Daniel Vijay s/o Katherasan and others *v* Public Prosecutor [2010] SGCA 33

Case Number	: Criminal Appeal No 1 of 2008
Decision Date	: 03 September 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; V K Rajah JA; Choo Han Teck J
Counsel Name(s)	: James Bahadur Masih (James Masih & Co) and Amarick Singh Gill (Amarick Gill & Co) for the first appellant; Subhas Anandan and Sunil Sudheesan (KhattarWong) for the second appellant; Mohamed Muzammil bin Mohamed (Muzammil & Co) and Allagarsamy s/o Palaniyappan (Allagarsamy & Co) for the third appellant; S Jennifer Marie, David Khoo, Ng Yong Kiat Francis and Ong Luan Tze (Attorney-General's Chambers) for the respondent.
Parties	: Daniel Vijay s/o Katherasan and others — Public Prosecutor

Criminal Law

Criminal Procedure and Sentencing

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2008] SGHC 120.]

3 September 2010 Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This is an appeal by the first appellant, Daniel Vijay s/o Katherasan ("Daniel"), and the second appellant, Christopher Samson s/o Anpalagan ("Christopher"), against the decision of the trial judge ("the Judge") convicting them of murder in Criminal Case No 16 of 2007 (see *Public Prosecutor v Daniel Vijay s/o Katherasan and others* [2008] SGHC 120 ("the GD")). The third appellant, Nakamuthu Balakrishnan (alias Bala) ("Bala"), originally appealed as well against his conviction for murder, but subsequently decided not to proceed with his appeal (see [46]–[47] below). For convenience, we shall hereafter refer to the three appellants collectively as "the Appellants".

2 This appeal requires us to consider the scope of s 34 of the Penal Code (Cap 224, 1985 Rev Ed) ("the 1985 Penal Code"). Section 34 of the 1985 Penal Code has its roots in s 34 of the Penal Code (Ordinance 4 of 1871) ("the 1871 Penal Code"), which was enacted in 1872 when Singapore was part of the Straits Settlements. Since 1872, s 34 of the 1871 Penal Code has remained unchanged in all the subsequent editions of the Penal Code up to the current edition (*ie*, the 2008 revised edition). For convenience, the generic term "the Penal Code" will hereafter be used to denote the particular version of the Penal Code that is relevant to the case or legal point being discussed, regardless of whether that version is the 1985 revised edition or some other edition, and s 34 of the Penal Code (*ie*, "the Penal Code" as just defined) will be denoted by the generic term "s 34".

3 It might be thought that since s 34 was enacted some 138 years ago, its meaning would already have been settled through judicial interpretation. But, this does not appear to be the case. In 1999, this court (which will also be referred to interchangeably as "the CA") said in *Shaiful Edham bin*

Adam and another v Public Prosecutor [1999] 1 SLR(R) 442 ("*Shaiful Edham*") at [52] that there were "two divergent lines of authority" on the scope of s 34, one of which was wrong. However, this statement did not have the effect of settling the law on s 34 as, in *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee (CA)*"), this court restricted the operation of the legal principle encapsulated in the accepted line of authority (see [42] below).

4 Despite the decision in *Lee Chez Kee (CA)*, s 34 remains a troubling provision. In the present case, for instance, the Judge applied s 34 to convict Daniel and Christopher on a joint charge of murder arising from Bala's criminal act of assaulting the deceased victim, Wan Cheon Kem ("Wan"), even though:

(a) the Appellants had not planned (*ie*, they had no common intention) to kill Wan or cause his death, but had only the common intention to rob him of the cargo of mobile phones which he was transporting ("the Cargo") (see the GD at [40] and [51]–[52]); and

(b) it was Bala alone who caused the death of Wan by intentionally inflicting a series of blows on the latter's head with a baseball bat ("the baseball bat"), resulting in Wan sustaining injuries which were sufficient in the ordinary course of nature to cause death and which did indeed cause his death a few days after the assault.

In the light of these findings, the Judge held that he was compelled by law to convict both Daniel and Christopher of murder as secondary offenders pursuant to s 34 for the offence of murder arising from the criminal act committed by Bala, the actual doer of that criminal act.

5 The Judge's decision highlights the apparent harsh effect of the application of s 34 in these circumstances. The outcome is particularly unjust when the offence charged is that of murder. This expansive interpretation of s 34 stems from certain statements on the scope of s 34 made by Wee Chong Jin CJ in the judgment of the Court of Criminal Appeal ("the CCA") in *Wong Mimi and another v Public Prosecutor* [1971–1973] SLR(R) 412 ("*Mimi Wong (CCA)*"). It has led to uncertainty in the way our courts have been applying s 34 in cases where the offenders (*ie*, the actual doer and the secondary offender(s)) have a common intention to commit a particular offence (or a criminal act resulting in a particular offence) and, in the course of committing that offence or that criminal act, another (more serious) offence (or another criminal act resulting in a more serious offence) is committed (such cases are commonly referred to as "twin crime" cases (see further [41] below)). In the circumstances, we find it necessary to revisit *Mimi Wong (CCA)* and the relevant case law on s 34 in order to clarify this difficult area of the law. We shall do this after we have considered the factual and legal issues raised in this appeal.

Factual background

Participants

6 Daniel was, at the material time, a male aged 23 who was a full-time national serviceman ("NSF") with the Singapore Armed Forces ("the SAF"). He was, at the material time, absent without official leave ("AWOL") from the SAF, and had been detained in the SAF Detention Barracks for being AWOL on four previous occasions. He had also been a secret society member in the past. [note: 1] Christopher was, at the material time, a male aged 23 who was also a NSF with the SAF. He too was AWOL at the time of the offence. Previously, he had been detained in the SAF Detention Barracks for being AWOL on three occasions. Bala was, at the material time, a male aged 48 who had previously worked as an odd-job labourer. [note: 2] He had spent time in prison for being AWOL from the SAF and

for various drug offences. [note: 3] Bala played a key role in the execution and planning of the robbery. There was some evidence that Bala had a dominant influence over Daniel and Christopher, and was a father figure to them. [note: 4] (This relationship could explain why Daniel and Christopher initially attempted to shield Bala from prosecution (after the Appellants were arrested) by falsely claiming that Daniel had beaten up Wan during the robbery and that Bala had not had anything to do with the assault (see [19] below).)

7 Apart from the Appellants, there were two other persons who were involved in the initial planning of the robbery, *viz*, one Ragu a/l Ramajayam ("Ragu") and one Arsan s/o Krishnasamy Govindarajoo (alias Babu) ("Babu"). Babu, in fact, played a major role in the planning of the robbery. Ragu was a driver employed by Sterling Agencies Pte Ltd ("Sterling"), a freight-forwarding company. His role was to provide information to Babu on when Sterling would be transporting expensive cargo from Changi Airfreight Centre ("CAC") to consignees. Babu was a second-hand goods dealer. He was introduced to Ragu by one Shanker, a mutual acquaintance who was not involved in the robbery. Wan, the deceased victim, was, at the material time, working as a driver for Sterling and was a colleague of Ragu. Babu admitted that he was the originator of the idea that during the robbery, the driver of the targeted lorry should be beaten up until he became unconscious so that he would not know what was happening and would not be able to recognise the perpetrators (see sub-para (c) of [16] below). Both Ragu and Babu were, however, charged with lesser offences (see, respectively, [14] and [15] below).

Undisputed facts

8 Sometime in May 2006, Ragu and Babu hatched a plan to carry out a robbery of expensive cargo to be transported by Sterling from CAC for delivery to consignees. Babu recruited Bala to carry out the robbery. Bala then recruited Daniel and Christopher to assist him in carrying out the robbery. Sometime before the day of the robbery, Daniel took the baseball bat from a workshop at Changi where he had his car serviced. Several days before the robbery, Babu and Bala went to survey CAC. They were driven there by Christopher. On the evening of 29 May 2006, Babu and the Appellants met at a coffee shop at Block 125 Lorong 1 Toa Payoh to have some drinks. In the course of the evening, the robbery plan was discussed.

9 On 30 May 2006, at about 5.30am, Ragu contacted Babu and informed him that Sterling would be delivering the Cargo, which consisted of ten pallets of mobile phones (later found to contain 2,700 Sony Ericsson W700i mobile phones valued at about US$823,500), that morning from CAC to a consignee by lorry. Babu relayed the information to Bala, who was with Daniel and Christopher at that time. The Appellants then proceeded to the vicinity of CAC in a rented ten-foot lorry bearing the registration number GM9520E ("Lorry 9520"), taking with them the baseball bat. They subsequently met up with Babu, who told them that the lorry carrying the Cargo bore the registration number YM815B ("Lorry 815").

10 At about 7.00am, the Appellants saw Lorry 815 being driven out of CAC (by Wan). Bala directed Daniel to follow Lorry 815 in Lorry 9520, while Babu, who was also at the scene, drove off separately in another lorry. Somewhere along Changi Coast Road, Daniel drove in front of Lorry 815, causing Wan to stop it by the side of the road. After Wan alighted from Lorry 815, he was assaulted by Bala repeatedly on the head and other parts of the body with the baseball bat, although he was not rendered unconscious. He was then carried into the cabin of Lorry 815 and put on the floorboard in front of the passenger seat.

11 Daniel, together with Christopher, then drove Lorry 815 to Pasir Ris Car Park A at Jalan Loyang Besar in the vicinity of Costa Sands Resort ("Car Park A"). Bala followed in Lorry 9520. After arriving

at Car Park A, Daniel and Bala transferred two pallets of the Cargo (comprising 540 mobile phones) from Lorry 815 to Lorry 9520. Bala then instructed Christopher to drive Lorry 9520 with the two pallets on board to Daniel's rented apartment in Ang Mo Kio ("the Ang Mo Kio Apartment"). Shortly after, Babu arrived at Car Park A to join Daniel and Bala, who transferred the remaining eight pallets of the Cargo (comprising 2,160 mobile phones) from Lorry 815 to Babu's lorry. Babu then left Car Park A with Daniel and Bala, while Lorry 815 (with Wan in it) was left at the car park. Later, Daniel and Bala met up with Christopher, and they transferred the two pallets of the Cargo from Lorry 9520 to the Ang Mo Kio Apartment.

12 At about 8.52am that same day, a member of the public reported to Pasir Ris Neighbourhood Police Centre that he had found a man covered in blood in a lorry. The police went to investigate and found Wan sitting in the front passenger seat of Lorry 815. Wan managed to alight from the lorry on his own when the police opened the door of the passenger compartment. He was sent to Changi General Hospital, where he underwent emergency surgery on his head. He died without regaining consciousness on 5 June 2006, about five days after the robbery. The autopsy performed by Dr Teo Eng Swee ("Dr Teo"), a consultant forensic pathologist with the Centre for Forensic Medicine, Health Sciences Authority, disclosed that at least 15 blows had been inflicted on Wan on the head and other parts of his body.

13 Police investigations subsequently led to the arrest of Bala at about 6.50pm on 31 May 2006. Ragu and Babu were arrested separately on 1 June 2006. Daniel and Christopher surrendered themselves to the police separately on the morning of 5 June 2006.

Prosecution of Ragu

14 On 24 April 2007, Ragu was charged with one count of abetment (by conspiracy) of robbery, punishable under s 109 read with s 392 of the Penal Code. [note: 5] He pleaded guilty and was sentenced by the District Court to six years' imprisonment and 12 strokes of the cane. The sentence was reduced to four years and six months' imprisonment and six strokes of the cane on appeal to the High Court. [note: 6]

Prosecution of Babu

15 After his arrest, Babu was charged with: [note: 7]

(a) one count of abetment (by conspiracy) of armed robbery with hurt, punishable under s 109 read with ss 394 and 397 of the Penal Code;

(b) two counts of voluntarily assisting in the concealing and/or disposing of stolen property in furtherance of a common intention, punishable under s 414 of the Penal Code read with s 34; and

(c) one count of abetment (by conspiracy) of voluntarily assisting in the concealing of stolen property, punishable under s 109 read with s 414 of the Penal Code.

He pleaded guilty to all the charges and was sentenced by the High Court to a total of 16 years and six months' imprisonment and 24 strokes of the cane. [note: 8] He did not appeal against the sentence.

16 In the proceedings against Babu, the Prosecution tendered a consolidated statement of facts [note: 9] ("the CSOF"), which Babu unreservedly admitted to. The CSOF contained a number of statements by Babu on his role as well as the respective roles of each of the Appellants in the

robbery and the killing of Wan. Amongst other things, the CSOF stated that:

(a) "[Babu's] role was to execute the robbery". [note: 10] Babu subsequently recruited Bala to commit the robbery, and Bala in turn recruited Daniel and Christopher to assist him. [note: 11]

(b) The Appellants "procured a baseball bat [*ie*, the baseball bat as defined at sub-para (b) of [4] above] from a car workshop at Changi Road, where [Daniel] had sent his motor car for repairs, for use during the robbery". [note: 12]

(c) Babu told the Appellants that "during the robbery, they should beat up [Wan] until he became unconscious". [note: 13] This would ensure that Wan "[would] not know what was happening and … would be unable to identify any of them subsequently". [note: 14]

17 The admissions by Babu in the CSOF incriminated Daniel and Christopher as to their knowledge that in the course of the robbery, Wan would be beaten up until he became unconscious. Babu, who was called as a prosecution witness, refuted the truth of the CSOF when cross-examined and claimed that he had admitted to the CSOF in order to escape the gallows. [note: 15] (Babu was not questioned by the Prosecution during re-examination on his claim that he had admitted to false facts in the CSOF.) In the GD, the Judge ruled that little or no weight should be given to the CSOF against the Appellants (see the GD at [31]).

Prosecution of the Appellants

The charge against the Appellants

18 After their arrest and/or surrender, the Appellants were jointly charged as follows: [note: 16]

That you …

…

on 30 May 2006, between 7.09 a.m[.] and 8.52 a.m., along Changi Coast Road, between lamp posts number 113 and [number] 115, Singapore, in furtherance of the common intention of you all, did commit murder by causing the death of [Wan], and you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code …

The Appellants' statements to the police

19 Each of the Appellants gave a number of statements to the police. In his statements, Bala tried to exculpate himself from the killing of Wan and to pin the blame on Daniel and Christopher instead, alleging that they had beaten Wan up with the baseball bat. In this regard, Daniel and Christopher had, in their first statements to the police, stated that Daniel had beaten Wan up and that Bala had played no part in the assault. In subsequent statements that were recorded after they had been charged with the murder of Wan, and likewise at the trial, both Daniel and Christopher repudiated what they had said in their first statements. In one of his subsequent statements, Daniel explained that he initially thought that he would face a charge of robbery and was thus willing to make his initial admissions in order to shield Bala, who was more than 20 years his senior, so that Bala would not be sent to prison. [note: 17] However, when informed that he faced a charge for the offence of murder, Daniel changed his story and decided to disclose his actual limited role in the robbery. [note: 18] It was

clear, on the evidence, that both Daniel and Christopher were initially not aware that they could have committed the offence of murder.

20 At the trial, the Prosecution sought to adduce all of the Appellants' statements. The Appellants challenged the admissibility of some of the statements on the ground that they were involuntary statements. The Judge held, after a trial-within-a-trial, that all the statements had been voluntarily made and admitted them in evidence. Subsequently, after entering their respective defences, each of the Appellants retracted the incriminating portions of his respective statements.

21 The material portions of the Appellants' statements, as reproduced by the Judge at [23]–[25] of the GD, are as follows:

> ***Statements made by [Daniel]***
>
> 23 … The material portions of [Daniel's] written statements are reproduced below:
>
> **Contemporaneous Statement – 6 June 2006**
>
> About one week before the robbery, I came home [at] about 5 – 6 am after clubbing. At home, I saw Bala and Christopher watching TV in the hall. I asked them why they were not sleeping. Bala told me he was waiting for Babu to call. Bala also told me that Babu gave a "lobang" to take the truck from Cargo Complex [*ie*, CAC]. The truck got handphones. Bala asked me to drive the 24 footer containing the handphones and I agreed. I then lie down on the sofa waiting for Babu's call. At about 6am plus, Babu called the house. Bala answered the phone and Babu said the truck carried laptop so we 'don't do that day'.
>
> After that, we have all been awake around the same timing, waiting at home for Babu's call.
>
> About 2 days after I get to know about the 'lobang', on one afternoon, Bala, Christopher and I were at a workshop in Changi to repair a rented lorry from my uncle Chinnasamy Raman [*ie*, Lorry 9520]. At the workshop, Bala took a wooden stick [*ie*, the baseball bat] and passed it to me. The wooden stick was about the length of my leg. Bala told me to keep the stick in the lorry. I then put the stick under the floor mat of the [p]assenger seat. After the lorry was being repaired, the 3 of us went back home. On the way back to Toa Payoh from the workshop, I asked Bala what the wooden stick was for, Bala said it can be used for the 'lobang'. I understood that the wooden stick will be use to hit the driver of the 24 footer truck.
>
> When I first knew about the 'lobang', I already knew we were going to hit the driver of the 24 footer truck. Bala was the one telling me and Christopher about the plan. This was on the same day I saw them in the living room after I came back from clubbing.
>
> **Investigation Statement – 9 June 2006**
>
> 8 On 30 May 2006 at about 5.00am to 5.30am, I came back home. I knocked on the door and Bala opened the door. When I entered the flat, Christopher was sleeping in the hall. I sat down in the hall and Bala told me to get ready to leave. Bala woke Christopher up and told him to get ready. On that day, I was wearing a pair of jeans. I just change my shirt. At about 5.45am, we left the flat and got into the same lorry that we used to go to the workshop. Bala and I sat behind the lorry. Christopher drove the lorry. Before we moved off, Bala told Christopher to proceed to Cargo Complex. When we were along the PIE near to

Upper Serangoon Exit, I felt like vomiting because I was drinking too much earlier. I slapped the driver side door several times and told Christopher to stop the lorry. Christopher stopped the lorry at the side of the PIE. I got down and sat in the front passenger seat with him. Bala sat behind.

9 We arrived at Cargo Complex at about 6.15am to 6.20am. Bala from behind told Christopher to park the lorry at the parking lot near to the place where the people change their pass to go into Cargo Complex. I think there were no cars in the parking lots. I saw lorry drivers coming out from Cargo Complex, the drivers would stop near to the pass office to change their passes before leaving the complex.

10 After we parked the lorry, I got down from the lorry and walked over to the driver side. I told Christopher that I will drive and told him to move over. He move over to the passenger seat. I got into the driver seat. Shortly after that, Bala came down from the lorry and sat at the front passenger seat.

11 About 10 minutes later at about 6.30am, Babu came in his lorry. I do not know the number. It was a grey colour aluminium cover behind lorry and the front was white colour. He parked his lorry beside near to the passenger side. He wind down the window and told us that the truck number is "815" and said that the company name was "Sterling". At this point, a lorry passed by and the driver pressed the horn and waved at Babu. Babu also waved his hand at the driver. Babu told us that the truck will be like this.

13 A few minutes later, the truck he mentioned came out of cargo complex. Babu said "this is the truck". I saw the company name "Sterling" on the front of the lorry. The lorry number was 815. I cannot remember the letters on the licence plate. The lorry 815 came out and stopped at the traffic light. Immediately, I drove the lorry following the lorry 815. I saw the lorry turn right into the main road outside Cargo Complex travelling [in] the opposite direction of Changi Village. I do not know where the road will lead to. I just followed the lorry. I remembered along the way, Bala was talking to someone over the handphone. I think he was talking to Babu. I heard Bala said we all were following the lorry already.

15 The lorry driver was travelling slowly [at] about 50 to 60km per hour. I followed him very closely, about one lorry length behind the said lorry 815. We followed for quite a distance from Cargo Complex. We followed the lorry for about 5 to 10 minutes when Bala told me to overtake the lorry and parked infront [*sic*] of him. Immediately I swerve the lorry to the right and overtake the lorry. After I passed the lorry, I cut into his path and stepped on the brakes. The lorry I drove stopped. The other lorry 815 also stopped. We stopped at the left side of the road. There were two lanes on the said road.

16 Bala immediately opened the passenger door and got down from the lorry. Bala stood on the grass verge near to the road kerb. Christopher also got down and went around the front of our lorry and stood behind near to the rear right side of the lorry. I still sat in the driver seat looking at the side view mirror to see whether there were any vehicles coming our way. From the right side mirror, I could see the driver of lorry 815 came down and walked towards Christopher. The driver was Chinese. I saw Christopher was pretending to check our vehicle and the lorry for damages. I saw the driver bending down and Christopher was also bending down. They were saying something which I do not know and pointing at certain part of the vehicles. I then heard Bala calling the driver to come over to him to change particulars. I think at this point, by looking at the left mirror, I saw Bala standing on the left side of our lorry somewhere in the middle. I saw him holding the same wooden stick which we got from

the workshop in his left hand. He was trying to hide the wooden stick behind his left leg.

17 Through the mirror, I saw that when the driver walked to Bala, Bala suddenly pulled the front part of the driver's shirt and pulled him. When Bala did this, the driver fell to the ground on the grass verge. I saw that when the driver fell, he was facing the ground and used his hand to stop the fall. The driver then turned around to get up. While he was sitting on the ground about to get up, I saw Bala swing the wooden stick towards the driver. I could not remember whether Bala swing the wooden stick from the left or right side but he was holding the wooden stick with both his hands when he swing it at the driver. The wooden stick hit the driver on the face. I do not know how many times Bala hit the driver as I concentrated myself to look around to see whether any car are passing by[.] About one or two minutes later, Bala shouted at me to come down from the lorry. I came out of the lorry and walked over to where Bala was with the driver. I saw that the driver was lying down on the ground facing the sky. His legs were nearer to his lorry. I saw a lot of blood on his face. The driver was mumbling something and moving his body from slightly side to side. Bala told me and Christopher to carry the driver and put him inside the cabin of the 24 footer. I carried his left leg using my left hand because my right hand was injured. I cannot remember clearly but Bala and Christopher were on either side of the driver. One of them was carrying the driver by his hand and right leg while the other was carrying him up by holding the driver's left hand and back. We carried him up and put him on the floor of the passenger seat of the 24 footer. I do not remember who had opened the door first before we carried the driver. We then pushed him onto the floor of the passenger seat head first and his knees were bent. I do not remember who closed the passenger door. Christopher and I then went around to the driver seat of the 24 footer. Christopher entered the lorry first and sat on the centre part of the front cabin. I also got into the lorry and sat on the driver seat. As I wanted to drive the lorry, I saw that the same wooden stick was on the floor of the 24 footer near to my leg. I drove off the lorry. Before I drove off, I saw Bala got into the driver side of our lorry. I had to put the right signal and overtake the white lorry on the right and moved off. As I was driving, the wooden stick was rolling on the floor[.] I picked it up and put it standing beside me on my left. As I was driving, the driver wanted to get up. I hit him lightly with my left hand on the head about 4 to 5 times, on and off as he wanted to get up. After I hit him the last time[,] [h]e did not try to get up anymore but he was moaning all the way. I drove the 24 footer to Pasir Ris Park near to Costa Sands. I went there because I knew about this place as I had been there several times before at the Chalet nearby.

[Note: There are no paragraphs 12 and 14]

Further Investigation Statement – 10 June 2006

18 I wish to say now that in the past Bala and I had asked "Babu" for financial help. We were short of cash and needed money urgently. When we spoke to him, he also told us that he was in a very bad position and needed money. "Babu" then told us that he would try to find something for us to do so that all of us can settle our money problem. I wish to clarify that I usually asked Bala to lend me money whenever I had money problems. Bala would then call Babu for help and this was usually the reply we get from Babu. I had also received some money from Bala.

19 About one to two weeks before 23rd or 24th May 2006, Bala told me about this "lobang". Bala told me that we can beat up the driver of the lorry carrying handphones from Cargo Complex and then robbed the goods. We did not talk about this anymore.

20 A few days after 23rd or 24th May 2006, at about 9.00pm, Bala, Christopher and I went to the coffeeshop at Blk 125 Lorong 1 Toa Payoh to have some drinks. My friend Povaneswaran was also sitting with us. While we were there, Bala called Babu and asked him to come and meet us at Blk 125 Toa Payoh Coffeeshop to talk about what we are going to do.

21 About 30 minutes later, Babu came to the same coffeeshop and sat with us. We continued drinking beers at the coffeeshop. Shortly after that, Povaneswaran left.

22 Babu then told us how we would carry out the robbery. He told us that we will have to follow the truck from Cargo Complex and stop the driver in between somewhere. We must beat up the driver until he cannot wake [u]p and do not know what is happening. After that we will take his truck. He wanted to know from us, who among us can drive and who were going to do what in the picture. After that Babu said that he will leave it to us on what we need to do in the robbery. Bala replied to Babu to leave it to him on what to do. Bala said that he will tell me and Christopher what to do. Babu told us that the truck is a 24 footer canopy truck carrying handphones. He said that the truck will carry full truckload of handphones and we can sell them for a lot of money. He did not say the amount. Bala then pointed his finger [at] me and told Babu that I will be the one driving the 24 footer lorry. Bala said that he will be the one to whack the driver.

23 Later, Bala said that after the driver cannot wake up, all of us will carry the driver into the 24 footer lorry. Bala said that he wants me to drive the 24 footer lorry and will get Christopher to assist me in the 24 footer in case the driver woke up. Babu then suggested a place to drive the 24 footer to. It was somewhere in Changi. Bala then tried to explain the location to me. I told them that I do not know the place they were talking about. I said I will think about a place to drive the 24 footer to and will tell them later.

24 After that, we continued drinking.

25 At about 11.00pm plus, Christopher and I left the coffeeshop leaving Bala and Babu to continue drinking. Christopher dropped me off at my flat at Blk 179 Toa Payoh and left. I think he went back to join Bala and Babu. I got changed and went to Boat Quay.

Further Investigation Statement – 17 June 2006

71 With regards to paragraph 19, I wish to clarify that this was the first time that I got to know from Bala about the "lobang" or plan to rob the lorry drivers carrying handphones. In the beginning, Bala told me about a plan to just steal the truck carrying handphones when the driver stopped their truck and alight from his lorry to walk to the Pass office to change his pass before going out of Cargo complex. However, this plan was changed just before the incident when Bala, Babu, Christopher and I met at the coffeeshop at Blk 125 Toa Payoh. It was during this meeting that Babu changed the plan and wanted us to beat up the driver of the lorry until he cannot wake up and do not know what was happening. He said that he wanted us to do this because he does not want the driver to recognize us.

Statements made by [Christopher]

24 The material portions of [Christopher's] written statements are:

122(6) Cautioned Statement – 5 June 2006

My role was a driver and I went there to drive the rented lorry. However, I knew that the others would be committing robbery at the place but I have no knowledge that they would beat the person up so badly. I was not with the others who beats the person. I did not even talk to the driver. After everything was over, I drove the lorry with only two pallets of goods to Ang Mo Kio as directed by Bala.

Contemporaneous Statement – 5 June 2006

1 On Monday night, Daniel, Bala and I went to drink beer at a Toa Payoh coffeeshop. About an hour or two [later], Babu came to join us. At that time he told us that on Tuesday morning, there is a lorry from Cargo Complex bringing handphones. Bala asked Babu for the exact timing. Babu told us to meet at 6.30am and he would tell us the vehicle number. Daniel asked Babu what should we do. He told us that we have no choice but to hammer the driver to make him not know what [was] happening. Babu said he would give us cash once the handphones are loaded on his lorry. We drank till 2.00am plus and left the coffeeshop.

Investigation Statement – 12 June 2006

4 On Monday, 29 May 2006 at about 5.00pm plus, I went to Daniel mother's house at Blk 179 Toa Payoh Central. Daniel and Bala were there. At about 8.00pm, Bala suggested that we go to the coffeeshop at Blk 125 Toa Payoh to have some drinks. We drove to the said coffeeshop. Along the way, Bala told me and Daniel that Babu is coming to the same coffeeshop to meet us. We arrived there not long after 8.30pm. We started drinking.

5 Sometime around 9.00pm to 10.00pm, Babu came. While we were having drinks, Babu told Bala that handphones are being taken out from Cargo Complex. Bala then asked Babu how Babu wanted it to be done. At this point I do not understand what they were talking about. I think they must have discussed this earlier. Babu instructed Bala saying "*Tomorrow morning, handphones is being delivered from the lorry from Cargo Complex. We should somehow take the phones. If we take it, there is good money*". Bala replied "*how is it to be done*". Babu replied "*Come at 6.30 in the morning at Cargo Complex. I will come there, I will show the lorry to you. Once the lorry leaves the place, tail him from behind, see a good spot and to knock his lorry on the side. He will then stop the lorry. He will then alight from the lorry and inspect the damage. When he is inspecting the damage, beat him up until he becomes unconscious*". Bala then asked Babu, "*Why the driver has to be beaten up until he was unconscious. Why can't we just blindfold, gagged and tie him up*". Babu replied "*This is risky. He should not know what is happening to him. There will be a lot of vehicles passing by. Once he becomes unconscious, put him back into the lorry and drive him to the spot where I will mention in the morning*."

6 Bala then asked Babu that if we were to carry out what he said how much money we are going to get. Babu replied that he does not know what kind of handphones is being delivered. He said that if Bala were to take the handphones and passed them to Babu, Babu would give him a certain amount of money the following day. Babu said that at the spot which he will mention later, the pallets have to be transferred into his (Babu's) lorry and after that, we can leave. After that, all of us continued drinking. We were at the coffeeshop until about 1.00am. Before we left the place, Bala told Babu to meet at Cargo Complex at 6.30am that same morning. Daniel, Bala and I then went back to Blk 179 Toa Payoh and slept there for the night. Babu went home.

7 While we were in the flat, I told Bala that I was not comfortable about joining them to

commit the robbery. Bala told me that I do not have to do anything. He told me that I would just have to drive the rented lorry from Changi to Blk 645 Ang Mo Kio and wait for him there. He did not tell me anything more. After that, Bala told Daniel saying "*What you are going to do is, you will drive the lorry from Cargo Complex and tail the lorry. I will tell you at a certain spot to knock the lorry. You will then knock the lorry. When he (the driver) is inspecting the damage, I will hit him. He (the driver) will fall down immediately, carry the driver and put him in the lorry. After that, you drive the lorry carrying the phones and drive the lorry to the spot where Babu mentions*.["] Bala then told me "*You then drive the rented lorry from the spot mentioned by Babu and drive it to Ang Mo Kio*." I agreed to follow them since my role is only to drive the rented lorry as directed by Bala.

8 At about 6.00am, Daniel woke me up from sleep. He told me that it was 6.00am. I washed my face and after that, together with Bala and Daniel, we went downstairs to the lorry that was parked at the side main road. I went to the driver seat and at this point, I noticed a baseball bat [*ie*, the baseball bat] tucked behind the passenger seat. It looks like dark brown or black in colour. This is the first time that I notice the baseball bat in the lorry. I drove the lorry. Daniel and Bala sat behind the lorry.

9 While I was driving along the PIE just after the Kallang Way Exit, Daniel used his can of beer and knocked on the side of the lorry. He told me to stop the lorry. I parked the lorry at the side of the PIE. He came down from the lorry and sat at the passenger seat. After that, I continued driving. I then asked Daniel "*what is this*" and pointing to the baseball bat. He pulled up the baseball bat and just replied "*Baseball bat*". I asked him "*Why, to beat up the man or what*?" and he replied "*Yes*". I asked him where he took the baseball bat from. Daniel told me that he got the baseball bat from the workshop at Upper Changi Road. Bala had taken it and put it inside the lorry. The baseball bat was about 1 meter in length (about the height of this table). One end of the bat was slim and about half the length of a computer diskette in diameter. The diameter for the other end was bigger, slightly more than the length of a computer diskette.

...

53 I only knew that we are going to commit robbery. My family is having financial difficulties. My father had just suffered a stroke. I needed money. I did not beat up the Chinese man. What I told the man was just go and speak to my "uncle", Bala. I did not know that he would be beaten up to this extent.

Further Investigation Statement – 19 June 2006

56 With regards to paragraph 9, I wish to delete the sentence "I asked him "Why, to beat up the man or what?" and he replied "yes".

...

Q7 Do you know what is going to happen to the driver when you asked the driver of [Lorry] 815 to go over to Bala?

Ans7 I know that he was going to be beaten up by Bala. However, I did not think that he would be beaten up at that spot.

...

Q16 Is there anything else you wish to say?

Ans16 What I wanted to say is that, when I followed them and even when I was at Pasir Ris Carpark, I did not know that I was going to take the two pallets to Ang Mo Kio. Earlier on, what they told me was to take the lorry to Ang Mo Kio. They did not tell me that I will be carrying stolen goods. I thought that I would be just sending them there and come back. Just for driving the vehicle, I am now facing a murder charge. I did not get anything from the robbery. I feel very sorry about what happened to the victim [*ie*, Wan]. It was just to beat him unconscious. I did not expect that he would be beaten to the extent that he would die. I feel sorry that this incident had taken place.

Statements made by [Bala]

25 The material portions of [Bala's] written statements are:

Investigation Statement – 12 June 2006

10 A week after this session, in May 2006, Babu asked me to meet him at the coffeeshop at Blk 73 Toa Payoh Lorong 4. I then brought along Daniel with me. I had told Daniel that Babu would be giving me the full details and how much each of us would get from the loots. I had already informed Daniel as to what items we were going to steal. We met Babu around 4.00 pm at the coffeeshop and we have 'Guinness' stout drinks. During the drinks, Babu told us that it was a very good 'lobang' and each of us could make about S$50,000/=. He also told us that when the driver was changing his pass, we should drive away his lorry and unload the cargo onto Babu's lorry at a deserted place. Daniel then told Babu to give all the details to me and left the place. He said he would find out all the details from me. After Daniel left, Babu told me that both he and I would go to Changi cargo complex [*ie*, CAC] to view and survey the place regarding the movements of the vehicles. Before we left the coffeeshop, Babu had also told me that during the theft should the driver try to stop our driver, then we should push the driver away or punch him. Around 7.00 pm, Babu and I left the coffeeshop. The following morning Babu picked me up in his lorry bearing registration number something like GM 3452 or GM 3542 from the carpark at Blk 73 Toa Payoh. As I was leaving the house, Daniel's friend Christopher asked me as to where I was going. The previous night, he came to stay at Blk 179 Toa Payoh after the church session along with Daniel. I told Christopher that I was going towards Changi and he came along. I did not mention anything to Daniel since he was sleeping after some drinks the previous day.

11 When I met Babu at 5.30 am, I introduced Christopher to him as Daniel's friend. Babu did not mention anything. Whilst travelling to Changi midway, I told Christopher that we were going to Changi cargo complex to survey the place. When Christopher asked me as to why we were going there to survey, I told him we were going there to do the surveying as we were planning to commit theft later from the lorry. I told him because I trusted him that he would not tell anyone. At that time, Babu and I did not have the intention to include Christopher in our group to commit the theft. We reached the cargo complex at about 6.00 am and Babu had parked his lorry at the parking bay about 40-feet from the pass office. Babu showed me the three yellow coloured lorries with the logo of 'Sterling' company leaving the cargo complex at intervals of about 20 minutes. He then pointed to the first lorry and told me that I cannot do anything to that lorry with an attendant. The driver of the first lorry was a male Indian and his lorry attendant was a male Chinese. They changed their passes at the checkpoint and left. When the second lorry arrived to change the pass, I noticed the driver was a male Chinese and there was no attendant to this lorry. Babu then

told me that perhaps the second lorry may carry goods and one of us could drive the lorry from the pass-office and go away with the goods. When the third lorry came, I noticed the driver was a male Indian and there was no attendant also in that lorry. Babu said that perhaps this lorry may also carry goods and one of us could drive the lorry from the pass-office and go away with the goods. I did not notice the registration number for all the three lorries. Babu had told me only out of these three lorries, that either the second or third would be our target and that we would have to look for. He did not mention about any other lorries. All these while, Christopher was beside us watching as to what we were doing. He did not mention anything. Babu and I did the survey until 7.00 am. Babu then drove us back to Blk 73 Toa Payoh coffeeshop. Babu said he would contact me later and let me know when to do.

12 Christopher did not utter anything until at night when we were having a drinking session with Daniel at home. Daniel asked me as to what happened about the survey and I told him everything was 'ok'. Christopher then told Daniel that everything so simple and that he wished to participate. I then told Christopher that only Daniel and I were sharing at $50,000/= each. I also told Christopher that I would first find out from Babu as to how much the entire loot would work out to before we could include Christopher in the matter. Christopher then told me to find out and let him know later. The same night at about 11.00 pm, I called Babu from Christopher's handphone to find out whether we could really make money out of the loot, or otherwise I did not want to get involved. Babu then replied saying that the minimum sum all three of us, meaning Daniel, Christopher and myself could make would be a minimum sum of S$150,000/=, if not more. Babu was not bothered as to how many of us were involved in doing it and that he would pay a minimum of S$150,000/=. He also said that he would pay more if he could get more. I did not mention to Babu that I was going to involve Christopher in the matter. At about midnight, we never talked about the matter again since Daniel's mother Rachael came home.

…

15 After we had done this survey at the Changi cargo complex, Daniel sent his car to Changi Road. We followed him in our lorry GM 9520 [*ie*, Lorry 9520] and Christopher was driving the lorry. After giving the car for servicing, Daniel picked up a discarded pole [*ie*, the baseball bat], in the size of a cricket bat, from the workshop and brought [it] to the lorry. He placed the pole underneath the passenger's seat, beside the driver. Christopher and I saw this. I asked him why he needed that and he said it could be of use one day. Christopher then drove us back home.

16 On 29 May 2006 at about 9.30 pm, Christopher called me at home and told me that Babu wanted to meet all of us at the coffeeshop at Blk 125 Toa Payoh Lorong 1 [at] around 10.00 pm. Christopher also said that Daniel, his friend Shanker and Christopher were already there and asked me to join them. When I arrived at the coffeeshop, Babu had not come yet. Daniel's friend Shanker who was at the coffeeshop earlier left the coffeeshop when his mother passed by. This was before Babu arrived at the coffeeshop. At the coffeeshop, we had 'Guinness' stout and 'Heineken' beer. Babu gave me S$300/= from which I paid for the drinks. During our drinking session, Babu told us that we can do the loot on the following morning at 5.30. Babu said he would call us again the following morning to confirm and asked us to be ready. Babu said he already knew one of the yellow coloured lorries was carrying either handphones or laptops. He further said he wanted to confirm which lorry was carrying these items before he could confirm with us. He also further told us that we could go with it if the lorry was either carrying handphones or laptops. After this, Daniel left with an Indian

girl who had just come there to see Daniel. After Daniel left, Babu asked me should we fail in our attempt to drive away the lorry, what would I do. I then told him I had no idea. Babu then suggested that we block his lorry and ask the driver of the lorry whether he had borrowed money from the moneylender 'ah long'. When the driver comes down from the lorry to answer, we should then scotch-tape his mouth, both his hands and legs, and take him along in the lorry in the front cabin, and drive away his lorry. Babu then said he would follow us in his lorry and after the unloading had been done, we could leave the lorry and driver somewhere and go away. All these serious matters were discussed during the drinking session that night after Daniel left. Christopher was with me during the discussion.

Further Investigation Statement – 13 June 2006

Q3 Reference to paragraph 10 of your previous statement, you mentioned in the said statement '*Before we left the coffeeshop, Babu had also told me that during the theft should the driver try to stop our driver, then we should push the driver away or punch him*'. Could you tell me more about this incident?

Ans3 Babu told me to push the driver away or punch him if the driver tried to stop us. Later, I told Daniel and Christopher the same as what Babu said.

Q4 Reference to paragraph 15 of your previous statement, you mentioned in the said statement '*After giving the car for servicing, Daniel picked up a discarded pole, in the size of a cricket bat, from the workshop and brought [it] to the lorry. He placed the pole underneath the passenger's seat, beside the driver. Christopher and I saw this. I asked him why he needed that and he said it could be of use one day*'. Could you tell me more about this incident?

Ans4 When Daniel told me that the wooden pole could be of use one day, I knew that he wanted to use it during the handphone theft.

[emphasis in original]

The trial in the court below

The case for the Defence

The case put forth by Bala

22 As Bala has decided not to proceed with this appeal in so far as his conviction is concerned (see [46]–[47] below), we shall not, in this judgment, reproduce the material parts of his submissions in the court below. We shall, instead, only set out the Judge's summary of these submissions, which was as follows (see the GD at [30]):

> [Bala] admitted that he struck [Wan] with the baseball bat. Counsel submitted that the defence of [Bala] was as follows:
>
> (a) there was no intention to commit murder and to cause the death of [Wan] as the plan was to rob [Wan] of the 2,700 handphones;
>
> (b) there was a sudden fight between him [*ie*, Bala] and [Wan] near the grass verge of Changi Coast Road which arose when [Wan] provoked [Bala] with abusive [language] and

expletives which led to [Bala] … assaulting [Wan] which are [*sic*] within the Exceptions 1 and 4 of Section 300 of the Penal Code …

The defence also contended that it was not within the contemplation of all three accused persons [*ie*, the Appellants] to use the baseball bat to assault Wan and to cause him serious injury. It was also submitted that certain police statements (exhibits 251, 255 and 257) made by [Bala] ought to be disregarded as: the statements were not verified by [Bala]; the statements were not recorded with the assistance of an interpreter; the statements were paraphrased by the recording officer and in some instances, the recorder even used words of his own; and/or the recorder did not administer a warning that the statements were recorded in the course of a murder investigation. Counsel urged the court to acquit [Bala].

The case put forth by Daniel

23 Daniel's submissions on the facts at the trial, as summarised by the Judge in the GD, were as follows:

26 [Daniel] stated in court that sometime in May 2006, [Bala] told him of a plan to "take away" a lorry carrying handphones and laptops out from CAC. He agreed to be part of the plan as he was then in financial straits. [Daniel] testified that the original plan was to simply steal the lorry while the lorry driver was changing his pass at the CAC pass office. This plan however failed when [L]orry 815 did not stop at the pass-office.

27 According to [Daniel], after [L]orry 815 failed to stop at the pass-office, [Bala] instructed him to tail the lorry. Somewhere along Changi Coast Road, [Bala] told him to overtake and intercept [L]orry 815. [Daniel] complied. After both [L]orry 815 and [L]orry 9520 had come to a stop, [Daniel] remained in his lorry while [Christopher] and [Bala] alighted. It was through the left side mirror that [Daniel] saw [Bala] holding a baseball bat [*ie*, the baseball bat] and then striking [Wan] once on the face using the bat. [Daniel] stated that he did not question [Bala] when he was told to tail the 24-footer from the Cargo Complex as [Bala] was elder to him and that he did not do anything to stop [Bala]'s assault on [Wan] as he was shocked.

28 [Daniel's] counsel submitted that the only plan [Daniel] was privy to was the plan to snatch [Wan's] lorry at the CAC pass-office and "there was no pre-arranged plan to beat up [Wan] till he was unconscious". It was further submitted that the Prosecution had adduced no evidence to show that [Daniel] had a common intention with [Christopher] and [Bala] to cause grievous bodily harm to [Wan]. …

24 In relation to the law, the material portions of Daniel's written submissions in the court below were as follows: [note: 19]

13. There is no doubt in the present case that there was no pre-arranged plan to beat up [Wan] till he was unconscious. …

…

19. [Babu], a Prosecution witness has testified that there was no pre[-]plan in the Toa Payoh coffeeshop to assault [Wan] until he was unconscious. He admitted and pleaded guilty to the [CSOF] to escape the murder charge. And [Bala] has also testified that there was no common intention to beat up [Wan] till he was grievously hurt or unconscious.

20. [Daniel] and [Christopher] have testified that there was no common intention to best [*sic*] up [Wan] till he was unconscious or cause him grievous bodily harm.

21. The fact [that] the baseball bat had been placed in the lorry does not mean that there was a common plan among the [Appellants] to beat up [Wan] and cause him grievous bodily harm. In ***Regina and Powell [1999] 1 AC*** … at page 5 at paragraph B, it is stated :–

> ***" To secure his conviction for murder the Crown would at the very least have to establish that the secondary party possessed an intent to cause serious bodily harm and that only if foresight is virtually certain can it be evidence from which a jury can infer intent. The line of authority stemming from Chan Wing-Siu v. The Queen [1985] A.C. 168 serves only to blur the distinction between foresight and intention. [Reference was also made to Reg. v. Smith (Wesley) [1963] 1 W.L.R. 1200, 1206; Reg. v. Barry Reid (1975) 62 Cr.App.R. 109, 112; Reg. v. Hancock [1986] A.C. 455; Reg. v. Slack [1989] Q.B. 775 and Reg. v. Smith [1988] Crim. L. R. 616.]***
>
> ***The mens rea of a defendant may be proved by either proof of participation in a joint enterprise having the requisite character or by proof of a specific intent. Where proof of participation in the joint enterprise in the course of which the relevant act was done is considered to prove the mens rea appropriate to a lesser crime, only the lesser crime will have been proved against the defendant, although the act may have involved the commission of the more serious crime by another against whom a specific intent can be proved: see Reg. v. Stewart and Schofield [1995] 1 Cr.App.R. 441 ."***

And at [p]age 7, last paragraph, it is stated :–

> ***" The starting point for the consideration of this question is the principle that if the principal and the secondary party agree on a common design and the principal "deliberately and substantially" varies from the common design, then the secondary party will not be liable: see Foster, Crown Cases, (1762), p. 369 ."***

At page 8, paragraph B, it is stated :

> ***" The adoption by one defendant, unknown to another, of a qualitatively different and fatal means of carrying out the joint intent takes the fatal blow outside the joint enterprise: see Reg. v. Price (1858) 8 Cox C.C. 96 ."***

And at page 15 at paragraph B, it is stated :–

> ***" Lord Windlesham, writing with great Home Office experience, has said that a minority of defendants convicted of murder have been convicted on the basis that they had an intent to kill: "Responses to Crime." Vol. 3 (1996) at page 342 n. 29. That assessment does not surprise me. What is the justification for this position? There is an argument that, given the unpredictability [as to] whether a serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction of murder in the event of a death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental***

element of murder results in defendants being classified as murderers who are not in truth murderers. It happens both in cases where only one offender is involved and in cases resulting from joint criminal enterprises. It results in the imposition of mandatory life sentences when neither justice nor the needs of society require the classification of the case as murder and the imposition of a mandatory life sentence **."**

[underlining and emphasis in bold italics in original]

25 To sum up, Daniel's defence was, in essence, that there was no common intention among the Appellants to use the baseball bat to assault or cause grievous bodily harm to Wan. The placing of the baseball bat in Lorry 9520 *per se* did not point to there being such a common intention; at least, Daniel had no such intention. Bala's assault on Wan with the baseball bat was not in furtherance of the Appellants' common intention to rob Wan, and it also exceeded the scope of that common intention. This defence was rejected by the Judge.

The case put forth by Christopher

26 Christopher's submissions on the facts at the trial, as summarised by the Judge, were as follows (see the GD at [29]):

> [Christopher] testified that he was not privy to the plan to rob the lorry carrying the [Cargo] and that he was merely an ignorant replacement driver. This assertion was corroborated somewhat by [Bala] who testified in court that [Christopher] was a last minute replacement for one "Shankar" who was supposed to be involved in the plan but who could not wake up that particular morning. [Bala] added that [Christopher's] role was only to send [Daniel] and [Bala] to CAC and nothing more. The reason why [Christopher] made the various incriminating police statements was because during their time in police custody, [Daniel] had disclosed to [Christopher] the contents of his police statements and in his confused [state] of mind, [Christopher] decided to give an account that tallied with [Daniel]'s.

27 In respect of the law, the material portions of Christopher's written submissions in the court below were as follows: [note: 20]

> 15. The Defence is in material agreement with the Prosecution's summation of the law. It is accepted that the pronouncements of the [CA] with regard to the law on common intention in ***Too Yin Sheong v Public Prosecutor*** **[1991] 1 SLR 682 ("*Too*")** have been accepted in the [CA's] decision in ***Public Prosecutor v Lim Poh Lye and another*** **[2005] 4 SLR 582 ("*Lim*")**.
>
> 16. It is humbly submitted that the existence of a pre-arranged plan must be established beyond a reasonable doubt to demonstrate common intention between the accused persons.
>
> …
>
> 18. … [W]e respectfully refer this … Court to ***Criminal Law in Malaysia and Singapore*** **, Yeo, Morgan, and Chan**, LexisNexis, 2007, Chapter 35, Joint Liability (**"*Criminal Law in Malaysia and Singapore*"**) at page[s] 819–820 where the learned authors state as follows:
>
> > " ***It is submitted that in the interest of striking a balance between the need to deter group crimes and the principle that an offender should not be punished beyond his or her personal culpability, subjective foresight by the secondary party of the collateral offence being committed should be insisted upon as the basis for his or her liability*** . *A*

degree of injustice is present in this compromise since a person may be convicted of an offence even if he or she did not possess the fault element for it, but this may be unavoidable in order to deter group crimes. The other meanings put forward for 'in furtherance of the common intention' will extend constructive liability for crimes committed by others too far." **[Emphasis added]**

19. Finally, it must be established beyond a reasonable doubt that an accused person participated, whether actively or passively, before liability under Section 34 of the Penal Code can be attracted. However, at this juncture, we respectfully refer this … Court to ***Criminal Law in Malaysia and Singapore*** at page 815 where the learned authors state as follows:

"*It is submitted that a better approach is to recognise that participation in the offence is the key ingredient for imposing joint criminal liability under s 34. Presence at the offence is neither required by the wording of s 34 no[r] is it a good proxy for participation*. ***It should be a question of fact in each case whether the accused had participated to a sufficient degree such that he or she is deemed to be blameworthy as the principal offender*** *...*" **[Emphasis added]**

20. It is humbly submitted that the learned authors of ***Criminal Law in Malaysia and Singapore*** are advocating a considered and balanced approach in the administration of the law on common intention which will properly calibrate culpability and punishment. This … Court is humbly invited to adopt such a view and not overextend the law on common intention. In this regard, it is accepted that each case will ultimately turn on its own specific facts.

…

35. It is humbly submitted that Christopher did not know that the bat [*ie*, the baseball bat] would be used upon observing the bat in [Lorry 9520] on the morning of 30 May 2006.

…

49. It is humbly submitted that there is a wealth of evidence suggesting that it would be unreasonable for the Prosecution to assert that Christopher knew of the plan to rob beyond a reasonable doubt. In fact, the evidence of Daniel and Bala adds weight to Christopher's plea that he had no knowledge of any pre-arranged plan.

…

62. It is humbly submitted that Christopher played a minor role in these entire proceedings. Christopher was simply an ignorant replacement driver who did as he was told by Bala.

63. While it is suggested that confederates who play passive roles in the criminal act can attract liability under Section 34 of the Penal Code, it is humbly submitted that this … Court can look to the actual level of this knowing participation before imposing liability similar to that of the principal offender in this case. It is respectfully submitted that it would be unreasonable for the Prosecution to suggest that Christopher's alleged passive participation should attract the same level of culpability when his actions neither facilitated nor promoted the offence.

[emphasis in italics, in bold and in bold italics in original; underlining in original omitted]

28 To sum up, the defence of Christopher was, in essence, that his being privy to a pre-arranged

plan (along with Daniel and Bala) to rob Wan had not been proved beyond reasonable doubt. He (Christopher) did not have prior knowledge of any such plan as he had merely been "an ignorant replacement driver"; [note: 21] he did not play an extensive role in the robbery; and he did not have subjective foresight that Bala might likely assault Wan and cause his death. These arguments were rejected by the Judge.

The case for the Prosecution

29 We turn now to the Prosecution's case at the trial. In this regard, we shall set out the more important parts of the opening statement and the closing submissions made by the Prosecution, with our comments on the Prosecution's various arguments interspersed in between.

30 The material portion of the Prosecution's opening statement at the trial was as follows: [note: 22]

> At this trial the [P]rosecution will adduce evidence to show beyond reasonable doubt that one or more of the [Appellants] had, in furtherance of the common intention of them all to rob [Wan] of the [Cargo], caused his death by intentionally inflicting head injuries on him and that the head injuries inflicted were sufficient in the ordinary course of nature to cause [Wan's] death.

31 The above submission rests on the proposition that where A, B and C have a common intention to rob D, and C, in furtherance of that common intention, intentionally inflicts fatal injuries on D, s 34 will apply to make A and B constructively liable for the offence arising from the criminal act committed by C (the actual doer). It may also be noted that, based on the above submission, A and B need not themselves have participated in the criminal act done by C (*ie*, the inflicting of fatal injuries on D) before they can be held constructively liable for the offence resulting from that criminal act.

32 The Prosecution, however, took a different stance on the participation element of s 34 in closing its case at the trial. The material paragraphs of the Prosecution's written closing submissions dated 24 January 2008 ("the Prosecution's written closing submissions") read as follows: [note: 23]

> **C. THE LAW**
>
> **Elements of the charge**
>
> 3. The Prosecution is proceeding against the [Appellants] on a joint charge of murder constituted under section 300(c) of the Penal Code … It is submitted that the essential elements of the joint charge against the [Appellants] are as follows:
>
> (a) The [Appellants] shared a common intention;
>
> (b) The criminal act that was perpetrated (i.e. murder) was in furtherance of the common intention of them all; and
>
> (c) ***The [Appellants], [who are] sought to be held liable under section 34 of the Penal Code, have in some way participated in the criminal act*** .
>
> **Murder**
>
> …

5. The [CA] in ***Public Prosecutor v Lim Poh Lye and another*** [2005] 4 SLR 582 (" ***Lim Poh Lye*** ") at [22] and [23] reaffirmed that for an injury to fall within the ambit of section 300(c) of the Penal Code, it must be one which, in the normal [course] of nature, would cause death and must not be an injury that was accidental or unintentional, or that some other kind of injury was intended. Whether a particular injury was accidental or unintended is a question of fact which has to be determined in light of the evidence adduced and taking into account all the surrounding circumstances of the case. If the accused intended to inflict what, in his view, was an inconsequential injury, where that injury is in fact proved to be fatal, he would be caught by section 300(c).

…

Common Intention

9. Sections 33 and 34 of the Penal Code [state]:

> *33. The word 'act' denotes as well a series of acts as a single act; the word 'omission' denotes as well a series of omissions as a single omission*.
>
> *34. When a criminal act is done by several persons, in the furtherance of a 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*.

10. It is not incumbent upon the Prosecution to show that the common intention of the accused was to commit the offence [with] which they are charged. What is required is that the criminal act was done in furtherance of their common intention. The accused must be physically present at the actual commission of the offence. ***There must be actual participation in the offence, whether active or passive*** . Presence for the purpose of facilitating or promoting the offence is tantamount to actual participation in the offence: ***Public Prosecutor v Gerardine Andrew*** [1998] 3 SLR 736, ***Too Yin Sheong v Public Prosecutor*** [1999] 1 SLR 682 (" ***Too Yin Sheong*** "), ***Lim Poh Lye*** .

11. Thus, it is trite law that the Prosecution does not have to prove that there exists, between the accused persons who are charged with an offence read with section 34 of the Penal Code, a common intention to commit the crime actually committed: ***Wong Mimi v Public Prosecutor*** [1972–1974] SLR 73 [*ie*, *Mimi Wong (CCA)*] and ***Public Prosecutor v Neoh Bean Chye*** [1972–1974] SLR 213. This principle has been endorsed and reaffirmed by the [CA] in ***Lim Poh Lye*** .

12. In ***Too Yin Sheong*** , the [CA] discussed the ambit of section 34 of the Penal Code extensively and noted that:

> *27* ***Section 34 was framed to meet a case in which it may be difficult to distinguish between the act of individual members of a party or to prove exactly what part was played by each of them*** . *The reason why all are deemed guilty in such cases is, the presence of accomplices gives encouragement, support and protection to the person actually committing the act. In Bashir v State of Allahabad (1953) Cri LJ 1505, it was said that the limb 'in furtherance of a common intention' was added to make persons acting in concert liable for an act [which], though not exactly intended by them, … has been done in furtherance of their common intention. We will now discuss the elements of s 34 under the [following] headings of (i) the common intention of all, (ii) in furtherance of the common intention and (iii) participation in the criminal act*. (**emphasis added**)

13. The [CA] explained the ambit of the phrase "common intention" as:

> *28 Common intention implies acting in concert, the existence of a pre-arranged plan. In Mahbub Shah v King-Emperor AIR 1945 PC 118, the Privy Council said*:
>
> > *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 prearranged plan. As has 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*.
> >
> > *It was also emphasised that care should be taken to distinguish common intention from a same or similar intention. There has to be a prior meeting of minds to form a pre-arranged plan. In Bashir, the High Court of Allahabad noted that the common intention should be inferred from the whole conduct of all persons concerned, and not from an individual act actually done*.
>
> *29 From Wong Mimi & Anor v PP [1972–1974] SLR 73; [1972] 2 MLJ 75 and PP v Neoh Bean Chye [1972–1974] SLR 213; [1975] 1 MLJ 3 , it has been held that it is not incumbent upon the prosecution to show that the common intention of the accused was to commit the crime [with] which they are charged*. ***It is the intention of the doer of the criminal offence charged that is in issue, and when s 34 applies, the others will be vicariously or constructively liable for the same offence. In other words, the participants need only have the mens rea for the offence commonly intended. It was not necessary for them to also possess the mens rea for the offence [with] which they are actually charged*** . *In Krishna Govind Patil AIR 1963 SC 1413, it was held that a pre-arranged plan may develop on the spot during the course of the commission of the offence, but the crucial circumstance is that the said plan must precede the act constituting the offence*. (**emphasis added**)

14. The [CA] also went on to explain what the phrase "in furtherance of the common intention" meant:

> *31 In Asogan Ramesh s/o Ramachandren v PP [1998] 1 SLR 286, it was stated that common intention invoked under s 34 was a wide principle whereby joint liability for a crime can be imputed to several accused if the circumstances justified it. However, it was imperative that the criminal act complained of was committed in furtherance of the common intention. The [CA] referred to Mahbub Shah, wherein it was held that to convict an accused of an offence under s 34, it must be proved that the criminal act was done pursuant to the prearranged plan. In other words, the criminal act complained against was done by one of the accused [persons] in furtherance of their common intention*.
>
> *32 From Mimi Wong, it is clear that for s 34 to apply, the intention of the doer which is imputed to his confederates must not be inconsistent with the carrying out of the common intention*.
>
> *33 Ratanlal & Dhirajlal's Law of Crimes (1997 Ed) at p 122, para 28, describes three categories of acts done in furtherance of a common intention*. ***Firstly, the act which is directly intended between all the confederates. Secondly, the act which the circumstances of the case leave [in] no doubt … that though the act was not directly***

intended between them[,] … [it] was taken by all of them as included in the common intention. Thirdly, the act which any of the confederates commits in order to avoid or remove any obstruction or resistance put up in the way of the proper execution of the common intention. In doing the third type of act, the individual doer may cause a result not intended by any other of the confederates *. It is difficult to prove the intention of an individual since it is subjective. In most cases, it has to be inferred from his act or conduct or other relevant circumstances of the case. The totality of the circumstances must be taken into consideration in arriving at the conclusion*. (**emphasis added**)

15. On the requirement of "participation in the criminal act", the [CA] had this to say:

35 ***It is the essence of s 34 that the person must be physically present at the actual commission of the crime in question for the section requires the criminal act to be done by several persons. Physical presence must be coupled with actual participation*** *. This has been conclusively established in PP v Andrew Gerardine [1998] 3 SLR 736 . In that case, Gerardine had incited two others to attack her landlady. During the attack, her landlady was stabbed to death. Gerardine was charged with murder under s 302 read with s 34 of the Penal Code … The trial judge convicted her of culpable homicide not amounting to murder. The prosecution appealed and the [CA] allowed the appeal. Gerardine had not been in the flat when the attack occurred. She was in fact outside the flat at the staircase landing*. ***The requirement is for physical presence at the actual commission of the offence, not physical presence at the immediate site [where] the commission of the offence took place*** *. The very nature of s 34 demand[s] a closer association with the actual commission of the offence, as compared to abetment where the person is punished for aiding or abetting the princip[al]*. ***There ha[s] to be actual participation, whether active or passive*** *. Regarding passive participation, the [CA] referred to Barendra Kumar Ghosh v Emperor AIR 1925 PC 1, where Lord Sumner said, 'it is to be remembered that in crimes as in other things they also serve who only stand and wait.'*

36 In Lim Heng Soon & Anor v PP [1969–1971] SLR 89, *[1970] 1 MLJ 166 , Wee Chong Jin CJ said that for s 34, every person who participates in the commission of that criminal act would be liable as if he had committed that act all by himself, irrespective of the fact that he might have only played a small role in the commission of the act*.

37 In Om Prakash v State AIR 1956 All 241, it was held that presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act. The court cited the example where a person who is an eye-witness of the incident is present at the spot as well as [the example of] a person who is a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime. On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. The following observations of Mookerjee J in Barenda Kumar Ghosh were held relevant:

> *It is the expectation of aid in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence*.
>
> *It is therefore sufficient to hold a party [liable] as principal, if it is made to appear that*

> *he acted with another in pursuance of a common design; that he operated at one and the same time for fulfillment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise*.
>
> *Thus, it is clear that the potential utility of a person present as a guilty confederate at the scene of the crime cannot be underestimated. Further, the word 'criminal act' in s 34 is used in the broadest sense, for s 33 states that it may include a series of acts or a single act. Beg J in Ohm Prakash stated that the words would cover any word, gesture, deed or conduct of any kind on the part of a person, whether active or passive, which tends to support the common design*. (**emphasis added**)

[underlining, emphasis in italics, emphasis in bold and emphasis in bold italics in original; emphasis added in bold italics with underlining]

33 As can be seen from para C.3 of the above extract from the Prosecution's written closing submissions, the Prosecution, in closing its case at the trial, took the position that participation by A and B in the criminal act done by C (*ie*, the inflicting of fatal injuries on D) was necessary before A and B could be held constructively liable for the offence resulting from C's criminal act. This submission by the Prosecution clearly contradicted the position set out in its opening statement, which did not mention that participation by Daniel and Christopher in the criminal act giving rise to the offence which they were charged with was necessary.

34 Confusingly, in its oral closing submissions, the Prosecution appeared to revert to the position set out in its opening statement when it contended: [note: 24]

> [D]espite [the] plethora of evidence presented, [Daniel] continuously harp[ed] on the issue that there was no plan to assault [Wan] … with the baseball bat. … [W]ith respect, *the Prosecution's case against the [Appellants] does not stand or fall on the ability of the Prosecution to prove whether there was a plan to assault [Wan] with the baseball bat*.
>
> … [T]he critical ingredients that the [P]rosecution is required to prove are as follows:
>
> Firstly,
>
> (A) Does the evidence show that the [Appellants] shared a common intention to commit robbery? …
>
> Now secondly,
>
> (B) If the answer to … (A) is "Yes", did [Bala] strike [Wan] with the baseball bat on the head in order to *facilitate* the robbery that was intended by the [Appellants?] …
>
> And (C), if the answer to … (B) is "Yes"[,] then the law as it stands … is that [Daniel] and [Christopher] are liable under section 34 of the Penal Code for the criminal act, in other words, murder, in this case, caused by [Bala] *as it was done in furtherance of the common intention to commit robbery*.

[emphasis added]

The above submission clearly indicates that, according to the Prosecution, participation by Daniel and

Christopher in the criminal act done by Bala which gave rise to the offence charged (*ie*, the criminal act of assaulting Wan) was not a requirement for the purposes of imposing constructive liability on Daniel and Christopher under s 34 as Bala had committed that criminal act "in furtherance of the common intention" [note: 25] of all the Appellants to rob Wan.

35 Thus, it appears that the Prosecution's final position at the trial was that even though Daniel and Christopher had not participated in the criminal act done by Bala which gave rise to the offence charged, they could be held constructively liable for that offence pursuant to s 34 because Bala had done the criminal act giving rise to that offence in furtherance of the Appellants' common intention to rob Wan. In the Prosecution's view, Bala's assault on Wan was in furtherance of the Appellants' common intention to commit robbery as it "facilitate[d]" [note: 26] the robbery in terms of its execution and/or its successful accomplishment (*eg*, presumably, it enabled the Appellants to avoid being identified by Wan and to escape after removing the Cargo from Lorry 815). Based on the Prosecution's approach as described in this paragraph, for the purposes of imputing constructive liability to secondary offenders pursuant to s 34, there does not need to be a common intention between C (the actual doer) and A and B (the secondary offenders) to commit the criminal act done by C which gives rise to the offence that A, B and C are charged with; all that is required is that the criminal act committed by C is in furtherance of and is not inconsistent with the criminal act commonly intended by A, B and C. This proposition is said to have been established by the CCA in *Mimi Wong (CCA)* and *Neoh Bean Chye and another v Public Prosecutor* [1974–1976] SLR(R) 164 ("*Neoh Bean Chye (CCA)*"), and to have been subsequently endorsed and reaffirmed by the CA in, *inter alia*, *Public Prosecutor v Lim Poh Lye and another* [2005] 4 SLR(R) 582 ("*Lim Poh Lye (CA)*"). We shall hereafter refer to this proposition as "the putative *Mimi Wong (CCA)* test".

36 We shall now examine the findings of fact made by the Judge and his actual decision in respect of Daniel and Christopher. His findings on Bala are not particularly pertinent to our discussion on s 34 as Bala was the actual doer of the criminal act in the present case and, therefore, his liability for the offence of murder would depend solely on the operation of s 300(*c*) of the Penal Code (s 300(*c*) being the particular limb of s 300 which was relied on by the Prosecution).

The findings of the Judge

37 In dealing with the retracted parts of the Appellants' statements, the Judge reminded himself that case law required the court to treat those portions of the statements with circumspection (see the GD at [32], citing *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [84]–[86]). With that caution in mind, the Judge made the following findings of fact against the Appellants:

(a) There might have been "some discussion among the [Appellants] in relation to hijacking Wan's lorry at the pass-office" (see the GD at [34]), but the evidence showed that "the plan … had changed by the time of the evening before the crime" (see the GD at [34]). The new plan was to "forcibly take over the goods-laden lorry [*ie*, Lorry 815] while making sure that the driver thereof [*ie*, Wan] would be unable to stop them or recognize them" (see the GD at [34]). It was clear to the Appellants that "the new plan had to be executed when [L]orry 815 did not stop at the pass-office and when [Bala] directed [Daniel] to tail the said lorry" (see the GD at [34]).

(b) The assertion by Daniel that the assault on Wan was unexpected and that he (Daniel) had been shocked by it should be rejected in view of, *inter alia*, the following factors (see the GD at [35]–[36]):

(i) Daniel was in control of Lorry 9520 when the Appellants tailed Lorry 815;

(ii) it was likewise Daniel who staged the near accident along Changi Coast Road;

(iii) Daniel did not mention his alleged shock and fear in any of his statements to the police; and

(iv) following the assault on Wan, Daniel (among other things) helped to carry Wan into the passenger compartment of Lorry 815 and subsequently went clubbing and drinking that same evening, which actions "negated the assertion of shock" (see the GD at [36]).

In the circumstances, the Judge held, Daniel "was privy to the robbery plan and … knew that [Wan] would be assaulted as part of the [robbery] plan" (see the GD at [36]).

(c) Christopher was "clearly privy to the robbery plan" (see the GD at [39]). Bala had informed the police that when Christopher drove him and Babu to CAC to survey the place ahead of the robbery, Christopher was aware that there was a plan to steal mobile phones (see the GD at [37]). Also, Daniel's testimony in court did not support the contention by Christopher that he (Christopher) was an ignorant last-minute replacement driver (see the GD at [37]). Furthermore, Christopher was present at the meeting at the coffee shop in Toa Payoh on 29 May 2006 when the robbery was discussed (see the GD at [38]). His evidence that he had been talking to his girlfriend on his mobile phone instead was not convincing (see the GD at [38]). Similarly, his assertion that he had made incriminating statements against himself so that his statements would tally with Daniel's statements was "inherently unbelievable" (see the GD at [39]). In addition, his conduct during the robbery showed that he was part of the robbery plan (see the GD at [39]).

(d) Bala satisfied the requirements for liability for the offence of murder as set out in s 300(*c*) of the Penal Code ("s 300(*c*) murder"). He admitted that whatever injuries were found on Wan's body had been caused by his assault (see the GD at [41]). In this respect, Dr Teo testified that, in his view, at least 15 blows had been inflicted on Wan and the injuries to Wan's head were sufficient in the ordinary course of nature to cause death (see the GD at [41]).

(e) The interception of Lorry 815 and the subsequent assault on Wan by Bala were "clearly premeditated" (see the GD at [43]). As stated by Daniel, Bala took the baseball bat with him when he alighted from Lorry 9520 and tried to hide it behind his left leg (see the GD at [44]–[45]). Also, "the multiple forceful blows inflicted on the unarmed and defenceless [Wan] showed that the assault was nothing short of being cruel" (see the GD at [45]). On those two scores, the defence of sudden fight was clearly not available to Bala (see the GD at [45]).

(f) Bala also could not rely on the defence of provocation. His attack on Wan was clearly premeditated and did not result from his having been deprived of his self-control due to Wan's alleged aggression (see the GD at [48]). It was highly unlikely that Wan had behaved in a provocative manner as:

(i) he was outnumbered;

(ii) his alleged aggressiveness was not mentioned in any of the Appellants' statements to the police; and

(iii) his alleged provocative behaviour was not corroborated by either Daniel or Christopher.

38 On the basis of these findings of fact, the Judge concluded that the fact that none of the

Appellants had intended to kill or cause the death of Wan did not mean that they could not be convicted of murder. *Vis-à-vis* Bala, the Judge held that the requirements for him to be made liable for the offence of s 300(*c*) murder were clearly met. The Judge referred to *Lim Poh Lye (CA)*, where this court reaffirmed the applicability of the principles set out by the Supreme Court of India in *Virsa Singh v State of Punjab* AIR 1958 SC 465 ("*Virsa Singh*") apropos the Indian equivalent of s 300(*c*) of the Penal Code, which were as follows (see *Virsa Singh* at [12]):

> [T]he prosecution must prove the following facts before it can bring a case under S. 300 "thirdly" [*ie*, the Indian equivalent of s 300(*c*) of the Penal Code];
>
> First, it must establish, quite objectively, that a bodily injury is present;
>
> Secondly, the nature of the injury must be proved[.] These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

39 Since, on the facts found by the Judge, Bala had committed s 300(*c*) murder, the Judge held that Daniel and Christopher were also guilty of the same offence as they (together with Bala) had a common intention to rob Wan and "knew that violence would be necessary to overpower and incapacitate Wan … in order to facilitate the commission of the robbery" (see the GD at [51]). The Judge added that "[t]he brutal assault [on Wan] was undoubtedly in furtherance of [the Appellants'] common intention to commit robbery of the goods in [L]orry 815" (see the GD at [51]).

40 To support his ruling that Daniel and Christopher's knowledge that "violence would be necessary to overpower and incapacitate Wan … in order to facilitate the commission of the robbery" (see the GD at [51]) was sufficient for Daniel and Christopher to be made constructively liable for murder pursuant to s 34, the Judge referred to this court's judgment in *Lee Chez Kee (CA)* and said (see the GD at [50]):

> 50 In *Lee Chez Kee v PP* [2008] SGCA 20, a decision handed down by the [CA] after the conclusion of the present trial, the court said (at [253]):
>
> > Thus, I can now summarise what I regard as the correct interpretation of s 34 of the Penal Code, taking into account the typical requirements to make s 34 of the Penal Code applicable, *viz*, (a) a criminal act; (b) participation in the doing of the act; (c) a common intention between the parties; and (d) an act done in furtherance of the common intention of the parties:
> >
> > > (a) Criminal act: Section 34 does not refer to the actual crime committed only. It is essential to realise that the expression "criminal act" is not synonymous with "offence" as defined in s 40 of the Penal Code.

(b) Participation: Presence at the scene of the criminal act, primary or collateral, need no longer be rigidly insisted on for s 34 of the Penal Code to apply. In a "twin crime" situation, there is no need for participation in the collateral criminal act as well as the primary criminal act; participation in the primary criminal act would be sufficient for liability to fix on all subsequent secondary offenders. The crux of the section is participation, and presence may or may not provide the evidence for participation; this is a question of fact to be decided in each case.

(c) Proving the common intention: To prove the common intention between the parties, inferences must be made from the circumstances of the case to show that the criminal act was committed in furtherance of a pre-arranged plan such as the conduct of the parties, the weapons used and the nature of the wounds inflicted. However, such inferences should never be made unless [they are] … necessary inference[s] deducible from the circumstances of the case. All the circumstances, including antecedent and subsequent conduct, are relevant in inferring the common intention of all involved.

(d) *In furtherance of the common intention: There is no need for the common intention of the parties to be to commit the offence actually committed in a "twin crime" situation, otherwise the words "in furtherance" would be superfluous*. The *Mimi Wong [(CCA)]* approach to the interpretation of s 34 of the Penal Code is justified by the historical underpinnings of the Indian Penal Code [*ie*, the Penal Code 1860 (Act 45 of 1860) (India)] and the doctrine of common purpose in English law. *The additional* mens rea *required of the secondary [offender] is that of a subjective knowledge on the part of the secondary offender in relation to the likelihood of the collateral offence 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*. There is no need [for the secondary offender] to have known of the actual method of execution in a murder situation.

[emphasis in original omitted; emphasis added in italics]

41 It is crucial to note that *Lee Chez Kee (CA)* was a "twin crime" case – *ie*, a case where the offenders share a common intention to commit a criminal act (hereafter called a "primary criminal act") such as breaking into a house to steal and, in the course of doing that criminal act, one of the offenders (*ie*, the actual doer) commits a different (or collateral) criminal act (hereafter called a "collateral criminal act") such as inflicting a fatal injury on the occupant of the house with a knife. In a typical "twin crime" case, it is the collateral criminal act – and *not* the primary criminal act – that the secondary offenders are concerned about as the offence which they are charged with, read with s 34, is the offence resulting from the former (*ie*, the collateral criminal act). In contrast, in a "single crime" case, the offenders share a common intention to carry out the criminal act actually done by the actual doer (which would be the primary criminal act as just defined), and that criminal act is also the criminal act which gives rise to the offence charged against the secondary offenders.

42 It was in the particular context of a "twin crime" case that this court laid down in *Lee Chez Kee (CA)* (at, *inter alia*, sub-para (d) of [253]) the additional *mens rea* requirement which had to be satisfied in order to hold a secondary offender (who might or might not himself have participated in the collateral criminal act done by the actual doer) constructively liable pursuant to s 34 for the offence resulting from the actual doer's collateral criminal act, namely:

The additional *mens rea* required of the secondary [offender] is that of a subjective knowledge

on the part of the secondary offender in relation to the likelihood of the collateral offence 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. [emphasis in original]

This *mens rea* requirement, which we shall hereafter refer to as "the *LCK* requirement", refers to subjective knowledge that "the criminal act constituting the collateral offence" (see *Lee Chez Kee (CA)* at sub-para (d) of [253]) – *ie*, the collateral criminal act as defined at [41] above – may likely be committed, and *not simply subjective knowledge that violence may be used* in furtherance of the common intention to do the primary criminal act. As mentioned at [3] above, the *LCK* requirement is a restriction on the operation of the putative *Mimi Wong (CCA)* test. In the light of the decision in *Lee Chez Kee (CA)*, it is no longer possible for the Prosecution to merely rely on the putative *Mimi Wong (CCA)* test when it seeks to hold a secondary offender constructively liable pursuant to s 34 for the offence resulting from the criminal act done by the actual doer; instead, the Prosecution must go further and show that the *LCK* requirement is satisfied. It is necessary to point out at this juncture that the putative *Mimi Wong (CCA)* test, as restricted by the *LCK* requirement, is relevant only in a "twin crime" situation.

43 Reverting to the GD, it should be noted that the Judge held that the *LCK* requirement was satisfied by reason of the findings set out at [51]–[53] of the GD, which were as follows:

> 51 The evidence before me more than sufficed to impute liability [for Bala's] actions to [Daniel] and [Christopher]. There was clearly a common intention among [the Appellants] to commit robbery. The [Appellants] knew that violence would be necessary to overpower and incapacitate Wan (to the extent [that] he would not be able to resist and to identify them) in order to facilitate the commission of the robbery, even if [Daniel] and [Christopher] were not aware of [Bala's] "actual method of execution". The brutal assault was undoubtedly in furtherance of their common intention to commit robbery of the goods in [L]orry 815.
>
> 52 In *Too Yin Sheong v PP* [1999] 1 SLR 682, the [CA] astutely noted at [27] that "[t]he reason why all are deemed guilty in such cases is, the presence of accomplices gives encouragement, support and protection to the person actually committing the act." [Daniel] and [Christopher] were no doubt *participants* in the robbery: [Daniel] staged the accident and was acting as a look out [*sic*] while Wan was being assaulted; [Christopher] directed Wan to [Bala] with full knowledge of the robbery plan and the fact that Wan would be assaulted by [Bala]. There was no expression of horror or surprise on their part after Wan was battered brutally by [Bala]. [Daniel] and [Christopher] were calm and purposeful in their actions. They helped to bundle Wan into his lorry before bringing it to the intended destination. [Daniel] was able to drive a stranger's lorry and yet retained the presence of mind to push Wan's head down at least twice when [Wan] tried to get up. He was also able to help offload two pallets from [L]orry 815 onto their own lorry at [Car Park A] before Babu arrived. [Christopher] was then able to drive away their lorry with the two pallets to their planned destination. There was no talk about what was going to happen to Wan if they left the badly wounded man in his lorry. Clearly, Wan was just someone they had to get rid of although *they did not plan to kill him*. Once they had got hold of the goods, they were completely nonchalant about the fate of the obviously badly injured Wan.
>
> 53 In the circumstances, I was of the view that pursuant to s 34 of the Penal Code, [Daniel] and [Christopher] were liable for the actions of [Bala] in the same manner as if the acts were done by them and that all [of the Appellants] were equally culpable.
>
> [emphasis added]

44 These findings were, in summary, as follows:

(a) the Appellants had a common intention to rob Wan;

(b) the Appellants knew that violence would be used to incapacitate Wan in order to facilitate the commission of the robbery, although Daniel and Christopher were not aware of (*ie*, they did not know) the "actual method of execution" (see the GD at [51]);

(c) Wan was brutally assaulted by Bala in furtherance of the Appellants' common intention to commit robbery;

(d) Daniel participated in the robbery by staging the near accident along Changi Coast Road and by acting as a lookout while Wan was being assaulted;

(e) Christopher participated in the robbery by directing Wan to Bala after Wan alighted from Lorry 815, knowing that Wan would be assaulted by Bala; and

(f) the Appellants had not planned to kill (*ie*, to cause the death of) Wan (see the GD at [40] and [52]).

45 It is also crucial to note that although the Judge was of the view that the Appellants knew that violence would be necessary in order to facilitate the commission of the robbery (see the GD at [50]) and that Daniel and Christopher knew that Wan would be assaulted as part of the robbery plan (see the GD at, respectively, [36] *vis-à-vis* Daniel and [52] *vis-à-vis* Christopher), he *did not* ultimately find as a fact that the Appellants had a common intention to knock Wan unconscious, let alone a common intention to do so by (specifically) hitting him on the head. Instead, the Judge found as a fact that the Appellants had no plan (*ie*, no common intention) to kill Wan or cause his death, and stated the Appellants' common intention solely in terms of a "common intention to commit robbery" (see the GD at [51]). A final point to note is that the Judge made express findings of participation by Daniel and Christopher only in relation to the *robbery*, and *not* in relation to the *assault on Wan*.

The appeal

The hearings before this court

46 At the first hearing of this appeal on 13 November 2008, counsel for the Appellants informed us that their clients did not wish to proceed with the appeal and applied for leave to withdraw the appeal. However, having read the record of proceedings ("the RP"), including the GD, it was our view that the correctness of the convictions of Daniel and Christopher merited further consideration, given the Judge's specific finding that the Appellants had not planned to kill or cause the death of Wan in carrying out the robbery. As both Daniel and Christopher were adamant in withdrawing the appeal in so far as their convictions were concerned, we appointed their respective counsel as *amicus curiae* to address us on the merits of the appeal *vis-à-vis* their convictions. The hearing was then adjourned to a later date. Subsequently, in a letter dated 15 January 2009, Daniel, through his counsel, informed the court of his decision to proceed with the appeal in relation to his conviction. Christopher's counsel continued to act for Christopher as though they had been instructed to proceed with the appeal where his conviction was concerned.

47 At the second hearing of this appeal on 9 April 2009, Bala maintained his decision to withdraw the appeal in so far as his conviction was concerned. After hearing the submissions of counsel for Daniel and counsel for Christopher as well as the Prosecution's submissions, we reserved our

judgment.

The submissions by Daniel and Christopher on appeal

Daniel's submissions

48 The main submissions by Daniel against his conviction were as follows:

(a) The Judge placed too much weight on the retracted parts of the Appellants' statements and too little or no weight on the Appellants' oral evidence at the trial.

(b) The Judge erred in law and in fact in failing to apply the correct test for imposing constructive liability under s 34.

(c) The Judge failed to properly consider and give due weight to the evidence adduced by or on behalf of Daniel that he did not do any act in furtherance of any common intention.

(d) The Judge erred in law and in fact in failing to properly consider Babu's evidence, which contradicted the CSOF that Babu had earlier unreservedly admitted to at his trial (see [16] above). This contradiction raised doubts as to whether Wan's death was caused in furtherance of the Appellants' common intention to commit robbery.

(e) The Judge erred in law and in fact in convicting Daniel of murder on the basis that he had prior knowledge of the planned assault on Wan. The only plan which the Appellants had in common was to commit robbery by driving away Wan's lorry (*ie*, Lorry 815) with the Cargo on board; Bala alone subsequently changed the plan and caused Wan's death without the participation of Daniel and Christopher.

(f) The requirements for constructive liability to be imposed under s 34, as laid down in *Lee Chez Kee (CA)*, were not satisfied as Daniel did not have subjective knowledge that Bala, in furtherance of the Appellants' common intention to commit robbery, might likely cause Wan's death by beating Wan until he was almost unconscious. Further, Daniel did not participate in the assault on Wan.

49 In his oral submissions, counsel for Daniel contended that the Appellants' common intention, if any, did not go beyond an agreement to rob. He argued that even if Daniel knew that Bala had the baseball bat with him at the material time, it did not necessarily follow that he knew that Bala would use the baseball bat to inflict on Wan bodily injury which was sufficient in the ordinary course of nature to cause death (hereafter referred to as "s 300(*c*) injury"). Counsel also contended that no medical evidence was adduced as to the degree of force necessary to either render a person unconscious or inflict on him s 300(*c*) injury.

Christopher's submissions

50 The main submissions by Christopher against his conviction were as follows:

(a) The Judge erred in fact and in law in relying on the retracted parts of the statements made by Bala and Daniel, which incriminated Christopher. In this connection, the Judge:

(i) did not place adequate weight on the reasons given by Daniel as to why he had initially falsely incriminated himself and Christopher in respect of Bala's assault on Wan;

(ii) did not give adequate weight to the explanation by Bala as to why he had falsely claimed in his statements to the police that Daniel and Christopher were the ones who had assaulted Wan; and

(iii) did not state what weight he placed on the retracted parts of the statements of Bala and Daniel.

(b) The Judge erred in fact and in law in not placing any weight on that part of the evidence of Bala and Daniel which corroborated Christopher's evidence. In this connection, the Judge:

(i) ignored the evidence of Bala and Daniel (in particular, the evidence of the former, who had no motivation to lie), which exculpated Christopher;

(ii) erred in failing to find that Christopher was not aware of a pre-arranged plan to commit robbery as he had only been asked to drive Lorry 9520 to a designated spot; and

(iii) erred in failing to find that Christopher could not have anticipated that violence would be used in furtherance of the Appellants' common intention to commit robbery and that Bala would assault Wan using, specifically, the baseball bat.

(c) The Judge erred in finding that the retracted parts of Christopher's statements were true and in failing to place adequate weight on Christopher's oral testimony at the trial.

(d) The Judge erred in law in failing to explain clearly his reasons for convicting Christopher of murder under s 302 of the Penal Code read with s 34 and, in particular, in failing to explain the relevance of *Lee Chez Kee (CA)* as the basis for imputing constructive liability to Christopher for the murder arising from the criminal act committed by Bala (*viz*, the assault on Wan).

(e) The Judge erred in fact and in law in imputing constructive liability to Christopher for the murder arising from the criminal act committed by Bala as Christopher had not participated in that criminal act.

(f) The Judge erred in finding that Christopher shared the common intention to commit robbery as Christopher had been involved only as a last-minute replacement driver. Furthermore, the Judge erred in finding that Christopher had subjective knowledge that there was a likelihood of violence being committed against Wan.

51 In his oral submissions, counsel for Christopher argued that the Judge should not have relied on the retracted parts of Christopher's statements to find Christopher guilty of murder as Daniel and Bala, who had implicated him in the robbery, had subsequently retracted the incriminating parts of their statements. Counsel emphasised that Christopher had not known about the robbery plan or any plan to assault Wan so as to render him unconscious as Christopher had stepped in merely as a last-minute replacement driver. Counsel also submitted that since Daniel and Christopher had the opportunity to discuss between themselves what they would tell the police (a fact which the Prosecution did not challenge), the Judge should have given little or no weight to their admissions in relation to their roles in the alleged plan to rob Wan and to beat him up so as to facilitate the commission of the robbery.

The Prosecution's submissions on appeal

52 The Prosecution's main submissions on appeal can be summarised as follows:

(a) The offence of s 300(*c*) murder had been made out *vis-à-vis* Bala, and none of the defences for murder was applicable.

(b) The evidence against Daniel and Christopher showed that they had prior knowledge of a plan to commit robbery of mobile phones which were being transported as well as to assault the driver of the targeted lorry with the baseball bat until he was unconscious so as to facilitate the commission of the robbery.

(c) Daniel and Christopher did not provide any satisfactory explanation for retracting the incriminating parts of their statements.

(d) Daniel and Christopher clearly participated in the offence of murder (in respect of which they were charged) as well as the offence of robbery (in respect of which they were not charged).

(e) The evidence showed that "[Daniel] was aware that [Wan] might be badly assaulted in [the course of] the robbery and might receive a bodily injury sufficient in the ordinary course of nature to cause death", [note: 27] and that Christopher was aware that the baseball bat "might be used" [note: 28] to assault Wan.

Our decision on the conviction of Bala

53 Even though Bala decided, at the hearing before this court on 13 November 2008, not to proceed with the present appeal in so far as his conviction was concerned (a decision which he subsequently confirmed at the hearing before us on 9 April 2009), it is incumbent on this court to nonetheless consider whether Bala's conviction was correct both in law and in fact as it formed the foundation for the convictions of Daniel and Christopher.

54 The offence of s 300(*c*) murder is defined in the Penal Code as follows:

> **300**. Except in the cases hereinafter excepted culpable homicide is murder —
>
> ...
>
> (*c*) if it is done with *the intention of causing bodily injury* to any person, *and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death*;
>
> ...
>
> [emphasis added]

55 Having regard to the evidence, and applying the test set out in *Virsa Singh* ("the *Virsa Singh* test") (see [38] above), we are of the view that Bala was properly convicted of s 300(*c*) murder as he had intentionally inflicted on Wan, using the baseball bat, s 300(*c*) injury which caused the death of Wan (see the evidence of Dr Teo as summarised at [41] of the GD). We accordingly affirm the Judge's conviction of Bala for murder.

56 For completeness, we should state that the defences relied on by Bala (*viz*, the defences of sudden fight and provocation), which the Judge rejected (see sub-paras (e) and (f) of [37] above), were correctly rejected on the evidence. In our view, the circumstances and the manner in which Wan was assaulted indicated that the defences of sudden fight and provocation were clearly

inherently improbable.

The convictions of Daniel and Christopher

Key issues to consider vis-à-vis Daniel and Christopher

57 Turning now to Daniel and Christopher's convictions, in our view, the Judge's findings that (a) Daniel and Christopher, together with Bala, had a common intention to rob Wan and (b) Daniel and Christopher participated in the robbery cannot be challenged on the evidence. Having regard to these finding as well as the Judge's findings mentioned at [37]–[39] and [43]–[45] above, the key issues to be considered in this appeal are:

(a) first, whether Bala's assault on Wan was in furtherance of the Appellants' common intention to rob Wan ("Issue (a)"); and

(b) second, whether the *LCK* requirement was satisfied with respect to Daniel and Christopher on the evidence ("Issue (b)").

We shall now examine these issues *seriatim*.

Issue (a): Was Bala's assault on Wan in furtherance of the Appellants' common intention?

58 Issue (a) – *viz*, whether Bala's assault on Wan was in furtherance of the Appellants' common intention to rob Wan – is a question of fact. The Judge held at [51] of the GD that "[t]he [Appellants] knew that violence would be necessary … to facilitate the commission of the robbery", and that "[Bala's] brutal assault was undoubtedly in furtherance of [the Appellants'] common intention to commit robbery of the goods in [L]orry 815" (see, likewise, [51] of the GD). The question which we have to consider is whether this finding is correct, *ie*: was the Judge right to hold that Bala's brutal assault on Wan was *in furtherance of* the Appellants' common intention to rob Wan because it *facilitated* the robbery?

59 We have grave doubts about the correctness of this finding by the Judge in the light of the fact that:

(a) the Judge found that the Appellants had a common intention to rob Wan, but had no common intention to kill him or cause his death; and

(b) the Judge did not make any finding that the Appellants had a common intention to knock Wan unconscious, let alone a common intention to do so by hitting his head with the baseball bat (*ie*, let alone a common intention to cause a specific injury to Wan).

In the circumstances, we find it difficult to accept that Bala's assault on Wan to facilitate the robbery was in furtherance of the Appellants' common intention to rob Wan. Certainly, it can be said that Bala's assault on Wan furthered the robbery and contributed to its success. But, Daniel and Christopher might not necessarily have agreed to carry out the robbery at all costs, to the extent, for example, of causing Wan grievous hurt or killing him. There was no finding in the present case that Daniel and Christopher had a common intention with Bala to assault Wan in the way that Bala actually did. The Judge found that Daniel and Christopher stood by while Bala assaulted Wan, but he stopped short of finding that Daniel and Christopher participated in the assault in some way. In the light of these findings, we are unable to accept that Bala's assault on Wan was done in furtherance of the Appellants' common intention to rob Wan as that common intention did not encompass assaulting

Wan. The assault on Wan was inconsistent with or, at least, outside the scope of the Appellants' common intention to rob Wan.

60 To provide a clearer illustration of this point, suppose A and B plan to abduct C with a common intention to rape her: they carry out the abduction successfully and confine C in a flat for the purpose of raping her. A, however, molests C instead of raping her. A's act of molestation may be said to be consistent with A and B's common intention to rape C, rape being a more serious sexual offence than sexual molest. Alternatively, suppose A were to sodomise C: it may be argued (although this should not be taken as representing our definitive opinion on this point) that A's act of sodomy is also consistent with A and B's common intention to rape C 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, like sexual assault or sexual molest. But, suppose A, in the course of raping C, were to suffocate her with a pillow while trying to stop her from screaming: in this situation, it *cannot* be said that because A's act of suffocating C furthered the rape of C, the suffocation was therefore in furtherance of A and B's common intention to rape 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).

61 In the context of the requirement of consistency between the criminal act done by the actual doer which gives rise to the offence charged and the criminal act commonly intended by all the above offenders, the above scenario may be compared with the scenario that occurred in *Ike Mohamed Yasin bin Hussin v Public Prosecutor* [1974–1976] SLR(R) 596 ("*Mohamed Yasin*"). In that case, the common object of the appellant and one Harun bin Ripin ("HBP"), the appellant's co-accused at the trial stage, was burglary (see *Mohamed Yasin* at [6]). As the appellant and HBP were trying to overpower the victim, the victim's trousers fell off. On seeing this, the appellant was overcome by desire and raped the victim while HBP ransacked the hut (HBP did not participate in the rape at all). While raping the victim, the appellant sat on her chest, fracturing a number of her ribs. When the appellant finished raping the victim, he discovered that she was dead. The evidence showed that the fractures to the victim's ribs had caused congestion of the victim's lungs, resulting in a heart attack.

62 The appellant and HBP were subsequently arrested and charged with committing murder in furtherance of a common intention under s 302 of the Penal Code read with s 34. The trial judges convicted the appellant of murder. In contrast, they acquitted HBP of murder and convicted him of robbery by night (*ie*, robbery committed after 7.00pm and before 7.00am (see s 392 of the Penal Code)) on the ground that the death of the victim was not caused by any act done by the appellant in furtherance of his and HBP's common object to commit burglary, but was instead caused by an act "done in furtherance of *the appellant's own unpremeditated impulse* to have sexual intercourse with the victim" [emphasis added] (see *Mohamed Yasin* at [6]). Only the appellant appealed against his conviction – *ie*, the case effectively became a non-s 34 case at the appellate stage. The appeal was dismissed by the CCA (see *Mohamed Yasin bin Hussin v Public Prosecutor* [1974–1976] SLR(R) 218). The appellant then appealed further to the Privy Council, which held (in *Mohamed Yasin*) that the appellant had not intended to cause the victim the type of injury which was in fact caused (*viz*, fracture of the ribs). Lord Diplock, who delivered the judgment of the Privy Council, stated:

> 9 … The lacuna in the Prosecution's case which the trial judges overlooked was *the need to show that, when the [appellant] sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal*.
>
> 10 There was no finding of fact by the trial judges that this was the appellant's intention; nor,

> in their Lordships' view, was there any evidence upon which an inference that such was his intention could have been based. … [T]o fall on someone's chest, even forcibly, is something which occurs frequently in many ordinary sports, … and though it may cause temporary pain, it is most unusual for it to result in internal injuries at all, let alone fatal injuries.
>
> [emphasis added]

The Privy Council thus set aside the appellant's conviction for s 300(*c*) murder and substituted it with a conviction for the offence under s 304A of the Penal Code of causing death by doing a rash act not amounting to culpable homicide.

63 Although *Mohamed Yasin* did not involve s 34 at the appellate stage (both before the CCA and before the PC), it was a s 34 case before the High Court, where HBP was acquitted of murder. Given the decision of the Privy Council that the appellant was also not guilty of murder, both the High Court's decision *vis-à-vis* HBP and the Privy Council's decision *vis-à-vis* the appellant were consistent with the principle that the appellant and HBP should not be held liable for murder under s 302 of the Penal Code read with s 34 as they did not have a common intention to inflict on the victim the specific injury which caused her death. Suppose, however, that in *Mohamed Yasin*, HBP had also been overcome by sexual desire upon seeing the victim's trousers fall off and had spontaneously formed a common intention with the appellant to rape the victim, and had subsequently been charged with the offence of murder under s 302 of the Penal Code read with s 34: in that scenario, it can be inferred from the reasoning of the Privy Council that it would have ruled that the appellant's criminal act of fracturing the victim's ribs was inconsistent with or, at least, in excess of the criminal act commonly intended by the appellant and HBP (*viz*, forcible sexual intercourse with the victim), and would not have held HBP constructively liable for murder under s 302 read with s 34.

64 Reverting to the facts of the present case, the Judge held that:

> (a) all the Appellants "knew that violence would be necessary to overpower and incapacitate Wan (to the extent [that] he would not be able to resist and to identify them) in order to facilitate the commission of the robbery" (see the GD at [51]);
>
> (b) Daniel "knew that [Wan] would be assaulted as part of the [robbery] plan" (see the GD at [36]); and
>
> (c) Christopher likewise had "full knowledge of … the fact that Wan would be assaulted by [Bala]" (see the GD at [52]).

65 In our view, knowledge is not the same as intention (see [87]–[90] below), and, therefore, the presence of the knowledge found by the Judge was insufficient to justify the conclusion that there was a common intention among the Appellants to use violence against Wan. Bala himself might have had such an intention (having regard to the fact that he was the one who assaulted Wan during the robbery as well as to the manner in which he carried out that assault), but it cannot be said that Daniel and Christopher would necessarily have shared this intention. It follows that the ruling by the Judge that Bala's criminal act was in furtherance of the Appellants' common intention to rob Wan was not supported by his findings of fact. In this regard, we note that in *Rex v Vincent Banka & Anor* [1936] MLJ 53 ("*Vincent Banka*"), where one of the two accused stabbed the victim to death in the course of a robbery (it was not clear from the evidence which of the accused actually inflicted the fatal wound on the victim), Huggard CJ *rejected* the following argument by the Prosecution (at 54):

> [I]nasmuch as the fatal wound was inflicted in carrying out a common intention on the part of

both accused to rob the [victim] – in other words, a common intention to commit a crime involving violence – it was immaterial which of the two had inflicted the wound, and … by virtue of section 34 of the Penal Code[,] both the accused were equally guilty of murder.

Issue (b): Was the LCK requirement satisfied with respect to Daniel and Christopher on the evidence?

66 Turning now to Issue (b) (*viz*, whether the *LCK* requirement was satisfied in respect of Daniel and Christopher on the evidence), we noted earlier (at [45] above) that although the Judge found that the Appellants knew that violence would be necessary in order to facilitate the commission of the robbery and that Daniel and Christopher knew that Wan would be assaulted as part of the robbery plan, he ultimately found that the Appellants had not planned to kill Wan or cause his death. In our view, these two findings are insufficient to satisfy the *LCK* requirement. There was no finding that Daniel and Christopher had subjective knowledge that Bala might likely commit the criminal act actually committed which resulted in the offence with which the Appellants were charged. In our view, these two findings are a far cry from a finding that Daniel and Christopher subjectively knew that Bala might likely inflict s 300(*c*) injury on Wan in furtherance of the Appellants' common intention to commit robbery. Indeed, since (as the Judge held at [40] and [52] of the GD) the Appellants had no intention to either kill Wan or cause his death, there would have been no cause or reason for Daniel and Christopher to suspect, much less subjectively know, that Bala might likely inflict s 300(*c*) injury on Wan in furtherance of the Appellants' common intention to rob Wan. In short, the evidence does not establish beyond reasonable doubt that Daniel and Christopher subjectively knew that Bala might likely cause Wan s 300(*c*) injury in furtherance of the Appellants' common intention to commit robbery.

67 The evidence is clear that Daniel and Christopher stood by (or, to be more precise where Daniel is concerned, waited in Lorry 9520) silently – and, according to Daniel's testimony, helplessly – while Bala assaulted Wan. In our view, the fact that neither Daniel nor Christopher did anything to stop Bala from assaulting Wan so viciously does not entail that they therefore subjectively knew that Bala might likely inflict s 300(*c*) injury on Wan in furtherance of the Appellants' common intention to commit robbery. The Judge's finding that the Appellants had not planned to kill Wan or cause his death would support the inference that Daniel and Christopher did not have subjective knowledge that Bala might likely inflict s 300(*c*) injury on Wan in furtherance of the Appellants' common intention to rob Wan. This might also explain their passivity at the material time.

68 The next point which we need to consider is whether it may be argued that all that is needed to satisfy the *LCK* requirement in the present case (which involves, specifically, the offence of s 300(*c*) murder) is proof that Daniel and Christopher had subjective knowledge that some form of *hurt* (whether simple or "grievous" within the meaning of s 320 of the Penal Code) might likely be caused to Wan in furtherance of the Appellants' common intention to commit robbery. This would not be an unreasonable approach, having regard to the established law (*ie*, the law laid down in *Virsa Singh* (see [38] above)) on how s 300(*c*) of the Penal Code should be applied. In other words, what we need to consider is: how specific must the secondary offender's subjective knowledge of the collateral criminal act which might likely be committed by the actual doer be for the purposes of satisfying the *LCK* requirement? To answer this question (which we shall hereafter refer to as "the 'degree of specificity' question" for convenience), we must first examine this court's decision in *Lee Chez Kee (CA)*.

69 In that case, the accused ("LCK") and two others ("Too" and "Ng") set out to rob the deceased at his house. In the course of the robbery, LCK stabbed the deceased. The deceased was then tied up by Too and LCK, and was later strangled by one of them. LCK was charged with murder

committed in furtherance of a common intention to rob the deceased. LCK denied that he had any part in the killing of the deceased, and claimed that he had left the house thinking that the deceased was alive. The trial judge convicted LCK of the charge even though he did not make a finding that there was a common intention to kill the deceased (see *Public Prosecutor v Lee Chez Kee* [2007] 1 SLR(R) 1142). LCK, in other words, was treated as though he was the actual doer and s 34 was not applied to determine his guilt.

70 LCK appealed against his conviction. On appeal, this court doubted whether it was LCK who had strangled the deceased and, accordingly, decided to consider whether LCK's conviction could be sustained if s 34 were applied, even though the trial judge did not find that there was a common intention between Too and LCK to strangle the deceased (the strangulation of the deceased was the criminal act which gave rise to the offence charged in *Lee Chez Kee (CA)*). This court held (*inter alia*) as follows where the law on s 34 was concerned:

(a) In a "twin crime" case, it was not necessary for the secondary offender (*ie*, LCK in the case of *Lee Chez Kee (CA)*) to participate in the collateral criminal act giving rise to the offence charged (which, in *Lee Chez Kee (CA)*, was the offence of murder). Instead, it sufficed so long as he participated in the primary criminal act which was commonly intended by all the offenders (*ie*, the acts constituting the robbery of the deceased in the case of *Lee Chez Kee (CA)*).

(b) The putative *Mimi Wong (CCA)* test was good law. For s 34 to apply in a "twin crime" case, it was not necessary for there to be a common intention among all the offenders to do the collateral criminal act done by the actual doer. However, before the secondary offender could be held constructively liable for the offence resulting from that collateral criminal act, the secondary offender must have subjective knowledge that the actual doer *might likely* commit that criminal act (*ie*, the collateral criminal act giving rise to the offence charged) in furtherance of all the offenders' common intention to carry out a primary criminal act (see *Lee Chez Kee (CA)* at sub-para (d) of [253] (also reproduced earlier at [42] above)).

71 On the facts of *Lee Chez Kee (CA)*, this court held by a majority, *vis-à-vis* the requirement set out at sub-para (b) of the preceding paragraph (*ie*, the *LCK* requirement), that LCK had the requisite subjective knowledge. In this regard, it was held, *inter alia*, that LCK "must … have appreciated that the deceased would have to be *killed* to protect [the] identities [of LCK and Too] in the light of the harm they had inflicted on him" [emphasis added] (see *Lee Chez Kee (CA)* at [262]).

72 Reverting to the "degree of specificity" question posed at [68] above, where a secondary offender is charged with murder read with s 34, the particular criminal act whose likely commission he must have subjective knowledge of, for the purposes of the *LCK* requirement, depends on the particular limb of s 300 which is invoked by the Prosecution. Section 300, part of which was quoted earlier (at [54] above), defines the offence of murder as follows:

300. Except in the cases hereinafter excepted culpable homicide is murder —

(*a*) if the act by which the death is caused is done with the intention of causing death;

(*b*) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(*c*) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(*d*) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

73 As a matter of statutory interpretation, the four limbs of s 300 of the Penal Code indicate that the criminal act which gives rise to the offence of murder may take on one of four distinct criminal acts. Accordingly, where s 34 is invoked to hold a secondary offender constructively liable for murder, the subjective knowledge which he must have is subjective knowledge of the likely commission of the criminal act that is relevant to the particular limb of s 300 relied upon by the Prosecution. At first glance, this may seem to require fine distinctions to be drawn between the various limbs of s 300 for the purposes of imposing constructive liability on a secondary offender pursuant to s 34. We are, however, of the view that in terms of application, there is, in substance, little or no difference between subjective knowledge of the likelihood of one of the criminal acts in s 300 occurring and subjective knowledge of the likelihood of another of those criminal acts occurring. Subjective knowledge that any one of the criminal acts set out in s 300 might likely be committed, whether that criminal act is the one delineated in s 300(*a*), s 300(*b*), s 300(*c*) or s 300(*d*), is in effect simply subjective knowledge that the victim might likely be killed or fatally injured, whatever the specific criminal act concerned might be.

74 Leaving aside subsections (*a*), (*b*) and (*d*) of s 300 (all of which are not applicable in the present case as Bala's criminal act was found to have given rise to the offence of s 300(*c*) murder specifically), where a secondary offender is sought to be made constructively liable pursuant to s 34 for s 300(*c*) murder, the *LCK* requirement would be satisfied only if the secondary offender has subjective knowledge of the likelihood of the victim receiving, specifically, *s 300(*c*) injury*. This corresponds to the type of bodily injury which must be inflicted on the victim for the purposes of s 300(*c*) murder. In this respect, it is *not* sufficient, in our view, for s 34 to apply if the secondary offender merely has subjective knowledge that the victim might likely suffer *an injury* (or, for that matter, if the secondary offender shares a common intention with the actual doer to inflict an injury on the victim), and that injury is subsequently shown to be of a type which is sufficiently serious to amount to s 300(*c*) injury.

75 In this regard, it bears emphasis that the *mens rea* requirement for s 300(*c*) murder is an *element* of the *substantive offence* of s 300(*c*) murder. In contradistinction, s 34 does not create a substantive offence but merely lays down a principle of liability (see *Mahbub Shah v Emperor* AIR (32) 1945 PC 118 ("*Mahbub Shah*") at 120), and the *LCK* requirement is only a *factor* in determining whether that principle of liability applies.

76 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. It does not necessarily follow that the *Virsa Singh* interpretation of s 300(*c*), which is applicable to the actual doer, is or should be equally applicable to a secondary offender, especially where the secondary offender did not inflict any injury on the victim at all. In other words, as a principle of criminal liability, it may not be unjust or unreasonable to hold the actual doer liable for

s 300(*c*) murder by applying the *Virsa Singh* test since (as just mentioned) he was the one who inflicted the s 300(*c*) injury sustained by the victim. However, it may not be just or reasonable to apply the *Virsa Singh* test to hold a secondary offender constructively liable for s 300(*c*) murder where he had no intention to do the specific criminal act done by the actual doer which gave rise to the offence of s 300(*c*) murder, and also did not subjectively know either that that criminal act might likely be committed or that that criminal act would result in s 300(*c*) injury to the victim.

77 In the present case (and assuming, *contra* our finding on Issue (a), that the inflicting of s 300(*c*) injury on Wan by Bala was in furtherance of the Appellants' common intention to rob Wan), the evidence, as already indicated at [66]–[67] above, *does not* show that Daniel and Christopher had subjective knowledge that Bala might likely inflict s 300(*c*) injury on Wan in furtherance of the Appellants' common intention. Accordingly, we answer Issue (b) in the *negative*; *ie*, on the evidence, it cannot be said that the *LCK* requirement was satisfied with respect to Daniel and Christopher. It follows that their convictions for murder have to be set aside (*cf* the decision in *Lee Chez Kee (CA)*, where this court upheld (by a majority) LCK's conviction of murder under s 302 of the Penal Code read with s 34 on, *inter alia*, the basis that LCK "must … have appreciated that the deceased would have to be killed to protect [the] identities [of LCK and Too] in the light of the harm they had inflicted on him" (at [262])).

Our decision on the convictions of Daniel and Christopher

78 Our decision on Issue (a) and Issue (b) suffices to dispose of this appeal where Daniel and Christopher's convictions for murder are concerned. These convictions are to be set aside. In substitution, Daniel and Christopher are to be convicted of robbery with hurt under s 394 of the Penal Code read with s 34 (see [185] below for our directions on sentencing).

The state of the law on s 34

79 At the beginning of this judgment, we expressed concern that more than 130 years after the enactment of s 34, the law on this provision is still unsettled (see [3] above). We shall now revisit s 34 to see how this state of affairs came about. We start by examining the origins of the phrase "in furtherance of the common intention of all" in s 34 and how it came to be made part of this section.

Origins of the phrase "in furtherance of the common intention of all"

80 Section 34 can be traced back to s 34 of the Penal Code 1860 (Act 45 of 1860) (India) ("the IPC"), which, in its *original* form, read as follows:

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

In 1870, the original version of s 34 of the IPC was amended by the insertion of the phrase "in furtherance of the common intention of all" (see s 1 of the Penal Code Amendment Act 1870 (Act 27 of 1870) (India) ("the 1870 IPC Amendment Act")). It was this *amended* version of s 34 of the IPC (hereafter referred to as "s 34 IPC" for short) which was introduced into our legislation when the 1871 Penal Code was enacted in 1872. Thus, s 34, as it currently stands in the Penal Code, reads as follows:

> 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.

81 According to Hari Singh Gour, *The Penal Law of India* (Law Publishers (India) Pvt Ltd, 11th Ed, 2000) ("*Gour*"), the insertion of the phrase "in furtherance of the common intention of all" into the original version of s 34 of the IPC (at vol 1, p 260):

> … ma[d]e all the difference between the old section [*ie*, the original version of s 34 of the IPC] and the new [*ie*, s 34 IPC as defined at [80] above], for without those words the [IPC] would be widely at variance with the English law, *where a person not cognizant of the intention of his companions to commit, say, murder, was never liable, though he [might] have joined their company to commit an unlawful act*. This view was adopted by the Courts in India, even before the section had been formally amended [citing The Queen v Gorachand Gope and others (1866) Bengal LR Supp 443]. [emphasis added]

82 It is important to note that even under the then prevailing English doctrine of common purpose, an accused had to be "cognizant of the intention of his companions to commit [the offence charged]" (see *Gour* at vol 1, p 260) before he could be made constructively liable for that offence. The law of common intention, like the law of common purpose, is concerned with the imposition of constructive liability on a secondary offender for an offence (or offences) arising from a criminal act committed by the actual doer. However, the amendment effected by s 1 of the 1870 IPC Amendment Act went further than the English doctrine of common purpose by requiring that the criminal act done by the actual doer which gave rise to the offence charged had to be done in furtherance of the common intention of all the offenders (*ie*, both the actual doer and the secondary offender(s)), instead of merely requiring the secondary offender to be "cognizant of the intention of his companions" (see *Gour* at vol 1, p 260).

83 In *Barendra Kumar Ghosh v Emperor* AIR 1925 PC 1 ("*Barendra (PC)*"), the Privy Council explained the rationale of the amendment effected by s 1 of the 1870 IPC Amendment Act as follows (*per* Lord Sumner at 9):

> Really the amendment is an amendment, in any true sense of the word, only if *the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention*, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. [emphasis added]

84 In *Ibra Akanda and others v Emperor* AIR (31) 1944 Cal 339 ("*Ibra Akanda*"), Khundkar J provided a similar explanation of the purpose of the amendment made by s 1 of the 1870 IPC Amendment Act. He said (at 361):

> *[T]he real operation of S. 34 was to take a completed criminal act, and then* ***to attribute the whole of that criminal act*** *, (by which is meant the physical act plus its effects or consequences, e.g., beating plus death or beating plus hurt),* ***to each separate doer of a fractional portion of the act*** *, (e.g., each person who struck a blow)*. The new words [*viz*, "in furtherance of the common intention of all"] were introduced into the section merely for making express what was already implicit, which was that ***the section would not have its operation of attributing the entire criminal act to one individual doer of a fraction of that act, unless the fractional act was one which helped on a purpose which was shared by all the individual doers*** . The object of the amendment was to make it plain that this rule would have application only where a nexus existed between the minds of individual doers. To express the mental nexus the phrase "common intention" was used, and this it is that has given rise to some confusion in a matter which ought to be essentially simple. [emphasis added in italics and bold italics]

85 In *Lee Chez Kee (CA)*, V K Rajah JA, proceeding on the premise that the putative *Mimi*

Wong (CCA) test was established law, examined the drafting history of s 34 IPC extensively and thereafter formulated the *LCK* requirement to align s 34 with the English doctrine of common purpose. The requirement of knowledge in the English doctrine of common purpose was recently reaffirmed in *Regina v Rahman and others* [2009] 1 AC 129 ("*Rahman*"), where the House of Lords held that a secondary offender would be made constructively liable for a crime committed by the actual doer if the secondary offender had foresight of what the actual doer might do (as opposed to foresight of the undeclared intention with which the actual doer might commit the crime in question). *Rahman* was subsequently applied in *R v Mendez and another* [2010] 3 All ER 231 ("*Mendez*"), where the English Court of Appeal stated that the following proposition was sound in principle as well as consistent with *Regina v Powell (Anthony) and Another* [1999] 1 AC 1 and *Rahman* (see *Mendez* at [45] *per* Toulson LJ):

> In cases where *the common purpose is not to kill but to cause serious harm*, D [*ie*, the secondary offender] is not liable for the murder of V [*ie*, the victim] if the direct cause of V's death was a deliberate act by P [*ie*, the actual doer] which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D. [emphasis added]

86 At this juncture, it is pertinent to note the Privy Council's comments in *Barendra (PC)* as to how the IPC should be construed (at 8):

> That the criminal law of India is prescribed by and, so far as it goes, is contained in the [IPC], that accordingly (as the [IPC] itself shows) the criminal law of India and that of England differ in sundry respects, and that the [IPC] has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are[,] though common-places, considerations which it is important never to forget. It is, however, equally true that the [IPC] must not be assumed to have sought to introduce differences from the prior law.

In this passage, the Privy Council cautioned that the IPC should be construed in accordance with its natural meaning as the criminal law of India "differ[ed] in sundry respects" (see *Barendra (PC)* at 8) from English criminal law, and, thus, the IPC should not be assumed to have imported English criminal law as it stood in 1870, when (as mentioned at [80] above) the original version of s 34 of the IPC was amended (the same applies *mutatis mutandis* to the construction of the Penal Code). At the same time, the Privy Council indicated (and this consideration likewise applies *mutatis mutandis* to the provisions of the Penal Code), English criminal law could not be wholly irrelevant where the provisions of the IPC were not clear on their face (see also *Ibra Akanda* at 359 *per* Khundkar J).

87 In our view, the requirement of *common intention* is, in principle, a *more exacting requirement* than the *LCK* 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 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.

88 The difference between knowledge and intention is succinctly summarised in Glanville L Williams, *Jurisprudence by Sir John Salmond* (Sweet & Maxwell Limited, 10th Ed, 1947) as follows (at pp 380–381):

> [H]e who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended. When King David ordered Uriah the Hittite to be set in the forefront of the hottest battle, he intended the death of Uriah only, yet he knew for a certainty that many others of his men would fall at the same time and place.

89 Admittedly, in certain circumstances, the line between subjective knowledge that a particular criminal act might likely occur and a common intention to do that particular act may be rather thin. Depending on the circumstances of the case, subjective knowledge may be evidence of the existence of a particular intention. Thus, in *Public Prosecutor v Lee Chin Guan* [1991] 2 SLR(R) 762 ("*Lee Chin Guan*"), M Karthigesu J held (at [34]) that "[k]nowledge [was] an essential element in coming to a conclusion as to whether there was or was not a common intention".

90 In a similar vein, the Full Bench of the High Court of Rangoon stated in *Emperor v Nga Aung Thein and another* AIR 1935 Rang 89 ("*Nga Aung Thein*") at 92:

> Knowledge is not the same thing as intention. Nevertheless if a man knows that a certain course of action in which he is taking part will under certain circumstances most probably result in death being caused, and still, with that knowledge, persists in his course of action, and death is caused owing to the eventuality which he has foreseen taking place, it may give rise to a legitimate deduction that he intended the causing of death if that eventuality did occur, and he would then be liable as though he had caused that death himself.

We would also draw attention to the following comments by Sir Barnes Peacock CJ (who was involved in the drafting of the IPC) in the Indian case of *The Queen v Gorachand Gope and others* (1866) Bengal LR Supp 443 ("*Gorachand Gope*") at 456–457:

> [W]hen several persons are in company together engaged in one common purpose, lawful or unlawful, and one of … them, without the knowledge or consent of the others commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take[s] no part in it, and do[es] not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and taking him to the thannah [*ie*, the police station] on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design.

The key elements of s 34

91 Let us now examine the key elements of s 34. As can be seen from the wording of s 34 itself,

three elements must be present before constructive liability can be imposed pursuant to this section, namely:

(a) the criminal act element (see the words "a criminal act");

(b) the common intention element (see the words "in furtherance of the common intention of all"); and

(c) the participation element (see the words "a criminal act … done by several persons").

The criminal act element

92 The law on the criminal act element of s 34 is settled. The "criminal act" in s 34 refers to the aggregate of all the diverse acts done by the actual doer and the secondary offenders, which diverse acts collectively give rise to the offence or offences that the actual doer and the secondary offenders are charged with. It is "*that* ***unity of criminal behaviour*** *, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence*" [emphasis added in italics and bold italics] (see *Barendra (PC)* at 9, which is also quoted at [94] below).

93 In the decision of the Full Bench of the High Court of Calcutta in *The King Emperor v Barendra Kumar Ghose* AIR 1924 Cal 257 ("*Barendra (FB)*"), Cuming J said (at 312) in respect of the corresponding words in s 34 IPC:

> It is impossible to conceive [of] two individuals doing identically the same act. Such a thing is impossible. ***Therefore to have any meaning, the expression "criminal act done by several persons" must contemplate an act which can be divided into parts[,] each part being executed by a different person, the whole making up the criminal act which was the common intention of all*** *. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all*. [emphasis added in italics and bold italics]

The sentence in bold italics in the above quotation makes it clear that the criminal act done by the actual doer which results in the offence charged must have been commonly intended by all the offenders. The putative *Mimi Wong (CCA)* test, it may be noted, is inconsistent with this statement because it does not require all the offenders to have a common intention to do the criminal act done by the actual doer which gives rise to the offence charged.

94 On appeal from the decision in *Barendra (FB)*, the Privy Council (*per* Lord Sumner) approved Cuming J's statement and restated the meaning of the words "a criminal act" as follows (see *Barendra (PC)* at 6–9):

> By S. 33 [of the IPC,] a criminal act in S. 34 includes a series of acts and, further "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. … Read together, [ss 33, 34, 37 and 38 of the IPC] are reasonably plain. S. 34 deals with *the doing of separate acts, similar or diverse by several persons*; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for *"that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it*.

…

… 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 all done by himself alone, that is, in a criminal offence*.

[emphasis added]

95 To sum up, according to the above passages from *Barendra (FB)* and *Barendra (PC)*, the criminal act referred to in s 34 IPC (and, likewise, s 34) must result in an offence which, if done by an individual alone, would be punishable. If all the separate and several acts forming the unity of criminal behaviour (*ie*, the criminal act) are done in furtherance of a common intention to engage in such behaviour, all the offenders who shared in that common intention are liable for the offence resulting from that unity of criminal behaviour. (We should add that in *Barendra (PC)*, which was a "twin crime" case, the criminal act, so understood, resulted in two different offences, *viz*, robbery and murder.)

96 We turn now to the common intention element of s 34.

The common intention element

97 Section 34 attributes constructive liability to joint offenders where the criminal act (as described at [92]–[95] above) is done by one or more of them "in furtherance of the common intention of all". It is therefore crucial, in every case, to identify the common intention in furtherance of which the criminal act was done. In this regard, we note that it is often difficult, if not impossible, for the Prosecution to procure direct evidence that a common intention existed between all the offenders. Thus, the existence (or otherwise) of such a common intention must frequently be inferred from the offenders' conduct and all the other relevant circumstances of the case.

98 In the context of s 34, the common intention of the offenders must be to do something or to achieve some goal or purpose. The crucial question is: to do or achieve what? The putative *Mimi Wong (CCA)* test, broadly speaking, rejects the notion that there must be a common intention among all the offenders to do the criminal act done by the actual doer which gives rise to the offence charged; instead, it merely requires the existence of a common intention to engage in some form of criminal conduct, in furtherance of which the criminal act giving rise to the offence charged is done by the actual doer. The question is whether the putative *Mimi Wong (CCA)* test is the correct interpretation of s 34. In our view, this vexed issue of what common intention must be present may be answered by examining two of the leading Privy Council cases on s 34 IPC, *viz*, *Barendra (PC)* and *Mahbub Shah*. These two decisions are still good law in India.

99 Before we examine these two Indian cases, we should highlight that s 34 refers to "a *criminal act*" [emphasis added], and not an *offence*, committed by several persons – *ie*, strictly speaking, the common intention of all the offenders must be a common intention to do a criminal act, as opposed to a common intention to commit an offence. The fact remains, however, that the criminal act done by the actual doer gives rise to the offence which the secondary offenders are charged with; if that is not in fact the case, s 34 would not be applicable at all. Thus, in practical terms, it is in many (although not all) cases immaterial whether the offenders' common intention is characterised as a common intention to do a criminal act or as a common intention to commit an offence (in this regard, see also [116] below). For instance, suppose A, B and C have a common intention to stab D so as to cause him grievous hurt, and A proceeds to stab D, causing him grievous hurt as a result: in this scenario, the relevant criminal act for the purposes of s 34 is the stabbing of D, while the offence resulting from that criminal act is the offence of causing grievous hurt. Although A, B and C's common

intention should (on a strict, literal reading of s 34) be characterised as a common intention to stab D, we are of the view that it would not be inappropriate to characterise it as, instead, a common intention to cause grievous hurt to D. Similarly, if A, B and C have a common intention to stab D in the heart and A does so, killing D as a result, it is, in our view, immaterial whether A, B and C's common intention is characterised as a common intention to stab D in the heart or as a common intention to murder D.

(1) Leading Indian cases

(A) *Barendra (PC)*

100 In *Barendra (PC)*, a group of robbers set out to rob a postmaster and, if necessary, to shoot him to kill should he resist. The postmaster resisted the robbery, and the robbers fired shots at him, one of which killed him. The accused ("BKG") was charged with murder (the rest of the culprits were not charged as they managed to escape arrest). His defence was that he had told his confederates that he did not want to harm the postmaster and that he had not fired his gun. There was some evidence that BKG might have fired his gun as the bullet that killed the postmaster matched the bore of the gun found in BKG's possession. However, there was no evidence as to whether the other robbers had used the same type of gun.

101 At the trial, Page J gave the following direction to the jury (see *Barendra (FB)* at 260–261):

> Therefore in this case if [the robbers] went to that place with *a common intention to rob the Post Master and if necessary to kill him* and if death resulted, each of them is liable whichever of [them] fired the fatal shot.
>
> *If you come to the conclusion that [the robbers] came into the Post Office with that intention to rob and if necessary to kill and death resulted from their act, if that be so, you are bound to find a verdict of guilty*.
>
> *I say if you doubt that it was the pistol of [BKG] which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of [the robbers] in furtherance of the common intention, if that be so[,] then it is your duty to find a verdict of guilty*.
>
> [emphasis added]

102 The jury direction given by Page J was very clear. He did not direct the jury to find BKG guilty if they found that the robbers had shot the postmaster in furtherance of the common intention to rob the postmaster *per se*. Instead, he directed the jury to find BKG guilty only if they were satisfied that the shot which killed the postmaster had been fired in furtherance of the common intention "to rob *and if necessary to kill*" [emphasis added] (see *Barendra (FB)* at 261). The jury direction was predicated on a common intention to kill as the animating intention. (The jury was further directed that for BKG to be found guilty of murder, it was not necessary for him to have fired the fatal shot or to have fired any shot at all, *ie*, it was not necessary for him to have participated in the shooting (see further [162] below).) The jury convicted BKG of murder. The conviction was affirmed by the Full Bench of the High Court of Calcutta. BKG then appealed to the Privy Council.

103 Before the Privy Council, BKG repeated the defence which he had relied on before Page J. Rejecting this argument and upholding the jury direction given by Page J, the Privy Council said (see *Barendra (PC)* at 6–8):

> Even if [BKG] did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait." …
>
> …
>
> … [BKG's] story was much more consistent with participation in the actual commission of the crime than with mere bodily presence after previous abetment. Indeed, he says that when he ran away, the others had already disappeared; thus it would seem that he covered their retreat.
>
> At any rate, his statement supports presence by way of actual participation in the criminal acts or series of acts by which the post master was killed …

104 In *Barendra (PC)*, the Privy Council focused on elucidating the meaning of the phrase "a criminal act" in s 34 IPC, and not the common intention in furtherance of which the criminal act in question was done. But, it is clear from Page J's jury direction (which was upheld by the Privy Council (see *Barendra (PC)* at 9)) that the necessary common intention of the robbers was to rob the postmaster *and, if necessary, to shoot him to kill*. The criminal act done by the robbers was done in furtherance of that common intention. In *Ibra Akanda*, Khundkar J explained that the common intention of the robbers in *Barendra (PC)* comprised both a settled intention to commit robbery and a contingent intention to kill, *viz* (see *Ibra Akanda* at 358):

> [T]he [robbers] set out with an intention to rob, plus an intention to kill provided killing became necessary. … *The intention with which they set out was the common intention. It was a wide intention because it embraced both robbery and murder*. The intention to kill was a narrower and a contingent intention. They would kill only if killing became necessary. … As I understand the judgment [in *Barendra (PC)*], it was held that [BKG] was the doer of a fractional act, at the very least, such an act as standing by or guarding the door, and further that he participated in the common intention which, if it was not the narrower contingent intention only to kill, was, at any rate, the wider intention, equally shared by all, which was *the absolute intention to rob, plus the contingent intention to kill if need be*. [emphasis added]

105 At 363 of *Ibra Akanda*, Khundkar J elaborated on the common intention element of s 34 IPC as follows:

> *I am led to the conclusion that "common intention" cannot be given a constant connotation. What it actually is … varies with the facts of each case*. *There are cases in which it is identical with the mens rea required for the offence actually committed. There are others in which its horizon is wider, like [*Barendra (FB)*] and [*Indar Singh v Emperor *AIR 1933 Lah 819], where the real common intention was to do a criminal act[,] the accomplishment of which might require some other criminal act to be committed*. In these cases the mens rea which makes the ancillary act a crime would be regarded as embraced by the common intention, not as a primary intention, but as a secondary and contingent intention, not in the forefront of the conscious mind, but latent or dormant therein. [emphasis added]

106 In *Barendra (PC)*, the criminal act which formed the basis of the murder charge against BKG was the shooting of the postmaster in furtherance of the common intention to rob him and, if necessary, to shoot him to kill. Both the criminal conduct constituting the robbery and the criminal conduct constituting the shooting were in furtherance of the common intention of all the robbers, which (as just mentioned) was to rob and, if necessary, to shoot the postmaster to kill.

107 Based on the approach laid down in *Barendra (PC)*, the criminal act done by the actual doer

which results in the offence charged would be considered to be done in furtherance of the common intention of all the offenders *only if* that common intention includes an intention *to commit the very criminal act done by the actual doer*. In the discussion which follows, we shall call this "the *Barendra* test".

(b) *Mahbub Shah*

108 The meaning of "common intention" was also discussed in *Mahbub Shah*, where the Privy Council said (at 120):

> Section 34 lays down a principle of joint liability in the doing of a criminal act. … 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 further 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 the 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. [emphasis added]

109 In the above passage, the Privy Council stated that the common intention referred to in s 34 IPC implied the existence of a pre-arranged plan. Later court decisions have clarified that a pre-arranged plan can be formed on the spot just before the commission of the relevant criminal act (see *Lee Chin Guan* at [36] and *Lee Chez Kee (CA)* at [161]). The italicised words in the above passage are an iteration of the express words of s 34 IPC itself and do not really provide guidance as to how s 34 IPC is to be applied to the facts of a particular case, in that they leave unexplained what the requisite common intention is. However, the Privy Council provided the explanation in a later part of that same passage when it stated that it was necessary that "the criminal act was done in concert *pursuant to the pre-arranged plan*" [emphasis added] (see *Mahbub Shah* at 120). These words clearly suggest that the "pre-arranged plan" must include a common intention to do the criminal act done by the actual doer which gives rise to the offence charged.

110 This is clearer from the factual findings made by the Privy Council in that case. The material facts there were as follows. The accused ("MS") and his companion ("WS"), armed with guns, went to rescue MS's cousin ("QS"), who was being assaulted by two men ("HK" and "AD"). MS fired at HK, injuring him, while WS fired at AD, killing him. The Privy Council found that there was no meeting of minds between MS and WS in respect of the shooting of HK and AD. Although both MS and WS intended to shoot HK and AD, they did not form this intention in concert; instead, each of them formed this intention on his own. Thus, on the facts of the case, the Privy Council could not find a *common* intention between MS and WS to shoot HK and AD.

111 Specifically, what the Privy Council said was as follows (see *Mahbub Shah* at 121):

> Their Lordships are prepared to accept that [MS] and [WS] had the same intention, viz., the intention to rescue [QS] if need be by using the guns and that, in carrying out this intention, [MS] picked out [HK] for dealing with him and [WS], [AD], but *where is the evidence of common intention to commit the criminal act complained against*, in furtherance of such intention? Their Lordships find none. *Evidence falls far short of showing that [MS] and [WS] ever entered into a premeditated concert to bring about the murder of [AD] in carrying out their intention of rescuing [QS]. Care must be taken not to confuse same or similar intention with common*

intention; the partition which divides "their bounds" is often very thin; nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. [emphasis added]

In our view, the words used by the Privy Council in *Mahbub Shah* indicate that s 34 IPC was interpreted in that case in the same way as it was interpreted in *Barendra (PC)*. This should not be surprising.

112 Let us now examine the pre-*Mimi Wong (CCA)* local decisions on s 34.

(2) Pre-*Mimi Wong (CCA)* local cases

(a) *Vincent Banka*

113 *Vincent Banka* is the first major Straits Settlements case on murder committed in furtherance of a common intention. In that case, the appellants ("VB" and "STK") were charged with murder and robbery with hurt. The evidence showed that VB and STK had planned to rob the deceased ("Chhua"), and, in the course of committing the robbery, one of them had stabbed Chhua with a knife, inflicting on him injuries from which he died. The evidence was inconclusive as to whether it was VB or STK who had: (a) carried the knife; and (b) stabbed Chhua with the knife. It was also unclear whether VB and STK, respectively, had known that the other was carrying a knife. Further, there was no evidence as to whether there had been a common intention between VB and STK that Chhua should be stabbed. VB and STK were convicted of both murder and robbery with hurt; they appealed against their convictions for murder only.

114 On appeal, one of the grounds of appeal which both VB and STK relied on was that the trial judge failed to direct the jury that for s 34 to apply, they must be satisfied that either: (a) the accused in question inflicted the wounds that resulted in Chhua's death; or (b) there was an intention common to both accused to cause Chhua's death and one of them caused such death. The Prosecution, on the other hand, argued that since the fatal wounds were inflicted in the course of carrying out VB and STK's common intention to commit robbery (an offence involving *violence*), the issue of whether it was VB or STK who had inflicted those wounds was immaterial, and, by virtue of s 34, both of them were equally guilty of murder (see in this regard the quotation at [65] above).

115 The Straits Settlements Court of Criminal Appeal ("the Straits Settlements CCA"), after referring to the law on s 34 IPC as decided in *Barendra (PC)* and *Nga Aung Thein*, set aside the murder convictions of VB and STK on the ground that the trial judge erred in law in failing to direct the jury to consider whether, *inter alia*, VB and STK had a common intention not only to rob, but also to kill. The Straits Settlements CCA (*per* Huggard CJ) stated the law on s 34 as follows (see *Vincent Banka* at 55–56):

> Under [the Penal] 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*. …
>
> … [I]t is the duty of the trial Judge, in cases where section 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*** ; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

…

… [N]owhere in his summing-up did the learned Judge direct the jury that, even if they were satisfied as to the identity of the two robbers, before they could find the accused guilty of murder by reason of the provisions of section 34 of the [Penal] Code[,] ***they must be satisfied on the evidence that there existed between the two men a common intention not only to rob but also, if necessary, to kill the deceased*** **[*ie* , Chhua]**. … The learned Judge should have told the jury, in effect, that they had first to be satisfied as to the identity of the robbers; that then, if so satisfied, they had to consider the further question whether on the evidence placed before them ***they were satisfied as to the existence of a common intention between the robbers not merely to commit robbery but, if necessary, to kill the deceased*** ; that for the purpose of coming to a decision they must consider the evidence against each of the accused separately; and that they could not properly convict either of the accused of murder by reason of section 34 of the [Penal] Code unless they were satisfied that this common intention existed. …

…

… Under the terms of that section [*ie*, s 34], as has already been pointed out, ***there must exist a common intention to commit the crime actually committed*** , and it is not sufficient that there should be merely a common intention to "behave criminally." …

[emphasis in original in italics; emphasis added in bold italics]

116 In our view, the principles stated in the above extract from *Vincent Banka* are clearly based on the *Barendra* test. Indeed, given the jurisdictional framework of the Singapore courts in 1936, it was inconceivable for the Straits Settlements CCA to have refused to apply the *Barendra* test. We also note that the common intention in *Barendra (PC)* was described in terms of a common intention to commit a *criminal act*, whereas in *Vincent Banka*, Huggard CJ used the phrases "the *act* actually committed" [emphasis in original omitted; emphasis added in italics] (at 55), "the *criminal act* actually committed" [emphasis added] (at 55) and "the *crime* actually committed" [emphasis added] (at 56) interchangeably. In our view, the different expressions used in *Vincent Banka* are not material for the reason stated at [99] above. In any case, Huggard CJ appeared to regard those expressions as having the same meaning; *ie*, in essence, he held that there had to be a common intention to commit a *criminal act*. The Straits Settlements CCA set aside the convictions of VB and STK for murder presumably because, in the absence of a finding that the two had a common intention to commit the criminal act done and in the absence of conclusive evidence as to who had actually stabbed Chhua to death, neither of them could be held liable for the offence resulting from that criminal act. In contrast, since there was evidence that VB and STK had a common intention to commit robbery, and since robbery was in fact committed, VB and STK's convictions for robbery were upheld.

(b) *Rex v Chhui Yi* [1936] MLJ 142

117 A few months after *Vincent Banka* was decided, the Straits Settlements CCA in *Rex v Chhui Yi* [1936] MLJ 142 ("*Chhui Yi*") clarified the statement of principle enunciated by Huggard CJ in the former case. The Straits Settlements CCA said (see *Chhui Yi* at 144):

This Court recently considered this question [of common intention] in the case of [*Vincent Banka*], where the terms of section 34 of the Penal Code were summed up in the following phrase: "Under the terms of that section … there must exist a common intention to commit the *crime* actually committed, and it is not sufficient that there should be merely a common intention

to 'behave criminally'." *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 sections 299 and 300 of the Penal Code and the doing of which, if death results, amounts to murder*. [emphasis added]

It should be noted that the court did not disagree with Huggard CJ's formulation, but merely clarified that where s 34 was invoked in respect of the offence of murder, the common intention need not necessarily be a common intention to kill because of the terms of ss 299 and 300 of the Penal Code (see in particular s 300(*c*), which requires only an intention to inflict the particular s 300(*c*) injury that was in fact caused to the victim; see also our earlier discussion on the various kinds of criminal acts which may give rise to the offence of murder as defined in s 300 and the application of s 34 thereto).

(c) Other pre-*Mimi Wong (CCA)* local cases

118 From 1936 up to 22 July 1972 (the date on which *Mimi Wong (CCA)* was decided), the Straits Settlements CCA and its successor court, the CCA, decided a number of cases on murder committed in furtherance of a common intention. To the best of our knowledge, all of these cases did not depart from what was said in (first) *Vincent Banka* and (subsequently) *Chhui Yi vis-à-vis* the requirement of a common intention to commit the criminal act done by the actual doer which gave rise to the offence charged. The cases which we are aware of are: (a) *T'ng Ban Yick v Rex* [1940] MLJ 153; (b) *Lim Heng Soon and another v Public Prosecutor* [1968–1970] SLR(R) 607; (c) *Ong Kiang Kek v Public Prosecutor* [1968–1970] SLR(R) 821; (d) *Kee Ah Tee and another v Public Prosecutor* [1971–1973] SLR(R) 63; and (e) *Lee Choh Pet and others v Public Prosecutor* [1971–1973] SLR(R) 299 ("*Lee Choh Pet*").

119 Two observations may be made with regard to this group of cases. First, as just mentioned in the preceding paragraph, they did not depart from *Vincent Banka*. Second, Wee CJ presided over the CCA hearings in the last four cases listed in the preceding paragraph. In addition, he presided over the CCA hearing in *Mimi Wong (CCA)*, the written decision for which was released about four months after the written decision for *Lee Choh Pet* (whose CCA hearing he likewise presided over) was released. Thus, from 1936 up to 22 July 1972, the law on the common intention element of s 34 can be said to have been settled – *viz*, for s 34 to apply, it was necessary to prove, in both a "single crime" case and a "twin crime" case (as should be expected), that there was a common intention to commit the criminal act done by the actual doer which gave rise to the offence charged.

120 Then, according to Prof Michael Hor ("Prof Hor") in his article "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] Sing JLS 494 ("the 'Common Intention' article") at pp 496–497, on 22 July 1972:

> [T]his seemingly settled position was, all of a sudden, *overthrown* by the case which can perhaps be described as the mother of all recent decisions on common intention – *Mimi Wong [(CCA)]*. Although the evidence would have satisfied the *Chhui Yi-Banka* test [which, according to Prof Hor at p 496, was that "the common intender [could not] be liable for the [collateral] offence, unless he or she also possessed the *mens rea* required (even if it [was] only conditional) for the [collateral] offence"] the [CCA] said that the intention of the actual doer must be distinguished from the common intention of all. The two intentions need not be the same, but they must be "consistent". *What is clear is that the* Mimi *formula [ie, the putative* Mimi Wong (CCA) *test] does not require the common intenders [ie, the secondary offenders] to possess any of the* mens rea *of the [collateral] offence*. [emphasis added]

121 Prof Hor read the decision in *Mimi Wong (CCA)* as having rejected *Vincent Banka* entirely. In our view, this was highly improbable. If the Straits Settlements CCA in *Vincent Banka* had applied the *Barendra* test (which, in our view, it certainly did), it would have been highly unusual for the CCA in *Mimi Wong (CCA)* to have rejected *Vincent Banka* without giving any explanation for such rejection. The principle of *stare decisis* would not have permitted even the CCA to treat a decision of the Straits Settlements CCA (which decision was, in principle, binding on the CCA as the successor court of the Straits Settlements CCA) in so cavalier a manner. Indeed, it would also have meant enlarging the *Barendra* test in a case where it was not necessary to do so. It ought to be remembered that in 1972, there was still a right of appeal to the Privy Council. *Mimi Wong (CCA)* has also been said to have led to the purported development of two divergent lines of authority on s 34 (see *Shaiful Edham* at [52] (referred to at [3] above)). In our view, neither Prof Hor's interpretation of *Mimi Wong (CCA)* nor the comment at [52] of *Shaiful Edham* reflects the correct position. Our examination of *Mimi Wong (CCA)* shows that the CCA in that case in fact applied the law as stated in *Barendra (PC)*. Let us now turn our attention to *Mimi Wong (CCA)*, beginning with the High Court's judgment in *Public Prosecutor v Mimi Wong alias Wong Weng Siu and Sim Woh Kum alias Sim Wor Kum* Criminal Case No 17 of 1970 (unreported) ("*Mimi Wong (HC)*").

(3) The decisions in *Mimi Wong (HC)* and *Mimi Wong (CCA)*

(A) *Mimi Wong (HC)*

122 In *Mimi Wong (HC)*, the first accused, Mimi Wong ("Mimi"), was the mistress of a Japanese man working in Singapore ("Mr W"). Mr W later brought his wife ("Mrs W") and his children from Japan to live with him. Two weeks after her arrival in Singapore, Mrs W was stabbed to death by Mimi, assisted by her husband, Sim Woh Kum ("Sim"), the second accused. Mimi and Sim were charged with murder committed in furtherance of a common intention. The evidence showed that Mimi and Sim had gone to Mrs W's house and, whilst there, Sim had thrown detergent into Mrs W's eyes just as Mimi was about to stab Mrs W. Mimi had then stabbed Mrs W in the neck and the abdomen (cutting the jugular vein and the aorta respectively), causing her to bleed to death.

123 In their grounds of decision, the trial judges held that for s 34 to apply, the Prosecution had to prove three things, namely: (a) that Mrs W was dead; (b) that Mrs W's death was caused by the act or acts of Mimi and Sim or one of them; and (c) that (see *Mimi Wong (HC)* at 59):

> *[S]uch act or acts were done in furtherance of their common intention of causing [Mrs W's] death, or were done in furtherance of their common intention of causing bodily injury to [Mrs W] and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death*. [emphasis added]

Vis-à-vis the last-mentioned factor, the trial judges said (see *Mimi Wong (HC)* at 60–70):

> … [T]his was the main issue in this case for we had to decide on the evidence before us whether or not the fatal injuries were inflicted in furtherance of either of the two common intentions already stated [*ie*, the common intention of causing Mrs W's death and the common intention of causing bodily injury to Mrs W]. If they were so inflicted[,] then it did not matter which of the two accused inflicted those fatal injuries because both would then be liable for those injuries in the same manner as if the injuries had been inflicted by each of them alone. On the other hand[,] if the fatal injuries were not inflicted in furtherance of either of these two common intentions[,] then it was imperative that we should ascertain, from the evidence before us, which of the two accused inflicted those injuries because in that event[,] only the accused who inflicted those injuries would be liable for causing the death of [Mrs W].

> The evidence showed that the fatal injuries were knife injuries deliberately inflicted with great force on vital parts of the body. They were not caused accidentally. Death occurred within a matter of minutes. Under the circumstances[,] *it was a fair inference that the said injuries were inflicted either with the intention of causing the death of [Mrs W] or with the intention of causing bodily injury to [Mrs W] with a knife*[,] and as the injuries actually inflicted were sufficient in the ordinary course of nature to cause death, the person who inflicted those injuries was guilty of murder unless he or she could successfully invoke any of the exceptions [to] … murder laid down in section 300 of the Penal Code.
>
> …
>
> The last question which we had to consider was whether or not the knife injuries inflicted on [Mrs W] by [Mimi] were inflicted in furtherance of the common intention of both accused[,] i.e. in furtherance of their pre-arranged plan to cause the death of [Mrs W] or to cause bodily injury to [Mrs W] with a knife and [whether] the bodily injury intended to be caused was sufficient in the ordinary course of nature to cause death. In other words, was [Sim] a party to the killing of [Mrs W] or was it the sole responsibility of [Mimi]? …
>
> …
>
> In view of the facts which we have outlined and the reasons we have given, we were convinced that *[Sim] shared a common intention with [Mimi] of either causing the death of [Mrs W] or of inflicting bodily injury on [Mrs W] with a knife*; that in furtherance of that common intention[,] [Mimi] inflicted with a knife serious injuries on [Mrs W] which resulted in her death; that the injuries so inflicted were sufficient in the ordinary course of nature to cause death[;] and that by causing the death of [Mrs W] in those circumstances[,] both accused were guilty of the offence of murder.
>
> [emphasis added]

124 In essence, the trial judges concluded on the facts that:

> (a) Mimi and Sim had a common intention to either cause Mrs W's death or inflict bodily injury on Mrs W with a knife; and
>
> (b) in furtherance of that common intention, Mimi had inflicted on Mrs W, with a knife, injuries which constituted s 300(*c*) injury.

The trial judges convicted both Mimi and Sim of murder.

125 It can be seen from the trial judges' statement of the law in *Mimi Wong (HC)* that although the trial judges did not refer to *Barendra (PC)*, they in effect applied the *Barendra* test. The trial judges' approach to s 34 was also in line with the approach of the Straits Settlements CCA in *Vincent Banka* (indeed, that had to be the case because the High Court was bound by decisions of the Straits Settlements CCA). On appeal, Wee CJ made it clear, at [26] of *Mimi Wong (CCA)* (quoted at [135] below), that the trial judges had applied s 34 properly *vis-à-vis* the charge against Sim.

(B) *Mimi Wong (CCA)*

126 Mimi and Sim appealed against their convictions for murder. One of the arguments raised by defence counsel before the CCA – which is the most material argument for present purposes – was as

follows (see *Mimi Wong (CCA)* at [22]):

> It is argued [that s 34] can only be applied *if the common intention of the persons accused of an offence is to commit the offence with which they are charged*. In other words it is argued that [Sim] will not be guilty of the offence under s 302 of the Penal Code unless the common intention of [Mimi and Sim] was to cause the death of [Mrs W], or was *such other intention as is mentioned in s 300 of the Penal Code*. [emphasis added]

127 It should be noted that, like the High Court's statement of the law in *Mimi Wong (HC)*, counsel's submission to the CCA in *Mimi Wong (CCA)* was *wholly consistent* with the *Barendra* test, except that counsel referred to the requisite common intention as a common intention to commit the *offence* which the secondary offender was charged with, as opposed to a common intention to commit the *criminal act* which gave rise to the offence charged. Counsel's submission in *Mimi Wong (CCA)* was also in line with the principles laid down by the Straits Settlements CCA in *Vincent Banka*, where Huggard CJ stated the law as laid down in *Barendra (PC)*, but used the words "act", "criminal act" and "crime" interchangeably instead of the specific term used in s 34, *viz*, "criminal act" (see [116] above).

128 Wee CJ responded to counsel's argument as follows (see *Mimi Wong (CCA)* at [23]):

> There is no doubt that for [s 34] to apply *there must be in existence a common intention between all the persons who committed the criminal act*, and *that a criminal act be done in furtherance of that common intention*. *When these two requirements are proved, each of such persons would be liable for the entire criminal act in the same manner as if he had done it alone* [citing the Privy Council's decision in *Mahbub Shah* at 120 (reproduced at [108] above)]. [emphasis added]

Wee CJ then went on to quote (at [24] of *Mimi Wong (CCA)*) the Privy Council's explanation of the phrase "a criminal act" in *Barendra (PC)* at 7–9 (reproduced at [94] above).

129 Wee CJ's statements were interpreted in subsequent cases as a rejection of counsel's argument on the law (see [120]–[121] above), but no explanation has been given for this interpretation. In our view, Wee CJ did not reject counsel's argument. There is nothing in his comment at [23] of *Mimi Wong (CCA)* to suggest that the principle formulated by counsel was incorrect (even though, as just mentioned, counsel referred to a common intention to commit an offence rather than a common intention to do a criminal act). All that Wee CJ said at [23] of *Mimi Wong (CCA)* was that two requirements must be satisfied before s 34 could apply, namely:

(a) "there must be in existence a common intention between all the persons who committed the criminal act" (see [23] of *Mimi Wong (CCA)*); and

(b) "a criminal act [must] be done in furtherance of that common intention" (see, likewise, [23] of *Mimi Wong (CCA)*).

130 What Wee CJ left unexplained in stating the law in this way was this: what was the common intention in furtherance of which the criminal act was done? He did not provide a connection between the two requirements which he laid down at [23] of *Mimi Wong (CCA)*. He did not explain what the common intention of all the offenders had to be. If Wee CJ had stated that the first requirement at [23] of *Mimi Wong (CCA)* was "a common intention between all the persons *to commit* a criminal act" [emphasis added], it would have provided the necessary connection with the second requirement in that paragraph, and this would in turn have made it clear what the requisite common intention was.

In the context of *Mimi Wong (HC)*, the common intention found by the trial judges was clear, and the CCA accepted that finding. In our view, the omission by Wee CJ to connect the two requirements set out at [23] of *Mimi Wong (CCA)* led later courts to give a literal interpretation to the second requirement without linking it back to the first requirement, and in turn gave rise to the putative *Mimi Wong (CCA)* test. It led the courts to decide that for the purposes of imposing constructive liability on secondary offenders pursuant to s 34 in a "twin crime" case, it was not necessary for the secondary offenders to have a common intention to do the (collateral) criminal act done by the actual doer which resulted in the offence charged. This meant (for instance) that where A, B and C had a common intention to rob D, and C killed D in the course of the robbery in order to facilitate the robbery or further its accomplishment, s 34 could apply to make A and B constructively liable for the offence resulting from C's criminal act of killing D, even if A and B did not share C's intention to kill D.

131 It is clear from the findings of fact of the trial judges in *Mimi Wong (HC)*, which were affirmed by the CCA (in *Mimi Wong (CCA)*), that s 34 was applicable to make Sim constructively liable for the offence resulting from the criminal act committed by Mimi as: (a) he shared a common intention with Mimi to either cause Mrs W's death or inflict bodily injury on Mrs W with a knife; and (b) the injuries which were in fact inflicted on Mrs W were sufficient in the ordinary course of nature to cause death, *ie*, those injuries amounted to s 300(*c*) injury. Prof Hor commented in the "Common Intention" article (at p 496) that the evidence in *Mimi Wong (CCA)* would have satisfied the law as set out in *Vincent Banka* and *Chhui Yi*. In our view, the actual decision in *Mimi Wong (CCA)* was based on an application of the *Barendra* test. Unfortunately, Wee CJ's failure to explain the connection between the two requirements set out at [23] of *Mimi Wong (CCA)* led to a misunderstanding of the actual *ratio* of that case. We explain below why we are of the view that there was such a misunderstanding.

132 It is first necessary to point out that Wee CJ's statements at [23] of *Mimi Wong (CCA)* may not have been original formulations. They bear a striking resemblance to the words (in bold italics in the quotation below) used in two passages in *Nazir and others v Emperor* (1946) 49 Cr LJ 271 ("*Nazir*"), a decision of the High Court of Allahabad. In that case, five persons planned to abduct a married woman and beat up her husband, with (so the court stated at [30]) "a remote wish or intention" that the husband should be killed. The abduction was carried out and, in the course of it, the husband was killed. The accused, who drove the abductee away, argued that he could not be liable for the offence of murder as he had not been present at the killing. Apropos this argument, Raghubar Dayal J said:

> 25 The result essential for the applicability of this section [*ie*, s 34 IPC] is undoubtedly ***the existence of a common intention between all the several persons who committed the criminal act, and the next essential is that a criminal act be done in furtherance of that common intention*** .
>
> 2 6 *When these two essentials are satisfied, each of such persons would be liable for the entire criminal act in the same manner as if he alone had done it irrespective of … whether he was present at the time or not*. Such view was held by their Lordships of the Privy Council in [*Barendra (PC)*].
>
> [emphasis added in italics and bold italics]

133 Two points should be noted about the two passages quoted above. First, Dayal J held that what he stated in these two passages represented the view of the Privy Council in *Barendra (PC)*. As may be recalled, the Privy Council's view in that case was that the murder of the postmaster was committed in furtherance of the common intention of the robbers to rob the postmaster and, if necessary, to shoot him to kill. The intention to kill was part of the robbers' common intention.

134 Second, although Dayal J did not specify that "*that* common intention" [emphasis added] (see [25] of *Nazir*) must be the common intention to commit the criminal act done by the actual doer which gave rise to the offence charged against the secondary offenders, he subsequently (in effect) said so at [28] when he described the relevant criminal act in that case as "the entire transaction composed of the abduction and the beating *which proceeded from the common intention of all*" [emphasis added]. The charge in *Nazir* was for the offence of murder resulting from the assault on the husband by the actual doer. In our view, [28] of *Nazir* is merely an elaboration of [25]–[26] thereof. If [25]–[26] of *Nazir* are read without reference to [28] thereof (or without reference to what the Privy Council decided in *Barendra (PC)*), they are liable to be misunderstood to mean that for the secondary offenders in *Nazir* to be held constructively liable under s 34 IPC for murder, it was not necessary for them to have a common intention to beat up the woman's husband; instead, it was sufficient so long as the beating was done in furtherance of their common intention to abduct the woman. In our view, this was precisely how the two requirements set out by Wee CJ at [23] of *Mimi Wong (CCA)* were misunderstood. It appears to us that this misunderstanding occurred because Wee CJ omitted, at [23] of *Mimi Wong (CCA)*, to specify the common intention in furtherance of which the criminal act was done. In our view, this misunderstanding led to the rise of the putative *Mimi Wong (CCA)* test, which, it is clear, is not supported by a proper understanding of what Wee CJ had intended to say at [23] of *Mimi Wong (CCA)*.

135 In *Mimi Wong (CCA)*, Wee CJ, after commenting on defence counsel's submission, proceeded to elaborate on the relevance of the *mens rea* for the offence committed by the actual doer in these words:

> 25 It is clear from the Privy Council's interpretation [in *Barendra (PC)*] of the words "criminal act" that *it is the result of a criminal act which is a criminal offence*. It then remains, in any particular case, to find out the actual offence constituted by the "criminal act". 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 that is an ingredient of the offence constituted by the criminal act is the intention of the actual doer and must be distinguished from the common intention of the [actual] doer and his confederates. It [*ie*, the intention of the actual doer] 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. Thus if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder. Applying s 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly consistent with the carrying out of that common intention[,] and as their [*ie*, A and B's] "criminal act", *ie* that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder.
>
> 2 6 *On the facts of the present case, we are accordingly of the opinion that s 34 has been properly applied with regard to the charge against [Sim]*. …
>
> [emphasis added]

136 It can be seen from the above quotation of [26] of *Mimi Wong (CCA)* that Wee CJ held that the trial judges had properly applied the law on s 34, *ie*, the law encapsulated in the *Barendra* test. In the light of this, we can now analyse Wee CJ's statements at [25] of *Mimi Wong (CCA)* against the

backdrop of Wee CJ's upholding of the trial judges' application of the *Barendra* test in *Mimi Wong (HC)*. What Wee CJ said in the first half of [25] of *Mimi Wong (CCA)* was, in essence, as follows: (a) where the nature of the offence arising from the criminal act done by the actual doer depended on the intention with which that criminal act was done, the intention of the actual doer in doing that criminal act would determine the offence committed by him; and (b) s 34 would then apply to make the secondary offenders constructively liable for the same offence. In *Mimi Wong (HC)*, Mimi intentionally stabbed Mrs W at the vital parts and caused her death. Mimi did the criminal act described in s 300(*c*) of the Penal Code with the necessary *mens rea*. Mimi's *mens rea* determined the offence committed by her, and, because there was a common intention between Mimi and Sim to either cause Mrs W's death or inflict bodily injury on Mrs W with a knife, Mimi's criminal act was done in furtherance of that common intention. Hence, in the context of the evidence in *Mimi Wong (HC)*, s 34 was incontrovertibly applicable to make Sim constructively liable for the s 300(*c*) murder arising from Mimi's criminal act, consistent with the *Barendra* test.

137 Next, Wee CJ said that the intention of the actual doer in committing the criminal act done which resulted in the offence charged had to be distinguished from the common intention of all the offenders (*ie*, the actual doer *plus* the secondary offenders). They might be identical, but, if they were not identical (*eg*, an intention on the actual doer's part to kill and a common intention among all the offenders to cause hurt), the actual doer's intention must at least be consistent with the common intention of all the offenders (*eg*, an intention on the actual doer's part to kill and a common intention among all the offenders to stab or shoot vital areas of the victim's body) because, if that were not the case, the criminal act done by the actual doer would not be in furtherance of all the offenders' common intention. In *Mimi Wong (HC)*, there was no need to consider the distinction between Mimi's intention in stabbing Mrs W and the common intention of Mimi and Sim to either cause Mrs W's death or inflict on Mrs W bodily injury with a knife because Mimi's intention was clearly consistent with Mimi and Sim's common intention, and the stabbing of Mrs W by Mimi was also done in furtherance of that common intention.

138 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 – it depends on the level of abstraction adopted in defining the common intention that is alleged to be furthered by the criminal act done. We must thus be careful in applying the concept of consistency (which was described by Prof Hor as "an unhappily ambiguous term in the context of the need for certainty in the criminal law" (see p 497 of the "Common Intention" article)) in the context of s 34 to impute constructive liability for joint offences.

139 In *Mimi Wong (CCA)*, Wee CJ provided an illustration of consistency at a general level of abstraction, with the result that the criminal act done by the actual doer in that illustration was consistent with the common intention in question, even though that same criminal act might be inconsistent with the common intention if the latter were defined at a more specific level of abstraction. His illustration was as follows (see [25] of *Mimi Wong (CCA)*):

> [I]f A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of [s 300(*c*)] murder. *Applying s 34* it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C

with a knife because B's act is clearly consistent with the carrying out of that common intention and as their [*ie*, A and B's] "criminal act", *ie* that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder. [emphasis added]

140 The above passage actually deals with two separate issues (namely, (a) consistency of B's criminal act with A and B's common intention; and (b) the offence of s 300(*c*) murder), but Wee CJ dealt only with the former (*ie*, the consistency issue). He said that B's act of stabbing C in the region of the heart was consistent with A and B's common intention to cause injury to C with a knife. That statement, in our view, is obvious, given that A and B's common intention was defined very broadly as a common intention to injure C with a knife, without any limitation on the type of injury that might be inflicted on C. From this perspective, B's act of stabbing C in the region of the heart could be said to be consistent with A and B's common intention.

141 If, however, A and B's common intention in Wee CJ's illustration had been defined more narrowly as a common intention to disfigure C's face (*ie*, as a common intention to commit a specific criminal act), it would be difficult to see how B's act of stabbing C in the region of the heart could be said to be consistent with A and B's common intention. Section 34 should then *not* apply to make A constructively liable for the offence resulting from B's criminal act (*viz*, the offence of s 300(*c*) murder) because the type of injury which A and B commonly intended to cause to C (*viz*, disfigurement of the face) was not 300(*c*) injury (s 300(*c*) injury being the type of injury which B in fact caused to C). A second objection to making A constructively liable for the offence resulting from B's criminal act if A and B's common intention in Wee CJ's illustration had been defined in the specific manner just stated (*ie*, as a common intention to disfigure C's *face*) is that it would be difficult to assert that B's act of stabbing C *in the region of the heart* is consistent with or in furtherance of that common intention. Therefore, regardless of whether or not the illustration of consistency given by Wee CJ at [25] of *Mimi Wong (CCA)* is considered in the light of the factual matrix of that case (where there was a common intention to either cause death or inflict bodily injury with a knife), that illustration of consistency must be understood as being based on the adoption of a particular level of abstraction in applying s 34 to the offence of s 300(*c*) murder. In our view, the illustration given by Wee CJ does not support the conclusion that in the present case, the mere fact that Bala's criminal act (*viz*, the assault on Wan) facilitated the robbery meant that that criminal act was in furtherance of the Appellants' common intention to rob Wan.

142 It is instructive to compare Wee CJ's illustration with the scenario that was before the Supreme Court of India in *Bhaba Nanda Sarma and others v The State of Assam* AIR 1977 SC 2252 ("*Bhaba Nanda Sarma*"). The accused in that case ("BNS") participated in an assault along with two companions by holding the victim, while his two companions inflicted on the victim bodily injuries from which he died. All three men were subsequently charged with murder committed in furtherance of a common intention. At first instance, the trial judge acquitted all three men. His decision was reversed by the High Court of Gauhati, which convicted all three men of murder committed in furtherance of a common intention. On further appeal, the Supreme Court of India held, on the evidence, that BNS had shared only the common intention of his two companions to commit "a lesser offence than murder" (at [6]), and not their common intention to murder the victim. The court thus set aside BNS's conviction for murder and replaced it with a conviction for culpable homicide not amounting to murder under s 304 read with s 34 of the IPC (in contrast, the murder convictions of BNS's two companions were upheld). Untwalia J emphasised (at [4]):

> To attract the application of S. 34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. *In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by*

one or more of the participants. [emphasis added]

143 The analysis above explains and supports our view that there is no basis to suggest that the CCA in *Mimi Wong (CCA)* had intended to overthrow *Vincent Banka*, which would have meant rejecting the *Barendra* test. We see nothing in the judgment of Wee CJ in *Mimi Wong (CCA)*, properly understood, to indicate that he was enunciating a new test that departed (or was intended to depart) from the *Barendra* test. In our view, the *Barendra* test sets out the correct position on the common intention element of s 34. In *Mahbub Shah*, the Privy Council interpreted s 34 IPC in the same way as the provision was interpreted in *Barendra (PC)* (see [111] above), and the same position was taken locally (*vis-à-vis* s 34) in *Vincent Banka* and *Chhui Yi* and, subsequently, *Mimi Wong (CCA)*. The *Barendra* test, in our view, is in line with the purpose for which s 34 IPC (and s 1 of the 1870 IPC Amendment Act) was enacted; this applies *mutatis mutandis* in respect of s 34.

(4) Application of the *Barendra* test to s 300(*c*) murder

144 One other important aspect of *Mimi Wong (HC)* and *Mimi Wong (CCA)* ought to be addressed – namely, the *application* of the *Barendra* test to, specifically, the offence of s 300(*c*) murder. It is necessary for us to express our views on this matter as s 300(*c*) murder is the offence which group offenders are most commonly prosecuted for in Singapore. As mentioned earlier (see [125] and [135]–[136] above), Wee CJ said in *Mimi Wong (CCA)* that the trial judges in *Mimi Wong (HC)* had applied s 34 properly, *ie*, they had proceeded, correctly, on the basis that s 34 would apply to Sim if there was "[a] *common intention of causing bodily injury* to [Mrs W] and [if] the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death" [emphasis added] (see *Mimi Wong (HC)* at 59). On this basis, it may be argued that if A and B have a common intention to punch C, and A delivers punches in the region of C's vital organs, resulting in C sustaining s 300(*c*) injury, A's fatal punches can be considered to be in furtherance of A and B's common intention, and B can be made constructively liable as a secondary offender for s 300(*c*) murder.

145 This would not be an unreasonable approach, having regard to the established law (*ie*, the law laid down in *Virsa Singh* (see [38] above)) on how s 300(*c*) of the Penal Code should be applied with respect to the *actual doer*. Where the *secondary offender* is concerned, however, we are of the view that he should not be made constructively liable for the offence of s 300(*c*) murder arising from the actual doer's criminal act unless there is a common intention to cause, specifically, s 300(*c*) injury, and not any other type of injury (in this regard, see our observations at [74]–[76] above on why our courts should not, where constructive liability under s 34 for s 300(*c*) murder is concerned, apply the *Virsa Singh* test and hold that a common intention to inflict any type of injury is sufficient for a secondary offender to be found guilty of s 300(*c*) murder). In our view, causing death or killing (whether by way of inflicting s 300(*c*) injury or otherwise) can be said to be *inconsistent* with or, at least, in *excess* of a common intention to cause hurt, whether simple hurt or grievous hurt. Interestingly, even under the English doctrine of common purpose, the position is that (*per* Toulson LJ in *Mendez* at [47]; see also [85] above):

> It would not be just that D [*ie*, the secondary offender] should be found guilty of the murder of V [*ie*, the victim] by P [*ie*, the actual doer], if P's act was of a different kind from, and much more dangerous than, the sort of acts which D intended or foresaw as part of the joint enterprise.

146 Of course, if the common intention is to cause s 300(*c*) injury generally without any particular kind of injury specified, then the inflicting of any fatal injury with any kind of weapon or object would be in furtherance of that common intention. In the context of s 300(*c*) injury, a common intention to cause such injury is substantially the same as a common intention to cause death by the infliction of the specific injury which was in fact caused to the victim since s 300(*c*) injury is, by definition, injury

that is sufficient in the ordinary course of nature to cause death. Thus, if A, B and C have a common intention to give D a good beating, but C causes D's death in the course of beating him, it does not necessarily follow that A and B are constructively liable for the offence resulting from C's criminal act as there is no common intention to inflict s 300(*c*) injury on D. Similarly, if A, B and C have a common intention to disfigure D's face, and C, in the course of carrying out this common intention, stabs D in the heart and kills him, A and B cannot be held constructively liable pursuant to s 34 for the killing done by C as injury caused to a person by disfiguring his face is not s 300(*c*) injury.

147 In this connection, it should also be noted that in *Mohamed Yasin*, the Privy Council held (at [9]) that it must be proved "*as a matter of scientific fact*" [emphasis added] that the injury inflicted on the victim amounted to s 300(*c*) injury. Applying this requirement (which may be satisfied by scientific evidence, including medical or forensic evidence) to that part of the Prosecution's case against Daniel and Christopher which is premised on the contention that the Appellants had a common intention to beat Wan on the head to render him unconscious (a contention which the Judge did not find to be supported on the facts), an issue would arise as to whether the injury caused to a person by beating him on his head can be regarded as s 300(*c*) injury if no scientific evidence (which would necessarily include medical evidence) is called (as counsel for Daniel pointed out (see [49] above)) to show *as a scientific fact* that *any knock on the head with a weapon akin to the baseball bat* is sufficient in the ordinary course of nature to cause death. Thus, even if the Judge had found on the evidence that the Appellants had a common intention to beat Wan on the head to render him unconscious, it would not necessarily follow that this common intention was a common intention to inflict s 300(*c*) injury on Wan.

148 In the present case, the Judge found that Bala's assault on Wan with the baseball bat gave rise to the offence of s 300(*c*) murder because Bala *intentionally* inflicted on Wan s 300(*c*) injury. This is a correct application of *Virsa Singh* as far as Bala's (direct) liability for s 300(*c*) murder is concerned. However, *vis-à-vis* Daniel and Christopher's constructive liability for s 300(*c*) murder, the Judge did not find that the Appellants had a common intention to beat Wan up or to beat him on the head (let alone a common intention to beat him on the head with, specifically, the baseball bat). The Judge merely found that Daniel and Christopher were aware that violence would be used to overpower Wan in order to facilitate the robbery (see the GD at [51]). In view of these findings, s 34 was not applicable to render Daniel and Christopher constructively liable for the s 300(*c*) murder resulting from Bala's assault on Wan as the Appellants had no common intention to inflict the specific injuries which Bala actually inflicted on Wan.

(5) Post-*Mimi Wong (CCA)* local cases

149 We shall now briefly review the post-*Mimi Wong (CCA)* local cases on s 34, when invoked in relation to the offence of murder, before concluding our discussion on the common intention element of s 34.

150 In this regard, the next reported decision after *Mimi Wong (CCA)* was the decision of the High Court in *Public Prosecutor v Neoh Bean Chye and another* [1974–1976] SLR(R) 61 ("*Neoh Bean Chye (HC)*"). In that case, the proprietor of a wine bar ("Chew") was killed in a robbery. The trial judges found that the first accused ("NBC") and the second accused ("LKH") had a common intention to rob Chew and to shoot him if he resisted. NBC brought with him a gun for that purpose. Before entering the wine shop, he loaded the gun and handed it to LKH. Chew resisted and LKH shot him dead. The defence was that Chew was shot accidentally in the struggle. The trial judges rejected this defence and convicted NBC and LKH of murder. On appeal, the CCA held that the trial judges were entitled on the evidence to conclude that NBC and LKH had *a common intention to rob as well as "to use the gun if any resistance was put up by [Chew] during the course of the robbery*" [emphasis

added] (see *Neoh Bean Chye (CCA)* at [2]).

151 In *Neoh Bean Chye (HC)*, the High Court (*per* Choor Singh J) reiterated Wee CJ's statement at [23] in *Mimi Wong (CCA)* that for s 34 to apply (see *Neoh Bean Chye (HC)* at [50]):

> [I]t is sufficient if the Prosecution prove[s] that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of the common intention. This is clear from the decisions of the Privy Council in [*Barendra (PC)*] and *Mahbub Shah* … and also from the recent decision of the [CCA] in [*Mimi Wong (CCA)*].

Although Choor Singh J also commented that "the headnote of the report of the decision in … *Vincent Banka* [did] not contain a correct statement of the law" (see *Neoh Bean Chye (HC)* at [50]), this was not material to the High Court's eventual decision as all that Choor Singh J meant to say was, in effect, that the *Barendra* test should be stated not in terms of a common intention to commit a crime, but, rather, in terms of a common intention to commit a criminal act. In this regard, we note that the essential facts found by the High Court in *Neoh Bean Chye (HC)* and affirmed by the CCA in *Neoh Bean Chye (CCA)* are similar to those in *Barendra (PC)*. On the facts found by the High Court (which, as just mentioned, were affirmed by the CCA), it would appear that the CCA applied the *Barendra* test.

152 After *Neoh Bean Chye (HC)* and *Neoh Bean Chye (CCA)*, *Vincent Banka* and its progeny ceased to be cited as precedents on s 34 for more than 20 years until 1999, when (as mentioned at [3] above) the CA observed in *Shaiful Edham* at [52] that they represented the wrong line of the "two divergent lines of authority" on s 34. As we have demonstrated, this observation is inaccurate as it overlooked the fact that post-*Mimi Wong (CCA)* decisions misunderstood what *Mimi Wong (CCA)* had actually decided and what Wee CJ had said in that case.

153 We do not propose to provide a detailed analysis of all the reported post-*Mimi Wong (CCA)* local cases on s 34, when invoked in relation to the offence of murder, to determine whether or not their outcomes would have been the same if the court in those cases (whether a trial court or an appellate court) had applied the *Barendra* test. We conclude from our examination of those cases that in a significant number of them, the court specifically made a finding that there was a common intention to kill or to cause death (in cases where the secondary offender was found guilty of murder (see, *eg*, *Mohamed Bachu Miah and another v Public Prosecutor* [1992] 2 SLR(R) 783 and *Maniam s/o Rathinswamy v Public Prosecutor* [1994] 2 SLR(R) 264)), or, conversely, that there was no such common intention (in cases where the secondary offender was acquitted of murder (see, *eg*, *Public Prosecutor v Mazlan bin Maidun & Anor* [1992] SGHC 134 and *Public Prosecutor v L Hassan & 2 Ors* [1998] SGHC 357)). There are also cases where the court found that there was a common intention to cause grievous hurt or injury that was found to be s 300(*c*) injury (see, *eg*, *Ramu Annadavascan and another v Public Prosecutor* [1985–1986] SLR(R) 21, *Suradet Senarit and others v Public Prosecutor* [1993] 2 SLR(R) 754, *Asokan v Public Prosecutor* [1995] 1 SLR(R) 936 and *Mansoor s/o Abdullah and another v Public Prosecutor* [1998] 3 SLR(R) 403). In respect of all these cases, it can be said that there was evidence on which, if the *Barendra* test had been applied, it would have been possible for the court to find that there existed a common intention to commit one of the criminal acts described in s 300 of the Penal Code as constituting the offence of murder.

154 There are, of course, also cases where the court appeared to have relied on the putative *Mimi Wong (CCA)* test to convict the secondary offender of murder arising from the criminal act done by the actual doer, even though the secondary offender *did not* participate in that criminal act, on the basis that that criminal act had been done by the actual doer in furtherance of all the offenders'

common intention. These cases have given rise to the impression that the courts have adopted an inconsistent approach in applying s 34, an issue which has often been the subject of academic comments. In our view, a close examination of the facts of the cases where the putative *Mimi Wong (CCA)* test was apparently applied (especially the findings of the trial court), would show that in most of them, the criminal act done by the actual doer could conceivably be said to have been done in furtherance of a common intention to commit any one of the four criminal acts described in s 300 of the Penal Code as giving rise to the offence of murder – in other words, the *Barendra* test would have been satisfied in those cases.

155 We propose to examine only two of the cases where the *Barendra* test, although not applied by this court, would or might have been satisfied if one were to look closely at the facts of the case. These cases are:

(a) *Public Prosecutor v Ibrahim bin Masod & Anor* [1993] SGHC 172 ("*Ibrahim (HC)*"), which was upheld on appeal in *Ibrahim bin Masod and another v Public Prosecutor* [1993] 3 SLR(R) 438 ("*Ibrahim (CA)*"); and

(b) *Public Prosecutor v Lim Poh Lye and another* [2005] 2 SLR(R) 130 ("*Lim Poh Lye (HC)*"), which was reversed in *Lim Poh Lye (CA)*.

156 In *Ibrahim (HC)*, the two accused ("Ibrahim" and "Liow") kidnapped the deceased and demanded a ransom, which was not paid. Subsequently, the deceased was strangled to death in the flat where he was being held when Ibrahim left the flat to sell a Rolex watch belonging to the deceased. The trial judge found that there was a pre-arranged plan between Ibrahim and Liow to kidnap the deceased for ransom, and that the killing had been done in furtherance of the common intention. Both accused were convicted of murder, and both appealed against their convictions (Liow, however, died before the appeal was heard). The CA upheld Ibrahim's conviction, holding that there had been a common intention on the part of Ibrahim and Liow "to kidnap [the deceased] for ransom in the furtherance of which Liow wilfully and deliberately strangled [the deceased] to death" (see *Ibrahim (CA)* at [44]). Although the CA appeared to have applied the putative *Mimi Wong (CCA)* test, the CA also stated that, on the evidence, "the inference that … [there] was … a pre-arranged plan to kidnap [the deceased] for ransom and *to do away with him* [was] irresistible" [emphasis added] (at [37]). In other words, the CA in effect found that there was evidence of a common intention to kill the deceased, even though the High Court did not make such an explicit finding of fact.

157 In *Lim Poh Lye (HC)*, the deceased ("Bock") was stabbed in the legs by the first accused ("Lim") and/or another man ("NKS") whilst being robbed by Lim, NKS and the second accused ("Koh"). (The evidence was unclear as to whether it was Lim or NKS who had inflicted the fatal stab wound.) One of the stab wounds severed the femoral vein in Bock's right leg and caused Bock to bleed to death. Lim and Koh were subsequently charged with murder under s 302 of the Penal Code read with s 34 (NKS was not charged as he fled the country). The trial judge acquitted Lim and Koh of murder, and convicted them instead of the offence under s 394 of the Penal Code of voluntarily causing hurt in committing robbery on the ground that "there was no common intention to kill, and … the gang did not have the common intention to use the knives [which they had brought with them] for injuring Bock, but merely to frighten him" (see *Lim Poh Lye (HC)* at [18]).

158 On appeal by the Prosecution, the CA allowed the appeal and convicted both Lim and Koh of murder on the ground (applying the putative *Mimi Wong (CCA)* test) that Bock had been killed in furtherance of the common intention to rob. However, the CA appeared to have had, at the back of its mind, the belief that the robbers had meant to use the knives which they had with them to cause some form of injury to Bock. This can be seen from [60] of *Lim Poh Lye (CA)*, where the CA said:

> *While it may well be that the knives were brought to frighten Bock, it must have been within the contemplation of the trio* [*ie*, Lim, Koh and NKS] *to use them if Bock should turn out to be difficult which was, in fact, the case*. In any event, we do not see how it could be seriously argued that using the knife to inflict physical injury, either by Lim or [NKS], would not be in furtherance of the common intention to rob. [emphasis added]

159 A common intention to commit the criminal act done by the actual doer which gives rise to the offence charged, even if it is a contingent or dormant intention (see *Ibra Akanda* at 363 (reproduced at [105] above)) or "a remote wish or intention" (see *Nazir* at [30] (referred to at [132] above)), is sufficient to render s 34 applicable to secondary offenders, even if they do not participate in the criminal act done by the actual doer which results in the offence charged (in this regard, see further [162]–[163] below). From this perspective, although the putative *Mimi Wong (CCA)* test was applied by the CA in *Lim Poh Lye (CA)* to reverse the trial judge's acquittal of Lim and Koh on the facts, it appears to us that on the CA's view of the evidence, the *Barendra* test could have been satisfied. This was because the CA was of the view that there was sufficient material for a court to find that there was a common intention on the part of Lim and Koh to rob, as well as a dormant common intention to use the knives which they had brought with them to stop Bock from being "difficult" (see *Lim Poh Lye (CA)* at [60]), if necessary.

The participation element

160 We now turn to examine the third key element of s 34, *viz*, the participation element.

161 In *Lee Chez Kee (CA)*, this court stated (at sub-para (b) of [253]) *vis-à-vis* the participation element of s 34:

> In a "twin crime" situation, there is no need for participation in the collateral criminal act as well as the primary criminal act; participation in the primary criminal act would be sufficient for liability to fix on all subsequent secondary offenders.

There is essentially no departure from this position if the *Barendra* test is applied.

162 In *Barendra (PC)*, it could be said that BKG satisfied the participation element (for the purposes of being held constructively liable for the offence of murder) based on one of two alternative grounds – namely, either (a) on the ground that he had participated in the shooting of the postmaster (the shooting being the *specific* criminal act, out of the "unity of criminal behaviour" (see *Barendra (PC)* at 9) engaged in by the robbers, that gave rise to the offence of murder); or (b) on the ground that although he had not participated in the shooting, he had participated in the robbery, which was part of the overall plan of the robbers to rob the postmaster and, if necessary, to shoot him to kill. In other words, it was not necessary for BKG to have participated in the *specific* criminal act done which resulted in the offence that he was charged with (*viz*, the criminal act of shooting the postmaster). Instead, all that was required was participation by BKG in any of the separate acts which collectively made up the "unity of criminal behaviour" (see *Barendra (PC)* at 9) engaged in by the robbers pursuant to their common intention to rob the postmaster and, if necessary, to shoot him to kill.

163 *Barendra (PC)* therefore indicates that a secondary offender satisfies the participation requirement if: (a) he participates in the specific criminal act committed by the actual doer which gives rise to the offence charged; or (b) he participates in some other criminal act that is done in furtherance of the common intention of all the offenders (*ie*, if he participates in any of the diverse acts which together form the unity of criminal behaviour resulting in the offence charged, that unity of criminal behaviour being commonly intended by all the offenders).

Application of s 34 in the present case

164 In the present case, there was no doubt that the Appellants had a common intention to rob Wan, and all of them participated in the acts constituting the robbery in furtherance of that common intention (see [57] above). However, the Judge did not find that the Appellants also had a common intention to inflict s 300(*c*) injury or any other specific injury on Wan, although he did find that all three of them knew that violence would be necessary to facilitate the commission of the robbery. In short, there was no finding of a common intention among the Appellants to cause Wan's death or inflict any specific injury on Wan; the evidence before the court was also, in our view, insufficient to prove beyond reasonable doubt the existence of such a common intention. Thus, s 34 had no application to Daniel and Christopher based on our analysis at [80]–[163] above and, therefore, they could not be held constructively liable for the offence of s 300(*c*) murder arising from the criminal act committed by Bala under the *Barendra* test.

Restatement of the law on constructive liability under s 34

165 The analysis at [80]–[163] above sets out what, in our view, is the correct interpretation of the law on the imposition of constructive liability pursuant to s 34. In our view, the putative *Mimi Wong (CCA)* test is a wrong formulation of the law applied in *Mimi Wong (CCA)* – the law applied in that case was the *Barendra* test, which was also applied in *Vincent Banka*.

166 The *Barendra* test, in our view, reflects correctly the true legislative purpose of s 34, which, in the words of Lord Sumner in *Barendra (PC)* at 9 (*vis-à-vis* s 34 IPC), 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". A criminal act is done in furtherance of a common intention only if it furthers that common intention, which must be an intention to do something or to achieve a purpose. The crucial question in every case where s 34 is invoked is to identify the relevant common intention. 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, and cannot be regarded as having been done in furtherance of that common intention.

167 It must be remembered that a charge of murder founded on s 300(*c*) of the Penal Code *read with s 34* (*ie*, a charge against a *secondary* offender) is not the same as a charge against the actual doer (*ie*, the *primary* offender), which would be *based on s 300(*c*) alone*. In the latter case, it is not necessary to consider whether the actual doer intended to cause the victim s 300(*c*) injury; instead, it is only necessary to consider whether the actual doer subjectively intended to inflict the injury which was in fact inflicted on the victim and, if so, whether that injury was, on an objective assessment, sufficiently serious to amount to s 300(*c*) injury. In contrast, in the former case (*ie*, where a secondary offender is charged with murder under s 300(*c*) read with s 34), because of the express words "in furtherance of the common intention of all" in s 34, it is necessary to consider whether there was a common intention among all the offenders to inflict s 300(*c*) injury on the victim (the inflicting of such injury being the criminal act which gives rise to the offence of s 300(*c*) murder). This is a critical distinction to bear in mind. In this regard, we note that although the trial judges in *Mimi Wong (HC)* described one of the common intentions of Mimi and Sim as the "common intention … of inflicting bodily injury on [Mrs W] with a knife" (see 70 of *Mimi Wong (HC)*), the common intention in that case was, on the facts, very specific. It was the common intention to inflict bodily injury on Mrs W *with a knife*, and the knife injuries in fact inflicted on Mrs W were sufficient in the ordinary course of nature to cause death. In other words, the common intention in *Mimi Wong (HC)* could easily have been taken to be a common intention to inflict s 300(*c*) injury.

168 We set out below a non-exhaustive list of various scenarios in which s 34 would apply (these

are cases in which the requirements of the *Barendra* test would be met) as well as various scenarios in which it would not apply:

(a) A, B and C have a common intention to kill D or cause his death, and all three of them participate in the criminal act resulting in D's death. Section 34 would apply to make A, B and C liable for the resultant offence as the criminal act done by them would have been done in furtherance of their common intention to kill or cause the death of D. In such a case, because A, B and C all participated in the criminal act giving rise to the offence charged, it is not necessary to determine which of them actually caused the death of D or had the means to cause his death.

(b) A, B and C have a common intention to cause D s 300(*c*) injury, and all three of them participate in inflicting such injury on D. If D dies from that injury, s 34 would apply to make A, B and C liable for the resultant offence (*viz*, the offence of s 300(*c*) murder) as the criminal act done by them would have been done in furtherance of the common intention to inflict s 300(*c*) injury on D. Similarly, in such a case, since A, B and C all participated in the criminal act giving rise to the offence charged, it is not necessary to determine who actually caused the death of D or had the means to cause his death.

(c) A, B and C have a common intention to inflict on D a minor injury which is not likely to cause his death (*eg*, a common intention to disfigure D's face). If C inflicts on D s 300(*c*) injury, s 34 would *not* apply to make A and B constructively liable for the offence resulting from C's criminal act, *provided* they do not participate in that act (see also the analogous scenario at sub-para (e) below). This is because C's criminal act would not be consistent with the common intention of A, B and C, and would instead be (at the very least) outside the scope of that common intention. If, however, A and B participate in C's act of inflicting on D s 300(*c*) injury, an inference may be drawn that A, B and C's common intention changed on the spot into a common intention to do the criminal act actually done by C (*ie*, a common intention to cause s 300(*c*) injury to D); s 34 would then apply to make A and B constructively liable for the offence resulting from that criminal act.

(d) A, B and C have a common intention to rob D and to kill him or cause his death, if necessary, in order to facilitate or accomplish the robbery. If D is killed by A in the course of the robbery, s 34 would apply to make B and C constructively liable for the offence resulting from A's criminal act (which would have been done in furtherance of the common intention of A, B and C), provided B and C participated in any of the diverse acts that collectively constituted the criminal act done in furtherance of the common intention.

(e) A, B and C have a common intention to rob D, but not to cause any physical harm to him. A, however, kills D to facilitate or accomplish the robbery. *Provided* B and C do not participate in A's criminal act, s 34 would *not* apply to make them constructively liable for the offence resulting from that criminal act as that criminal act would not have been done in furtherance of the common intention of A, B and C. Although A's criminal act furthers the robbery, it does not further A, B and C's common intention in respect of the robbery (which is to rob D, but not to harm him physically); A's criminal act would in fact be *inconsistent* with or, at least, outside the scope of that common intention (see also our observations at [61]–[63] above on *Mohamed Yasin*). If, however, B and C participate in A's act of killing D, an inference may be made that A, B and C's common intention changed on the spot into a common intention to do the criminal act actually done by A (*ie*, a common intention to kill D); s 34 would then apply to make B and C constructively liable for the offence resulting from that criminal act (see also sub-para (c) above).

(f) It should also be noted that in the scenario described in sub-para (e) above, if B and C have subjective knowledge that A might likely kill D in the course of the robbery and, despite such knowledge, go ahead to participate in the plan to rob D, and A does indeed kill D while carrying out the robbery, it may be possible for the court to infer, in an appropriate case, that B and C, by acquiescing in the likelihood of A committing the criminal act actually done (*ie*, the killing of D), themselves shared A's intention to commit that criminal act (see *Nga Aung Thein* at 92 and *Gorachand Gope* at 456–457 (both reproduced at [90] above)). We should clarify that the *LCK* requirement is no longer in itself a sufficient basis to impute constructive liability to B and C (the secondary offenders) in this scenario. However, because the *LCK* requirement is satisfied, the court may infer that the common intention of A, B and C was in fact not merely to rob D without causing him physical harm, but was instead to rob D and, if necessary, kill D in order to successfully carry out the robbery.

169 In reviewing the scope of s 34, we also examined a number of decisions of the Supreme Court of India on s 34 IPC. These decisions are relevant since, as mentioned at [80] above, s 34 is merely a re-enactment of s 34 IPC. In principle, there is no reason for our law on s 34 to be different from India's law on s 34 IPC. These decisions are discussed below.

170 In *Hardev Singh and another v The State of Punjab* AIR 1975 SC 179, the Supreme Court of India, using the terms "act" and "crime" interchangeably, said (at [9]):

> The view of the High Court [of Punjab and Haryana] that even the person not committing the particular crime could be held guilty of that crime with the aid of Section 34 of the [IPC] if the commission of the act was such as could be shown to be in furtherance of the common intention not necessarily intended by every one of the participants … is not correct. *The common intention must be to commit the particular crime, although the actual crime may be committed by any one sharing the common intention*. [emphasis added]

171 Similarly, in *Bhaba Nanda Sarma* (the facts of which were outlined earlier at [142] above), the Supreme Court of India said (at [4]):

> To attract the application of S. 34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that *all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants*. [emphasis added]

172 In *Surat Singh and another v State of Punjab* AIR 1977 SC 705 ("*Surat Singh*"), the facts were as follows. Three persons ("Shingara", "CS" and "Surat") went to the house of the victim ("KS"). Shingara instigated CS to kill KS, whereupon CS dealt a blow with a spear to the left side of KS's chest. After KS fell down, Surat dealt two hatchet blows to the left arm of KS, causing simple injuries. Shingara, CS and Surat were charged with murder under s 302 of the IPC read with s 34 IPC. The trial court acquitted all three men. On appeal, the High Court of Punjab and Haryana upheld Shingara's acquittal, but convicted CS and Surat of murder. On further appeal, the Supreme Court of India affirmed CS's conviction for murder (save that the court amended the charge against CS from one under s 302 of the IPC read with s 34 IPC to one under s 302 *per se*). In contrast, the court allowed Surat's appeal. It held that since Surat had only caused KS simple hurt, he could not be said to have shared the common intention of causing KS's death. The court thus set aside the conviction of Surat for murder and convicted him instead of the offence under s 324 of the IPC (*viz*, the offence of voluntarily causing hurt by dangerous weapons or dangerous means). The court said (at [11]):

> The High Court [of Punjab and Haryana] says "These facts admit of no doubt that the injuries were caused by both [CS and Surat] in furtherance of their common intention." It did not say that the common intention was to cause death or to cause such injuries which on [an] objective test were found to be sufficient in the ordinary course of nature to cause death. The fact that [Surat] caused only two simple injuries on the arm of [KS] and did not give any blow on any vital part of the body goes against the view that he had shared the common intention of causing the death of [KS]. But surely [CS] was guilty of causing the death of [KS] by giving the fatal blow with [the] spear on his chest.

This judgment may be compared with Wee CJ's illustration at [25] of *Mimi Wong (CCA)* (reproduced at, *inter alia*, [139] above).

173 In *Dharam Pal and others v State of Haryana* AIR 1978 SC 1492 ("*Dharam Pal*"), the second accused ("Surta") and the third accused ("Samme") accompanied the first accused ("DP") and his father ("RS") to teach one Hari Ram ("HR") a lesson in connection with an altercation. HR tried to run away when he saw RS, DP, Surta and Samme armed with weapons coming for him. DP shot one Sardara (a bystander who had run to HR's rescue) in the neck, resulting in Sardara's death 12 days later. DP, Surta and Samme were charged with and convicted of murder in furtherance of a common intention. The Supreme Court of India upheld DP's conviction, but set aside the convictions of Surta and Samme on the ground that "[t]here [was] no material to indicate that there was a pre-arranged plan to murder or to attempt to commit the murder of any person who might intercede to save [HR]" (at [13]). The court said:

> 14. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf.
>
> 15. A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or [from] some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. …

174 In *Munna and Ayyia v State of U P* AIR 1993 SC 278 ("*Munna*"), the two accused ("Munna" and "Ayyia") shared a common intention to beat up the victim ("Nafis"), but not to kill him. In the course of the beating, Munna brought out a knife and stabbed Nafis, killing him. The trial court convicted Munna of murder under s 302 of the IPC, and also convicted Ayyia of the same offence under s 302 read with s 34 IPC. On appeal, the Supreme Court of India upheld Munna's conviction for murder, but set aside Ayyia's conviction for that offence and substituted it with a conviction for the offence of voluntarily causing grievous hurt by dangerous weapons or dangerous means under s 326 of the IPC read with s 34 IPC. The court said (at [4]):

> Ayyia[,] though armed with a razor[,] did not choose to use the same. Ayyia had no idea that [Munna] would take out the knife and cause the fatal injury to [Nafis]. In the circumstances, it is difficult to attribute to [Ayyia] a common intention to kill [Nafis] and convict him with the aid of Section 34. At the most since [Ayyia] knew [Munna] was carrying a weapon and was smarting under an insult [dealt by Nafis,] he could be said to be aware of the fact that there was a possibility of Munna causing injury. One can infer that [Ayyia] shared the common intention to beat up or assault [Nafis] though not to kill him. In the circumstances, we think that his conviction under Section 302/34 needs to be altered to [a conviction under] Section 326/34.

175 In *Mithu Singh v State of Punjab* AIR 2001 SC 1929 ("*Mithu Singh*"), the accused ("Mithu") accompanied one Bharpur Singh ("BS") to the house of the victim ("GK"), each carrying a pistol. Mithu knew that there was enmity between BS and GK arising out of a civil dispute. When Mithu and BS reached GK's house, BS fired a shot at GK and killed her. Mithu and BS then fled. They were subsequently charged with and convicted of murder in furtherance of a common intention under s 302 of the IPC read with s 34 IPC. They were also convicted of the offence under s 27 of the Arms Act 1959 (Act 54 of 1959) (India) ("the Indian Arms Act") of possessing arms with intent to use them for an unlawful purpose. The Supreme Court of India allowed in part the appeal by Mithu and set aside his conviction for murder (the court, however, upheld his conviction for the offence under s 27 of the Indian Arms Act). The court stated:

> 5. … The allegation that [BS] and [Mithu] belong to one party faction … is not based on any concrete fact wherefrom such an inference may be drawn by the Court and … therefore does not go beyond being merely a[n] ipse dixit of the witnesses. Therefore, the question arises … [as to] whether an inference, as to [MS] having shared a common intention to cause the death of [GK] with [BS], can be drawn?
>
> 6. To substantiate a charge under S. 302 with the aid of S. 34, 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 … both. Common intention has to be distinguished from same or similar intention. It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance. At the worst [Mithu] knew that [BS] was armed with a pistol. The knowledge of previous enmity existing between [BS] and [GK] can also be attributed to [Mithu]. But there is nothing available on record to draw an inference that [BS] had gone to the house of [GK] with the intention of causing her death and [that] *such intention was known to [Mithu], much less shared by him*. Simply because [Mithu] was himself armed with a pistol[,] that would not necessarily lead to an inference that he had also reached the house of [GK] or had accompanied [BS] *with the intention of causing the death of [GK]*. In our opinion, an inference as to [Mithu] … having shared with [BS] a common intention of causing the murder of [GK] cannot be drawn. His conviction under S. 302/34, IPC cannot be sustained and must be set aside.
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> [emphasis added]

176 It may be noted that in *Bhaba Nanda Sarma*, *Surat Singh*, *Dharam Pal*, *Munna* and *Mithu Singh*, the critical issue was whether the criminal act done by the actual doer which gave rise to the offence charged was done in furtherance of a common intention to cause death. In each of those cases, the Indian Supreme Court was unwilling to infer from the facts that the criminal act done by the actual doer (giving rise to the offence charged) was done in furtherance of a common intention to cause

death. No doubt, in some cases (such as *Mithu Singh*), the Indian Supreme Court appeared to have been excessively cautious in not drawing such an inference. The crucial point to note, however, is that the Indian Supreme Court's approach to s 34 IPC is that this provision will apply only if the criminal act done by several persons which results in the offence charged is done by one or more of those persons in furtherance of a common intention to do that very criminal act (*ie*, the criminal act which gives rise to the offence charged).

177 In this regard, it is also pertinent to refer to *Emperor v Mujjaffar Sheikh and another Accused* AIR 1941 Cal 106, a decision of the High Court of Calcutta. In that case, the court said (at 109):

> In order to make a person constructively liable with the aid of S. 34, [IPC], for an offence not actually committed by him, it must always be shown that the person so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under S. 34, [IPC], for murder, *it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions in the joint criminal act or enterprise. Unless this intention is proved, he cannot be made liable under the aforesaid section even though the murder [is] committed in order to accomplish some other object or purpose shared in common*. [emphasis added]

178 The decisions which we have referred to at [170]–[175] above show that the Indian Supreme Court has settled on the view that the legislative purpose of s 34 IPC is to make a secondary offender constructively liable for the offence resulting from a criminal act done by another person (*ie*, the actual doer) only where the secondary offender and the actual doer have a common intention to commit that particular criminal act.

179 To conclude our examination of the scope of s 34, we would refer to an offence in the Penal Code which, in our view, demonstrates that the putative *Mimi Wong (CCA)* test has no basis in principle, resulted in a distortion of the legislative policy of s 34 and is a misbegotten principle resulting from a misunderstanding of what Wee CJ said at [23] of *Mimi Wong (CCA)*. That offence is gang-robbery with murder under s 396 of the Penal Code, which reads as follows:

> If any one of 5 or more persons who are conjointly committing gang-robbery [as defined in s 391 of the Penal Code] … commits murder in so committing gang-robbery, every one of those persons shall be punished with death *or imprisonment for life*, and if he is not sentenced to death, shall also be punished with caning of not less than 12 strokes. [emphasis added]

180 Gang-robbery is, by definition, an offence which is committed *conjointly* by five or more persons (see the definition of "gang-robbery" in s 391 of the Penal Code); this implies that all the members of the gang must participate in the robbery with a common intention to rob. Where murder is committed in the course of a gang-robbery, at least one member of the gang must have had the intention to either cause the victim's death (see s 300(*a*) of the Penal Code) or inflict on the victim one of the types of injury set out in ss 300(*b*)–300(*d*) of the Penal Code, even if the rest of the gang members had no such intention; otherwise, no murder (as defined in s 300) would have been committed. In a case of gang-robbery with murder, the court has the *discretion* to sentence the gang members to either death or life imprisonment with caning, depending on their respective roles in the robbery and the murder (*cf* the *mandatory* sentence of death where the offence charged is that of murder). Members of the gang who, in the court's view, do not deserve the death sentence are punished instead with life imprisonment plus at least 12 strokes of the cane.

181 The difference between gang-robbery with murder and what we shall hereafter term "murder in

a non-gang-robbery scenario" (*ie*, murder committed in the course of a robbery carried out by a gang of less than five members) is this: in the former case, s 34 does not need to be invoked to hold the gang members who are secondary offenders liable for murder since s 396 of the Penal Code expressly states that all members of the gang "shall be punished"; in the latter case, however, s 34 needs to be relied on if the Prosecution seeks to charge those members of the gang who are secondary offenders with murder. If the putative *Mimi Wong (CCA)* test does indeed reflect how s 34 is meant to be applied, the result would be that where liability for murder in a non-gang-robbery scenario is concerned, it is not necessary for all the members of the gang to have a common intention to kill or cause the death of the victim before they can be convicted of murder; instead, they can be thus convicted so long as one of them kills the victim or causes his death in furtherance of the common intention to rob.

182 Thus, if the putative *Mimi Wong (CCA)* test is a correct statement of the law (*ie*, if it is indeed the law that B can be held constructively liable for an offence arising from a criminal act done by A even if B does not have a common intention with A to commit that criminal act), then, where murder is committed in the course of a gang-robbery, there would be no reason for the Prosecution to rely on s 396 of the Penal Code, which requires proof of, specifically, an intention on the part of at least one member of the gang to commit one of the criminal acts set out in s 300. It would be far easier for the Prosecution to simply rely, instead, on s 300 of the Penal Code read with s 34 because – according to the putative *Mimi Wong (CCA)* test – it would then be unnecessary for the Prosecution to prove a common intention among all the gang members to commit one of the criminal acts set out in s 300. All that would be needed is proof that the criminal act constituting the offence of murder was committed in furtherance of a common intention to engage in some "unity of criminal behaviour" (see *Barendra (PC)* at 9) – a condition which would invariably be satisfied since the actual doer must have committed that criminal act in furtherance of the gang members' common intention to commit robbery.

183 However, the fact is that s 396 of the Penal Code has been retained all these years and currently still remains in this form. This indicates that the Legislature does *not* intend the members of a gang, where gang-robbery with murder is committed, to be prosecuted for murder based on s 300 read with s 34. The result is that the putative *Mimi Wong (CCA)* test would apply *vis-à-vis* murder in a non-gang-robbery scenario (where the offence charged (*viz*, murder) is punishable with the *mandatory* death penalty), whereas s 396 of the Penal Code would apply in a case of gang robbery with murder (where the death penalty is *discretionary* for the offence charged) – even though the latter (*ie*, gang-robbery with murder) is, paradoxically, the more serious offence in so far as it involves a larger number of people jointly participating in a criminal enterprise. This result is not rational from a policy point of view as gang-robbery should be regarded as a more serious threat to the safety of the community than a robbery which is not a gang-robbery, given that gang-robbery involves, by definition, a larger number of robbers.

184 In short, if the putative *Mimi Wong (CCA)* test were good law, there would be a misalignment between, on the one hand, the legislative policy on gang-robbery with murder and, on the other hand, the legislative policy on murder in a non-gang-robbery scenario (as well as the legislative policy on the imposition of constructive liability on secondary offenders pursuant to s 34 generally). In our view, it is desirable that the legislative policy underlying s 34 be aligned with that underlying s 396 of the Penal Code. These two legislative policies have been misaligned ever since the putative *Mimi Wong (CCA)* test arose. Our restatement of the law on s 34 will align these two legislative policies.

Conclusion

185 For the reasons given above, we allow this appeal in so far as Daniel and Christopher are concerned and set aside their convictions for murder. We shall, in substitution, convict them of the

offence of robbery with hurt under s 394 of the Penal Code read with s 34. We order this case, in so far as Daniel and Christopher are concerned, to be remitted to the Judge for sentencing on a date to be fixed.

186 As for Bala, notwithstanding his confirmation at the hearing before this court on 9 April 2009 that he is no longer challenging his conviction for murder, we have reviewed his conviction and we agree with the Judge's decision that he is guilty of murder. We accordingly uphold his conviction for murder, save that the charge against him is to be amended to one under s 302 of the Penal Code *per se*, and dismiss this appeal where he is concerned.

[note: 1] See the Record of Proceedings ("the RP") at vol 4A, p 894.

[note: 2] See the RP at vol 4A, p 774.

[note: 3] *Ibid*.

[note: 4] See the RP at vol 2, p 609 and vol 3, pp 839 and 926.

[note: 5] See the RP at vol 4B, pp 915–916.

[note: 6] See the RP at vol 4B, p 914.

[note: 7] See the RP at vol 4B, pp 926–929.

[note: 8] See the RP at vol 4B, p 930.

[note: 9] See the RP at vol 4B, pp 948–956.

[note: 10] See the CSOF at para 9 (at vol 4B, p 950 of the RP).

[note: 11] See the CSOF at paras 10–11 (at vol 4B, p 951 of the RP).

[note: 12] See the CSOF at para 11 (at vol 4B, p 951 of the RP).

[note: 13] See the CSOF at para 13 (at vol 4B, p 951 of the RP).

[note: 14] *Ibid*.

[note: 15] See the RP at vol 1, pp 373–374.

[note: 16] See the RP at vol 4, pp 1–2.

[note: 17] See the RP at vol 4A, p 892.

[note: 18] *Ibid*.

[note: 19] See the RP at vol 4, pp 203–212.

[note: 20] See the RP at vol 4, pp 303–324.

[note: 21] See the RP at vol 4, p 324.

[note: 22] See the RP at vol 4, p 12.

[note: 23] See the RP at vol 4, pp 144–150.

[note: 24] See the RP at vol 3, pp 1088–1089.

[note: 25] See the RP at vol 3, p 1089.

[note: 26] *Ibid*.

[note: 27] See para 131 of the respondent's written submissions dated 9 April 2009.

[note: 28] *Id* at para 173.