

CLARIFYING COMMON INTENTION AND INTERPRETING S34: SHOULD THERE BE A THRESHOLD OF BLAMEWORTHINESS FOR THE DEATH PENALTY?

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Lee Chez Kee v Public Prosecutor

In criminal cases ... we think that the accused party ought always to have the advantage of a doubt on a point of law, if doubt be entertained by the highest judicial authority, as well as a doubt on a matter of fact.¹

Lord Macaulay

Introduction

There are several ways in which the criminal law deals with secondary criminal liability. In Singapore, the principal mechanisms include common intention (Penal Code (Cap 224, 1985 Rev Ed) s34), abetment (ss107-113), common object (s149) gang robbery with murder (s396) and armed offences (Arms Offences Act s5). Section 34 has been the most controversial due to its frequent use in murder charges and the unsatisfactory interpretation of the provision. Section 34 provides 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.

The common law equivalent is found in the doctrine of common purpose or joint enterprise.² The objective of these doctrines is to deal with situations where more than one person engages in a criminal activity and it cannot be shown exactly what each person did. To overcome this evidential hurdle, s34 provides that criminal liability will be imputed equally to all participants where it can be proved that the parties acted with a common intention. Thus, if four people assault a victim with the common intention of killing the victim, each of the four will be guilty of murder even if it cannot be proved which of them landed the fatal blow. This is relatively uncontroversial, as it is clear that each of them had the requisite mental state and had participated in the commission of the actual crime.

Potential problems arise when s34 is used in what is often described as “twin crime” situations. For example, two individuals, A and B, jointly commit robbery (the primary crime), and A goes on to commit murder (the secondary crime) in the course

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¹A Letter from the Indian Law Commissioners, 2 May 1837. See CD Dharker (ed), Lord Macaulay’s Legislative Minutes (London: Oxford University Press, 1946) 259.

²See generally, R v Smith [1963] 1 WLR 1200; R v Powell [1999] 1 AC 1; R v Rahman and Others [2008] UKHL 45; McAuliffe v The Queen (1995) 183 CLR 108; Gillard v The Queen (2003) 219 CLR 1; Clayton v R [2006] HCA 58.

of committing the primary crime. In such a scenario, the prosecution will typically rely on s34, read with s302, to charge B with murder. Unlike the earlier example, described in the preceding paragraph, here there is ambiguity with respect to the accused's mens rea and actus reus in relation to the secondary crime. As s34 is silent on the actus reus and mens rea requirements, courts have been forced to try and work out exactly what is required. In terms of actus reus, need B have participated in the primary crime only or both the primary and secondary crime? Is B's presence required at either or both crimes? In terms of mens rea, does B need to share A's intention with respect to the secondary crime, or is it sufficient if B foresees the possibility of the secondary crime; or can criminal liability be strict as long as the secondary crime was in furtherance of the primary crime?

Ten years ago, Michael Hor undertook a comprehensive analysis of Singapore's s34 jurisprudence and highlighted the total disarray in this area: the actus reus requirements have ranged from mere participation in the primary offence to actual presence at the secondary offence, and the mens rea requirements have ranged from strict liability to actual intention.³ Where s34 is used in the context of a murder charge, which in Singapore carries the mandatory death sentence, the magnitude of this problem and the potential injustice of the law are glaringly obvious.⁴ The Court of Appeal in *Lee Chez Kee v PP*⁵ acknowledged this unhappy state of affairs and undertook a comprehensive review of the jurisprudence surrounding s34 before stating the law for Singapore.

The facts and issues in *Lee Chez Kee*

The *Lee* prosecution arose out of a crime that was committed fifteen years ago when the accused and two others robbed and killed a victim. The accused had evaded the authorities until his capture in 2006. The other two individuals, Too Yin Sheong and Ng Chek Siong were charged with murder and robbery respectively.⁶ Briefly, the facts were that Too, Ng and Lee had gone to the victim's house with the intention of robbing him. In the course of the robbery, the victim was violently assaulted, stabbed and strangled. The cause of death was asphyxiation, and the evidence suggested that it had been Too who had strangled the victim. The two critical issues at appeal related first, to the admissibility in evidence of statements made pursuant to s378(1)(b)(i) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) by Too Yin Sheong (now deceased) during investigations prior to his trial and secondly, to the proper interpretation of s34.

Section 378 set out the grounds on which out-of-court statements, ordinarily inadmissible, could be admitted. Section 378(b)(i) provided that such statements were admissible, inter alia, if the person were dead. However, s378 was qualified by s377, which provided that any statements admitted under s378 must first be admissible under

³M Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] Singapore Journal of Legal Studies 494.

⁴Rajah JA seemed to have a more sanguine view that no injustice had in fact occurred over the years of confused application of s34 (*Lee* at para 221) while Choo J clearly had concerns and refused to confirm the death penalty in this case.

⁵[2008] 3 SLR 447.

⁶*PP v Too Ying Sheong* [1998] SGHC 286.

existing evidence laws. Section 30 of the Evidence Act (Cap 97, 1997 Rev Ed) clearly precluded such evidence because Too's statement was by way of confession and s30 provided that such confessions could only be used against co-accused if the parties were tried jointly; in this case the parties were not tried jointly. As such, s378(1)(b)(i) was subject to s30. The court, comprising Rajah JA, Choo Han Teck and Woo Bih Li JJ, decided by majority (Woo J dissenting) that Too's confessionary statement implicating Lee should not have been admitted.⁷ The court, by a differently constituted majority (Choo J dissenting), upheld the trial judge's decision and confirmed the death penalty sentence. This paper deals mainly with the s34 issue and does not comment on the evidence issue.⁸

Criminal culpability and section 34

At the end of a comprehensive judgment, Rajah JA summarised the proper approach to s34.⁹ In a nutshell, the four elements of s34 were "(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."¹⁰ With respect to the element of participation, there were two critical questions. First, did the accused have to be present at the scene of the crime, and secondly, in twin crime situations, did the accused have to be present and participating in the secondary crime. According to *PP v Gerardine Andrew*,¹¹ criminal liability under s34 required presence by the accused at the scene of the crime, and in twin crime situations, the accused had to be present at the scene of the secondary offence.

Rajah JA held that *Gerardine Andrew* was wrongly decided, and affirmed that all that was required was participation and not presence, although presence could be evidence of participation.¹² Further, in twin crime situations, there was no need for participation in the secondary crime, as long as the accused had participated in the primary crime. In coming to this conclusion, Rajah JA said, "It should be a question of fact in each case whether the accused had participated to a sufficient degree such that he is deemed to be as blameworthy as the primary offender."¹³ This statement about relative blameworthiness raises a crucial question about proportionality in terms of criminal labelling and punishment, which will be dealt with below.

The more contentious issue surrounding s34 is the mental state of the accused in twin crime situations. This has ranged from full intention to strict liability; Lee has now authoritatively stated that the mental element for s34 is subjective knowledge of the likelihood that the primary offender may commit the secondary offence.¹⁴ Early authorities in Singapore suggested that nothing less than intention with respect to the

⁷Woo J disagreed with the Rajah JA's analysis and preferred the approach taken by the trial judge.

⁸For discussion of the evidence issue, see Tay Eu-yen, *Lee Chez Kee v PP: Murder Beyond Reasonable Doubt?* (October 2008) *The Singapore Law Gazette* 9.

⁹Both Choo and Woo JJ agreed with Rajah JA's analysis and conclusion on the proper interpretation of s34.

¹⁰Lee at para. [253].

¹¹[1998] 3 SLR 736.

¹²Lee at paras. [146-147].

¹³Lee at para. [146] (emphasis added).

¹⁴Lee at para. [253].

secondary crime was required.¹⁵ In *R v Vincent Banka*,¹⁶ a case involving a robbery-murder, it was held that the accused had to have had the common intention not just for the primary crime of robbery but for the secondary crime of murder as well. As there was no evidence of a common intention to murder, the accused were convicted of robbery and acquitted of murder. This clear authority was then confused by a misreading of *Wong Mimi v PP*.¹⁷

Mimi Wong is generally referred to as authority for the proposition that the mental element required of the accused with respect to the secondary crime is subjective knowledge.¹⁸ In fact, *Mimi Wong* stands for no such proposition. Wee CJ stated:

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 doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it must nevertheless be consistent with the carrying out of the common intention, otherwise the criminal act done by the actual doer would not be in furtherance of the common intention. 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 '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.¹⁹

Mimi Wong merely explains when the secondary crime will be found to be in furtherance of the common intention, while *Vincent Banka* sets out the requisite mental state for s34. The example given in the above passage reinforces this. The misreading of *Mimi Wong* is so entrenched that even the headnote in the revised Singapore Law Reports blatantly rewrites the critical passage in the judgment by simply substituting the "actual doer" with the "accused person".

In a criminal prosecution under s 34 of the Penal Code, the accused person's intention has to be considered. The accused person's intention has to be distinguished from the common intention of the doer and his confederates. It may be identical with the common intention or it may not. Where it is not identical with the common intention, it has to 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.²⁰

¹⁵*R v Vincent Banka* [1936] MLJ 53; *R v Chhui Yi* [1936] MLJ 142.

[1936] Malayan Law Journal 53.

¹⁷[1972-1974] SLR 73.

¹⁸Lee at para. [236] per Rajah JA: "As our analysis above in relation to the *Mimi Wong* approach shows, the additional mens rea required is that of a subjective knowledge on the part of the secondary offender in relation to the collateral offence likely happening."

¹⁹[1972-1974] SLR 73 at 80 (emphasis added).

²⁰[1972-1974] SLR 73.

The problem with s34 is that it suffered from unnecessary intrusion from the common law, both in terms of the 1870 amendment and subsequent interpretation.²¹ The common law doctrine of common purpose in the mid-nineteenth century was based on strict liability whenever the criminal act was in furtherance of the common intention of the group. Where the criminal act was not in furtherance of the common intention, then some form of mental element was required to link the accused to the crime. This is explicit in the statement by Peacock CJ, in one of the judgments which is said to have influenced the Indian Law Commissioners to add the phrase “in furtherance of the common intention of all” to s34. In *The Queen v Gorachand Gope*²² Peacock CJ stated:

[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.

Rajah JA’s reading of this passage as supporting a general requirement of subjective knowledge is, with respect, straining the ordinary meaning of this passage;²³ nevertheless, given the state of s34 prior to *Lee*, Rajah JA’s interpretation is a welcome one. Section 34 has too frequently been relied on by the prosecution to secure convictions on an objective liability or strict liability standard.²⁴ Considering its use in conjunction with s302, which results in the mandatory death penalty, nobody would quarrel with an interpretation that requires a subjective fault element. The only question is whether *Lee* went far enough.

It should be recalled that when the Indian Penal Code was enacted in 1861, s34 did not contain the phrase “in furtherance of the common intention of all” and simply read, “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.” It was a simple general principle setting out vicarious responsibility for the act, not criminal liability for the act. Criminal liability still depended on proving the requisite mental element, which on one view was set out in s35.²⁵ Section 35 arguably required an accused charged pursuant to s34 to possess the mental element necessary for the secondary crime. Rajah JA acknowledges this and cites several authorities in support of this view,²⁶ but then rejects this view by stating, “I think somewhere along the way, s34 gained dominance over s35 in laying down the common law doctrine of common purpose in the Penal Code, ...”²⁷

²¹Macaulay had a simple prescription for this type of unwarranted misconstruction of the Penal Code: “In some cases it will be found that the law is already sufficiently clear and that the misconstruction which has taken place is to be attributed to weakness, carelessness, wrong-headedness or corruption on the part of an individual, and is not likely to occur again.” CD Dharker (ed), *Lord Macaulay’s Legislative Minutes* (London: Oxford University Press, 1946) 266.

²²(1866) *Bengal Law Reports* supp 443 at 456.

²³*Lee* at para. [211].

²⁴See for example, *PP v Tan Lay Heong* [1996] 2 SLR 150; *Too Yin Sheong* [1998] SGHC 286; *Asogan Ramesh v PP* [1998] 1 SLR 286.

²⁵Section 35, with apparent reference to s34, states, “Whenever an act, which is criminal only be reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.” See M Hor “Common Intention and the Enterprise of Constructing Criminal Liability” [1999] *Singapore Journal of Legal Studies* 494 at 508-509.

²⁶*Lee* at paras. [213-214].

²⁷*Lee* at para. [214]

It is significant that, in the common law, the early conception of common purpose envisaged strict or objective liability.²⁸ Thus, the recent shift toward subjective foreseeability is in line with the general trend in criminal law toward subjective fault and individual responsibility.²⁹ With respect to the Penal Code, arguably s34, as borne out by its original incarnation, early Singapore authorities³⁰ and the preponderance of Indian jurisprudence³¹ set the standard at actual intention. The shift to subjective knowledge of the likelihood of the secondary crime being committed is a dilution of the fault element, at least in theory. In practice, given that the Singapore jurisprudence had embraced an interpretation of s34 that imposed strict liability, the Lee formulation is obviously an improvement to the status quo.

Separately, and more importantly, Lee sets the mental element for s34 at knowledge of likelihood, as opposed to the common law standard of foresight or contemplation of possibility. Knowledge of likelihood is a slightly more stringent standard compared to foresight or contemplation of likelihood. With the former, it must be proved that the accused actually knew that the principal was likely to commit the secondary crime. Foreseeability on the other hand can be based on something less than knowledge, as one can foresee events even when one does not actually know all the facts. An individual is more culpable in the case where he or she had specific evidence of another's likelihood to murder than in the case where the evidence was more ambiguous and a debatable inference had to be drawn. Thus, foreseeability is one step removed from knowledge and has a lower threshold of culpability.³²

For example, A and B jointly commit robbery, during the course of which B draws a gun and shoots someone dead. A knows that B is carrying a gun; under the common

²⁸R v Bowen (1841) Car & M 149; 174 ER 448; R v Betts and Ridley (1930) 144 LT 526; 22 Cr App R 148. See generally, KJM Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991) at 209-214.

²⁹McAuliffe v R (1995) 183 CLR 108 at para. [13]: "Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose."

³⁰R v Vincent Banka [1936] MLJ 53; R v Chhui Yi [1936] MLJ 142.

³¹As observed by Rajah JA, the Indian Supreme Court has consistently required actual intention as the relevant mens rea for s34, although there have been inconsistent decision at lower levels (Lee at para. [185]). The rationale for insisting on intention is clearly explained in *Dharam Pal and Others v State of Haryana* 1978 AIR 1492 at para. [15]: "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 companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. As already stated, there is no evidence to justify the conclusion that [the appellants] shared the common intention with [the principal] to commit the murder of [the deceased] or to make an attempt on the life of [the victim] and that the said acts were committed by [the principal] in furtherance of the common intention of all the appellants. ... As pointed out above, the common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan eg. during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused."

³²I would like to acknowledge Andrew Gleeson of the Philosophy Discipline, Adelaide University for helping clarify this point through an email exchange.

law test of foresight of possibility, it is arguable that A foresaw the possibility that B would kill someone. Under the Lee knowledge of likelihood test, absent any further evidence to suggest that A actually knew that B was likely to kill, the prosecution would not have satisfied the mens rea requirement.³³ While Rajah JA observed that a subjective knowledge approach would bring Singapore in line with the approach adopted in the United Kingdom and Australia, the Lee test is clearly set at a higher level than that adopted in the latter two jurisdictions.³⁴ In view of the mandatory death penalty, it is suggested that this distinction be adhered to and the higher test of knowledge be adopted in preference to the foreseeability test applied in the United Kingdom and Australia.

Relative blameworthiness and the mandatory death penalty

Assuming that it is indeed too late in the day to divorce s34 from the common law concept of common purpose,³⁵ the question is whether Singapore should adopt subjective knowledge or something more as the requisite mental element. There are a number of ways in which the arguments can be framed. One is based on a contextual analysis of s34 by locating it within the web of provisions dealing with complicity;³⁶ another is based on a historical analysis of s34;³⁷ and a third is based on normative arguments, grounded in the assumption that nothing less than intention or its moral equivalent is defensible in the Singapore context, where s34 is often used to prosecute offences which carry the mandatory death penalty.

The difficulty with a historical analysis of s34 is in determining the legislative intent behind particular provisions.³⁸ The Indian Penal Code was over a quarter of a century in the making from Macaulay's commission in 1833 to the Code's enactment in 1861. Although Macaulay's original draft was hailed as a triumph in codification, it was received with considerable hostility by English judges sitting in Indian courts, who were wedded to the common law of England. The Indian Law Commissioners who were tasked with finalizing Macaulay's draft included some of these very English

³³See G Williams, *Textbook of Criminal law* (London: Stevens & Sons, 1978) 300 who makes a similar point.

³⁴This argument is further supported by Rajah JA's equation of the subjective knowledge test with the "probable consequence" test in s111 (Lee at para. [242]), which is much narrower than the common law's foresight of possibility test.

³⁵On this point, one should note that a leading local scholar had argued that the unhappy pre-Lee interpretation of s34 had taken such deep roots in Singapore that it was too late to remedy the defect: M Sornarajah, "Common Intention and Murder under the Penal Codes" [1995] *Singapore Journal of Legal Studies* 29 at 31. To this, Rajah JA adopted a robust view, emphasizing the constitutional role of the Court of Appeal in correcting erroneous interpretations, regardless of pedigree. Lee at para. [122] per Rajah JA: "This court which stands at the apex of the judicial system of Singapore ... is constitutionally charged with the responsibility of departing from any existing interpretation if such interpretation no longer assumes the currency of accuracy or correctness."

³⁶See M Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] *Singapore Journal of Legal Studies* 494.

³⁷See Lee at paras. [188]-[212].

³⁸Rajah JA himself acknowledged the futility of the enterprise, when he said, "... whatever Lord Macaulay's original intentions were when he drafted the Indian Penal Code, these were evidently papered over when the final Penal Code was enacted in 1860 because, by that time, he had passed away." (Lee at para. [191]).

judges,³⁹ who not surprisingly were influenced both by English common law and the criminal law reform activity then going on in England.⁴⁰

It is suggested here that a historical analysis, while of academic interest, is not conclusive in determining the scope of s34. One needs to bear in mind that the original s34 did not include the phrase “in furtherance of the common intention of all.” That was a common law technique to extend the scope of liability for common purpose while maintaining some limits on the reach of the extended doctrine. The focus was on the connection between the primary and secondary crimes, rather than on the basis of the accused’s personal proximity to the secondary crime in terms of *actus reus* and *mens rea*. This development may have been necessary in the common law, as the law on accessorial liability was too narrow to adequately deal with criminal liability in the classic twin crime situations.⁴¹ The Penal Code however had expressly provided for such contingencies in ss111 and 113;⁴² this raises the question as to whether normatively, the extended interpretation of s34 is defensible.

In a recent article, Andrew Simester set out the normative arguments for secondary liability and justified why the mental element for common purpose or joint enterprise could be based on mere foresight of possibility rather than the higher mental element requirements for all other forms of complicity.⁴³ Rajah JA quoted with approval Simester’s justification for this lower mental state for common purpose:

Joint enterprise doctrines come into their own, however, in respect of offences incidental to the common purpose. By forming a joint enterprise, S [the secondary offender] signs up to its goal. In so doing, she accepts responsibility for the wrongs perpetrated in realising that goal, even though they be done by someone else. Her joining with P [the primary offender] in a common purpose means that she is no longer fully in command of how the purpose is achieved. Given that P is an autonomous agent, S cannot control the precise manner in which P acts. Yet her commitment to the common purpose implies an acceptance of the choices and actions that are taken by P in the course of realising that purpose. Her responsibility for incidental offences is not unlimited: S cannot be said to accept the risk of wrongs by P that she does not foresee, or which depart radically from their shared enterprise, and joint enterprise liability rightly does not extend to such cases. Within these limitations, however, the execution

³⁹ See Lee at paras. [192, 193, 209, 237].

⁴⁰ See generally, D Skuy, “Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India’s legal System in the Nineteenth Century (1998) 32 *Modern Asian Studies* 513.

⁴¹ Secondary liability, with the exception of joint enterprise, required actual intention or knowledge of the essential elements of the actual crime that was committed. See generally, A Simester, “The Mental Element in Complicity” (2006) 122 *Law Quarterly Review* 578.

⁴² Section 111 provides, “When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner, and to the same extent, as if he had directly abetted it: Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.” Section 113 provides, “When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner, and to the same extent, as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.”

⁴³ A Simester, “The Mental Element in Complicity” (2006) 122 *Law Quarterly Review* 578.

of the common purpose – including its foreseen attendant risks – is a package deal. Just as risks attend the pursuit of the common purpose, an assumption of those risks flows from S's subscription to that purpose.⁴⁴

Referring to Simester's illustration, while it may be accepted that S may well be tainted with criminal culpability with respect to the secondary offence, will it always be the case that regardless of the particular circumstance of S, P and the nature of the primary offence, that S has crossed the moral blameworthiness threshold for the secondary offence? Take for example, an eighteen year-old girl who is infatuated with a thirty year-old man, and joins him in stealing a few packets of cigarettes from a local store. The man ends up stabbing the store keeper to death. The girl, upon being questioned by police, admits that she knew her boyfriend was a violent sort and that he often carried a knife. Upon further questioning, she concedes that it had occurred to her as a possibility that her boyfriend could get violent and use the knife on the storekeeper to intimidate or injure him, although she never contemplated that he would kill anyone. On these facts, the girl would be found to have foreseen as a possibility that the principal offender was likely to inflict an injury sufficient in the ordinary course of nature to result in death. She would be guilty of murder under s302 read with s34 and a judge would have no choice but to sentence her to death.

This example illustrates the significance of relative blameworthiness,⁴⁵ which is particularly crucial in jurisdictions with mandatory sentences, especially the mandatory death penalty. To rely on prosecutorial discretion to avoid the potential injustice of the mandatory death penalty is wholly inadequate. The argument that group criminal activity is inherently more dangerous due to the higher potential for escalation is less convincing when one takes a realistic appraisal of many common intention scenarios. The heightened group threat argument is pertinent in cases of rioting, mass anti-social movements, violent robbery and so on, all of which are more than adequately covered by other provisions.⁴⁶ Many of the s34 murder prosecutions involve two or three persons, often with the participant being a less than willing participant. It should be borne in mind that the participant will always be guilty of the primary offence, which in itself will carry a punishment; the accused does not walk free, which answers the need for deterrence and retribution. The question is: Is it justifiable to impose the mandatory death penalty in all twin crime murder cases?

The real problem of course is the mandatory death penalty, but as long as that is on the books, it is incumbent on courts to bear that in mind when interpreting penal provisions that could result in the mandatory death penalty. Rajah JA clearly had this vexed problem on his mind when he stated in the very first paragraph setting out the issues on appeal:

The appellant has, in the present appeal, appealed against the trial judge's decision on both conviction and sentence. However, as the sentence of death is a mandatory one

⁴⁴Lee at para. [250] (emphasis by Rajah JA).

⁴⁵This was one of the considerations that compelled Kirby J to dissent in *Clayton v R* [2006] HCA 58, an Australian High Court decision on common purpose, and require a higher form of mens rea for extended common purpose. In Kirby J's view it was necessary "to restore greater concurrence between moral culpability and criminal responsibility..." (Clayton at para. [41]).

⁴⁶Penal Code ss149, s 396, Arms Offences Act s5.

in relation to the charge, and the appellant has not challenged, for example, the constitutionality of the mandatory death sentence, the outcome in the present proceedings, in effect, rests entirely on the result of the appeal against his conviction.⁴⁷

If this is to be read as an invitation for the constitutionality of the mandatory death penalty to be challenged, the significance of *Lee* is doubled.⁴⁸ While Rajah JA's subjective knowledge interpretation of s34 is welcome, as it is a vast improvement from the earlier situation where accused persons had been hanged on the strength of a strict liability-based murder charge relying on ss34 and 302, it is suggested that *Lee* does not go far enough. In so far as s34 can be used for criminal charges that could result in the mandatory death penalty, the courts should require nothing less than intention to commit the secondary offence, or at least the moral equivalent thereof.⁴⁹ Given that s34 is a general provision, this interpretation cuts across the board for all s34 prosecutions. If this sets the bar too high for the prosecution with respect to less serious crimes, then it is for the legislature to intervene. The court should not allow an interpretation of s34 that allows individuals to be sent to the gallows in cases where their criminal culpability does not cross the threshold of blameworthiness to justify this most severe – and constitutionally troubling – punishment.

Finally, it should be noted that Choo J, although agreeing with Rajah JA on the legal issues, dissented on the final disposition of the case. Choo J held that the accused should have been retried and that it would have been manifestly unjust to confirm the death penalty for two reasons. First, the court had held by majority that the statements of Too had been wrongly admitted and there was a real risk that the trial judge's views would have been influenced by those statements. Secondly, the court had unanimously reinterpreted s34 as requiring subjective knowledge and a retrial was therefore necessary to ensure that the findings of fact satisfied the new legal test. This case again raises the question whether, in the absence of a jury trial, a mandatory death penalty should be upheld on appeal where there is a dissenting opinion.⁵⁰ Macaulay's caution over 150 years ago, quoted at the beginning of this paper, remains a salutary guide.

Conclusion

Lee has certainly clarified an extremely untidy area of law in Singapore and is a positive step forward in that it confirms that criminal liability under s34 is based on

⁴⁷*Lee* at para. [43] (emphasis in original).

⁴⁸Rajah JA has on another recent occasion stressed the constitutional role of the court in ensuring justice is done, especially in criminal cases. See, *X v PP* [2008] SGHC 107 at para. 98: "The Prosecution's case is only one side of the story; our adversarial system requires and ensures that the defence be fully ventilated should one exist. In each and every case, it is the constitutional role of the judges to carefully and dispassionately evaluate the deficiencies of the Prosecution's and/or the Defence's case theory on the sole basis of legal proof and not mere suspicion or intuition."

⁴⁹The formulation adopted by Kirby J, in the absence of actual intention to commit the secondary offence, was based on either the accused wanting the principal to commit the secondary crime or the accused knowing as a virtual certainty that the principal would commit the secondary offence (Clayton at para. [125]). For discussion of Clayton, see K Amirthalingam, "Common Purpose and Homicide" (2007) 123 LQR 369.

⁵⁰Another recent case where the mandatory death penalty was upheld on appeal by a majority decision is *Took Leng How v PP* [2006] 2 SLR 70. See also, KS Rajah, "The Court of Appeal: Wounded Murder Decisions?" (2006) Law Gazette.

subjective knowledge. It would have been preferable if the court had required an even higher level of mens rea, at least with respect to prosecutions that result in the mandatory death penalty. There is a real moral and constitutional question as to whether the mandatory death penalty is justifiable,⁵¹ especially when the evidence does not demonstrate that the accused is sufficiently morally blameworthy to be labeled a murderer and sent to the gallows.

⁵¹See M Hor, "The Death Penalty in Singapore and International Law" (2004) 8 Singapore Yearbook of International Law 105.

