

**THE DICHOTOMY BETWEEN FORESIGHT AND INTENTION IN
JOINT ENTERPRISE MURDER: SHOULD OUR TOP COURT
DEPART FROM CHAN WING SIU AND SZE KWAN LUNG?**

by

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ABSTRACT

Since 21 June 1984, Hong Kong courts have faithfully followed the Privy Council decision in Chan Wing Siu (which was adopted by our Court of Final Appeal in Sze Kwan Lung after the handover) to hold a secondary party liable for joint enterprise murder based on his participation with foresight of a real risk of his co-adventurer inflicting grievous bodily harm on the deceased victim, even if he did not so intend. On 18 February 2016, the UK Supreme Court and Privy Council held in Jogee that the common law took a “wrong turn” in Chan Wing Siu by equating foresight with intent rather than treating foresight as evidence of intent. This landmark decision has prompted our top court to grant leave to appeal on 17 May 2016 in Chan Kam Shing to re-examine the Chan Wing Siu doctrine of extended joint enterprise. While pending the appeal hearing, there is yet another interesting development in that the High Court of Australia decided on 24 August 2016 in Miller not to follow Jogee but affirmed Chan Wing Siu. With the help of volunteer law students, a comprehensive survey of our appellate court decisions (both reported and unreported) before and after Chan Wing Siu on joint criminal enterprise resulting in the victim’s death has been done. This paper traces the relevant history of development of the doctrine of extended criminal joint enterprise in Hong Kong and concludes that our top Court should now depart from Chan Wing Siu and Sze Kwan Lung and reinstate the mens rea requirement of intention instead of foresight for joint enterprise murder.

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Introduction

When two or more people set out to commit an offence, and in the course of that joint enterprise one of them (the principal offender A) commits a different offence not intended by his or her partner (the secondary party B), should B become liable for the different offence if B foresees the possibility of A committing that different offence?

Since 21 June 1984, Hong Kong courts have faithfully followed the decision of the Privy Council on appeal from Hong Kong in *Chan Wing Siu v R*¹ to hold a secondary party in joint criminal enterprise guilty of murder for death resulting from acts committed by the primary offender so long as the former foresaw a real (as opposed to a remote) risk of inflicting grievous bodily harm in the execution of the joint enterprise, even if he did not intend to kill or cause grievous bodily harm to the victim, as the “*criminal culpability lies in participating in the venture with that foresight*”². Since the handover in 1997, earlier Privy Council decisions on appeal from Hong Kong remain binding on our Court of Appeal and lower courts but are no longer binding on our Court of Final Appeal. Our top Court in *Sze Kwan Lung v HKSAR*³ decided without critical examination to follow *Chan Wing Siu* and affirmed that a participant in joint enterprise could be convicted of murder even though the actual killer was acquitted outright or convicted of the lesser offence of manslaughter only, and whether or not he intended it, he would be criminally liable for any such act if it were of a type which he foresaw as a possible incident of the execution of joint enterprise and he participated in the joint enterprise with such foresight.

¹ [1985] 1 AC 168.

² As per Sir Robin Cooke at p 175 in *Chan Wing Siu*.

³ (2004) 7 HKCFAR 475.

As a result, in Hong Kong the liability for a secondary party in a criminal joint enterprise which resulted in the victim's death has been greatly extended in that he would be guilty of murder on the basis of a lesser degree of culpability, namely foresight only of the possibility that other participant(s) may inflict grievous bodily harm, while the one who actually committed the murderous act could only be found guilty of murder upon proof of an intention to kill or cause grievous bodily harm. This striking anomaly of requiring a lower mental threshold for guilt in the case of a secondary party in a joint enterprise than in the case of the principal offender has led to an understandable sense of unfairness and injustice, as exemplified in the case of *Ng Pak Lun*, which the Clinical Legal Education Centre of the Faculty of Law of the University of Hong Kong has been approached to provide pro bono assistance.

The Case of Ng Pak Lun

Ng was convicted by the jury with a 5 to 2 majority verdict of joint enterprise murder. There was no dispute that in the early morning of 2 October 2008, the deceased was attacked by 9 young men including Ng in a McDonald's Restaurant in Tin Shui Wai. The young men were unarmed on their entry to the restaurant, though during the scuffle a rubbish compacting rod seized from the deceased and a metal umbrella stand were used by some of them to attack the deceased. According to the forensic evidence, the fatal blows were likely made by a person called Ah Man using the metal umbrella stand found in the restaurant to strike and crush the deceased's skull towards the end of the attack while others were leaving the scene. The prosecution's accomplice witness (PW4) testified that "*he had been surprised by the sudden escalation in violence and that so far as he was aware there had been no pre-existing intention amongst the group members to cause serious bodily harm to the deceased.*"⁴ The whole attack which lasted for less than 30 seconds

⁴ As stated in the trial judge's summary in his Report dated 6 September 2012 to the Chief Executive pursuant to section 67B(2) of the Criminal Procedure Ordinance.

was captured on CCTV and the names of all attackers except two (labelled as Male E and Male F) were identified. Ng was either Male E or Male F, whose respective roles in the attack were in sharp contrast.

Male E only played a minor role by kicking the deceased at the beginning of the attack after the co-accused *Lam Siu Fung* had used the rubbish compacting rod seized from the deceased to hit the latter, and Male E was not aware of the use of the murderous umbrella stand by Male F or Ah Man to strike the deceased towards the end of the attack. Male F was the one who first picked up the umbrella stand in the restaurant to hit the deceased, though the fatal blows likely came from Ah Man who later picked up the same. Ng throughout maintained that he was Male E, and his claim was supported by the co-accused Lam. The only evidence that Ng was Male F came from PW4, an accomplice witness who had earlier pleaded guilty to the offence of manslaughter. But as the trial judge stated in his Report dated 6 September 2012 to the Chief Executive pursuant to section 67B(2) of the Criminal Procedure Ordinance specifying matters relevant to any future review of the mandatory life imprisonment sentence imposed on Ng, “*it was common ground [that PW4] had on various occasions lied to the police in the course of their investigation*”.

While the prosecution’s primary case was that Ng was Male F so that the jury could infer that he himself intended really serious injury to the deceased, they relied on the fallback that even if Ng might have been Male E, the jury could “*still be satisfied that he was at least aware of the real risk that one or more members of the group intended to cause [the deceased] really serious injury.*” In accordance with the doctrine of extended joint enterprise liability laid down in *Chan Wing Siu* and *Sze Kwan Lung*, the trial judge directed the jury to consider the culpability of Ng for murder under both alternative bases by determining whether they were sure that while participating in the attack upon the deceased, Ng “*was aware that there was a real risk that one or more other members of the group would intentionally cause [the deceased] really serious injury*” and that Ng “*was aware*

of the possibility that a member of the group might use a weapon of the sort which caused the fatal injury to [the deceased]”.

The trial judge acknowledged in his Report to the Chief Executive that PW4 might have been disbelieved by some jurors and so “*it is quite possible that as a matter of practicality that the defendant was convicted at least in part on the basis that he had used no weapon in the assault on the deceased, but had continued to participate in the attack*” after he had been aware of the rubbish compacting rod being used by Lam, in which case “*his culpability in that regard would be little if at all, greater than two other members of his group (PW4 and a person Bo Ka-shing) from whom the prosecution had accepted pleas of guilty to manslaughter*“. PW 4 was sentenced to 4 years imprisonment given his assistance to the prosecution while Bo received a sentence of 5 years and 6 months, but Ng was sentenced to mandatory life imprisonment because he was convicted of the most heinous crime of murder.

In summary, given the questionable evidence from the accomplice witness, there is a real likelihood that Ng was treated as Male E by some jurors who convicted him on the basis of his “*continued participation with the necessary foresight*“. As such, given that the prosecution had accepted the manslaughter pleas of other defendants in the same group who played a similar (if not greater) role as Male E, it appears unfair and unjust to convict Ng (who was only 18 years and 11 months old at the time of the offence) of murder with a mandatory life imprisonment sentence. However, in view of the decisions in *Chan Wing Siu* and *Sze Kwan Lung*, no challenge was taken on the application of this extended joint enterprise liability and Ng’s appeal based on other grounds was dismissed⁵.

⁵ See the Court of Appeal in *HKSAR v Lam Siu Fung and Another* [2014] 1 HKLRD 241. Leave to appeal to the Court of Final Appeal was refused by the Appeal Committee: see FAMC10/2014, 2 May 2014.

A Golden Opportunity for our Top Court to Re-examine the Doctrine of Extended Joint Enterprise

On 18 February 2016, the UK Supreme Court sitting at the same time as the Judicial Committee of the Privy Council held in *R v Jogee and R v Ruddock*⁶ that the common law took a "wrong turn" in *Chan Wing Siu* by equating foresight with intent rather than treating foresight as evidence of intent and that there is no place for such extended joint criminal enterprise liability in the law. This landmark decision has provided a golden opportunity for our top court to re-examine the *Chan Wing Siu* doctrine of extended joint enterprise hitherto followed in Hong Kong without critical examination, which resulted in a striking anomaly in the requisite mental threshold for murder in respect of a secondary party in a joint enterprise as compared to the principal offender and which has led to an understandable sense of unfairness and injustice. The author therefore welcomes the determination of the Appeal Committee of our Court of Final Appeal on 17 May 2016 to grant leave to appeal in *HKSAR v Chan Kam Shing*⁷ to determine whether *Chan Wing Siu* should continue to be applied in light of *Jogee*.

Before our top Court is to hear this appeal on 28 November 2016, there is yet another interesting development in that the High Court of Australia (by a majority of 6 to 1) decided on 24 August 2016 in *Miller v The Queen*⁸ not to follow *Jogee* but affirmed the doctrine of extended joint enterprise in *Chan Wing Siu*. While the majority acknowledged that *Jogee* is in line with the views of a number of distinguished commentators, they regarded *Jogee*'s decision was essentially based on considerations about "the policy that the law should pursue"⁹. In light of the history of the development of the doctrine of extended criminal joint enterprise in Australia (particularly, that its top Court in 2006 in *Clayton v The*

⁶ [2016] 2 WLR 681.

⁷ FAMC 57/2015.

⁸ [2016] HCA 30.

⁹ Para 32.

*Queen*¹⁰ declined to grant special leave to appeal after entertaining a fully argued attempt to reopen the issue and that the problem generated has not been ignored by legislatures and law reform bodies in Australia), the majority decided that “*it is not appropriate for this Court to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with Jogee.*”¹¹ On the other hand, Gageler J gave a very powerful dissenting judgment to explain why his Lordship felt “*compelled by principle*”¹² to return to the common law position before its top court in 1995 in *McAuliffe v The Queen*¹³ first decided to adopt the *Chan Wing Siu* doctrine.

So what is the relevant history of the development of the doctrine of extended criminal joint enterprise in Hong Kong and should our top Court follow *Jogee* or *Miller*?

Pre-*Chan Wing Siu* Cases in Hong Kong

With the help of our law student volunteers¹⁴, a comprehensive survey of our appellate court decisions (both reported and unreported) before and after *Chan Wing Siu* on joint criminal enterprise resulting in the victim’s death has been conducted. For the purpose of this paper, the author summarises below only those cases decided after the abolition of constructive malice for felony murder by section 2(1) of the Homicide Ordinance (Cap. 339. passed in May 1963, which followed the English Homicide Act of 1957). As explained by the Court of Appeal in *Tsang Wai-Keung and Others v The Queen*¹⁵, “*The effect and, indeed, the intended purpose of that section was to abolish what was hitherto*

¹⁰ (2006) 81 ALJR 439.

¹¹ Para 43.

¹² Para 107.

¹³ (1995) 183 CLR 108.

¹⁴ The author wishes to express his thanks to Anthony Chan Man Chit, Chan Pak Fai, Pakco, Jevons Chan, Dicky C.H. Cheung, Ho Wing In Ivy, Lam Yi Yeung Wilson, Lau Tak Chak Douglas, Lee Wing Yin Wayne, Li Chee Wing Gloria, Lui Chi Lok Patrick and Yeung Sze,

¹⁵ [1973] HKLR 432 (15 March 1973).

known as the doctrine of constructive malice. For a killing to amount to murder when not done in the course or furtherance of another offence, there must be an intent either to kill - which is express malice - or to cause serious bodily harm when in fact results in death - which is implied malice."¹⁶ Hence, before the abolition of constructive malice, a secondary party to a joint enterprise to commit a felony with contemplation of the use of some degree of violence if necessary could be convicted of murder if death resulted even though the actual degree of violence used by the principal offender went considerably beyond that contemplated or envisaged by the secondary party and even though he had no intention (conditional or otherwise) to kill or to inflict grievous bodily harm.

After the abolition of constructive malice upon the introduction of section 2(1) of the Homicide Ordinance, as the Court of Appeal explained in *Tsang Wai-Keung*, "...in so far as [the earlier cases] decide that where there is a preconceived common intention to rob accompanied by, if necessary, some degree of violence, and death results therefrom, all parties to that common intention are guilty of murder, are no longer good law. The test now to be applied is the purely subjective test: what was the intention in the mind of the party charged with the offence? And if more than one party, the individual intention in the mind of each one of them."¹⁷ Any pre-abolition of constructive malice cases before May 1963 must therefore be read cautiously in that light.

As can be seen from the summary of cases below, all the appellate Court¹⁸ decisions before *Chan Wing Siu* spoke with one voice on joint enterprise murder, namely, that there must be proof of common intent or common design, that the requisite *mens rea* for the secondary party was the same as that of the principal offender who committed the murderous acts, and that there must be proof of an intention to kill or cause grievous bodily harm while

¹⁶ At p 441.

¹⁷ At p 441.

¹⁸ The Full Court or the Court of Appeal when the latter was established in 1976.

mere foresight or knowledge was insufficient. There was also no indication or suggestion that the jury had any substantial difficulty in understanding or applying the orthodox directions given by the trial judge in determining whether the requisite intention existed in respect of each participant to the joint enterprise, nor that the law prior to *Chan Wing Siu* failed to provide the public with adequate protection.

Chan Ming decided on 14 February 1969

In *Chan Ming and Another v The Queen*¹⁹, four accused were indicted for joint enterprise murder. The case for the prosecution was that there was a common design entered into and agreed upon between each of the four accused to inflict, at the very least, grievous bodily harm to the deceased and that the injuries inflicted upon him, which resulted in his death, were the direct consequence of that common design. However, the jury at the end convicted only the first two accused of murder but returned a manslaughter verdict for the other two accused. The Full Court explained that the manslaughter verdict for one accused must have been on the basis that the evidence “*satisfied [the jury] that he was not a party to an intention to kill or to cause grievous bodily harm or, at any rate, left them in reasonable doubt as to the extent to which he was prepared to go in the plan to assault the deceased.*”²⁰ In dismissing the first two accused’s appeal, the Full Court held that the law was “*lucidly and admirably set out in a passage in the summing-up of Theisiger, J. - approved by a Full Bench of the then Court of Criminal Appeal - in the case of R v Smith (Wesley)*”²¹ ” as follows: -

"a person who takes part in or intentionally encourages conduct which results in a criminal offence will not necessarily share the exact guilt of the one who actually strikes the blow. His foresight of the consequence will not necessarily be the same

¹⁹ CACC 762/1968 (14 February 1969).

²⁰ Para 21.

²¹ [1963] 1 WLR 1200 at 1205-1206.

as that of the man who strikes the blow, the principal assailant, so that each may have a different form of guilty mind, and that may distinguish their respective criminal liability. Several persons, therefore, present at the death of a man may be guilty of different degrees of crime - one of murder, others of unlawful killing, which is called manslaughter. Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results.”²²

The only caveat noted by the Full Court was that the last sentence of that passage should be read in light of *R v Anderson and Morris*²³ (i.e. The accused might not be guilty of manslaughter if the principal offender went beyond what had been tacitly agreed as part of the common enterprise).

Law Kam Wah decided in 1971

In *Law Kam Wah v The Queen*²⁴, the Appellant was convicted of joint venture murder. In dismissing the appeal, the Full Court again stressed that “*common intent is one of the elements of guilt as a principal in the second degree*”²⁵, but it was satisfied in that case that “*the jury must have understood that they had to be satisfied of the Appellant's intention that serious bodily harm be caused to the Deceased*”²⁶.

²² Para 23.

²³ [1966] 2 QB 110.

²⁴ CACC 985/1971 (date of judgment not stated).

²⁵ Para 3.

²⁶ Para 2.

Lee Hin-Kai decided on 26 January 1972

In *Lee Hin-Kai and Others v The Queen*²⁷, the three Appellants, aged 19, 15 and 21 respectively, were convicted of affray and joint enterprise murder. Whilst there was no evidence that any of the Appellants had struck the fatal blows, the case for the prosecution proceeded on the basis that the three Appellants, individually being identified as being armed with offensive weapons, were part of an armed gang that waylaid and attacked the deceased and his companions with intent to kill, or at least to cause serious bodily harm. The Full Court was satisfied that there was ample evidence on which the jury could properly convict the Appellants of affray and that by their guilty verdict for murder, the jury must have been fully satisfied that the Appellants went into the fight armed. However, the Full Court allowed the appeal on murder and substituted a conviction for manslaughter because “*intention - though a question of fact - was not adequately left to the jury by the learned judge*”²⁸, as the trial judge directed the jury to convict the Appellants of murder if they were satisfied that each of the Appellants formed part of the armed gang of attack.

The explanation given by the trial judge in his summing up was that “*No person forming part of a gang which is armed with long knives such as those you have seen in Exhibit 1 or long poles such as those you have seen like Exhibit 35 and who join in an attack upon a smaller number of unarmed persons in the way that you have heard described by the five witnesses could possibly or conceivably deny that he intended at least serious harm to the deceased and his companions.*”²⁹

However, as held by the Full Court, “*There remains, however, the question of intention, unquestionably one of fact for the jury... As such it was a usurpation of the function of the*

²⁷ CACC 516/1971 (26 January 1972).

²⁸ Para 19.

²⁹ Para 20.

jury in regard to intention, which issue was simply never left to them. It is conceivable, though not probable, that the appellants, or one or more of them, might have had an intent to do some harm not amounting to grievous bodily harm - but that was a matter for the jury."³⁰

It can be seen that the Full Court again emphasised the need to satisfy the jury beyond reasonable doubt that each accused had the requisite intention to cause at least grievous bodily harm before he could be convicted of joint enterprise murder. It is also worthy of note that the Full Court observed that the jury possibly did not like the trial judge's direction to convict the Appellants of murder by withdrawing the issue of intention from them when the jury returned the guilty verdict for murder in these words: "*According to law, guilty*"³¹.

Li Chi Wing decided on 27 July 1972

In *Li Chi Wing and Others v The Queen*³², the case for the Crown was that as a result of an earlier alleged attack by members of the Wo Shing Wo Triad Society on one of the Appellants, the six Appellants together with others decided to take violent revenge and, with that object, went to Block 32 Tsz Wan Shan Resettlement Estate and attacked such members of the Wo Shing Wo as they were able to find, including the deceased. They were alleged to have gone armed with a variety of weapons, including knives and pieces of water-pipe some three feet in length, but the actual killer could not be identified. The jury convicted the first five Appellants of murder and the 6th Appellants of manslaughter.

The main ground of appeal for the first five Appellants related to whether and how the issue of provocation should be left to the jury, but the Full Court held that on the facts of

³⁰ Para 24.

³¹ Para 14.

³² [1972] HKLR 315 (27 July 1972).

that case there was simply no need to direct the jury on the issue of provocation because there was no evidence that any of the accused was provoked into killing the deceased. The Full Court however considered that some guidance might be of assistance in future cases as to “*whether it can ever be requisite for a judge to leave the issue of provocation in a case where the defence allege what has been described as "group provocation", that is to say provocation by the deceased and his associates to the group of which the accused was a member.*”³³ The Full Court opined that:

“...where a victim is one of a group of persons whose overall pattern of behaviour may amount to provocation, we think, his killer may successfully set up the defence of provocation: R v Twine³⁴. But we are of opinion that where the killer cannot be identified beyond reasonable doubt no question of provocation can ever arise for determination by the jury. In such a case even if it were proper for the jury to speculate that a particular accused was the killer (and we think it is not) they must also consider the possibility that he was not the killer. It follows that in order to convict of murder the jury would have to find a common intent to kill or to do grievous bodily harm. More than that, they would have to find that the death was a result of that common intent. If the death was a result of that common intent it could not also be a result of provocation. In other words, the finding of death due to a common intent to kill or to do grievous bodily harm rules out the possibility of a finding that there was provocation in law which would reduce the offence to manslaughter.”³⁵

The Full Court however allowed the 6th Appellant’s appeal against his manslaughter conviction because the trial judge did not follow *Reg. v Anderson & Morris*³⁶ and failed to

³³ At p 319.

³⁴ 1967 Crim. L. R. 710.

³⁵ At pp 319-320.

³⁶ (1966) 50 Cr. App. R. 216.

direct the jury to consider whether the killer's act went outside the scope of the joint enterprise because on the facts, *"It would indeed have been open to the jury, as counsel for the Crown submitted, to find that the 6th Appellant took part in the attack although intending to do something less than grievous bodily harm but he could be convicted of manslaughter only on the basis that the killer did not go outside the scope of the common intent when he used a triangular file or similar weapon"*³⁷.

It may be noted that the Full Court in *Li Chi Wing* again affirmed the need for a common intent to kill or to do grievous bodily harm for joint enterprise murder, and opined that the finding of common intent would rule out the possibility of "*group provocation*" for reducing the offence to manslaughter. There was no indication that the jury had any problem in determining whether each of the accused had the requisite intent in this sort of triad gang violence cases where the gang member who struck the fatal blows could not be identified. Indeed, the jury were able to distinguish the role of the 6th Appellant from that of the first five Appellants and found that *"the 6th Appellant was present at the scene and that he took part in the attack, although intending to do something less than grievous bodily harm."*³⁸

Tsang Wai-Keung decided on 15 March 1973

In *Tsang Wai-Keung and Others v The Queen*³⁹, the deceased was stabbed to death by the third appellant when he resisted a concerted robbery by the three Appellants, who were all masked and armed with triangular files. All three Appellants were charged and convicted of robbery. Only the Second and Third Appellants were charged with murder because the First Appellant had already left the scene before the deceased was stabbed. The jury at the end convicted the Third Appellant of murder but convicted the Second Appellant only of

³⁷ At p 323.

³⁸ At p 321.

³⁹ [1973] HKLR 432 (15 March 1973).

manslaughter. The Full Court dismissed the appeal of all three Appellants, and the only difficult legal issue which confronted the Full Court concerned the manslaughter conviction of the Second Appellant, because of the different interpretation/application of the principle laid down in *Anderson & Morris* between the justices of appeal (Rigby CJ and Brigg J with McMullin J dissenting).

As explained by Rigby CJ when delivering the majority judgment, the issue was:

“But can it be said, as the learned Commissioner has directed the jury, that if they were satisfied that the second appellant was a party only to a common intention to rob and, if necessary, to achieve that purpose, to cause some lesser injury than serious bodily harm, and one of his co-adventurers, departing beyond the common intention, caused injury resulting in death, then it was open to them to convict the second appellant of the lesser offence of manslaughter?”⁴⁰

The majority took the view that in light of the distinguishable facts, the decision in *Anderson and Morris* was not contradictory to, or inconsistent with, the earlier decisions of *Betty*⁴¹ and *Smith (Wesley)*⁴²:

“The clear distinction between these two earlier cases and that of Anderson and Morris was that in the latter case the jury directed the jury that they could convict Morris of manslaughter even though he did not know that Anderson had a knife or intended to use it either to kill or cause grievous bodily harm-an act which the trial

⁴⁰ At p 442.

⁴¹ (1964) 48 Cr. App. R. 6.

⁴² [1963] 3 All E.R. 597.

judge was at pains to point out was "outside the common design to which Morris is proved to have been a party."”⁴³

The majority considered that the Second Appellant’s situation differed from that in *Anderson and Morris* but were similar to that in the *Smith (Wesley)* case:

“In the case now under consideration before us the evidence, if believed, clearly established that all these three men were armed with triangular files which they visibly displayed in furtherance of their manifest intention to rob their victims. The blow which resulted in death, even though not the act of the second appellant could by no stretch of the imagination be said to be outside the scope of the concerted action of the three armed robbers. If, indeed, the jury genuinely believed it to be a reasonable possibility that the second appellant only intended or envisaged that the files might be used to cause some lesser injury than death or serious bodily harm, then the words of Theisiger, J., in directing the jury in Smith's case -words approved by all five judges on the hearing of the appeal-are directly relevant, to wit:-

"Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results."”⁴⁴

It should be noted that the *Tsang Wai-Keung* case as well as the three English cases discussed therein all concern joint enterprise manslaughter instead of joint enterprise murder, and there was no dispute as regards the *mens rea* required for joint enterprise murder, namely, *"Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder“* (in the words of Theisiger J). A key distinction between murder

⁴³ At p 447.

⁴⁴ At p 448.

and manslaughter is that murder is a crime of specific intent, in which proof is required of an intention to kill or to do grievous bodily harm⁴⁵, while manslaughter is a basic intent offence and one can be convicted of unlawful act manslaughter without any malice aforethought.

Hence, it is submitted that cases on joint enterprise manslaughter need to be read cautiously in that light, as there may be no need to prove an intention to cause a specific harm. The twist created by *Anderson and Morris* could be understood on the basis that in some factual scenarios, it is possible that the murderous acts committed by the principal offender were not within the contemplation or foresight of the secondary party so that the latter could not even be convicted of joint venture manslaughter on the ground that the murderous acts went outside the scope of the common design or be considered as an “*overwhelming supervening event*”.

Chau Cheuk Yin decided on 2 October 1973

In *Chau Cheuk Yin and Others v The Queen*⁴⁶, again the jury had no problem in finding the existence of common intent to cause grievous bodily harm on the part of all the Appellants who took part in triad related abduction and assault on the deceased even though the actual killer could not be identified. In dismissing their appeal against the joint enterprise murder verdict, the Full Court found the following direction of the trial judge on common intent “*a perfectly adequate direction*”:

“...Once you have decided that somebody it does not have to be one of the accused necessarily - once you have decided that somebody contributed to the death intending death or grievous bodily harm, then you must consider the intent that was

⁴⁵ *The Director of Public Prosecutions v Beard* [1920] AC 479 at 499.

⁴⁶ CACC 337/1973 (2 October 1973).

in the mind of each accused. Anybody who hit Shanghai Chai intending his death or grievous bodily harm to him is guilty of murder also, anybody who was present and was encouraging or assisting and intending to encourage or assist anybody else to cause death or do grievous bodily harm, even though he struck no blow himself, is guilty of murder"⁴⁷

Lo Kwok-Hung decided on 20 February 1974

In *Lo Kwok-Hung and Others v The Queen*⁴⁸, there was a fight inside a teahouse between the deceased and the Appellant and others whereby the deceased received four stab wounds of which one was fatal, but the eye-witness could not identify the actual killer. The Appellant's conviction for joint venture murder was allowed because of some errors or inadequacies in the summing-up. The Full Court clearly treated knowledge of the lethal weapon possessed by the principal offender and foresight of the probability of its use in the attack only as a factor for inferring the existence of common intent, as shown in the following passages:

"6. ...It is common ground that the jury must have based their conviction of the appellant for murder on the doctrine of common intent: namely that they took the view that he joined in the fight knowing that Chung Wing Choi or whoever it was who struck the fatal blow was armed with a knife and would in all probability use it, and indeed had used it.

7. The evidence, as I have said, showed that the appellant had knowledge that Chung Wing Choi was in possession of a knife. There is also the evidence that he picked up a beer bottle and intended to hit the deceased but that the deceased collapsed before he could carry out that intention. We think that on very careful direction a jury might hold that the fact that the appellant knew of the existence of

⁴⁷ Para 28.

⁴⁸ CACC 898/1973 (20 February 1974).

the knife together with the conduct of the appellant in picking up the bottle and attempting to hit the deceased showed that the appellant and Chung Wing Choi had, at the time of the fatal blow, a common intention to kill or cause grievous bodily harm to the deceased...”

Kwong Pak Leung decided on 24 October 1974

In *Kwong Pak Leung and Others v The Queen*⁴⁹, the deceased had a meeting with a group of persons inside a restaurant and she was attacked and stabbed to death by a triangular file. Not only was there no evidence that any of the three Appellants struck either of the two fatal blows but none of the witnesses was able or willing to testify to the identity of the assailants. The case for the Crown was that the Appellants together with some other men had planned a possible attack upon the deceased and had in the event put that plan into effect. Even though the prosecution had presented its case on the basis that the Appellants were guilty of murder or nothing, the jury convicted all three Appellants only of manslaughter. The Full Court allowed the appeal of one of the Appellants because of the lack of evidence that he was an active participant in the fight but dismissed the appeal of the other two. The Full Court affirmed that it was satisfied that the trial judge “*gave an entirely correct direction*” as follows:

“Now, in this case, we have no evidence as to who actually inflicted the fatal blow or blows which caused the death of the deceased WONG On-chung. It is the Crown's case that the accused, acting together in pursuance of the common intent to cause death or grievous bodily harm, did actually cause the death of the deceased. Provided that the Crown has satisfied you beyond all reasonable doubt that there was such a common intention, it is not necessary also to prove that the accused struck the fatal blow or even inflicted any injury at all. All that is required of the Crown is to prove to your complete satisfaction that the accused actively participated in doing something to further the act or acts which resulted in the

⁴⁹ CACC 282/1974 (24 October 1974)

death of WONG On-chung. In other words, it must be shown that, in sharing the common intention with others, he had taken some active steps towards that end. Mere presence would not suffice. It is important for you to remember that the common intention must be a common intention to cause very serious bodily injury or death. If the common intention had been to cause some other damage or lesser injury and then death resulted, then the accused may be guilty of the lesser offence of manslaughter, but he would not be guilty of murder. If you find on the evidence that the accused, at the time of the killing, did not have the intent to cause death or serious bodily injury then you should go on to consider the possibility of the lesser offence of manslaughter.

Manslaughter, for the purpose of this case, is the unlawful killing of another person without malice aforethought. A person commits manslaughter if, in doing some unlawful and dangerous act, he kills another by accident. Thus, if A and B attacked C with knives but their intention was not to kill C or cause him any really serious injury but simply to inflict some minor injuries and unfortunately as a result C died, this would be manslaughter, and not murder. Take another example. Whilst both A and B have knives, A intends to cause grievous bodily harm or death but B intends to cause only some lesser injury and C, the victim, dies as a result of the attack, A of course is guilty of murder because of his malice aforethought, but B is only guilty of manslaughter because he didn't have the requisite malice aforethought for murder, and there was no common intention between the two men. Therefore on applying the doctrine of common intent, a verdict of guilty of murder may be returned even if the defendant himself did not inflict any wound on the deceased, provided that he has shared in the common intent and did something in pursuance of that common intent".⁵⁰

⁵⁰ Para 10.

Man Kam-wah decided on 2 December 1974

In *Man Kam-wah and others v The Queen*⁵¹, a police officer was killed by a shot fired from an unidentified robber while the gang were escaping from the scene of the bank robbery. The jury had no problem in finding the existence of the requisite common intent and convicted all the Appellants of joint enterprise murder, and the verdict was upheld on appeal.

The Full Court affirmed that “*It was, of course, necessary for the jury to be satisfied that each of the Appellants had the required intent. In their cases that intent had to be an intent common with the person who actually fired the shot to use extreme violence to effect the escape of all the robbers and the safe transit of the stolen property to the place where it was to be distributed among them*”⁵². It may be noted that this was the “*entirely orthodox approach*” mentioned in *Jogee*⁵³.

Siu King-Him decided on 13 March 1980

In *Siu King-Him and Others v The Queen*⁵⁴, again a police officer was killed by gunshot from the Fourth Appellant during the course of an armed robbery carried out by the gang in possession of three loaded revolvers and a knife. The First Appellant who had taken part in the planning of the robbery but was not himself present at it pleaded guilty to manslaughter and robbery. The jury had no problem in finding the existence of the requisite common intent and convicted the Second to Fourth Appellants of joint enterprise murder, and the verdict was upheld on appeal. The Crown case was again based on the orthodox approach that all these three Appellants were “*equally guilty because they were*

⁵¹ CACC 470/1974 (2 December 1974).

⁵² Para 5.

⁵³ At page 696.

⁵⁴ [1980] HKLR 126 (13 March 1980).

party to a common design to rob and to take any violent steps that were necessary with loaded firearms to succeed in this robbery and to get away.”⁵⁵

The Court of Appeal again affirmed the trial judge’s summing up based on common intent:

“...counsel reminded the judge that, if the jury were of the view that the gang shared an intent less than that of using whatever force was necessary, they could be properly convicted of manslaughter. The judge indicated to the jury that this accorded with his view of the law.”⁵⁶

“It was beyond dispute that the plan agreed by all those who took part was that revolvers would be carried and should be used to induce fear among the gamblers... The only real issue for the jury was whether there was a common intent to do serious bodily harm.”⁵⁷

“What is material, for the purpose of gauging common design, is the intention which was in the minds of those who took part before the expedition began. However, in order to decide what this may have been, it is perfectly proper to look at the way in which those concerned behaved during and after the raid.”⁵⁸

It is true that on occasion, the Court of Appeal used terms such as “*envisaged*”, “*thought*”, “*believed*” and “*knew*”. However, these terms were used either in the context of an alternative verdict of the lesser offence of joint venture manslaughter (which, unlike

⁵⁵ At pp 132-133.

⁵⁶ At p 134.

⁵⁷ At p 135.

⁵⁸ At p 135.

murder, does not require proof of a specific intent), or as factors for inferring the requisite murderous intent. For example:

“These cases did not deal with the intermediate situation, in which (unlike Anderson) the others knew that the killer was armed. In such circumstances, the others will be liable to be convicted of murder or manslaughter according to their own mens rea-i.e. the use to which they intended that the weapons would be put. If they thought it would be used only to frighten, this would be manslaughter.”⁵⁹

“If such injury was not intended by the others they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter.”⁶⁰

“He made it abundantly clear that if D2 or D4 believed that the firearms were to be used at the most for firing warning shots, they should be acquitted of murder, though they could be convicted of manslaughter.”⁶¹

“By convicting D2, D4 and D6; the jury must have accepted the substance of PW3's evidence, which is of great importance in deciding the common intent of the members of the gang. His evidence showed that the robbery was planned with the greatest care and that all those taking part in it knew that three members of the gang were armed with loaded firearms and another with a knife.”⁶²

⁵⁹ At p 133.

⁶⁰ At p 134.

⁶¹ At p 135.

⁶² At p 135.

Choi Chi Keung decided on 9 June 1980

In *Choi Chi Keung and Others v The Queen*⁶³, a pig farmer was stabbed by a knife carried by the First Appellant while he resisted a robbery and eventually, he died. The robbery was committed by a gang of five men, but only the first two Appellants invaded the hut and had a scuffle with the deceased, while the Third Appellant and the other two men acted as look-outs. Again the trial judge adopted the orthodox approach in his summing up and asked the jury to determine the common intent and common design by drawing an inference from all the relevant circumstances:

*"As for the killing of the pig-breeder, the man who chopped him is obviously guilty. But as for the others, the extent of the common design is all important-the common plan. Now, as counsel have made it clear this morning, there is no evidence there was obviously no plan to go and kill this old pig breeder nor is there any evidence that they went out with the intention of causing him serious bodily harm. But, as you will see later, and as I think it has already been made clear by Crown counsel at the beginning, the all important question to be decided is whether the common design included the use of whatever force was necessary to achieve the robbery. ...Anyway, let me once more say that, in order that anybody else should participate in this murder, it would be necessary-it is necessary-for the Crown to establish that there was a common design to use whatever force was necessary to achieve the robbery."*⁶⁴

"What was the common intention of this joint venture which the third accused joined? As I said-as we've considered already-nothing was said! The third accused never said anything in reply to the first accused when he announced his declaration that he was going to rob the pig-breeder. But the third accused did know that the first accused had this knife and the first accused knew that he knew. Well, did the

⁶³ [1980] HKLR 391 (9 June 1980).

⁶⁴ At p 403.

third accused's mind run in the same way as the second accused, or did he think that the first accused's intentions were less violent than the second accused may have thought? Well, you have got to consider all the facts and then draw your inferences from them such as you can."⁶⁵

The Court of Appeal affirmed the trial judge's direction:

*"We think that direction adequately covered the question of common intent and participation. He first invited the jury to determine what was the intention of the robbers that night. If they came to the conclusion that either the first or second accused or both intended to use all necessary force to overcome resistance they still had to determine whether the third appellant shared that intent or whether he harboured a different but lesser intent to frighten the occupants with a knife. His position had to be considered in isolation but that if they concluded he had the lesser intent there was still a sufficient mens rea for the offence of manslaughter."*⁶⁶

At the end, the jury had no difficulty in following the direction and convicted the first two Appellants of murder and robbery and the third of manslaughter and robbery, and their respective appeals were dismissed by the Court of Appeal. As concluded by the Court of Appeal:

"In our case once the jury accepted the evidence of [the accomplice witness] on any reading of his evidence they must have come to the conclusion that there was a common design on the part of all to use the knife at least to intimidate. There was no evidence to the contrary. We consider that read in its entirety notwithstanding the misdirections as to the evidence of [the deceased's wife] the general effect of

⁶⁵ At p 405

⁶⁶ At p 405

the summing up can have left the jury in no doubt but that as far as the first appellant was concerned they might legitimately convict him of murder if satisfied that he inflicted the fatal blow with the intention of causing grievous bodily harm; that they might convict the second appellant of murder only if the common design existing in his mind included the causing of serious harm or the use of whatever force was necessary to achieve their object or permit their escape and that they were entitled to convict the third appellant of manslaughter depending on his own mens rea, that is, the use to which he intended the knife which he knew the first appellant had might be put.”⁶⁷

The Court of Appeal Decision in Chan Wing Siu on 8 April 1982

In *Chan Wing Siu and Others v The Queen*⁶⁸, according to the evidence of the deceased’s wife (who was a prostitute), she opened the door when the doorbell rang one afternoon, thinking that it was a prospective customer. The three Appellants then rushed in and told her to kneel down with one of them guarding her while the other two almost at once attacked her husband who was in the kitchen of the premises. One of them inflicted upon her husband a number of serious wounds from which he died a short time afterwards. The wife herself received a slight head injury inflicted with a knife. The three men then left the flat and ran away leaving behind three knives two of which were heavily bloodstained with blood of the same group as that of the deceased. The three Appellants admitted in their respective cautioned statements that they did enter the flat with a view to collecting a debt from the deceased but they gave different exculpatory stories which were different from the wife’s evidence. However, none of the Appellants chose to give evidence at trial. The jury convicted all three Appellants of murder of the husband and of another charge of wounding the wife with intent to cause grievous bodily harm.

⁶⁷ At p 405.

⁶⁸ [1982] HKLR 280 (8 April 1982).

It is worth noting that there was no indication from the judgment that any of the Court of Appeal judges intended to widen the scope of the secondary party's liability for joint enterprise murder or saw any inadequacies in the then existing law of joint enterprise for addressing triad activities or gang violence. Indeed, it is quite apparent that on the facts of that case, all three Appellants would have been convicted of murder had the trial judge directed the jury on joint enterprise murder based on the orthodox approach of common intent and common design.

This could be seen from the fact that in relation to the charge of wounding with intent to cause grievous bodily harm, the trial judge pointed out to the jury that since the wife was unable to identify which of the Appellants had actually struck her, and then gave a strong direction that the jury "*would find it difficult, in view of the fact that the attackers were then in retreat, to be able to say with certainty that whoever it was had struck her must have shared with the others an intention to inflict such an injury*"⁶⁹. Nevertheless, he left that charge to the jury for their decision on the evidence as a whole, and at the end the jury still convicted all the Appellants of wounding with intent. On this issue, the Court of Appeal rejected the Appellants' submission that the verdict was perverse, but took the view that if the jury had accepted the wife's evidence "*as substantially true, it was open to them to conclude that anyone who had gone to the premises armed with a knife was prepared to be a party to all the violence offered to any of the inhabitants of the flat. No doubt, that is the conclusion to which they came.*"⁷⁰

Hence, given that the jury were satisfied beyond doubt that the three Appellants shared the common intent to inflict grievous bodily harm on the wife, *a fortiori* they must also have been satisfied that all the Appellants shared the common intent to cause grievous bodily

⁶⁹ At p 283H.

⁷⁰ At p 284A-B.

harm to the deceased. As stated by Silke JA, *“They must, as my Lord has said, have come to the conclusion that the appellants coming to the flat, armed as they were, not only contemplating violence but were also prepared to be a party to all forms of violence offered to its inhabitants.”*⁷¹

However, it appears that the trial judge had given somewhat confusing directions to the jury on the joint enterprise murder charge. As noted from the Court of Appeal’s judgment, the trial judge on the one hand used *“words such as “possible”, “possibility”, “might” and “may” in relation to the appellants’ foresight of the outcome of their acts”*, but on the other hand there were *“other passages which suggest that the jury must find a positive intent to kill or cause grievous harm.”* However, as accepted by the Court of Appeal, *“a reasonable paraphrase of the summing-up at large, in relation to this matter, is that the learned trial judge did throughout direct the jury on the basis that a conviction for murder could and should follow if they were satisfied as regards each of the defendants that he foresaw death or grievous bodily harm as a possible, not as a probable, consequence of the enterprise to which he had lent his assistance”*, and *“the general cast of the directions is in the mode of foresight of possible consequences.”*⁷²

The Court of Appeal therefore was confronted with a situation where on the facts of the case, the safety of the murder verdict reached by the jury was not in doubt, but that the trial judge had given rather unconventional and to some extent, confusing directions. The majority (Li and Silke JJ.A.) indeed preferred to salvage the murder conviction by applying the proviso to section 83(1) of the Criminal Procedure Ordinance i.e. even if the directions had been wrong, the jury would inevitably have come to the same verdict. Even though Silke JA on the one hand expressed agreement with the conclusions reached by McMullin VP and affirmed that there was no misdirection, his Lordship took pain at the end to

⁷¹ At p 300B.

⁷² Per McMullin VP at p 284C-F.

emphasise again the need to prove intention and common design for joint venture murder: “As my Lord has trenchantly stated what the trial court and the jury are concerned with is the question: was there proof that the accused, at the time he did the act, had the intention either to kill or to do grievous bodily harm to the victim and, I would add, ancillary to that in a case such as this: what was the nature of the common design encompassing all the accused.”⁷³

It was only McMullin VP who went into detail on an interesting discussion of the law relating to the *mens rea* required for murder. However, it must be noted that his Lordship did not seek to suggest a different mental threshold for the secondary party’s liability in joint enterprise murder or to come up with any doctrine of extended joint enterprise for the secondary party. What prompted his Lordship’s discussion were the uncertainties of the law on murder created by the differences of opinion to be found in the five speeches in the House of Lords’ decision in *R v Hyam*⁷⁴. His Lordship even referred to some academic writings after *Hyam* and opined that “there is still some doubt whether murder is to be regarded as a crime of specific or of basic intent.”⁷⁵ Hence, the judgment of McMullin VP must be understood in the historical context that the law on the *mens rea* required for murder at that time was in “a state of disarray” because of *Hyam*. As explained by Lord Steyn in *R v Woollin*⁷⁶:

“In R v Hyam the House of Lords had an opportunity to consider what state of mind, apart from the case where a defendant acts with the purpose of killing or causing serious injury, may be sufficient to constitute the necessary intention. The defendant had burnt down the house of her rival in love, thereby killing her children. The judge directed the jury to convict the defendant of murder if she knew that it

⁷³ At p 301H.

⁷⁴ [1975] AC 55

⁷⁵ At p 292D.

⁷⁶ [1999] 1 AC 82.

was highly probable that her act would cause death or serious bodily harm. The jury convicted her of murder. The House upheld the conviction by a majority of three to two. But the Law Lords constituting the majority gave different reasons: one adopted the "highly probable" test; another thought a test of probability was sufficient; and a third thought it was sufficient if the defendant realised there was a "serious risk." The law of murder was in a state of disarray. The decision in Hyam was not only criticised by academic writers but was badly received in the profession."⁷⁷

The focus of McMullin VP's discussion was a choice between "*foresight of possibility*" versus "*foresight of probability*" of death or grievous bodily harm as being sufficient to constitute the malice aforethought for murder, rather than choosing between "*foresight*" versus "*intention*" as the required *mens rea* for a secondary party's liability for joint enterprise murder. McMullin VP interpreted the majority of the House of Lords in *Hyam* as favouring the foresight test based on "*probability and not bare possibility*", but considered that the point had not yet been settled. Relying on the Australian cases, McMullin VP eventually favoured "*substantial possibility*" instead of "*probability*" and concluded that "*Malice aforethought in murder is constituted by (a) a positive and direct intent to kill, or (b) the taking of a deliberate and unjustifiable risk when the one who takes it foresees that death or really serious bodily injury is a substantial possibility. A risk is unjustifiable when objectively judged, it was unreasonable to take it in view of its magnitude and want of social utility. But the final question is still subjective: did the accused foresee the result as a serious, or substantial possibility?*"⁷⁸

It is therefore important to note that neither McMullin VP nor the other two members of the Court of Appeal in *Chan Wing Siu* intended to widen the doctrine of joint enterprise

⁷⁷ At pp 90-91.

⁷⁸ At p 296D-E.

murder by changing the *mens rea* required for rendering the secondary party culpable from an intention to kill or cause grievous bodily harm to that of foresight of such a possibility. Indeed, this is reinforced in the subsequent Court of Appeal decision in *The Queen v Lam Tsz Wah*⁷⁹ presided also by McMullin VP (together with Silke and Fuad JJA) one and a half year later on 22 December 1983 but before the Privy Council delivered its decision in *Chan Wing Siu* on 21 June 1984.

Lam Tsz Wah decided on 22 Dec 1983

In *Lam Tsz Wah*, the Applicant was originally indicted with five other young men on three counts, namely, murder, wounding a second man with intent and assault occasioning actual bodily harm to a third man. The Applicant was convicted of murder but was found to have no case to answer to the other two charges, and all the other defendants were acquitted of all three charges. The events on the night the deceased was killed were most confusing since several men armed with iron bars and wooden poles were clearly involved in assaulting the deceased and others, in different places, but there was scant evidence to identify whether any of the accused was actually part of the attacking gang. The evidence of the Applicant's participation was limited to the inferences that could properly be reached from the circumstantial evidence of the bloodstain and finger print found on a metal bar recovered from the scene by the police on the morning following the incident. The evidence of the pathologist who conducted the post-mortem examination of the deceased showed that he had been the victim of a prolonged and savage beating, and the death was due to the fractures of the skull and injury to the brain caused by more than one blow on the head by blunt and heavy instruments. The Court of Appeal rejected all the other grounds of appeal advanced by the Applicant's counsel and it was left in no doubt that the jury were entitled to draw the inference from the evidence as a whole that the Applicant took some part in a serious assault upon the deceased. However, in the end, the Court of Appeal allowed the appeal with concession by the Crown and substituted a conviction of manslaughter because of the misdirection in relation to the doctrine of common intent in

⁷⁹ [1983] 2 HKC 171 (22 Dec 1983).

its application to the offences of murder and manslaughter. The misdirection was contained in the following passage of the trial judge towards the end of his summing-up:

“Now do not overlook, and I emphasise this, that if [the Applicant] was one of two or more who were attacking this deceased, although he did not have the intention to cause serious bodily harm but was lending his assistance to other or others who were, whose intentions were to cause serious bodily harm, then he is guilty of murder.”⁸⁰

In the judgment delivered by Fuad JA without any dissent from McMullin VP and Silke JA, the Court of Appeal held that this quoted passage *“clearly contains a misdirection - if it could reasonably be inferred that the Applicant did not himself share the intention to cause serious bodily harm he would not be guilty of murder...There was however, ample evidence for a conviction for manslaughter on proper directions.”⁸¹* Hence, it is clear that neither McMullin VP nor Silke JA who decided *Chan Wing Siu* intended to extend liability to a secondary party for joint enterprise murder in the absence of an intention to cause serious bodily harm on his part.

The Privy Council Decision in *Chan Wing Siu* on 21 June 1984

Before the Privy Council in *Chan Wing Siu*, the Appellants’ counsel unfortunately did not seek to argue that *“foresight”* by the secondary party of the risk of other participants killing or causing grievous bodily harm in the execution of the joint enterprise should not be equated with the requisite intent for joint enterprise murder, but argued that the law should

⁸⁰ At p 184H.

⁸¹ At p 184I-185A.

require a “*foresight of probability*” instead of a “*foresight of possibility*”. As summarised by Sir Robin Cooke:

“As in the Court of Appeal, it is submitted for the appellants that it was not enough if an appellant foresaw death or grievous bodily harm as a possible consequence of the joint enterprise: that the jury ought to have been directed that it must be proved that he foresaw that one of those consequences would probably result. Refining the argument somewhat, counsel for the appellants conceded before their Lordships that a person who is charged with murder on the basis of having been a party to an unlawful enterprise, and who was aware that weapons were being carried, need not have foreseen as more probable than not a contingency in which a weapon might be used by one of his companions (for example, resistance by the victim of an intended robbery). The main proposition submitted for the appellants remained, however, that such an accused does at least have to be proved to have foreseen that, if such a contingency eventuated, it was more probable than not that one of his companions would use a weapon with intent to kill or cause grievous bodily harm.”⁸²

When the Privy Council was confronted with a choice between “*foresight of probability*” versus “*foresight of possibility*”, it is unsurprising that the latter was adopted. As their Lordships rightly concluded, it would be “*wholly unacceptable*” that the guilt of an accomplice should depend on “*whether on considering in advance the possibility of a crime of the kind in the event actually committed by his co-adventurers he thought that it was more than an even risk*”, because what public policy requires must be that “*he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic.*”⁸³ Hence, the Privy Council has not heard any submissions as to whether “*foresight of possibility*” should replace “*intention*” (to kill or cause grievous

⁸² At p 175C-E; see also counsel’s submissions at pp 170D-171G.

⁸³ At p 177C-E.

bodily harm) as the requisite *mens rea* for joint enterprise murder. This might well explain why the Privy Council at the end introduced a new principle of law which extended liability for murder to a secondary party on the basis of a lesser degree of culpability “*based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments*”⁸⁴, as explained in the speech of Lord Hughes and Lord Toulson (with whom Lord Neuberger, Lord Thomas and Baroness Hale agreed) in *Jogee*.

Further Clarification and Development of the Law on the Requisite Mens Rea for Murder Since *Chan Wing Siu*

The House of Lords Decision in Moloney on 21 March 1985

It should however be noted that after the Privy Council decision in *Chan Wing Siu*, the House of Lords in *R v Moloney*⁸⁵ had the opportunity to review the case law since the abolition of constructive malice by the Homicide Act 1957 and critically examine the relationship between foresight and intention in dealing with the requisite *mens rea* for murder, and firmly concluded that “*foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence.*”⁸⁶

Similar to the trial judge in *Chan Wing Siu*, the trial judge in *Moloney* also gave somewhat confusing directions on the requisite *mens rea* for murder. On the one hand, he correctly directed the jury that in order to prove the Appellant guilty of murder, “*the prosecution have to prove that he intended either to kill his stepfather or to cause him some really serious bodily injury.*”⁸⁷ However, he also had at the same time given the following

⁸⁴ [2016] 2 WLR 681 at para 79.

⁸⁵ [1985] AC 905 (21 March 1985).

⁸⁶ At p 928F per Lord Bridge.

⁸⁷ At p 917E

directions on intent which mixed up or equated “*intent*” with “*foresight of probable consequences*” or even mere “*foresight*”:

"When the law requires that something must be proved to have been done with a particular intent, it means this: a man intends the consequence of his voluntary act (a) when he desires it to happen, whether or not he foresees that it probably will happen and (b) when he foresees that it will probably happen, whether he desires it or not."⁸⁸ (emphasis added)

"In deciding the question of the accused man's intent, you will decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances. Members of the jury, it is a question of fact for you to decide."⁸⁹ (emphasis added)

The House of Lords allowed the appeal and substituted a verdict of manslaughter for that of murder. In his discussion of the relationship between foresight and intention, Lord Bridge of Harwich summarised the most significant developments in this field within the past 30 years with the following highlights:

- (1) Section 2(1) of the Homicide Act of 1957⁹⁰ abolished what used to be called constructive malice, but not what used to be called implied malice. Hence, “*killing in the course of committing another felony, e.g., theft or rape ("constructive malice"), was no longer murder. To constitute murder what had*

⁸⁸ At p 917F.

⁸⁹ At p 918F.

⁹⁰ The equivalent was enacted in Hong Kong by section 2(1) of the Homicide Ordinance passed in May 1963.

now to be proved was either an intention to kill ("express malice") or an intention to do grievous bodily harm ("implied malice")."⁹¹

- (2) In *Director of Public Prosecutions v Smith*⁹², the House of Lords approved a direction by the trial judge in terms that *"The intention with which a man did something can usually be determined by a jury only by inference from the surrounding circumstances including the presumption of law that a man intends the natural and probable consequences of his acts."*⁹³ The effect of this decision was to declare the presumption that a man intends the natural and probable consequences of his acts to be irrebuttable. In this respect the decision was never popular with the profession. It was said to have been widely disregarded by trial judges, directing juries in murder cases, until it was eventually overruled by section 8 of the Criminal Justice Act 1967⁹⁴, which provides:

"A court or jury, in determining whether a person has committed an offence, - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

Lord Bridge further took pain to emphasise that the conjunction of the verbs *"intend or foresee"* in sub-section (b) was not *"an indication that Parliament*

⁹¹ At p 921B.

⁹² [1961] AC 290.

⁹³ At p 921E.

⁹⁴ The equivalent was enacted in Hong Kong by section 65A(1) of the Criminal Procedure Ordinance passed in 1971.

*treated them as synonymous; on the contrary, two verbs were needed to connote two different states of mind.*⁹⁵

- (3) Between 1957 and the decision of *Hyam* in 1974, it was not the practice of trial judges to equate intent with foresight of probable consequences.
- (4) However, the differences of opinion to be found in the five speeches in *Hyam* have caused some confusion in the law. One uncertainty identified by the Criminal Law Revision Committee in its Fourteenth Report entitled *Offences against the Person* (1980) (Cmnd. 7844) was that *“if foresight of probable consequences is to be treated either as equivalent to intent, or as evidence from which intent may (or must?) be inferred, how is the degree of probability in homicide cases, where some risk of death or serious injury is foreseen to be defined in a way that will distinguish murder from manslaughter?”*⁹⁶

As regards the aforesaid uncertainty, Lord Bridge firmly concluded: *“...the first fundamental question to be answered is whether there is any rule of substantive law that foresight by the accused of one of those eventualities as a probable consequence of his voluntary act, where the probability can be defined as exceeding a certain degree, is equivalent or alternative to the necessary intention. I would answer this question in the negative...I am firmly of opinion that foresight of consequences, as an element bearing on the issue of intention in murder, or indeed any other crime of specific intent, belongs, not to the substantive law, but to the law of evidence.”*⁹⁷

Lord Hailsham added: *“I conclude with the pious hope that your Lordships will not again have to decide that foresight and foreseeability are not the same thing as intention although*

⁹⁵ At p 929A.

⁹⁶ At p 925D.

⁹⁷ At pp 927H-928F.

either may give rise to an irresistible inference of such, and that matters which are essentially to be treated as matters of inference for a jury as to a subjective state of mind will not once again be erected into a legal presumption. They should remain, what they always should have been, part of the law of evidence and inference to be left to the jury after a proper direction as to their weight, and not part of the substantive law."⁹⁸

As further explained by Lord Scarman in *R v Hancock*⁹⁹, the House of Lords in *Moloney*:
“...cleared away the confusions which had obscured the law during the last 25 years laying down authoritatively that the mental element in murder is a specific intent, the intent to kill or to inflict serious bodily harm. Nothing less suffices: and the jury must be sure that the intent existed when the act was done which resulted in death before they can return a verdict of murder.”¹⁰⁰

While the House of Lords in *Moloney* has cleared away any earlier confusions and firmly settled that the requisite *mens rea* for murder is “*intention*” but not “*foresight*”, the following suggested direction which Lord Bridge gave in the “*rare cases*” in which it might be necessary to direct a jury to infer the requisite intention by reference to foresight of consequences soon caused practical difficulties:

"First, was death or really serious injury in a murder case (or whatever relevant consequence must be proved to have been intended in any other case) a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his act? The jury should then

⁹⁸ At p 913E.

⁹⁹ [1986] AC 455

¹⁰⁰ At p 471G.

be told that if they answer yes to both questions it is a proper inference for them to draw that he intended that consequence."¹⁰¹

The House of Lords Decision in Hancock on 27 February 1986

The problems caused by the quoted guidance above arose a year later in acute form in *Hancock*. Two miners on strike had pushed a concrete block from a bridge on to a three-lane highway on which a miner was being taken to work by taxi. The concrete block hit the taxi and killed the driver. The defendants were charged with murder. The defendants said that they merely intended to block the road and to frighten the non-striking miner. Following the guidance in *Moloney* the trial judge directed the jury to ask themselves: "*Was death or serious injury a natural consequence of what was done? Did a defendant foresee that consequence as a natural consequence?*" The jury convicted the defendants of murder. The murder conviction was quashed on appeal and was substituted with a verdict of manslaughter. Lord Scarman gave the leading judgment and accepted that the *Moloney* guidelines were misleading since they omitted any reference to probability. Lord Scarman observed:

*"They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence."*¹⁰²

However, as Lord Scarman took the view that model directions were generally undesirable and so did not give any concrete guidance. Moreover, Lord Scarman thought that where explanation is required the jury should be directed as to the relevance of probability without

¹⁰¹ At p 929G.

¹⁰² At p 473F.

expressly stating the matter in terms of any particular level of probability. Hence, the manner in which trial judges were to direct juries on inferring the requisite intention by reference to foresight of consequences was left unclear. It was only in *R v Woollin*¹⁰³ that the House of Lords settled on the issue and the guidance that should be given.

The House of Lords Decision in Woollin on 22 July 1998

In *Woollin*, the appellant lost his temper and threw his three-month-old son onto a hard surface. The child sustained a fractured skull and died, and the appellant was charged with murder. Towards the end of his summing up the trial judge directed the jury that if they were satisfied that the appellant *"must have realised and appreciated when he threw that child that there was a substantial risk that he would cause serious injury to it, then it would be open to you to find that he intended to cause injury to the child and you should convict him of murder."*¹⁰⁴ The House of Lord held that the reference to a *"substantial risk"* instead of the risk being a *"virtual certainty"* was a misdirection, quashed the murder verdict and substituted for a verdict of manslaughter.

The House of Lords eventually settled on the following guidance (which was adopted with minor modifications from the guidance earlier given by the Court of Appeal in *R v Nedrick*¹⁰⁵) in cases *"where a defendant was charged with murder and the simple direction that it was for the jury to decide whether the defendant had intended to kill or do serious bodily harm was not enough"*, as follows:

"the jury should be directed that they were not entitled to find the necessary intention for a conviction of murder unless they felt sure that death or serious bodily harm had

¹⁰³ [1999] 1 AC 82.

¹⁰⁴ At p 88A.

¹⁰⁵ [1986] 1 W.L.R. 1025.

been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant had appreciated that such was the case” and that “the decision is one for the jury to be reached upon a consideration of all the evidence.”¹⁰⁶

On the policy consideration, Lord Steyn explained:

“The Crown did not argue that as a matter of policy foresight of a virtual certainty is too narrow a test in murder... Moreover, over a period of 12 years since Nedrick the test of foresight of virtual certainty has apparently caused no practical difficulties. It is simple and clear. It is true that it may exclude a conviction of murder in the often cited terrorist example where a member of the bomb disposal team is killed. In such a case it may realistically be said that the terrorist did not foresee the killing of a member of the bomb disposal team as a virtual certainty. That may be a consequence of not framing the principle in terms of risk-taking. Such cases ought to cause no substantial difficulty since immediately below murder there is available a verdict of manslaughter which may attract in the discretion of the court a life sentence.”¹⁰⁷

It should therefore be observed that notwithstanding the confusions and uncertainties of the law on the requisite *mens rea* for murder which contributed to the change from “*intention*” to “*foresight*” in *Chan Wing Siu*, the law has subsequently been clarified and settled by successive decisions of the House of Lords authoritatively, namely that “*the mental element in murder is a specific intent, the intent to kill or to inflict serious bodily harm. Nothing less suffices.*” In cases where trial judges need to direct juries on how to infer the requisite intention by reference to foresight of consequences, the jury “*should be directed that they were not entitled to find the necessary intention for a conviction of*

¹⁰⁶ Per Lord Steyn at p 96C-H.

¹⁰⁷ At pp 94E-95A.

murder unless they felt sure that death or serious bodily harm had been a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant had appreciated that such was the case." Such clarification and development of law clearly goes against the reduction of the mental threshold for secondary party's liability for joint enterprise murder to one of a mere subjective foresight of a real possibility of death or serious bodily harm which may be committed by other participants in the execution of the joint enterprise. It is however unfortunate that there has been no critical examination of the issue by the Hong Kong courts since *Chan Wing Siu*.

Post Chan Wing Siu Cases in Hong Kong

As the Privy Council decision on appeal from Hong Kong before the handover was binding on all Hong Kong courts, there has not been any critical examination in Hong Kong of this new principle of law which extended liability for murder to a secondary party on the basis of a mere foresight of risk instead of intention since the Privy Council decision in *Chan Wing Siu*. Hence the post-*Chan Wing Siu* cases in Hong Kong are rather uneventful.

The first Court of Appeal decision in Yau Sau-Kam

In *The Queen v Yau Sau-Kam*¹⁰⁸, the trial judge directed the jury on the issue of common design along the lines then approved by the Court of Appeal in *Chan Wing Siu* as follows:

"If more than two went, or if you were in doubt as to whether more than two went, then you would have to consider whether he (that is YAU) committed the offence on the basis of whether he was a party to a common agreement, that is, you would have to be satisfied beyond a reasonable doubt there was such a common objective, that he would have realized that there was a risk of causing death or serious injury

¹⁰⁸ CACC 948/1983 (10 August 1984).

to someone in the premises, but he ran that risk and that the fatal blow was struck in pursuit of that objective. If you were satisfied of all of that beyond a reasonable doubt, you would be duty bound to find him guilty of murder." (Emphasis supplied)¹⁰⁹

The Appellant initially took issue with that direction and in particular with the word "risk". The appeal was adjourned at the suggestion of the Appellant's counsel pending the then forthcoming Advice of the Privy Council in *Chan Wing Siu*. After the Privy Council decision was handed down, the Appellant's counsel conceded that that sole ground of appeal was no longer arguable¹¹⁰, and the appeal was accordingly dismissed.

The Court of Final Appeal decision in Sze Kwan Lung

After the handover on 1 July 1997 with the establishment of our own Court of Final Appeal, Privy Council decisions on appeal from Hong Kong, though still binding on our Court of Appeal and lower courts, no longer remain binding on our top court, which "*may depart from previous Privy Council decisions on appeal from Hong Kong and [the Court of Final Appeal]'s own previous decisions*".¹¹¹ An opportunity for our top court to re-examine the doctrine of extended joint enterprise liability arose in the *Sze Kwan Lung* case in 2004, but unfortunately the focus of the arguments was on the distinction between the doctrine of joint enterprise and the common law principles of accessorial liability, but not whether foresight of risk should replace intention as the requisite *mens rea* for joint enterprise murder.

¹⁰⁹ See para 14.

¹¹⁰ See para 19.

¹¹¹ *A Solicitor (24/07) v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, at para 18; see also paras 19-20 and 52.

In *Sze Kwan Lung*, a group of protesters pressed their claim to the right of abode in Hong Kong at the immigration office, some with lighters and bottles containing thinners. When the immigration staff started to evict the protesters, some protesters splashed liquid from the bottles whereby a fireball erupted and two people sustained burns from which they later died. The seven Appellants, who were part of this group of protesters, were charged with two counts of murder and one of arson. The prosecution case was that they acted in joint enterprise to stage a violent protest by starting a fire with intent to kill or at least cause really serious injury. The First Appellant was convicted of murder and the other six Appellants were convicted of manslaughter, while all were convicted of arson. The Court of Appeal: (a) quashed the First Appellant's murder conviction on the ground that where those who played a principal role in the events were acquitted of murder, any secondary parties to the killing would have to be acquitted, and substituted it with one of manslaughter; (b) affirmed the other six Appellants' manslaughter convictions; and (c) affirmed all the arson convictions.

The Court of Final Appeal allowed all seven Appellants' appeal as there was a fatal misdirection by the trial judge as to the proper approach to defence evidence in the circumstances, and quashed all the convictions with an order for retrial on two counts of manslaughter and one count of arson. It also held that the Court of Appeal had given the wrong reason for quashing the First Appellant's murder conviction because the doctrine of joint enterprise was distinct from the common law principles of accessorial liability whereby the person charged with aiding, abetting, counselling or procuring an offence could only be convicted if the principal offender, charged at the same trial, was found guilty of the relevant principal offence. For joint enterprise liability, each participant was criminally liable for all the acts done in pursuance of the joint enterprise, and so a participant could be convicted of murder even though the actual killer was acquitted outright or convicted of the lesser offence of manslaughter only. However, there was a good reason for quashing the murder conviction because having regard to the absence of any relevant distinction between the First Appellant's position and that of his co-accused, his murder conviction was inconsistent with their convictions for manslaughter.

It is therefore important to note that the real issue that confronted the Court of Final Appeal on the doctrine of joint enterprise was whether a secondary party could be held liable for joint enterprise murder if the principal offender was convicted of the lesser offence of manslaughter only. On this issue, the author agrees with the views of the Court of Final Appeal, as directly supported by the House of Lords decision in *R v Howe*¹¹² and the Australian High Court decision in *Osland v R*¹¹³ cited by the Court of Final Appeal. However, it is one thing to say that *"where a person has been killed and that result is the result intended by another participant, the mere fact that the actual killer may be convicted only of the reduced charge of manslaughter for some reason special to himself does not, in my opinion in any way, result in a compulsory reduction for the other participant"*, as the Court of Final Appeal quoted with approval Lord Mackay's explanation in *Howe*¹¹⁴; it is a totally different thing to say that a secondary participant should be held liable for joint enterprise murder even if the result of killing was never intended by him or her but was just foreseen as a real possibility in the execution of the joint enterprise.

While Bokhary PJ (who gave the only judgment for the Court of Final Appeal with which the other four members concurred) acknowledged that by reason of the fatal misdirection on the proper approach to defence evidence, the disposal of the appeal did not require a decision on whether the trial judge's directions on joint enterprise were correct, his Lordship nonetheless went on to give the following guidance about joint enterprise *"for the benefit of the retrial of the present case and the trial of other cases"*¹¹⁵:

¹¹² [1987] AC 417.

¹¹³ (1998) 197 CLR 316.

¹¹⁴ [1987] AC 417, at 458C-D.

¹¹⁵ At para 32.

“... the doctrine [of joint enterprise] is distinct from the common law principles of aiding, abetting, counselling or procuring. Each participant is criminally liable for all the acts done in pursuance of the joint enterprise. And whether or not he intended it, he will be criminally liable for any such act if it was of a type which he foresaw as a possible incident of the execution of the joint enterprise and he participated in the joint enterprise with such foresight. This may be traced at least as far back as Alderson B's famous direction to the jury in *Hodge's Case*¹¹⁶. And it is the effect of our law as it has been clearly understood at least since the decision of the Privy Council on appeal from Hong Kong in *Chan Wing Siu v R*¹¹⁷, which involved murder and wounding with intent. I have particularly in mind what Sir Robin Cooke (as Lord Cooke of Thorndon then was) said at pp.175G-H and 177B in the course of delivering their Lordships' advice in that case.”¹¹⁸ (emphasis supplied)

The author has no quarrel with the first two sentences of the quoted passage above. Indeed, it is exactly because the doctrine of joint enterprise is distinct from the common law principles of aiding, abetting, counselling or procuring in that each participant is criminally liable for all the acts done in pursuance of the joint enterprise that the focus must be on the common design and common intent of the participant, and so it would be wrong to equate foresight of possibility with intention.

It is clear that when Bokhary PJ went further to say “*whether or not he intended it, he will be criminally liable for any such act if it was of a type which he foresaw as a possible incident of the execution of the joint enterprise and he participated in the joint enterprise with such foresight*”, his Lordship simply regarded the Privy Council decision in *Chan*

¹¹⁶ (1838) 2 Lewin 227 at p.228; 168 ER 1136.

¹¹⁷ [1985] AC 168.

¹¹⁸ At para 34.

Wing Siu as representing good law without any critical examination (or contrary submissions advanced by counsel) as to whether foresight of possible consequence should amount to sufficient *mens rea* for joint enterprise murder in the absence of actual intention. His Lordship's reference to Alderson B's famous direction to the jury in *Hodge's Case* has nothing to do with the dichotomy between foresight and intention, as Alderson B's famous direction in that case was that if a case was made up of circumstantial evidence only, "*the jury must be satisfied, not only that those circumstances were consistent with his having committed the act, but that they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person*".

Indeed, had the Court of Final Appeal really taken the considered view that mere foresight by a secondary party of possible risk of killing or causing grievous bodily harm by other participants would suffice for joint enterprise murder, it would have been puzzling for it to quash the First Appellant's murder conviction and refuse to order a retrial for the murder charges on the ground that there was no relevant distinction between the First Appellant's position and that of his co-accused. On the facts of that case, it should have been open to the jury to have reached different conclusions as regards the subjective foresight of the First Appellant and that of his co-accused:

- (1) As summarised by Bokhary PJ, the First Appellant "*is described in his own printed case as "the most vocal of the protesters". And the evidence is that the things which he said to members of the Immigration Service that afternoon include the following utterances made by him in the corridor outside Room 1301 between about 5:30 and 5:45 pm:*

Today, next year will be the anniversary of your death.

You people are not lucky. Today you will become roast pig.

Ah Sir, it's you people again. You people are unlucky, hugging together and die.

Today next year will be the anniversary of the death of you people and I.

*You people will die for sure.*¹¹⁹

- (2) As also stated by Stuart-Moore VP in the Court of Appeal judgment, “*Without a specific direction to this effect, it is easy to understand why the jury convicted D1 of murder. No doubt they would have had in mind what Mr McCoy rightly described as D1’s “foul-mouthed threats” towards immigration officers just outside the room. This one important factor, regarding what may have been in D1’s mind when carrying out his actions, placed him, evidentially, in a different category to all his co-defendants.*”¹²⁰

It is readily understandable why none of the 8 judges in the Court of Appeal and in the Court of Final Appeal in *Sze Kwan Lung* found there was a case for joint enterprise murder against the First Appellant: It is simply stretching the law too far and repugnant to common sense to conclude that the First Appellant had the requisite intention to kill or cause grievous bodily harm when he joined the enterprise while the other protestors who splashed the inflammatory liquid from the bottles and caused the fire did not have that requisite intent. However, if liability for joint enterprise murder is based on his participation in the joint enterprise with a subjective foresight of a real possibility that fatal tragedy may occur in its execution, it is difficult to see why it is not open to the jury to convict him of murder on the facts of that case. See the Privy Council decision in *Hui Chi-Ming v The Queen*¹²¹.

It is also worth noting that the Court of Final Appeal decided to leave open the question of whether unlawful and dangerous act manslaughter should no longer be understood in the sense explained by the House of Lords in *DPP v Newbury*¹²² but should now be understood

¹¹⁹ At para 4.

¹²⁰ At para 44 of CACC 92/2002, 12 June 2003.

¹²¹ [1992] 1 AC 34.

¹²² [1977] AC 500.

instead in the sense explained by the majority in the High Court of Australia in *Wilson v R*¹²³. As explained by Bokhary PJ, “*The Newbury approach requires that the unlawful act was one which all sober and reasonable people will inevitably realise must subject the victim to at least the risk of some harm, albeit not serious harm. This is to be contrasted with the Wilson approach which requires that the accused realised that the unlawful act exposed the victim to an appreciable risk of serious injury.*”¹²⁴ If the *Wilson* approach is to be adopted, it would mean that the jury will be asked to draw an extremely fine line as to whether a secondary party to a criminal joint enterprise which resulted in the death of the victim realised “*an appreciable risk of serious injury*” as opposed to “*an appreciable risk of really serious injury*” in order to decide whether the accused should be convicted of unlawful and dangerous act manslaughter under the *Wilson* approach or be convicted of murder under the *Chan Wing Siu* doctrine.

The Court of Final Appeal decision in Cheung Chi Keung

Sze Kwan Lung was cited and followed by the Court of Final Appeal in *Cheung Chi Keung v HKSAR*¹²⁵, again without any critical examination. This is a tragic case where a 13-year-old boy was kidnapped by the Appellant and his co-adventurer, Wu and died from injuries received upon being hit first with a hammer and then a stone by Wu while the boy was struggling inside the van driven by the Appellant during the abduction. On the Appellant’s appeal against his joint enterprise murder conviction, the Court of Appeal accepted, upon concession by the prosecution, that there were misdirections by the trial judge but affirmed the conviction by applying the proviso. The Court of Final Appeal dismissed the appeal.

¹²³ (1992) 174 CLR 313.

¹²⁴ At para 31.

¹²⁵ (2009) 12 HKCFAR 502 (12 March 2009).

It is worthy of note that the primary reason given by the Court of Appeal for affirming the application of the proviso was based on the pre-*Chan Wing Siu* doctrine of joint enterprise. Bokhary PJ gave the judgment for the Court and said:

“23. *What are the material facts as they emerge from the appellant’s own evidence? He handed Wu a stone after Wu had told him that the hammer had broken and asked him for a bar or wooden pole. And that was after he himself had punched the victim, hit his head with a hammer and changed places with Wu after Wu had asked him to hit the victim’s head again. After he handed Wu the stone, he continued to drive the van in which the victim was being abducted. He continued to drive the van even when he heard the victim’s shouts, banging noises and the victim saying to Wu, “I recognise you, uncle”*

...

25. *Such were the material facts which emerged from the appellant’s own evidence that it is difficult to imagine that the attack on the victim, who had recognised Wu, could possibly have been carried out otherwise than with intent to kill the victim so as to silence him forever. But even leaving that aside, it is fanciful to imagine that an attack such as this one could possibly have been carried out with anything less than at least intent to cause the victim really serious injury.” (emphasis added)*

It was only in the subsequent paragraph that Bokhary PJ adopted the wider doctrine of joint enterprise under *Sze Kwan Lung* and opined that:

“26. *In any case, the appellant and Wu were acting pursuant to a joint enterprise to kidnap the victim and obviously to use considerable, repeated and escalating violence to stop him, a frightened and desperate boy of 13, from struggling and shouting while he was being abducted by them, a pair of grown men. At the very least, the appellant must have foreseen, as a possible incident of that joint*

enterprise, a lethal attack by Wu on the victim after he, having himself attacked the victim, changed places with Wu and handed Wu a stone when Wu announced that the hammer had broken and asked him for a bar or wooden pole. Such foresight would suffice to make him guilty of murder under the doctrine of joint enterprise.”

Hence, the *Cheung Chi Keung* case serves as an example that there might not be a real need to lower the mental threshold for holding the secondary party liable for joint enterprise murder to one of foresight in place of the time-honoured requirement of intention.

Conclusion: The Court of Final Appeal Should now Depart from *Chan Wing Siu* and *Sze Kwan Lung*

The above survey of the development of law in Hong Kong reinforces the validity of Lord Hughes and Lord Toulson’s views in *Jogee* that the Privy Council in *Chan Wing Siu* erroneously introduced a new principle of law which extended liability for murder to a secondary party on the basis of a lesser degree of culpability “*based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments*”, and there were simply no distinct historical and social circumstances prevailing in Hong Kong that would have justified the introduction of such a new principle.

There is no objective evidence that the law prior to *Chan Wing Siu* failed to provide the public with adequate protection. The Court of Appeal judges in *Chan Wing Siu* indeed did not intend to widen the scope of the secondary party’s liability for joint enterprise murder nor did they see any inadequacies in the then existing law of joint enterprise for addressing triad activities or gang violence. The policy considerations canvassed before the Privy Council related to the choice between “*foresight of probability*” versus “*foresight of possibility*”, but not because of any jurisprudential or practical criminal justice

justifications which should favour substituting “*foresight of possibility*” for “*intention*” as the requisite *mens rea* for the secondary party’s liability for joint enterprise murder. The real issue that confronted the Court of Final Appeal in *Sze Kwan Lung* on the doctrine of joint enterprise was whether a secondary party could be held liable for joint enterprise murder if the principal offender was convicted of the lesser offence of manslaughter, and there was no conscious decision on or critical examination of the issue as to whether a secondary party’s liability for joint enterprise murder should be based on participation with the mere foresight of possible consequence, without the requisite intent.

All the appellate Court decisions in Hong Kong before *Chan Wing Siu* spoke with one voice on joint enterprise murder, namely, that there must be proof of common intent or common design, that the requisite *mens rea* for the secondary party was the same as that of the principal offender who committed the murderous acts, and that there must be proof of an intention to kill or cause grievous bodily harm while mere foresight or knowledge was insufficient. There was no indication that the jury had any substantial difficulty in understanding or applying the orthodox directions given by the trial judge in determining whether the requisite intention existed in respect of each participant to the joint enterprise, nor that the law prior to *Chan Wing-Siu* failed to provide the public with adequate protection. In cases where the jury were not satisfied beyond reasonable doubt that a particular participant had the requisite murderous intent, they could convict him of joint enterprise unlawful and dangerous act manslaughter (which carries a potential sentence of life imprisonment), as manslaughter is a basic intent offence. There was simply no consideration in *Chan Wing Siu* or *Sze Kwan Lung* of the fundamental policy question as to whether and why it was necessary and appropriate to reclassify such conduct as murder rather than manslaughter.

The suggested foundation for the extended joint enterprise doctrine appears to be that the secondary party’s criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight. But this suggestion does not explain how it is

consistent with justice and principle that a secondary party is liable for murder for participating merely with foresight of the possibility without the requisite intent, while the principal offender is liable for murder only if he has the requisite murderous intent. In particular, when A was acting alone, he would be guilty of manslaughter but not murder for continuing with an unlawful and dangerous act without any murderous intent even if he had the necessary foresight that such an act might kill or cause grievous bodily harm to another person who eventually died. So as a matter of principle, why should A be guilty only of manslaughter if he did a lethal act himself without the requisite murderous intent, but be guilty of the most heinous crime of murder if the same lethal act was done by his agent, B? Why should A's culpability be elevated to one of murder simply because B joined him and executed the same lethal act? Should A be guilty of murder if B joined him but the same lethal act was still committed by A without any murderous intent but with the necessary foresight?

In this connection, one must not forget that joint enterprise is an expression used to denote the conduct of two or more persons who take part together in a course of criminal conduct. Indeed, one might note that in *Hancock* the two defendants were acting together in pushing a concrete block from a bridge onto the highway and killed the driver, though they said they merely intended to block the road and to frighten the non-striking miner. The House of Lords affirmed the Court of Appeal's decision to substitute a verdict of manslaughter for that of murder and made it clear that the requisite *mens rea* for murder was intention instead of foresight, even though this was indeed a joint enterprise case.

As any doctrine established on joint enterprise may apply beyond triad activities or gang violence, it is unjustifiable to widen the net of criminal liability for its participants by lowering the requisite mental threshold in order to address any perceived social problems arising from say, the easy escalation of violence in a gang fight; otherwise it would produce

corresponding injustices in other situations. As explained by Gageler J in his dissenting judgment in *Miller*¹²⁶:

“124. Courts must of course make normative judgments in the course of adapting the common law to meet contemporary social conditions. But courts must be extremely cautious about refashioning common law principles to expand criminal liability. Escalating gang violence is hardly a new social phenomenon. Whether some, and if so what, modification of common law principles of secondary criminal liability is needed to address that particular social problem in a contemporary setting is appropriately a question for legislative consideration. Significantly, no law reform body considering the problem has seen fit to recommend that the appropriate response is to impose secondary criminal liability by reference only to foresight.

125. Whether the social science literature to which the prosecution points provides an empirical basis for drawing any general conclusion about gang behaviour has been questioned academically and was not scrutinised in argument. The literature does nothing to dispel the concern expressed by Kirby J in Clayton that the extension of secondary criminal liability to individuals unable to extricate themselves from a group as violence gets out of hand operates to catch potentially weak and vulnerable secondary offenders, fixing them with "very serious criminal liability because they were in the wrong place at the wrong time in the wrong company"”

It is submitted that there is a great difference between the culpability of a participant in joint enterprise who intends to kill or cause grievous bodily harm whether by himself or by his co-adventurer(s) and that of a participant who merely foresees a risk that his co-adventurer(s) may kill or cause grievous bodily harm in the execution of the joint enterprise. The act of the former is much more worthy of blame than that of the latter. To treat

¹²⁶ [2016] HCA 30 at para 124-125.

knowledge of a possibility as having the same consequences as actual intention would extend the law too far and obliterate almost totally the distinction between murder (which is the most heinous crime which attracts a mandatory life imprisonment sentence) and manslaughter.

It may be noted that the Supreme Court and Privy Council in *Jogee* seems to treat joint enterprise liability as one form of accessorial liability, while our Court of Final Appeal in *Sze Kwan Lung* has taken pain to highlight the distinction between the two. As explained by Gageler J in the Australia High Court decision in *Miller*¹²⁷, whether accessorial liability and joint criminal enterprise liability are distinct concepts or just a subcategory of accessorial liability has been debated academically and conflicting answers have been suggested judicially, but in any event, the two have overlapped considerably in practice so that there has seldom been seen to be any practical need to distinguish between them. The author takes the view that joint enterprise based on common design or common intent can be distinguished from the normal type of accessorial liability, as explained in *Sze Kwan Lung*. But it does not follow that the mental element for joint enterprise murder should be reduced to one of foresight instead of intention.

While it is unobjectionable to hold each participant criminally liable for all the acts done in pursuance of the joint enterprise, the focus should be on the common design and common intent of the joint enterprise. Why should an act committed by the principal offender which is not intended by the secondary party be regarded as within the scope of the agreed criminal enterprise simply because it is within the secondary party's contemplation and foreseen as a possible incident of its execution? In order to be liable, a secondary party must intend the commission of the offence by the primary party.

¹²⁷ [2016] HCA 30 at paras 85-87.

The doctrine of extended joint enterprise under *Chan Wing Siu* and *Sze Kwan Lung* may result in a striking anomaly of requiring a lower mental threshold for guilt in the case of a secondary party in a joint enterprise than in the case of the principal offender and give rise to an understandable sense of unfairness and injustice, as exemplified in the *Ng Pak Lun* case mentioned at the beginning. Indeed, the Privy Council decision in *Hui Chi-Ming v The Queen*¹²⁸ also serves to highlight the problem.

The Privy Council decision in Hui Chi-Ming

In *Hui Chi-Ming*, the principal offender A, carrying a length of water pipe and accompanied by the defendant and four other youths, went to “look for someone to hit”, and eventually hit an innocent man with the pipe, causing injuries from which he later died. No witness saw the defendant hit the deceased, or play any particular part in the assault. A was charged with murder with three of the group, but two pleaded guilty to manslaughter and the other was acquitted on the direction of the judge. The jury acquitted A of murder but convicted him of manslaughter, and he was sentenced to six years' imprisonment. The defendant was arrested and charged with manslaughter but he was indicted for murder with another youth whose plea of guilty to manslaughter was accepted. The defendant refused an offer by the prosecution to accept a plea of guilty to manslaughter and was tried for murder. The trial judge directed the jury as follows:

*“Members of the jury, if you are satisfied that the [defendant] was present and that he shared an intention with his companions that the victim should be assaulted, you might ask yourselves 'Did the [defendant] contemplate that in the carrying out of the common unlawful purpose, that is the assault of the victim, that one of his partners in the enterprise might , ' I did not say 'would,' ' might use that water pipe with the intention of causing at least really serious bodily injury?' If the answer is 'Yes,' then you would find the [defendant] guilty.”*¹²⁹

¹²⁸ [1992] 1 AC 34.

¹²⁹ At p 46F.

The defendant was convicted of murder by the jury. Following *Chan Wing Siu*, the defendant's appeal was dismissed. The Privy Council rejected the submission that the trial judge had a duty to direct the jury that prior contemplation by A of the possibility of death or grievous bodily harm being caused to the victim was required for the defendant to be convicted of murder. It held that "*the secondary party may be liable simply by reason of his participating in the joint enterprise with foresight that the principal may commit the relevant act as part of the joint enterprise*". As the focus is "*upon the contemplation of the secondary party alone*", "*their Lordships are unable to accept that in every case the relevant act must be shown to have been in the contemplation of both parties before the secondary party can be proved guilty.*"¹³⁰

Though the Privy Council dismissed the defendant's appeal because of the *Chan Wing Siu* doctrine, their Lordships observed that "*The Crown acted consistently by accepting pleas of guilty to manslaughter from all the secondary parties and were willing to accept such a plea from the defendant*"¹³¹, recognised that "*it would be permissible to ask whether the Crown should have persisted in seeking a verdict of guilty of murder when a finding of manslaughter would have produced equality among the accused*"¹³², and acknowledged that "*a serious anomaly occurred cannot be denied.*"¹³³

It is a cold comfort to note that the judgment of the Privy Council ended with the following passage:

¹³⁰ At p 52A-E.

¹³¹ At p 56E.

¹³² At p 57C.

¹³³ At p 57E.

“More specifically, as, their Lordships simply feel justified in recalling, giving judgment in the similar case of Reg. v. Luk Siu-keung [1984] H.K.L.R. 333 , 339, Li J.A. said:

‘It is always open to the Governor-in-Council to exercise his prerogative of mercy to commute the sentence to a suitable term as an act of humanity. As far as the law is concerned, there is nothing we can do.’”¹³⁴

Not so for our Court of Final Appeal. As the final court at the apex of Hong Kong's judicial hierarchy, the Court of Final Appeal may depart from previous Privy Council decisions on appeal from Hong Kong and its own previous decisions. While recognising that it will approach the exercise of that power with great circumspection to avoid undermining the certainty, predictability and consistency which adherence to precedent provides, our top Court has stressed that *“a rigid and inflexible adherence by this Court to the previous precedents of Privy Council decisions on appeal from Hong Kong and its own decisions may unduly inhibit the proper development of the law and may cause injustice in individual cases. The great strength of the common law lies in its capacity to develop to meet the changing needs and circumstances of the society in which it functions.”*¹³⁵

In light of the discussions above and with the benefit of a much fuller analysis than on previous occasions when the doctrine of joint enterprise has been considered, it is appropriate for our top Court to now decide to depart from *Chan Wing Siu* and *Sze Kwan Lung* and require, in the case of joint enterprise liability, proof of intention instead of foresight in accordance with previously established principles. As elegantly put by Gageler J in his very powerful dissenting judgment in *Miller*¹³⁶:

¹³⁴ At p 57G-H

¹³⁵ *A Solicitor (24/07) v The Law Society of Hong Kong* (2008) 11 HKCFAR 117, at para 19; see also paras 18, 20 and 52.

¹³⁶ [2016] HCA 30 at para 128.

“The problem the doctrine has created is one of over-criminalisation. To excise it would do more to strengthen the common law than to weaken it. Where personal liberty is at stake, no less than where constitutional issues are in play, I have no doubt that it is better that this Court be “ultimately right” than that it be “persistently wrong””

Lastly, in a joint enterprise resulting in death, the author finds it useful to adopt the following gradations of criminal responsibility of participants as Gibbs ACJ spelt out in *Markby v The Queen*¹³⁷:

“When two persons embark on a common unlawful design, the liability of one for acts done by the other depends on whether what was done was within the scope of the common design. Thus if two men go out to rob another, with the common design of using whatever force is necessary to achieve their object, even if that involves the killing of, or the infliction of grievous bodily harm on, the victim, both will be guilty of murder if the victim is killed ... If, however, two men attack another without any intention to cause death or grievous bodily harm, and during the course of the attack one man forms an intention to kill the victim, and strikes the fatal blow with that intention, he may be convicted of murder while the other participant in the plan may be convicted of manslaughter ... The reason why the principal assailant is guilty of murder and the other participant only of manslaughter in such a case is that the former had an actual intention to kill whereas the latter never intended that death or grievous bodily harm be caused to the victim, and if there had not been a departure from the common purpose the death of the victim would have rendered the two participants guilty of manslaughter only. In some cases the inactive participant in the common design may escape liability either for murder or manslaughter. If the principal assailant has gone completely beyond the scope of the common design, and for example 'has used a weapon and acted in a way

¹³⁷ (1978) 140 CLR 108 at 112.

which no party to that common design could suspect', the inactive participant is not guilty of either murder or manslaughter".