FACC 5/2016

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO.5 OF 2016 (CRIMINAL)

(ON APPEAL FROM CACC NO.231 OF 2014)

---

BETWEEN

| | |
|---|---|
| HKSAR | Respondent |
| and | |
| CHAN Kam Shing (陳錦成) | Appellant |

---

# PRINTED CASE FOR THE APPELLANT

---

**Page Reference**

1. The Appellant appeals his conviction for murder on the basis that the verdict is unsafe because the learned trial judge's directions to the jury were inconsistent, did not explain the law accurately in relation to principal and accessorial liability and were inaccurate on the evidence. Fundamentally, the jury were not directed to consider the Appellant's knowledge of essential facts at the material time in order to assess whether he was part of a plan or the scope of that plan. Nor were they properly directed to consider which acts of his they could use to infer an intention to assist or encourage the principal offenders. This would require direction on whether there was a common purpose, a concurrent purpose or a departure from any plan.

2. In addition, it is submitted that the lack of precision created by the tangent of law known as parasitic accessorial liability ("joint enterprise") adopted by Hong Kong following *Chan Wing-Siu v R*[1] affected the lack of precision in this case. Therefore this appeal also gives the Hong Kong court a rare and relatively swift opportunity to consider the effect of the decision in *R v Jogee*[2]; *Ruddock v The Queen*[3]. In that decision, the UK Supreme Court sitting for the first time, at the same time as the Judicial Committee of the Privy Council (UKPC) decided that the Privy Council in *Chan Wing-Siu v*

[1] [1985] AC 168
[2] [2016] UKSC 8; [2016] 2 WLR 681
[3] [2016] UKPC 7

*R*[4], an appeal to the UKPC from Hong Kong, took a wrong turning in allowing foresight of the offence committed by P to be sufficient *mens rea* in itself for the liability of D for that offence, under what became known as parasitic accessory liability. *R v Powell; R v Daniels*[5] which has been applied in Hong Kong up to the present was held to have been wrongly decided. In addition, the UK Supreme Court respectfully disagreed with the High Court of Australia in *McAuliffe*[6] where the High Court created parasitic accessorial liability known as 'extended joint common enterprise': In England, Australia and Hong Kong, following *Chan Wing-Siu v R*[7] an accessory (D) is liable for an offence committed by the principal (P) outside the scope of a common purpose so long as D participated in the common criminal venture with foresight of the possibility that offence might take place. The lack of clarity and over-criminalisation in English law has also been recognised in Australian law[8]. In Hong Kong parasitic accessorial liability has materially affected the development of Hong Kong law on accessorial liability and it is submitted this court ought to concur with the UK Supreme Court and remove the tangent of law that is known in Hong Kong as "joint enterprise".

[4] [1985] AC 168
[5] [1999] 1 AC 1
[6] (1995) 183 CLR 108
[7] [1985] AC 168
[8] A judicial contribution to over-criminalisation?: Extended joint criminal enterprise liability for Murder Luke McNamara: McNamara (2014) 38 Crim LJ 104

3. It is submitted that the effect of *R v Jogee*[9]; *Ruddock v The Queen*[10] goes beyond simply disapproving the *Chan Wing-Siu v R*[11] and abolishes parasitic accessorial liability. The UK Supreme Court deliberately went on to lay down a clear restatement of the law which refocuses on the crime and D's contribution to it. The Court summarized the essential principles applicable to <u>all</u> cases into "*the requisite conduct*" and "*the requisite intent*". Against a background of requiring evidence that D knows the essential facts, accessorial liability is resolved into two issues:

   (1) *whether D is in fact a participant, that is, whether he assisted or encouraged the commission of the crime*"; and

   (2) *whether the accessory intended to encourage or assist D1 to commit the crime*.

4. We submit that the principles as stated in *R v Jogee*[12]; *Ruddock v The Queen*[13] should be adopted as Hong Kong law restoring foundationally correct principles and that the lack of precision in this Appellant's trial makes this the appropriate appeal to restate the correct foundational legal principles for accessorial liability.

**The Prosecution Case**

[9] [2016] UKSC 8; [2012] 2 WLR 681
[10] [2016] UKPC 7
[11] [1985] AC 168
[12] [2016] UKSC 8
[13] [2016] UKPC 7

5. The prosecution case at trial was that the Appellant told an undercover police officer the following: That he was part of an agreement to go out and chop members of a rival gang. That he set out in a vehicle with others (car A). That all apparently had weapons for said chopping. That there were two cars in total that set off around the same time but went in different directions. That another car (Car B) located a member of the rival gang (the deceased (V)) and killed him. The manner of the killing was consistent with "chopping" and it was a logical inference that those present and participating intended to kill V or cause him really serious harm. The evidence was that a phone call was then made to the occupants of car A which arrived at the scene after the killing was complete. There is no dispute that the Appellant was not present at the scene when the killing occurred. The prosecution case was that the Appellant was part of a common purpose to kill rival gang members and his attendance at the scene was 'akin to a getaway driver'. It was therefore not suggested that he had participated in the *actus reus*.

6. Both that *actus reus* and the *mens rea* were in issue at trial. This required a focus on what evidence could be used to demonstrate that the Appellant agreed to a common purpose (referred to as "common intention" by the prosecution). In effect the issues were as follows: What was it that the Appellant knew of the scope of the alleged plan at the time, not after the event? What did the Appellant agree to, if anything? Was the actual killing within the scope of any

common purpose? To what extent the Appellant assisted or encouraged the attack on the deceased as part of any common purpose? To what extent is the killing of an unknown victim too remote in the sense that, once the cars had separated, it could be inferred that the Appellant was engaged in a common purpose with those in car A but not car B? These issues were not the subject of full legal submissions at trial and were not clearly dealt with by the summing up. Accordingly it is our submission that the verdict is unsafe. Our full submissions are developed below.

7. A principal offender who was in car A and party to the attack on Kwok at the scene was convicted of manslaughter on the basis that he only foresaw less than grievous bodily harm[14]. We recognise that it is established law that in some factual circumstances, an accessory can be convicted of more than a principal. [15] However, here, in the absence of precise directions on law and fact the outcome is unsafe and potentially illogical.

**The Summing Up**

[14] See Exhibit D1 of HCCC No. 365/2013, Admitted Facts II, 13.6.2014. It was admitted under s.65C of the Criminal Procedure Ordinance, Cap 221 that in the small hours of 5.12.2011, Mr Wong Chun-kit together with other persons arrived at the scene in private car PX 159. The other persons who arrived with Wong alighted and attacked the deceased. Wong and other persons later fled the scene and PX 159 was left behind at the scene. Wong was charged with murder of the deceased under JCCC 160/2012. On 15.1.2013, Wong pleaded guilty to and was convicted of manslaughter. The plea was accepted by the prosecution on the basis that before Wong arrived at the scene on 5.12.2011 he only foresaw some harm which was less than grievous bodily harm might be caused to the deceased and that he had not been told of the purpose of going to the scene. Wong also pleaded guilty to and was convicted of an offence of acting as a member of a triad society.

[15] *Howe* [1987] AC 417

8. The learned trial judge referred to "joint enterprise" in two places: On the first day of the summing up, the trial judge said at p.28-29:

> *"Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan, or agreement to commit it, they are each guilty….*
>
> *"And your approach to this case, members of the jury, should therefore be as follows. If looking at the case of this defendant you are sure that with the intention I have mentioned, he took some part in committing it, namely that <u>when he armed himself with a knife, went to the scene as part of a joint plan or agreement with the others either to kill or to cause Kwok really serious harm</u>, and if that resulted in consequence, then he is guilty of murder….*
>
> *"…Joint enterprise murder. Before you may convict the defendant of murder, you must be sure (1) the defendant was part of a group who struck or chopped <u>Kwok</u> with knives; (2) that those persons intended at the time of that act, to kill <u>Kwok</u> or to cause him really serious bodily harm; (3) that those blows or that chopping was a significant cause of <u>Kwok's</u> death; (4) that the defendant intentionally <u>took part in that attack</u> with those other persons in the chopping of <u>Kwok</u>; and (5) that at the time he took part in that attack, the*

*defendant intended that Kwok be killed or caused really serious bodily harm by that act and that the act was unlawful."* [Emphasis added]

9. However, on the second day of the summing up, the trial judge in response to the request of the prosecution, added the following, at p.41B:

> *"Good morning, members of the jury. I will continue with part 2 of my summing-up but, before I do so, I want you to take a look at Sheet 2 that I have given you, which is titled 'Joint Enterprise Murder'. I don't want you to have any confusion about this because, before I gave you Sheet 2, I directed you on what is known as a joint enterprise, namely that people enter into an agreement to do some unlawful act and they did it together, pursuant to that agreement.*
>
> *"The basis of the prosecution case against the defendant here is that the defendant and the others reached an agreement to chop people of the opposite gang or faction and pursuant to such an agreement, he participated to have that agreement carried into effect. It is never suggested by the prosecution, neither on Sheet 2, that he took part in the actual chopping.*
>
> *"You will all be aware by now that the prosecution case is that there was an agreement beforehand and they travelled in two cars and he was in a second car,*

*or a third car, we don't know, but then he went there and the chopping was over, he helped them to get away. That was the prosecution case, not that the defendant was the actual chopper in this incident.*

*"All right. So in essence, it's the agreement with the intention and also participation pursuant to that common intention agreement."*
[Emphasis added]

10. It follows that the learned trial judge summed up on the basis that the Appellant was a joint principal without properly explaining accessorial liability to the jury. In addition, the summing up was inconsistent with itself. On the initial directions the appellant must be acquitted. On the evidence he did not go to the scene to kill Kwok, and he was not part of the group who struck Kwok (see principal liability below). On the further directions, the joint agreement was changed from one of attacking Kwok with intent to kill or cause serious harm, to one of chopping unspecified members of the rival gang[16]. It is here that no precise directions were given to the jury as to what evidence they could use and how in the context of an alleged common purpose. In addition, the summing up was materially inaccurate on the essential facts which means that the jury were not properly directed on knowledge. The Appellant's case was that there was no agreement. The jury should have been directed to consider what evidence there was of an agreement in advance of the

Form B
[A/Tab 5/pp.7-10]

[16] Application for Leave to Appeal (Form B) pp.7-10, (a) to (h)

cars setting out and then, after the cars had set out, whether any alleged purpose was a concurrent purpose or a purpose in common. Again, our full submissions are developed below.

## Criminal Liability in Hong Kong

11. Principal and accessorial liability in Hong Kong is based on long established English Law which is set out in detail in *Bases and Baselessness in Secondary Liability* by Dr Dr Matthew Dyson[17]. We have attached that resource to these submissions for the assistance of the court and all parties and will include it in the bundle of authorities. It formed the Foundations Document served on behalf of *Jogee* in the UK. What is set out below is a summary of the historic and current principles for the purposes of this appeal which should be read in concurrence with this resource.

## Principal Liability

12. Principal Liability in Hong Kong Law is the same as English Law which remains unchanged by *R v Jogee*[18]; *Ruddock v The Queen*[19]: Where there are several participants in a crime, D will be a principal offender if his conduct fulfils the *actus reus* element of the crime and at the time of performing the *actus reus* he had the relevant *mens rea.*[20] The crucial question in deciding whether D is a joint principal or an

[17] M Dyson, 'Bases and baselessness in secondary liability' University of Cambridge Faculty of Law Research Paper 31/2015
[18] [2016] UKSC 8
[19] [2016] UKPC 7
[20] *Macklin and Murphy* (1838) 2 Lew CC 225; *R v Rahman* [2001] 1 AC 129

accessory is whether D by his own act (as distinct from anything done by P with D's advice or assistance) performed the *actus reus*. There is no need for D and P to act with a common purpose to commit the crime together although in cases of joint principals they usually will: They may for example both independently engage in attacking V, each intentionally causing him grievous bodily harm (GBH) by their blows. If each has by his own acts caused GBH then he is liable as a principal.

**Accessorial Liability**

13. Until the erroneous tangent of parasitical accessorial liability, Hong Kong Law, applying English law on accessorial liability was clear and had sound foundations:

    (a) Basic accessorial liability (aid, abet, counsel and procure) where the accessory *knows* of the plans of P and *intended*, by his acts, to aid or encourage P. Basic accessory liability does not require that D and P share a common purpose, though one might in fact be present in any given instance of basic accessorial liability.

    (b) A subset of basic accessorial liability where each member of a *common purpose* had knowledge of the

> essential matters and intended that the actions within that illegal purpose to be carried out[21].

14. Accessories are, by definition, not the people who completed the physical elements of the offence. Accessorial or secondary liability arises where D aids, abets, counsels or procures the principal's crime. Merely associating with P or being present at the scene of P's crime, particularly after the event will not be enough. It was long required that D *knew* of the plans of P and *intended*, by his acts, to aid or encourage P. It is for the jury to determine the scope of the common purpose, as directed by the judge.[22] The common purpose rule was therefore a subset of basic accessorial liability. It was most closely associated with abetting, in the sense that D was usually present, encouraging the crime. Article 17 of Stephen's Digest holds:

> When several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose. If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree, nor accessories <u>unless they actually instigate or assist in its commission</u>.[23]

[21] M Dyson, 'Bases and baselessness in secondary liability' University of Cambridge Faculty of Law Research Paper 31/2015
[22] *R v Pridmore* (1913) 8 Cr App R 198, 201, 202
[23] L. F. Sturge (ed), JF Stephen: *A Digest of the Criminal Law (Indictable Offences)* (London: Sweet & Maxwell, 9th ed, 1950).The text is the same as in the 4th edition published by J. F. Stephen in 1887. The underlining is ours.

15. Whilst there is no requirement that D is present assisting or encouraging at the time that P kills[24], in all cases D's *actus reus* is satisfied by proof that he did acts to encourage and/or assist P to commit the offence[25]. D is therefore liable as an accessory if he assists or encourages or causes P, to commit the offence even if D does not, by his own conduct, perform the *actus reus*.[26] The offence occurs where and when the principal offence occurs.[27] It is not necessary that D's act of assistance or encouragement was contemporaneous with the commission of the offence by P but generally D's acts must have been performed before P's crime is completed[28]. There is no requirement that D and P share a common purpose or intent.[29] It is immaterial that D joined in the offence without any prior agreement.[30] It follows that D will not be liable for P's offence if D and P have agreed on a particular victim and P deliberately commits the offence against a different victim[31].

16. It is not necessary to prove D's conduct in fact encouraged or assisted[32]. It needs to be made clear to the jury what conduct it is that D is alleged to have participated in and how.

---

[24] *R v Rook* [1993] 1 WLR 1005
[25] *R v Jogee*; *Ruddock v The Queen* [2016] 2 WLR 681 at [8]
[26] *Kennedy (No 2)* [2007] UKHL 38
[27] *JF Alford Transport Ltd* [1997] EWCA Crim 654
[28] *R v Stringer and another* [2011] EWCA Crim 1396; [2010] QB 160
[29] *A-G's Reference (No 1 of 1975)* [1975] QB 773
[30] *Rannath Mohan* [1967] 2 AC 187
[31] *Saunders & Archer* (1575) 2 Plowden 473; 75 ER 706; *Gordon-Butt* [2004] EWCA Crim 961. See also Ormerod., D *A Note on secondary Liability After Jogee* for the UK Judicial College (this will be supplied as it has no clear citation).
[32] *R v Jogee; R v Ruddock* [2016] 2 WLR 681 at [12]

17. D's *mens rea* is therefore satisfied by proof that D intended to assist or encourage P. As elsewhere in the criminal law that is not limited to cases where D "desires" or has as his "purpose" that P commits the offence. Most importantly, intention is not to be equated with foresight.[33]

18. D can be found to be part of a common purpose if there is evidence that he has knowledge of "existing facts necessary" for P's conduct/intended conduct to be criminal[34]. These should be specific facts on the evidence not a range of possibilities[35]. *R v Bainbridge*[36] determined that for accessorial liability "there must be not merely suspicion but knowledge that a crime of the type in question was intended".

19. Again, D's *mens rea* is intention. This is consistent with "foresight as evidence of intent" as set out in *R v Jogee*[37]; *Ruddock v The Queen*[38] which sits alongside the law of murder more generally.[39] It is notable that, Hong Kong courts before *Chan Wing-Siu v R*[40] correctly applied intention (based on the evidence) as set out in *R v Smith (Wesley)*[41], *R v Anderson and Morris*[42] and *R v Betty (Carol)*[43]: See, for

[33] *R v Jogee; R v Ruddock* at [73]
[34] *R v Jogee*; *Ruddock v The Queen* at [9], [16] and see *Johnson v Youden and Others* [1950] 1 KB 544, 546, 547 affirmed a year and a week later by the Court of Appeal, again led by Lord Goddard, C.J., *Ferguson v Weaving* [1951] 1 KB 814, 820
[35] *Maxwell v DPP for NI* [1978] 1 WLR 1350
[36] *R v Bainbridge* [1960] 1 QB 129 at 134
[37] [2016] UKSC 8
[38] [2016] UKPC 7; [2016] 2WLR 681; http://www.bailii.org/uk/cases/UKSC/2016/8.html
[39] *Woollin* [1998] UKHL 28
[40] [1985] AC 168
[41] [1963] l WLR 1200
[42] [1966] 2 QB 110
[43] (1964) 48 Cr App R 6

example *Li Chi-wing and others v The Queen*[44] and *Tsang Wai-keung and others v The Queen*[45].

**Parasitic Accessorial Liability ("joint enterprise")**

20. The current state of the law of parasitical accessorial liability ('joint enterprise') in Hong Kong adopted errors which developed in English law which have no proper legal foundation[46]. Before 1 July 1997, the Privy Council in England was Hong Kong's court of final appeal. Before *Chan Wing-Siu v R*[47] was decided by the Privy Council, Hong Kong courts applied the law of accessorial liability as stated in in *R v Smith (Wesley)*[48], *R v Anderson and Morris*[49] and *R v Betty (Carol)*[50]. The Hong Kong Court of Appeal in *Chan Wing-Siu v R*[51] "in the absence of direct English authorities" expressed itself as following the Australian decision of *Johns v The Queen*[52] which, was in turn followed by *McAuliffe*[53]. The English Courts followed the parasitic extension in *R v Powell; R v Daniels*[54]

21. Through these few cases, the courts moved towards a loose notion of foresight and continuation in the enterprise[55]. The

[44] [1972] HKLR 315
[45] [1973] HKLR 432
[46] *R v Jogee*; *Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7; [2016] 2 WLR 681
[47] [1985] AC 168
[48] [1963] l WLR 1200
[49] [1966] 2 QB 110
[50] (1964) 48 Cr App R 6
[51] [1985] AC 168
[52] (1980) 143 CLR 108
[53] (1995) 183 CLR 108
[54] [1999] 1 AC 1
[55] M Dyson, 'Bases and baselessness in secondary liability' University of Cambridge Faculty of Law Research Paper 31/2015

joint enterprise as an object must relate solely to the crime agreed upon and the part a defendant was to play in it (Crime A). Liability for a further crime (B) turns simply on acts that were foreseen as possible. It is rather difficult to use an idea of "scope" when such a thing is determined solely by reference to what a particular defendant foresaw. Each defendant created his or her own scope for the enterprise by the extent of the acts that he or she foresaw. The scope of the joint enterprise as far is D is concerned, is what D foresees P will do. Logically the same "joint enterprise" from P's perspective covers whatever crimes P foresaw, which may bear no relation to D's, other than the one crime they both agreed on. Foresight, not agreement became the test[56].

22. Guilt by mere contemplation has therefore been created not by Parliament, but by the courts with no foundation. The focus on holding D responsible for everything s/he foresaw might happen casts the net of criminality incredibly wide. D is made liable for the most serious offences possible without showing what connection D's conduct has to that offence and without showing any significant culpability, foresight being the lowest subjective fault standard in the criminal law.

23. As set out above, joint wrongdoing was considered in *R v Anderson and Morris*.[57] This case marks the bridge from contemplation, used in the earlier cases, to ascribing a justification for liability through references to D's "tacit

[56] M Dyson, 'Bases and baselessness in secondary liability' University of Cambridge Faculty of Law Research Paper 31/2015
[57] [1966] 2 QB 110

agreement", or "authorisation".[58] Lord Parker CJ accepted as true the following proposition put forward by Geoffrey Lane QC:

> *"Where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but…if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act…It is for the jury to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise."*

24. This statement focussed on agreed actions with the fault element of authorisation. It was the use of the word tacit which ultimately gave rise to parasitic accessorial liability. That one word created the opportunity to prosecute offences which are not part of the *agreed joint enterprise* but which "arise from the execution" of it and have been "tacitly agreed" to by D.[59]

25. Parasitic accessorial liability was arrived at JC Smith published "Criminal Liability of Accessories: Law and Law

[58] *R v Anderson; Morris* [1966] 2 Q.B. 110, 118-119 per Lord Parker CJ
[59] "Simply harsh to fairly simple: joint enterprise reform" [2015] Crim LR 3, 8

Reform" [60] oversimplifying the relationship between incitement and common purpose and by conflating "contemplation" with "authorisation" when commenting on R v *Wakely* [61] illogically followed by Lord Lowery in *Hui*[62] and in *McAuliffe*[63] when even the use of "assent" from *Johns v The Queen*[64] was lost wrongly leaving mere contemplation or foresight as the fault element. It follows that English and Australian "joint enterprise" liability rested on no foundation.

26. The case of *Sze Kwan Lung v HKSAR* [65] was a missed opportunity for the Court of Appeal to review the doctrine of 'joint enterprise'. There, the trial judge directed the jury that D1, who was not present and did not contribute to the act of the offence, could be guilty because "*he was part of an agreement to commit those offences*". He also said that "*if [D1] is to be found guilty of any of the offences on the indictment, it can only be because he was part of an agreement to commit those offences*". In a dissenting judgment, Stock JA held that this was a material misdirection, and that "*intentional assistance was a condition precedent to guilt*", and "*if not physical action, then encouragement or some other form of intentional assistance was a condition precedent to guilt"*[66]. He also said that there was ample evidence of D1's leadership and acts of

[60] JC Smith, 'Criminal Liability of Accessories: Law and Law Reform' (1997) 113 LQR 453
[61] [1990] Crim LR 119
[62] *The Queen v Hui Chi-Ming* [1992) 1 AC 34
[63] (1995) 183 CLR 108
[64] (1980) 143 CLR 108
[65] (2004) 7 HKCFAR 475
[66] *HKSAR v Sze Kwan Lung & Others* (Court of Appeal) unreported CACC 92/2002 at [127]

encouragement and assistance, but those were facts for the jury to find and they were not left to the jury to find.

27. It was in that context that the Court of Final Appeal stated that the doctrine of joint enterprise was distinct from the common law principles of aiding, abetting, counseling or procuring. The doctrine of joint enterprise was, said Bohkary PJ giving the judgment of the court:

> "*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 … Hedge's Case … 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……*"[67]

28. The judgment made clear that the disposal of the appeal did not require a decision on the correctness or otherwise of the trial judge's directions. The court's statement of the doctrine of joint enterprise was not a determination after hearing full argument but a statement of the law on the basis that *Chan Wing-Siu v R*[68] was correct. The statement demonstrates that

[67] (2004) 7 HKCFAR 75 at [34]
[68] [1985] AC 168

the principle was of general application and is by no means only to be invoked in a "Crime A, Crime B" situation, not to be merged with common purpose and principal liability as it was in this Appellant's case.

29. Parasitic accessorial liability has affected basic accessorial liability and is a clear departure from the common purpose rule in that neither intention nor knowledge is required. Accessorial liability is now far wider than liability for the principal and is based on a parasitic extension from a lower level offence with the lowest level of subjective fault; mere contemplation of the risk that the principal might go on to commit a further crime[69].

30. In a series of piecemeal decisions, English judges created parasitical accessorial liability. Those judgments often confuse the terminology of "joint" and "purpose" and "common" and "enterprise"[70]. Prosecutors are required to prove little but ultimately and easily obtain convictions for serious offences; prosecution decisions to charge under "joint enterprise" or parasitic accessorial liability, drive courts to

[69] There was an effort to focus on knowledge in *R v Stringer* [2012] QB 160 which involved the chasing and killing of a known hard man in possession of a baseball bat who had been glassed in the face by a co-defendant (McPhee) who had pleaded guilty to murder. Both Appellants had chased the deceased over a significant distance. They said they did not know of the knife and were mere spectators. To reach their verdict, the jury were told to decide whether they knew McPhee had a knife. In para 54, Toulson LJ outlines the defendants' involvement: "The Appellant's involvement was far greater. The jury's verdicts mean that they must have been satisfied that the appellants knew that McPhee was armed with a knife; that they intended that Bones should be caught and made to suffer at least really serious harm and that they foresaw that McPhee might use the knife to do so. Bones was known to be armed with a baseball bat and well capable of defending himself if the odds were equal. With that knowledge and intent the Appellants joined McPhee in a sustained chase". It is in such cases that the use of foresight is wrong. The correct approach is that, if the jury are sure that the defendants knew the deceased was a hard man, knew that McPhee had possession of a knife and that the odds would need to be unequal for McPhee to succeed then the Appellants know McPhee's purpose is to overcome Bones at all costs and the next step is for the jury to decide whether they are sure that the defendants intended by their act of chasing to assist or encourage McPhee, thus being sure it was a common purpose.

[70] M Dyson, "Justifying Secondary Liability: Might does not Make Right" [2015] Crim LR (forthcoming)

give judgments on it far more often than facts merit. The frustration is perhaps exposed in the opening line of *R v Stringer*[71] *"This appeal raises issues once again about secondary liability for murder and the so-called joint enterprise doctrine"*.

31. At the same time, parasitic accessorial liability also offers, in the average gang case, substantive and sentencing simplicity for judges by approaching cases on an "in it together" basis without specificity; that simplicity in a typical gang case has been achieved through the abandonment of established legal principle. The effect has been that parasitic accessorial liability has purported to subsume all accessorial principles, imposing liability at the point that the secondary participant foresees the risk that the principal might commit a further crime.[72] The lack of considered legal foundation to this form of liability has resulted in no clear moment for a party to withdraw or for a jury to conclude that s/he had participated. Such clarity cannot be present when the fault element of foresight, an un-defined suspicion or awareness, is applied.

32. It may well be that in the past the concept of "common purpose" has caused confusion because P and D may have different *purposes* for agreeing to the same illegal enterprise. The confusion derives from a conflation of common purpose with motivation or reasons. Because of this failure to define

[71] [2012] QB 160

[72] M Dyson, "Bases and baselessness in secondary liability" University of Cambridge Faculty of Law Research Paper 31/2015 and M Dyson, "Justifying Secondary Liability: Might does not Make Right" [2015] Crim LR (forthcoming)

what the common purpose *is*, parasitic accessorial liability, which is parasitic upon the "common purpose", is made more complicated due to the fact that an offence to which parasitic accessorial liability is applied is never one which was any part of the "common purpose". Hence in the dicta in *R v Smith (Wesley)*[73] and *R v Anderson; R v Morris*[74] about authorisation and tacit agreement; they are trying to capture the essence of the extension of the common purpose rule. The result has been to make contemplation enough for D to be guilty by parasitic extension. It seems that the sense of injustice from the unexpected results of this doctrine led to the "fundamentally different" concept growing in prominence, when it is really just the converse of what D intended, knew or believed would happen.

33. The courts have fallen into error using foresight or realisation as the fault element for accessorial liability and, in addition, the expositions of law have missed an essential step of identifying the evidence: If D does not know essential facts, like possession of a knife or purpose / tendency of the group, he cannot foresee or realise what will happen. More importantly, he cannot be agreeing to the common purpose as he cannot be intending by his acts to participate[75]: there may be a common purpose, but it is not a purpose common to D.[76]

[73] [1963] 1 WLR 1200. See also *R v Betty* [1966] 2 QB 110
[74] [1966] 2 QB 110
[75] So, in *R v Train* (1862) 3 Foster and Finlason 22, 26-27; 176 ER 11, 13 there was an acquittal for nuisance of one defendant who did not know that the obstruction was placed on a highway. He believed it was his own land.
[76] This was amply demonstrated on the facts of *R v Gnango* [2012] 1 AC 827 where a common purpose between Gnango and "Bandana Man" to have a gun fight was sufficient for criminal liability even though the deceased was an unintended victim. Gnango knew the essential fact that "Bandana Man" had a gun and would use it with intention to kill or cause really serious harm (as Bandana Man pulled the trigger). Evidence that Gnango intended to participate (not in self-defence but in a shoot-out) can be inferred from his own acts including the

The current state of the law asks a jury to work back from a result – any result is inevitably possible because the evidence is that it happened so the prosecution have no burden.

34. The failure to stick to the foundational principles of *knowledge of essential matters* and intention began a search for alternative theories such as "fundamental difference" or a focus on "withdrawal". As the UK Law Commission[77] identified, the "fundamental difference" rule does not produce just results. It is a tortuous task for a jury to fairly decide whether an action by P was fundamentally different from what had been agreed when the focus ought to be on the state of mind of each party. In *R v Rahman*,[78] the defence argument (that S ought not to be liable for murder unless the Crown proved that S knew or foresaw that such weapons would or might be used with *intent to kill*, rather than with intent to cause serious injury) was rejected. Lord Bingham described "fundamentally different" as having a "plain meaning" and suggested that it is "not a term of art"[79]. In *R v Yemoh*,[80] the Court of Appeal emphasised that whether or not what P did was fundamentally different from anything foreseen by S was a *question of fact*. However, in *R v Rahman* Lord Brown restated the law as follows:

---

evidence that he fired back. On other evidence, if D1 did not know D2 had a gun, the purpose (the shoot-out) would not be common.

[77] Law Reform Commission *Participating in Crime* (Law Com 305, 2007)

[78] [2009] 1 AC 129, [2008] UKHL 45

[79] *Ibid.* at [26]

[80] [2009] Crim LR 888; [2009] EWCA Crim 930

> *"If D realises (without agreeing to such conduct being used) that P may kill or intentionally inflict serious injury, but nevertheless continues to participate with P in the venture, that will amount to a sufficient mental element for D to be guilty of murder if P, with the requisite intent, kills in the course of the venture unless (i) P suddenly produces and uses a weapon of which D knows nothing and which is more lethal than any weapon which D contemplates that P or any other participant may be carrying and (ii) for that reason P's act is to be regarded as fundamentally different from anything foreseen by D."*[81]

35. It is here that the use of "contemplation" is particularly unjust, as a "fundamentally different" plea is generally available only if there is a change of weapon (or the use of a weapon when none at all was contemplated). The difficulty in determining whether acts are "fundamentally different" can be seen by the divergence of opinion amongst their Lordships in *R v Rahman*[82] over the decision in *R v Gamble*:[83] Lords Bingham and Rodger regarded throat cutting as being "of an entirely different character in an entirely different context" from the planned knee capping whereas Lords Brown, Scott and Neuberger expressed strong reservations over the decision. However, in *R v Mendez and*

[81] [2009] 1 AC 129; [2008] UKHL 45, [68].
[82] [2001] 1 AC 12.
[83] [1989] NI 268

*Thompson*[84] where the prosecution did not suggest that Mendez knew that anyone in the group had a knife until after the fatal stabbing had occurred, the Court of Appeal allowed the appeals, criticised the harshness of the joint enterprise doctrine as applied to murder and concluded that: *"what matters is not simply the difference in weapon but the way in which it is likely to be used and the degree of injury which it is likely to cause"*. Having referred to the Law Commission proposals in 2005, the Court concluded that it is *"helpful to concentrate on the life threatening nature of P's unexpected conduct as compared with the harm foreseen or intended by D."*[85]

36. Until *R v Jogee*[86]; *Ruddock v The Queen*[87] these issues had not been cured by any of the cases since the 2007 Law Reform report[88]. The situation has also been complicated as the factual question of withdrawal has been raised to a principle of law.[89] "Withdrawal" is a consequence of the effect of joint enterprise on the common purpose rule. In the *Chu Yiu Keung*[90] case, the court rightly said that "*the options facing them were stark*", once the defendants have *"allied themselves to the criminal enterprise by carrying out a secondary but nevertheless important role"*, and that is, an

[84] [2011] QB 876; [2010] EWCA Crim 516.
[85] At [44] (emphasis added). Four defendants were acquitted of murder as there was no evidence that any of them were involved in chasing or attacking the deceased before or at the time of the stabbing.
[86] [2016] UKSC 8
[87] [2016] UKPC 7
[88] Law Commission *Participating in Crime* (Law Com 305, 2007)
[89] *HKSAR v Chu Yiu Keung & Others* CACC 27/2009; *HKSAR v Lam Siu Fung and Another* [2014] 1 HKLRD 241
[90] *HKSAR v Chu Yiu Keung & Others*, CACC 27/2009, partly reported in [2011] 2 HKLRD 108

unequivocal withdrawal[91]. But its harshness is also inherent in the situation where D is vulnerable or the situation develops so fast that withdrawal, or at least the evidence of withdrawal, is totally unrealistic[92].

37. Overall, the extremely low fault level provided by foresight of a possibility is a flimsy justification for effectively bringing in constructive malice for D by the back door. In practice this just gives rise to utility for the prosecution. The law is thrown further out of kilter by the lesser offence option (usually manslaughter) being effectively lost. The result is all or nothing with most of the cards stacked in favour of the prosecution, unless D can play the "fundamentally different" trump card and win a complete acquittal. Parasitic accessorial liability allows the prosecution to utilise the option of being "in it together" to achieve guilt by association so long as there is a suspicion that at some stage something might go wrong. It is this loose language that has affected this Appellant's case. The focus is not on criminal activity but on with whom people associate. It follows that the weight of evidence and learning is against the continuation of parasitic accessorial liability. The huge utility this gives to the prosecution is unjust and this appeal allows for the solution to be spelled out in Hong Kong.

## Correcting the tangent

[91] *Ibid.* at [129]

[92] For example, in *HKSAR v Lam Siu Fung & Another* [2014] 1 HKLRD 241, a fight broke out between rival gangs of youths in a café in the course of which someone picked up a heavy umbrella stand and struck V who died as a result. The whole episode was captured on CCTV and lasted only 30 seconds. Ds were convicted of murder on joint enterprise. Their appeal on the ground of withdrawal failed.

38. In our submission it is for the courts to cure the erroneous tangent of law known in Hong Kong as "joint enterprise" that has moved contemplation from a question of fact to a fault element. In *HKSAR v Coady*, dismissing an appeal based on the ground that the "grievous harm" rule of the *mens rea* of murder was "arbitrary" contrary to art.5(1) of the Hong Kong Bill of Rights and art.28 of the Basic Law, the Court of Appeal (holding that the rule represented a respectable view and therefore was not arbitrary) stated that:

> "*The rule is firmly entrenched in the common law as it applies to Hong Kong. It was confirmed by the House of Lords in R v Cunningham [1982] AC 566, and has been applied in Hong Kong without question before or since. It is not appropriate for an intermediate appellate court to embark upon law reform. Its duty is to apply the common law as it is, not to say what it should be. If the common law in this area is to be changed by the courts, that should only be done by the Court of Final Appeal.*"[93]

39. Here, we submit that in relation to accessorial liability, this is an opportunity not to change but to correct the law. The decisions in *HKSAR v Pun Ganga Chandra* that joint enterprise "*represents a respectable view*"[94] does not hold

[93] [2000] 2 HKLRD 195 at 201 I to 202 A
[94] [2001] 2 HKLRD 151 at 166 F-G

water. *Sze Kwan Lung v HKSAR*[95] was a missed opportunity in reviewing the law of Hong Kong of joint enterprise because the appeal to this court did not involve joint enterprise as a question of law.

40. From 2004 onwards there were no appeal based on the question of liability in joint enterprise. It was widely perceived that the only room for appeal was whether the crime was within the scope of the common purpose or a "fundamentally different" event, and on 'withdrawal' from the enterprise. This appeal gives this Court the opportunity to correct the tangent of "joint enterprise" in Hong Kong. It is submitted that the court should embark on the review because there is a need to clarify the law and to curb its illegitimate expansion, because it does not work as it stands and because of the effect it had on the lack of clarity in this case. There should be a return to judicial direction based on sound legal doctrine. It is not that a different kind of direction on withdrawal is required but for a refocus on knowledge and intention.

41. The true focus ought to be whether at that crucial moment the defendant knew what P would do and intended to and did participate, or not. It is submitted that, by focussing on expected conduct (knowledge of what will happen) rather than unexpected conduct the true legal foundation of liability for alleged accessories is achieved and can be more properly expressed as follows:

[95] (2004) 7 HKCFAR 475

(i) Did S *know* of the plans of P and *intend*, by his acts, to aid, abet, counsel or procure; or

(ii) Did each member of a *common purpose* have knowledge of the essential facts and intend that the actions within that illegal purpose be carried out so that the action by a P (or a group of P's) was within the scope of the common purpose?

42. The question for this court relates to the essential facts. In a case such as the present appeal, the common purpose has a "class of individuals" whose whereabouts and identity are unspecific, and no specificity is required of "participation". That it is even less than conspiracy, because in a charge of conspiracy, the particulars of the course of criminal conduct the conspirators agreed on and their roles in it would have to be stated and proved by evidence.

43. It is notable that in some pre- *Chan Wing-Siu v R*[96] Hong Kong cases, a conspiracy charge was added to the substantive offences. Complaint was made of unfairness, but the courts upheld the propriety of doing so, because of the need to introduce evidence to show the whole picture. In *Li Chi-wing v The Queen*[97], the 6th Appellant was charged with conspiracy to wound because he did not strike the fatal blow, and there was an issue of whether he was present at the

[96] [1985] AC 168
[97] [1972] HKLR 315

attack. In *Chan Kat-lam-hoi v The Queen*[98], the 5th Appellant was charged with conspiracy in a case of false imprisonment and extortion of money because although he took part in luring the victim to the place of detention, he was not present when his accomplices extorted money with menace from the victim.

44. It follows that in addition to being the correct course of law, for conspiracy to have legitimacy, returning the law to the position in *Johnson v Youden*[99] was the correct course in *R v Jogee*[100]; *Ruddock v The Queen*[101] and is the correct course in Hong Kong. It is important to note that the proper formulation covers most factual matrices any court is likely to come across so this would not lead to endless appeals. It follows, in our submission that reformulating the law on accessorial liability in the way we have suggested means the basis for a verdict would be identifiable. Both unjust convictions and appeals would be fewer and individuals would have clarity on when to withdraw.[102] Accordingly, it is submitted that this court should hold that *Chan Wing-Siu v R*[103] was indeed a wrong turn and wrongly adopted in *Sze Kwan Lung v HKSAR*[104]and ought to be expunged.

---

[98] [1965] HKLR 289
[99] [1950] 1 KB 544
[100] [2016] UKSC 8; [2016] 2 WLR 681
[101] [2016] UKPC 7
[102] In cases other than murder / manslaughter the approach is the same. So, in *Attorney General v Able* [1984] QB 795 aiding and abetting suicide might be proved by supplying a self-help book to a specific person but not general sales as, in the specific sale, the supplier would know the essential matter that P intended to commit suicide and would be intending by his own act of supplying the book that he was assisting by providing the detail on how to do so.
[103] [1985] AC 168
[104] (2004) 7 HKCFAR 475

**Effect on the Appellant's case**

45. As stated at the outset of the Appellant's Printed Case, the learned trial judge summed up on the basis that the appellant was a joint principal without properly explaining accessorial liability and the later summing up on joint enterprise was inconsistent and inaccurate.

46. It is notable that the prosecution's basis of joint enterprise liability was confused and uncertain. It was a mixture of two strands of accessory liability: the "common purpose" strand, whereby D was liable if he agreed to a joint plan to locate and inflict serious harm on others and he participated by taking a step or steps; and the "foresight of possible consequence" strand, where liability is based on participation in a plan "fully realizing" that there was a "real risk" that those persons might be located and chopped"; that he knew the others had knives because he took a knife himself:

> *"…the accused was fully aware that a plan to locate and attack the followers of Fei Kit was in place on the night in question and that weapons like knives would be used in the attack."*[105]

Transcript [p.102 L]

> *"…the prosecution's case is that the accused and his associates were acting together as part of a joint plan or agreement to inflict serious injury on others. And while participating in it, they had an intention to cause*

[105] Prosecution opening, p.102 L

*really serious bodily harm and they also realized that someone might be killed or suffer really serious injury in the attack, but nevertheless continued to take part in it."*[106]

Transcript [p.103 P – S]

*"Now we say on the night in question, there was a plan or an agreement in place to locate and chop the followers of Fei Kit. And that the accused and his associates, knowing full well that such a plan or agreement was in place, nevertheless participated in such a plan or agreement in order to have it carried out."*[107]

Transcript [p.172 A – C]

*"Now the prosecution say when the accused participated in this joint plan or agreement to have other people chopped, he fully realized that there was a real risk that those persons who were to be located and chopped by them might suffer serious, really serious injuries."*[108]

Transcript [p.172 G – H]

*"…the prosecution do not say that the defendant was one of those persons who actually inflicted the injury, but he should be held liable for the death of the deceased because he took part in that joint plan or agreement and while taking part in that joint plan or*

[106] Prosecution opening, p.103 P-S
[107] Prosecution closing, p.172 A – C
[108] Prosecution closing, p.172 G – H

*agreement, he realized that the persons to be chopped by them might suffer really serious bodily harm."*[109]

Transcript [p.181 J – L]

47. The one thing the prosecution held to be unnecessary was D's assistance or encouragement of the attack of V to kill or cause GBH. Encouragement was relevant only as evidence of the common purpose. It is the agreement to a common purpose which was the basis of D's liability:

> *"So the crux of the matter is whether there was a common purpose, ex [sic] of encouragement, only evidence from which one can draw the inference that there was a common purpose."*[110]

Transcript [p.58E at I – J]

48. In this case D did not attack V and therefore did not commit the *actus reus* as a joint principal offender.

49. The jury should have been directed clearly on traditional accessorial liability: To consider what the Appellant knew in advance of the group setting out of the essential matters/facts. To identify those essential matters/facts and then to consider whether D in fact assisted and encouraged that particular killing as part of a common purpose to kill or cause grievous bodily harm. None of this was made clear here. Here, it is submitted there was no clear evidence of agreement and no evidence of acts which demonstrate an intention to assist or encourage before the killing is complete. In fact, the call to

[109] Prosecution closing, p.181 J – L
[110] Prosecution reply to defence submission on "No case to answer", p.58E at I – J

attend demonstrates that there was no intention to assist those in car B as it had to be requested and importantly there is no evidence that D drove anyone who had participated away.

50. In addition, that the learned trial judge wrongly summed up the evidence is important as the jury should have been directed to consider the Appellant's knowledge of any other "existing facts necessary" for P's conduct/intended conduct to be criminal. The relevant part of PW8's evidence was at p.110 S to 113 D. It does not contain clear evidence of agreement, knowledge of essential facts in advance of the killing or intention as an accessory. Here, if the court agrees that the correct fault element is intention, then the jury should not be left to consider merely the "type" of offence but must be directed to consider what the Appellant actually knew and agreed to as well as what he did. <u>Fundamentally and logically, concurrently holding the same purpose is not the same as holding it in common</u> and the jury in this case were not directed to consider this accurately.

Transcript [p.110 S – 113 D]

51. The prosecution case here was that there was a common purpose to attack a class of persons and V (who falls into the description) is attacked and dies. In *R v Jogee; R v Ruddock*, Lord Toulson asked at the hearing if there was a decision or academic view on what the link must be between a plan and its execution. Despite how aggressively prosecutions have been brought in this area, there is no authority and only one

piece of academic comment[111]."Arises in the course of" a common purpose is a remarkably vague definition. For example, D and P plan a robbery, D conditionally intending (or merely foreseeing) that P kill with a gun in pursuance of the robbery. On the way to the robbery, P happens to see an old enemy, P takes out his gun and kills the enemy. The drive to a robbery isn't enough for an attempted robbery and therefore, it is submitted, it cannot be that D is liable for murder. Similar issues arise here. The loose nature of the *Chan Wing-Siu*[112] approach has infected the judicial direction on the evidence necessary to identify what facts the Appellant knew in advance and then on what was done in furtherance of any agreement. No consideration was given in this case as to roles or weapons or the Appellant's knowledge. A general conversation days after the event with an undercover police officer is simply not enough, particularly when it was not summed up accurately. The undercover agent never said that the Appellant agreed to a plan to chop the rival gang. What he said was that the Appellant told him that *"on this occasion Kam Mo-cheung had given an order that the followers of Fei Kit were to be chopped"*[113]. In the premises it is submitted that there was no clear evidence that he agreed to locate the rival gang and chop anyone. The jury were not invited to consider what he knew in advance of any order to locate and chop or whether he found out afterwards, when common sense indicates there would have been discussions within the community before he

Transcript [p.112 B]

[111] M Dyson, "Fundamental Similarity in Secondary Liability" [2007] 4 Archbold News 4 at page 5
[112] [1985] AC 168
[113] Examination-in-chief of PW8, p.112 at B

met the undercover agent 11 days later. At most the evidence was that he was able to tell the officer that *"on this occasion Kam Mo-cheung had given an order that the followers of Fei Kit were to be chopped"*[114]. The evidence was perfectly compatible with his finding out details after the event and/or going to show force[115]. There was no evidence that each car was not operating on its own. They went separate ways[116]. However, the trial judge simply told the jury that he agreed to the plan to kill, that he *"received instructions from Kam Mo-cheung to chop the followers of Fei Kit"*[117]. It was a material misdirection. The trial judge did not leave this fact to the jury to find, and refused to let them hear the recording of the undercover agent's evidence to come to its own conclusion, and instead just repeated and thus reinforced her misdirection[118]. This approach would be consistent would be consistent with the principal who was involved in the actual killing and who pleaded guilty to manslaughter on the basis that he was not told the purpose of going to the scene[119]. A plea that was accepted by the prosecution. What the judge told the jury was, however, that:

Transcript [p.112 B]

Transcript [p.112 T]

Transcript [p.112 K – M]

Summing Up [A/Tab 1/p.42 O]

Summing Up [A/Tab 1/p. 55 A – L]

Transcript [p.112 B, F – J]

> *"An undercover police officer told you that on 16 December 2011, he heard from this defendant how he obeyed an order of Tai Kau and Fei Chiu to fetch sharp knives, water pipes and torches to board a*

[114] Examination-in-chief of PW8, p.112 at B
[115] Examination-in-chief of PW8, p.112 at T
[116] Examination-in-chief of PW8, p.112 at K – M
[117] Summing up, p. 42 O
[118] Summing up, p. 55 at A – L
[119] See Note 14 above.

*private car to look for followers of Fei Kit and to chop them."*[120]

Summing Up
[A/Tab 1/p.19 L – M]

*"He [PW8] said Yu Ngau (the Appellant) said he received instructions from Kam Mo Cheung to chop the followers of Fei Kit, another faction of the Turn Mun Sun Yee On…."*[121]

Summing Up
[A/Tab 1/p.42 N – P]

*"In short, can you be sure that the defendant did what he said he did to PW8, namely, arm himself with a knife in pursuance of a joint intention and agreement to cause serious injuries to the deceased or to kill the deceased, and went to the scene and rendered assistance?"*[122]

Summing Up
[A/Tab 1/p.49 C – E]

52. Upon the jury's request to hear the audio-tape of PW8's evidence in-chief on the conversation on 16.12.2011 in the Luxe Bar, the learned trial judge said:

*"If that is what you mean, I regret to tell you that we cannot replay that part….But what I will do to assist you is to read again my summing-up, the parts that I sum up just earlier this morning to you about his evidence in relation to the Luxe Bar meeting."*

*"….He said that Yu Ngai said he received instructions from Kam Mo Cheung to chop the*

[120] Summing up, p.19 L – M
[121] Summing up, p.42 N – P
[122] Summing up, p.49 C – E

*followers of Fei Kit, another faction of the Tuen Mun Sun Yee On, and that Yu Ngau told him that he armed himself with a knife and boarded the private car driven by Tai Kau, to look for the followers of Fei Kit."*[123]

Summing Up
[A/Tab 1/p.55 A – J]

53. PW8's evidence was the only evidence connecting the Appellant to the murder. The request of the jury indicated that it felt uncertain about what PW8 actually said. The possibility that the jury convicted on the inaccurate summing up of the trial judge on the crucial issue of whether the Appellant agreed to a plan to chop the rival gang could not be excluded and the verdict is unsafe.

54. The prosecution will no doubt suggest that the death of V was within the contemplation of all parties to the agreement. However, the very issue in this appeal is the extent of foreseeability as a matter of fact and, it is submitted that the approach taken by the trial judge was too expansive for the following reasons:

(a) There was no clear evidence of agreement on the available evidence when accurately approached: on the evidence of PW8 the undercover agent, 11 days after the murder, the Appellant was able to tell the undercover agent that *"on this occasion Kam Mo-cheung had given an order that the followers of Fei Kit were to be chopped"*[124]. This does not say when the

Transcript
[P.112 B]

[123] Summing up, p.55 A – J
[124] Examination-in-chief of PW8, p.112 B

Appellant acquired that knowledge, even less that he *"received instructions from Kam Mo-cheung to chop the followers of Fei Kit"*[125]. The only instructions he said he received before setting off was from Tai Kau and Fei Chu to *"bring along tools"* to come together in Tin Shui Wai[126], and that was compatible with *"chui kai"* (blow whistle) or show force to the rival gang[127]. This is also consistent with the principal whose plea of manslaughter was accepted on the basis that he had not been told the purpose of going to the scene[128].

Summing Up [A/Tab 1/p.42 O]

Transcript [p.112 A, 112 I]

Transcript [p. 183 O] [Exhibit P122]

(b) Once the cars separate, any acts of the occupants of car B are too remote for accessorial liability in the sense that the people in the other car were outside any plan. The Appellant may have had a common purpose with those in car B at the outset but without contemporaneous association, he ultimately only had a common purpose with those in car A who were not involved in killing V. At the very least, the jury should have been directed as to whether he had agreed to a plan and then whether the people in car B were outside the plan he had agreed to; whether purposes were concurrent or common.

(c) The Appellant did not in fact render any assistance: Driving off elsewhere / coming after the event are not acts of assistance. In essence, although the other car's

[125] Summing up, p.42 O
[126] Examination-in-chief of PW8, p.112A, 112I
[127] Defence closing, p.183 O; Exhibit P122, witness statement of triad expert, at para. 2.1-2.2
[128] See Note 14 above.

occupants may be fortified by knowledge of a second car, he is not akin to a getaway driver because he didn't in fact drive anyone away.

55. The broad use of "realization", "agreement", "common intention" and "participation" by the prosecution and the judge was too vague. In our submission, this leaves no case to answer. Conspiracy was not put as an alternative so the conviction should be quashed. Further or alternatively, the jury should have been directed to consider (a), (b) and (c) in paragraph 54 above and, as they were not, the verdict is unsafe and the Appellant should be retried.

56. In addition, in our submission, in answer to the question of law certified by this court, in light of *R v Jogee*[129]; *Ruddock v The Queen*[130], *Chan Wing-Siu*[131] and *Sze Kwan Lung v HKSAR*[132] should no longer be applied. Not only should parasitic accessorial liability ("joint enterprise") be abolished, but with its abolition, accessory liability should be restored to the long established principles as restated in *R v Jogee*[133]; *Ruddock v The Queen*[134]. D should not be held criminally responsible as a secondary party unless a properly directed jury conclude that D knew the existing facts necessary which constitute the offence which P goes on to commit and acts

[129] [2016] UKSC 8; [2016] 2 WLR 681
[130] [2016] UKPC 7
[131] [1985] AC 168
[132] (2004) 7 HKCFAR 475
[133] [2016] UKSC 8
[134] [2016] UKPC 7; [2016] 2 WLR 681 at [88] – [90] and [8] – [12], [14] – [16]

demonstrating an intention to assist or encourage can be inferred from the evidence in the proper way.

Dated the 25th Day of June, 2016

**Felicity Gerry QC**
36, Bedford Row
London
WC1R 4JH

**Margaret Ng**
10/F, New Henry House,
10 Ice House Street, Central,
Hong Kong

**Leonard Chow**
10/F, New Henry House,
10 Ice House Street, Central,
Hong Kong

Counsel for the Appellant