

HONG KONG / JUDGMENT

HKSAR v. ARIF AQIB AND ANOTHER

[2023] HKCA 1320

COURT

Court of Appeal

DECIDED

13 December 2023

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CACC 223/2020

[2023] HKCA 1320

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CRIMINAL APPEAL NO. 223 OF 2020

(ON APPEAL FROM HCCC NO. 56 OF 2019)

BETWEEN

HKSAR

Respondent

and

ARIF Aqib

MOHAMMAD Shahzeb

1st Appellant (D1)

2nd Appellant (D2)

Before: Hon Macrae VP, Zervos and Anthea Pang JJA in Court

Date of Hearing: 10 November 2023

Date of Judgment: 10 November 2023

Date of Reasons for Judgment: 13 December 2023

REASONS FOR JUDGMENT

Hon Anthea Pang JA (giving the Reasons for Judgment of the Court):

Introduction

The 1st and the 2nd appellants, to whom we shall refer by their trial designations as D1 and D2 respectively, were jointly charged with one count of murder (Count 1) and two counts of wounding with intent (Counts 2 and 3). On 3 December 2020, they were convicted after trial before Yau J (“the judge”) and a jury by a majority verdict of 6:1 on all counts. On 17 December 2020, D1 was sentenced to life imprisonment, whereas D2 was sentenced to 20 years’ imprisonment.

Both D1 and D2 applied for leave to appeal against conviction and leave was granted by a Single Judge on a ground relating to the judge’s answer to the jury’s question 1. The remaining grounds were all rejected and were not renewed before us.

After the hearing, we allowed the appeal and quashed the convictions of D1 and D2. The prosecution asked for them to be re-tried on all counts, which we ordered. We indicated that we would hand down the reasons for our decision in due course, which we now do.

The prosecution case

On 13 November 2017, at around 11 p.m., at Ngau Tau Kok Road Playground (“the playground”), while a group (“the victim group”) was gathering and drinking at the pavilion, several males armed with knives/choppers/metal poles attacked the victim group. As a result, Waqar Hamed (“the deceased”) was killed, whereas Singh Jaskarn Brar (“PW4”) and Mohammad Yasin (“PW5”) were seriously injured. The prosecution suggested that the reason for the attack was animosity between Tyson (“PW1”) in the victim group, and Sing Fai as well as KK in the attack group.

Although D1 and D2 did not take part in the actual assault, the prosecution case was that they were acting in a joint enterprise with the assailants, knowing that weapons would be used. The prosecution further contended that each of the appellants had a specific role in the joint enterprise: D1 was responsible for driving to the scene to conduct reconnaissance whereas D2 was responsible for guiding the assailants to the playground.

Evidence against D1

PW1 told the jury that he had an argument with Sing Fai and KK about a month before the attack. While he was drinking with the victim group at the pavilion that night, he saw three vehicles circling the playground at low speed shortly before the attack: namely, a grey Toyota 7-seater (“the 7-seater”), a white-colour 7-seater (“the white van”) driven by one Ansib Mahmood (“Ansib”), and a black/dark blue saloon car (“the black car”) driven by D1. When the deceased appeared, PW1 greeted him and when PW1 returned his attention to the vehicles, he saw the attackers rushing towards them.

PW4, the victim in count 2, said that about 10 minutes before the attack, he saw D1 driving the black car slowly past the playground twice, looking in their direction.

PW2 and PW6, two passers-by, did not give any specific evidence against D1 or D2 but they confirmed that there was the 7-seater and the armed assailants.

In D1’s 3rd and 4th video recorded interviews (“VRIs”), D1 said: on the evening in question, he, D2 and a friend Nomi attended a wedding party at the Pakistani Club where Sing Fai and KK showed him a photo of the victim group (PW1, PW3, PW4 and PW5), saying that they had to go to those people in D1’s car (the black car). D1 said he was only told to go along and he did not know why.

Before getting on board D1’s car, Sing Fai and KK talked to Ansib, the driver of the white van. With Sing Fai, KK, D2 and Nomi on board, D1 drove to Ngau Tau Kok. After D1 had driven for about 2 minutes, Sing Fai took over; Sing Fai and KK then started talking about “beating them”.

Upon arrival in Ngau Tau Kok, D1’s car circled the playground, and Sing Fai was keeping an eye on the victim group. Then, Sing Fai telephoned someone to hurry up and talked about how many people were still at the playground.

Later, the white van with 2 to 3 passengers on board and a 7-seater full of passengers wearing masks, gloves and caps also arrived. The passengers alighted from the 7-seater, holding knives and iron bars. D1 said that D2 then got off and signaled to the assailants to cross the road, pointing at the people in the playground. The men ran towards the victim group, and Sing Fai started moving the car. D1 denied knowing the attackers would come with cleavers/choppers and said he was scared. He told Sing Fai to stop the car. He then got off and ran away.

At trial, the prosecution asked the jury to reject D1’s assertion that he was initially not aware of the attack. It was also the prosecution’s position that D1 had driven the black car all the way to Ngau Tau Kok without any change of driver – that was why PW1 and PW4 were able to identify D1. The prosecution further said that D1 knew full well that their group was going there to carry out the armed attack.

Evidence against D2

Both PW1 and PW3 testified that they saw D2 near the scene shortly after the attack.

D2, after his arrest, was said to have uttered these words, which were repeated in a post-record, “Ah Ki (D1) drove me there, but I did not chop anyone”.

In his 3rd and 4th VRIs, D2 said that while they were at the Pakistani Club, KK told him that he would later need to bring some people to the “temple”. He asked but was not told why. KK then assaulted and threatened D2. After the dinner, D2 boarded D1’s car as instructed by D1. Nomi and KK were also on board and KK said they had to go to Ngau Tau Kok. KK again told D2 to take some people there, adding that those people would carry “Ka Chaan”, meaning weapons, and they were to “beat or hit” some people. D2 refused.

D2 was not sure whether D1’s car circled the area but when the white van arrived, Sing Fai, KK and others had a meeting in which D2 did not participate. Sing Fai made further threats to D2 to guide the people up to the “temple” or they would “cut him” first.

A 7-seater then arrived. D1 boarded the 7-seater and honked to signal the assailants and D2 to get on board. The people were carrying weapons. D2 was threatened again and was very scared. D1, who was then the driver of the 7-seater, told him that Sing Fai and KK were dangerous people and he had to do what they said, otherwise they would kill D2 and his family.

D2 said he had no choice. He then walked a little bit ahead. After telling the position of the “temple”, he returned and later went home.

The prosecution asked the jury to find, from D2’s admission, that he had guided the armed attackers to the playground but invited them to reject D2’s claim of duress.

The defence case

Both appellants elected to testify. In respect of their VRIs, both said that what was contained in their 3rd and 4th interviews was untrue and was the result of improper conduct by the police.

D1’s case was that he did not know about the attack. On 13 November 2017, after arriving at the Pakistani Club, Sing Fai and KK borrowed his car. Sometime after 10 p.m., D1 retrieved his car at Ting On Street, Ngau Tau Kok and drove back to the Pakistani Club to pick up Nomi and D2. After dropping Nomi off at Jordan, he received a telephone call from a friend, so he told D2 to get off at On Tak Road. He only heard about the attack the following morning. He denied being the driver of the black car.

D2’s case was that, after attending the wedding banquet, he accepted a lift home from D1, but he could not recall if Nomi was with them. During the journey, D1 talked on the telephone and told D2 that he had urgent things to do, so D2 got off at On Tak Road. When D2 walked past the playground, he heard screaming and noises, got scared and entered a shop nearby. D2 denied saying anything under caution and said he had never met Sing Fai or KK but had heard about them from his friends.

The summing-up

The judge's summing-up lasted four days and was entirely premised on the basis of joint enterprise, which was the stance of the prosecution. In the course of the summing-up, eight handouts were distributed: (1) murder, (2) joint enterprise, (3) the case against the defendants, (4) wounding with intent, (5) wounding under section 19 of the OAPO, (6) assault occasioning actual bodily harm, (7) identification evidence, and (8) duress.

The judge also directed that the essential matter in considering whether the appellants committed the offences by way of a joint enterprise was whether they had the knowledge or foresight that there would be an attack on the victim group with weapons, emphasizing that:

“So the only way you can be sure that anyone of the defendants are responsible for the acts or act which caused the deaths of Waqar and indeed, in the injuries of Jaskarn and Yasin, is on the basis of joint enterprise or joint responsibility.”

After the jury retired for deliberation, they asked a total of three questions, which the judge dealt with having heard submissions from the parties.

Since the present appeal centres on the judge's answer in relation to question 1 and not the other two, we consider it appropriate to leave aside questions 2 and 3, just repeating the text of question 1 and how the judge dealt with it:

“If D1 or D2 knows the attack (with weapons) prior departing the club, get on the car and arrived the scene. After getting off the car but without performing the role, e.g. pointing the park, guilty or not?” (question 1)

In reply to this question, the judge, after discussing it with counsel, told the jury:

“... So basically, the question is the two defendants allowed them to be carried on the car knowing that the people were going to attack other people with weapons but the two defendants did not do anything, would they be guilty? So that is the question. Now, there are different scenarios.

Now, firstly, you have to decide who was driving the car. ... who does the car belong? Now, say, if you are sure that the 1st defendant was driving the car, knowing that the people were going there to carry out attack on other people, of course, you would have no difficulty to find that he was assisting those people to take them there. So if, say, 1st defendant was not driving the car but if the car belongs to the 1st defendant, the 1st defendant allow other people to use his car to go to attack other people, again, it may be that you would have little difficulty to find that this was assistance given by the attackers.

Now, if the car did not belong to the 1st defendant or also did not belong to the 2nd defendant and both of them were not driving, the car was driven by somebody else, and D1 and D2 knowing that they were going to attack people, other people with weapons, allowed themselves to be carried on the car, then the matter will require very close scrutiny by you. You have to decide whether allowing oneself to be carried on a transport knowing that the people were going to perpetrate an attack to other people, amount to part of the joint enterprise. The concept here is encouragement.

Now, for joint enterprise. If somebody else encourages another person to do a crime, that will still make the person part of the joint enterprise. Say, for example, if you know that I am going to commit a crime, you tell me, 'Oh, go ahead, do it. That's very good decision. Go to do it.' Then, that may very well amount to encouragement.

... So the matter you have to consider is whether their presence in the vehicle is mere presence or amounted to encouragement. I have told you mere presence will not make the person part of the joint enterprise.

Now, for encouragement here, you have to be sure that D1 and D2, firstly, had the intention to encourage those people to carry out the attack. Say, if they just wanted to take a lift to go to that place, that is all, then that will not be encouragement. They must, first of all -- you must satisfy beyond reasonable doubt that when they were being carried on the transport, they had the intention to encourage those people to attack other people.

And the second question for you to consider is whether their presence in the car amounted to encouragement. So again, you have to be sure that their presence in the vehicle amounted to encouragement.

You must be sure of these two matters before you can find them part of the joint enterprise. Now, this is a very high standard of proof. So with such evidence, you have to be very, very careful in making your determination about whether this amount to encouragement according to the principles I have told you.

..." (emphasis added)

The ground of appeal

Mr Mitchell (for D1) and Mr Mughal (for D2) argued that the judge's directions in reply to question 1 were wrong, their complaint being that the judge:

should have reminded the jury that there was no direct evidence about the appellants' knowledge of weapons prior to their departure from the Pakistan Club;

should have focused the jury's minds on the joint enterprise inference argued by the prosecution;

should have reminded the jury that the appellants were not present with the assailants at the scene when the attack took place;

should not have conflated the direction on joint enterprise with that based on presence, assistance and encouragement which was wrong in law and which might well have confused the jury; and

had not, in the circumstances, afforded the appellants a fair trial for they were disadvantaged or prejudiced in not getting a chance to deal with the alternative basis of accessorial liability.

Parties' submissions

Both Mr Mitchell and Mr Mughal laid emphasis on the fact that there was no direct evidence with which the prosecution could prove that the appellants knew or foresaw the use of weapons prior to departing from the Pakistani Club. Further, there was no evidence as to whether any of those on board the black car being armed with weapons or going from the black car to join the attack at the pavilion. Counsel, therefore, submitted that not only was there no evidence as to how the appellants had “assisted” or “encouraged” the attack, but also that there was a lack of direction from the judge as to how the jury should approach this matter of encouragement, when the prosecution had all along run their case on the basis of joint enterprise with specific roles ascribed to the appellants and without relying on traditional accessorial liability.

In any event, it was contended that the appellants were prejudiced as defence counsel had not been given a chance to address this matter.

Mr William Siu, with him Mr Raymond Chan, submitted on behalf of the respondent that the doctrine of joint enterprise does not require all the co-adventurers to be present at the scene: *Sze Kwan Lung & Others v HKSAR*. They further suggested that the judge had, by his later directions, effectively narrowed down the ambit of joint enterprise to one of “encouragement”, which was more favourable to the appellants.

Discussion

In order to examine the appellants' complaint, we consider it necessary to repeat what the Court of Final Appeal held in *HKSAR v Chan Kam Shing*:

“33.

The doctrine of joint criminal enterprise is distinct from the traditional rules on accessorial liability, although there are situations where those rules may overlap. It is important to note – since consequences flow from this – that under the doctrine of joint criminal enterprise, liability is not derivative: it is not dependent on proving that one person (the principal) committed the main offence and that another (the accomplice) assisted or encouraged its commission. Liability is independently based on each defendant's participation in a joint criminal enterprise with the requisite mental state to constitute the offence relevant to the defendant in question.

34.

Sir Robin Cooke noted the distinction between the doctrines in *Chan Wing Siu v R*, contrasting accessory liability by ‘aiding, abetting, counselling, inciting or procuring’ the primary offence with complicity based on participating in a ‘common unlawful enterprise’ in which a crime is ‘foreseen as a possible incident of the common unlawful enterprise’.

35.

In *McAuliffe v The Queen*, the High Court of Australia explained that the doctrine of joint criminal enterprise provides an additional means of establishing complicity alongside the rules of accessory liability:

‘... the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission. Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose.’

36.

And in *Clayton v The Queen*, citing Professor AP Simester, the High Court highlighted the different factual bases upon which the respective doctrines rest:

‘... liability as an aider and abettor is grounded in the secondary party's contribution to another's crime. By contrast, in joint enterprise cases, the wrong lies in the mutual embarkation on a crime, and the participants are liable for what they foresee as the possible results of that venture. In some cases, the accused may be guilty both as an aider and abettor, and as participant in a joint criminal enterprise. That factual intersection of the two different sets of principles does not deny their separate utility.’ (emphasis added)

It is clear from the above extract that – firstly, the doctrine of joint enterprise is distinct from traditional accessory liability rules. For joint enterprise, liability is not derivative, whereas it is so for traditional accessory liability. Secondly, there may be situations where the two may overlap but “that factual intersection of the two different sets of principles does not deny their separate utility.”

In view of the way the judge gave the further directions, the critical questions in this appeal are: (1) what did the judge mean when he referred to encouragement and assistance – was it encouragement and assistance in the context of a joint enterprise – or was it a reference to accessory liability which is derivative in nature (“the first matter”); and (2) what was the message that was likely to have been imparted on the jury when the judge addressed them by using the terms he did (“the second matter”).

The first matter: the context

In respect of the first matter, it was not disputed by the respondent that the prosecution case at trial was run from beginning to end on the basis of a joint enterprise with specific roles ascribed to each appellant (D1 being the driver who conducted the reconnaissance and D2 being the one who showed the assailants the way to the pavilion).

It was also on this basis that the judge summed up the case, saying at the very beginning:

“...The case of the prosecution is that the two defendants although not taking part in the actual attack of the victim group, the 1st defendant was responsible for driving people to the scene to perpetrate the attack. And the 2nd defendant was responsible for guiding the attackers to the Ngau Tau Kok Road Playground and both of them were aware that the attackers were armed with knives and metal pipes and would use them in the attack.

Each defendant, therefore, played a role in causing the death of Waqar and the injuries of Jaskarn and Yasin and they were acting in joint enterprise with those people who actually attacked the group and those people who perpetrated the attack. That is to say they were all acting together for the purpose of attacking the victim group with knives and metal pipes and they are all responsible jointly. ...”

As to the evidence of the joint enterprise, the judge said:

“... The prosecution says that from the facts they have proven you can draw the inferences that the two defendants were members of such a joint enterprise. ...”

Throughout the summing-up, the judge repeatedly referred to the prosecution case of joint enterprise and provided the jury with a handout to specifically deal with the issue:

“This takes us to handout 3, if I may read it out. ‘To prove murder against either one of the two defendants the prosecution must make you sure: (1) the defendant was a member of a joint enterprise with one or more other people, including the attackers, to physically attack the victim group or any one of the group; ...’”

When summarising the defence position, the judge told the jury:

“... Mr Khosa and Mr Mughal say that the two defendants were not part of the joint enterprise and there is insufficient evidence to draw any inference to that effect. ...”

As recorded above, the judge later instructed the jury:

“So the only way you can be sure that anyone of the defendants are responsible for the acts or act which caused the deaths of Waqar and indeed, in the injuries of Jaskarn and Yasin, is on the basis of joint enterprise or joint responsibility.”

Hitherto, it was clear that the joint enterprise alleged by the prosecution was based on specific roles performed by the appellants and not participation in the enterprise by standing ready and offering general assistance or encouragement if need be. That was also the case which the defence were asked to meet.

However, things seemed to have taken a number of unexpected turns during the judge's discussion with counsel after receiving question 1 and when he eventually provided the further directions.

Firstly, perhaps prompted by the jury's question, Ms Crebbin, counsel on fiat, changed the stance of the prosecution from an allegation of specific roles in the joint enterprise to one of participation in the enterprise by way of general encouragement or assistance. This latter stance had never been advanced before the jury and the judge had made no mention of it in his summing-up:

“MS CREBBIN: My Lord, what this question seems to be saying is it before they get into the car and go off, they both know that there's going to be attack with weapons and they still get in the car. It depends on why they think they went into the car.

COURT: Unless you construe that as encouragement...

...

MS CREBBIN: Yes, I understand. That's what I'm saying. I think, my Lord, it's obviously is a jury decision but if they just think he's merely going along with the ride and have no intention of joining in, that's mere presence. If they believe he gets in the car and goes with them because he's part of it, effectively encouragement, that's why he knows, then that would be a different story. Depends on what basis -- it must be their decision on what basis they think he got in the car on the facts that they find, I mean, from the facts in that question.

COURT: I will consider that but my initial view...

MS CREBBIN: Yes.

COURT: ... is that just travelling on the car, even though they knew there was going to an attack with weapons, if they only travel in the car and doing nothing, my initial thinking is that it's difficult to amount to encouragement or taking any part.

MS CREBBIN: Well, my Lord, I -- if they think he's just going to sit there and watch the view, then fine, and they're entitled to find that. But if they think he's going along as part of the group, encouragement is not necessarily need.

...

COURT: No, even if I wanted to help and eventually I did not help, that's still not joint enterprise.

...

COURT: So in answer -- so when I answer the question, I'll emphasise if they did nothing else, just travelling on the car, arrived at the scene there, doing nothing else, I would say that if that is the situation, then it would be difficult to amount to part of the joint enterprise.

...

COURT: Because my point is -- I don't agree with you because my point is that legally speaking even knowing full well they are going to attack people, if you allow yourself to be carried on a transport, I am of the view that, legally speaking, it cannot amount to encouragement.

...

COURT: Yes, so you are saying that if the person has the intention to encourage those people and he consider the presence of himself amount to encouragement, then it will make the person part of the joint enterprise. Are you saying this?

MS CREBBIN: Yes, that's the only point I'm making my Lord.

COURT: All right.

...

MS CREBBIN: I'm only asking, my Lord. I'm submitting that it should be explained to the jury that clearly that mere presence or just getting in for a ride or not knowing why he got in, he cannot be found guilty. But if they are sure or on all the evidence that he was there and had the intention to join this enterprise, knowing what was going to happen, and he was there to encourage or assist in whatever way, then he can on -- in law be found guilty. That's the only point that I'm trying to make, my Lord. And it -- but it's very much a jury question.

COURT: All right.” (emphasis added)

Secondly, following the above suggestion by Ms Crebbin and probably because such a position had never been the prosecution's basis of joint enterprise at trial, defence counsel seemed to have taken it as the prosecution trying to run their case on the alternative basis of traditional accessorial liability:

“MR MUGHAL: ... from that expressed by Ms Crebbin. And we are stuck, my Lord, in question one with the jury question. We cannot go outside the boundary of the question. And implicit in the question, my Lord, must be the consideration according to the prosecution that D2's role is to point out or guide the attackers towards the pavilion. And obviously, my Lord, in relation to that, implicit must be the understanding that they have seen the CCTV which contradicts this role. So D2 is in the vicinity but he is not seen as doing anything.

So in our submission, my Lord, it's a case of mere presence alone without further ado. And mere presence, my Lord, alone is not sufficient to find the basis for a guilty consideration. And it's not the case, my Lord.

The prosecution now is extending its boundary by saying that D2 must have encouraged or counselled or assisted others. That is not the case, my Lord. It's a case he got on in the car, even if he knew, my Lord, that there was an imminent attack, he has not performed his role, my Lord. And that's what I think the question is getting at in question No.1.

So my Lord, in my submission, I would say that your Lordship's observation, in my submission, is the correct one, and the jury should be told that mere presence without anything...

...

MR KHOSA: My Lord, I support and adopt the submissions of Mr Mughal. I feel that Ms Crebbin may be right that in cases where the presence is for encouraging or assisting, then of course you can reach the conclusion. But then, in this present case, where the attack happened, D1 and D2 were not there at all. So in those other typical cases, what happens is three guys go up and beat up a guy and then the three others stand behind, then the inference could be, in the right case, that they were there to support in case it's required.

But I feel that in this case, to now introduce this new concept of encouragement and assisting to the jury would only confuse them, whereas all along it was quite straightforward. And I think the summing-up or the directions you've given them as to, quite simply, whether or not they had joined the enterprise when they boarded the car. I think if they are -- if explanations are made again along those lines just to remind them that mere presence is not enough, and mere presence means this. But, however, if by their action or words, they go beyond mere presence and you are sure from evidence that either by their actions or words, they have joined the enterprise, then obviously, they are guilty. Otherwise, just knowing about the attack and the knowing that -- even if they know there will be weapons, but if they are not part of the enterprise, then they cannot be found guilty.

I think if we confine ourselves to what was originally summed up, probably it will not cause confusion. Those are my submissions on Q1." (emphasis added)

In our view, and as is evident from the judge's answer to question 1, the next unfortunate turn was that when the judge gave his further directions, he seemed to conflate encouragement and assistance in the context of a joint enterprise with encouragement and assistance in the context of traditional accessory liability for he said, and we quote again:

"... So the matter you have to consider is whether their presence in the vehicle is mere presence or amounted to encouragement. I have told you mere presence will not make the person part of the joint enterprise.

Now, for encouragement here, you have to be sure that D1 and D2, firstly, had the intention to encourage those people to carry out the attack. Say, if they just wanted to take a lift to go to that place, that is all, then that will not be encouragement. They must, first of all -- you must satisfy beyond reasonable doubt that when they were being carried on the transport, they had the intention to encourage those people to attack other people.

And the second question for you to consider is whether their presence in the car amounted to encouragement. So again, you have to be sure that their presence in the vehicle amounted to encouragement.

You must be sure of these two matters before you can find them part of the joint enterprise. Now, this is a very high standard of proof. So with such evidence, you have to be very, very careful in making your determination about whether this amount to encouragement according to the principles I have told you.”

The use of the phrases “intention to encourage” and “whether their presence in the car amounted to encouragement” would seem to have been adopted from Specimen Directions 2020 page 101-4 which deals with “aiding and abetting” in the context of traditional accessorial liability; and the question is: was it appropriate in this case for the judge to shift from the prosecution case of a joint enterprise based on specific roles to one of general encouragement when answering question 1.

Ribeiro PJ made the following observation on the facts of Chan Kam Shing:

“100.

However, the appellant’s appeal must, on any view, be dismissed. The principles of accessorial and joint criminal enterprise liability provide overlapping bases for establishing his guilt. Obeying orders from his triad boss, he and his fellows armed themselves with lethal weapons with the intention of ‘chopping’ – that is, at least inflicting grievous bodily harm on – their rivals. It was a basic joint criminal enterprise case and it mattered not that other members of the gang were the actual perpetrators of the fatal attack. By arming himself and participating in the predatory hunt for victims, he also acted as an accessory, encouraging the other members of the gang, including the eventual perpetrators, to commit the intended offence, giving them ‘the comfort and spur of knowing that [they were] not on [their] own, but had the support of the [appellant] and the reasonable expectation that [he and other members of the gang] would come to his aid if he needed it.’” (emphasis added)

While there was an overlap of the joint enterprise and accessorial liability doctrines in Chan Kam Shing, the prosecution case here, up to the time when Ms Crebbin delivered her closing speech, had never been run on the basis of the appellants’ participation in a joint enterprise through general encouragement and assistance. The case was, instead, argued on the basis of specific roles performed by the appellants pursuant to the joint criminal enterprise. It was also not contended before the jury that the appellants were aiders and abettors in the sense of traditional accessorial liability. Viewed in this light, there did not appear to have been any overlap between

the two doctrines in respect of the case prosecuted before the jury.

In the circumstances, we consider that the judge did err in answering question 1 with the formulation quoted above. That formulation or the emphasis on “intention to encourage” was not the correct focus of the prosecution case: “... The essence of the joint criminal enterprise principle involves the accomplice’s culpability for the criminal act of another person, of a co-adventurer – not his own act – falling within the agreed scope of the joint enterprise or foreseen as a possible incident thereof....”. As encapsulated above, in a joint enterprise situation, an act carried out by any party pursuant to the enterprise would be taken as the act done by the other parties.

With this in mind and returning to the jury’s question, we would suggest that a simple answer to question 1 may well have been to tell the jury that there was no direct evidence as to the appellants’ knowledge of the armed attack prior to their departure from the club. And if the jury were sure, from all the evidence adduced, that the appellants had that knowledge and had the requisite intent, then the prosecution would have made out their case of joint enterprise, even if the jury were not sure that the appellants had performed the roles ascribed to them by the prosecution. Plainly, as parties to the joint enterprise (if the jury were sure of this), the appellants were responsible for the acts of the assailants acting in pursuit of their common purpose and there was no need to prove separately that the appellants had themselves done anything after alighting from the vehicle. Equally, there was no need to prove separately that the appellants had in fact provided the assailants with any particular assistance or encouragement. The judge’s references to encouragement and assistance, especially couched in terms of traditional accessory liability, were, with respect, unnecessary and inappropriate.

The second matter: the message conveyed

To address this, we should repeat question 1:

“If D1 or D2 knows the attack (with weapons) prior departing the club, get on the car and arrived the scene. After getting off the car but without performing the role, e.g. pointing the park, guilty or not?”(emphasis added)

It is plain from the words used that the jury were putting the question with an important assumption – “if” they were sure that the appellants knew of the armed attack before boarding the vehicle. Also of significance was the reference to “without performing the role, e.g. pointing the park” for it illustrated that the jury were considering the case based on the prosecution stance, as they would and should do, that each appellant had a specific role to play in the joint enterprise.

Unfortunately, this important assumption and the significance of “mutual embarkation on a crime” seemed to have been missed by the judge. Instead of focusing the jury’s minds on the sufficiency of evidence on the matter of inference regarding the alleged joint enterprise, the jury were told to consider whether, knowing that there would be an attack, the appellants’ presence in the vehicle “amounted to encouragement” and whether they “had the intention to encourage those people to carry out the attack”

We consider, in the circumstances, there was a real danger that the jury might have regarded themselves as entitled to convict simply because they were sure that the appellants’ presence in the vehicle was tantamount to encouragement and that the appellants had the intention to encourage the assailants.

This approach, if based on the traditional accessorial liability principles, would beg the question as to how the appellants, who were on board a vehicle different from that of the assailants and who were not present at the pavilion when the attack took place, could be said to have encouraged the commission of the offences – or at the very least, the jury had not been told how to tackle this suggestion.

If, on the other hand, the jury had approached the matter based on the joint enterprise principles, then they had not been reminded that the essence of a joint enterprise was “acting in concert” or “joint embarkation on a crime”; and if they could not be sure that the appellants were parties to that enterprise, it might not help the prosecution even if they were sure that their presence on the vehicle was a form of encouragement.

We are also concerned that the defence had not been given any opportunity to deal with this argument on encouragement before the jury were so directed. Given that the prosecution case had all along been run on the basis of a joint enterprise with specific roles ascribed to the appellants, the change from that basis to one premised on the appellants’ presence on the vehicle as amounting to encouragement would appear to be a significant shift and it would seem unjust not to allow the defence a chance to deal with the matter.

Conclusion

For the reasons given, and since the dangers and errors identified above would apply to both the murder and wounding counts, we allowed the appellants’ appeals and quashed all their convictions.

In respect of the respondent’s application for a re-trial, to which counsel for both appellants did not raise any objection, we considered that it was in the interests of justice to have the appellants re-tried on all the original counts on a fresh indictment and, we so ordered.

(Andrew Macrae)

(Kevin Zervos)

(Anthea Pang)

Vice President

Justice of Appeal

Justice of Appeal

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