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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
SANJAY KISHAN KAUL; M.M. SUNDRESH, JJ.

January 07, 2022

JASDEEP SINGH @ JASSU *VERSUS* **STATE OF PUNJAB**

Indian Penal Code, 1860 ; Section 34 - A mere common intention per se may not attract Section 34 IPC, sans an action in furtherance - The word “furtherance” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion- Scope of Section 34 IPC discussed. (Para 26, 28)

CRIMINAL APPEAL NO.1584 of 2021 (@SLP (CRL.) NO. 11816 OF 2019) WITH CRIMINAL APPEAL NO.1585 OF 2021 (@SLP(CRL.) NO.11486/2019) CRIMINAL APPEAL NO.1586 OF 2021 (@SLP(CRL.) NO.3301/2020)

For Parties Mr. Gaurav Agrawal, AOR Mr. Sidharth Luthra, Sr. Adv. Ms. Supriya Juneja, AOR Mr. Aditya Singla, Adv. Ms. Shubhangi Jain, Adv. Ms. Sonali Sharma, Adv. Mr. Pankaj Singhal, Adv. Mr. Yash Giri, Adv. Mr. Nikhil Jain, AOR Mrs. Jaspreet Gogia, AOR Ms. Mandakini Singh, Adv. Mr. Karanvir Gogia, Adv. Ms. Shivangi Singhal, Adv. Ms. Varnika Gupta, Adv. Ms. Ashima Mandla, Adv.

J U D G M E N T

M.M. SUNDRESH, J.

1. Heard learned counsel appearing for the parties.
2. Crl. A. No.1584 of 2021 and Crl. A. No.1585 of 2021 are filed by convicted Appellants/Accused 3 and 4 respectively against conviction under Section 304 Part I of the Indian Penal Code (IPC) with life sentence, while Crl. A. No.1586 of 2021 is filed by the de facto complainant seeking modification of the conviction to the sentence punishable under Section 302 IPC. Thus, we shall deal with all the appeals by our common order, particularly, when they emanate and emerge from a common impugned order.

BRIEF FACTS

3. Four accused persons were charged, convicted, and sentenced in the following manner:

Name of convict	Offence under Section	Sentence
Ramsimran Singh Makkar	U/s 304 Part I IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine to undergo further RI for one year.

	U/s 25 Arms Act	To undergo rigorous imprisonment for two years and to pay fine of Rs.2000/- and in default of payment of fine to undergo further RI for three months.
	U/s 27 Arms Act	To undergo rigorous imprisonment for five years and to pay fine of Rs.5000/- and in default of payment of fine to undergo further RI for six months.
Amardeep Singh Sachdeva	U/s 304 Part I, read with Section 34 IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine to undergo further RI for one year.
	U/s 25 Arms Act	To undergo rigorous imprisonment for two years and to pay fine of Rs.2000/- and in default of payment of fine to undergo further RI for three months.
Jasdeep Singh	U/s 304 Part I, read with Section 34 IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine to undergo further RI for one year.
Amarpreet Singh Narula	U/s 304 Part I, read with Section 34 IPC	To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine to undergo further RI for one year.

4. The occurrence took place at about 12:45 a.m. on 21.04.2011 in the area of Baba Rasoi Dhaba, Jalandhar. The motive for the occurrence was that the deceased felt that a raid conducted in the hotel belonging to him and his father (PW6), the Appellant in CrI. A. No.1586 of 2021, was done at the instance of the accused. All the accused are friends of each other.

5. PW6 went in search of the deceased on finding that he had not returned home, though he was in a habit of coming late. On a particular street, he saw the accused grappling with the deceased. It was seen by him in the street light. The occurrence was also witnessed by PW10 who incidentally was a friend of the deceased. PW13 spoke about the common intention on the part of the accused on the previous night to do away with the deceased.

6. In pursuance to the statement made by A3 and A4, saying “what are you seeing now”, A1 took out a gun from his pocket and shot the deceased. A2 took his gun and

brandished it against the deceased, prior to the aforesaid statement made by A3 and A4, followed by the shooting by A1. A3 and A4 made the statement pointing to A1, though A2 was already having the gun out. It is only thereafter that A1 took out his gun and shot the deceased.

7. The deceased was taken to the hospital situated about 3 kms from the place of occurrence, notwithstanding the other hospitals nearby. PW23 helped PW6 and PW10 to carry the deceased into the car of PW6. Thereafter PW6 gave the complaint under Exhibit PL. In the complaint, he did not make any statement that A3 and A4 exhorted A1 to shoot, except the statement as referred earlier. However, in his additional statement given under Section 161 CrPC, he improved his version by stating that A3 and A4 instigated A1 to fire. We may note, A6 is a legally qualified person.

8. PW24 took up the investigation and completed the formalities. Recoveries have been made, including of the weapons.

9. Before the trial court, the prosecution examined 27 witnesses and marked documents in support of its case. On behalf of the defense, 16 witnesses have been examined along with the documents.

10. Before the trial court, PW10 and PW23 turned hostile. Upon hearing the counsel appearing for the parties a conviction has been rendered against all the accused for the offences punishable under Section 304 Part I IPC along with life sentence. The trial court reasoned that it is not as if the accused were waiting for the deceased. The deceased went nearer to the accused, as could be seen from the evidence of PW10 under Exhibit PF/1 and PQ. There was only one single shot. Though the deceased fell down the accused did not shoot him thereafter. There was indeed a quarrel preceding the occurrence. The evidence of PW13 was disbelieved with respect to prior concert. It was noted that he was a resident of a place 50 kms away from Jalandhar. The evidence adduced by his cousin (DW1) showed that he was not present at his house at Jalandhar and there was no reason for going to Jalandhar on 20.04.2011. The prosecution did not prove that that day was his birthday and there were other places available nearer to his residence. There was absolutely no material to hold that he knew the accused at any prior point of time. It would be improbable that the accused would make a plan to commit a murder in public, by addressing themselves by names while flaunting their weapons. Further, he did not make any complaint. The statement that he visited days thereafter to seek tires for his jeep was not believed as such tires could be obtained otherwise in a nearer place.

11. Accordingly, holding that there was no premeditation, and the occurrence took place in pursuance to a sudden fight, in a heat of passion, the case was brought under Exception 4 to Section 300 IPC.

12. Appeals were filed by all the parties. The High Court concurred with the views of the trial court. However, it did not specifically deal with the scope of Section 34 IPC as against A3 and A4 which was accordingly done by the trial court. We may also note that the trial court did an in-depth, exhaustive assessment, by considering almost all the material placed before it, including the statements made by the witnesses.

13. A3 and A4 are before us by filing their respective appeals seeking to overturn the judgment rendered by the High Court confirming the one by the trial court. Thus, A1 and A2 have not filed their appeals. We have been informed at the Bar, by the learned Senior Counsel appearing for the de facto complainant/Appellant in CrI. A. No.1586 of 2021 that A1 has since been let out on pre-mature release by the State. We do not wish to state anything on the role of A1 and A2 except to the extent of testing the decision of the High Court and the trial court as to whether the case would fall under Section 304 Part I or Section 302 IPC.

Arguments on behalf of the Appellants

14. Since appeals have been filed both by the convicted Appellants and the de facto complainant, we would like to note the arguments of A3 and A4 first and thus the other appeal filed by de facto complainant would be taken along with the arguments of the State.

15. It is submitted by the learned counsel that the evidence of PW13 having been disbelieved, the courts have committed an error in applying Section 34 IPC. There is an improvement with respect to the statement made by PW6. A mere statement *per se* would not be sufficient to attract Section 34 IPC. It is strange that both of them made the same statement. The presence of PW6 is very doubtful. He had deposed that the deceased used to come late and there was no complaint whatsoever. If A2 brandished the gun before the deceased was shot by A1, it is only logical that A3 and A4 would have asked A2 to shoot first. Even the other eyewitness in PW10 has turned hostile and so also another material witness in PW23. Under those circumstances it is a fit case where the conviction rendered against A3 and A4 are to be set aside.

Submission of the Respondents

16. The learned Senior Counsel appearing for the de facto complainant submitted that the accused are influential persons. The case would come under offense punishable under Section 302 IPC. The trial court has committed an error as confirmed by the High Court in bringing it under Section 299 IPC and therefore wrongly applied Section 304 Part I IPC. It is not necessary that an accused will have to do a physical act in order to attract Section 34 IPC. Thus, a mere presence of the accused would suffice. Hence, the appeal filed by the de facto complainant be allowed while dismissing the appeal filed by the Accused-Appellants.

17. The counsel appearing for the State submitted that cogent reasoning was given by the High Court. The trial court considered the entire material available on record. Recoveries made have been proved. Under those circumstances there is no need to interfere with the conviction and sentence.

Section 34 IPC

18. We shall first go back into the history to understand Section 34 IPC as it stood at the inception and as it exists now.

Old Section 34 of IPC	New Section 34 of IPC
“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”	“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 by him alone”

19. On a comparison, one could decipher that the phrase “in furtherance of the common intention” was added into the statute book subsequently. It was first coined by Chief Justice Barnes Peacock presiding over a Bench of the Calcutta High Court, while delivering its decision in Queen v. Gorachand Gope, (1866 SCC OnLine Cal 16) which would have probably inspired and hastened the amendment to Section 34 IPC, made in 1870. The following passage may lend credence to the aforesaid possible view:

“It does not follow that, because they were present with the intention of taking him away, that they assisted by their presence in the beating of him to such an extent as to cause death. If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and taking him to the thannah on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. I do not know what the evidence was, all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.”

20. Before we deal further with Section 34 IPC, a peep at Section 33 IPC may give a better understanding. Section 33 IPC brings into its fold a series of acts as that of a single one. Therefore, in order to attract Section 34 to 39 IPC, a series of acts done by several persons would be related to a single act which constitutes a criminal offense. A similar meaning is also given to the word 'omission', meaning thereby, a series of omissions would also mean a single omission. This provision would thus make it clear that an act would mean and include other acts along with it.

21. Section 34 IPC creates a deeming fiction by infusing and importing a criminal act constituting an offence committed by one, into others, in pursuance to a common intention. Onus is on the prosecution to prove the common intention to the satisfaction of the court. The quality of evidence will have to be substantial, concrete, definite and clear. When a part of evidence produced by the prosecution to bring the accused within the fold of Section 34 IPC is disbelieved, the remaining part will have to be examined with adequate care and caution, as we are dealing with a case of vicarious liability fastened on the accused by treating him at par with the one who actually committed the offence.

22. What is required is the proof of common intention. Thus, there may be an offence without common intention, in which case Section 34 IPC does not get attracted.

23. It is a team effort akin to a game of football involving several positions manned by many, such as defender, mid-fielder, striker, and a keeper. A striker may hit the target, while a keeper may stop an attack. The consequence of the match, either a win or a loss, is borne by all the players, though they may have their distinct roles. A goal scored or saved may be the final act, but the result is what matters. As against the specific individuals who had impacted more, the result is shared between the players. The same logic is the foundation of Section 34 IPC which creates shared liability on those who shared the common intention to commit the crime.

24. The intendment of Section 34 IPC is to remove the difficulties in distinguishing the acts of individual members of a party, acting in furtherance of a common intention. There has to be a simultaneous conscious mind of the persons participating in the criminal action of bringing about a particular result. A common intention *qua* its existence is a question of fact and also requires an act "in furtherance of the said intention". One need not search for a concrete evidence, as it is for the court to come to a conclusion on a cumulative assessment. It is only a rule of evidence and thus does not create any substantive offense.

25. Normally, in an offense committed physically, the presence of an accused charged under Section 34 IPC is required, especially in a case where the act attributed to the accused is one of instigation/exhortation. However, there are exceptions, in particular, when an offense consists of diverse acts done at different times and places. Therefore, it has to be seen on a case to case basis.

26. The word “furtherance” indicates the existence of aid or assistance in producing an effect in future. Thus, it has to be construed as an advancement or promotion.

27. There may be cases where all acts, in general, would not come under the purview of Section 34 IPC, but only those done in furtherance of the common intention having adequate connectivity. When we speak of intention it has to be one of criminality with adequacy of knowledge of any existing fact necessary for the proposed offense. Such an intention is meant to assist, encourage, promote and facilitate the commission of a crime with the requisite knowledge as aforesaid.

28. The existence of common intention is obviously the duty of the prosecution to prove. However, a court has to analyse and assess the evidence before implicating a person under Section 34 IPC. A mere common intention *per se* may not attract Section 34 IPC, sans an action in furtherance. There may also be cases where a person despite being an active participant in forming a common intention to commit a crime, may actually withdraw from it later. Of course, this is also one of the facts for the consideration of the court. Further, the fact that all accused charged with an offence read with Section 34 IPC are present at the commission of the crime, without dissuading themselves or others might well be a relevant circumstance, provided a prior common intention is duly proved. Once again, this is an aspect which is required to be looked into by the court on the evidence placed before it. It may not be required on the part of the defence to specifically raise such a plea in a case where adequate evidence is available before the court.

29. The essence and scope of Section 34 IPC can be borne out of excerpts from the following judgements:

Suresh v State of U.P. ((2001) 3 SCC 673):

“24. 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 an 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.

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40. 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 not to 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 preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *Satrughan Patar v. Emperor*, AIR 1919 Pat 111 held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied.”

Lallan Rai v. State of Bihar, [(2003) 1 SCC 268]:

“22. The above discussion in fine thus culminates to the effect that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing himself from the scene cannot absolve the accused — though the same however depends upon the fact situation of the matter under consideration and no rule steadfast can be laid down therefor.”

Chhota Ahirwar v. State of M.P., [(2020) 4 SCC 126]:

“24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the offenders. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the criminal act to bring about a particular result, which consensus can even be developed at the spot as held in *Lallan Rai v. State of Bihar*, (2003) 1 SCC 268. There must be a common intention to commit the particular offence. To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.”

Barendra Kumar Ghosh v. King Emperor (AIR 1925 PC 1):

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

the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. S. 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

Mehbub Shah v. Emperor (AIR 1945 PC 148):

"....Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intentions 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 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 the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan..."

Rambilas Singh & Ors. v. State of Bihar [(1989) 3 SCC 605]:

"7...It is true that in order to convict persons vicariously under section 34 or section 149 IPC, it is not necessary to prove that each and every one 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..."

Krishnan & Another v. State of Kerala [(1996) 10 SCC 508]:

"15. 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 an 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*."

Surendra Chauhan v. State of M.P. [(2000) 4 SCC 110]:

"11. 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...."

Gopi Nath @ Jhallar v. State of U.P. [(2001) 6 SCC 620]:

"8. ...As for the challenge made to the conviction under Section 302 read with Section 23 IPC, it is necessary to advert to the salient principles to be kept into consideration and often reiterated by this Court, in the matter of invoking the aid of Section 34 IPC, before dealing with the factual aspect of the claim made on behalf of the appellant. Section 34 IPC has been held to lay down the rule of joint

responsibility for criminal acts performed by plurality or persons who joined together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action – be it that it was not overt or was only covert act or merely an omission constituting an illegal omission. The section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case.”

Ramesh Singh @ Photti v. State of A.P. [(2004) 11 SCC 305]:

"12. ...As a general principle in a case of criminal liability it is the primary responsibility of the person who actually commits the offence and only that person who has committed the crime can be held guilty. By introducing Section 34 in the Penal Code the legislature laid down the principle of joint liability in doing a criminal act. The essence of that liability is to be found in the existence of a common intention connecting the accused leading to the doing of a criminal act in furtherance of such intention. Thus, if the act is the result of a common intention, then every person who did the criminal act with that common intention would be responsible for the offence committed irrespective of the share which he had in its perpetration..... "

Nand Kishore V. State Of Madhya Pradesh [(2011) 12 SCC 120):

“20. A bare reading of this section shows that the section could be dissected as follows:

- (a) Criminal act is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the criminal act and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word “done”. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity.

21. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or

different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between “common intention” on the one hand and “mens rea” as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be coincidental with or collateral to the former but they are distinct and different.

22. Section 34 also deals with constructive criminal liability. It provides that where 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 was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. (Refer to *Brathi v. State of Punjab* 1991 (1) SCC 519).

23. Another aspect which the court has to keep in mind while dealing with such cases is that the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any predetermined plan to commit such an offence. This will always depend on the facts and circumstances of the case...”

Shyamal Ghosh V. State of West Bengal [(2012) 7 SCC 646]:

“87. Upon analysis of the above judgments and in particular the judgment of this Court in the case of *Dharnidhar v. State of Uttar Pradesh*, [(2010) 7 SCC 759], it is clear that Section 34 IPC applies where two or more accused are present and two factors must be established i.e. common intention and participation of the accused in the crime. Section 34 IPC, moreover, involves vicarious liability and therefore, if the intention is proved but no overt act was committed, the section can still be invoked. This provision carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others, if he had the common intention to commit the act. The phrase “common intention” means a pre-oriented plan and acting in pursuance to the plan, thus, common intention must exist prior to the commission of the act in a point of time. The common intention to give effect to a particular act may even develop on the spur of moment between a number of persons with reference to the facts of a given case.”

30. The aforesaid principle has also been dealt with in extenso by the Apex Court in *Virendra Singh V. State of Madhya Pradesh* ((2010) 8 SCC 407) through the following paragraphs:

"15. Ordinarily, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had the common intention to commit the offence. The words "common intention" implies a prearranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the prearranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a prearranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in the case of *Amrik Singh & Ors. v. State of Punjab*, 1972 (4) SCC (N) 42:1972 CriLJ 465.

16. The essence of the 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. Undoubtedly, it is difficult to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. Therefore, in order to find whether a person is guilty of common intention, it is absolutely necessary to carefully and critically examine the entire evidence on record. The common intention can be spelt out only from the evidence on record.

17. Section 34 is not a substantive offence. It is imperative that before a man can be held liable for acts done by another under the provisions of this section, it must be established that there was common intention in the sense of a prearranged plan between the two and the person sought to be so held liable had participated in some manner in the act constituting the offence. Unless common intention and participation are both present, this section cannot apply.

xxx xxx xxx

36. Referring to the facts of this case, the short question which arises for adjudication in this appeal is whether the appellant Virendra Singh can be convicted under section 302 with the aid of section 34 IPC. Under the Penal Code, the persons who are connected with the preparation of a crime are divided into two categories: (1) those who actually commit the crime i.e. principals in the first degree; and (2) those who aid in the actual commission i.e. principals in the second degree. The law does not make any distinction with regard to the punishment of such persons, all being liable to be punished alike.

37. Under the Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. Under the Penal Code, two sections, namely, Sections 34 and 149, deal with them circumstances when a person is vicariously responsible for the acts of others.

38. The vicarious or constructive liability under Section 34 IPC can arise only when two conditions stand fulfilled i.e. the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.

39. The common intention postulates the existence of a prearranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant circumstances. Therefore, in inferring the common intention under section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver than the one originally designed, during execution of the original plan, should be clear and cogent.

40. The dominant feature of Section 34 is the element of intention and participation in action. This participation need not in all cases be by physical presence. Common intention implies acting in concert.

41. The essence of Section 34 IPC is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. Russell in his celebrated book *Russell on Crime*, 12th Edn., Vol. 1 indicates some kind of aid or assistance producing an effect in future and adds that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony. It was observed by Russell that any act of preparation for the commission of felony is done in furtherance of the act.

42. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a prearranged and premeditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the premeditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with section 34."

On merit

31. Having understood Section 34 IPC, we shall now deal with the case on hand.

32. The evidence of PW13 did not find favour with the courts. The trial court which had the advantage of noting the deposition of the witnesses, chose to disbelieve the evidence adduced, by giving cogent reasons. This evidence was rightly eschewed by the trial court and also by the High Court. There are too many improbabilities in the testimony of PW13. A person who was living 50 kms away remembered the accused and their names and overheard their plot to commit the murder. His evidence was belied by the evidence of DW1 who was none other than his own cousin with whom he was said to be residing at the relevant point of time.

33. The other material witnesses are PW6 and PW10. PW10 had given prior statements. Though he turned hostile despite being a friend of the deceased, the trial court did take into consideration his earlier statement, while coming to the conclusion that there was no premeditation and thus the case would fall under culpable homicide not murder. Though the evidence of PW6 was not rejected, both the courts did find a clear exaggeration on his part. On many occasions PW6 made a concerted effort to improve the case of prosecution. The testimony given by him on the dying declaration, a case inserted by him in his supplementary statement, made subsequently, was also rightly rejected by the courts. This was also supported by the medical evidence. The other part of the evidence with respect to the fight was also dealt with by the courts as evidence available would suggest that it is the deceased who went nearer, and the accused were not stationing themselves waiting for his arrival. Therefore, the aforesaid findings of both the courts in coming to the conclusion that it is not a case which would attract punishment under Section 301 Part I IPC does not suffer from any perversity. In view of the above CrI. A. No.1586 of 2021 stands dismissed. At this stage we also hasten to add that the overt act

of A2 being different and in the absence of any appeal filed by him, we do not wish to make any remark for the purpose of acquitting him.

34. The only other issue for consideration is the application of Section 34 IPC to the case of the Appellants. The occurrence was admittedly during the nighttime. It happened on the street. If A3 and A4 had made such a statement in the same voice, they should have addressed A2 instead of A1. A2 was already having a gun and A1 was stated to have taken his gun out only on the statement made by A3 and A4. The reasoning of the trial court in disbelieving the evidence of PW6 as he improved on his case subsequently, ought to be applied for the statement made that A3 and A4 had asked A1 to fire. Admittedly, this was an improvement to the earlier statement made as could be seen from the evidence of PW6 on more than one occasion. Thus, in our considered view both the courts ought to have disbelieved the evidence of PW6 insofar as Section 34 IPC is concerned. There is no evidence at all on record to hold that A3 and A4 were aware of the fact that A1 was having a gun with him. The prosecution wanted to implicate A3 and A4 mainly on the evidence of PW13. Once the said evidence was not accepted, more care ought to have been taken before convicting A3 and A4 under Section 34 IPC. We have no difficulty in holding that a common intention can be formed at the time of the occurrence. However, the evidence available is not sufficient enough to hold that Section 34 IPC is attracted as against A3 and A4, especially when the testimony of PW13 did not find favour with the courts. We further note that except the statement said to have been made by A3 and A4, there was no other material to implicate them.

35. Now, we shall come to the statements. The statement made by A3 and A4 is as follows: “what are you seeing now”. The question is as to whether the said statement would constitute an offense punishable under Section 304 Part I IPC. We have already noted the fact that had A2 fired at the deceased in pursuance to the statement made by A3 and A4 the situation would have been different. It is possible that the said statement has been made only to attack otherwise the deceased. Suffice it is to hold that the prosecution has not proved its case beyond reasonable doubt as against A3 and A4 by reflecting the offence committed by A1, taking umbrage under Section 34 IPC.

36. The High Court did not even consider the import of Section 34 IPC as against A3 and A4. We find that the approach of the trial court cannot be sustained to that extent in the light of our discussion. Thus, we are inclined to set aside the judgment of the High Court confirming that of the trial court as against the Accused-Appellants namely A3 and A4 alone are concerned.

37. In the result Crl. A. No.1584 of 2021 and Crl. A. No.1585 of 2021 are allowed. The Crl. A. No.1586 of 2021 stands dismissed.