Chee Soon Juan and others *v* Public Prosecutor
[2012] SGHC 109

Case Number	: Magistrate's Appeals Nos 373, 374, 375, 378 and 380 of 2010
Decision Date	: 21 May 2012
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Appellants in person; Ms Ravneet Kaur and Mr Sellakumaran Sellamuthoo, with Mr Kwek Chin Yong (Attorney-General Chambers) for the respondent.
Parties	: Chee Soon Juan and others — Public Prosecutor

Criminal Law – Criminal Procedure and Sentencing

21 May 2012 Judgment reserved.

Quentin Loh J:

Introduction

1 This is an appeal by six individuals ("the Appellants"), namely: Dr Chee Soon Juan ("Dr Chee"); Ms Chee Siok Chin; Mr Tan Liang Joo, John; Mr Seelan s/o Palay; Mr Chong Kai Xiong; and Mr Yap Keng Ho ("Mr Yap") against their conviction and sentence by District Judge Kessler Soh ("the DJ") under Rule 5 of the Miscellaneous Offences (Public Order and Nuisance)(Assemblies and Processions) Rules (Cap 184, Rule 1) ("the Rules") read with Section 5(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA"). Dissatisfied with the DJ's decision, the Appellants filed their individual notices of appeal on 19 October 2010.

2 Save for Mr Yap, the remaining Appellants wholly adopted Dr Chee's defence as their own. As such, Mr Yap's appeal will be dealt with separately.

Background

3 All six Appellants faced the following common charge ("the common charge"):

> You [...] are charged that you on the 9th day of August 2008, at about 2.33 pm at the walkway in front of Block 190 Toa Payoh Lorong 6, Singapore, which is a public place, did participate in an assembly intended to publicise the "Tak Boleh Tahan" ("TBT") campaign organized by the Singapore Democratic Party, together with [the other defendants] which assembly you ought reasonably to have known was held without a permit and you have thereby committed an offence punishable under Rule 5 of the [Rules] read with section 5(1) of the [MOA].

The common charge was preferred against the Appellants on 7 July 2010, almost two years after the alleged incident. However, as none of the Appellants made an issue of this delay in prosecution, I will say no more on this point. At the start of the trial before the DJ, this common charge was preferred by the Prosecution against 12 persons. However, in the course of the hearing, three of the defendants pleaded guilty. Of the remaining nine who were convicted and sentenced, only the above-mentioned six Appellants pursued an appeal.

4 The facts as alleged in the common charge were undisputed before the DJ as well as before me. First, it was not disputed that all six appellants were present on 9 August 2008 at the time and place stated in the common charge. Secondly, it was also not disputed that the place in question, the walkway in front of Block 190 Toa Payoh Lorong 6 ("Block 190"), was a public place. Thirdly, there was also no dispute that there were more than five persons gathered in that assembly. Fourthly, the Appellants (other than Mr Yap) did not dispute that they participated in the assembly.

5 Fifthly, it was common ground that the purpose of the assembly was to publicise the "Tak Boleh Tahan" ("TBT") or "cannot take it anymore" campaign organised by the Singapore Democratic Party ("SDP") and that the Appellants, save for Mr Yap, were distributing flyers and selling T-shirts and other materials relating to the TBT campaign ("the National Day incident"). It should also be noted that of the six appellants, only Mr Yap was not a member of the SDP and was not wearing a red TBT t-shirt.

6 Finally, and perhaps most importantly, it was not disputed that no permit had been sought and, therefore, none was granted for the holding of the assembly. This was clear from Dr Chee's testimony during cross-examination: [note: 1]

> DPP Kaur: Moving on to the event on 9 August at Toa Payoh Central, do you confirm that no permit was obtained?
>
> Dr. Chee: No application was made.
>
> DPP Kaur: You were aware even prior to 9 August that no application was made for a permit for this event?
>
> Dr Chee: Yes.

Decision below

7 In his Grounds of Decision ("GD"), which can be found at *Public Prosecutor v Chee Soon Juan and 8 Ors* [2011] SGDC 13, the DJ stated at [9] that the burden lay on the Prosecution to prove the following elements of the common charge:

(a) There was an assembly on 9 August 2008 at about 2.33pm at the walkway in front of Block 190 (undisputed).

(b) The location was a "public place" (undisputed).

(c) Five or more persons participated in the assembly (undisputed).

(d) The purpose of the assembly was to publicise the TBT campaign organized by the SDP (undisputed).

(e) No permit was granted in respect of the holding of the assembly (undisputed).

(f) Each defendant ought reasonably to have known that the assembly was held without a permit (disputed).

8 Only Dr Chee and Mr Yap gave evidence in their defence. The other defendants elected to remain silent but adopted a common defence with Dr Chee. The joint submissions of Dr Chee and the

other defendants (other than Mr Yap) were prepared by Mr Tan. In so far as Dr Chee's defence was concerned, it was the final element, namely, that the defendants *ought reasonably to have known that the assembly was held without a permit* that was contested.

9 The DJ found that there were essentially two material issues in dispute:

(a) Whether the Appellants ought reasonably to have known that the assembly was held without a permit; and

(b) In respect of Mr Yap, whether he had participated in the assembly.

10 On the first issue, the DJ found that all the Appellants ought reasonably to have known that the assembly was held without a permit and therefore the *mens rea* requirement for the offence was met. The key passage of the DJ's reasoning can be found at [49] of the GD:

> … [O]n l May 2008, evidence was led from the Compliance Management Unit officer (PW6) that an application for a permit was received by the police but the application was rejected. Notwithstanding the rejection of the permit, the SDP proceeded with the activity on l May 2008. *By the fact that a permit application was submitted by the SDP for the event on l May 2008, they must have known that a permit was required for such an event.* Given the defendants' contention that both the events of 9 August 2008 and 1 May 2008 were exactly the same, *they must have been aware that the event of 9 August 2008 likewise required a permit*.
>
> [emphasis added]

11 On the second issue, the DJ found that Mr Yap was a participant in the assembly. The DJ held that while there was no statutory definition of "participate" in the MOA, he adopted the High Court's pronouncement of participation in the context of common intention liability under s 34 of the Penal Code (Cap 224, 2008 Rev Ed) ("PC") in the decision of *Quak Siew Hock David v Public Prosecutor* [1999] 3 SLR(R) 807 ("*Quak Siew Hock*"). Applied to the context of the MOA, the DJ found at [58] that:

> … Whether a person could be said to have *participated* in an assembly ***depended on the facts and circumstances of the case. Where certain facts were present, such as the doing of an act in furtherance of the intention of the assembly, or providing general encouragement and support to the members of the assembly, an inference of participation could more readily made.***
>
> [emphasis in original in italics; emphasis added in bold italics]

12 On the strength of his reasoning the DJ found the Appellants guilty, and meted out the following sentences:

S/N	Accused	Sentence
1	Chee Soon Juan [xxx];	Fined $1,000 in default 1 week's imprisonment
2	Chee Siok Chin [xxx];	Fined $950 in default 6 days' imprisonment
3	Tan Liang Joo, John [xxx];	Fined $900 in default 6 days' imprisonment
4	Seelan S/O Palay [xxx];	Fined $900 in default 6 days' imprisonment

5	Chong Kai Xiong [xxx];	Fined $900 in default 6 days' imprisonment
6	Yap Keng Ho [xxx]	Fined $1,000 in default 1 week's imprisonment

Appellants case

13 As noted above, while the elements of the offence were largely undisputed, Dr Chee raised a defence on the final element, namely that the defendants *ought reasonably to have known that the assembly was held without a permit.* This merited further examination beyond the DJ's observations at [49] of the GD (see above at [10]). Before me, Dr Chee forcefully argued that he was operating under the belief that he did not need a permit for the National Day incident, which formed the subject matter of this appeal, due to the police's response to a similar event conducted by him, three months earlier, on 1 May 2008 ("the May Day incident"). By way of background, the May Day incident concerned a similar assembly which was held by the SDP at a location not far from Block 190 (outside Toa Payoh Community Library), i.e. the site of the National Day incident.

14 At the trial below, Dr Chee testified to the following details in relation to the May Day incident:

(a) On 1 May 2008, Dr Chee together with some of the defendants other than Mr Yap went to Toa Payoh Central outside the Toa Payoh Community Library to distribute pamphlets and to sell some T-shirts and books to commemorate May Day.

(b) The May Day incident lasted from 10 am in the morning till about 5 pm. All participants from the SDP were wearing the red TBT T-shirts and distributing pamphlets and materials which had been laid out on a table.

15 The DJ noted that the Police had received a call from a member of the public reporting that Dr Chee was distributing pamphlets and had set up a table selling books and T-shirts at Toa Payoh Central. In response to the phone call, Senior Investigation Officer Mohamad Bin Mohamad Jalil ("SIO Mohamad") was despatched to observe the scene and to report his findings. SIO Mohamad observed the SDP activities for 15 minutes between 1 pm and 2 pm. He noted that there were four persons standing around a makeshift table where some items had been placed for sale and about three other persons were distributing flyers. Seven persons were observed to have been wearing the red TBT T-shirts. SIO Mohamad informed his superior officer, Superintendent Deep Singh ("Supt Singh") of his observations.

16 In connection with the May Day incident, evidence was led from the Prosecution's witness, Mr Lawrence Chin, the Compliance Management Unit Officer of Tanglin Police Division, that while an application for a permit was received by the Police it was rejected. Notwithstanding the rejection of the permit, the SDP proceeded with the May Day activity. The following day (i.e. 2 May 2008), the Today Newspaper carried an article on the May Day incident ("the article") which reported the Police's position on the said incident ("the Police statement"). Dr Chee testified that he had read the article "within a few days" after it was published. [note: 2] The relevant extracts of the article are as follows:

> In response to media queries, *the police said* **:** "Police received a call from the Bishan-Toa Payoh Town Council reporting that Chee Soon Juan was distributing pamphlets, and had set up a table selling books and T-shirts at Toa Payah Central. Police observation in response to the call confirmed it.

"*Chee did not stage an unlawful assembly or an illegal outdoor demonstration.*

"He was however peddling his books and T-shirts without a hawker's permit.

"As this may be a case of illegal hawking, the Police has referred the matter to the National Environment"

[emphasis added]

17 In addition to the article, the defence highlighted the testimony of Supt Singh. Under cross-examination, Supt Singh revealed that on 1 May 2008, he was informed by the Operations Room of a call from a member of the public regarding the SDP's activities at Toa Payoh. While cross-examining Supt Singh, Dr Chee drew comparisons between the May Day incident and National Day incident (forming the subject matter of this charge) as follows: [note: 3]

Dr Chee: We are going back now to 1 May. Did you also receive information that I and some other persons were distributing pamphlets and selling books and T-shirts displayed on a makeshift table?

Supt Singh: All I can recall my officer telling me that he saw about 4 persons standing near a table where some items were being displayed, and a short distance away some [3 persons were distributing flyers].

...

Dr Chee: Did he [the officer] tell you what these 4 or 7 persons were wearing? [note: 4]

Supt Singh: He informed that these people were wearing the red "Tak-Boleh Tahan" T-shirts.

Dr Chee: So now you are telling this court that you were told by your SIO that there were 7 persons wearing the red "Tak Boleh Tahan" T-Shirt in that location?

Supt Singh: Yes.

Dr Chee: And that red "Tak Bolah Tahan" is the same T-shirt you saw us wearing on 9 August 2008?

Supt Singh: Yes.

Dr Chee: In your view, the activity that was conducted on 1 May 2008 did not constitute an illegal assembly, am I correct?

Supt Singh: *At the material time it was unclear whether this group was part of the same group or not. It was also unclear what was their purpose of being there.* Was it for the sale of books or was it for the distribution of flyers, and the word "Tak Boleh Tahan" itself was something new, it was unclear to me. I am not certain whether they were acting together or separately, what was the purpose of the assembly there.

...

Dr Chee: *Based on the information, you made the assessment that there was no illegal assembly there, yes or no?*

Supt Singh: *My assessment then was there was no assembly there.*

....

Dr Chee: *The fact that we were all wearing the same T-shirt at the location, it didn't dawn on you that we were there for a common activity or purpose?*

Supt Singh: *It was unclear to me then what was the purpose of the assembly. The trigger point for me to act on 9 August was when I was told of the banner which clearly states the purpose of their presence there and all in the group would have known why they were gathered there. By that time I also had more feedback what this "Tak Boleh Tahan" campaign was all about.*

[emphasis added]

18 In describing his recollection of the May Day incident, Supt Singh also stated as follows: [note: 5]

Dr Chee: What did you do when you received the information from the SIO?

Supt Singh: My assessment, from the information provided, that was more a sale of books and the matter was reported to NEA.

Dr Chee: It was more a sale of books, am I correct?

Supt Singh: *There were also flyers being distributed. But the offence I could see was only one of illegal hawking and the matter was referred to NEA.*

...

Dr Chee: You told this Court you put together a team that was on the alert? Did you activate your team on 1st May? Did you ask them to do anything?

Supt Singh: *They did not go down to the scene.*

[emphasis added]

19 What I found troubling was that it was the Police who had publicly stated that the May Day incident *did not* constitute "*an unlawful assembly or an illegal outdoor demonstration*". The Prosecution had accepted here and below that the article had carried an accurate quote (above at [16]) of the Police's position on the incident. This was not just anybody giving an opinion or advice; this was the very body to which applications were made and who issued the requisite permits if approval was given.

20 Quite apart from what the DJ found at [49] of his GD (above at [10]), Dr Chee was not arguing that he did not know that a permit was required *per se*. Rather, his belief, forming the basis of his defence was that no permit was required for the National Day incident because the Police had assessed the May Day incident to be legal in so far as the MOA was concerned (elaborated above at [16]-[18]). In his examination-in-chief, Dr Chee explained the factual basis of his defence: [note: 6]

Dr Chee: [There] were clearly a group of us, between 8 to 10 persons ... wearing the red "Tak Boleh Tahan" T-shirts and either distributing pamphlets or selling the merchandise that we had laid out on the table on that day. No one approached us on 1 May to tell us what we did was an offence. And it was the following day that we read in the newspaper that the police had actually sent someone down to observe our activity, and then concluded that there was no offence that

had taken place except perhaps that we were selling something that the National Environment Agency might want to look into.

Subsequently we did not hear from anyone, neither from the police or the NEA. And so for the months of May, June, July we did not get any correspondence from the authorities regarding that activity on May 1st. And you add to the fact that we had learned from the police saying that no offence was committed, we then decided to conduct the same activity on 9 August, which we did. And as you can see, the video that the prosecution produced, was also of the same few persons in addition to a few more wearing the red "Tak Boleh Tahan" T-shit, also distributing pamphlets and selling some of the stuff on the table. And then we were told subsequently by Mr Rani that there was an offence to what we were doing. We couldn't quite figure out why because the activity was no different from the one that we had held on 1st May.

21 In essence, Dr Chee's point was that the Appellants had relied on the position taken by the Police as stated in the article and had chosen not to apply for the permit prior to the National Day incident as they were operating under the belief that they did not require one.

Issues

22 The two primary issues raised before me were as follows:

(a) Whether the DJ erred in finding that the Appellants (save Yap) ought reasonably to have known that the assembly was held without a permit ("Dr Chee's defence"); and

(b) Whether Mr Yap could be said to have participated in the assembly.

Issue 1: Dr Chee's defence

23 As noted above, the fact that the 9 August 2008 assembly was held without a permit was not in dispute. [note: 7] Rather, Dr Chee's defence was that the defendants did not know and reasonably ought not to have known that *a permit was required* for the National Day incident because of the Police's public statement on the May Day incident.

24 I pause to note at this juncture that having reviewed Supt Singh's testimony and the video recordings of both incidents tendered by the Prosecution and the Defence I find that the National Day incident and the May Day incident were not materially different from each other. They both involved the sale of t-shirts and the distribution of pamphlets to publicise the TBT campaign. The unfurling of a TBT banner in the National Day incident and the fact that the May Day incident was conducted in an open space while the National Day incident was conducted in a walkway near Block 190, were the main observable differences. In my view these differences did not materially set apart the two incidents in so far as the pivotal question of whether the MOA had been breached (see above at [17]). As to why the police had managed the two incidents differently, Supt Singh's answer was that in May 2008 the Police were unclear whether those present were part of the same group or not and he was unclear of their purpose. Further, the TBT campaign was something new; but by the August 2008 incident, he had more information and feedback as to what this campaign was all about.

25 Nonetheless, while the conduct of the Police was without a doubt troubling, Dr. Chee's defence must fail for the following reasons:

(a) First, on a proper interpretation of Rule 5 of the Rules, there was no additional *mens rea* requirement that the Appellants knew or reasonably ought to have known that *a permit was*

required. All that was required was that the Appellants knew or reasonably ought to have known that the assembly was held without a permit.

(b) Secondly, the article reporting the statement of the Police was not capable of constituting a waiver of the requirement at law to procure a permit prior to conducting an assembly in a public space.

26 These points will be addressed in turn.

Interpretation of Rule 5 of the Rules

Applicable law

27 Rule 5 of the Rules ("Rule 5") reads:

Any person who participates in any assembly or procession in any public road, public place or place of public resort shall, if he knows or *ought reasonably to have known that the assembly or procession is held without a permit*, or in contravention of any term or condition of a permit, be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000.

[emphasis added]

28 Rule 2(l) prescribes that the Rules would apply in the following situations ("Rule 2(1)"):

... to any assembly or procession of 5 or more persons in any public road, public place or place of public resort intended - (a) to demonstrate support for or opposition to the views or actions of any person; (b) *to publicise a cause or campaign;* or (c) to mark or commemorate any event.

[emphasis added]

29 On a plain reading of Rule 5, it is clear that the essence of the offence is that the accused knows or ought reasonably to know that the assembly was held without a permit. As is clear from a plain reading, Rule 5 does not state or imply that there is an additional *mens rea* requirement, *viz*, that the Appellants knew or reasonably ought to have known that *a permit was required*. Accordingly, it is worth setting out the relevant case law on this point.

You Xin v Public Prosecutor and another appeal

30 In *You Xin v Public Prosecutor and another appeal* [2007] 4 SLR(R) 17, where there were appeals against both conviction and sentence under Rule 5, the sole defence raised by the appellants was that there was not an assembly of *five or more people*.

31 The appellants argued that as there was no specific time indicated on the video recording adduced by the Prosecution, it could not be said with certainty whether the alleged offences had taken place within the time frame specified in the charge. Further, the appellants submitted that the video recording had been tampered with to make it appear that they had appeared in an assembly when they had not in fact participated in one. In dismissing the appeal, V K Rajah JA held at [5] that:

… The video recording clearly showed that the appellants were aware of the presence of each other and their fellow accused. It also showed that the appellants had communicated and interacted frequently with different combinations of persons constituting the assembly. It is plain

therefore that they had participated in an assembly to publicise "a cause or campaign". *As no permit for such an assembly was either applied for or existed, the appellants were in contravention of r 5 of the Rules read with s 5(1) of the Act. …*

[emphasis added]

32 Clearly, Rajah JA's *dictum* neither says nor suggests that it is an element of the offence under Rule 5 that the appellants knew or reasonably ought to have known in the first place that *a permit was required.* That said, this particular point was not argued by the appellants on appeal. Somewhat paradoxically, the trial judge took the appellants' own evidence that they did not believe that a permit was required as inculpating, as opposed to exculpating them. This is clear from the trial judge's Grounds of Decision in *Public Prosecutor v You Xin* and Others [2007] SGDC 79 at [44]:

One other issue raised was the matter of whether the accused persons 'ought reasonably to know' that there was no permit applied for. *The accused person's own evidence shows that they did not believe that a permit was required.* One can infer, therefore, that the existence of a permit was never truly active in their mind, or that they simply did not care. As a result, they, at the very least, ought to know that there was indeed no permit for such an assembly.

[emphasis added]

Public Prosecutor v Chong Kai Xiong and others

33 In *Public Prosecutor v Chong Kai Xiong and others* [2010] 3 SLR 355 ("*Chong Kai Xiong*"), Choo Han Teck J allowed an appeal by the Prosecution against the appellants' acquittal under Rule 5and convicted the appellants.

34 In *Chong Kai Xiong*, a group of people had engaged in a "walk" from Hong Lim Park to various places including Parliament House and the Supreme Court in order to commemorate the first anniversary of a protest led by Dr Chee. The event was planned to end at Queenstown Remand Prison where Dr Chee was incarcerated at the time. All except one of the respondents wore t-shirts emblazoned with "Democracy Now" and "Freedom Now." The fifth and final respondent, Mr Yap (the sixth appellant in this appeal), claimed that he was a blogger who was observing the "walk".

35 The trial judge acquitted all the appellants on the ground that the gathering was not an "assembly or procession" for the purposes of Rule 5 but a walk. This was because it was not disruptive and proceeded without a sustained formation; the group obeyed traffic lights and did not impede either traffic or pedestrian flow; the group walked casually and sometimes in pairs, sometimes singly, and sometimes in small groups; and the group did not attract any significant attention of the public and did not carry "the usual paraphernalia associated with a protest" (see *Chong Kai Xiong* at [8]).

36 Choo J noted at [9] the "patent" absurdity of adopting a plain reading of Rule 5 since that would *require* a permit to be granted before holding *any* gathering of *five or more persons*:

… [A]ny group of five or more persons would require a permit if they were to walk to a cinema to watch the anniversary of a James Bond film. The patently absurd situation would warrant a dismissal of the charge against the respondents because if they could walk to the cinema they can walk to the Istana. On the other hand, it is also obvious that r 5 was clearly not restricted to formal processions on the street proper. …

37 The challenge was thus to formulate a nuanced, purposive reading of Rule 5. Accordingly, Choo J held at [10] that:

> … *What makes the assembly and procession one that falls within the ambit of r 5 is whether the assembly or procession was one that was designed to attract public attention to a cause as may give rise to a public disturbance or nuisance.* Assemblies and processions with political or popular causes are more likely to fall within this category. This was the critical aspect of the present case that distinguished it from a walk. It may be that in the event, the respondents created no disturbance and thus, a walk such as they had planned should not reasonably be prohibited, but that does not address the question in this appeal, namely, *was it one that a permit was required?*
>
> [emphasis added]

38 Hence, under Rule 5, a permit would be required for an assembly or procession involving five or more people "that was designed to attract public attention to a cause as may give rise to a public disturbance or nuisance." Pertinent to the present case, Choo J went on to observe at [11] that there might be a "marginal case" where a defendant might receive "the benefit of the doubt" when he or she reasonably believed that a permit was necessary:

> In the present case, the evidence on record shows that the respondents had a political purpose for what they called a "walk". They also knew that a licence was probably required because they had stated that the walk in question was going to be "as [they] had originally planned in 2006" [an earlier event]. In 2006, as the second respondent conceded, the organisers had applied for a permit but it was refused**.** *On the facts of this case, therefore, there was no question that the respondents knew that a permit was required for them to organise a walk similar to the one they planned in 2006. That walk did not take place because the police stopped them.* In the present case, the respondents and the other members walked from the Hong Lim Park without fanfare as to attract immediate police action. Miss Cheah, *amicus curiae*, agreed with the trial judge's finding that because no disturbance occurred and that the respondents were sometimes walking in pairs and sometimes singly, the indication was that "the degree of organisation was so low that the respondents failed to attract public attention". In this regard, I find myself unable to agree. The test is whether the organisers and participants intended to attract public attention, not whether they had succeeded or not. Rule 5 being pre-emptive leaves the assessment of risks to the permit issuer. When an event such as the present has been made public, public disorder may not necessarily be caused by the participants only; it may arise from crowds gathered to observe the event. The evidence of the internet posting, the selected use of t-shirts emblazoned with political slogans, the choice of route from departure to destination, and the distribution of pamphlets indicated otherwise. Breaking into smaller groups from time to time along the 12km walk may also be part of the plan, but that is not important because with the degree of planning already in place, it is precisely a matter for the police to decide whether a permit should be issued or not. The organisers and participants can only take it that no permit was necessary at their own risk. As Miss Cheah also noted, r 5 was a pre-emptive rule – a procession intended to be peaceful can turn violent, and it is the police who has to assess the risk of that happening. *Whether the circumstances were such that a permit ought to be sought must not be mixed up with the merits as to whether a permit would or ought to be given. In a marginal case, a defendant might have received the benefit of the doubt for having mixed up the two in believing that no permit would be necessary for the planned activity, but not in this case because the evidence shows that the respondents must have known that a permit was required.*
>
> [emphasis added]

39 From the passage above, what is apparent is that on the facts, it was clear that the respondents knew that a permit was required. However, Choo J adopted a purposive approach to guard against the absurdities of a strict or literal approach. This included having regard to whether or not the respondents in question knew whether a permit was required. This case thus in a sense lent some weight to Dr Chee's argument. Second, Choo J found that the actual occurrence of disturbance from the event in question did not impact upon the question of whether a permit was required. Rather, the relevant question was whether the event may give rise to *a public disturbance or nuisance*; Rule 5 was thus pre-emptive in nature.

Chee Soon Juan and others v Public Prosecutor

40 In the recent decision of *Chee Soon Juan and others v Public Prosecutor* [2011] 3 SLR 50 ("*Chee Soon Juan*"), an earlier case which is not to be confused with the present appeal, one of the issues which fell to be determined on appeal was whether the appellants ought reasonably to have known that a permit was required for their activity. In addressing this issue, Woo J adopted a similar purposive approach to interpreting Rule 5 as Choo J in *Chong Kai Xiong.* Woo J stated at [4] and [9] that:

> 4 The MOR was promulgated pursuant to the power granted to the Minister of Home Affairs by s 5(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("the MOA"). *The purpose of the MOR was to ensure the maintenance of public order and to prevent congestion and annoyance caused by assemblies and processions held by all kinds of groups and organisations*: see the statement of the Senior Minister of State for Home Affairs, Dr Lee Boon Yang, at the Second Reading of the Minor Offences (Amendment) Bill (*Singapore Parliamentary Debates, Official Report* (16 February 1989) vol 52 at col 689).
>
> 9 *Under the MOR, subject to the exceptions stated in r 2(2), an assembly (whether it involved commercial, political, social, recreational or other activities) intended to achieve any of the purposes listed in rr 2(1)(a)–2(1)(c) was an assembly for which a permit was required if there were five or more participants. The police would then have the discretion whether to grant a permit when this was applied for.*
>
> [emphasis added]

Rules 2(1)(a)-2(1)(c) of the MOR refer to assemblies or processions intended to (a) demonstrate support for or opposition to the views or actions of any person; (b) to publicise a cause or campaign; or (c) to mark or commemorate any event.

41 It should be noted that the question of whether the appellants knew or reasonably ought to have known that *a permit was required* was not in doubt in *Chee Soon Juan* since Dr Chee had conceded as much in that case. This is clear from Woo J's findings at [26] and [28]–[29]:

> 26 Dr Chee's evidence was as follows:
>
> ...
>
> Q: You did not think that according to the regulation that applies in Singapore that you needed a permit to distribute pamphlets on 10/9/06?
>
> A: Yes.

Q: You did not think that the law requires you to get a permit to distribute pamphlets?

A: This or any party.

Q: What if you stand in an open area, instead of distributing pamphlets and shouted out the contents to passing public, do you think?

A: That would be a hypothetical question we are not allowed to answer hypothetical questions.

CT: Answer the question. It goes towards your knowledge.

A: If you say if it was a contravention of the rules if I stood up in public and uttered the contents verbally rather than passing it out the authority would have accused me of speaking in public without a permit. The contents are secondary. It would be the act of speaking in public.

Q: Your answer would be if you had thought you require a permit.

A: Yes

28 In my view, he [Dr Chee] knew that there was no permit for the activity on 10 September 2006. He applied for one for the rally and march on 16 September 2006 (but the application was unsuccessful). He did not apply for one for the [earlier] activity on 10 September 2006. *A fortiori*, he ought reasonably to have known that the assembly was held without a permit.

2 9 *As mentioned above, it is no defence for Dr Chee to say that he thought that no permit was required* ***in the circumstances.***

[emphasis in original in italics; emphasis added in bold italics]

42 These past precedents are a little ambiguous as to whether the Prosecution must prove that a defendant knew or reasonably ought to have known that *a permit was required* in the first place. *A fortiori*, it is equally unclear *in what circumstances*, short of Choo J's example of a group of five persons walking to a cinema to watch the anniversary of a James Bond film (see above at [36]), it would be open for a defendant to successfully argue that he or she did not reasonably know that a permit was required. The question then is whether within the scheme of Rule 5:

(a) Rule 5 should be interpreted, as a matter of construction, to include the additional *mens rea* element that the Prosecution must prove that a defendant knew or reasonably ought to have known that a permit was required;

(b) Whether the Appellants could have legitimately relied upon the public statement of the Police who are the licensing authority, that a permit was not necessary; and

(c) Whether the positive public statement by the Police concerning the legality of an earlier assembly could reasonably be construed as waiving the requirement to apply and obtain a permit for a similar, subsequent assembly.

Construction of Rule 5

43 As noted by Yong Pung How CJ in *Comfort Management Pte Ltd v Public Prosecutor [2003]* 2 SLR(R) 67, citing with approval the earlier decision of *Forward Food Management Pte Ltd and another v Public Prosecutor* [2002] 1 SLR(R) 443, at [15]:

> … The proper approach to be taken by a court construing a penal provision is to first consider if the literal and purposive interpretations of the provision leave the provision in ambiguity. It is only after these and other tools of ascertaining Parliament's intent have been exhausted, that the strict construction rule kicks in in the accused person's favour.

44 Yong CJ also laid out a three step test on the relevant principles of statutory interpretation which assist in the present context, at [19]:

> …
>
> (a) Words or phrases in statutory provisions should generally be given their literal meanings (the "literal interpretation" rule).
>
> (b) However, if the literal meaning would not promote the statutory purpose, then some other secondary meaning which promotes the statutory purpose would be chosen (the "purposive interpretation" rule).
>
> (c) If the provision is still ambiguous after applying the "literal interpretation" and "purposive interpretation" rule, then the courts should prefer an interpretation which favours the accused (the "strict construction rule").

45 Applying this approach of construction set out at [44], while there is no conflict between the literal interpretation of Rule 5 and its statutory purpose, the purposive enquiry is limited to the net cast by the offence, i.e. as noted by Choo J in *Chong Kai Xiong*. Once the net is cast, or the activity is one which Rule 5 captures, there is no further need to then embellish the existing *mens rea* requirement purposively or otherwise. It is clear from the wording of Rule 5 that there is no ambiguity as to the existence of an additional *mens rea* requirement namely, the defendant's knowledge of the *need* for a permit prior to the court's analysis of the knowledge of the existence of the permit. Construing the provision literally clarifies that no such additional mental element has been envisioned by the drafters.

46 I should add that to my mind, while Rule 5 is not a strict liability offence, the mental element to be established is limited to the defendant's knowledge of the *existence* of the permit. The supplementary or additional enquiry as to the individual's knowledge of the *need* for a permit is entirely distinct from the mental element envisioned by the wording of Rule 5. Thus in the absence of any wording or statutory intent in support, a pronouncement on the existence of this additional element by way of interpretive devices would be tantamount to a back door "import" of an additional mental element into the offence structure carefully crafted by Parliament — resulting in the burden placed upon the Prosecution being judicially widened. In the present case it bears noting that it is not the function of the court to modify the law and this is certainly not to be done under the guise of the application of traditional principles of construction.

47 In my view, no reading of Rule 5 supports the finding of an additional *mens rea* requirement to be proved by the Prosecution, *viz*, that the Appellants reasonably ought to have known that a permit was required in the first place. Further, I have not been given a compelling reason to depart from the ordinary, plain and unambiguous wording of the Rule. As such, all that is required under Rule 5 is that the Prosecution establish that the Appellants knew or reasonably ought to have known that they did

not have a permit. It is clear in the instant case that this element was proven beyond a reasonable doubt by the admission of the Appellants before the DJ as well as before me.

Dr Chee's "reliance" on a statement of the Police

48 As noted above at [19], this was the question that troubled me the most. The Police were the very public body to whom applications under the Rule were submitted. They were the body which processed the applications and decided whether to issue or decline to issue permits to hold such public assemblies. If they issued a public statement in a newspaper article that the May Day incident (held without a permit), was not an unlawful assembly or an illegal outdoor demonstration, should members of the public not be entitled to rely upon that statement?

49 In his GD, the DJ stated at [55] as follows:

> … Section 79 relates to mistakes by reason of a mistake of fact and not by reason of a mistake of law. *Whether an assembly required a permit is an issue of law and not an issue of fact.* Had it been the evidence of the defendants, for example, that they were under the mistaken impression that a permit had been obtained, that could amount to a mistake of fact. However, the defendants were aware that no permit had been obtained or applied for because they assumed that no permit was required. This was a mistake of law. Thus the general defence of mistake under section 79 did not avail Mr Yap or the other defendants.
>
> [emphasis added]

50 Whether some issues are of fact or law or mixed fact and law is a question that has vexed lawyers. As noted by D. O' Connor and P. A. Fairall in *Criminal Defences* (Butterworths, 3rd Ed, 1996) p 52 at [3.6], "it is disturbing that the availability of a criminal defence should turn upon a distinction that cannot be clearly delineated ... examination of the law reports reveals that the test for distinguishing fact from law is also a closely guarded secret." The distinction is of some importance because of s 79 of the PC, which is a mistake of fact defence:

> **79**. Nothing is an offence which is done by any person who is justified by law, or *who by reason of a mistake of fact and not by reason of a mistake of law* in good faith believes himself to be justified by law in doing it.
>
> [emphasis added]

51 Having carefully considered the matter, I am however of the view that the Appellants' contention cannot stand because it does not raise a question of fact but one of law: *viz*, was a permit required for the activity carried out by the Appellants in May and August 2008. There can be little doubt that if the Appellants were given an opinion or advice by a lay-friend, or a friend who was a law professor, or even a practising lawyer giving advice under a retainer, then their reliance on the mistaken advice or opinion would be of no avail. That must be because the law requires parties participating in such events to have a permit. The fact that an accused thought that he did not need a permit or was advised by a friend or received legal advice to that effect cannot afford him a defence because the need for a permit for certain activities is a matter of law.

52 The Latin maxim, *ignorantia juris quod quisque scire tenetur non excusat*, (Ignorance of the law which everybody is supposed to know does not afford excuse), also abbreviated as *ignorantia juris non excusat*, (Coke, 2 Co.Rep.3b) has been attacked by some academics. It has been characterised as a "*preposterous doctrine resting on insecure foundations within the criminal law*" (*see* Andrew

Ashworth, "Ignorance of the Criminal Law, and Duties to Avoid it" [2011] 74 MLR 1). In Paul Matthews, "Ignorance of the Law is No Excuse?" [1983] 3 Legal Studies 174 ("Matthews") the author notes at p 175 that Hale clearly stated that ignorance of the law did not relieve criminal liability, "because every person is bound to know the law, and presumed to do so ... ". Matthews went on to point out at p 175 that Hale relied upon the decision of *Brett v Ridgen* (1586) 75 ER 516 at 520, which was a civil case where it was argued that a will should be construed as at the testator's death and not as at the date of its exclusion. Matthews further argued at p 175 that Blackstone merely repeated Hale's view and "[prayed] in aid the Roman law" which maxim, *error juris nocet, error facti non nocet*, was never applied to criminal law but only to civil law and even then only to sections of the community who might reasonably be expected to know the civil law. However, in spite of these learned misgivings, the existence of the legal maxim ignorance of the law is no excuse has now been too well established and entrenched to be ignored, much less discarded.

53 The learned DJ took the view that despite the article quoting the Police in the Today Newspaper of 2 May 2008, the question whether a permit was required for a public assembly was strictly a question of law. I respectfully agree. If it were otherwise then public bodies charged with regulating this and various other activities would be able to disregard the law and decide, contrary to the law, that permits not only to hold assemblies but for a whole host of activities were not necessary. By the same token, a mandatory order cannot be imposed on a public body if it is allowed to create its own exceptions outside the law laid down by Parliament. This proposition is well illustrated in the case of *Cambridgeshire and Isle of Ely County Council of Rust* [1972] 2 QB 426 ("*Rust*"). In *Rust*, a defendant made enquiries of local and national authorities before setting up a stall selling produce on a grass verge beside a highway. None of them suggested it was unlawful and he actually paid rates for that stall for three years. The County Council charged the defendant under s 127 of the Highways Act 1959 c(25) (UK) as an itinerant trader or hawker who pitched a stall on a highway without lawful excuse. In convicting him on appeal, Lord Widgery CJ took the view that a defence of lawful excuse was unavailable as there was no law or authority in existence who could have granted him a licence to set up stall on the highway. Hence despite all the enquiries he had made, there was no lawful excuse for conduct where one is mistaken as to the law, as everyone is presumed to know the law. *Rust* was considered in the decision of *Brook v Ashton* [1974] Crim LR 105 ("*Brook v Ashton*") where the defendant was charged with obstructing the free passage along an unmade highway. The defendant received permission to resite the footpath and successfully laid an eight-foot wide tarmac footpath. However, when he sought to widen the tarmac to 12 feet, the local council refused permission and on his application the justices also declined to make the order he sought. The defendant argued that he reasonably believed, on his dealings with the council that he was justified in carrying out the extension. The defendant's mistaken belief that the council could confer such authority was held to be a mistake of law rather than fact, which could not amount to a lawful excuse.

54 On facts analogous to the present case, in *Surrey County Council v Battersby* [1965] 2 QB 194 ("*SCC v Battersby*"), a woman who enquired with the local council whether she was obliged to register a certain arrangement was wrongly advised and subsequently prosecuted and convicted under the relevant statute. Notwithstanding the court's finding that the defendant had acted *bona fide* on the advice of an official of the Surrey County Council, the local council's advice was no defence. While *SCC v Battersby* has been heavily criticised by academics for skewing the law on officially induced mistake (*see* Peter Brett, "Mistake of Law as a Criminal Defence" (1996) 5 MULR 179; P. G. Barton, "Officially Induced Error as a Criminal Defence: A Preliminary Look" (1980) 22 Crim LQ 314; W. J. Brookbanks, "Officially Induced Error as a Defence to Crime" (1993) 17 Crim LJ 381), it remains good law. I would go so far to venture to say that the reasoning underpinning this decision is the reluctance to permit inroads into the entrenched legal maxim that ignorance of the law is not an excuse. Similarly, in *Regina v Arrowsmith* [1975] 2 WLR 484

("*Arrowsmith*"), the defendant distributed leaflets and was charged with incitement under a statutory provision. She defended herself on the basis that a letter she had received from the Director of Public Prosecutions would have led any reasonable person to believe that the distribution of leaflets did not contravene the relevant act. This defence was rejected at trial and on appeal.

55 Some may argue that *Postermobile plc v Brent London Borough Council*, [1997] EWHC Admin 1002 ("*Postermobile*") illustrates the existence of a defence based on an officially-induced mistake. However the facts of that case are quite different from the present appeal. In *Postermobile*, the appellants sought permission to put up temporary advertisements. They were referred to and told by a steering committee of the licensing authority that temporary advertisements of one month or less did not require permission. Upon the decision of the magistrates to proceed with prosecution, *Postermobile* appealed and the Divisional Court quashed the magistrate's decision and stayed proceedings as an abuse of process.

56 Again in *Regina v Bowsher* [1973] RTR 202 ("*Bowsher*"), the defendant was disqualified from driving for six months by a court on 19 November 1970 ("the first six month term"). However, a couple of months later, a different court imposed a further six months disqualification for similar offences committed on the same day as those for which the disqualification had been imposed on 19 November 1970 ("the second six month term"). The second six month term was not recorded by the licensing authority and at the conclusion of the first six month term the defendant's licence was returned to him by court officials whist he was still within the second period of disqualification. The defendant argued that he honestly believed that he was entitled to drive because his licence was returned to him, negating the *mens rea* of the relevant offence. The Court of Appeal held that his reasonable mistake could not be a defence since on a plain reading of the offence elements the absence of knowledge of disqualification was not a defence. Similar to *Bowsher*, Rule 5 does not contemplate knowledge of the *requirement* of a permit but only requires that the Appellants knew or reasonably ought to have known about the *existence* of a permit (above at [47]).

57 The cases cited above are good authority for the principle that an officially induced mistake of law is not a valid defence to unlawful conduct where the elements of the offence in question have been established beyond a reasonable doubt. Even if I was willing to ignore the English authorities on this point, which I am not, the codification of defences in the PC does not allow me to accept such a defence (i.e. officially induced mistake of law), see for example, the distinction in s 79 PC on a mistake of fact and a mistake of law. Such a defence would be a matter for Parliament to consider as part of the overall scheme of the PC, particularly in light of the significant inroad it would make into a well established principle that ignorance of the law is not an excuse. For this reason, I do not think that the defence of an "officially induced error" in the Canadian case of *R. v Cancoil Thermal Corporation and Parkinson* (1986) 52 CR (3d) 188 is part of Singapore law. In that case, Lacourcière JA of the Ontario Supreme Court, Court of Appeal said at 199:

> The defence of 'officially induced error' is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to raise this defence successfully, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors, including the efforts he made to ascertain the proper law, the complexity or the obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

It may well be an instance where prosecutorial discretion is exercised but that is a separate matter and the province of the Attorney-General.

58 It is also important to point out that on the facts I entertained serious doubts about the reliance that the Appellants actually placed on the Police statement in the article. On the facts, Dr Chee was evasive when questioned on whether he had in fact *relied* on the article when he staged the National Day incident: [note: 8]

> DPP Kaur: Prior to holding the event on 9 August, did you make any enquiries with any Government agency as to the necessity for a permit? Did you make any phone calls, send any letters?
>
> Dr Chee: *If I recall I did make a couple of calls. I cannot recall specifically when.*
>
> DPP Kaur: You are not able to give us any information as to what transpired?
>
> Dr Chee: Not when something happened two years ago, no.
>
> [emphasis added]

Dr Chee's admission in the above exchange with Deputy Public Prosecutor ("DPP") Kaur diminishes the strength of his apparent reliance on the article. The crux of his argument before me was that he saw no reason to make an application for a permit before the 9 August 2008 incident as he was sure that he did not need one based on the Police statement in the article on the 1 May 2008 incident. The fact that Dr Chee saw the need to make enquiries or a "couple of calls" without identifying who he spoke to and what the response was on the need to apply for a permit, raised serious doubts on this part of his evidence and as to whether he relied on the article.

59 Turning to Mr Yap, at trial, he also relied on the fact that the Police had not taken any action for the 1 May 2008 incident and he was under the impression that the Police had granted the SDP some sort of exemption. He agreed therefore that no permit had been obtained for the National Day incident. Yet when pressed, he admitted that he himself did not read the article, he claimed that he learnt of it from others. He also saw the article for the first time in court. His answers, from the transcript on these points can be seen to be vague and evasive. Further when the police recorded his statement on 2 September 2008, he never mentioned this fact nor of the "exemption" granted for an identical activity in May 2008. When asked about this, his immediate reaction was that the Police should not refer to it. When this failed, his only weak excuse was that he did not think it was important to mention it then. This defence of his was clearly an afterthought and picked up from the defences of the other Appellants.

60 As such, I find that any reliance on the erroneous statement of the Police in the article was a mistake of law and not of fact and therefore s 79 of the PC was not available to the Appellants as a defence. Further, in the relevant English decisions discussed above, the courts have consistently rejected the existence of a defence of an officially induced mistake of law which in any event I cannot accept in our local context in light of the codification of defences available in the PC, without a clear direction to that effect from Parliament. I now turn to the final question before me which was whether as a matter of law, the article was capable of waiving the requirement under Rule 5 to obtain a permit.

The article did not constitute a waiver of the requirement to obtain a permit

61 This point can be dealt with shortly. First, a police communiqué or press statement does not amount to an authoritative statement on whether criminal liability has been made out in a particular instance. Such authoritative pronouncements lie solely with the courts. Secondly, even if the police

had erroneously stated that the May Day incident did not violate Rule 5, this error, as the cases referred to above show, cannot be a defence or a waiver for the National Day incident. Thirdly, the police communiqué did not constitute a clear and unambiguous representation that similar future activities would not violate Rule 5. In fact, the article only reported the police's statement that Dr Chee (not all six Appellants) did not stage an "unlawful assembly or an illegal outdoor demonstration" on 1 May 2008. Fourthly, I have already dealt with whether Dr Chee had in fact relied on the article when he staged the National Day incident. There is consequently no merit in this argument.

Issue 2: Mr Yap's conviction

62 Mr Yap's position was unique in that unlike the other Appellants he was not a member of the SDP, not wearing a red t-shirt and not distributing pamphlets or selling t-shirts at the National Day incident. Accordingly, the success of his appeal against conviction turned on whether the DJ had erred in finding that he had "participated" in the National Day incident, an element of the offence (under Rule 5) that has to be proved by the Prosecution beyond a reasonable doubt. In this respect, Mr Yap's defence was that he was simply a blogger covering the National Day outreach activities of two opposition parties, namely, the National Solidarity Party ("NSP") and SDP. [note: 9]

63 At the trial, Mr Yap said:

> Mr Yap: In the previous trial there were issues during cross-examination with my co-defendants, because my style and my length of cross-examination it causes a lot of unnecessary tension. I like to make an application under CPC, there is a provision to disjoin a joint trial. Section 176 – I would like to highlight the illustration in s 176. The illustration number (d) illustrates that when A and B being members of opposing faction of riot should be charged separately. My co-defendants are members of SDP, and I am not. I maintain some positions in political view opposing the views of the Singapore Democratic Party. I am involved in politics as an individual. The illusion provided in the statute would apply in my situation. I request the Judge to disjoin the trial. I would like to have a separate trial for the charge I face. The illustration is one of riot. Here we are charged with illegal assembly. There is some similarity although there is no violence. The illustration fits well.

The DJ took the view that illustration (d) of s 176 Criminal Procedure Code (Cap 68, 1985 Rev Ed) was not applicable to the present case. In response, Mr Yap indicated that he wanted to plead guilty. However, as his plea was qualified it was rejected and he re-joined the trial with the remaining five Appellants. Mr Yap's primary contention is that he did not participate in the National Day incident. This calls for an examination of the precise scope of "participation" for the purposes of Rule 5.

What is participation?

64 In defining the meaning of "participation" in the context of Rule 5, the DJ cited the following passage from [29] of *Quak Siew Hock* (at [57]):

> [T]he issue of whether the conduct of an accused is sufficient to constitute ***participation*** for the purposes of s 34 is a *question dependent on the facts and circumstances* of each particular case: *Barendra Kumar Ghosh* [AIR 1925 PC l], *Ibrahim bin Masod v PP* [1993] 3 SLR(R) 438. [...] I am satisfied that Quak's accompaniment amounted to sufficient participation in their common intention for the purposes of S 34, at the very least because, firstly, it indicated ***a readiness to play his part in the accomplishment of their common design . Secondly, it was reasonable to presume that his physical presence in the circumstances provided encouragement and***

support for Lee and was therefore in furtherance of their common intention. Accordingly, to borrow a phrase from *Ramaswami*, Quak's ***facilitative presence*** *was tantamount to actual participation in their "criminal act" and went beyond mere involvement in the preparation for or planning of their common design.*

[emphasis in original in italics, emphasis added in bold italics]

Having looked at the cases and considered the matter, with respect, I find the DJ's analogy between "participation" under s 34 of the PC and under Rule 5 open to question.

65 I am not sure that one can equate "participation" under s 34 of the PC and Rule 5. I venture to think that in the context of s 34 of the PC, the concept of participation is intricately wedded to the common intention alleged in the charge preferred. However, under Rule 5, the "participation" required of the accused person is specifically in relation to the illegal assembly conducted in "*any public road, public place or place of public resort*". Thus, unlike s 34 of the PC where presence at the scene of the crime is not a pre-requisite for a finding of "participation" to be made (see *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 ("*Lee Chez Kee*") at [146]), on a plain reading of Rule 5 one could argue that "participation" requires the physical presence of the accused person in the public space in which the illegal assembly is conducted. This difference alone suggests to me that participation in the context of Rule 5 is different from that under s 34 of the PC. However I say no more as I have not had the benefit of argument on this point.

66 More pertinently, the law on "participation" in the context of s 34 of the PC has moved on since 1998 (*ie*, the year when *Quak Siew Hock* was decided). The characterisation of "participation", as stated in *Quak Siew Hock*, ought to be interpreted in light of the more recent Court of Appeal decision of *Lee Chez Kee*. There, V K Rajah JA, (with whom the other two judges agreed on the interpretation of s 34), considered the meaning of "participation" under s 34 of the PC and stated as follows at [138] and [146]:

> 138 … s 34 of the Penal Code does not apply unless such a "criminal act" has been "done by several persons". Participation in the criminal act is the main feature of s 34 of the Penal Code and it is this which explains why the persons involved are made to share in the criminal liability for the offence jointly. It necessarily follows from this that a person cannot be made liable for an offence with the help of s 34 unless he has actually participated in the commission of the crime. In other words, the mere agreement between a number of persons to commit a certain crime is not enough for the purpose of this section. Such persons could be committing the offence of a criminal conspiracy, but they would not fall foul of s 34.
>
> 146 In my view, it is a better approach to view participation, *not presence*, as the key ingredient in imposing liability under s 34 of the Penal Code. ***It should be a question of fact in each case whether the accused had participated to a sufficient degree such that he is deemed to be as blameworthy as the primary offender*** **.** Participation, however, need not in all cases be by physical presence. As the learned authors of *Criminal Law in Malaysia and Singapore* state at para 35.36, this is particularly so in view of modern technological advances where assistance in committing an offence can be given from afar.
>
> [emphasis in original in italics; emphasis added in bold italics]

67 In drawing the analogy between s 34 of the PC and Rule 5 "participation", we therefore have to take note of *Lee Chez Kee;* not only must the totality of the evidence be considered but, pertinent to the present context, the accused must be said to have *participated to a sufficient degree to be*

deemed as blameworthy as other individuals in the illegal public assembly in question. The question – to what extent has Mr Yap participated in the National Day incident – must be answered in light of *Lee Chez Kee*.

68 The DJ accepted DPP Sellakumaran's submissions on whether Mr Yap "participated" in the National Day incident: [note: 10]

> DPP Sellakumaran: It is our submission that in order for him [Mr Yap] to participate in the assembly it was not necessary for him to have been involved in the organisation of the assembly or even the "Tak Boleh Tahan" campaign. It is not even necessary for him to have been a member of the SDP. *As long as his actions provided support or encouragement to the group he may be said to have participated in the assembly and the activities. It is our submission that in uttering the words "Tak Boleh Tahan" twice Mr Yap had identified himself with the common purpose of the assembly, which was to publicise the "Tak Boleh Tahan" campaign, and he had also provided support and encouragement to the assembly. And the very act of shouting "Tak Boleh Tahan" was a publicisation of the "Tak Boleh Tahan" campaign. So on that basis there is also some evidence to suggest that he participated in the assembly.*
>
> [emphasis added]

Thus, DPP Sellakumaran submitted and the DJ accepted that Mr Yap had participated in the National Day incident by providing support and encouragement to the group through his 'facilitative presence' (using the test in *Quak Siew Hock*) and from his act of shouting the words "Tak Boleh Tahan" twice (at 14:37:40 in PW25). The DJ also found that Mr Yap had identified himself with the TBT campaign and publicised it. Mr Yap claims otherwise. In Mr Yap's cross-examination of Supt Singh, this is what Supt Singh said:

> Mr Yap: In your investigation do you have any information that I had anything to do with the preparation and display of this banner [the banner displayed at the "Tak Boleh Tahan" campaign]?
>
> Supt Singh: No.
>
> Mr Yap: Do I have anything to do with those "Tak Bolah Tahan" T-shits?
>
> Supt Singh: No.
>
> Mr Yap: Do I have anything to do with the leaflets on that day?
>
> Supt Singh: No.
>
> Mr Yap: I have only something to do with the video and photos, is that correct?
>
> Supt Singh: As I explained earlier, based on the information we had, the observation of the officers, the banner, the presence of the defendant at scene, and he shouting "Tak Boleh Tahan" twice, there is reason *to believe he is somewhat connected to this activity that was going on*.
>
> [emphasis added]

69 The requirement and finding of "support and encouragement" in *Quak Siew Hock* was made in a quite distinct context where the accused in that case was convicted of possessing prohibited publications in furtherance of the common intention to hand them out by going door-to-door. It

should be noted that the accused in *Quak Siew Hock* was a member of a two-man door-to-door team, from which it was obvious, notwithstanding that he did not have the publications on hand, that he shared in the common intention to distribute the said publications.

70 If we accept that Yap's "facilitative presence" by, *inter alia*, shouting 'Tak boleh tahan" is sufficient to show participation for the purposes of Rule 5, then where do we draw the line? What of a passer-by who signs a petition, cheers on the group and departs after 5 minutes, is he too a participant? Or a passer-by who buys a T-shirt, receives a pamphlet, takes a photograph with the Appellants and stays for 10 minutes before departing, is he too a participant under Rule 5? Indeed Supt Singh revealed that there were other members of the public who had freely interacted and photographed the first five Appellants that day. [note: 11]

71 The essence of the charge Mr Yap faces is participating, together with 11 other named persons, in an assembly, in a public place along the walkway in front of Block 190, organised by the SDP and intended to publicise the TBT campaign without a permit. The Prosecution has to prove, beyond a reasonable doubt, how Mr Yap participated in the SDP assembly with the other 11 persons on that day and that he did so to a sufficient degree to be deemed as blameworthy as those other 11 SDP members. The evidence is that Mr Yap is not an SDP member. He was not wearing a TBT t-shirt, he was not distributing pamphlets or selling t-shirts or talking to or engaging passers-by about the TBT campaign. Mr Yap was not doing any of these things the other members of the assembly were doing. He was, for almost all of the time on a staircase landing, away from and above the SDP group, their table and banner, filming the assembly. The photographs "P-2" and "P-22" show this clearly. A main component of the Prosecution's evidence against Mr Yap was their video camera recording, "P-25", of the SDP activities on that day and the police intervention that followed.

72 The other Appellants maintained that they did not consider Mr Yap to be a participant: [note: 12]

> Chia: I discussed with the rest of the defendants. We do not dispute we were there and organised the activities. *All except for Mr Yap.*
>
> Mr Yap: I was there independently. I never agreed to participate in any activity with anybody. Original charge state earlier time. Amended charge state later time. In between the two times I was away from the scene. There was another political party activity also in Toa Payoh. It was National Solidarity Party. They were there. I left the KFC area and went there to take video of NSP walkabout. Then I came back to SDP's activity. My role was independently as a blogger to take video of the political parties' activities on National Day and write it on my blog as a blogger. I was not participating in any of the political party's activities.
>
> [emphasis added]

Having watched "P-25", except for a short time when Mr Chia Ti Lik looks up at Mr Yap during the photograph taking at the end and says something to him, I noted that there was no eye-contact or interaction between the SDP members and Mr Yap. There were no gestures, no smiles or even any acknowledgement of Mr Yap's presence by the SDP members. They were all busy going about their own business in engaging people who were passing by and speaking to them about and publicising their campaign. It was for the Prosecution to establish how Mr Yap could be said to be a participant in the activities which the remaining Appellants were carrying out so as to publicise the TBT campaign.

73 The only relevant evidence adduced by the Prosecution in support of their case was Mr Yap shouting "Tak boleh tahan" towards the end of the assembly. Mr Yap says he did this as a narrative to his film, to put a title to his documenting the event and did so loudly because there was a hawker in the background using a loudspeaker and hawking his wares. The Prosecution made much of this. So did the learned DJ below and I can understand why. Mr Yap was being disingenuous when he said that he was merely documenting the event with those words and had to do so loudly because of the hawker in the background. The hawker's voice was audible in the background for a considerable length of time. There was no narration or oral titling of the event by Mr Yap until towards the end of the video. It is no coincidence that at that juncture, the SDP members had been asked by the police to disperse. Instead of doing so immediately, they gathered for a group photograph with their TBT banner. It was at this moment that Mr Yap shouted "Tak boleh tahan" loudly. There was also evidence of someone in the group also saying "tak boleh tahan". This was the only evidence that could be said to support the Prosecution's case in establishing Mr Yap's "participation" in the SDP assembly.

74 But that evidence on its own is not enough to show participation to a sufficient degree of blameworthiness as the other Appellants. In his defence, Mr Yap claimed that he is a "citizen journalist":

> This is my defence. I was there to give coverage to both SDP and NSP activities. I have been charged for one but not the other. Same place, different parties. This will have to be looked at in addition to what was seen on 1 May 2008, where another "Tak Boleh Tahan" also at Toa Payoh wasn't deemed by the police as violating MOA. That conclusion by police was made known to the public prior to this event [the 9 August event] taking place. Therefore it forms a crucial element of my defence. I submit that s 79 of Penal Code, general exceptions, provide that an act justified by law or by mistake of fact, is an exception.

The evidence Mr Yap produced, which was not rebutted by any evidence from the Prosecution, was that he also covered other opposition party rallies, including the NSP rally which was in the same vicinity and on the same day, which he also filmed and put up on his blog (see the five videos adduced in evidence, Defence Exhibit "3I"). He also posted his comments on the NSP rally in the same blog post as his comments on the National Day incident (Defence Exhibit "D11"). On the evidence, he was not only focussed on the SDP. This appears clearly when the screen shots of his blog are examined. The totality of the evidence shows that Mr Yap is not a secret chronicler of the SDP, a possibility I did not exclude when examining the evidence. One cannot but help notice that in the many reported cases where the Appellants are brought before the courts, Mr Yap is similarly in their company.

75 Mr Yap admitted that he publicised the TBT campaign on his blog website and that he supported it but he claimed that it was from a different perspective. He claimed that he wanted to show that the "Lee Kuan Yew regime" could not take it when the SDP was alive and kicking despite its efforts to crush it. His blogs also contained comments about other parties like the Workers' Party and the NSP. There is also credible evidence that Mr Yap does not always see eye-to-eye with Dr Chee and the SDP and that they do distance themselves from each other on occasions. None of this evidence was rebutted by the Prosecution.

76 What comes out clearly is that Mr Yap supports the TBT campaign. He is critical of the ruling party. He can be said to be a sympathiser with the TBT campaign run by the SDP. From his evidence, he also feels strongly about and agrees with the grievances behind the TBT campaign. But someone who sympathises with the campaign or agrees with it may be properly classed as a supporter, but he does not thereby become a participant in an illegal assembly. Neither is the posting of a blog after the

event necessarily 'participating' in the event. The nature of Rule 5 and the object of regulating such assemblies is primarily temporal as it is to prevent such a gathering from turning into a public disturbance or public nuisance (see *Chong Kai Xiong* at [10]). Mr Yap also felt that the Police always targeted the SDP. Whilst I have no doubt that that is not at all true, Mr Yap is entitled, within the limits of the law, to his own view. That was the real reason why he gave his shout at the end of the assembly. But giving a loud shout in support or in empathy, much like signing a petition, agreeing with or expressing support for a view, taking a pamphlet or taking a picture with those SDP members on that day falls short of liability under Rule 5.

77 I am therefore of the view, with respect, that Mr Yap's conviction was wrong. The wrong test was applied and on the facts as supported by the evidence before me, Mr Yap was not a participant in the National Day incident. Mr Yap's conviction and sentence must be set aside.

Issue 3: Sentencing

78 I need to deal with some of the cases mentioned above on the sentencing aspect. In *SCC v Battersby* at 204, after upholding the appellant's conviction, the English Court of Appeal remitted the case to the trial judge, recommending an absolute discharge:

> In my view the case should go back to the justices with a direction to convict. But when saying that, I have also in mind that this prosecution has taken place despite the respondent having acted bona fide (for it has been conceded in this court that she did act bona fide) on the advice of an official of the Surrey County Council. It has also been conceded here, as already stated, that she is indeed a respectable person and a proper person to have the care of children, and that this case is merely intended to be a test case on the law. *Those circumstances operate as very strong mitigation in relation to any sentence which may fall to be considered by the justices. It is the justices of course, who have the decision on this matter, and they may well feel, having looked into the matter, that this is a case for an absolute discharge.*
>
> [emphasis added]

79 Similarly, the English Court of Appeal in *Arrowsmith* (endorsing *SCC v Battersby*), after considering the unjust effect on the individual facing criminal liability as a result of an officially induced mistake of law, quashed the appellant's 18-month sentence which resulted in her immediate release. The court observed as follows at 690-691:

> I turn now to the problem of sentence, which has caused us considerable anxiety. On a number of occasions in the past the courts have had to consider the effect of mistake as to law. Fairly recently there have been cases in which people have found themselves in the dock for doing something which an official had advised them it was permissible to do: *Surrey County Council v Battersby* [1965] 2 Q.B. 194 is one example. More recently there was *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 Q.B. 426.
>
> ...
>
> In this case the person in authority was the Director of Public Prosecutions. What he did was not to take any action in respect of previous distributions of this pamphlet, and to say by his letter of September 7 that he was not going to give his consent to a prosecution.
>
> What effect ought this inaction have on sentence? It is difficult to believe that this well educated and intelligent defendant did not appreciate what she was doing. She must have known

that she was inciting soldiers to mutiny and desertion. The story which she put forward at the trial, that she was merely giving information to those in the services who were already disaffected, was an insult to the intelligence of the jury who were trying her. *Nevertheless, as a result of the Director of Public Prosecutions' decision, she may have thought that she could continue, with immunity, doing what she had done. I want to say in the clearest possible terms in this case, that her conduct was unlawful.* Had there not been the complication arising from the Director of Public Prosecutions' decision, this court would have had no hesitation whatsoever in saying that every day of that 18 months' prison sentence was deserved. If anybody thinks because of the course we are going to take that light sentences are appropriate in this class of case, they should think otherwise.

It is, however, one of the principles of the administration of justice in this country that not only should justice be done (and justice would have been done to this woman by a long sentence), but it must appear to be done. The defendant may have drawn the inference from the Director of Public Prosecutions' inaction and decision that nothing would happen to her if she went on distributing these leaflets. We have looked carefully to see whether there is any evidence that she was warned that if there was a repetition of her conduct, she could not expect the Director of Public Prosecutions to remain inactive. There was no such warning. It follows, we think, that she has got some grounds for thinking that she has not been treated fairly.

Having said what I have, it remains for me to say that in the interests, not of justice but of the appearance of justice, the appropriate order for this court to make is that the sentence be quashed and a sentence be substituted which will allow for the defendant's immediate release.

[emphasis added]

80 A close reading of *SCC v Batterby* and *Arrowsmith* reveals that while the courts rejected officially induced mistake of law as a defence to liability, they were acutely aware of the singular importance of justice being seen to be done. In those circumstances, it is no coincidence that the courts recommended either a discharge of the sentence imposed or substituted the sentence so as to allow for the defendants immediate release. In other words, they treated the official-induced mistake of law as a mitigating factor going to sentence. In my view, for fact situations like *SCC v Battersby*, *Arrowsmith* or *Postermobile*, it would be preferable for the Public Prosecutor to exercise his/her discretion by not prosecuting in such circumstances. But again that is not within the province of the courts. I also caution that the facts of this case are not within the same category as these English cases and that the abuse of process doctrine in England is very different from that in Singapore (see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [134]).

81 Rule 5 states that upon conviction, the first five Appellants "*shall be liable* on conviction to a fine not exceeding $1,000" [emphasis added]. In interpreting the phrase "shall be liable", Yong CJ observed in *Public Prosecutor v Lee Soon Lee Vincent* [1998] 3 SLR(R) 84 at [14]–[15]:

14 In my view, *prima facie*, the phrase "shall be liable" (as opposed to "shall be punished") contained no obligation or mandatory connotation. In *Ng Chwee Puan v R* [1953] MLJ 86, Brown J had said that:

> ... the word "liable" contains no obligatory or mandatory connotation. Sitting in this court, with a table fan blowing directly on to me, I am "liable" to catch a cold. But it does not follow that I shall.

15 Turning to s 344 of our Penal Code (Cap 224) for an example, the provision states:

> Whoever wrongfully confines any person for 10 days or more, shall be punished with imprisonment for a term which may extend to 3 years, and *shall also be liable to fine*. [emphasis added]
>
> It was clear to me that the fine in s 344 would not be mandatory, and ***the court retained a discretion to impose a fine up to its jurisdictional limit or not at all*** . Indeed, if one looked at the Penal Code, it would be apparent that the draftsman had been very careful in using the phrase "shall be punished" to prescribe a mandatory penalty, and ***using "shall be liable" only when the penalty was dependent on the court's discretion.*** So, in s 344 above, the court had discretion whether or not to pass the additional punishment of a fine at all.
>
> [emphasis in original in italics; emphasis in bold italics added]

By parity of reason, the courts retain the discretion under Rule 5 to determine whether (any) fine should be imposed in light of all the circumstances of the case.

82 Other than Mr Yap, I have gone through the sentences imposed on each of the Appellants. Taking into account the facts and circumstances of their cases, including the multiple antecedents of the Appellants, I do not find them manifestly excessive. Further, given my doubt as to whether the Appellants actually relied on the article, I see no reason to disturb the sentences on that score. The Appellants did not canvass any reasons as to why their sentences were manifestly excessive. I accordingly dismiss the 1st to 5th Appellants' appeals on conviction and sentence.

83 For the reasons set out above, Mr Yap's conviction and sentence is set aside.

Conclusion

84 To summarise,

(a) The first to fifth Appellants' appeals against conviction and sentence are dismissed; and

(b) Mr Yap's appeal against conviction is allowed.

[note: 1] Record of Proceedings, Volume 1 of 2, 15 February 2011, at p 345.

[note: 2] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 325.

[note: 3] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 198.

[note: 4] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 239-244.

[note: 5] Record of Proceedings, Volume 1 of 2, 15 February 2011 at p 208.

[note: 6] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 323.

[note: 7] Mr Yap agreed with the Prosecution that he was aware that no permit had been obtained for the activity (see NE pp 391E and 392A-B).

[note: 8] Record of Proceedings, Volume 1 of 2, 15 February 2011 at p 347.

[note: 9] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 158.

[note: 10] Record of Proceedings, Volume 1 of 2, 15 September 2011, at p 312.

[note: 11] Record of proceedings, Vol 1 of 2, dated 15 September 2011 at p 264.

[note: 12] Record of Proceedings Volume 1 of 2, 15 February 2011 at p 44.

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