Privy Council Appeal No. 4 of 1991

Hui Chi-ming *Appellant*

v.

The Queen *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST 1991

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY

*[Delivered by **Lord Lowry**]*

This is an appeal by special leave from a judgment of the Court of Appeal of Hong Kong exercising its criminal jurisdiction (Cons V.-P., Kempster and Clough JJ.A.) given on 30th December 1988 and refusing the appellant's application for leave to appeal against his conviction for murder in a trial before the High Court of Hong Kong (de Basto J. and a jury) on 27th April 1988.

The grounds of this appeal (which, as the Criminal Procedure Ordinance of Hong Kong, C. 221, makes clear, falls to be considered on the same principles as those which apply to appeals under the United Kingdom Criminal Appeal Act 1968) are -

1. The exclusion from evidence of the fact that the alleged principal offender had at an earlier trial been acquitted of murder and convicted of manslaughter;
2. Alleged misdirection of the jury by the trial judge as to the participation of an accomplice in a common unlawful enterprise;
3. The alleged abuse of process constituted by the prosecution of the appellant for murder after the alleged principal offender had merely been convicted of manslaughter.

Their Lordships will examine these grounds with more particularity after adverting to the facts, which may be summarised as follows.

Miss Lo Kwai-ying ("Mui Mui") had a boyfriend Ah Po, of whom her parents and her brother strongly disapproved. He asked his friend, Ah Hung, to speak to his sister. He attempted to frighten her by describing Ah Hung as the "Southern Boxing Champion": this was quite untrue. Ah Hung tried to intimidate her into giving up Ah Po. She was upset. After he left, she telephoned Ah Po at a park at Lei Yue Mun pier, told him what had happened and gave him a description of Ah Hung, in particular, that he was tall, wearing glasses and had a red stain on his chest. Ah Po told his friends, including the appellant, that Mui Mui had been bullied. He wanted his friends to go to the Yau Tong Estate to look for Ah Hung and "to look for some-one to hit".

Ah Po left with two other youths in a taxi: he was carrying a length of waterpipe. The appellant went with two others in a following taxi. At the estate, they stood together in the vicinity of a bus stop, waiting for a man answering to the description of Ah Hung. A number of people were approached by some of the youths and asked if they were the "Southern Boxing Champion". A bus arrived and a number of passengers climbed on board. As the bus moved off, a tall man wearing glasses ran after it to catch it. He was seized by four, five or six of the group: the evidence conflicted as to the number. He was struck by the metal pipe, wielded, as the Crown alleged, by Ah Po. The man, who was not Ah Hung and was a perfectly innocent victim, received numerous bruises, three wounds to the head and fractures in two places to his skull. He later died from his injuries. Some time after this Ah Po called out "Let's go" and the group of six left. When they got back to the pier, a number of them remonstrated with Ah Po who agreed that he had gone over the top. The group then went by ferry to Ah Po's house, where they spent the night. No witness saw the appellant speak to anyone or strike a blow, or play any particular part in the assault on the victim. Ah Po was arrested on 30th June 1986.

On 6th January 1987, Ah Po and three of the group who had accompanied him, were indicted for murder before the High Court of Hong Kong. All four pleaded not guilty. Ah Po was tried by a jury before Hooper J. The second accused changed his plea to guilty of manslaughter on the fourteenth day of the trial and was remanded in custody for a new trial, at which he renewed his plea of guilty to manslaughter and was sentenced to three years' imprisonment. The third accused pleaded guilty to manslaughter at the outset and his plea was accepted by the Crown: he was sentenced to five years' imprisonment; this sentence was

reduced to four years on appeal. The fourth defendant was acquitted and discharged on the fourth day of the trial by direction of the judge, the Crown offering no further evidence against him. The trial lasted until 6th February 1987.

The defence of Ah Po at his trial was that he had nothing to do with the incident. He did not suggest provocation or diminished responsibility. By unanimous decision of the jury, Ah Po was acquitted of murder and convicted of manslaughter. He was sentenced to six years' imprisonment.

The appellant, who had no previous convictions, was arrested on 19th October 1987. He was initially charged with manslaughter by the police, on advice from the Legal Department of the Attorney General's Chambers. But on the advice of another Crown Counsel, Mr. Gerber, who received the brief to prosecute, the appellant was indicted for murder. The same procedure was followed with another friend of Ah Po, Sze Hoi-tai, who was arrested on 3rd November 1987, charged with manslaughter but subsequently jointly indicted with the appellant for murder.

On the first day of the trial, Sze pleaded not guilty to murder but guilty to manslaughter, and the Crown accepted the plea: he was subsequently sentenced to three years' imprisonment. Crown Counsel offered to accept a plea of guilty to manslaughter from the appellant, but the offer was refused.

The appellant sought leave to appeal against his conviction on two principal grounds corresponding to grounds 1 and 2 already referred to. He also attacked the judge's conduct of the trial and his summing up on a number of grounds which are no longer relied on and which their Lordships therefore need not discuss. In refusing leave to appeal the Court of Appeal, quite correctly, as their Lordships will explain, rejected the appellant's first submission on the ground that the conclusion reached by the jury at the trial of Ah Po was irrelevant and therefore inadmissible at the separate trial of the appellant. The court was also satisfied with the judge's directions on the question of joint enterprise. Their Lordships now turn to the grounds of appeal advanced before the Board.

1. Evidence of the principal offender's acquittal.

The prosecution's case at the appellant's trial was, as it had been at the trial of Ah Po, that Ah Po, encouraged and assisted by the other members of the group of six, had attacked the man who was running to catch the bus and beaten him severely with the metal pipe, thereby inflicting grievous injuries from which the victim died. Thus, although Ah Po had only been convicted of manslaughter, the prosecution at the

appellant's trial presented their case against the appellant on the basis that Ah Po had been guilty of murder. The appellant's counsel, in order that the jury might know of the result of the earlier trial, wished to adduce evidence of Ah Po's acquittal of murder and conviction only of manslaughter. The prosecution, however, objected to this course and the trial judge upheld the objection. Their Lordships have no doubt that he was right to do so, because the verdict reached by a different jury (whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury.

Authority is clearly against the appellant on this point. Their Lordships first refer to *Hollington v. Hewthorn* [1943] K.B. 587 where, in an action for damages arising out of a road traffic accident, evidence of the defendant's conviction for careless driving was held to be inadmissible. Even though one proceeding was criminal and the other civil, the observations of Goddard L.J. at page 593-4 are greatly in point. In *R. v. Luk Siu-Keung* [1984] HKLR 333, which the Crown relied on at the trial, one Ho Kin-on stabbed a victim, was separately tried on charges of murder and robbery and was convicted of manslaughter and robbery. The appellant was later charged with murder and robbery as a participant in the unlawful enterprise and was convicted on both charges. On a Governor's reference the appellant argued that the trial judge should have withdrawn the issue of murder from the jury (1) in view of the favourable terms in which he had directed the jury and (2) because the principal offender had only been convicted of manslaughter. The Court of Appeal rejected these arguments on the ground (1) that the judge would have been wrong to withdraw murder from the jury, since there was evidence to support that charge against the appellant and (2) as a general proposition, which applied in the instant case, that a person may properly be convicted of aiding and abetting an offence even though the principal offender has been acquitted. In the latter connection their Lordships refer also to *Reg. v. Burton* (1885) 13 Cox 71, C.C.R.

Starting from the general rule that all evidence which is sufficiently relevant to an issue is admissible and that evidence which is irrelevant or insufficiently relevant should be excluded (*Myers v. D.P.P.* [1965] A.C. 1001), it is the irrelevance of the outcome of an earlier trial, as illustrated by cases such as *R. v. Turner* (1832) 1 Mood. C.C. 347, that makes evidence of that outcome inadmissible. The exceptions to the rule, some of which the appellant relied on, do nothing to undermine the trial judge's ruling in the present case. In *R. v. Hay* (1983) 77 Cr.App.R. 70 the accused had signed a statement confessing to arson and burglary. The offences were unconnected and he was tried first

on the arson charge, of which he was acquitted. When tried on the burglary charge the accused unsuccessfully tried to have the entire statement, containing also a confession to the burglary, and the result of the arson trial put before the jury. Having been convicted of burglary, he succeeded in his appeal since the Court of Appeal, applying the principle enunciated in *Sambasivam v. Public Prosecutor Federation of Malaysia* [1950] A.C. 458, held that the jury should have been told that he had been acquitted of arson and that his acquittal was conclusive evidence that he was not guilty of arson and that his confession to that offence was untrue, because evidence to that effect was relevant to the question whether the confession to the burglary was also untrue. A significant link in the chain of reasoning was that it was the appellant himself who had been acquitted in the first trial and, as Lord MacDermott had said in *Sambasivam*:-

> "The effect of a verdict of acquittal ... is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication."

In *R. v. Cooke* (1987) 84 Cr.App.R. 286 it was held by the Court of Appeal that counsel should have been allowed to bring out in cross-examination the circumstances and the result of an earlier trial. A, B and C were alleged to have made admissions to the same detective constable. B and C were tried first on a charge of robbery and acquitted. There was a clear inference from the acquittal that the jury had disbelieved the detective's evidence and the Court of Appeal, in allowing A's appeal from his conviction at a later trial (based on his alleged admissions to the same detective), held that his counsel ought to have been allowed to bring out the circumstances in which B and C had been acquitted because they were so relevant to the credibility of the detective constable. As Parker L.J. put it at p.293:-

> "In the present case although the acquittal and its circumstances which were sought to be relied on related to different accused and a different offence, the circumstances were that the credibility of Detective Constable Spreckley was a vital matter and the offences and interviews were so closely connected that the defence ought in our judgment to have been allowed to bring the matter out."

A study of the cases, including those which were canvassed in *Cooke*, shows that some exceptional feature is needed before it will be considered relevant (and therefore admissible) to give evidence of what happened in earlier cases arising out of the same transaction. The logic of the appellant's submission

here may be tested by asking what ruling the trial judge ought to have given if the appellant or another member of the group had been tried first and found guilty of murder and subsequently, on the trial of Ah Po, the Crown had tendered evidence of the conviction of an accomplice for murder at the earlier trial.

2. Alleged misdirection with regard to joint enterprise.

At the trial of the appellant the judge, when charging the jury, gave directions with regard to the doctrine of acting unlawfully in concert which their Lordships think it convenient to set out in full, adding numbers to the paragraphs for ease of reference:-

"1. The Crown does not suggest that it was the accused who held the water pipe at any stage nor does the Crown suggest that it was the accused who inflicted the fatal blow or blows. But the Crown does not have to prove to you that the accused even laid a finger on the deceased. It is not necessary for the Crown to prove which particular individual caused the fatal blow or blows which resulted in the death of the deceased. The Crown says that, in the circumstances of this case, to constitute murder, it is not necessary for the Crown to prove who precisely struck the fatal blow or blows.

2. The Crown in this case relies on the well known doctrine of acting in concert, and the law on that is this: Where 2 or more persons embark upon a joint unlawful enterprise and going to assault someone - even punching someone on the nose is an unlawful enterprise - each is liable for the consequences of such acts of the others as are done in the pursuance of that joint enterprise and also for the unusual consequences of such acts if these arise from the execution of the agreed joint enterprise.

3. But if one of the adventurers goes beyond what has been expressly, or tacitly, agreed as part of the common enterprise, his co-adventurers are not liable for the consequences of that unauthorized act. It is for you, as a jury, to decide whether what was done was part of the joint enterprise, or went beyond it and was an act unauthorized by the joint enterprise.

4. Let me give you an example of that - that last portion. Let's say 3 men decide to go and burgle a house and, whilst 2 of them are going round looking for things to steal, the third man comes across a woman and he there and then rapes her. Now all 3 men would be guilty of burglary but the other 2 would not be guilty of rape because that was never in their

contemplation. The intention was to steal and it was not within their contemplation that anyone should be raped.

5. It is important that you thoroughly understand the doctrine or the concept of common intent, so I will rephrase what I have just said to you a moment ago.

6. It is not only the person who inflicts the fatal blow or blows who is criminally responsible. The law says that if two or more persons reach an understanding or arrangement that they will commit a crime, and, as I have said, assaulting someone is a crime, and whilst that arrangement is still in being, they are both present and one or other of them does, or they do between them, in accordance with their arrangement all the things necessary to constitute the crime, then they are all equally guilty of it provided the crime does not go beyond their understanding or arrangement.

7. It is not necessary that the understanding or arrangement be express. It can be tacit. It can be arrived at by means of actions or words. People who go and do something wrong do not go to a solicitor's office and have a contract drawn up and signed, sealed and delivered. They do not want to advertise what they are going to do.

8. The Crown may establish the count of murder against the accused by proving the accused was present and that the deceased was killed in accordance with an understanding or arrangement to which the accused was a party and that that understanding or arrangement included the intent charged, that is either to kill or to cause grievous bodily harm.

9. The Crown may establish the offence charged against the accused by proving that the accused was present when the victim was attacked in accordance with an understanding or arrangement to which the accused was a party, and that understanding or arrangement included the intent either to kill or to cause grievous bodily harm.

10. The accused would also be guilty if he lent himself to a criminal enterprise knowing that a potentially lethal weapon was being carried by one of his companions, and in the event it is in fact used by one of his partners with an intent sufficient for murder. Then he too will be guilty of that offence if you are sure beyond reasonable doubt that the accused contemplated

that in the carrying out of the common unlawful purpose, one of his partners in the enterprise might use a lethal weapon with the intention of at least causing really serious bodily harm. It is what the accused in fact contemplated that matters.

11. You may remember, members of the jury, that the accused was asked by Mr. Gerber this question, and I am reading from - I have had it transcribed. The question is 'You realized very well that there was a very real danger that somebody was going to get a terrible beating, didn't you?' And the accused's answer was 'That was just what I thought'. And you may interpret that to mean, it is a matter for you, that the accused foresaw the very real possibility that somebody was going to receive a terrible beating.

12. You may also remember the evidence of the accused that Ah Po whom he had known for a number of years, several years, and I think he had been at school together with him although in different classes. He told you that Ah Po was comparatively hot tempered.

13. Members of the jury, if you are satisfied that the accused was present and that he shared an intention with his companions that the victim should be assaulted, you might ask yourselves 'Did the accused 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 waterpipe with the intention of causing at least really serious bodily injury?' If the answer is yes, then you would find the accused guilty.

14. If on the other hand, you are satisfied that the accused was present and that he shared an intention with his companions that the victim should be assaulted and caused some injury, but some injury less than some really serious bodily injury, then he would not be guilty of murder but he would be guilty of manslaughter.

15. If you conclude that it was a reasonable possibility that the accused though present did not share any intention with the others that the victim should in any way be assaulted, then he would be entitled to an acquittal."

The appellant's case at the trial was put by his counsel, Mr. Percy, in the following terms:-

> "He went along not to join with the others in any common purpose that they devised amongst themselves but to prevent his friends or friend getting into trouble. He was there in the opposite capacity, not to assist them attack someone, but to dissuade them from getting into trouble."

In the alternative he argued that the common intention of the group of six was not the intention to kill or to cause grievous bodily harm and that if, as the Crown contended, Ah Po had any such intention the whole group did not share it. Mr. Percy put it thus:-

> "I would suggest that if there was indeed a common purpose shared by all of them, then you would expect all of them to equip themselves even with a waterpipe, either to use in defence or attack but that wasn't done. No other person except for Ah Po armed himself with any weapon, that is the evidence. And the simple reason for that is that Ah Po was the only one who wanted revenge. No one had any interest in protecting Ah Po's girl friend from anything. What interest did the others have? Misguided loyalty, is that going to be suggested as the reason for assisting Ah Po? I would suggest, members of the jury, that this dissolves this so-called common purpose."

The directions in paragraph 15 above were clearly designed to cover the appellant's primary case, but the only inference which can be drawn is that the jury did not accept the reasonable possibility that either paragraph 14 or paragraph 15 accorded with the facts. On the contrary, the jury must have been satisfied that what happened accorded with the situation described in paragraphs 8 and 9 or else in paragraphs 10 and 13 of the directions. This of course also necessarily involves the jury's acceptance that Ah Po was guilty of murder.

The appellant's basic proposition in his written case was as follows:-

> "On the trial of a secondary party for murder on the basis of a 'common intent', the Crown must prove:-
>
> (a) that the act was in the contemplation of both the principal and secondary party as an act which might be done in the course of carrying out the primary criminal intention; and
>
> (b) that the principal party intended to kill or to do serious bodily injury at the time he killed."

No question arises on this appeal in relation to proposition (b), because the judge (in paragraph 10) gave the appropriate direction to the jury. It is with the appellant's basic proposition (a) that their Lordships are here concerned. The case then noted that the trial

judge left the issue of intent to the jury on two bases. Having explained that a party is liable for the consequences of such acts of the others as are done pursuant to a common criminal enterprise, and emphasising that a party is not liable for the consequences of an act which goes beyond that which has been expressly or tacitly agreed, he said:-

(1) "The Crown may establish the count of murder against the accused by proving the accused was present and that the deceased was killed in accordance with an understanding or arrangement to which the accused was a party, and that the understanding and arrangement included the intent charged, that is, either to kill or to cause grievous bodily harm."

The judge's alternative direction on intent was recited in the appellant's case as follows:-

(2) "Then [the accused] too will be guilty of [murder], if you are sure beyond reasonable doubt that the accused contemplated that in the carrying out of the common unlawful purpose, one of his partners in the enterprise might use a lethal weapon with the intention of at least causing really serious harm. It is what the accused in fact contemplated that matters ... if you are satisfied that the accused was present and that he shared an intention with his companions that the victim should be assaulted, you might ask yourselves, 'Did the accused contemplate that in the carrying out of the common unlawful purpose, that is the assault of the victim, that one of his partners might ... I did not say "would" ... might use the waterpipe with the intention of causing at least really serious bodily injury?' If the answer is yes, then you would find the accused guilty."

Their Lordships would here observe that direction (1) noted above (which corresponds to paragraphs 8 and 9 of the directions) contemplates the straightforward case where a crime is agreed upon and carried out according to plan: the principal and the accomplices will all be guilty. Direction (2) (which corresponds to paragraphs 10 and 13) contemplates that one partner (the principal) may in carrying out the common unlawful purpose commit an act which, although not mutually arranged in advance, is within the contemplation of an accessory, who will in this case also be guilty of murder in the circumstances described. The typical example is of a group of men who set out on a bank robbery as the planned crime. One, who to the knowledge of his companions has a loaded revolver, shoots a bank clerk or a watchman dead and generally all will be guilty of murder. What the judge said adapts that concept to the possible circumstances of the present case.

The printed case, when adverting to contemplation of the consequences, cites the observation of Sir Robin Cooke in *Chan Wing-siu v. R.* ("*Chan*") [1985] A.C. 168, 175G:-

> "It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

The appellant's basic proposition was then repeated:-

> "The correct principle is expressed in *Johns v. R.* (1980) 143 CLR 108 where the High Court of Australia approved the statement by Street C.J. in the Supreme Court of New South Wales:-
>
> > '... an accessory before the facts bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention - an act contemplated as a possible incident of the originally planned particular venture.'
>
> The crux of that dictum is that the act must be within the contemplation of both parties. For the Crown to establish murder against a secondary party on the basis that he contemplated, or authorised, an attack with murderous intent, it is necessary to prove that the primary party himself so contemplated." (emphasis supplied.)

The written submissions on this part of the appeal concluded with this proposition:-

> "If reliance is to be placed simply on the foresight of the secondary party, then the learned judge ought in any event to direct the jury to consider whether the risk as recognised by the accused was sufficient to make him a party to the crime committed by the principal."

As to this last submission, which was based on a passage at p.179 of the judgment in *Chan*, their Lordships consider that on the facts of the present case the judge put the case to the jury both adequately and correctly in paragraphs 10 to 13 of his directions.

Mr. Thomas Q.C., who appeared for the appellant before the Board, made two further points. The first, which stemmed from the appellant's basic proposition, was that the judge should have told the jury that, for the appellant to be guilty of murder, it was necessary that Ah Po contemplated the possibility of at least grievous bodily harm being caused when the unlawful

agreement to assault Ah Hung was made; otherwise his severe attack on the victim, though intended when it was made, would have gone beyond what was authorised by the agreement. The second point was that Sir Robin Cooke's equation in *Chan* of contemplation with authorisation meant that an accomplice who merely foresees the further and additional act of the principal is not thereby rendered liable for that act. Neither point poses any problem on the assumed basis that the jury found the unlawful joint enterprise to be one of the first type, which was covered by paragraphs 8 and 9 of the judge's directions ("type 1"). Both points were directed to the question of guilty intent on the part of the accomplice in relation to an unlawful joint enterprise of the second type (as their Lordships for the purposes of argument will assume the crime to have been), which was dealt with in paragraphs 10 and 13 of the directions ("type 2"). Paragraph 10 clearly recalls Sir Robin Cooke's reference in *Chan* to the accomplice's "contemplation" of "a crime foreseen as a possible incident of the common unlawful enterprise", which tends to indicate, not surprisingly, that the judge's directions were based on *Chan*.

The principle enunciated in *Chan* has since been clearly stated by Lord Lane C.J. in the Court of Appeal (Criminal Division) in *R. v. Ward* (1987) 85 C.A.R. 71 and *R. v. Slack* [1989] Q.B. 775, in both of which *Chan* was expressly approved and applied, and most recently in *R. v. Hyde* [1991] 1 Q.B. 134, which also applied *Chan*. Having referred to *R. v. Slack* [1989] Q.B. 775 Lord Lane C.J. said (at p.138):-

> "There are, broadly speaking, two main types of joint enterprise cases where death results to the victim. The first is where the primary object of the participants is to do some kind of physical injury to the victim. The second is where the primary object is not to cause physical injury to any victim but, for example, to commit burglary. The victim is assaulted and killed as a possibly unwelcome incident of the burglary. The latter type of case may pose more complicated questions than the former, but the principle in each is the same. A must be proved to have intended to kill or to do serious bodily harm at the time he killed. As was pointed out in *Reg. v. Slack* [1989] Q.B. 775, 781, B, to be guilty, must be proved to have lent himself to a criminal enterprise involving the infliction of serious harm or death, or to have had an express or tacit understanding with A that such harm or death should, if necessary, be inflicted.
>
> We were there endeavouring, respectfully, to follow the principles enunciated by Sir Robin Cooke in *Chan Wing-Siu v. The Queen* [1985] A.C. 168, 175:
>
> 'The case must depend rather on the wider principle whereby a secondary party is criminally

> liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.'

It has been pointed out by Professor J.C. Smith, in his commentary on *Reg. v. Wakely* [1990] Crim.L.R. 119, 120-121, that in the judgments in *Reg. v. Slack* [1989] Q.B. 775 and also in *Reg. v. Wakely* [1990] Crim.L.R. 119 itself, to both of which I was a party, insufficient attention was paid by the court to the distinction between on the one hand tacit agreement by B that A should use violence, and on the other hand a realisation by B that A, the principal party, may use violence despite B's refusal to authorise or agree to its use. Indeed in *Reg. v. Wakely* we went so far as to say:

> 'The suggestion that a mere foresight of the real or definite possibility of violence being used is sufficient to constitute the mental element of murder is prima facie, academically speaking at least, not sufficient.'

On reconsideration, that passage is not in accordance with the principles set out by Sir Robin Cooke which we were endeavouring to follow and was wrong, or at least misleading. If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.

That being the case it seems to us that the judge was correct when he directed the jury in the terms of those passages of the summing up which we have already quoted. It may be that a simple direction on the basis of *Reg. v. Anderson* [1966] 2 Q.B. 110 would, in the circumstances of this case, have been enough, but the direction given was sufficiently clear and the outcome scarcely surprising. That ground of appeal, which was in the forefront of the arguments of each of the appellants, therefore fails."

That passage from the judgment in *R. v. Hyde* correctly states, in their Lordships' opinion, the law applicable to a joint enterprise of the kind described, which results in the commission of murder by the principal as an incident of the joint enterprise.

Against that background their Lordships consider the two arguments set out above. The first can be readily disposed of on the facts by pointing out that Ah Po's arming himself with the waterpipe before setting out showed unequivocally what he did contemplate at that stage. The connection between the argument and the facts to which it was directed was tenuous, to say the least.

Counsel's submission, however, was based on the passage already cited from *Johns v. R.* (1980) 143 C.L.R. 108 at pp. 130-131. The issue in that case was whether an accessory before the fact is, like a principal in the second degree, responsible for an act constituting the offence charged if such act was contemplated as a possible incident of the common purpose, or whether it has to be established as a likely or probable consequence of the way in which the crime was to be committed. The court unanimously accepted the former alternative. But, in the course of their judgment, Mason, Murphy and Wilson JJ. stated the law in the manner already quoted, requiring the act to have been within the contemplation of both the principal and the accessory as an act which might be done in the course of carrying out the primary criminal intention. It is on the basis of that passage that the appellant contends that the secondary party cannot be liable unless the relevant act was within the contemplation of both the principal and the secondary party.

Johns v. R. is a leading case on the law relating to accessories. It was specifically relied on by Sir Robin Cooke in *Chan*, in which the same central issue fell to be considered. It is, however, plain that, in the passage upon which the appellant relies, attention was being concentrated on those cases in which the question is whether the act of the principal falls within the common purpose of the parties. This appears from the immediately succeeding sentence in the judgment of Mason, Murphy and Wilson JJ. (not quoted in the written case for the appellant), which reads as follows:-

> "Such an act is one which falls within the parties' own purpose and design precisely because it is within their contemplation and is foreseen as a possible incident of the execution of their planned enterprise."

In such a case the contemplation of both parties will be relevant. But, as appears from Sir Robin Cooke's judgment in *Chan* (and as was recognised by Lord Lane C.J. in *Hyde*, departing in this respect from some of the observations contained in the earlier judgments in *Slack*

and *Wakeley*), 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. We therefore find Sir Robin Cooke focussing upon the contemplation of the secondary party alone, as in the following passage (at p.178):-

> "In some cases in this field it is enough to direct the jury by adapting to the circumstances the simple formula common in a number of jurisdictions. For instance, did the particular accused contemplate that in carrying out a common unlawful purpose one of his partners in the enterprise might use a knife or a loaded gun with the intention of causing really serious bodily harm?"

In practice, of course, in most cases the contemplation of both the primary and the secondary party is likely to be the same; if there is an alleged difference, it will arise where the secondary party asserts in his defence that he did not have in contemplation the act which was in the contemplation of the principal. But their Lordships are unable to accept that in every case the relevant act must be shown to have been in the contemplation of <u>both</u> parties before the secondary party can be proved guilty.

Let it be supposed that two men embark on a robbery. One (the principal) to the knowledge of the other (the accessory) is carrying a gun. The accessory contemplates that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even by discharging it, with a view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim dead. His act is clearly an incident of the unlawful enterprise and the possibility of its occurrence as such was contemplated by the accomplice. According to what was said in *Chan* the accomplice, as well as the principal, would be guilty of murder. Their Lordships have to say that, having regard to what is said in *Chan* and the cases which applied it, they do not consider the prior contemplation of the principal to be a necessary additional ingredient. In their opinion the judge had no duty to direct the jury to that effect in paragraphs 10 and 13 of the relevant passage in his summing up.

In none of the cases reviewed, including the case under appeal, was the prior contemplation of the principal a live issue. But it must be recognised that to hold the accomplice to be guilty in the example their Lordships have posed is consistent with *Chan* and *Hyde*.

Their Lordships appreciate that the hypothetical example they have given is largely theoretical. Rarely, if ever, will a case arise in which the accessory, but not the principal, contemplates the possibility of a further relevant offence and, if the facts appeared to support such a hypothesis, the defence would no doubt seize the opportunity to contend that the accomplice himself had not been proved to have contemplated something which was not in the mind of the principal. Alternatively, he might contend that the principal's further act had gone beyond the contemplated area of guilty conduct, with the result that the accessory to the planned offence was not criminally liable for the new offence. In truth, the point taken by the appellant was academic; but, for the reasons they have given, their Lordships reject it as unsound.

The appellant's second point relies on Sir Robin Cooke's use of the word "authorisation" as a synonym for contemplation in the passage already cited from his judgment. Their Lordships consider that Sir Robin used this word - and in that regard they do not differ from counsel - to emphasise the fact that mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight, still have participated in the enterprise. The word "authorisation" explains what is meant by contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: "The criminal culpability lies in participating in the venture with that foresight."

Their Lordships are satisfied that the trial judge accurately conveyed that idea to the jury by paragraph 10 of his directions.

This was a strong case of at least tacit agreement that Ah Hung should be attacked accompanied by foresight, as admitted by the appellant, that a very serious assault might occur, even if that very serious assault had not been planned from the beginning. It is, moreover, easier to prove against an accomplice that he contemplated and by his participation accepted the use of extra force in the execution of the planned assault than it normally would be to show contemplation and acceptance of a new offence, such as murder added to burglary.

Their Lordships therefore reject all the criticisms of the judge's directions to the jury on joint enterprise.

3. Abuse of process.

The appellant contended that in the circumstances to prosecute the appellant for murder rather than manslaughter amounted to an abuse of process which

would have justified and even called for the trial judge's refusal to allow the prosecution to proceed. It is unfortunate, in a matter involving the exercise of discretion, that no application based on this ground was considered suitable to be made either in the court of trial or in the Court of Appeal of Hong Kong (both of which courts would have been specially qualified to form a view), but this Board, even at this stage, has jurisdiction to intervene in a proper case.

It will be remembered that Ah Po, though charged with murder, was convicted of manslaughter and that the appellant, when arrested nearly two years after the event, was originally charged with manslaughter but was later indicted on a charge of murder. The appellant's written case contained the following submissions:-

> "The decision of Crown Counsel to substitute the original charge of manslaughter with a charge of murder was oppressive and an abuse of the process of the court in the following circumstances:-
>
> (1) the primary party had been acquitted of murder and convicted of manslaughter;
>
> (2) the pleas of the three other participants, of guilty to manslaughter, had been accepted by the Crown;
>
> (3) there was no evidence that the Appellant had played any particular part or struck any particular blow in the incident;
>
> (4) Crown Counsel was at all times prepared to accept a plea from the Appellant of guilty to manslaughter;
>
> (5) the only reasonable inference to be drawn from (1) to (4) above, is that the purpose of charging the Appellant with murder was to put unfair pressure upon the Appellant to plead guilty to the lesser charge;
>
> (6) the appellant in advancing his defence of non-participation, was unfairly put at risk of a conviction of a capital offence;
>
> (7) the result is that the Appellant has been sentenced to death, while his co-accused, including the primary party, received merely prison sentences varying between 3 and 6 years."

The submission proceeded to say that the trial judge or the Court of Appeal (though not requested to do so) "ought to have intervened to prevent an abuse of its procedure".

The appellant supported his submission with a citation from the speech of Lord Salmon in *DPP v. Humphreys* [1977] A.C. 1, 46C:-

> "I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred."

The doctrine of abuse of process and the remedy of refusal to allow a trial to proceed are well established. As Lord Reid said in *Connelly v. DPP* [1964] A.C. 1254, 1296, there must always be a residual discretion to prevent anything which savours of abuse of process. The main modern authorities are *Connelly* and *Humphreys* and their Lordships refer to those cases for statements of principle.

In *Connelly* at p.1300 Lord Morris of Borth-y-Gest said this:-

> "I consider that if a charge is preferred which is contained in a perfectly valid indictment which is drawn so as to accord with what the court has stated to be correct practice and which is presented to a court clothed with jurisdiction to deal with it and if there is no plea in bar which can be upheld the court cannot direct that the prosecution must not proceed. I agree with what was said by Lord Goddard C.J. in *Reg. v. Chairman, County of London Quarter Sessions, Ex parte Downes*, [1954] 1 Q.B. 1 that once an indictment is before the court the accused must be arraigned and tried thereon unless (on a motion to quash or demurrer pleaded) the indictment is held to be defective in substance or form and is not amended, or unless matter in bar is pleaded and the plea is tried or confirmed in favour of the accused or unless (after the indictment is found) the Attorney-General enters a nolle prosequi or unless the court has no jurisdiction to try the offence disclosed by the indictment. In that case Lord Goddard said that he knew of no power in the court to quash an indictment because it is anticipated that the

evidence would not support the charge: indeed, the only ground on which the court can examine the depositions, before arraignment, is to see whether (in a case where there is a count for which there has not been a committal) the depositions disclose the offence covered by that count.

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. The preferment in this case of the second indictment could not, however, in my view, be characterised as an abuse of the process in the court."

In *Humphreys* Viscount Dilhorne said at p.24B:-

"Where an indictment has been properly preferred in accordance with the provisions of that Act [Administration of Justice (Miscellaneous Provisions) Act 1933], has a judge power to quash it and decline to allow the trial to proceed merely because he thinks that a prosecution of the accused for that offence should not have been instituted? I think there is no such general power and that to recognise the existence of such a degree of omnipotence is, as my noble and learned friend Lord Edmund-Davies has said, unacceptable in any country acknowledging the rule of law. But saying this does not mean that there is not a general power to control the procedure of a court so as to avoid unfairness."

and at p.25G:-

"It does not appear to me to have been necessary in *Connelly v. Director of Public Prosecutions* to decide whether a judge had power to stop any prosecution in limine, and while I recognise that some of the speeches contained observations of a very general and far-reaching character, I cannot see any reason for thinking that any members of the House would have held that a judge could, in his discretion, prevent the trial of a person for perjury after the alleged perjury had secured his acquittal on the ground that in the judge's view as a matter of policy the prosecution should not have been brought, was unfair, oppressive and an abuse of process. In this connection I regard the observations of Lord Morris of Borth-y-Gest as very pertinent."

Also in *Humphreys* Lord Edmund-Davies said at p.52G:-

> "It is clear that autrefois acquit was not available to Humphreys. But it by no means follows that cases falling outside the rules governing the two special pleas in bar must proceed even though they appear as oppressive as any which happen to fall within those rules. Notwithstanding certain of my observations in delivering the judgment of the Court of Criminal Appeal in *Connelly v. Director of Public Prosecutions* at pp. 1276-1277, I am now satisfied that, in the words of Lord Parker C.J. in *Mills v. Cooper* [1967] 2 Q.B. 459, 467:
>
> > '... every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of process of the court.'"

Cases cited earlier in this judgment show that the trial of a secondary offender can proceed although the alleged principal has been acquitted in an earlier trial. In such circumstances abuse of process has not even been suggested: see, for example, *R. v. Luk Siu-Keung* [1984] HKLR 333. Their Lordships now turn to the numbered arguments listed in the appellant's case.

(1) This point has been dealt with above.

(2) 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 appellant.

(3) The absence of evidence that the appellant had played a particular part or struck a blow did not mean that there was not a case of murder against him.

(4) The fact that Crown counsel was prepared to accept a plea of guilty to manslaughter from the appellant (as from the other secondary parties) did not mean that it was an abuse of process to indict and prosecute him for murder. The appellant ran a defence which, if successful, would have resulted in his acquittal and to have accepted a manslaughter plea would have been quite in order.

(5) Their Lordships cannot agree that the only reasonable inference to be drawn from points (1) to (4) above was that the appellant was charged with murder in order to put unfair pressure on him to plead guilty to manslaughter. There was a strong prima facie case of murder, but it was understandable, in view of the outcome of the earlier trial, that the appellant was originally charged with manslaughter. It was equally understandable (and consistent with good faith) that the charge was amended to one of murder on the

advice of Crown counsel. There was no evidence, in their Lordships' opinion, of bad faith on the part of the Crown nor, in view of the evidence, could the charge of murder be called an overcharge, much less a deliberate overcharge.

(6) Their Lordships consider that the appellant was not unfairly put at risk of a conviction for murder, since there was ample evidence to support that conviction and since the first jury's acquittal of Ah Po, once his defence of non-participation was rejected, was perverse.

(7) The sentence of the primary party was due to his good fortune in being acquitted of murder and the sentences of the co-accused were due to their having pleaded guilty to manslaughter, as the appellant could have done, instead of advancing a defence of non-participation which was rejected by the jury.

Having reviewed the facts, their Lordships find no aspect of the case which can credibly be described as an abuse of process, that is, something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding. There can be no suggestion that the appellant was the victim of a plea bargaining situation since he did not plead guilty to the lesser offence. There was no sign of fraud or deceit and, as between the Crown and the appellant, the charge was fair.

Their Lordships recognise 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. There seem to be two answers. One is that, provided the case was conducted with propriety, it is difficult to see how the judge could properly have intervened to prevent counsel from seeking or the jury from returning a verdict which was justified by the evidence. The other answer is that, if it was not an abuse to indict and prosecute for murder, it could scarcely be an abuse to seek a verdict which was justified by the evidence.

That a serious anomaly occurred cannot be denied, but "as long as it is possible for persons concerned in a single offence to be tried separately, it is inevitable that the verdicts returned by the two juries will on occasion appear to be inconsistent with one another": *R. v. Andrews Weatherfoil Ltd.* (1972) 56 Cr.App.R. 31, 40 per Eveleigh J.

If he had been tried with Ah Po there can be no doubt (since Ah Po did not have a special defence) that the appellant would not have been found guilty of murder. But, as Cons V.-P. observed in the Court of Appeal:-

> "[This] is a matter that may well be of importance and be taken into account in another quarter, but, so far as the courts are concerned, it was not a relevant matter for the jury's consideration."

More specifically, as their Lordships feel justified in recalling, giving judgment in the similar case of *R. v. Luk Siu-Keung (supra)*, Li J.A. said at p.339:-

> "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."

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed.