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Raising the Bar for the Mens Rea Requirement in Common Intention Cases: Daniel Vijay s/o Katherasan v PP

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RAISING THE BAR FOR THE *MENS REA* REQUIREMENT IN COMMON INTENTION CASES

Daniel Vijay s/o Katherasan v. Public Prosecutor [2010] 4 Sing. L.R. 1119

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Recently, the Court of Appeal in Daniel Vijay s/o Katherasan v. Public Prosecutor *took the view that the law on common intention was not adequately settled in Singapore despite the 138-year history of s. 34 of the* Penal Code. *It went on to give an extensive review of the cases interpreting the section as well as its Indian equivalent, before setting out the proper approach to take in "twin crime" common intention cases, focusing specifically on the mens rea element required in order to establish constructive liability for the secondary crime. This case note seeks to highlight the changes brought about by* Daniel Vijay s/o Katherasan v. Public Prosecutor *and to comment on the significance of these changes.*

I. INTRODUCTION

The case of *Daniel Vijay s/o Katherasan v. Public Prosecutor*[1] is the Court of Appeal's latest pronouncement on the law of common intention in the context of "twin crime" situations in Singapore. A "twin crime" situation refers to a situation where there was not only a primary criminal act that all the participants intended to commit, but also a secondary or collateral criminal act that ensued as a result of the actions of one or more of the original group of participants. Those who were not directly involved in committing the collateral criminal act are commonly referred to as "secondary offenders", in contradistinction to the "primary offenders" who both intended and carried out the collateral criminal act.

Daniel Vijay followed closely on the heels of *Lee Chez Kee v. Public Prosecutor*,[2] which contained a lengthy and thorough analysis of s. 34 of the *Penal Code*[3] as well as a statement on its correct interpretation. There, the Court of Appeal held that there was "no need for the common intention of the parties to be to commit the collateral offence actually committed in a 'twin crime' situation, otherwise the words 'in furtherance' [in s. 34] would be superfluous". It also held that the *mens rea* element required of the secondary offender is that he 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."[4]

Nevertheless, in *Daniel Vijay*, the Court of Appeal went back to the origins of s. 34, reviewed how it had been interpreted and applied since then, and found that the Singapore courts had, over the years, strayed from what ought to have been the correct interpretation of the *mens rea*

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

2 [2008] 3 Sing. L.R. (R.) 447 (C.A.) [*Lee Chez Kee*].

3 Cap. 224, 1985 Rev. Ed. Sing., s. 34.

4 *Supra* note 2 at para. 253(d).

requirement. It took the view that the subjective knowledge standard in *Lee Chez Kee* was not exacting enough, and that the *mens rea* required in order to find the participants in the primary criminal act constructively liable for the collateral criminal act was the intention to commit that collateral criminal act. This narrows the class of participants in group crimes that may be liable for collateral criminal acts under s. 34. This case note seeks to examine and comment on the significance of this change.

II. SUMMARY OF FACTS

In May 2006, two individuals hatched a plan to rob cargo which was transported by Sterling Agencies Pte Ltd ("Sterling"), a freight-forwarding company. They recruited Nakamuthu Balakrishnan ("Bala"), a 48 year-old former odd-job labourer, to carry out the robbery. Bala, in turn, recruited Daniel Vijay s/o Katherasan ("Daniel") and Christopher Samson s/o Anpalagan ("Christopher"), both full-time national servicemen aged 23, to assist him. Bala, Daniel and Christopher will hereinafter be collectively referred to as "the Appellants".

Sometime later, Daniel had his car serviced at a workshop in Changi and while he was there, he took a baseball bat and placed it in his car. On 29 May 2006, the Appellants met at a coffee shop in Toa Payoh to have some drinks. The robbery plan was discussed at this meeting.[5]

Early the next morning, Bala was informed that Sterling would be delivering a cargo of mobile phones from Changi Airfreight Centre ("CAC"). The Appellants then drove to CAC in a rented ten-foot lorry ("the rental lorry") and took the baseball bat with them. Just outside the CAC, they were told the registration number of the lorry delivering the mobile phones ("the delivery lorry").

At about 7.00 a.m., the Appellants saw the delivery lorry drive out of CAC and they followed it in the rental lorry. Somewhere along Changi Coast Road, Daniel drove in front of the delivery lorry, causing the delivery lorry to stop by the side of the road. After the driver of the delivery lorry ("the Victim") alighted, he spoke with Christopher who directed him to speak with Bala. Bala then repeatedly assaulted the Victim with the baseball bat. The Appellants then carried the Victim into the rental lorry and drove off to a car park. After removing the cargo of mobile phones from the delivery lorry, they left the delivery lorry at the car park with the Victim inside.

Later in the day, the Victim was discovered by a member of the public and the police were called in. The Victim was sent to Changi General Hospital where he underwent emergency surgery on his head. Unfortunately, he never regained consciousness and died about five days after the robbery. The autopsy disclosed that at least 15 blows had been inflicted on the Victim's head and other parts of his body resulting in, amongst others, serious fractures to the Victim's skull and knuckles.

III. PROSECUTION AND CONVICTION

In the High Court, the Appellants were jointly charged for committing murder in furtherance of a common intention and were accordingly found guilty.

In relation to Bala, the High Court found that he had satisfied the requirements of the offence of murder under s. 300(c) of the *Penal Code* because he admitted that all the injuries found on

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

the Victim's body were caused by him, and a medical expert had testified that the injuries to the Victim's head were sufficient in the ordinary course of nature to cause death.[6]

In relation to Daniel and Christopher, the High Court considered all the evidence before it and relying on *Lee Chez Kee*, it found all the elements of establishing liability for committing murder in furtherance of a common intention made out for the following reasons.[7]

First, the criminal act in question was the robbery of the cargo in the delivery lorry. Second, Daniel and Christopher had participated in the robbery. Daniel caused the delivery lorry to pull over and acted as a lookout while the Victim was being assaulted. Christopher directed the Victim to Bala with full knowledge of the robbery plan and of the fact that the Victim would be assaulted by Bala. Both of them had also helped to carry the Victim into the rental lorry and drove it to the intended destination before participating in the removal of the cargo. Third, the Appellants had a common intention to commit robbery and knew that violence would be necessary to overpower and incapacitate the Victim in order to facilitate the commission of the robbery. Fourth, even if Daniel and Christopher were not aware of the precise means in which Bala was going to overpower and incapacitate the Victim and they did not plan to kill the Victim, the assault was carried out in furtherance of their common intention to commit the robbery.

IV. ISSUES BEFORE THE COURT OF APPEAL

Although Bala originally appealed against his conviction together with Daniel and Christopher, he later decided not to proceed with his appeal. Nevertheless, the Court of Appeal reviewed his conviction and upheld it save that the charge against him was amended to one of committing murder per se.[8]

The Court of Appeal spent more time considering the convictions of Daniel and Christopher and identified two issues:

a. whether Bala's assault on the Victim was in furtherance of the Appellants' common intention to rob him; and
b. whether with respect to the Appellants, on the evidence, the requirement in *Lee Chez Kee* for "subjective knowledge on the part of the secondary offender in relation to the likelihood of the collateral offence happening" ("the *LCK* requirement") was satisfied.[9]

The first issue deals with how to determine whether an act is in furtherance of a common intention. The second issue deals with the state of mind required on the part of the secondary offenders before they can be imputed with liability for the collateral offence.

A. Meaning of "In Furtherance" of a Common Intention

On the first issue, the Court of Appeal found it difficult to accept that Bala's assault on the Victim

6 *Supra* note 5 at para. 41.
7 *Ibid.* at paras. 51-53.
8 *Supra* note 1 at paras. 53-55, 186.
9 *Supra* note 1at para. 57.

to facilitate the robbery was in furtherance of the common intention to rob the Victim.[10] The court placed emphasis on the fact that there was only a finding that Daniel and Christopher shared a common intention with Bala to rob the Victim but not to kill him. Although there was a finding that Daniel and Christopher each knew that the Victim would be assaulted by Bala, there was no finding that they shared a common intention with Bala "to assault [the Victim] in the way that Bala actually did [emphasis added]".[11]

In other words, it was insufficient for the collateral criminal act to merely facilitate the primary criminal act in order to constitute an act "in furtherance" of a common intention. The collateral criminal act had to be consistent with the criminal act that was commonly intended to some degree of specificity. For example, in the context of the present case, the Court of Appeal implied that had the High Court found a common intention on the part of the Appellants to knock the Victim unconscious by hitting his head with a baseball bat, Bala's assault on the Victim would be consistent with such a common intention.[12]

The Court of Appeal also gave a further illustration using a hypothetical scenario involving 2 parties, A and B, who plan to abduct C with a common intention to rape her. The court suggested that if after the abduction, A molested C instead of raping her, then that act of molestation may be said to be consistent with the common intention to rape C. Alternatively, if A were to sodomise C, it may be argued (although the court was careful to state that this position should not be taken as definitive of its opinion on the point) that the act of sodomy is also consistent with the 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".[13] However, if A, in the course of raping C, suffocated her with a pillow while trying to stop her from screaming, it cannot be said that the suffocation was in furtherance of A and B's common intention to rape C just because the act of suffocating C furthered the rape of C.

At this juncture, the Court of Appeal foreshadowed its departure from the subjective knowledge test in *Lee Chez Kee*. By stating that "knowledge is not the same as intention", and that for the purposes of determining whether the collateral criminal act was part of what was commonly intended, the court has to ask whether the secondary offenders shared in the intention to commit the collateral criminal act (and did not merely know about it),[14] the Court of Appeal clearly signalled that the *LCK* requirement was no longer correct.

B. Whether the LCK *Requirement was Satisfied*

Nevertheless, the Court of Appeal went on to consider whether the *LCK* requirement was satisfied on the facts.

In *Lee Chez Kee*, three young men planned to rob someone who was well-acquainted with one of them. During the course of the robbery, the three young men assaulted, stabbed and strangled their victim to death. On the facts of that case, the Court of Appeal found that the appellant, who had participated in the assault and stabbing but not the strangulation, "must ... have appreciated that the deceased would have to be killed to protect [the] identities [of him and his companion who

10 *Ibid.* at para. 59.
11 *Ibid.*
12 *Ibid.* at para. 59(b).
13 *Supra* note 1 at para. 60.
14 *Ibid.* at para. 65.

were both not personally acquainted with the deceased] in the light of the harm they had inflicted on him".[15]

Applying the rule in *Lee Chez Kee*, the High Court in *Daniel Vijay* found that although the Appellants had not planned to kill the Victim or cause his death, they had known that the Victim would be assaulted as part of the robbery plan. As a result of that knowledge, the Appellants were imputed with liability for the collateral criminal act of murder.

The Court of Appeal rejected this analysis. In its view, there had to be a finding that the Appellants had subjective knowledge that Bala might likely inflict physical injury in contravention of s. 300(c) of the *Penal Code* on the Victim in furtherance of their common intention to commit robbery.[16] In other words, the knowledge required had to be specific to the particular limb of s. 300 invoked by the Prosecution.[17] It would not be sufficient to satisfy the requirements of s. 34 if the secondary offender merely had subjective knowledge that the victim might likely suffer an injury (or share in the common intention to inflict an injury on the victim) even if that injury was subsequently shown to be of a type which was sufficiently serious to amount to s. 300(c) injury.[18]

Although this test was used to hold a person directly liable for murder in *Virsa Singh v. State* of Punjab,[19] because s. 34 imposed constructive liability rather than direct liability, the Court of Appeal held that it may not be just or reasonable to apply that same test where the secondary offender 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 the criminal act would result in s. 300(c) injury to the victim.

For what it is worth, such a degree of specificity is correctly required and goes towards addressing concerns relating to concurrence between moral blameworthiness and criminal responsibility in cases of constructive liability.[20]

In a recent article, Professor Kumaralingam Amirthalingam raised these concerns through a hypothetical of an 18 year-old girl joining with her 30 year-old boyfriend to steal cigarettes from a local store where the man ends up stabbing the store keeper to death.[21] The girl admits to the police that she knows that her boyfriend was a violent sort and often carried a knife. She also 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.

Based on the rule in *Lee Chez Kee*, Professor Amirthalingam concluded that the girl would be found to have foreseen as a possibility that the primary offender was likely to inflict an injury sufficient in the ordinary course of nature to result in death, and hence would be guilty of murder under s. 302 read with s. 34 of the *Penal Code*. However, after *Daniel Vijay*, this conclusion

15 *Supra* note 2 at para. 262.

16 *Supra* note 1 at para. 66.

17 However, this did not mean that fine distinctions between the different limbs of s. 300 should be drawn, but rather, in effect, subjective knowledge that the victim might likely be killed or fatally injured must be present. See *Daniel Vijay* at paras. 72-73.

18 *Supra* note 1 at para. 74.

19 All I.R. 1958 S.C. 465.

20 See the dissent of Kirby J. in *Clayton v. R*, [2006] HCA 58 at para. 41; G. H. Gordon, "Subjective and Objective *Mens rea*" (1974-1975) 17 Crim. L.Q. 355 at 355; Kumaralingam Amirthalingam, "Clarifying Common Intention and Interpreting Section 34: Should there be a Threshold of Blameworthiness for the Death Penalty?" [2008] Sing. J.L.S. 435 at 443 [Amirthalingam, "Clarifying Common Intention"].

21 *Ibid., supra* note 20 at 443.

would no longer hold true. The knowledge that the primary offender may injure the deceased with a knife is not sufficient to justify liability where the secondary offender never contemplated that the deceased would be killed. The secondary offender has to have actual knowledge that the knife would likely be used to inflict a fatal injury in order for the requisite common intention to be inferred.

V. THE STATE OF THE LAW ON COMMON INTENTION

The determination of the above two issues did not end the matter. Dissatisfied with the current state of the law on common intention in Singapore, the Court of Appeal undertook a study as to whether s. 34 of the *Penal Code* had been correctly interpreted. It concluded that the requirement of common intention is "a more exacting requirement" than the *LCK* requirement of subjective knowledge for the purposes of imposing constructive liability.[22] How the Court of Appeal arrived at this conclusion deserves closer study.

First, it appears to be based on statutory interpretation, in particular, the legislative purpose behind introducing the phrase "in furtherance of the common intention of all" into s. 34 of the Indian *Penal Code* ("the IPC"). Section 34 of the IPC reads:

> 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.[23]

Singapore's s. 34 is based on the amended version of s. 34 of the IPC.

The Court of Appeal approvingly quoted Hari Singh Gour's opinion that the addition of the phrase "in furtherance of the common intention of all":

> ... ma[d]e all the difference between the old section and the new, 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 may have joined their company to commit an unlawful act.[24]

In other words, the phrase served to narrow the reach of constructive liability as originally embodied by s. 34 of the IPC and align it more closely with English law.

Under the English doctrine of common purpose, a secondary offender would be made constructively liable for the collateral criminal act if the secondary offender had foresight of what the actual doer might do.[25] For example, if A and B conspired to cause serious harm to C but A ended up killing C, then B would not be liable for the murder of C if the direct cause of C's death was a deliberate act by A that was: (1) unforeseen by B; or (2) more life-threatening than acts of

22 *Supra* note 1 at para. 87.

23 *Penal Code* 1860 (Act 45 of 1860) (India).

24 Hari Singh Gour, *The Penal Law of India*, 11th ed. (India: Law Publishers (India) Pte. Ltd., 2000) at vol. 1, 260.

25 See *e.g. Regina v. Rahman*, [2009] 1 A.C. 129; *R v. Mendez*, [2010] All E.R. 231. These cases were cited in *Daniel Vijay*, *supra* note 1 at para. 85.

the kind intended or foreseen by B.[26] This is akin to the *LCK* requirement of subjective knowledge.

The Court of Appeal in *Daniel Vijay*, however, took a different tack. It quoted the Privy Council's statement in *Barendra Kumar Gosh v. Emperor* [27] that the criminal law of India differed from that of England, and that the IPC had:

> ... 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...

Additionally, although it acknowledged that English criminal law was relevant in resolving ambiguities in the IPC,[28] the Court of Appeal chose to rely on explanations of the amendment to the IPC provided in the Indian cases of *Barendra* – to "punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention"[29] – and in *Ibra Akanda v. Emperor*[30] – to attribute an entire criminal act to an individual doer of a fraction of that act where "the fractional act was one which helped on a purpose which was shared by all the individual doers". The Court of Appeal interpreted these explanations to mean that s. 34 required all the offenders to have the same intention to commit the collateral criminal act in order for a secondary offender to be constructively liable for that criminal act.

It is submitted that the legislative purpose behind the insertion of the phrase "in furtherance of the common intention of all" is far from clear and does not necessarily point to the eventual conclusion reached by the Court of Appeal. The quotations relied on by the Court of Appeal could arguably lead to the conclusion that subjective knowledge is sufficient.[31] As argued by Professor Michael Hor, how the phrase is read really depends on which particular word in the phrase is emphasised:

> If the focus is thus: "in furtherance of the common intention of all", then the [*Mimi Wong v. PP*[32]] progeny, i.e., no need for common intender to have the same level of *mens rea* as actual doer, looks plausible. ... On the other hand, if the phrase is rendered thus: "furtherance of the common intention of all" then [*Rex v. Vincent Banka* [33]] seems to make more sense.[34]

This explanation seems to explain the range of the standards that courts have used in applying s. 34 and takes us to the second main reason for the Court of Appeal's departure from the *LCK* requirement precedent.

It is no secret that because of the nature of the interpretive exercise, courts in both Singapore and India have come to different conclusions as to the *mens rea* requirement of s. 34. On one end

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26 This example is taken from *R v. Mendez, ibid.* at para. 45.

27 All I.R. 1925 P.C. 1 [*Barendra*].

28 *Supra* note 1 at para. 86.

29 All I.R. 1925 P.C. 1 at 9.

30 All I.R. (31) 1944 Cal. 339.

31 This was in fact the case in *Lee Chez Kee*. See *Lee Chez Kee, supra* note 2 at para. 131, 133, 212.

32 [1971-1973] Sing. L.R. (R.) 412 [*Mimi Wong*].

33 [1936] M.L.J. 53 [*Vincent Banka*].

34 Michael Hor, "Common Intention and the Enterprise of Constructing Criminal Liability" [1999] Sing. J.L.S. 494 at 507 [Michael Hor, "Common Intention"].

of the spectrum, there are cases such as the Indian case of *Barendra* and the local case of *Vincent Banka*, both of which establish the high watermark of *mens rea* – intention to commit the collateral criminal act. On the other end, there are cases in India, such as *Nazir v. Emperor*[35] , which seem to establish a standard of objective foreseeability, and *Ng Beng Kiat v. Public Prosecutor*[36] in Singapore, which established a standard of strict liability.[37]

As pointed out in *Lee Chez Kee*, to date, the interpretation of s. 34 of the IPC remains vexed in India. Although the Indian Supreme Court has seemingly maintained the *Barendra* requirement[38] the lower Indian courts have not been so consistent.[39] Additionally, as apparent from the survey of the Singapore cases done in *Daniel Vijay*, consistency has also been absent in both the High Court and the Court of Appeal.[40] I therefore do not find the argument from precedents convincing.

I acknowledge, however, that the Court of Appeal in *Daniel Vijay* took the view that the position in Singapore was that applied in *Barendra* and *Vincent Banka* up till the decision of *Mimi Wong*. It was only after *Mimi Wong* that diverging views on s. 34 emerged in the Singapore courts.[41] After examining *Mimi Wong* in detail, the Court of Appeal concluded that *Mimi Wong* had been wrongly interpreted as diverging from *Barendra* and *Vincent Banka*, in a nutshell, because there was simply no reason for any divergence. It then restated the law on constructive liability under s. 34 to be consistent with *Barendra* and *Vincent Banka*.

Although the analysis provided by the Court of Appeal in *Daniel Vijay* is both comprehensive and plausible, it is unsatisfying because it did not engage directly with the equally persuasive reasoning in *Lee Chez Kee* which led to a starkly different conclusion. There, it was held that in order to give effect to the words "in furtherance of the common intention of all"[42] the *mens rea* requirement of the secondary offender in a twin crime situation "is certainly not the actual intention to commit the ... criminal act which constitutes the collateral offence".[43] The court in *Lee Chez Kee*, after conducting an analysis of *Mimi Wong*, also saw the case as a representation of a wider interpretation of s. 34 as compared to *Vincent Banka*.[44] It is submitted that the *Lee Chez Kee* interpretation of *Mimi Wong* sits better with the ordinary reading of the words chosen in that case to differentiate between the intention of the primary offender and the common intention of all as follows:

> 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,

35 All I.R. (35) 1948 All 229.

36 [1995] 2 Sing. L.R. (R.) 844.

37 See Michael Hor, "Common Intention", *supra* note 34 at 497 - 501 for a discussion of the *mens rea* spectrum that has been required under s. 34.

38 See Kumaralingam Amirthalingam, "Common Purpose and Homicide" (2007) 123 Law Q. Rev. 369 at 371.

39 *Supra* note 2 at para. 182.

40 *Supra* note 1 at paras. 112-154.

41 *Ibid.* at paras. 118-119.

42 *Supra* note 39 at para. 221.

43 *Supra* note 2 at paras. 210-211.

44 *Ibid.* at paras. 168 and 171.

> otherwise the criminal act done by the actual doer would not be in furtherance of the common intention.[45] [emphasis added]

The Court of Appeal in *Mimi Wong* then gave the illustration of A and B forming 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 – an injury sufficient in the ordinary course of nature to cause death – and C dies. In the Court's view, applying s. 34, it was:

> 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", i.e. that unity of criminal behaviour, resulted in the criminal offence of murder punishable under s 302, A is also guilty of murder.[46]

In other words, the secondary offender need not have the common intention to cause injury with a knife that was sufficient in the ordinary course of nature to cause death. This is contrary to what the Court of Appeal in *Daniel Vijay* had required.[47]

I would further point out that unlike in *Lee Chez Kee*, the Court of Appeal in *Daniel Vijay* did not consider the role of s. 34 in light of the abetment provisions of the *Penal Code* (ss. 111 and 113) and the provision relating to an offence committed by an unlawful assembly in prosecution of a common object (s. 149 of the *Penal Code*), where the offence actually committed was not that intended by the abettor.[48] It only focused on how s. 34 may be reconciled with s. 396 (gang robbery with murder), i.e. that common intention cannot merely be inferred from participation in the offence. This, however, did not mean that the *LCK* requirement was incorrect. And, in fact, the Court of Appeal in *Daniel Vijay* did not expressly overrule *Lee Chez Kee*.

We can therefore expect that *Daniel Vijay* may not represent the last word on the law of common intention in Singapore. It is, however, difficult to imagine that the *mens rea* requirement would be changed once again after this categorical pronouncement by a Court of Appeal comprising the Chief Justice of Singapore, and two out of the three judges who shared in the opinion in *Lee Chez Kee*.[49]

VI. THE SIGNIFICANCE OF *Daniel Vijay*

At this juncture, it would be helpful to take a step back to consider the practical and normative significance of *Daniel Vijay*.

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45 *Supra* note 32 at para. 25.

46 *Ibid.*

47 *Supra* note 1 at paras. 144-145.

48 The Court of Appeal in *Lee Chez Kee* had considered that the subjective knowledge requirement would bring s. 34 into conformity with ss. 113, 114 and 149 of the *Penal Code*. See *Lee Chez Kee, ibid.* at para. 238 - 247.

49 In the most recent Court of Appeal pronouncement on s. 34, there was no detailed discussion on that provision. See, *Kho Jabing v. Public Prosecutor* [2011] S.G.C.A. 24. This could perhaps be because the facts of the case (murder in the course of a robbery) mirrored that of *Daniel Vijay*.

A. From Subjective Knowledge to Intention

Daniel Vijay apparently meant to raise the standard of what is required to establish constructive liability under s. 34 of the *Penal Code* from subjective knowledge that the primary offender may likely commit the collateral criminal act, to actual intention to commit the collateral criminal act. Yet, the Court of Appeal observed that 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" and that depending on the circumstances "subjective knowledge may be evidence of the existence of a particular intention".[50] Additionally, in setting out a non-exhaustive list of various scenarios in which s. 34 would or would not apply, the Court of Appeal stated that in an appropriate case, it may be possible for the court to infer the presence of a common intention to commit the collateral criminal act because the *LCK* requirement was satisfied, although the *LCK* requirement was not itself a sufficient basis.[51]

These statements raise the question of whether there really is any discernable line that may be drawn between knowledge and intention. The Court of Appeal was certainly careful to make such a distinction. It approvingly referred to Glanville L. Williams' description of knowledge and intention as follows:[52]

> [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.

On the other hand, the Court of Appeal also cited *Emperor v. Nga Aung Thein*[53] and *The Queen v. Gorachand Gope*[54] to demonstrate that knowledge is an essential element in coming to a conclusion as to whether there was or was not a common intention.[55] It quoted the High Court of Rangoon in *Nga Aung Thein* as stating:[56]

> 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

50 *Supra* note 1 at para. 89.

51 *Ibid.* at para. 168(f).

52 *Ibid.* at para. 88, citing Glanville L. Williams, *Jurisprudence by Sir John Salmond*, 10th ed. (London: Sweet & Maxwell Limited, 1947) at 380-381.

53 All I.R. 1935 Rang 89 at 92 [*Nga Aung Thein*].

54 (1866) Bengal LR Supp. 443 at 456-457 [*Gorachand Gope*].

55 See the Court of Appeal's referece to *Public Prosecutor v. Lee Chin Guan* [1991] 2 Sing. L.R. (R.) 762 in *supra* note 1 at para. 89.

56 *Supra* note 49 at para. 92.

> 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.

From this passage, it appears that where a person's knowledge of a particular act occurring is to a certain degree of probability, he may be taken to have intended that particular act. However, this effectively erases the distinction between the *LCK* requirement and the *Daniel Vijay* requirement of *mens rea* as it cannot reasonably be maintained that there is a substantial difference between "may likely" (the phrase used in *Lee Chez Kee*) and "most probably" (that used in *Nga Aung Thein*).

In respect of *Gorachand Gope*, the Court of Appeal in *Daniel Vijay* actually referred to the identical passage that was cited in *Lee Chez Kee* to support that court's interpretation of the *mens rea* requirement under s. 34 as subjective knowledge on the part of the secondary offender of the likelihood of the collateral offence happening.[57] It is confusing how this same passage can be relied on as authority for two different *mens rea* standards, unless those two standards are in fact not any different in practice.

Applying *Nga Aung Thein* and *Gorachand Gope* to the illustration of King David and Uriah the Hittite serves to demonstrate the closeness of knowledge and intention. Glanville Williams meant to show through the use of this illustration that because King David only intended the death of Uriah when he sent Uriah and his men to the forefront of the hottest battle, he did not intend the deaths of Uriah's men although King David knew that Uriah's men would likely die. However, based on *Nga Aung Thein* and *Gorachand Gope*, it may be inferred that King David actually intended the death of Uriah's men along with Uriah because of his knowledge that their deaths would be inevitable.

In hesitating to draw a clear line between intention and subjective knowledge, the Court of Appeal seems to have watered down its commitment to the higher *mens rea* standard it sought to impose in *Daniel Vijay* and left the door open to the continued use of the *LCK* requirement in certain cases. This possibility can be discerned from the recent case of *Kho Jabing v. Public Prosecutor*.[58] There, while reaffirming that *Daniel Vijay* represented the test for common intention, the Court of Appeal stated:

> Such a common intention may, depending on the circumstances, be inferred if the secondary offender is found to have subjective knowledge that "one in his party may likely commit the criminal act (murder) constituting the collateral offence in furtherance of the common intention of carrying out the primary offence (robbery)

B. Applicability of s. 34 to the Twin Crime Situation

Another change that has been brought about by *Daniel Vijay* relates to the elements the Prosecution will have to establish in order to rely on s. 34 in twin crime cases. In *Lee Chez Kee*, the Court of Appeal set out the elements as follows: (1) a criminal act; (2) participation in the doing of the act;

57 *Supra* note 2 at para. 211.

58 [2011] SGCA 24.

(3) a common intention between the parties to do that act; and (4) an act done in furtherance of the common intention of the parties.[59]

However, after *Daniel Vijay*, the elements the Prosecution will have to prove are as follows: (1) a criminal act; (2) participation in the doing of that act; and (3) a common intention between the parties to do that act.[60] There is no longer any need to separately show that there is an act done in furtherance of the common intention of the parties because the court has decided that a criminal act which is not commonly intended by all the offenders cannot be regarded as having been done in furtherance of that common intention.[61]

Although this reduction simplifies matters conceptually, it is submitted that it would nevertheless be harder for the Prosecution to establish constructive liability under s. 34. As the Court of Appeal recognises, it is often difficult, if not impossible, for the Prosecution to procure direct evidence of a pre-arranged plan between the parties.[62] Further, the courts are cautioned to only make necessary inferences deducible from the circumstances of the case.[63]

The success or failure of the Prosecution will likely turn on whether the court is willing to draw an inference of common intention based on all the circumstances of the case, including the extent of participation in the criminal act and the motivation for such participation. Because intention is supposed to be a higher standard than knowledge, it may be expected that judges who may have been willing to infer the existence of knowledge shy away from inferring the presence of intention (despite their similarities). The Prosecution may then wish to consider relying on other provisions in the *Penal Code* such as ss. 113 and 114, where subjective knowledge is sufficient to impute liability on an abettor of an offence, in order to procure a sentence for a secondary offender that is the same as that of the primary offender.

It is therefore submitted that *Daniel Vijay* may have a substantial impact on how twin crime cases are prosecuted and tried.

C. Normative Value

In *Lee Chez Kee*, V. K. Rajah JA agreed with Professor Andrew Simester's views on the normative value of having the mental element for constructive liability in a joint enterprise be based on a lower standard than that for other forms of complicity.[64] Professor Simester had written:[65]

> 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

59 *Supra* note 2 at para. 253.

60 This listing is not expressly stated in the judgment and is this author's interpretation of the effect of the decision.

61 *Supra* note 1 at para. 166.

62 *Ibid.* at para. 97; *Lee Chez Kee, supra* note 54 at para. 161.

63 *Supra* note 2 at para. 161, citing *Mahbub Shah v. Emperor* All. I.R. (32) 1945 P.C. 118 at 121.

64 *Lee Chez Kee, supra* note 2 at para. 250.

65 Andrew Simester, "The Mental Element in Complicity" (2006) 122 Law Q. Rev. 578 at 599.

> 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 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.

As a result of the re-interpretation of the *mens rea* required for constructive liability under s. 34 in *Daniel Vijay*, the secondary offender will no longer be held constructively liable for a criminal act which she was aware was likely to occur from her participation in the primary criminal act, and accordingly, will not be held to share the intention to commit the primary act with the primary offender. Even where the secondary offender knew almost to a certainty that the primary offender would carry out the collateral criminal act, where the court is unwilling to infer intention from that knowledge, she may be punished less severely than another person who committed the same crime individually and consequently posed less risk to the community.

Accordingly, the deterrence value of s. 34 is reduced and problems are also posed in respect of the principle of proportionality. According to the Court of Appeal in *Daniel Vijay*, the "true legislative purpose of s. 34" is "to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention".[66] Unfortunately, there appears to be no explanation why the requirement of intention to commit the collateral criminal act is normatively preferable to the *LCK* requirement.

VII. CONCLUSION

This case note has attempted to highlight the changes *Daniel Vijay* has brought about to the law on common intention in Singapore, particularly in respect of the *mens rea* requirement in s. 34 of the *Penal Code*. Instead of subjective knowledge of the likelihood that a collateral criminal act may be committed, actual intention to commit the collateral criminal act in question is now necessary. Although the difference between the two standards may blur in practice, and the justification for the abandonment of the *LCK* requirement is far from clear, it is submitted that the conceptual change is significant enough to impact the conduct of prosecutions and trials under s. 34 as well as the normative value of s. 34.

66 *Supra* note 1 at para. 166.