

THE CONCEPT OF CONSTRUCTIVE LIABILITY UNDER THE INDIAN PENAL CODE: A CRITICAL ANALYSIS

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For the sin ye do by two and two
Ye must pay for one by one!¹

Introduction

‘They also serve who only stand and wait’- the axiom of the concept of joint liability in criminal jurisprudence can be understood in light of this statement of John Milton quoted by the Privy Council in the famous *Barendra Kumar Ghosh’s*² case. Every man is responsible criminally for what wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another³. It is thus the general principle of criminal liability that the primary responsibility is of the person who actually commits an offence and only that person who has committed crime can be held guilty and shall be punished in accordance with law. Group liability or joint liability is liability for constructive criminality, i.e., liability for an offence not committed by the person charged⁴. When a crime is done by several persons together, who intended to commit that crime, they are all liable as though they had committed the crime in their individual capacities.

Group liability in criminal law (also called joint liability, vicarious liability, constructive liability, or complicity in crime) is a concept expatiated upon in several sections in the Indian Penal Code (Act 45 of 1860)⁵. Offence committed by groups is of frequent occurrence and courts are called upon to determine the liability of each member/members thereof. Where parties go with the common purpose to execute a common object, each and everyone

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¹ Rudyard Kipling, *Tomlinson*, 1891, cited in Glanville Williams, *Textbook of Criminal law*, (Stevens and Sons, London, 2nd ed., 1983).

² *Barendra Kumar Ghosh v. King Emperor* AIR 1925, P.C. at 8-9

³ Joel Prentiss Bishop, “*Commentaries on the Criminal Law*” 1856 cited in *supra* note 1 at 257,274.

⁴ Ratanlal & Dhirajlal, *Law of Crimes* 107 (Bharat Law House, 26th ed. 2007)

⁵ KD Gaur, *A Textbook on The Indian Penal Code* 29 (Oxford & IBH publishing Co. 1992,).

becomes responsible for the acts of each and every other in execution and furtherance of the common purpose; as the purpose is common so must be the responsibility.⁶

The principle of group liability is invoked only when the specific conditions of the provision providing for it are satisfied. There is no presumption to group liability. Prosecution has to prove that the case of the accused squarely falls in the four corners of the provision providing for group liability or vicarious liability. The basic justification for making provision of group liability is twofold: Firstly, offences committed in groups give encouragement to the accomplices and secondly, in offences committed in groups the job of the prosecution becomes difficult to ascertain the specific role played by each member of the group. Therefore, to deter people from committing offences in groups and to spare the prosecution from the onerous task of providing specific *actus reus* of each member of group, the legislature in its wisdom has made provisions providing for group liability making each member of the group vicariously liable for the acts done by others.⁷

The legality of conviction by applying Ss. 34 or 149 have been examined by Courts in several cases. In *Willie (William) Stanley v. State of M.P.*⁸ it was held as follows⁹:

Section 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regarding actual participants, accessories and men actuated by a common object or a common intention and ‘the charge is rolled-up one involving the direct liability and the constructive liability’ without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for a substantive offence without a charge can be set aside, prejudice will have to be made out.

Group Liability under English Laws: The Concept of Complicity

The English law makes distinction between principals and accessories. Whereas former take part in the actual execution of

⁶ V. Balasubramanyam, *Essays on The Indian Penal Code*, (ILL, New Delhi, 2005)

⁷ *Ibid.* at 185.

⁸ AIR 1956 SC 116.

⁹ *Ibid.*, para 17 at 379.

crime, the latter assist the offenders in shielding them from justice.¹⁰ Complicity in crime extends beyond the perpetrator to accessories. Both the perpetrators and accessories are regarded by law as participants in the crime and are called accomplices. The perpetrator is an accomplice of the accessory, and they are accomplices of the perpetrator and of each other.¹¹

Whosoever shall aid, abet, council or procure the commission of any indictable offence shall be liable to be tried, indicted and punished as a principle offender.¹²

Where there are several participants in the crime we define the principle as the participant 'whose act is the most immediate cause of the *actus reus*.'¹³

Group Liability under the Indian Penal Code

The Indian Penal Code contains a few provisions laying down principles of joint and constructive liability in this behalf defining the criminal liability of individual members forming the groups. These provisions of the code are contained in S. 34-38, S.114, S.149, S. 396 and S. 460. In all these sections a joint liability is created either because the intention is common or the object is common to all the persons forming that group¹⁴. S. 34 and S. 149 amongst them present constantly recurring problems in the matter of interpretation of language used in those sections. While, S. 34 is a rule of evidence, S. 149 is in itself a substantive offence besides being a provision providing for vicarious liability.¹⁵

Though the code does not use the expressions principals or accessories the distinction between the two is recognised. S 34 to 38 deal with principals while S. 107 to 120 deal with accessories. No distinction is however made between principals and accessories or principal in the first degree and principals in the second degree as regards punishment to be awarded.¹⁶

¹⁰ *Supra* 4 at 108.

¹¹ *Supra* 1 at 329.

¹² *Ibid.*

¹³ *Id.*

¹⁴ R C Nigam, *Law of Crimes in India*(Volume I), *Principles of Criminal Law*, (Asia Publishing House, New Delhi,1965).

¹⁵ *Nanak Chand v. State of Punjab*, AIR 1955 SC 274; *Bhajan Singh v. State of U.P.*, AIR 1974 SC 1564.

¹⁶ *Supra* 2 at 1,7-9, also see *supra* 4 at 108.

The Concept of Common Intention

The penal code makes a provision for liability under Section 34 where the accused shares in the commission of the offence though he did not commit it. The section runs as such - when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.¹⁷ The words 'in furtherance of common intention of all' did not exist in the original code and were added by the amending Act of 1870.¹⁸ The addition of these words was made with a view to assimilate the Indian law with the English law. For instance, a person not cognizant of the intention of his companions to commit a murder would not be held liable under English law of murder but under the older Indian law he would have been held liable for murder.¹⁹

This section is framed to meet a case in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was played by each of them.²⁰ The reason why all are deemed guilty in such cases is that the presence of accomplices gives encouragement, support and protection to the person actually committing the act.²¹ The primary object underlying section 34 is to prevent miscarriage of justice in cases where all are responsible for the offence which has been committed in furtherance of common intention.

The principle hereby recognized and acknowledged by this Section is that if two or more persons intentionally do the same thing jointly, it is the same as if each of them had done it individually. The Doctrine of Joint Liability thus defined is said to have been evolved in the case of *R. v. Cruise*,²² where, when a constable had gone to A's home to arrest A, three other persons B, C, and D upon seeing the constable emerged from the house and physically attacked him, thereby driving him away. The Court here held that each member of the group i.e. B, C, and D were equally liable and responsible for the blow, irrespective of whether only one of them had actually struck the blow.

¹⁷ S. 34,IPC.

¹⁸ Act XXVI, 1870, Section 1.

¹⁹ *Supra* note. 12 at 180.

²⁰ *Bharwad Mepa Dana v. State* AIR 1960 SC 289.

²¹ *Supra* note. 4 at 108.

²² (1838) S.C. 545.

In yet another English case *R. v. Clark*²³ two persons went to the house of the former girlfriend of one of them. They broke into the house, destroyed some material and set alight a chair. The fire spread. Both of them ran off in different directions. Later they met. In their versions to the police each blamed the other for the fire. Their appeal against conviction was dismissed. The court said that there was clear evidence of joint enterprise. Both were in the house when the fire was started. There was clearly joint enterprise to break into the house and they met again later.

Likewise, it is observed²⁴ “what is meant by common intention is the community of purpose or common design or common intent. Therefore, it will not be wrong to interpret the words ‘common intention’ to mean community of purpose, ‘common design’ or ‘common enterprise’ which are the words used in the English law.²⁵

S. 34 can easily be understood by subdividing its essentials into three basic ingredients:

- (1) A criminal act must be done by several persons;
- (2) The criminal act must be to further the common intention of all;
- (3) There must be participation of all the persons in furthering the common intention.²⁶

1. Criminal Act done by Several Persons: Here S. 34 is to be read in the light of the preceding S. 33²⁷. It follows that the words ‘when a criminal act is done by several persons’ in S. 34, may be construed to mean ‘when criminal acts are done by several persons.’²⁸The acts committed by different confederates may be different but all must in one way or the other participate and engage in the criminal enterprise. For instance, one may stand only as a guard to prevent a person coming to the relief of the victim, or may otherwise facilitate the execution of the common design. Such a person also commits an act as much as his co-participants actually committing the planned crime.²⁹

²³ (1991) Cr LR 625 (CA).

²⁴ *Bashir v. State*, 1953 Cr LJ 1505 at p. 1508.

²⁵ *Supra* note 6 at 191.

²⁶ *Parichhat v. State of M.P.* (1972), 4 S.C.C. 464, also see *supra* note 5 at 30.

²⁷ The Word “Act” denotes as well a series of acts as a single act.

²⁸ *Supra* note 5 at 30.

²⁹ *Ibid.*, also see *Girija Shankar v. State of U.P.*, (2004)3 SCC 793.

In *Ramaswamy Ayangar v. State of Tamil Nadu*³⁰ it was held that S. 34 of IPC is to be read with the preceding S. 33 IPC which makes it clear that the 'act' spoken of in S. 34 IPC includes a series of acts as a single act.

2. Common Intention and the Scope thereof: The scope of S. 34 was first clearly delineated in *Barendra Kumar Ghosh's*³¹ case. In this case, the postmaster of Shankaritola was sitting in the backroom of the post office counting his money when several persons appeared at the door and demanded the money. Upon his refusal to part with it, they fired pistols at him and ran away. He died almost immediately – however, the accused was the only one who was chased down and caught holding a pistol. In his defence he stated he was only standing guard outside the post office because he was compelled to do so by the other accused, and hence he had no intention to kill the postmaster. This defence was quashed and he was convicted for murder u/s 302, r/w S.34 of the IPC. The Privy Council said that 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'.³²

All the persons concerned with the criminal act must possess a general intention in common as to the crime. In *Mahboob Shah v. Emperor*³³ it was enunciated that a furtherance of the common design is a condition precedent for convicting each one of the persons who take part in the commission of the crime, and the mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of that crime.

Common intention here must be shown to be premeditated. However, it is possible that there may be incidents in which common intention may develop on the spot, after the offenders have gathered. In *Kirpal Singh v. State of Uttar Pradesh*³⁴, the apex court has said that the common intention may develop on the spot after the offenders have gathered there. A previous plan is not necessary. Common intention can be inferred from the conduct of the accused and the circumstances of the case.

³⁰ AIR 1976 SC 2027.

³¹ *Supra* note 2.

³² *Supra* note 2 at 7.

³³ AIR (1943) P.C. 118.

³⁴ AIR (1954) S.C. 706.

Again, proof of such common intention needs be gleaned from the facts and circumstances of the individual case. As Madhavan Nair, J. rightly observed:³⁵

“The inference of common intention within the meaning of the term in S. 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. To invoke 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 furtherance of the common intention of all; if this is shown, the liability for the crime may be imposed on any of the persons in the same manner as if the act was done by him alone....it should be proved that the criminal act was done in concert of the prearranged plan.

If some of the several accused charged at a joint trial under S. 34 were acquitted, the test for determining whether the remaining accused whether one or more, could be convicted was laid down in *Bharwad Mepa Dana v. State of Bombay*³⁶. The Supreme Court held that the test under S. 34 is- Did the remaining accused share a common intention to commit a crime only? Did they participate in the commission of a crime? If on the evidence on record such intention and participation is proved, there is nothing illegal in their conviction under S. 34 of IPC.³⁷

Furthermore, in the absence of conclusive proof of common intention, individual offenders will be liable only for individual acts. The benefit of the doubt is always on the side of the accused. It is interesting to note that the Supreme Court of India has held that “mere presence together is not sufficient to hold that two or more people shared a common intention.”³⁸

It is imperative to note here that S. 34 is only a rule of evidence and does not create a substantive criminal offence. The Supreme Court observed that S. 34 of the Indian Penal Code does not create a distinct offence; it only lays down the principle of joint criminal liability.³⁹

³⁵ *Supra* note 28.

³⁶ AIR 1963 SC 1413.

³⁷ *Ibid.*

³⁸ *Rangaswamy v. State of TN*, AIR 1989 SC 1137.

³⁹ *B.N. Srikanth v. State of Mysore*, AIR 1958 SC 672, also see *Garib Singh v. State of Punjab*, 1972 Cr LJ 1286; *Yogendra v. State of Bihar*, 1984 Cr LJ 386 (SC).

The case of *Balaur Singh v. State of Punjab*⁴⁰ threw into sharp relief a difficulty in imposing the rules of joint liability as far as mutual hostility and free fighting are concerned. In this case, two antagonistic groups suddenly happened to enter into a fight with each other. Four persons (two from each group) were involved in this free fight. One of them was grievously injured and six days after the fight, he died. There were two problems before the courts in this case: firstly, to assess and account for the specific role of each of the assaulting parties, and secondly, to determine whether common intention could be proved at all in this case.⁴¹

It was finally held that this being a free fight, each individual was accountable for the extent of damage he had himself caused. This was to be determined by analyzing the kind of weaponry employed by the person and the nature of the injuries inflicted by him upon the others. However, in the context of the doctrine of common intention with regard to the death of that one particular individual, it was observed that in a free fight the victims themselves are either already participants or expected/probable participants in the cross assault on each other. Hence it would be close to impossible to specifically ascribe to the accused an intention to cause injuries that would eventually result in death of that particular individual.⁴²

3. Participation in the Criminal Act: All those charged with the criminal offence must have necessarily participated in it if the principle of joint criminal liability is to be brought into operation. The Supreme Court originally held that "... it is the essence of S. 34 that the person must have been physically present at the actual commission of the crime. He need not be present in the actual room but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or the other at the time the crime is actually committed."⁴³ Thus quite clearly the ambit of 'participation' in this case was to include actual presence plus prior concert of any sort. However, in a later case⁴⁴ the Supreme Court itself expanded this ambit and clarified that participation in all cases need not be indicated or proven only by physical presence. Wherever offences involved physical violence, for example, it is obvious that physical presence of the accused would be an essential fact. However,

⁴⁰ AIR 1995 SC 1956

⁴¹ *Ibid.*

⁴² *Id.*

⁴³ *Shreekanth Ramayya v. State*, (1954) 57 Bom LR 632 (SC).

⁴⁴ *Jaikrishandas Desai v. State*, (1960) 3 SCR 319.

where non-physical violence was called into question, for example in cheating and misappropriation, it would be completely unreasonable for physical presence to be a prerequisite in establishing joint liability. But when once participation is proved in cases of physical violence, the accused persons will be jointly liable for the criminal acts even when the hand that technically administered the poison or delivered the fatal blow cannot be determined.

The trend of opinion in several cases have been thus to lay considerable emphasis on the criminal act done in furtherance of the common intention so that common intention is interpreted to connote a general purpose or design with which several people begin to act and proceed to commit individual acts in furtherance of that purpose.⁴⁵

Waliullah, CJ observed, “The common intention animating all those who are acting in concert within the meaning of S. 34 must, therefore, be an intention to do a particular criminal act or bring about a particular result, not necessarily the act or result which constitutes the crime charged. Here the word ‘intention’ is used in a much wider sense and is not confined to what is called volitional intention, i.e. something willed or desired. When a number of persons act in pursuance of a common design or purpose each is responsible for the doings of the others provided that what others actually do is something which may have been in contemplation of all at the time when the common intention was entertained by them.⁴⁶

Overt Acts and Common Intention

In *Krishnan v. State of Kerala*⁴⁷, the Supreme Court in no uncertain terms clarified that “... establishment of an overt act is not a requirement of law to allow S. 34 to operate inasmuch as this section gets attracted when ‘a criminal act is done by several persons in furtherance of a common intention of all... 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 the sharing of common intention: *res ipsa loquitur*.” In this case, the deceased was killed by his brother and nephew over a property dispute. The brother was proved to have inflicted

⁴⁵ *Supra* 6 at 191, also see *Muktai Prasad v. State of Bihar*, 2005 Cr LJ 681 (SC).

⁴⁶ *State v. Saidu Khan*, AIR 1951 All. 21(F.B.) 33

⁴⁷ AIR 1997 SC 383

repeated knife injuries on the deceased leading to his death. It was reported that the nephew inflicted a few head injuries before his knife was snatched from him. But it could not be decisively proved that he (the nephew) had inflicted such injuries as to cause death. The question before the Court was that in the absence of any overt act pointing to his guilt, could the nephew be convicted u/s 302 r/w S. 34? As aforementioned, it was held that both the brother and the nephew shared the common intention of killing the deceased and the act done was in furtherance thereof – hence S. 34 was conclusively attracted and the nephew was jointly liable for the death of his uncle.⁴⁸

Common intention can also be proved via circumstantial evidence i.e. no direct evidence is required to prove it – the conduct of the parties involved and the attendant circumstances, if when analyzed provide sufficient reason to infer common intention, are enough to attract the doctrine of joint liability.⁴⁹ The conduct of parties can be a tell-tale factor even when intention coheres on the spur of the moment and is not prearranged or premeditated. It is oft-quoted in this regard: “The incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.” Direct evidence is sometimes considered unreliable by the courts because it is generally provided by approvers or accomplices themselves, and there are rarely material particulars to corroborate such allegations of community of interest.

Common Intention and Same Intention

There is a difference between common intention and same/similar intention depending upon the nature of the intention not only liability will differ but also the nature of conviction and sentence to be awarded. S. 34 can be invoked only when the accused shares the common intention and not when they share a similar intention.⁵⁰ Unless common intention is proved individual offenders will be liable only for their individual acts. The mode of proving common intention should be such as to exclude doubts about the prevalence of the common intention mobilizing the offenders into action. However, if there is any doubt then the benefit of doubt should be given to the accused.⁵¹

⁴⁸ *Ibid.*

⁴⁹ *Rajesh Govind Jagesh v. State of Maharashtra*, AIR 2000 SC 160; *Girja Shankar v. State of U.P.*, (2004) 3 SCC 793.

⁵⁰ *State of U.P. v. Rohan Singh*, 1996 Cr LJ 2884 (SC) at p. 2885.

⁵¹ *Brijal Prasad Sinha v State of Bihar*, AIR 1998 SC 2443) .

In *Dukhmochan Pandey v. State of Bihar*⁵² the distinction between common intention and similar intention was considered. The complainant had sent about 2200 labourers to his field for transplanting paddy at about noon of the day the accused party numbering about 200 people assembled as a mob armed with various deadly weapons came to the field and asked the labourers to stop working on the field. When the complainant objected to this, two accused Uttam Pandey and Upendra Pandey directed the mob to kill the labourers. Soon thereafter Dukhmochan Pandey and SarbNarain Mishra fired from their respective guns into the group of labourers. Thereafter the mob also started assaulting the labourers with their weapons in which two persons died. The death was established to have been caused by shock and haemorrhage caused by injuries inflicted with sharp pointed weapons. The question before the Supreme Court was whether the mob which had the common object to prevent the labourers from working in the field had developed, on the spot, the common intention to commit murder the court noticed that the intention could be formed previously or on the spot during the progress of the crime. Generally such situations will involve a pre arranged plan which in turn presupposes a prior meeting of mind but, in a specific case the intention may develop at the spur of the moment. The court observed that such common intention which developed at the spur of the moment is different from a similar intention actuated by a number of persons at the same time. And, therefore, the said distinction must be borne in mind which will be relevant in deciding whether S. 34 I.P.C. will apply to all those who might have made some overt act on the spur of the moment. The distinction between common and a similar intention may be fine but is nonetheless a real. And, if overlooked may lead to miscarriage of justice.⁵³

Common intention differs from ‘same’ or ‘similar’ intention. S. 34 can only be invoked in cases of common intention— and importantly, liability, conviction and sentence will all differ depending on the nature of intention. To constitute common intention it is necessary that the intention of each person be known to all the others and be shared by them, whereas this is not the case in ‘same’ or ‘similar’ intention.

⁵² AIR 1998 SC 40.

⁵³ *Ibid.* at 46, para 6.

Common Object

S. 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object: If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Thus, the essentials of this provision are:

1. There must be an unlawful assembly.
2. The offence must have been committed by one or the other member of the assembly in prosecution of the common object of the unlawful assembly; and
3. The offence must be such as the members of the unlawful assembly knew it to be likely to be committed in prosecution of the common object.⁵⁴

An unlawful assembly must have a minimum of five persons who are a part of it and share the common object. Unlawful assembly has been defined under S. 141 of IPC.⁵⁵ A combined reading of Ss. 141 and 149 reveals that if the assembly is of less than five persons, it will not be an unlawful assembly u/s 141 and therefore cannot form the basis of conviction.⁵⁶ As far as presence under S. 149 is concerned, it is true that mere presence of the accused is not sufficient to hold him guilty for sharing of common object as the prosecution has to further prove that they were not mere by standers but infact were sharing the common object.⁵⁷

Section 149 is an exception to the general principle of criminal law in the sense that a person can be convicted and sentenced only on proof of his being a member of the unlawful assembly, sharing the common object, notwithstanding as to whether he had actually participated in the commission of the crime or not.⁵⁸ There may not be a common object in a sudden fight but in a planned attack

⁵⁴ *Supra* note 14 at 194.

⁵⁵ S. 141.

⁵⁶ *Ramashish Yadav v. State of Bihar*, 2000 Cr LJ 12(SC); *Bhudeo Mandal v. State of Bihar*, AIR 1987 SC 826.

⁵⁷ *Madan Singh v. State of Bihar*, 2004 Cr LJ 2862 (SC).

⁵⁸ *Chandra Bihari Gautam v. State of Bihar*, (2002) 9 SCC 208.

on the victim, the presence of the common object amongst the persons forming the unlawful assembly can be inferred.⁵⁹

In *Umesh Singh v State of Bihar*⁶⁰ the supreme court held that an accused whose case falls within the terms of S. 149 I.P.C. cannot put forward the defence that he did not with his own hand commit the offence, committed in the prosecution of common object of the unlawful assembly or such as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object. Everyone must be taken to have intended the probable and natural results of the combination of the acts in which he had joined. The court referring to *Shamshul Singh v. State of U.P.*⁶¹ and *Bhajan Singh v. State of U.P.* pointed out that the vicarious liability extends to the members of unlawful assembly only in respect of the acts done in pursuance of the common object of the unlawful assembly or such other offences as the members of the unlawful assembly are likely to commit in pursuance of the common object. The words in prosecution of the common object have to be strictly construed as equivalent to 'in order to attain common object'.⁶²

The section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its member during the time when they are engaged in the prosecution of common object. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command but also according to the extent to which he shares the community of object. And as a consequence of this the affect of the section may be different on different members of the same unlawful assembly.⁶³

The common object may be commission of one offence while there may be likelihood of the commission of yet another offence. The knowledge whereof is capable of being safely attributable to the members of the unlawful assembly. In either case every member

⁵⁹ *Ibid.*

⁶⁰ 2000 (5) SC 92.

⁶¹ (1995) 4 SCC 430.

⁶² *Dulichand v. State*, 1998 Cr LJ 998 (Del.); *Jalamv. State*, 1998 Cr LJ 2103.

⁶³ *Jahiruddin v Queen Empress* (1895 ILR 22 Cal 306), This view of the Calcutta High Court has been approved by Supreme Court in *Shambunath Singh* (AIR 1960 SC 725).

of the assembly would be vicariously liable for the offence actually committed by any member of the assembly. A mere possibility of the commission of the offence would not necessarily enable the court to draw an inference that the likelihood of the commission of such offence was within the knowledge of every member of the unlawful assembly.⁶⁴

S. 34 and S. 149- A Comparative Study

It is very important here to discuss the main difference between the two sections: a comparison between the ‘common intention’ of S. 34 and the ‘common object’ of S. 149. The crucial difference here lies in the fact that common intention connotes a community of interest and a meeting of minds, so to speak, with regard to the outcome of the criminal act. However, such a meeting of minds is quite unnecessary for a common object to arise. In an unlawful assembly, the gathered people may have a common object, but need not have a common intention.⁶⁵

For invoking S. 34, it is sufficient if there are two or more persons involved; however in S. 149, there have to be a minimum of five persons and more to attract coverage of the provision. Section 149 creates a specific offence and deals with the punishment of that offence alone while S. 34 is simply a rule of evidence.⁶⁶

As aforementioned, S. 34 only qualifies the principle of joint liability and does not create a separate offence in itself. In contrast, S. 149 specifically creates the offence of membership of an unlawful assembly and is classified under Chapter VIII as an Offence against Public Tranquility. It follows that for S. 34 to be attracted, ‘participation’ in the criminal act is required whereas in the case of S. 149, mere ‘membership’ of the unlawful assembly should suffice.⁶⁷

While S. 34 limits the responsibility of each participant to acts done in furtherance of the common intention, S. 149 goes further, in as much as it renders every member of an unlawful assembly guilty of the offence when it is known to be likely that such an

⁶⁴ *RajendraShantaramTodankar v. State of Maharashtra*(2003 Cri. L.J. 1277 SC).

⁶⁵ *Supra* note 6 at 206.

⁶⁶ *Supra* note 2; also see *supra* note 8.

⁶⁷ *Ibid.*

offence might be committed in prosecution of the common object.⁶⁸

In *Sukha and Others v. State of Rajasthan*⁶⁹ the Supreme Court said that the difference between S. 34 and 149 lies in the fact that in a case under section 149 there need not be a prior meeting of minds. It is enough that they have the same object in mind and that they are more than five in number and that they act as an assembly to achieve that object.

In *Nathu v. State*⁷⁰ the court observed, “Although there is a distinction between S. 34 which deals with common intention and section 149 which deals with constructive liability based on common object, there may not be much difference between intention and object because if there is common intention to commit an offence it must also be assumed that the common object was to commit the offence.

Critical Analysis

On the pretext of varying judgments of the courts different explanations have been attributed to common intention imbibed under S. 34 of the Indian Penal code. Thus the expression common intention means:

- A bare desire to commit a criminal act without any contemplation of the consequences.⁷¹
- The *mens rea* necessary to constitute the very offence that has been committed.⁷²
- The intention to commit some criminal act and not necessarily the offence which is actually committed.⁷³
- What common intention contemplates depends upon the circumstances of each case and therefore the expression cannot be given a fixed meaning.⁷⁴

In the light of above meanings attributed to the common intention few problems arise, say whether all the participants in a criminal act should be held guilty of the same offence or whether it is

⁶⁸ *GupteshwarNathOjha v. State of Bihar*, AIR 1986 SC 1649; *Jaswant Singh v. State of Haryana*, AIR 2000 SC 1883; also see *supra* 6 at 207.

⁶⁹ 1956 Cr LJ 923.

⁷⁰ 1960 Cr LJ 1329 at 1330.

⁷¹ Per Lodge, J. in *IbraAkanda v. Emperor*, AIR 1944, Calcutta 339 at 343.

⁷² *Ibid*, Per Das, J.

⁷³ Per Wanchoo in *supra* note 45.

⁷⁴ Per Khundkar in *supra* note 66.

possible while applying S. 34 to convict them of different offences. If we go by second and third meanings, all must be held guilty of the same offence. If S. 34 applies it is impossible to convict the conspirators of different offences.⁷⁵ But if we go by first and third explanation above stated it is possible to them to attribute liability for different offences to the participants depending upon the individual *mens rea* of each of them. Hence such an interpretation will involve not only an investigation in the common intention but also the guilty intention of the individual members.

Yet another problem is whether S. 34 is applicable to offences that do not involve the *mens rea* of 'intention', e.g. s. 304 Part II or any *mens rea* at all.⁷⁶ Whether a participant could be said to have a common intention if he had only knowledge of the consequences or did not even contemplate them. Knowledge is the highest degree of probability. Conjoint complicity is the inevitable inference when a group animated by lethal intent accomplishes their purpose cumulatively. The preponderant view is that S. 34 is applicable to a case falling u/s 304 II.⁷⁷ A contrary view has also been expressed by some judges.⁷⁸ Besides a middle course is suggested that joint liability can rise in the case of an offence u/s 304 Part II provided Ss. 34 and 35 are both applied but not by S. 34 alone.⁷⁹ The provisions of Ss. 34 and 35 are complementary in as much as the principle embodied in S. 35 supplements the principle embodied in S. 34.⁸⁰

Thus where several persons are concerned in committing an act which is criminal only by reason of its being done with a criminal knowledge, each of such persons who joins the act with such knowledge is liable for the act in the same manner as if the act were done by him alone with that knowledge.⁸¹

There is lot of confusion which has crept in to by the inconsistent judgments of the courts. In *Mahboob Shah's* case considerable emphasis was laid on prearranged plan or concert as being necessary to infer common intention. However it was practically difficult to discern prearranged or prior concert in each and every case. In course of time the courts held that the common intention

⁷⁵ *Maina Singh v. State of Rajasthan*, AIR 1976 SC 1084.

⁷⁶ See *supra* note 6 at 198.

⁷⁷ See *supra* note 45.

⁷⁸ Per Das, J. in *supra* note 66.

⁷⁹ See *In re Mallappa Shivappa*, 1961(2) Cr LJ 515.

⁸⁰ *Supra* note 4 at 274.

⁸¹ *Ghure v. Rex*, AIR 1949 All. 342.

may develop on the spot.⁸²In *Amrik Singh v. State of Punjab*⁸³ that the common intention may develop in the course of the fight but there must be common and unimpeachable evidence to justify the inference.

Also some judges have suggested a recasting of the section in simpler terms to settle the conflicting views. The court observed in *R. v. Nazir*⁸⁴, “In our opinion S. 34 refers to physical act only. Of course the physical act contemplated should be criminal, that is, should be what is considered a crime which is not defined in the code and should mean a thing which ought not to be done and which affects the state in addition to the individual against whom the act is done”. Wanchoo, J., in *Saidu Khan’s*⁸⁵ case has expressed a similar view. He made a suggestion that S. 34 may be recast thus: “When in a criminal action two or more persons participate in concert pursuant to a prearranged plan, each of them is liable for each of the acts done by each of them as if it were done by him alone”.⁸⁶

The fifth law commission in its 42nd report has suggested a reconstitution of section 34 of the IPC as “Where two or more persons with a common intention to do a criminal act, do any act in furtherance of such common intention, each of them is liable for the criminal act done as if it were done by him alone”.⁸⁷

The author is of the view that the prosecution in any case has to establish the common intention by evidence, whether direct or circumstantial, that there was a plan or meeting of the minds of all the assailants to commit the offence, be it prearranged or at the spur of the moment. This view has been taken by the courts in plethora of cases.⁸⁸

Latest Judgements

In the case of *Jangal Ramsharan and Anr. v. State of Chhattisgarh (through P.S. Chavni)*⁸⁹ the court held “In order to convict the accused with the aid of Section 34 of the IPC the prosecution

⁸² *Rajesh Govinda Jagesha v. State of Maharashtra*, AIR 2000 SC 160.

⁸³ (1972) 4 SCC 42.

⁸⁴ 1947 All LJ 417.

⁸⁵ *Supra* note 45.

⁸⁶ See also *Lakshipati Sahai v. State of Bihar*, 2000 Cri LJ 1959 (Pat).

⁸⁷ 42nd report of the Law Commission of India.

⁸⁸ See *Anil Sharma v. State of Jharkhand* (2004) 5 SCC 679; *Motidas v. State of Bihar*, 1954 Cri LJ 1708.

⁸⁹ 2012(1) Crimes 17 (Chhatt.).

must prove the fact that there was pre-meeting of mind and overt act of the appellants during the course of the commission of the offence.⁹⁰ Mere presence on spot along with the co-accused without any overt act or pre-meeting of mind conviction for murder with the aid of S. 34 is not sustainable. Acquittal of three of the five accused persons comprising the unlawful assembly does not in the light of the settled legal position make any material difference. When there were four other persons with the appellant who had the common object of committing an offence the assembly would be unlawful in nature acquittal of some of those who were members of the unlawful assembly by reason of the benefit of doubt given to them notwithstanding”.

*Nand Kishore v. State of M.P.*⁹¹For the application of section 34 IPC it is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend upon the facts and circumstances of each case whether the persons involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together.

In *Roy Fernandes v. State of Goa and Othrs.*⁹²the court held that members of an unlawful assembly may have a community of the object upto a certain point beyond which they may differ in their objects and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object may vary not only according to the information at his command but also according to the extent to which he shares the community of object. As a consequence the effect of section 149 of the IPC may be different on different members of the same unlawful assembly.⁹³

*Mano Dutt and Anr.v. State of U.P.*⁹⁴The legal position is well established that inference of common object has to be drawn from various factors such as the weapons with which the members were armed, their movements, the acts of violence committed by them and the result. We are satisfied that the prosecution, from the entirety of the evidence, has been able to establish that all the members of the unlawful assembly acted in furtherance of the common object to cause the death of Ramchandra Singh.

⁹⁰ *Ibid.* at para 40.

⁹¹ 2011(4) Crimes 71 (SC).

⁹² 2012 (1) Crimes 167 (SC).

⁹³ *Ibid.* at 175-176, para 22.

⁹⁴ 2012 (3) SCALE 219.

*LokeshShivakumar v. State of Karnataka*⁹⁵ it was held that the Appellant had not brought any weapon with him is equally without substance, as it is well settled that common intention can form and develop even in course of the occurrence. It is true that the Appellant had not brought with him any weapon but it is equally true that in the gobbaly tree wood piece lying at the place of occurrence he found one and used it with lethal effect.

Conclusion

The principle of joint liability or constructive liability intends to punish the persons who commit an offence together in group. Thus one may become criminally liable for the act of someone else provided it is shown that he and the criminal had either the criminal intention or common object in view. It is clear that when several persons are alleged to have committed a criminal act, each may have had a different role to play in the process. It may not be that every hand actively indulged in the act; there are myriad possibilities for encouragement, support, help, and protection, as also active participation or commission of the act itself. Thus, even though a particular act may have been committed by an individual, where common intention exists, and they had all acted in furtherance of that common intention, then all of them are held liable for the offence.

The offense to be brought under section 149 shall also be observed with great precision on the basis of facts and circumstances of each case. There may be occasions where the accused was a mere bystander not aware of the common object of the assembly and that it was unlawful. Also there maybe occasions where one of the members acted in a way which was neither a part of the common object of neither an assembly nor it was contemplated by the members.

Thus it is the opinion of the author that in cases of S. 149 a knowledge is imputed on the members of the unlawful assembly, which *per se* makes all the members liable for the acts committed in pursuance of the common object and it does not amount to vicarious liability which makes a master liable for the acts of the servant based on the principle of *respondent superior*, wherein the master is liable without any knowledge or intention on his part.

⁹⁵ 2012 (3) SCC 396.

In view of renowned author R C Nigam⁹⁶ Section 149 enunciates a principle of joint liability for an act of the confederate which he had anticipated. S. 34 create a similar rule of constructive liability. While under S. 34 joint liability is based on common intention, under S. 149 it is based upon common object and knowledge of the probability.

The non preservation of unlawful assembly and riot on their land is made punishable under S. 154, irrespective of the fact that whether the owner has any knowledge of its' being committed or not. This is an instance of the extension of the maxim of *respondent superior* to criminal law.⁹⁷ Thus both S. 34 as well as S. 149 of IPC speaks of constructive liability.



⁹⁶ See *supra* note 14 at 193.

⁹⁷ *Ibid.* at 207.