

SURESH AND ANR.

A

v

STATE OF U.P.

MARCH 2, 2001

[K.T. THOMAS, R.P. SETHI AND B.N. AGRAWAL, JJ.]

B

Penal Code, 1860 :

Section 34 :

Applicability of—Murder—Conviction of husband, wife and her brother—Husband and brother killing members of a family while wife was standing in front of the house of the deceased—Held, 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, she cannot be held guilty with the aid of Section 34—It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three—Her inaction in preventing the other two accused from committing the crime not conclusive to infer that she shared a common intention with others—Hence her acquittal, upheld.

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Ambit and scope of—Explained—Participation in the crime in furtherance of the common intention being sine qua non for Section 34, whether the act done is overt or covert—Existence of a common intention being a question of fact in each case to be proved mainly as matter of inference from the circumstances of the case—Presence of the co-accused at the scene of crime not a necessary requirement—Vicarious Liability—Principle of—Sections 32, 33, 35, 37, 38 and 302.

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Common intention and similar intention—Distinction between—Explained.

Evidence Act, 1872—A child of 7 years was the sole survivor of a ghastly incident—Deposition that wife of the 1st accused caught hold of his mother's hair, pulled it up and thereafter went outside and exhorted that everybody should be killed—Deposition by uncle of the deceased and 1st accused and a neighbour that the wife of the 1st accused was merely standing in front of the house of the deceased while her husband and brother were inside the house inflicting blows on the victims—Deposition by the little child evaluated with

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A *greater care—Acceptance of his evidence only to the extent it secured corroboration from the testimony of the other two witnesses—No infirmity in the findings recorded.*

B Animosity over a piece of land led A-1 to kill his brother, his brother's wife and three children along with his brother-in-law A-2. One of the children, PW3, however escaped only with injuries. A-3, wife of A-1 and sister of A-2, was also present at the scene of crime.

C In his evidence, PW3 a child of 7 years and the sole survivor of the ghastly incident, deposed that A-1 and A-2 inflicted blows on other members of his family. According to his deposition, A-3 caught hold of his mother's hair and pulled it up, thereafter she went outside and exhorted that everybody should be killed. On the other hand, PW1, uncle of the deceased & also of A1 and PW2, a neighbour, deposed that when they reached the scene of occurrence, A-3 was standing in front of the house of the deceased while A-1 and A-2 were inside the house engaged in the acts of inflicting blows on the victims.

E On the aforesaid evidence, the trial court imposed death penalty on all the accused which was confirmed by a Division Bench of the High Court qua only A-1 and A-2. A-3 was ordered to be acquitted. Hence the present appeal by A-1 and A-2. The other appeal has been preferred by State against the acquittal of A-3.

On behalf of the appellants, it was contended that if Section 34 IPC was to be invoked as against A-3, the prosecution should have established that she had done some overt act in furtherance of the common intention.

F On behalf of the State, it was contended that the presence of A-3 was in furtherance of the common intention of the three accused to commit the murders; that if she remained at the scene without sharing the common intention, she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively.

G Dismissing the appeals, the Court

HELD : (Per Thomas, J.) :

H 1. It is difficult to conclude that a person, merely because he was

present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 of the Indian Penal Code for the offence committed by the other accused. In the present case, the FIR shows that A-3 was standing on the road when the incident happened. Either she would have reached the road on hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three. The inaction of A-3 in preventing the other two accused from doing the ghastly acts need not necessarily lead to the conclusion that she shared a common intention with others. [275-C-F]

2. To attract Section 34 IPC two postulates are indispensable. (1) The criminal act (Consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. Thus participation in the crime in furtherance of the common intention is *sine qua non* for Section 34 IPC. Exhortation to other accused, even guarding the scene etc. would amount to participation. Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34. [272-H; 273-A; F-H]

Pandurang v. State of Hyderabad, AIR (1955) SC 216 and *State of U.P. v. Iftikhar Khan and Ors.*, [1973] 1 SCC 512, distinguished.

Aydooss v. Emperor, AIR (1923) Madras 187; *Barendra Kumar Ghosh v. Emperor*, AIR (1925) PC 1 and *Mahhub Shah v. Emperor*, AIR (1945) PC 118, referred to.

3. The trial court and the High Court have given very cogent reasons and quite elaborately for choosing the extreme penalty against A-1 and A-2. It is a rarest of rare cases in which the lesser alternative is unquestionably foreclosed. The acts committed by A-1 and A-2 cannot be pulled out of the contours of the extremely limited sphere of rarest of rare cases. [275-G-H; 276-A-C]

Panchhi and Ors. v. State of U.P., [1998] 7 SCC 177, held inapplicable.

A *Bachan Singh v. State of Punjab*, [1980] 2 SCC 684, referred to.

Per Sethi, J. for himself and Agrawal, J.

B 1. On facts, the prosecution has not succeeded in proving that A-3
C shared the common intention with the other two accused persons, one of
D whom was her husband and the other her brother. It has come in evidence
E that when the witnesses reached the spot, they found the said accused standing
F on the road whereas the other accused were busy committing the crime
G inside the house. The exaggerated version of PW3 regarding the participa-
H tion of A-3 by allegedly catching hold of his mother's hair cannot be ac-
cepted as PWs 1 and 2 have not supported the aforesaid version. 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 IPC. [286-C-E]

D 2. It is well settled that no overt act is necessary to attract the applica-
E bility of Section 34 for a co-accused who is otherwise proved to be sharing
F common intention with the ultimate act done by any one of the accused
G sharing such intention. Section 34 of the Indian Penal Code recognises the
H principle of vicarious liability in 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. 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. [276-E-G; 277-A]

F 3. Dominant feature for attracting Section 34 of the Indian Penal Code
G is the element of participation in absence resulting in the ultimate "criminal
H 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 inten-
tion. Participation in the crime in furtherance of the common intention can-
not conceive of some independent criminal act by all accused persons, be-
sides 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 single act.
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. [277-B-F]

Shatrughan Patar & Ors. v. Emperor, AIR (1919) Patna 111; *Barendra Kumar Ghosh v. King Emperor*, AIR (1925) PC 1; *Mahboob Shah v. Emperor*, AIR (1945) PC 118; *The King Emperor v. Brendra Kumar Ghosh*, AIR (1924) Cal. 257; *Emperor v. Nirmal Kanta Roy*, (1914) 41 Cal. 1072; *Pandurang & Ors. v. State of Hyderabad*, AIR (1955) SC 216; *Shreekantiah Ramayya Munipalli & Anr. v. State of Bombay*, AIR (1955) SC 287; *Takaram Ganapat Pandare v. State of Maharashtra*, AIR (1974) SC 514; *Lalai alias Dindoo & Anr. v. State of U.P.*, AIR (1974) SC 2118; *Ramaswami Ayyangar & Ors. v. State of Tamil Nadu*, AIR (1976) SC 2027; *Rambilas Singh Ors. v. State of Bihar*, AIR (1989) SC 1593; *State of U.P. v. Iftikhar Khan & Ors.*, [1973] 1 SCC 512; *Krishnan & Anr. v. State of Kerala*, JT (1996) 7 SC 612 and *Surender Chauhan v. State of M.P.*, [2000] 4 SCC 110, relied on.

4. 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 as a series of acts as a single act and the word “omission” denotes as well as series of omissions as a single omission. The distinction between a “common intention” and “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 in 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. [285-E-G]

Mohan Singh & Anr. v. State of Punjab, AIR (1963) SC 174 and *State through Superintendent of Police, CBI/SIT v. Nalini & Ors.*, [1999] 5 SCC 253, relied on.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 821 of 2000.

From the Judgment and Order dated 23.02.2000 in CrI. R. No. 1/98 Connected with CrI. A. No. 2/98 of the High Court of Allahabad.

WITH

A Criminal Appeal No. 160/2001.

K.B. Sinha, Rajeev K. Singh, Kunwar Ajit Mohan Singh, for P.N. Ramalingam for the Appellant.

B Pramod Swarup, Parveen Swarup, Ms. Pareena Swarup, Prashant Choudhary for the respondents.

The Judgment of the Court was delivered by

C **THOMAS, J.** Section 34 of the Indian Penal Code is a very commonly invoked provision in criminal cases. With a plethora of judicial decisions rendered on the subject the contours of its ambit seem well neigh delineated. Nonetheless, when these appeals were heard a two-judge Bench felt the need to make a re-look at the provision as to whether and if so to what extent it can be invoked as an aid in this case. Hence these appeals were heard by a larger Bench.

D In one of the appeals A-1 Suresh and his brother-in-law A-2 Ramji are fighting their last chance to get extricated from the death penalty imposed on them by a Sessions Court which was confirmed by a Division Bench of the High Court. In the other appeal Pavitri Devi, the wife of A-1 Suresh (also sister of A-2 Ramji) is struggling to sustain the acquittal secured by her from the High Court in reversal of the conviction for murder ordered by the Sessions Court with the aid of Section 34 IPC.

F On the night of 5.10.1996 when Ramesh (brother of appellant Suresh) and his wife and children went to bed as usual they would have had no foreboding that it was going to be the last night they were sleeping on this terrestrial terrain. But after they, in their sleep, crossed the midnight line and when the half crescent moon appeared with its waned glow above their house the night turned red by the bloodiest killing spree befallen the entire family. The motely population of that small house were whacked to pieces by armed assailants, leaving none, but a single tiny tot, alive. The sole survivor of the gory carnage could have seen what happened inside his sweet home only in the light which itself turned carmine. He narrated the tale before the Sessions Court with the visible scars of the wounds he sustained on his person.

H That infant witness (PW-3 Jitendra) told the trial court that he saw his uncle (A-1 Suresh) in the company of his brother-in-law (A-2 Ramji) acting like demons, cutting the sleeping children with axe and chopper. He also said

that his aunt (A-3 Pavitri Devi) clutched the tuft of his mother's hair and yelled like a demoness in thirst for the blood of the entire family.

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Lalji (PW-1), the uncle of the deceased Ramesh (who is uncle of A-1 Suresh also) and Amar Singh (PW-2) a neighbour gave evidence supporting the version of PW-3 Jitendra. But the said two witnesses did not attribute any overt act to Pavitri Devi except saying that she too was present near the scene of occurrence. The house of the accused was situated not far away from the scene of occurrence but across the road which abuts the house of the deceased.

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The doctor (PW5-C.M. Tiwari) who conducted the autopsy on the dead bodies of all the deceased described the horrifying picture of the mauled bodies. The youngest of the victims was a one year old child whose skull was cut into two and the brain was torn asunder. The next was a three year old male child who was killed with his neck axed and the spinal cord, trachea and the larynx were snipped. The next in line was PW-3 Jitendra - a seven year old child. (His injuries can be separately stated). His immediate next elder was Monisha - a nine year old female child, who too was axed on the neck, mouth and chest with her spinal cord cut into two.

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The mother of those little children Ganga Devi was inflicted with six injuries which resulted in her skull being broken into pieces. The last was Ramesh - the bread winner of the family, who was the father of the children. Four wounds were inflicted on him. All of them were on neck and above that. The injuries on Ramesh, when put together, had neared just short of decapitation.

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PW-3 Jitendra had three incised wounds on the scapular region, but the doctor who attended on him (PW-6 S.K. Verma) did not probe into the depth of one of them, presumably because of the fear that he might require an immediate surgical intervention. However, he was not destined to die and hence the injuries inflicted on him did not turn fatal.

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The motive for the above dastardly massacre was the greed for a bit of land lying adjacent to the house compound of the deceased which A-1 Suresh claimed to be his. But deceased Ramesh clung to that land and it resulted in burgeoning animosity in the mind of Suresh which eventually grew alarmingly wild.

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The evidence of PW-1 Lalji and PW-2 Amar Singh was considered by the Session Court in the light of various contentions raised by the counsel for

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A the accused. The trial judge found the said evidence reliable. The Division
Bench of the High Court considered the said evidence over again and they did
not see any reason to dissent from the finding made by the trial court. The
evidence of PW-3 Jitendra, the sole survivor of the carnage, was evaluated with
greater care as he was an infant of seven years. Learned Judges of the Division
B Bench of the High Court accepted the evidence of PW-3 only to the extent it
secured corroboration from the testimony of PWs.1 and 2.

Though Mr. K.B. Sinha, learned senior counsel made an endeavour to
make some tears into the fabric of the testimony of PWs.1 and 2, he failed to
satisfy us that there is any infirmity in the findings recorded by the two courts
C regarding the reliability of the evidence of those two witnesses. As the learned
senior counsel found it difficult to turn the table regarding the evidence against
the accused which is formidable as well as trustworthy, he focussed on two
aspects. First is that acquittal of Pavitri Devi does not warrant interference from
this Court. Second is that this is not a case belonging to the category which
D compels the court to award death penalty to the two appellants, Suresh and
Ramji.

We will now deal with the role played by Pavitri Devi to see whether the
court can interfere with the acquittal order passed in her favour by the High
Court. PW-3 said that while he was sleeping the blood gushed out of the
E wounds sustained by his father reached his mouth and when he woke up he
saw the incident. According to him, Pavitri Devi caught hold his mother's hair
and pulled it up, thereafter she went outside and exhorted that everybody
should be killed. But PWs.1 and 2 did not support the aforesaid version
pertaining to Pavitri Devi. According to them, when they reached the scene of
F occurrence Pavitri Devi was standing in front of the house of the deceased
while the other two were inside the house engaged in the acts of inflicting
blows on the victims.

The position which prosecution succeeded in establishing against A-3
Pavitri Devi is that she was also present at the scene of occurrence. Learned
G counsel for the State contended that such presence was in furtherance of the
common intention of the three accused to commit the murders and hence she
can as well be convicted for the murders under Section 302 IPC with the aid
of Section 34 IPC. Mr. K.B. Sinha, learned counsel contended that if Section
34 IPC is to be invoked as against Pavitri Devi the prosecution should have
H established that she had done some overt act in furtherance of the common
intention.

We heard arguments at length on the ambit of Section 34 IPC. We have to consider whether the accused who is sought to be convicted with the aid of that Section, should have done some act, even assuming that the said accused also shared the common intention with the other accused.

Section 34 reads thus:

“Acts done by several persons in furtherance of common intention.-
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.”

As the section speaks of doing “a criminal act by several persons” we have to look at Section 33 IPC which defines the “act”. As per it, the word “act” denotes as well a series of acts as a single act. This means a criminal act can be a single act or it can be the conglomeration of a series of acts. How can a criminal act be done by several persons?

In this context a reference to Sections 35, 37 and 38 of IPC, in juxtaposition with Section 34, is of advantage. Those four provisions can be said to belong to one cognate group wherein different positions when more than one person participating in the commission of one criminal act are adumbrated. Section 35 says that when an act is done by several persons each of such persons who joins in the act with *mens rea* is liable for the act “in the same manner as if the act were done by him alone with that knowledge or intention”. The section differs from Section 34 only regarding one postulate. In the place of common intention of all such persons (in furtherance of which the criminal act is done), as is required in Section 34, it is enough that each participant who joins others in doing the criminal act, has the required *mens rea*.

Section 37 deals with the commission of an offence “by means of several acts”. The section renders any one who intentionally cooperates in the commission of that offence “by doing any one of those acts” to be liable for that offence. Section 38 also shows another facet of one criminal act being done by several persons without connecting the common bond i.e. “in furtherance of the common intention of all”. In such a case they would be guilty of different offence or offences but not for the same offence. Among the above four provisions the common denominator is the participation of several persons (more than one person) in the commission of a criminal act. The special feature of Section 34 is only that such participation by several persons should be “in

A furtherance of the common intention of all”.

Hence, under Section 34 one criminal act, composed of more than one act, can be committed by more than one person and if such commission is in furtherance of the common intention of all of them, each would be liable for the criminal act so committed.

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To understand the section better it is useful to recast it in a different form by way of an illustration. This would highlight the difference when several persons do not participate in the crime committed by only one person even though there was common intention of all the several persons. Suppose a section was drafted like this: “When a criminal act is done by one person in furtherance of the common intention of several persons each of such several persons is liable for that act in the same manner as if it were done by all such persons.”

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Obviously Section 34 is not meant to cover a situation which may fall within the fictitiously concocted section caricatured above. In that concocted provision the co-accused need not do anything because the act done by the principal accused would nail the co-accused also on the ground that such act was done by that single person in furtherance of the common intention of all the several persons. But Section 34 is intended to meet a situation wherein all the co-accused have also done something to constitute the commission of a criminal act.

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Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract Section 34, e.g. the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targetted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why Section 34 cannot apply in the case of those two persons indicated in the illustrations.

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Thus to attract Section 34 IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act

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cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.

Looking at the first postulate pointed out above, the accused who is to be fastened with liability on the strength of Section 34 IPC should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of Section 32 IPC. So the act mentioned in Section 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, e.g. a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC.

There may be other provisions in the IPC like Section 120B or Section 109 which could be invoked then to catch such non participating accused. Thus participation in the crime in furtherance of the common intention is *sine qua non* for Section 34 IPC. Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.

A Division Bench of the Madras High Court has said as early as in 1923 that "evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required to justify the application of Section 34 IPC". (vide *Aydrooss v. Emperor*, AIR (1923) Madras 187.

A In *Barendra Kumar Ghosh v. Emperor*, AIR (1925) PC 1, the Judicial Commission after referring to the cognate provisions adverted to above, held thus:

B “Read together, these sections are reasonably plain. S.34 deals with the doing of separate acts, similar or 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.”

C We have come across the observations made by another Judicial Commission of the Privy Council of equal strength in *Mahbub Shah v. Emperor*, AIR (1945) PC 118. The observation is that Section 34 IPC can be invoked if it is shown that the criminal act was done by one of the accused in furtherance of the common intention of all. On the fact situation their Lordships did not have to consider the other component of the Section. Hence D the said observation cannot be understood to have obviated the necessity of proving that “the criminal act was done by several persons” which is a component of Section 34 IPC.

E In *Pandurang v. State of Hyderabad*, AIR (1955) SC 216 Vivian Bose J., speaking for a three-Judge Bench of this Court focused on the second component in Section 34, IPC i.e. “in furtherance of the common intention.” There was no need for the bench to consider about the acts committed by the accused charged, in order to ascertain whether all the accused committed the criminal act involved therein. In other words the first postulate was not a question which came up for consideration in that case. Hence the said F decision, cited by both sides for supporting their respective contentions is not of much use in this case.

G Mr. Pramod Swarup, learned counsel for the State invited our attention to the decision of this Court in *State of U.P. v. Iftikhar Khan and Ors.*, [1973] 1 SCC 512 in which it is observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In that case four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact H in that case was also the same. When a plea was made on behalf of those

two persons who were armed with lathis that they did not do any overt act, this Court made the above observation. From the facts of that case it can be said that there was no act on behalf of the two lathi-holders although the deceased was killed with pistols alone. The criminal act in that case was done by all the persons in furtherance of the common intention to finish the deceased. Hence the observation made by Vaidialingam, J., in the said case has to be understood on the said peculiar facts.

It is difficult to conclude that a person, merely because he was present at or near the scene, without doing anything more, without even carrying a weapon and without even marching along with the other assailants, could also be convicted with the aid of Section 34 IPC for the offence committed by the other accused. In the present case, the FIR shows that A-3 Pavitri Devi was standing on the road when the incident happened. Either she would have reached on the road hearing the sound of the commotion because her house is situated very close to the scene, or she would have merely followed her husband and brother out of curiosity since they were going armed with axe and choppers during the wee hours of the night. It is not a necessary conclusion that she too would have accompanied the other accused in furtherance of the common intention of all the three.

Mr. Pramod Swarup, learned counsel for the State contended that if she remained at the scene without sharing the common intention she would have prevented the other two accused from doing the ghastly acts because both of them were her husband and brother respectively. The inaction of Pavitri Devi in doing so need not necessarily lead to the conclusion that she shared a common intention with others. There is nothing to show that she had not earlier tried to dissuade her husband and brother from rushing to attack the deceased.

Thus we are unable to hold that Pavitri Devi shared common intention with the other accused and hence her remaining passively on the road is too insufficient for reversing the order of acquittal passed by the High Court in order to convict her with the aid of Section 34 IPC.

Mr. K.B. Sinha, learned senior counsel made an all out effort to save the convicted appellants from death penalty. The trial court and the High Court have given very cogent reasons and quite elaborately for choosing the extreme penalty. Knowing fully well that death penalty is now restricted to the rarest of rare cases in which the lesser alternative is unquestionably

A foreclosed as held by the Constitution Bench in *Bachan Singh v. State of Punjab*, [1980] 2 SCC 684 we could not persuade ourselves in holding that the acts committed by A-1 Suresh and A-2 Ramji should be pulled out of the contours of the extremely limited sphere. Mr. K.B. Sinha cited a number of decisions including *Panchhi and Ors. v. State of U.P.*, [1998] 7 SCC 177

B in an endeavour to show that this Court had chosen to give the alternative sentence in spite of the ferocity of the acts perpetrated and a number of victims involved. None of such cases is comparable with the facts in this case. Even after bestowing our anxious consideration we cannot persuade ourselves to hold that this is not a rarest of rare cases in which the lesser alternative is unquestionably foreclosed.

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Accordingly we dismiss both the appeals.

SETHI, J. for himself and Agrawal, J. 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

E 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.

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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

G 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

H 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 v. King Emperor*, AIR (1925) PC] 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:

- A “.....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
- B 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
- C 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
- D 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
- E 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.”
- F

(Emphasis supplied)

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

- G “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
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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 v. 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

A 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.”

B (Emphasis supplied)

C A Full Bench of the Patna High Court in *The King Emperor v. 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:

D “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.

G 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.

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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 Bench of this Court in *Pandurang & Ors. v. State of 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:

"It is true there must be some sort of preliminary planning which may

A 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
B door, provided that is done with the intention of assisting in further-
ance 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)

C 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
D 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 attain-
E ment 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.

F 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
G 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 commis-
H sion 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 overt 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. Ifikhar 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

A 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.

B In *Krishnan & Anr. v. State of Kerala*, JT (1996) 7 SC 612, this Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Penal Code holding:

C “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*.”

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F 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:

G “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

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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. v. 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

A 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.

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

C 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.

F M.P.

Appeals dismissed.