1965] 2 M.L.J. 108.
67. *Ibid.*, at p. 114.
68. A.I.R. (1955) S.C. 216.
69. *Op. cit.* (fn. 3).
70. *Op. cit.* (fn. 6) at p. 55.

> abetment. It abandons others, such as principals in the first or second degree, but it must not be supposed that because it ceases to use the terms, it does not intend to provide for the ideas which these terms, however, imperfect, expressed.

This view was followed in *Ibra Akanda*[71] by Khundakar J. who stated:

> It will now be clear that the phrase 'common intention' in section 34 is not free from ambiguity, and therefore in order to ascertain its real meaning it is permissible and indeed necessary, to consider what are the principles of joint criminal liability in the English common law.

Also in the later case of *Bashir* v. *State*,[72] we find the following expression:

> Section 34 has to be interpreted in conformity with the English law.... The interpretation that we have placed on the various expressions used in the section is in conformity with the English law.

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71. *Op. cit.* (fn. 19), at p. 359.

72. *Op. cit.* (fn. 32), at p. 1513.

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