of the applicant were in the nature of an 'unlawful act' with the result not desired nor intended with the consequence of a verdict of manslaughter being open to the jury. I shall come back to this latter aspect in a moment. . . .

I turn now to the directions on intent. At the commencement of the summing up, having given general and proper directions on the burden and standard of proof, the trial judge said this to the jury:

> Now, members of the jury, the accused, as I have said, faces only the one charge and that is one of murder. In this case, the Crown have to prove the unlawful killing of a woman named Law Shut-bing with the intent on the part of the killer either to kill her or to cause her grievous bodily harm.

No possible exception could be taken to that. He repeated this direction towards the close of his summing up posing a question directly to the jury:

> Has it been proved, members of the jury, that in killing the deceased, the accused at the time of doing so had formed an intention to kill her or to cause her grievous bodily harm?

He advised them to consider the manner, as depicted on the video reconstruction, in which the incident occurred because –

> . . . in essentially deciding where intention lies, you will be looking at the manner in which the deceased met her death.

Then, in relation to intoxication – for the accused said he had been drinking –

> Did he intend to kill her or cause her grievous bodily harm, then this part of the case is proved against him. A drunken intent, members of the jury, is still an intent.

And, stressing to the jury that it was for the Crown to prove the necessary intent, he went on to say:

> If you are not sure that he had formed, when he killed this woman, he had formed an intent to either kill her or cause her grievous bodily harm, if you entertain reasonable doubts about that, then you would find him, members of the jury, not guilty of murder but guilty of manslaughter – guilty of manslaughter because he had not formed the necessary intent for him to be guilty of murder.

He concluded his summing up by dealing with the matter of provocation.

No complaint can be made of any of those directions, they were proper ones, and, if anything, over generous to the applicant. It is however a passage which appeared at p 28, in the middle of that which was otherwise a very careful and conscientious summing up, which gives me cause for concern.

The trial judge indicated to the jury that the initial use of the knife, the holding of the blade at her neck, coupled with his description of her moving that neck, did not in his view indicate that, at that particular point, there was any indication that the applicant had formed an intention to kill or cause her grievous bodily harm. He then suggested to them that it was the second sequence of events which 'may possibly indicate intention to you. Again it is a matter for you.' Then, a little further down at that page, he said this:

> Now, members of the jury, in carrying out that act, [the second sequence] what do you believe his intention was? Was the *probable consequence of* his action one of causing her grievous bodily harm or even killing her? If it was, if that was his intent and you are satisfied of that, then the Crown has proved the necessary intent to have the defendant convicted of murder. (Emphasis supplied.)

This was an unfortunate direction. It ignored the advice given in *R v Moloney* [1985] AC 905. . . .

Moloney, explained in *R v Hancock and Shankland* [1986] AC 455 and *R v Nedrick* [1986] 1 WLR 1025 was, as were the others, a case of an indirect act. Here there was a direct attack with a weapon, whether or not in the first instance movement of her neck by the girl may have resulted in the knife's penetrating her. The direction was quite unnecessary. But, once a direction of this nature is given, then it must be given properly. This was not. What concerns me is that in the perfectly proper directions both earlier and later in the summing up, which emphasised the word 'intent', that word may have become coloured in the minds of the jury by the passage I have just cited. If they believed that the applicant thought that the probable consequence of his action would be to cause the girl grievous bodily harm or even killing her then, they were told, in effect, that that was his intent. This is wrong.

While the expression 'natural consequences' was used in *Moloney* this, it was made clear, meant that the consequences must be 'overwhelming'. In *Hancock and Shankland* the expression 'high probability' was used which became, in *Nedrick* 'virtually certain' – and this is now the correct phrase and emphasis if a direction on foresight is to be given at all. A jury should be told that a result is intended when it is the doer's purpose and they should be directed, if necessary, that they may infer that a result is intended, though it is not desired, when the result is a virtually certain consequence of the act and the doer knows that it is a virtually certain consequence (vide Smith and Hogan *Criminal Law* 6th Ed p 56).

While the evidence as disclosed by the video tape, the statements, the pawning of the watch and the bloodstains was very strong, nevertheless, the judge quite properly left manslaughter to them and left it solely on the basis as to whether the applicant had formed this specific intent required for murder. I cannot say, in the light of the passage to which I have drawn attention, that the jury would necessarily, although it was open to them to do so, have found the requisite intent. Intent in this case was all. A material misdirection of this nature does not, in my judgment, permit the conviction for murder to stand. Mr Wong has asked that, if we be with him on this, we substitute a verdict of manslaughter. Should we be with him on any other of his grounds, which for myself I am not, then there should be an acquittal.

That I find this not to be a matter of an unlawful and dangerous act in the sense of *Moloney* must by now be clear and that part of Mr Wong's submission causes me no concern. Accident, or indeed manslaughter, on that basis was not open to the jury.

I would therefore, with reluctance, allow this appeal and substitute for the verdict of murder one of manslaughter.

Bewley J: I am reluctantly obliged to dissent from the judgment of my Lord the Vice-president.

disregard it. The only matter which implicated the appellant was the holding by him of a travel document of one of the robbers, Hui. It was the case for the prosecution that Hui thought that, to assist in getting away after the completion of the Landmark robbery, it was necessary for him to be able to gain access to his travel documents without the necessity of his returning to his residence. He wanted to be able, should it become imperative, to leave Hong Kong. He wanted a reliable contact. This was the appellant and it was the Crown's case that the actions of the appellant were intentional encouragement of Hui in his commission of the robbery.

The appellant was arrested on the evening of 12 August after the robbery had taken place and when he returned to his flat where some of the stolen property was recovered. At 2:15 am on 13 August, the appellant made a cautioned statement. He was told that he had been arrested in connection with the case of the armed robbery at the Dickson Watch and Jewellery Company to which he replied he had absolutely nothing to do with the case and it was because of that he tried to go away at the time of his arrest.

He was then asked a series of questions. Because he had mentioned that 'this case' was probably done by Fung, Hui, a person called 'Ah Chi' and another, he was asked how he knew this. He repeated that he did not know about 'this case' but said he only knew that they would go to Hong Kong Island to commit a robbery.

He then described in detail how that knowledge came to him. On the Friday before the robbery, Fung Ah Chi and another came to his home and they went in to have a talk with Hui. The three who arrived had been carrying a travelling bag. A few minutes later, the four left the appellant's flat carrying another, green, travelling bag. At about 11:00 am the four returned. Having gone into one of the other rooms there, they then returned and had a chat in the sitting room. The appellant heard the man Hui say that Hong Kong Island roads were very congested and they had come back without 'achieving success in anything'. Three of the men then left leaving Hui remaining. After midnight on the Monday, Hui received a telephone call and, upon receipt of this, he telephoned Ah Chi and told Ah Chi to 'start' a car the following morning saying, 'Let's go do it again tomorrow morning'. Hui returned to his sleep.

The appellant woke up at about mid-day on 12 August, a Tuesday. Some of the men had left but Hui while the appellant was, as he described himself, 'still sleeping', tossed two Hong Kong re-entry permits and two China entry permits onto his bed. Hui said in so doing 'I am go snatching today, bring them out for me'. To which the appellant said 'Alright' and then fell asleep again. When he left the flat he brought with him those documents. He did not see Hui again until upon his return to the flat late on the 12th, he found the police there and Hui under arrest.

. . . In another statement made at 9:20 pm on 13 August when asked 'Why Ah Fai (Hui) wanted you to "bring out his and Ah Wing's re-entry permits and China entry permits?" ', the appellant answered:

> Because at that time I heard Ah Fai say he went snatching that day and he asked me to bring his re-entry permit and China entry permit out. The reason is that in case anything, the matter happened, then he could 'fut' [which we are told means page] me and ask me to bring them their documents for them to go back to their native place or go to Macau to lie low.

He said that he brought out the documents for Hui because he thought that it did not matter much and after all they were friends. In the gambling den, he had placed the documents in a woman's bag and retrieved them from there before he left.

The appellant had received a telephone call at 3 o'clock in the course of the afternoon and confirmed that he did have the documents with him. He was told to bring the documents back to the flat later that evening which is what he in fact did.

The appellant gave evidence. Its main purport was an attempt to water down the effect of the contents of the cautioned statement and to attack that statement as first, not being properly recorded and secondly, that the words attributed to him were not used by him.

Hui, who gave evidence for the prosecution, said that he had put his own travel documents, but not those of a person Ah Wing or Ip – the co-accused on the second count, into a paper bag and sealed it which bag he then put in a drawer below the appellant's bed. He went on that he woke the appellant and told him that if the appellant had occasion to go out he was to take the bag from the drawer with him and that he would page the appellant what was in the bag nor did he tell him why he wanted him to take the bag out with him. He admitted he did commit the robbery and said that he had telephoned the appellant afterwards asking him if he had the bag. He denied telling the appellant that he was going to rob.

It is contended that a passage in the summing up at p 4 K-R and together with two subsidiary passages, one at p 5 I-K and the other at p 7 O-Q were wrong in law. At p 4, the judge said this:

> For the purpose of this case it is sufficient to say that if you are satisfied beyond all reasonable doubt that D2 intentionally encouraged Hui Yick-fai to commit the robbery, then he is guilty of that offence even though he was not at the scene.
>
> 'Encouraged' in this context does not necessarily mean that there must be some act on the part of D2 amounting to an instigating, urging or cajoling of Hui Yick-fai to commit the robbery as Mr Kenny seemed to be suggesting yesterday. If you find that D2 played a role which Hui Yick-fai regarded as important for the successful outcome of the Landmark robbery and that D2 acted as he did for the purpose of helping to ensure that successful outcome, then he is by law guilty of the same offence as Hui.

At p 5, the judge said:

> With the aid of a reliable contact holding those documents and able to make them available to him at short notice without any need to return to his residence he could leave Hong Kong and avoid detection.

At p 7, he said:

> If the evidence you accept makes you feel sure that D2 did encourage Hui to commit the offence in the manner contended by the prosecution then your true verdict is Guilty. If it falls short of doing that then it is Not Guilty.

The emphasis placed by Mr Kenny, who appeared for the appellant both here and below, is on the use by the trial judge of the word 'encourage' and on the definition of it which he gave in the first passage cited above. He submits that encouragement here was not sufficient to constitute the

R v Luk Siu-keung
Court of Appeal
McMullin VP, Li JA and Power J
[1984] HKLR 333

Participation – Secondary party convicted – Principal acquitted

The appellant was convicted of murder and robbery along with two others, one of whom was present at the scene of the crimes and one who was not. The appellant's main ground of appeal was centred on the fact that the appellant's accomplice, the person who actually inflicted the wound which caused the death, was merely convicted of manslaughter.

HELD – appeal dismissed. The conviction was clearly sustainable on the ground that the jury were satisfied that the appellant knew that his companion was armed and that the use of a weapon might result in grave bodily injury.

Li JA: This is an appeal by way of His Excellency's reference pursuant to the provisions of s 83(1)(a) of the Criminal Procedure Ordinance.

The appellant was convicted of murder and robbery. On 22 January 1981, a robbery occurred in the course of which one Mr Ho Siu-kei was killed. There was evidence that two robbers took part in that robbery. The appellant was alleged to be one of the robbers.

It was a planned robbery instigated by a third person who gave all the details and information about the place to be robbed. The third person never joined the actual robbery. One of the two robbers by the name of Ho Kin-on stabbed Mr Ho Siu-kei in the course of the robbery.

Medical evidence was that Mr Ho Siu-kei died of one stab wound, a deep wound, which penetrated his lung and heart. The evidence as to how that stab wound was caused was somewhat hazy. According to the government doctor who did the autopsy, it could have been caused in any one of a thousand ways which may well seem a gross exaggeration.

The killer Ho Kin-on and the person who instigated the robbery were caught within days of that robbery, Ho being caught on the 27 January 1981 and the other person shortly thereafter. In the meanwhile, the appellant left Hong Kong on 29 January 1981, two days after Ho Kin-on was caught, and went to stay in China mainland for a whole year. Efforts made to locate him in his place of work and in his home proved fruitless.

In the event, the two persons were caught, Ho Kin-on and the other person were indicted for murder, Ho was eventually acquitted of murder but convicted of manslaughter and robbery. The other person was convicted of robbery only in the latter part of 1981. On or about 31 January 1982, the appellant returned to Hong Kong. He learned that the police were looking for him. After consultation with members of his family, he presented himself on 10 February 1982 accompanied by his solicitor, mother and brother to the Waterfront Police Station.

[Li JA then went on to discuss the grounds of appeal. The only ground relevant to secondary party liability was the following:]

> . . . the last ground is that the murder verdict should be set aside on the ground that it is unsafe and unsatisfactory. The reason in support is that the judge took the view that the evidence fell short of establishing beyond reasonable doubt that the offence was one of murder. Secondly, the accomplice, the person who actually inflicted the wound, was merely convicted of manslaughter.
>
> In a previous trial the person who did the stabbing was convicted of manslaughter. The appellant who was merely an aider and abettor was convicted of murder. It is contended that this is unjust to the appellant. We are referred to the case of *Quick and Paddison* [1973] 57 Crim App R 722. At p 736 Lord Justice Lawton said:
>
> > If Quick's conviction is quashed, what happens to Paddison's, having regard to the fact that he was said to have aided and abetted Quick? The quashing of Quick's conviction amounts in law to an acquittal. Can Paddison be deemed to have aided and abetted someone who has been adjudged 'Not Guilty'? As a general proposition of law, the answer to this question is a qualified 'yes'. The facts of each case, however, have to be considered and in particular what is alleged to have been done by way of aiding and abetting. In this case the allegation against Paddison was encouragement by conduct. The case against him was that he knew what Quick was going to do and encouraged him to do it by getting the other patients out of the way. If Quick acted without conscious volition, it is most unlikely that Paddison would have known what he (Quick) intended to do. The quashing of Quick's conviction in our judgment introduces an element of unreality into the verdict which too must be quashed as being unsatisfactory.

In the present case there was no co-accused who pleaded that of automatism. We do not know what defence was run by Ho Kin-on. There is no way to find out the reason for the verdict returned by another jury who sat in the trial of Ho Kin-on. Suffice it to say that the judge had put every possibility to the jury in this particular trial. They came to the conclusion, having regard to the evidence as a whole, that the appellant was guilty of murder. The verdict is clearly sustainable on the ground that the jury were satisfied that this accused knew that his companion was armed and that the use of the knife might result in grave bodily injury.

It must be mentioned in all fairness, that learned counsel for the Crown in this appeal readily conceded that it was an anomaly that the principal offender should be convicted of manslaughter and this aider and abettor convicted of murder. He indicated that he would not say anything against our substituting a verdict of manslaughter. With due respect to this compassionate view, we can see no reason to interfere with the jury's verdict. Had that been the unqualified feeling of the Attorney General, he should not have indicted the appellant for murder. At the time of the trial of this appellant, the verdict against Ho Kin-on was well known to him. He nonetheless chose to proceed upon the murder charge. The verdict which was returned was no doubt the verdict he expected.

It is not the duty of a judge to usurp the function of the jury, still less is it the duty of the Court of Appeal. Having regard to the circumstances, we will adopt a qualified 'yes' as put by Lawton JJ. If an executive act is felt to have gone amiss an executive act can provide the remedy. It is always open to the governor-in-council to exercise his prerogative of mercy

R v Wakely we went so far as to say: 'The suggestion that a mere foresight of the real or definite possibility of violence being used is sufficient to constitute the mental element of murder is prima facie, academically speaking at least, not sufficient.'

On reconsideration, that passage is not in accordance with the principles set out by Sir Robin Cooke which we were endeavouring to follow and was wrong, or at least misleading. If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder. That being the case it seems to us that the judge was correct when he directed the jury in the terms of those passages of the summing up which we have already quoted. It may be that a simple direction on the basis of *R v Anderson* [1966] 2 QB 110 would, in the circumstances of this case, have been enough, but the direction given was sufficiently clear and the outcome scarcely surprising. That ground of appeal, which was in the forefront of the arguments of each of the appellants, therefore fails.

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

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

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

Johns v The Queen is a leading case on the law relating to accessories. It was specifically relied on by Sir Robin Cooke in *Chan Wing-siu v The Queen* [1985] AC 168, in which the same central issue fell to be considered. It is, however, plain that, in the passage upon which the defendant relies, attention was being concentrated on those cases in which the question is whether the act of the principal falls within the common purpose of the parties. This appears from the immediately succeeding sentence in the judgment

of Mason, Murphy and Wilson JJ, at p 131 (not quoted in the written case for the defendant), which reads:

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

In such a case the contemplation of both parties will be relevant. But, as appears from Sir Robin Cooke's judgment in *Chan Wing-siu v The Queen* (and as was recognised by Lord Lane CJ in *R v Hyde* [1991] 1 QB 134, departing in this respect from some of the observations contained in the earlier judgments in *R v Slack* [1989] QB 775 and *R v Wakely* [1990] Crim LR 119), the secondary party may be liable simply by reason of his participating in the joint enterprise with foresight that the principal may commit the relevant act as part of the joint enterprise. We therefore find Sir Robin Cooke focusing upon the contemplation of the secondary party alone, as in the following passage, at p 178:

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

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

Let it be supposed that two men embark on a robbery. One (the principal) to the knowledge of the other (the accessory) is carrying a gun. The accessory contemplates that the principal may use the gun to wound or kill if resistance is met with or the pair are detected at their work but, although the gun is loaded, the only use initially contemplated by the principal is for the purpose of causing fear, by pointing the gun or even by discharging it, with a view to overcoming resistance or evading capture. Then at the scene the principal changes his mind, perhaps through panic or because to fire for effect offers the only chance of escape, and shoots the victim dead. His act is clearly an incident of the unlawful enterprise and the possibility of its occurrence as such was contemplated by the accomplice. According to what was said in *Chan Wing-siu v The Queen* [1985] AC 168, the accomplice, as well as the principal, would be guilty of murder. Their Lordships have to say that, having regard to what is said in *Chan Wing-siu v The Queen* and the cases which applied it, they do not consider the prior contemplation of the principal to be a necessary additional ingredient. In their opinion, the judge had no duty to direct the jury to that effect in paras 10 and 13 of the relevant passage in his summing up.

In none of the cases reviewed, including the case under appeal, was the prior contemplation of the principal a live issue. But it must be recognised that to hold the accomplice to be guilty in the example their Lordships have posed is consistent with *Chan Wing-siu v The Queen* and *R v Hyde* [1991] 1 QB 134.

through the third appellant completed the certificate of completion. It was on the basis that *Chan Wing-on*'s case was binding on him that the learned magistrate found that the architect had no case to answer.

Before Jones could be convicted it had to be shown that it used defective concrete in the building works and its 'brain' had knowledge of that use and in respect of the other charges that the deviations specified had occurred and that it had knowledge of them – that is to say that its 'brain' had that knowledge.

Before the first (or third) appellant could be found guilty it had to be shown either that he had incorporated the defective concrete in the building and had knowledge of the fact that it was defective and in the case of the deviation summonses that he caused and had knowledge of the deviations *or* that Jones did so with the requisite knowledge and he failed to discharge the onus imposed by s 40(6). In the case of the first defendant it was, of course, most relevant from the point of view of punishment to decide if his guilt arose from his personal responsibility or by reason of s 40(6).

I would agree with the learned magistrate that knowledge can be imputed to the appellants by showing that they actually knew of the defects or deviations or having good reason to know turned a blind eye to them. The learned magistrate may have been over-favourable to the appellants when he said:

> Before the principle of 'constructive knowledge' or connivance can be applied to the defendants it is necessary to show more than mere negligence or laziness or optimism on the part of the contractors. One must be satisfied that there was some reason some factual circumstances known to them which were sufficient to make them appreciate that something wrongful was going on and yet they still 'close their mind to it' for fear of what they would find – 'would' not 'might' find.

In think it would be sufficient to show insofar as each of the first, second and third appellants is concerned that he was guilty of a grave dereliction of duty in relation to defects or deviations – a dereliction going beyond mere negligence or laziness or optimism. Be that as it may I am content to adopt for the purpose of this appeal the criterion of constructive knowledge expressed by the learned magistrate in the terms I have quoted in the absence of any notice by the Crown of intention to support the magistrate's findings on other grounds but in applying the criterion one must bear in mind the statutory duty imposed on the fourth appellant to give constant supervision to building works of which it was the registered contractor. Section 9(3) of the Ordinance then in force reads:

> A registered contractor so appointed (ie by the building owner under section 9(1)) shall –
>
> (*a*) give continuous supervision to the carrying out of the building works.

In this section 'continuous supervision' is clearly intended to mean exactly that. Every material operation on the site must be supervised. The purpose for which continuous supervision is required is laid down in reg 14 of the Building (Adminstration) Regulations and is to ensure that they (the building works) are carried out in accordance with the plans and Ordinance. This obligation was recognised by the first, second and third appellants and by Mr Horroyd, a senior structural engineer with the Public Works Department

for many years, who said when giving evidence of the system usual in Hong Kong:

> Registered contractor has on site a practically qualified man – site supervisor.

and again

> Foreman on site is directly responsible for quantity and quality control – mixing of concrete, correct dimensions, proper placing of concrete, delivery of materials, etc.

and later

> Foreman . . . in direct control is foreman employed by contractor – responsible for what is produced on site – directly responsible for mixing of concrete. Anyone working on site would be under direct supervision of site foreman. Site foreman has to be satisfied that whatever is done according to specifications. . . .

He was, of course, speaking here as to the recognised course of business usually followed in Hong Kong. He appreciated that others besides the registered contractor had responsibilities. At the relevant time, the second appellant had been in the building trade for over 10 years and had 'acquired a lot of knowledge as to what goes on on building sites'. His view of his duties was that he had 'to continually supervise' to see that the work was carried out in accordance with his instructions. He had 'to supervise not only Jones' employees but also sub-contractors and their workers. A foreman never leaves it to sub-contractors to supervise our part of the work. I have to supervise work and architect has to supervise it too'. 'I was responsible to check work even when the architect was there.' Clearly he recognised that these duties were imposed on him by reason of his employment as site foreman with Jones the registered contractor and that he in turn was at the relevant time answerable for the discharge of his duties to the first appellant as director of Jones 'Chung Yat is in charge of me – can't leave everything to me. That is why (he) visited site every day or other day'. The first appellant likewise recognised that 'continuous supervision' meant just that. 'By the word "continuous" I mean I would have to stand there all day and a man in my position cannot do that.' He did not admit that he personally had to give continuous supervision but did agree that it had to be given by Jones

> Duty as registered contractor is to exercise continuous supervision. I do not agree that on this site there was not continuous supervision. *For company* I had left supervision to site foreman (my emphasis). Company relied on its site foreman. Agree foreman was there for that but there are many works that are not within his duty and fall into my duty, eg to arrange subcontractors in advance and to order materials and to ensure safety measures when workers working on site.

and later

> Leung Hoi-wing was right in saying that it was my job to check his job. That was job given to me by company on this site.

Time and again he says that he left various matters – various parts of the duty continually to supervise – to the second appellant. But it is abundantly clear that he and, through him, Jones recognise the existence of that duty resting on Jones. Breach of that duty is not an offence but the existence of

In the commentary to that case, the editors say as follows:

> Since this was a charge under s 18 of the Offences Against The Person Act requiring an intent to cause grievous bodily harm, it was, on any view, a crime requiring a 'specific intent' and so the jury were therefore required to take into account the evidence of drunkenness in deciding whether P had such an intent.
>
> In *Sheehan*, the court did not find it necessary to express a concluded opinion on the argument that the question was not whether the defendant had the capacity to form the intention but whether he in fact formed the intention. The present case, however, does decide this important point and is greatly to be welcomed.

In *Sheehan* [1975] 2 All ER 960 which was a murder case, the court substituted a finding of manslaughter for the jury's verdict of murder. In that case, again, the trial judge had directed the jury in terms of the capacity of the defendant to form the intent in reference to his condition of drunkenness. At p 964, Lord Justice Geoffrey Lane, giving the judgment of the court, says:

> In the light of these changes in the law since 1920 we think that great care must be exercised when citing the opinion in *Beard's* case at the present time. Indeed, in cases where drunkenness and its possible effect on the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.
>
> Secondly, and subject to this the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent.

It may be accepted that the form of direction there indicated is a proper form of direction. But in none of these three cases is anything said by the appellate court to indicate that a reference to the capacity to form the intention must be improper in circumstances such as those with which the courts were confronted in those cases and with which this court is now confronted. Indeed, as Mr Plowman for the Crown has rightly said it is very difficult to see how a jury could turn to consider the question of whether or not the defendant in any case had, in fact, formed the necessary intent without considering his capacity to form such an intent. What is clear, however, is that in addressing a jury, a judge must now be careful to distinguish these two points. While it is not improper for him to refer to the capacity of the accused and to invite the jury to consider what his capacity to form any intent was at the time of the act, in relation to their opinion as to his condition of drunkenness, he must go on to make it clear to the jury that the final question for them to decide is whether or not, in fact, the defendant in the circumstances before them did form the necessary intent. The passage to which I have referred in the summing-up of the trial judge, although it is somewhat compressed and might, perhaps, have been expanded a little, differs from the summing-up in the passages complained of in *Garlick* 72 Cr App R 291 and in *Sheehan* [1975] 2 All ER 960 and, so far as we can tell, from the direction complained about in *Pordage* [1975] Crim LR 575, in that the judge did specifically refer to the actual intent of the defendant when he said the words which are underlined in the transcript, 'and did not form the intention to cause serious bodily harm'.

We are satisfied that the underlining which appears in the transcript must reflect the emphasis given by the judge to that factor when he was addressing the jury.

Mr Hoosen has ably argued that the form of the direction is faulty in that these words, coming as they did immediately after the reference to the capacity to form the intent, may have left the jury under the impression that the important thing for them to decide was whether the capacity to form that intention was present and that once having considered that matter, they might not have thought it necessary to consider whether or not, in fact, the intention was formed, so that if it were possible that they thought that he had the capacity to form the intention, they might not have gone on to consider whether notwithstanding that degree of capacity he, nevertheless, did not form the intent.

It seems that the task of a trial judge is not rendered any easier by some of the latest developments in the law on this matter. It is difficult to see how the capacity to form an intention to cause death or grievous bodily harm can be easily separated from the actual intention of the accused at the time the act was done. Nevertheless, as it stands, it would seem that the law does require a trial judge to make it plain, if he is referring to capacity to form an intent, that that is not the primary question and that the vital question is the actual intent of the defendant at the time. But the form of words used, coupled with the passages I have recited coming immediately before and after this direction, seem to us to render this direction in this case unexceptionable.

It is not even, therefore, a case in which we would have thought it necessary to apply the proviso notwithstanding the arguments of counsel. We are satisfied that there is no substance in that ground of appeal and the appeal must, therefore, be dismissed.

R v Yeung Ka Wah

Court of Appeal
Yang CJ, Silke VP and Macdougall JA
[1992] 1 HKC 84

Robbery – Direction of trial judge as to standard of proof – Effect of intoxication on mens rea

The accused was convicted of two counts of robbery and appealed. In his defence he stated that on the day in question, he had taken 10 tablets of rohypnol and could remember nothing of the events. A psychiatrist, giving evidence for the defence, had said that it was possible at the time of commiting the offence that the appellant may have been substantially influenced by the drugs had he ingested such an amount. The trial judge convicted the accused, but said in his judgment that while he believed the expert, he did not accept that the accused had taken the amount of drugs claimed.

> The only force that doth excuse is a force upon the person and present fear of death: and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in *Oldcastle's* case, that they joined *pro timore mortis*, and *necesserunt quam cito potuerunt*.

In *Kenny's Outlines of Criminal Law* (14th Ed) p 75 is the passage which presumably the learned judge referred to when he said he adopted the law as summarised in *Kenny*: 'But he must show that the compulsion continued throughout the whole time that he was assisting; and that he did no more than he was obliged to do; and that he desisted at the earliest possible opportunity.' *Stephen's Digest of Criminal Law* Art 32 also quotes *McGrowther's Case* without giving 'continuous force' the extended meaning in Foster and East.

In the first place I cannot agree with the submission of counsel for the appellant that the passages in East and Foster referred to above are to be taken as asserting that there is any presumption of law upon proof of an original force that 'he continued amongst them against his will though not constantly under an actual force or fear of death'. There would be at the most a presumption of fact which the jury is entitled to draw from all the circumstances of the case. That it is a question for the jury appears from the passage in Foster at p 217 which after enumerating various circumstances which might excuse continues: 'or from other circumstances which it is impossible to state with precision, but which, when proved ought to weigh with a jury that an attempt to escape would have been attended with great difficulty and danger'. The extended meaning given to the idea of continuous force by East and Foster rises naturally out of the impossibility of proving the existence of fear during every moment of the period in question and this impossibility would be apparent to a reasonable jury. In this case the jury must either have come to the conclusion that the appellant was not in sufficient fear to justify treasonable activities, or if they found there was such fear, they must have held he did not escape at the first opportunity. The question of such escape is intimately bound up with the continuance of fear and the learned judge traversed at length the evidence on this subject. It cannot be held that the judge (who adopted the wording of the only decided case on this branch of the law of which there is a reasonably detailed report) misdirected the jury in law by failing to point out that the compulsion to which he referred in the summing-up could be latent as well as manifest.

The appeal must therefore fail on all four grounds.

The following case is very similar to the facts of the English case of *R v Larsonneur*.[20] These cases are not the usual type of situation from which duress arises, but are examples of how the defendant is compelled by physical force to commit the actus reus without any choice being involved.

20 (1933) 24 Cr App Rep 74.

R v Leung Wing-cheung

Full Court
Gould, Acting CJ and Reece J
[1958] HKLR 49

Duress – Lawful excuse – Breach of deportation order contrary to s 13(1), Deportation of Aliens Ordinance

The defendant was a person prohibited for life from being within the Colony by a deportation order of 11 July 1949 and was subsequently deported to China. He was then forced back across the border by Chinese soldiers in circumstances amounting to a threat to his life if he refused to go. Without proceeding to a conviction or acquittal, the District Court reserved the following question of law for the court 'whether the circumstances arising form the facts . . . amounted to the defence of "lawful excuse" within the meaning of s 13(1) of the Deportation of Aliens Ordinance (Cap 240)'.

HELD – the court was of the opinion that there was no satisfactory and comprehensive definition of 'lawful excuse'. They were of the opinion that a deportee who returned under duress to the colony is not precluded from relying on the section but the matter must be decided upon having regard to his conduct and circumstances subsequent to his return in each particular case.

Gould J: In this case, a document has been submitted to this court by a District Judge headed 'Special Verdict and Reasons Therefor' and reserving for the consideration of this court a question of law. The accused appeared in person and we have had no argument on the procedural side of the matter. As far as we know there is no authority to submit a special verdict to this court as such though the conclusions arrived at by a court upon a special verdict may be tested on appeal, and this court could under s 82(5)(c) of the Criminal Procedure Ordinance (Cap 221) substitute its own conclusion. Any reservation of a question of law for the opinion of this court should state the section or other authority under which it is reserved and the one now under consideration is deficient in that respect. We are prepared, however, to deal with it as a reservation under s 81 of the Criminal Procedure Ordinance.

The accused was charged with the offence of breach of a deportation order contrary to s 13(1) of the Deportation of Aliens Ordinance (Cap 240) (hereinafter referred to as 'the Ordinance'). The particulars of the offence were set out in the charge sheet as follows:

> Leung Wing Cheung, on the 5th day of November, 1957, being a person prohibited for life from being within the Colony by a deportation order dated the 11th day of July, 1949, made under the Deportation of Aliens Ordinance, Cap 240, was found within the Colony without lawful authority or excuse.

Section 13(1) of the Ordinance is as follows:

> Any person who is prohibited from being within the Colony by a deportation order made under this Ordinance or a banishment or deportation order made under any repealed Ordinance, and who without lawful authority or excuse is

actually reach the mind of the incitee. Otherwise it amounts at most to attempted incitement. It is immaterial, however, whether the incitee acts upon the communication or not.

In speaking of mens rea the learned authors say at p 397:

> The accused must have intended the communication to reach the incitee in the sense that he knew, or at least foresaw the possibility, that it would reach his mind.

And a little later on appears the following extract:

> *S v Nkosiyana* (1966) 4 SA 655 (AD) settled the vexed question of whether incitement requires an element of persuasion, inducement, etc or whether a mere request is sufficient. Prior to *S v Nkosiyana* some cases required, or appeared to require such an element for guilt; in others the view was taken that it was sufficient if the accused merely requested another to commit a crime, and some were indecisive on this issue. In *Nkosiyana's* case Holmes JA (in whose judgment Beyers JA and Ogilvie Thompson JA concurred) expressed the view that 'Some of the doubt is attributable to exclusive preoccupation with the dictionary meaning of incite, namely to urge, spur on, stir up, animate, instigate, stimulate or provoke', and having stressed that the essential inquiry relates to the intention of the legislature, the learned Judge of Appeal stated the law as follows:
>
> > 'An inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance, the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of crime . . . I reiterate that the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes. Hence, depending on the circumstances, there may be an incitement irrespective of the responsiveness, real or feigned, or the unresponsiveness of the person sought to be influenced.'
>
> It is clear from this extract that for incitement the accused must have sought to influence the mind of the incitee to the commission of a crime. In other words, he must have had mens rea in the form of intention in respect of influencing the incitee to an act which was criminal. Intention here, it is submitted, bears its usual meaning in that actual intention is not required, legal intention will suffice. Thus, it must be shown that the accused must have foreseen, and hence by inference did foresee, at least the possibility that his communication would influence the incitee's mind and result in his doing an act which amounted to a crime

This statement is consonant with the view that incitement is a crime designed to nip criminal tendencies in the bud at their earliest inception. In these circumstances the mens rea would be 'an intention to do an act forbidden by law on account of the essential tendency which it possesses' (see Aikenhead on *Mens Rea*, 1914 Ed, p 152)

This was indeed the basis for the decision in *R v Phillips* (1805) 6 East 464 where it was held that a mere endeavour to provoke a challenge to a fight was in itself an indictable misdemeanour although no challenge was returned and no fight took place. In his judgment Lord Ellenborough CJ said:

> Although the intended effect may not have been produced, yet the means calculated and likely to produce such effect have been used. The letter was as much an act done towards the misdemeanour meant to be accomplished in this case, namely a challenge, as it was in the case of *The King v Vaughan* where the misdemeanour meant to be accomplished by the letter, offering a bribe to a minister of state, was the inducing such minister corruptly to recommend to an office of public trust. The means in each case were equally proper to effectuate their respective purposes, and prosecuted to the same extent.

But what was the crime solicited in this case? Surely it was that Mrs Chan should be persuaded to endeavour to conspire with each defendant to pervert the course of justice. They intended she should believe their overtures to be real and though it would have been open for the learned trial judge to have found as a fact that they were earnest in their solicitations he did not rule out the probability that this might equally have been a pretence. There was therefore no affirmative proof that they were in fact 'on the job'.

Does this pretence prevent the crime of incitement from being committed? It does seem to be singularly without merit to suggest that a defendant can escape criminal liability by stating that the overture he made, criminal in design and accepted by the incitee as such was never really intended by him in fulfilment of the commission of the criminal offence proposed but that it merely set the scene for a different criminal offence he intended to perpetrate. Whether this strange situation results or not is, in my opinion, dependent on the mens rea requisite for incitement.

Professor Glanville Williams is his book *Criminal Law, The General Part*, p 611 says:

> Intention or, at least, recklessness is needful. Asking another to do an immoral act (eg to be is not an incitement to commit a crime that may possibly result (eg perjury), unless the inciter contemplated that the act would be committed in the circumstances that make it criminal. It is no excuse that the inciter has no personal interest in the crime: a lawyer who in his professional capacity advises a crime will be guilty of incitement.
>
> A curious question is whether a man can be guilty as inciter or accessory before the fact to an attempt that he alone knows is doomed to failure. D incites E to attempt to steal from a pocket that, as D knows, is empty. If E makes the endeavour, he is guilty of the attempt. The attempt was solicited by D; yet D cannot be convicted as party to it because he knew from the start the desired result could not follow. It is probable that he cannot be convicted of incitement either, because he lacks the mens rea in respect of the offence. Thus in a South African case, *R v Wolff* [1930] TPD 821 D incited an Indian to purchase metal described as gold but [was] actually copper. He was acquitted of inciting the Indian to purchase precious metal contrary to statute the offence solicited being incapable of being carried out. It is submitted that had D supposed the metal to be gold, he would have been guilty. It is further submitted that on the actual facts D could have been convicted of attempting to obtain money from the Indian by false pretences the Indian's own unlawful intent constituting no defence to this charge.

A further case cited to us was *R v Bodin and Another* [supra], a decision of the Lincoln Crown Court. There the defendants were charged with incitement to assault, the particulars of which alleged that they unlawfully incited P to assault G. In fact this was not in accordance with the evidence which showed they invited P to procure another to assault G and no assault took place. A submission of no case to answer was upheld. The learned trial judge ruled that what was being incited was not the commission of the crime of assault but the procurement of that offence and he said he knew of no case where anyone had been indicted on inciting an accessory before the fact.

From these cases, and others, it was submitted that the rules applicable to attempt and incitement should equally apply to conspiracy since they are closely related misdemeanours having as their object the punishment of incipient acts towards the commission of a criminal offence and generally governed by the same principles.

It was also argued that under s 1 of the Criminal Law Act 1977 the words 'the commission of any offence' means the commission as a principal in the first degree. That Act is not in force in Hong Kong. It is unnecessary to consider this point though the examples given in the commentary to s 1 of the Act in 1977 Current Law Statutes under the heading 'Agrees that a course of conduct shall be pursued' is not irrelevant. There it is said that if A and B agree that B should cause C to commit an offence and C does so, B becomes an accessory to C's act and A and B together, having agreed on that course of conduct, are liable as conspirators. In other words the use in s 1 of the words 'agrees . . . that a course of conduct shall be pursued' ensures that liability for conspiracy is not limited to those who agree that one or more of their own number shall pursue the course of conduct contemplated.

The Crown maintains that the offence charged is one known to the law. Mr Duffy's argument is simple. To aid, abet, counsel or procure the commission of an offence is a crime and since a conspiracy comprises an argument by two or more persons to do an unlawful act therefore they can conspire to aid, abet, etc. He points out that in this case the crime was completed.

Mr Duffy argued that it was a *non sequitur* to maintain that because an attempt to aid and abet is an offence not known to the law therefore it followed there could not be a conspiracy to aid and abet. *In vacuo* neither an attempt to aid and abet nor a conspiracy to aid and abet is an offence. He instanced differences in the offences of conspiracy and attempt. If a person acting alone performs an act sufficiently proximate to the actual crime he may be convicted of attempt. Conspiracy, on the other hand, involves two people. The parties to a conspiracy need only contemplate that one of them will engage upon a course of conduct which will involve the commission of an offence or an unlawful act. An incitement to conspire matures into a conspiracy on agreement. He pointed out that for a person to be guilty of aiding and abetting, the act done need not be as proximate to the offence as would amount to an attempt. Suppose, he argued, a person entered a bank intending to commit robbery but once inside he merely looked around to see what his chances of succeeding were and was then arrested. If he had performed no proximate act he would not be guilty of any offence. If, however, two persons agreed that one of them would rob a bank they would both be guilty of conspiracy on completion of the agreement.

He contended that the charge preferred against the appellants and others accused them with conspiring to aid, abet, counsel and procure one named immigrant and others to land unlawfully. It was he says a conspiracy to land and this act he says was the unlawful act. The charge was worded in a manner so as to describe the course of conduct which constituted the unlawful act; namely that they agreed they would involve themselves in the commission of the offence by providing the ship and actually transporting the refugees so that the offence was fully carried out.

Mr Duffy stressed that in this case the offence was completed and he maintained that the appellants had ample knowledge of the unlawful act which they were accused of committing and any error made, if at all, was to provide the appellants with more particulars than was necessary.

It may be thought to be illogical to say that the particulars given are more than adequate where an attack is launched that the charge is one unknown to the law and hence defective but the offence was one of conspiracy and the law is that in stating the object of the conspiracy the same certainty is not required as in an indictment for the offence: (see *R v Blake* (1844) 6 QBD 126; *Sydserff v R* (1847) 11 QBD 245). For conspiracy to trespass however it is essential to state in the particulars of the offence the intention or other special circumstances which render the trespass indictable; *Kamara v DPP* [1973] 2 All ER 1242 (HL) though in *R v Peevey* (1973) 57 Cr App R 554 at p 557, Lawton LJ expressed the view that the particulars are not part of the offence charged.

In this case the Crown contends that from the very nature of the offence committed its performance required conduct amounting to an aiding and abetting for how otherwise could these persons have landed and he maintained that since aiding and abetting the commission of an offence is itself an offence there could be a conspiracy to do that very thing.

The court was referred to the case decided on 27 November 1979 of *R v Skewes and Others* Victorian Court of Appeal 27 November 1979 heard in the Victorian Court of Appeal presided over by Young CJ, Anderson and Jenkinson JJ. There the appellants were charged with conspiracy to aid, abet, counsel and procure divers persons to contravene the provisions of Part II of the Commercial Goods Vehicle Act. It was argued both in the court below and in the Court of Appeal that the indictment disclosed no offence on the ground that since the offence aided, etc was a summary offence no indictment lay.

The Court of Appeal upheld the ruling of the trial judge who adopted the principles enunciated in *R v Blamires Transport Services Ltd* [1963] 3 All ER 170 which distinguished *R v Barnet* [1951] KB 245. It was a case, the Court of Appeal said, where the particulars of the conspiracy charged were in terms and substance very different from the offence created by the Act.

The Crown invites this court to take the view that had the Victorian Court of Appeal thought the indictment to have been defective by averring, aiding and abetting, etc it would have said so. No complaint otherwise was directed at the indictment. Our attention was directed to the ruling of the learned trial judge who said:

> The act of aiding, abetting, counselling or procuring may be regarded as an overt act done in furtherance of conspiracy (cf *R v Muicarity* (1868) LR 3 HL 306 at p 317 in the judgment of Willes J delivering the opinion of the judges,

> indictment would lie here. That does not mean that there must always be found a statutory provision declaring that the crime is punishable here because if persons do acts abroad for the purpose of defrauding someone in this country, they are indictable here and accordingly a conspiracy to do such an act would be indictable.

Lord Tucker (at p 634) also expressly reserved the following question:

> . . . I would, however, reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad.

In *R v Baxter* [1972] 1 QB 1 the defendant posted in Northern Ireland letters written by him and addressed to pools promoters in Liverpool falsely claiming that he had correctly forecast the results of certain competitions and was entitled to the winnings. The claims were unsuccessful and the defendant was charged on three counts of attempting to obtain money by deception. Before arraignment the defence submitted that the court had no jurisdiction to try the defendant as the attempts were completed when the letters were posted in Northern Ireland and that no criminal act had been committed within the jurisdiction of the English courts. The recorder ruled that the court had jurisdiction and the defendant was convicted. The Court of Appeal upheld the conviction on the ground that the attempt was a continuing offence and occurred at the moment of discovery when the three letters were seen by the pools promoters in Liverpool and accordingly the crime was committed within the jurisdiction; or alternatively a part of the attempt was the use of the post facilities within the jurisdiction. Commenting on this decision in *DPP v Stonehouse* [1978] AC 55 Lord Diplock said (at p 67):

> For my part I think there would have been jurisdiction in *Baxter*'s case even if the fraudulent claims had been intercepted in the post whilst still in Northern Ireland.

In *DPP v Doot* [1973] AC 807 the respondents, American citizens, formed a plan abroad to import cannabis into the United States by way of England. Two vans in which cannabis was concealed were shipped from Morocco to Southampton. The cannabis in one van was discovered in Southampton and in the other van in Liverpool from whence it was intended to ship the vans to the United States. The respondents were charged with, *inter alia*, conspiracy to import dangerous drugs. At the trial they contended that the court had no jurisdiction to try them on that count since the conspiracy had been entered into abroad. Lawson, J overruled that submission but the Court of Appeal quashed the respondents' convictions holding that the offence of conspiracy was completed when the agreement was made.

The following point was certified for consideration by the House of Lords:

> Whether an agreement made outside the jurisdiction of English courts to import a dangerous drug into England and carried out by importing it into England is a conspiracy which can be tried in England.

The House of Lords answered the question in the affirmative and restored the convictions.

As there had been acts performed in England, namely the importation of the cannabis, in pursuance of the conspiracy, Lord Pearson who gave the leading speech confined himself to that situation. He said (at p 827):

> On principle, apart from authority, I think (and it would seem the Court of Appeal also thought) that a conspiracy to commit in England an offence against English law ought to be triable in England if it has been wholly or partly performed in England.

Lord Wilberforce expressly reserved his opinion on the question of whether a conspiracy formed abroad to do an illegal act in England, but not actually implemented in England could be tried in England (see p 818). The general tenor of Lord Salmon's speech appears to be in favour of the view that a conspiracy entered into abroad to commit a crime in England is triable in England even if no other act pursuant to the conspiracy takes place in England. Lord Salmon started his discussion of the problem by saying (at p 832):

> It is obvious that a conspiracy to carry out a bank robbery in London is equally a threat to the Queen's peace whether it is hatched, say, in Birmingham or in Brussels. Accordingly, having regard to the special nature of the offence a conspiracy to common law even when entered into abroad, certainly if acts in furtherance of the conspiracy are done in this country. There can in such circumstances be no doubt that the conspiracy is in fact as well as in theory a real threat to the Queen's peace.

And he finished his discussion by saying (at p 835):

> My Lords, even if I am wrong in thinking that a conspiracy hatched abroad to commit a crime in this country may be a common law offence because it endangers the Queen's peace, I agree that the convictions for conspiracy against these respondents can be supported on another ground, namely, that they conspired together in this country notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of the conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

In *DPP v Stonehouse* (*supra*) the facts were that soon after insuring his life in England for the benefit of his wife the defendant, a man prominent in English public life, fabricated the appearance of his death by drowning abroad. He was charged in England with attempting to obtain in England property by deception. He was convicted and the Court of Appeal upheld his conviction but certified the following point of law:

> Whether the offence of attempting on 20 November 1974, to obtain property in England by deception, the final act alleged to constitute the offence of attempt having occurred outside the jurisdiction of the English courts, is triable in an English court, all the remaining acts necessary to constitute the complete offence being intended to take place in England.

The House of Lords were unanimous in their view that the charge was justiciable in England. The majority laid stress upon the fact that the effects of the defendant's actions were felt in England through the false reports of his death in the media which he intended and anticipated would result from

> In effect, the prosecution is asking you to say that no one could have inflicted those injuries without wanting to do the child really serious bodily harm, or at least without knowing that really serious bodily harm would probably result. Remember in deciding that you must look at all the evidence.

It is Mr Lee's contention that there being but one defence – the non-realisation of the consequences of her acts by the applicant – the directions of the trial judge were inadequate in making it clear to the jury that as a matter of law, which they must take from him rather than counsel, they were not bound to infer knowledge of the consequences from the nature of the injuries inflicted.

We do not think these criticisms to be justified. The jury were aware of the provisions of s 65A which had been drawn directly to their attention by counsel in the course of his final address. We do not consider that the directions of the trial judge, coming though they did after his corrective directions, in the light of the language used could have left the jury under the mistaken impression that these directions were also intended to be corrective. He did make it clear to them in the last passage quoted above that in their consideration of the Crown's case, they must look at 'all the evidence' which evidence goes beyond these acts and the injuries caused.

The directions were in our view sufficient as they stood so that the mind of the jury was directed to the correct approach.

Mr Hoo then made submissions which related to the evidence of two psychiatric witnesses which he stated would go towards 'an issue in this trial, in fact the sole issue – namely, the intention of the first accused, whether she did intend to kill or cause grievous bodily harm at the time of these alleged beatings'.

The two psychiatric reports were handed to the judge for as Mr Re[illegible] said, it would be impossible to rule upon the submissions until they had been read.

Generally, evidence as to the intent in the mind of a person accused of committing a crime must be proved directly by the prosecution. By directly we mean by evidence at the trial of that person which can lead the jury to find that person guilty.

Such intent can be negatived by evidence led to show the accused as being incapable of forming it. The obvious example is insanity within the meaning of the *M'Naughten* Rules. Also, by statute, diminished responsibility is now available in its context and if the conscious mind does not go with the act, automatism – first brought into the field of criminal law in the summing-up of Barry J in *Charison* [1955] 1 WLR 317, can also be availed of. Drunkenness is a less obvious form of defence with which I shall deal later.

The overriding characteristic of all of these is the lack in an accused of a conscious mind by reasons of failure, due to disease or abnormality of the mind, to appreciate his acts. The category is limited and rightly so. It is for the jury to come to their conclusions and not by psychiatrists, however eminent, to try the case. This has been said in the past and remains true today.

It is Mr Lee's submission that here, while the conscious mind of the applicant was with her acts her intent to kill or cause grievous bodily harm was, at the very least, obscured by her suffering from 'battered baby syndrome' 'the syndrome' resulting from the treatment she herself had received when a child. He would say that the intent did not exist at all and that this was a factor which should have been before the jury so that they on the whole of the evidence could reach their verdict. By the refusal of the trial judge to allow the psychiatric evidence, the jury were prevented from considering a vital aspect of the defence and thus the applicant was deprived of the benefit of a verdict of manslaughter.

It is not Mr Lee's contention that the syndrome is a general defence. He says that it is relevant as a defence in a child battering case. We do not think that it can be compartmentalised in this manner. A personality disorder is not, of itself, a defence in law. To succeed Mr Lee would have to persuade us that the sydrome is a defence by reason of a mental disorder – mental abnormality or disease of the mind. This goes much further than the evidence as it stood before the trial judge at the time of this ruling and would be much further than we are prepared to go on that evidence.

There was nothing before the judge to suggest that the defence application was directed to anything other than intent. It is suggested here that it was also directed as to credibility but we do not think that the question of intent can be separated from the question of credibility in this way. For it all depended on whether or not the appellant was capable of forming the necessary intent which upon their view of he evidence as a whole, including that of the applicant herself, the jury had to decide. There was nothing to suggest that the syndrome was anything greater than a personality disorder. It might be, and we put this no higher and express no decided opinion upon it, that the syndrome could be shown in a trial within a trial on the aspect of admissibility to come within one of the required definitions of mental abnormality, to use a neutral phrase. It is not enough for such evidence to be admissible to show that a person is 'not quite normal' within the law as it now stands.

We accept the principle enunciated in *Smith* [1979] WLR 1445 where psychiatric expert evidence called by the Crown was held to be relevant and necessary to help the jury determine whether Smith's defence of automatism was valid – that even if the flood gates are opened it is our concern to do justice and to see that the applicant is not deprived of a fair trial.

I promised to refer to the matter of drunkenness and its possible relationship to the evidence sought to be introduced here both on the issue of intent and of credibility. This also impinges, in the light of *Hyam v DPP* [1975] AC 55 on Mr Lee's s 65A point.

At first blush we had thought there to be a possible correlation but upon a perusal of the authorities we do not think such correlation here exists. The applicant was fully aware of the nature of her acts, there was no suggestion of any recklessness, mistake or lack of a conscious mind. It is the ability to appreciate the effect of those acts which she attempted to call into question. The acts were clearly voluntary ones. The issue of intent was intermingled with that of credibility in that both lay for the consideration of the jury. Murder being a crime of specific intent, uncontrollable impulse, if it exists, does not go as far as a defect of reason sufficient to negative intent by rebutting the presumption of sanity.

That having been said, we do not think the trial judge to have exercised his discretion wrongly nor do we think that, in the circumstances here, the psychiatric evidence was admissible evidence.

In the event the appeal is dismissed.

Having suggested that any sober and prudent driver might have crashed into the road-block that night Addison J went on to say:

> The Crown says other drivers had stopped in time without hitting anyone, why didn't this defendant do exactly the same? Well, as Mr Hill pointed out to you, it wasn't striking the PC that caused his death. The evidence indicates, does it not, that it was the carrying of the body along the road which caused irreversible brain damage and death.
>
> So the question you will ask yourselves is this: having hit the PC did the defendant thenceforward drive his vehicle in such a manner as to cause an obvious and serious risk of causing physical injury to that PC highly likely to result in his death and that in driving in that manner he did so without having given any thought to the possibility of there being such a risk or having recognised that risk he pressed on regardless?

It was submitted by Mr Matthew, who appeared on behalf of the applicant, as his first ground of appeal, that this was a direction which had been vitiated by the further words:

> In my opinion, members of the jury, and this is simply my opinion, the whole crux of this case is this: did the defendant know that he struck the PC, whether the PC landed on the bonnet or not? If he did not know he had struck the PC, would a sober and prudent driver have been aware that he had struck the PC? If you are satisfied of that fact, then would a sober and prudent driver have realised that by continuing to drive ahead he was exposing the PC to an obvious risk of injury which would very highly probably result in his death? If you conclude that to be the case, members of the jury, then you will convict the defendant of manslaughter. If, on the other hand, you think a sober and a prudent driver would not have been aware of that high risk of death or might not have been aware of it, then you will acquit him.
>
> You should examine all the evidence very carefully to determine whether or not the PC did land on the bonnet and for how long and whether you think a sober and careful driver would obviously have been aware of his presence on the bonnet. Also you will consider whether by virtue of the noise made on impact a sober and prudent driver would have known that he hit someone at that time.
>
> Merely because, if you so find, that the defendant was drunk at the time and might not have seen the man on the bonnet or heard the noise is no defence.

Mr Matthew contended that the jury should specifically have been directed to confine their attention to what transpired after impact.

We are satisfied that the earlier direction of the learned judge was more favourable to the applicant than was required in the circumstances as was his direction that the jury had to be satisfied that the constable's death was 'substantially' attributable to the applicant's driving. To have struck the constable was in itself a significant cause of his death. The applicant can be in no better position in law because, the constable having been so knocked down, he himself rather than, say, another motorist subsequently and perhaps unwittingly caused the fatal injuries. It is because the applicant's driving before impact was a cause of the constable's death that Addison J cannot legitimately be criticised for leaving its nature for the consideration of the jury who were entitled to convict of manslaughter if satisfied as to the 'three issues' in relation to the accused's driving before or after impact

and, a fortiori, if so satisfied in relation to his driving throughout. It matters not that, as appears from the terms in which he sentenced the applicant, the learned judge thought that he had directed the jury in the way Mr Matthew submits he should have done.

The second ground of appeal is to the effect that the learned judge 'failed adequately to direct the jury as to the relevancy of drink in respect of the manner of the (applicant's) driving'. What Addison J said about drink was:

> There is evidence that he had been drinking. If you conclude that his driving was impaired by drink, you will consider what effect that drink had on the way he drove and on his state of mind. You may think that the amount he drank has a considerable bearing on this case and it is an explanation for all that happened. On the other hand, members of the jury, you may think that the alcohol he drank played no part in this incident. That's for you to decide.
>
> Drunkenness is no defence. If the defendant, through his self-induced intoxication, was unaware of the risk which he would have been aware of had he been sober, then his unawareness is immaterial. In short then, the Crown says he was aware of the risk he was taking to the life of the PC when he continued to drive ahead after hitting the police constable. Or if he was unaware of that risk, he ought to have been aware of it as a sober and prudent driver. If you conclude that the defendant's driving was impaired by drink, do not convict him on that ground alone. Drink may or may not have played any part in this case. You must decide this case on the direction which I have already given you. But drunkenness is a matter, however, you are entitled to take into account when determining the question as to whether he was reckless as to the circumstances.

He also reminded the jury of the evidence relevant to the applicant's condition in the early morning of 14 July 1983. We find no failure adequately to direct the jury in this regard or to follow the guidance given by the House of Lords in *DPP v Majewski* [1976] 2 WLR 623.

The third ground of appeal, like the first, stemmed from the commendable concern of the learned trial judge to be fair to the applicant; a concern to which Mr Matthew paid tribute. In reminding the jury of former PC 21656 Lui Fung-yip's evidence he referred to a disquieting feature of this case.

> There was a conspiracy by police officers to manufacture false evidence against the defendant. It's agreed that a number of police officers did put their heads together to say that cone lights were on when they were not. According to PC 21656, the conspiracy went no further than that. Mr Hill contends that the area of the conspiracy wasn't confined to that later on. Police emotions did run high that night.
>
> Ex-PC 21656 admitted he was a conspirator. If you find him to be a believable witness, then I should warn you and I now do so, members of the jury, that it is dangerous to act on his evidence in the absence of some confirmatory evidence coming from an independent and reliable source. If, however, being alive to that danger, you are, nevertheless, perfectly satisfied that he has told the complete and unvarnished truth, then you may act on his evidence which is unconfirmed by other independent evidence.
>
> As to his evidence that the PC was hit by a Volvo and thrown up by the car, there is independent evidence capable of corroborating his testimony. There's the evidence of Chan Wai-to, Yip Kwai-sang, Cheung Siu-lung, Dr Lambourn by inference and also the evidence of Dr Clarke – inferentially.

officers, but it did not extend to the control, direction or influence of a prostitute within the section. We need therefore not go on to consider, as was questioned by counsel, whether the judge's simple observations on corroboration at the commencement of his reasons for verdict were a sufficient discharge of his duties in that respect.

R v Lee Leung-wai

High Court
Bewley J
[1988] HKC 658

Prostitution – Living on the earnings – Presumption can arise from a single transaction

The accused was convicted of living on the earnings of prostitution. The evidence for his conviction arose out of the testimony of two police officers masquerading as customers and two single incidents of the provision of women for sexual services.

HELD – appeal dismissed. Evidence of a single occasion, whether or not it was a solitary transaction, was sufficient evidence to give rise to the presumption that the accused was living on the earnings of prostitution.

Bewley J: The appellant (D2) was convicted, together with another man (D1), who has abandoned his appeal, by Miss Wong at South Kowloon Magistrates Court, of living on the earnings of prostitution, contrary to s 137(1) of the Crimes Ordinance (Cap 200).

It was a case of sexual entrapment on the part of police officers masquerading as customers looking for prostitutes. The magistrate found the prosecution witnesses to be truthful and accurate in their evidence, which she accepted. She did not believe the evidence of either defendant. She made the following findings of fact:

(a) At about 9.20 pm on 8 May 1987, PW1 and PW2 each received four marked $100 banknotes from PW3. At about 9.30 pm, they went to 5th floor, 137 Shanghai Street where they were received by D1. D1 told them the prices of Thai girls, Filipina girls and 'Pore' girls and the sexual services by 'Pore' girls. PW1 and PW2 ordered two 'Pore' girls for sexual services at a cost of $400 each from D1. D1 later brought Cheng Fung-yee (Cheng) to PW2 to perform the sexual services which D1 agreed to provide. D1 told PW2 to pay Cheng. PW2 paid Cheng with the four marked $100 banknotes given to him by PW3. After receiving the payment, Cheng undressed herself in front of PW2 but no sexual activity took place between them. Cheng had offered her body to PW2 for acts of lewdness in return for the payment PW2 made to her. The $400 PW2 paid to Cheng was earnings of her prostitution. D1 brought Cheng to PW2 knowing she was a prostitute and knowing she was required to perform sexual services for payment. Cheng was offering her body for acts of lewdness for payment and was a prostitute. D1 was in the employment of Cheng knowing that she was a prostitute and assisting in her prostitution. He was paid by Cheng for his services knowingly with earnings of her prostitution. D1 knowingly lived upon the earnings of prostitution of Cheng. D1 was a man.

(b) D2 later arrived at the premises with Liong Wai-leng (Liong). He brought Liong to perform the sexual services PW1 and PW2 requested and which D1 agreed to provide. In the presence of D2 and Liong, PW1 paid $400 to D1. The $400 were the four marked $100 banknotes given to PW1 by PW3. After the payment to D1, Liong undressed in front of PW1 but no sexual activity took place between them. Liong had offered her body to PW1 for acts of lewdness in return for the payment PW1 made to D1. The $400 PW1 paid to D1 was earnings of the prostitution of Liong. D2 brought Liong to the premises knowing she was a prostitute and knowing she was required to perform sexual services for payment. Liong was offering her body for acts of lewdness for payment and was a prostitute. D1 supplied Liong to PW1 to perform acts of lewdness knowing that Liong was a prostitute. D1 received $400 from PW1 knowing it was earnings of the prostitution of Liong. D1 knowingly lived upon the earnings of prostitution of Liong.

(c) D2 received $300 from D1. That payment came from the earnings of the prostitution of Liong. It was received by D2 knowing that it was such earnings and was payment for bringing Liong to the premises to engage in prostitution. D2 knowingly lived upon the earnings of prostitution of Liong. D2 was a man.

Section 137 provides:

> (1) A man who knowingly lives wholly or in part on the earnings of prostitution shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.
>
> (2) For the purposes of sub-s (1), a man who lives with or is habitually in the company of a prostitute, or who exercises control, direction or influence over a woman's movements in a way which shows he is aiding, abetting or compelling her prostitution with others, shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary.

In convicting D1, the magistrate found the presumption in sub-s (2) arose and was not rebutted. She was also satisfied, however, that there was sufficient evidence without the presumption on which to convict D1. In the case of this appellant, she does not refer to the presumption and it must be taken that she did not consider it arose.

When the appellant and the prostitute entered the room, D1 asked PW1: 'Does this one suit you?' While PW1 was looking at her, the appellant said: 'This "Pore" girl has just arrived by plane.' PW1 then agreed to have her and gave D1 $400. The magistrate found that the only conclusion to be drawn from this evidence was that the appellant had brought the girl to the premises knowing she was a prostitute required to perform sexual services. Since he received part of the earnings of the prostitution from D1, as a reward for bringing her to the premises, he was guilty of living on her earnings.

Mr Hampton submits that the conviction can only be sustained if the court finds that the presumption is raised. He further submits that, even if the appellant escorted the girl to the apartment house, knowing she was going there as a prostitute, this does not amount to the 'control, direction or influence' required to trigger the presumption.

did not inform his superiors that he had used the cash to pay off his own debts and thereby obtain credit, albeit credit from the car dealer not from the Crown.

The trial judge referred to *Pang Hei-cheung* [1971] HKLR 80 where the Full Court held that 'dishonesty as an element in a charge of theft under s 9 of the Theft Ordinance is complete when there is an intentional appropriation of property without the consent of the owner, notwithstanding a genuine belief by the taker of his ability to replace or substitute the property appropriated'. He did not however have the benefit of the recent decision of the Court of Appeal in England in *R v Ghosh* [1982] 3 WLR 110, in which Lane LCJ laid down the following test.

> In determining whether the prosecution had proved that the person charged was acting dishonestly, a jury had first of all to decide whether according to the ordinary standards of reasonable and honest people, what was done was dishonest. If it was not dishonest by those standards that was the end of the matter and the prosecution failed.
>
> If it was dishonest by those standards, then the jury had to consider whether the person charged himself must have realised that what he was doing was by those standards dishonest. In most cases where the actions were obviously dishonest by ordinary standards there would be no doubt about it. It would be obvious that the person charged himself knew that he was acting dishonestly.

We are satisfied that the appellant's action in using the government's money to pay off his own debts and in issuing his own post-dated personal cheques to purchase the cars would be regarded by reasonable and honest people as dishonest. We are also satisfied that the appellant on his own admission regarded it as dishonest. He said in evidence that he did not tell his senior officers what he was doing because 'they would not allow it, I knew I would not be allowed to do that'. Apply[ing] the test of *R v Ghosh*, we have no doubt that the appellant acted dishonestly. Accordingly his appeal against conviction is dismissed.

R v Sze Sing-ming and Others

Court of Appeal
Power, Macdougall JJA and Wong J
[1991] 2 HKLR 481

Procuring the making of a bank entry by deception – Ghosh direction on dishonesty – Whether required in all circumstances

The accused were convicted of numerous offences involving the defrauding of four mainland Chinese companies. They were convicted mainly of offences contrary to s 18D of the Theft Ordinance in that they procured the making of bank entries by deception. One of the grounds of appeal was that the trial judge had failed to properly instruct the jury as to the subjective element required in *R v Ghosh*.

HELD – appeal dismissed. There was no requirement in Hong Kong that a *Ghosh* direction was necessary in all cases involving commercial dishonesty.

Power JA:

Ground 9

The learned judge failed to properly direct the jury on the essential element of dishonesty. The direction was wholly insufficient, it fails at all to deal with the subjective elements of dishonesty (*R v Ghosh* [1982] QB 1053).

The suggested defective direction reads as follows:

> Well, the prosecution must prove, first of all, that the entry alleged in the bank record was made. Now in this case you probably have very little problem about that but it is always a matter for you. Secondly, the prosecution must prove that that entry was brought about or procured by the deception alleged or at least one of the deceptions alleged and not in any other way; in other words, the prosecution must prove that the entry was caused by one of the deceptions. I will have a little more to say about that in due course.
>
> Then the prosecution must prove that the deception alleged was false. Here there are alleged the deceptions that the documents were true and genuine documents, first of all, and you know what the issues are about that when the prosecution says they were certainly not true and genuine documents. They were all forged they say.
>
> Then the next deception is that the goods referred to in the documents and which were the subject of the letter of credit had been shipped in accordance with the terms of the letter of credit and the prosecution say that that was false also and that the deception was made in the documents supplied. And finally, that the deception alleged is that the Lordship Company was entitled to have its account credited in the sum alleged when it was certainly not so entitled. In order to establish the offence, members of the jury, the prosecution have to establish that at least one of those deceptions caused the entry to be made.
>
> Then the prosecution must prove of course that the accused concerned was a party to the submission of those documents to the bank and that he or she knew that the documents were false at the time. That means that he or she knew that the document was not true and genuine, the goods had not been shipped, and that the company was not entitled to the credit.
>
> Next the prosecution must prove that the accused concerned did all that with the intention of gain for himself or herself or another or with intent to cause loss to another. If the other ingredients are satisfied, I doubt whether you will have too much difficulty in finding the appropriate intent because what else is this done for. It has not been suggested in this case that it was done for any other or collateral purpose.
>
> And finally it must be proved that the accused did all this dishonestly. Members of the jury, I needn't direct you in this case about what dishonesty means. It is dishonesty by the standards of ordinary decent, reasonable people that has to be applied and if the other matters are proved, I doubt whether you would have great problems in relation to dishonesty. Again that is a matter entirely for you.

It was the submission of Mr McCoy that this direction fails to deal with the subjective element of dishonesty and thus fails to comply with the ruling in *R v Ghosh* (1982) 75 Cr App R 154. Mr McCoy referred us to the judgment of Lord Lane at p 162 where he stated:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary

perceives that they have been threatened. If the accused is aware of these characteristics, however, and is seeking to take advantage of them then this may be sufficient to constitute a menace (see *Garwood*[28]).

Finally the demand must be unwarranted. If an accused has a legal right to make the demand then there is no blackmail. It follows therefore that an honest but mistaken belief as to such legal right would also be a defence to this crime.

R v Tsang Yip Fong and Tsang Shui Lee

Court of Appeal
Silke Ag CJ, Penlington and Nazareth JJA
[1993] 1 HKC 308

Blackmail – Menaces not communicated to victim

While the intended victim went to the toilet, the accused told a police officer, who was posing as the victim's daughter, that if the victim did not pay they would chop his hands off. They were convicted of a number of counts of blackmail and appealed.

HELD – appeal dismissed. It does not matter that the demand with menaces is not communicated to the victim. It is enough that it be intended to be conveyed.

Silke Ag CJ: The background facts were that Mr Yi Wah operated a decorative work business. On 24 June 1991, he was offered some business by a man named Yuen. They met by arrangement at the Sun Ho Restaurant. From there, Yuen took Mr Yi to the flat where the decoration work was to be carried out. When he got there D1, D2 and an unnamed man were present. D1 told him that his, D1's, uncle was on the way to the flat, with the plans. While they were waiting, Yuen invited Mr Yi to play cards. Mr Yi was to share his bets with D1. It would appear, though the evidence of Mr Yi was not, as the trial judge was fully aware, of the clearest – though he impressed the judge as being a totally sincere and honest man – that Mr Yi joined in with the rest. When the game concluded, D1 told Mr Yi that there was a loss of $200,000. The uncle with the plans had not as yet arrived and D1 said he would go and see him, having been informed that he was in a traffic accident. Yuen and the fourth man also left leaving behind Mr Yi and D2. Mr Yi started to leave but he was prevented by D2. Yuen and the fourth man returned and demanded that Mr Yi pay his share of the loss. Mr Yi was threatened. He was frightened and he paid $2,000 cash to D2. This however did not satisfy the group and Mr Yi was taken to his home. There he was forced to draw two cheques, one a cash cheque for $13,000 and the second a post-dated cheque for $85,000. The men left with the cheques.

28 [1987] 1 All ER 1032.

The cheque for $13,000 cash was cashed the same day. Mr Yi, having reported to the police, countermanded payment on the post-dated cheque. On 2 August and 14 August 1991, groups of men uttered threats to Mr Yi at his home. His life was said to be endangered. On 14 August, he was told to contact person named Li through a pager number which he was given.

Mr Yi made another report to the police. A meeting was arranged with the person named Li at the Sun Ho – or New Best – Restaurant on 19 August. A woman police constable posing as Mr Yi's daughter went with him to the meeting. D1 was present and identified himself as the Mr Li whom Mr Yi Wah had been told to and did contact. There were discussions about the payment. Mr Yi said he would not pay unless D2 were present. D1 left the restaurant and returned shortly afterwards with D2. There was a demand that Mr Yi pay the so called gambling loss. There were further discussions. A third man entered the talks demanding in a fierce manner that Mr Yi 'Pay. Pay.' At some time in the course of the discussions, Mr Yi, who was a man of some age, left the group to go to the toilet. While Mr Yi was absent D1 said to the purported 'daughter' that if her 'father' refused to pay 'we will chop his hands off'. D2 added words to the effect that her 'father' had a lot of money and to 'pay and everything will be alright'.

The evidence of that which occurred as recounted by the woman police constable was attacked in cross-examination – neither of the applicants gave evidence in the trial proper – but the trial judge found her to be a witness of the truth. He also found that the threat made to the 'daughter' was in exactly the same terms as the threats made to Mr Yi by groups of men at his own home on the two occasions to which we have earlier referred.

In addition to the evidence of Mr Yi and the woman police constable, statements made by D1 and D2 were admitted in evidence. The trial judge found that the statement of D1 was partly exculpatory, partly inculpatory and partly silent on relevant issues. D1 admitted to telephoning Mr Yi to demand repayment of the gambling debt and admitted to getting D2 to come to the New Best Restaurant at the time the threats were issued to the woman police constable. D2 admitted that he intended to cheat Mr Yi. Further, while the words in relation to the 'chopping off of the hands' were not said by him, his purpose was to get Mr Yi to repay and 'we only made it by word of mouth and would not do so'.

There was ample evidence before the trial judge to find that the demands of D1 and D2 were unwarranted. It is with the 'menaces' that we are concerned, though not with the fact that the words could amount to menaces. The issue is that they were never brought to the attention of Mr Yi for D1 and D2 were arrested before Mr Yi returned from the toilet.

We thought it right that both D1 and D2 be granted legal aid on the sole issue. There is no direct authority on the point – 'Can a menace made to a third party and never communicated to the intended victim be sufficient to establish the blackmail of that intended victim – accepting that the demand was an unwarranted one.'

We have had the benefit of submissions made to us by Mr Macrae on the point on behalf of both D1 and D2. He has referred us to *Treacy v DPP* [1971] AC 537 where, although the main issue was that of jurisdiction, the House of Lords held that where a man posted in the Isle of Wight a

the actual authority of the credit card companies to make the contracts on those companies' behalf that those companies would honour the vouchers on presentation. Quite clearly she had no such authority and to this extent, permission of the card holder for her to use the cards was irrelevant. (See *R v Lambie* [1981] 3 WLR 80 House of Lords.)

The magistrate was correct to find that in respect of the five charges of obtaining property by deception, there had been false representations.

The magistrate then had to consider whether the appellant had acted dishonestly when making those false representations. He correctly directed himself to the test laid down in *R v Ghosh* [1982] 2 All ER 689 and had this to say in his statement of findings:

> I conclude as an adjudication of fact that what the defendant did was dishonest by the standards of ordinary men. I also conclude that by those standards she knew about credit limits and what to do when a card was lost. She agreed she was aware of the requirement for two cards on one account. I conclude beyond a reasonable doubt that she was dishonest.

Mr Alderdice who appears for the appellant submits that the magistrate was wrong to reach such a conclusion without having regard to several matters which come from the evidence. These are:

(1) The agreed fact that the appellant had the authority of Mr Lau to use his credit cards.
(2) The evidence of the appellant that she had used the cards on previous occasions and that Mr Lau had paid the credit card companies for these purchases.
(3) That the appellant had on one occasion had goods purchased by using Mr Lau's credit card delivered to her address.
(4) That she had made no real attempt to copy the signature of Mr Lau.
(5) That she had presented one card issued to James CK Lau when clearly she could not have been the card holder.

The test in *Ghosh* shortly stated is that a defendant acts dishonestly if his conduct would be regarded as dishonest by the ordinary standards of reasonable and honest people and the defendant realises that his conduct is so regarded.

The conduct complained of is the use of credit cards in respect of which the appellant was not the account holder and the signing of the account holder's name on the voucher relating to the purchases. In applying the first limb of the *Ghosh* test, the magistrate was right to find this conduct such as would be regarded as dishonest by the ordinary standards of reasonable and honest people.

Was he right to then go on to decide the second limb, the subjective part of the test, without considering the matters referred to by Mr Alderdice. In my judgment, he was. He had to decide whether the appellant realised that her conduct would be regarded as dishonest by reasonable and honest people. On the evidence she knew how the credit card system operates and the magistrate was entitled to find that she knew that what she was doing was dishonest by the ordinary standards of reasonable and honest people. That she also believed she could ignore those standards was irrelevant to the question of guilt. The matters referred to by Mr Alderdice were very strong mitigating factors but do not amount to a defence in law.

The appeal is dismissed.

Ng Chi-kwong and Another v R

Court of Appeal
Roberts CJ, Leonard and Li JJ
[1980] HKLR 32

Obtaining property by deception – Theft Ordinance (Cap 210) – Whether misrepresentation has to operate on the mind of the victim

The appellants were police officers who made an unlawful raid on certain illegal gamblers who believed that the appellants were acting lawfully. The appellants seized money from the gamblers who believed they were paying bail money or that the money would pay others to appear in court as their substitutes. The appellants were convicted of obtaining property by deception and appealed on the basis that the trial judge had not given an adequate direction as to the obtaining, in that the misrepresentation did not operate on the mind of those deceived.

HELD – appeal dismissed. The fact that some other representation or misrepresentation was the essential or effective cause is not conclusive. All that the prosecution is required to show is that the misrepresentation alleged contributed to the action of the victim in handing over the money.

Leonard J:

> Ng Chi-kwong and Mok Sui-bun, on the 3rd day of May, 1978 at Chi Fu Fa Yuen Construction Site, Pokfulam Road, Hong Kong, in this Colony, dishonestly obtained from Lee Kwong-wah cash $250, from Chan Kam-tai cash $300, from Chung Chi-shing cash $500, from Chan Chi-kuen cash $590, from Chong Kam-hung cash $200 and from Yeung Lau-sum cash $350 with the intention of permanently depriving them of the said money by deception, namely by falsely representing that they, the said Ng Chi-kwong and the said Mok Sui-bun, were police officers acting lawfully in the course of their duty in raiding the said Chi Fu Fa Yuen Construction Site where gambling was in progress and by falsely representing that money seized from a table would be used as an exhibit in subsequent court proceedings and that money handed over by the said persons would be spent either in full or in part in acquiring the attendance of other persons to appear in court as their substitutes or otherwise as bail money.

Although this count is somewhat inelegantly expressed, it is clear that one obtaining, and a number of false representations, are alleged. The first representation was that the appellants falsely represented that they were police officers acting lawfully in the course of their duty in raiding the construction site; the second that they falsely represented that money seized from a table would be used as an exhibit in subsequent court proceedings; the third that money handed over by those engaged in gambling would be spent in full or in part in acquiring the attendance in court of other persons as substitutes for the gamblers; the fourth that the money handed over by