

CASE NO.:

Appeal (crl.) 821 of 2000

Appeal (crl.) 160 of 2001

PETITIONER:

SURESH AND ANR.

Vs.

RESPONDENT:

STATE OF U.P

DATE OF JUDGMENT: 02/03/2001

BENCH:

R.P. Sethi & B.N. Agrawal

JUDGMENT:

SETHI, J. for himself and Agrawal, J.

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We agree with the conclusions arrived at by Brother Thomas, J. in his lucid judgment.@@

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However, in view of the importance of the matter, in so far as the interpretation of Section 34 of the Indian Penal Code is concerned, we have chosen to express our views in the light of consistent legal approach on the subject throughout the period of judicial pronouncements. For the applicability of Section 34 to a co-accused, who is proved to have common intention, it is not the requirement of law that he should have actually done something to incur the criminal liability with the aid of this section. It is now well settled that no overt act is necessary to attract the applicability of Section 34 for a co-accused who is otherwise proved to be sharing common intention with the ultimate act done by any one of the accused sharing such intention.

Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur of moment. The existence of a common intention is a question

of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

Dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the

element of participation in absence resulting in the

ultimate "criminal act". The "act" referred to in latter part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown to not have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have pre-conceived result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in Shatrughan Patar & Ors. v. Emperor [AIR 1919 Patna 111] held that it is only when a court with some certainty hold that a particular accused must have pre-conceived or pre-meditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.

In Barendra Kumar Ghosh vs. King Emperor [AIR 1925 PC 1] the Judicial Committee dealt with the scope of Section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

".....the words of S.34 are not to be eviscerated by reading them in this exceedingly limited sense. By S.33 a criminal act in S.34 includes a series of acts and, further, "act" includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By S.37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By S.38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. S.34 deals with the doing of separate acts, similar of diverse, by

several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. S.37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S.38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

(Emphasis supplied)

Referring to the presumption arising out of Section 114 of the Evidence Act, the Privy Council further held:

"As to S.114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; *Abhi Misser v. Lachmi Narain* [1900 (27) Cal.566]. Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S.114 deals with the case where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitive. Because participation de facto (as this case shows) may sometimes be obscure in detail, it is established by the presumption juris et de jure that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by S.114 brings the case within the ambit of S.34.

"(Emphasis supplied)

The classic case on the subject is the judgment of the Privy Council in *Mahboob Shah vs. Emperor* [AIR 1945 PC 118]. Referring to Section 34 prior to its amendment in 1870 wherein it was provided:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

it was noticed that by amendment, the words "in furtherance of common intention of all" were inserted after the word "persons" and before the word "each" so as to make the object of Section clear. Dealing with the scope of Section, as it exists today, it was held:

"Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intention of all' nor does it say 'an intention common to all'. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a

criminal act in furtherance of such intention. To provide the aid of S.34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from this act or conduct or other relevant circumstances of the case."

(Emphasis supplied)

A Full Bench of the Patna High Court in *The King Emperor vs. Barendra Kumar Ghose* [AIR 1924 Cal. 257] which was later approved by the Privy Council dealt with the scope of Section 34 in extenso and noted its effects from all possible interpretations put by various High Courts in the country and the distinguished authors on the subject. The Court did not agree with the limited construction given by Stephen, J. in *Emperor v. Nirmal Kanta Roy* [1914 (41) Cal.1072] and held that such an interpretation, if accepted, would lead to disastrous results. Concurring with Mookerjee, J. and giving the section wider view Richardson, J. observed:

"It appears to me that section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In *R. v. Salmon* [1880 (6) QBD 79] three men had been negligently firing at a mark. One of them - it was not known which - had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J. said: - 'The death resulted from the action of the three and they are all liable'. Stephen, J. said: - 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger.

Moreover, sections 34, 35 and 37 must be read together, and the use in section 35 of the phrase 'each of such persons who joins in the act' and in section 37 of the phrase, 'doing any one of those acts, either singly or jointly with any other person' indicates the true meaning of section 34. So section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different mode of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.

To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.

This view of section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere."

Approving the judgments of the Privy Council in Barendra Kumar Ghose and Mahboob Shah's cases (supra) a three Judge@@

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 Bench of this Court in Pandurang & Ors. v. State of@@
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Hyderabad [AIR 1955 SC 216] held that to attract the applicability of Section 34 of the Code the prosecution is under an obligation to establish that there existed a common intention which requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all. This Court had in mind the ultimate act done in furtherance of the common intention. In the absence of a pre-arranged plan and thus a common intention even if several persons simultaneously attack a man and each one of them by having his individual intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section. In a case like that each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any or the other. The Court emphasised the sharing of the common intention and not the individual acts of the persons constituting the crime. Even at the cost of repetition it has to be emphasised that for proving the common intention it is necessary either to have direct proof of prior concert or proof of circumstances which necessarily lead to that inference and "incriminating facts must be incompatible with the innocence of the accused and incapable of explanation or any other reasonable hypothesis". Common intention, arising at any time prior to the criminal act, as contemplated under Section 34 of the Code, can thus be proved by circumstantial evidence.

In Shreekantiah Ramayya Munipalli & Anr. v. State of Bombay [AIR 1955 SC 287] this Court held: @@

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"It is true there must be some sort of preliminary planning which may or may not be at the scene of the crime and which may have taken place long beforehand, but there must be added to it the element of physical presence at the scene of occurrence coupled with actual participation which, of course, can be of a passive character such as standing by a door, provided that is done with the intention of assisting in furtherance of the common intention of them all and there is a readiness to play his part in the pre-arranged plan when the time comes for him to act."

(Emphasis supplied)

This Court again in *Takaram Ganapat Pandare v. State of Maharashtra* [AIR 1974 SC 514] reiterated that Section 34 lays down the rule of joint responsibility for criminal act performed by a plurality of persons and even mere distance from the scene of crime cannot exclude the culpability of the offence. "Criminal sharing, overt or covert, by active presence or by distant direction making out a certain

measure of jointness in the commission of the act is the essence of Section 34".

In a case where the deceased was murdered by one of the two accused with a sharp edged weapon at 10.30 p.m. while he was sleeping on a cot in his house while the other accused, his brother, without taking part stood by with a spear in his hand to overcome any outside interference with the attainment of the criminal act and both the accused ran away together after the murder, this Court in Lalai alias Dindoo & Anr. v. State of U.P. [AIR 1974 SC 2118] held that these facts had a sufficient bearing on the existence of a common intention to murder.

In Ramaswami Ayyangar & Ors. v. State of Tamil Nadu [AIR 1976 SC 2027] this Court declared that Section 34 is to

be read along with preceding Section 33 which makes it clear

that the "act" mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In Ramaswami's case (supra) it was contended that A2 could not be held vicariously liable with the aid of Section 34 for the act of other accused on the grounds: firstly he did not physically participate in the fatal beating administered by co-accused to the deceased and thus the "criminal act" of murder was not done by all the accused within the contemplation of Section 34; and secondly the prosecution had not shown that the act of A2 in beating PW was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons participating in the criminal action to bring about a particular result. Conviction of A2 under Section 302/34 of the Code in that case was upheld.

In Rambilas Singh & Ors. v. State of Bihar [AIR 1989 SC 1593] this Court held:

"It is true that in order to convict persons vicariously under S.34 or S.149 IPC, it is not necessary to prove that each and everyone of them had indulged in over acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly." (Emphasis supplied)

Again a three Judge Bench of this Court in State of U.P.

v. Iftikhar Khan & Ors. [1973 (1) SCC 512] after relying upon the host of judgments of Privy Council and this Court, held that for attracting Section 34 it is not necessary that any overt act must be done by a particular accused. The section will be attracted if it is established that the criminal act has been done by one of the accused persons in furtherance of the common intention. If this is shown, the liability for the crime may be imposed on any one of the person in the same manner as if the act was done by him alone. In that case on proof of the facts that all the four accused persons were residents of the same village and accused Nos.1 and 3 were brothers who were bitterly inimical to the deceased and accused Nos.2 and 4 were their close friends, accused Nos.3 and 4 had accompanied the other two accused who were armed with pistols; all the four came together in a body and ran away in a body after the crime coupled with no explanation being given for their presence at the scene, the Court held that the circumstances led to the necessary inference of a prior concert and pre-arrangement which proved that the "criminal act" was done by all the accused persons in furtherance of their common intention.

[illegible]

"Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*."

In *Surender Chauhan v. State of M.P.* [2000 (4) SCC 110] this Court held that apart from the fact that there should be two or more accused, two factors must be established - (i) common intention and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment this Court held:

"Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of

Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them (Ramaswami Ayyangar v. State of T.N. 1976 (3) SCC 779]. The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra 1999 (8) SCC 428). To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established" (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case." For appreciating the ambit and scope of Section 34, the preceding Sections 32 and 33 have always to be kept in@@

mind. Under Section 32 acts include illegal omissions.@@

Section 33 defines the "act" to mean as well a series of acts as a single act and the word "omission" denotes as well a series of omissions as a single omission. The distinction between a "common intention" and a "similar intention" which is real and substantial is also not to be lost sight of. The common intention implies a pre-arranged plan but in a given case it may develop at the spur of the moment in the course of the commission of the offence. Such common intention which developed at the spur of the moment is different from the similar intention actuated by a number of persons at the same time. The distinction between "common intention" and "similar intention" may be fine but is nonetheless a real one and if overlooked may lead to miscarriage of justice.

After referring to Mahboob Shah's case (supra) this Court in Mohan Singh & anr. vs. State of Punjab [AIR 1963 174] observed, it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre-concerted plan cannot be held guilty for the "criminal act" with the aid of Section 34. Similarly the distinction of the words used in Section 10 of the Indian Evidence Act "in reference to their common intention" and the words used in Section 34 "in furtherance of the common intention" is significant. Whereas Section 10 of the Indian Evidence Act deals with the actions done by conspirators in reference to the common object, Section 34 of the Code deals with persons having common intention to do a criminal act.

In State through Superintendent of Police, CBI/SIT vs. Nalini & Ors. [1995 (5) SCC 253] Brother Thomas, J. in his judgment dealt with such a proposition in paras 107 and 108.

However, in this case on facts, the prosecution has not

succeeded in proving that A3 Pavitri Devi shared the common intention with the other two accused persons, one of whom was her husband and the other her brother. It has come in evidence that when the witnesses reached on the spot, they found the said accused standing on the road whereas the other accused were busy committing the crime inside the house. The exaggerated version of PW3 regarding the participation of Pavitri Devi by allegedly catching hold of his mother's hair cannot be accepted as PWs 1 and 2 have not supported the aforesaid version. The High Court was, therefore, justified in holding that Pavitri Devi, A3 did not share the common intention with the other accused persons. By her mere presence near the place of occurrence at or about the time of crime in the absence of other evidence, direct or circumstantial, cannot hold her guilty with the aid of Section 34. But in case the prosecution had succeeded in proving on facts of her sharing of common intention with A1 and A2, she could not be acquitted of the charge framed against her only on the ground that she had actually not done any overt act. The appeal of the State filed against Pavitri Devi has no merit and has thus rightly been dismissed by Brother Thomas, J.