Bashir vs State on 19 March, 1953

Equivalent citations: AIR1953ALL668, AIR 1953 ALLAHABAD 668

JUDGMENT

Desai, J.

1. This is an appeal by Bashir who has been convicted under Section 302, 323 and 447 read with Section 34, Penal Code; under Section 302, Penal Code he has been sentenced to transportation for life.

2. The case against the appellant was very simple, Sardar Khan, Uzair Khan and Wazir Khan were brothers. P. W. Angan is Sardar Khan's son, Majid Khan deceased was the son of Uzair Khan and Bashir appellant is the son of Wazir Khan. Along with the appellant his three sons Ibrahim, Nisar and Hamid were also said to have taken part in the crime but they absconded immediately after the commission of the crime and were not arrested and put on trial. Angan and Majid had a joint field in the neighbourhood of the fields of Bashir. On 31-3-1950 Angan and Majid reaped the crops of the field and stored them in the field. Bashir and his sons were at that time reaping crops of their field. When next morning Angan and Majid went to their field they found that some of their crops were missing. So they questioned the appellant and his sons who were in their field about the missing crops. This offended the appellant and his sons who abused Majid and Angan and rushed at them with lathis and beat them. Angan getting two blows with a lathi stood apart while Majid was struck and knocked down with lathis by the appellant and his sons. The witnesses turned up and the appellant and his sons left off the beating. Majid and Angan were then taken to the police station where within two hours of the occurrence the first information report was lodged by Angan. Majid was taken to the hospital where he died at 11 A.M.

3. The appellant denied having taken part in the beating and pleaded that he was at home. His defence is that a fight took place between Angan and Majid on one side and his sons on the other.

4. Walli Khan, Shan Ahmad, Murli, Badlu, Jangali and Angan examined by the prosecution, supported the prosecution case. They all stated that they had seen Majid being beaten by the appellant and his sons. Walli Khan has a field near the field of Majid and Shafi Ahmad and Badlu were working in the field as his labourers. Murli was passing by the field of Majid and Jangali was grazing his cattle in the neighbourhood, when the occurrence took place. The statement of Angan is fully corroborated by the first information report made by him at the police station without any delay and also by the injuries found on his person on medical examination. The names of Walli Khan, Shafi Ahmad, Badlu and Murli are mentioned in the report and there is no reason to doubt their presence at the time of the occurrence. All these witnesses are independent, having no reason to favour Angan and Majid or to give false evidence against the appellant and his sons. There are no serious contradictions in the statements made by the witnesses and there is no ground for

discarding the evidence of any of them. It is clear from their evidence that Majid and Angan were beaten by the appellant and his sons.

5. The appellant examined a doctor to prove that his right fore-arm was fractured. His plea was that he was not in a position to wield a lathi. But the evidence of the doctor does not bear out his plea. His right fore-arm was certainly fractured but it is stated by the doctor that it has movement though not free movement, that the appellant can hold a lathi with his left hand also with the help of the right hand and that he can use a lathi as a weapon with both hands though not with full force. Ail the prosecution witnesses to whom the question was put stated that the appellant used a lathi with both hands. So there is no justification for saying that the appellant could not have wielded a lathi on account of this defect in the right fore-arm. The appellant also examined Shanker Lal and Triloki who supported his version by saying that the fight took place with the appellant's sons and that the appellant was not present at the time. There are contradictions in the statements of the two witnesses. Shanker Lal said that he had learnt from the appellant later that the fight arose on account of Majid's cutting a portion of the appellant's Rabi crop. The appellant himself did not say anything about it in his statement in Courti. Neither of the witnesses was produced by the appellant before the investigating officer. Triloki could not explain why the fight started at all. He stated that the appellant's sons did not receive any injuries but could not, explain why they were not injured. We are nor impressed with the evidence of the defence witnesses and hold that they have failed to rebut the evidence of the prosecution witnesses. We are satisfied that the appellant and his; sons all jointly beat Angan and Majid.

6. Majid died on account of shock and haemorrhage resulting from the injury to the head. He had received nine injuries, out of which six were contused wounds inflicted on the head and one was a bruise also on the head. The skull bones were fractured on account of the injuries on the head. Whoever inflicted the injuries which caused fracture of the skull must be held guilty of the offence of murder because he must have intended the natural consequences of the act. A fracture of skull in the ordinary course of nature would result in death. A person is also presumed to know that a fracture of skull is likely to result in death. Therefore, whoever hit Majid on the head and fractured his skull bones was guilty under Section 302, Penal Code. Mr. Kazmi urged that he would be guilty under Section 304, Penal Code and not 302 because his case was covered by exception 4 to Section 300. Penal Code. He pointed out that the quarrel was a sudden one and that the assailant who fractured Majid's skull bones had no previous intention to do so. Exception 4 will not come into play every time that a quarrel takes place suddenly; for its applicability a number of facts are required. In addition to the suddenness of fight, there must be heat of passion, sudden fight and absence of undue advantage or of acting in a cruel or unusual manner.

Here the quarrel might have been sudden but neither was there a sudden fight in the heat of passion nor did the accused act without taking undue advantage. No provocation was given by Majid; he had only enquired about his missing crops. He did not abuse the accused, but instead it was the accused who abused him in reply to his enquiry. Bashir (unreasonably) thought that he and his sons were suspected of the theft and shouted that Majid should be beaten. At once they attacked him with lathis. It is impossible to say that the assailant, who fractured his skull bones, acted in a sudden fight in the heat of passion upon a sudden quarrel. Moreover, he took undue advantage of the fact that

Majid was not armed with a lathi. Several blows were given on the head with lathis and the beating continued even after he had fallen down. We, therefore, hold that the offence committed by the assailant who broke the skull bones of Majid is not reduced to that of culpable homicide not amounting to murder.

7. The question whether the other assailants would also be guilty under Section 302, Penal Code will depend upon whether Section 34 applies. It was argued before us that the appellant and his sons had no common intention or had no common intention of causing anything more than simple or grievous injuries, and that if their common intention was only to cause simple or grievous injuries, none of them could be punished under Section 302 even after applying Section 34. The reasoning was this: As it is not known which appellant fractured the skull bones, none can be held guilty under Section 302 without the aid of Section 34 and as the common intention was only to cause simple or grievous injuries, even after applying Section 34, the accused could not be convicted of any offence graver than that of Section 325. The matter was argued at considerable length before us and several authorities were cited. We have come to the conclusion, and done so without any hesitation, that all these contentions are without substance and that all the assailants are guilty under Section 302 read with Section 34.

8. Section 34 has proved to be one of the most difficult sections in the Penal Code. Though its language is plain and the words used are of everyday use, the section is interpreted by different Judges in different manners. We think that all the trouble and confusion are caused by ignoring the words used in the section or by interpolating new words.

The section is:

> "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."

The "criminal act" mentioned in the section is the physical act that has been done. It must be distinguished from the effect or result or consequence of it. In many cases the distinction between the physical act done and its effect has been lost sight of. If A and B strike X, the criminal act done within the meaning of the section is the physical act of striking, and not the pain, or the fracture of a bone, or the death that, may result from the striking. If they strike with lathis on his head and fracture his skull bones or put his brain out of action by producing concussion, the criminal act is the striking with lathis on the head and not the fracture or the concussion. If they stab him and pierce his heart and he dies in consequence, the criminal act is not the killing but the stabbing into the heart with a knife. In --'Nazir v. Emperor'. AIR 1948 All 229 (A). Dayal J., with whom Sankar Saran J. agreed, said at Page 237 that "Section 34 refers to a physical act only". At page 234, he said that criminal act is not equivalent to an offence which is composed of a physical act, its effect and the intention or knowledge. In -- 'State v. Saidu Khan', AIR 1951 All 21 (FB) (B), decided by a Full Bench, Wanchoo J. said that "criminal act" mentioned in the section is different from "offence".

9. The "criminal act" must include at least two acts; it must be a series of acts. If only one act has been done, Section 34 cannot apply. For its applicability, it is essential that the criminal act is done by several persons. Obviously, one act cannot be done by several persons. If several persons do an act, they must do several acts even though they may be of the same nature and effect. If only one blow with a lathi is given by A, B, who is present there at the time, may be guilty as an abettor but would not be guilty under Section 34 unless his presence at the spot is itself deemed to be an act. In certain cases, it may be deemed to be an act but not in all.

10. The "criminal act" is the whole series of acts. It is, what Lord Sumner called, "unity of criminal behaviour" in -- 'Barendra Kumar v. Emperor', AIR 1923 PC 1 (C). If A and B go to the place of X with an intention to beat him and A gives him three blows with a lathi and B two blows with a spear, the criminal act comprises of their going to the place of X and the infliction of five blows with the weapons. If Section 34 applies, A will be punished as if he alone had done the whole act and similarly B will be punished as if he alone had done the whole act. If A and B are sitting at a place, X happens to pass by, a quarrel takes place between them and A gives one blow to X, the mere presence of B may not be an act and "criminal act" would consist only of the infliction of a blow and B would not be rendered punishable by virtue of Section 34. Even omission to prevent an offence being committed may be an act; vide -- 'AIR 1925 PC 1 (C).

11.The next requirement of Section 34 is that the "criminal act" must be done by several persons. If it is done by one person, even if it consists of a series of acts, Section 34 will not apply. All the persons who are sought to be made liable by virtue of Section 34 must have done some act which is included in the "criminal act". One who has not taken any part in doing the criminal act cannot be made liable under the section.

12. Another requirement is that all the persons who are sought to be made liable must have formed a "common intention". It should be understood clearly that all that is required is the formation of a common intention; no particular kind of common intention is required. The common intention may be to do a certain act regardless of the end and the means, it may be to achieve a certain end regardless of the means or it may be to do an act with certain means regardless of the end. If A and B jointly decide to strike X generally without deciding upon the weapons and without intending a particular result or effect, if they jointly decide to strike him with a certain weapon only but without intending a particular result, if they jointly decide to strike him in order to bring about his death and if they jointly decide to strike him in order only to maim him without fixing the weapons, these are all common intentions within the meaning of Section 34. A and B may in some cases jointly decide to achieve a certain end, but it would be quite wrong to look for the end sought in every common intention. There may be common intention in which only the doing of a certain physical act is fixed and the end or the means are not decided upon.

13. What is meant by "common intention" is the "community of purpose" or "common design" or common intent". Section 34 lays down a principle of Common Law and it has been pointed out by Lord Sumner in the case of -- 'AIR 1925 PC 1 (C)' (ubi supra), at page 8 that the Indian Penal Code must not be assumed to have sought to introduce differences from the prior law and it must not be supposed that, because it ceases to use the terms "principal in the first degree" and "principal in the

second degree" it does not intend to provide for the ideas which those terms, however imperfectly expressed. Therefore it will not be wrong to interpret the words "common intention" to mean "community of purpose", "common design" or "common enterprise" which are the words used in the English Common Law. 111 -- 'Mahboob Shah v. Emperor', AIR 1945 PC 118 (D), "common intention" was held to imply a "pre-arranged plan". This does not mean either that there should be confabulation, discussion and agreement in writing or by word, nor that the plan should be arranged for a considerable time before the doing of the criminal act. The Judicial Committee in the case of Mahboob Shah (D)', did not lay down that a certain interval should elapse between the formation of a pre-arranged plan and the doing of the criminal act and did not negative the formation of a pre-arranged plan just a moment before the doing of the criminal act. There is no reason why A and B should not proceed to carry out their common intention as soon as they form it. In -- 'AIR 1951 All 21 (B), Sankar Saran, J. said on page 37:

> "A pre-arranged plan does not mean that there should be a conference where resolutions are moved and a decision arrived at to commit a particular crime.....the plan might have been arranged just half a minute before the actual beating started."

Common intention can certainly be formed by conduct; neither a written nor an oral agreement is required to constitute common intention. In most cases of common intention, there is no agreement either in writing or oral. As common intention can be formed only a moment before the doing of the criminal act, the suddenness of a quarrel or fight does not by itself negative the existence of common intention. Just as the fight is sudden, the common intention also might have been formed suddenly.

14. "Common intention" should not be confused with the ntention that is an ingredient of many of the offences defined in the Penal Code. The intention, that is an ingredient of many of the offences, is the intention formed by a person himself committing the offence; it is a personal matter. It is the intention immediately behind the act done by the doer. On the other hand, "common intention" is the common design or common intent of two or more persons acting together. It is more akin to motive or object. It is remoter than the intention with which each act included in the criminal act is done; it is what the persons jointly decide to achieve. It is the reason or object for doing all the acts forming the criminal act. In some cases, the intention which is an ingredient of an offence, may be identical with the common intention of the conspirators but it would still be separate from, or in addition to the common intention and not merge in it. If the common intention is to do a simple act, which can be done with only one intention, the intention with which that act is done by the doer will be identical with the common intention. But when the common intention is to do an act which can be done with different intentions, the intention of the doer may be different from the common intention. Even when it is identical, it is distinct from the common intention, being the intention of the doer. Wali Ullah J. pointed out in the case of -- 'AIR 1951 All 21 (B), that the phrase "common intention" is used "in a much wider sense and is not confined to what is described as volitional intention" (page 32). In the same case, Sankar Saran J. quoted with approval an observation of Khundkar J. in -- 'Ibra Aklnda v. Emperor', AIR 1944 Cal 339 (E), to the effect that " "common intention" cannot be given a constant connotation, that there are cases in which it is identical with 'mens rea' required for the offence actually committed and that there are others in which its horizon

is wider."

We respectfully differ from the contrary view advanced in -- 'Behari v. State', AIR. 1953 All 203 (F), by Agarwalla J. with whom Dayal J. agreed.

In that case, A, B and C forming a common intention hit X with lathis and a blow given by one of them proved fatal and X died. Our learned brother held that the accused who himself dealt the fatal blow was guilty of murder and that the others also became guilty of murder because there was "nothing to show that the intention of the person who actually caused the fatal blow on the head was different from the intention of the others". "The intention of the others" could be nothing but the common intention, as they had not dealt the fatal blow it could not possibly be the intention with which it was dealt. Apparently our learned brother held the others guilty because he found that the common intention was the same as the intention which is an ingredient of the offence of Section 300. We authorities have been cited by our learned brother and the view taken by him, we say so with respect is not one we can accept and is opposed to authorities.

15. When several acts are done by two or more persons, in order to make each of them responsible for all the acts, the only thing necessary is that they should have done the acts "in furtherance" of their common intention. It is not always essential to ascertain the common intention, if it can be shown that they did the acts in furtherance of their common intention, whatever it was, each would be responsible for all the acts. In some cases it may be necessary to ascertain the common intention because without ascertaining it it cannot be said whether the criminal act done was done in furtherance of it or not. In some cases, there may be clear evidence about the common intention. But in every case, the only object of ascertaining the common intention is to find out if the criminal act was done in furtherance of it. If the answer is in the affirmative, the purpose of the ascertainment is exhausted and the liability of the several persons will depend upon the criminal act done by them and not upon the common intention. The existence of the common intention will only make all of them liable, but for what they should be held liable or to what extent they should be liable, will depend upon the criminal act done. The common intention will bring into existence their liability, but its nature or extent will depend not exclusively upon it but upon it and the criminal act. Therefore it is quite wrong to stake everything upon whether the common intention is to do the criminal act actually done or not. The words, "in furtherance of the common intention" are not enacted for nothing. They are not to be treated as non-existent or mere surplusage. If the common intention contemplated by the section were the intention to do the criminal act actually done, then that by itself would mean that the criminal act done was done in furtherance of the common Intention and the words "in furtherance of the common intention" would be without any content. These words were added by the legislature in 1870 and must have been added for a purpose. That purpose could be none other than to make persons, acting in concert, liable for an act, which is not exactly the act jointly intended by them, taut has been done in furtherance of their common intention. The words would not have been required at all if the common intention implied an intention to do the very criminal act done.

16. When the common intention is formed by conduct, obviously it can be proved only from the conduct of all the persons, no direct evidence is possible even in theory. Direct evidence to prove the

formation and nature of the common intention is possible in theory only when it is formed in writing or by word of mouth, but in practice it is difficult to be had. Conspiracies are not hatched within the sight or hearing of others. That in most cases the common intention -- its formation and nature -- is to be inferred from circumstances is clear from --'Barendra Kumar v. Emperor (C)', and -- 'Glasser v. U.S.A.', (1942) 86 Law Ed 680 (G). In the latter case, Murphy J. said at p. 704 that "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and a collocation of circumstances." In the -- 'King and the Attorney General of the Common Wealth v. Associated Northern Collieries', 14 CLR 337 (H), Issacs J. said on page 400:

> "Community of purpose may be proved by independent facts, but it need not be. If the other defendant is shown to be committing other acts, tending to the same end, then though primarily each set of acts is attributable to the person whose acts they are, and to him alone, there may be such a concurrence of time, character, direction and result as naturally to lead to the inference that these separate acts were the outcome of preconcert, or some mutual contemporaneous engagement, or that they were themselves the manifestations of mutual consent to carry out a common purpose, thus forming as well as evidencing a combination to effect the one object towards which the separate acts are found to converge."

The presumption of the common intention must be subject to the same restrictions as other presumptions, it must not take the form of a bare surmise or conjecture or suspicion. There must be data from which it can be inferred and the inference of common intention "should never be reached unless it is a necessary inference deducible from the circumstances of the case", (per Sir Madhavan Nair in -- 'AIR 1945 PC 118 at p. 121 (D)'. When the nature of the common intention is to be inferred, it must be inferred with the least amount of flight of fancy. For instance, in the absence of any evidence, the Court should not infer that the common intention of A and B was to kill X or that it was not to kill X, but only to cause simple or grievous hurt. It does not matter whether the inference is to be drawn in favour of the prosecution or in favour of the defence, in either case there must be evidence to support it. As we said earlier, it is not essential in every case to find out the exact nature of the common intention. If the common intention was formed by conduct or is to be inferred from conduct, the Court can infer only a general outline of the common intention and cannot infer its details. Another warning that is necessary to be given is that, the common intention should be inferred from the whole conduct of all the persons concerned and not only from an individual act actually done. As the criminal act done is not to be assumed to be in furtherance of the common intention it follows that the common intention is not to be inferred exclusively from the criminal act done. The criminal act done will certainly be one of the factors to be taken into consideration but should not be taken to be the sole factor. Besides proving that a certain criminal act was done, the prosecution has to prove the existence of common intention and that the criminal act was done in furtherance of it, these two are independent facts and one is not to be assumed or inferred exclusively from the other.

In -- 'R. v. Appleby', (1940) 28 Cr App Rep 1 (I), the facts were that Appleby and Ostler were surprised by police officers while committing house-breaking, that they tried to escape but were

overtaken and that a shot fired by Ostler killed a police officer. The Court of Criminal Appeal held that Appleby and Ostler were both guilty of murder. It was contended in appeal that the trial Court did not point out to the jury that there was some evidence that the common design was not to use violence but to use some degree of force which would not amount to violence. The argument was repelled because there was no such evidence. In the case of -- 'AIR 1951 All 21 (B)', Sankar Saran J. said at page 38: "When people stand near their victim and simultaneously attack him with lathis, the presumption is that it would not be a case of "same intention" but one of 'common intention'." In the case of -- 'Mamand v. Emperor', AIR 1946 PC 45 (J) the existence of common intention was presumed by the Judicial Committee from the facts that one of the persons had strong grounds for entertaining feelings of enmity against the deceased, that the other conspirators were related to, or connected with him, that all lived together and that they all ran away together after the assault. Their Lordships did not ascertain what was the exact common intention formed by the three accused but concluded that the murder was committed in furtherance of it.

The decision in -- 'Mahboob Shah v. Emperor', (D) has not always been correctly understood and much confusion and great miscarriage of justice have resulted. The decision must be read in the light of its facts. The essential facts in the case were these. A and H collected reeds from land belonging to G. A quarrel took place between A and G and A struck G who snouted for help. Hearing his shouts W and M came up from behind bushes with guns. When A and H tried to run away they were intercepted by M and W and W fired at A and killed him at once and M fired at H and wounded him. The High Court itself found that there was no common intention to attack A and H formed by G, M and W and that a common intention came into existence only when M & W fired at A and H. Their Lordships of the Judicial Committee disagreed. There were no circumstances on the basis of which they would say that W and M had a common intention to commit the criminal act. There was no evidence that W ever entered into a premeditated plan or concert to bring about the murder of A in carrying out their intention of rescuing G. It was in this connection that their Lordships laid down that the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances. It is to be noted that M fired only one shot and W also fired only one shot, and that one fired at one person and the other at another person. Though they came together from behind the bushes, it did not necessarily follow that they came in concert. Their conduct might be consistent with concerted action but was also consistent with their having acted independently of each other. Each could have very well acted regardless of what the other was doing and there was nothing to suggest that they were animated by a common purpose or intention. Had M and W fired several shots it could have been said that they acted in concert, but when they fired one shot each it could not necessarily be said that they acted in concert.

In -- 'Bishuwanath v. Emperor', AIR 1946 All 153 (K) the facts were as follows. B and his companions were erecting huts when the four accused went there armed with lathis and stopped B. B asserted his right over the land which annoyed one of the accused who asked his companions to beat him. Thereupon all the four accused jointly attacked. B with lathis & B foil down & died on account of injuries. Because there was no evidence of concert or prearranged plan, Mulla, J. held that Section 34 did not apply. We think that the circumstances of the case established the existence of common intention on the part of the four accused to beat B. This decision was considered by a Bench of this Court in -- 'Dipa v. Emperor', AIR 1947 All 408 (L). There the facts were similar but

the trial Court itself held that Section 34 did not apply. The judgment in -- 'Dipa's case (L)' proceeded on the footing that Section 34 did not apply. It is not an authority laying down when Section 34 applies and when it does not apply; it only deals with a case which is not governed by Section 34. This was made clear in the case of -- 'AIR 1951 All 21 (B)' at page 43 by Wanchoo. J. who was a member of the Court deciding -- 'Dipa's case (L)'. The decision in the case of -- 'Bishuwa Nath (K)' was criticized by Sankar Saran J. in the case of --'AIR 1951 All 21 (B)' at pages 37 and 38.

17. The last contention for the applicability of Section 34 is that the criminal act done must have been done in furtherance of the common intention. Russell on Crime, 10th edn. p. 557, adopts this definition of "furtherance", e.g., "the action of helping forward" and writes that "it indicates some kind of aid or assistance producing an effect in the future" and 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." The criminal act for which all the conspirators are sought to be made liable must be connected with the common intention; it must have been done while, or for the purpose of, executing or carrying out the common intention. If it is extraneous to the common intention or is done in opposition to it, or is not required to be done at all for carrying out the common intention, it cannot be said to be in furtherance of it. If A and B jointly decide to strike X, then all the striking done by them, whatever be the result, is done in furtherance of it provided there is nothing unusual or nothing that was not contemplated or anticipated in the striking or the means used for the purpose.

In -- AIR 1948 All 229 (A)', Raghubar Dayal, J. said at page 234, that "only such acts are not to be deemed in furtherance of the common intention as could not have taken place ordinarily in the carrying out of the common intention."

Kenny in his Outlines of Criminal Law, 15th edn. writes on page 162 that "the act done must relate to the common design and not totally or substantially vary from it."

A slight variation will not prevent the act from being in furtherance of the common intention; what is required to prevent that is altogether departing from the agreement or direction. The distinction between varying to some extent and altogether departing was pointed out in the case of -- 'Appleby (I)'. In -- 'R. v. Betts and Ridley', (1931) 144 L T 526 (M) Avory, J. said, quoting from Poster's Crown Cases that "if the principle in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases, the person soliciting to the offence will..... .be..... .if present, a principal."

Whether an act is in furtherance of the common intention or not depends upon the common intention and the nature of the act. It is an incident of fact and not of law.

In -- 'Brennan v. The King', 55 C L R 253 (N) A and B broke into a shop, stole jewellery and while doing so killed the watchman while C remained outside on watch and it was laid down that it did not follow as a matter of law that if C aided and abetted the shop-breaking he was criminally responsible for the murder, that it was a question of fact whether this followed from the facts and that it was clear from the evidence that C aided and abetted A and B in a criminal enterprise which he knew

included the use of some force upon the watchman to prevent his giving the alarm or obstructing the commission of the theft and that consequently he could be guilty of man slaughter.

In -- 'AIR 1953 All 203 (F)', there is an observation to the effect that "each one's act must be presumed to have been done in furtherance of the common intention" (p. 207). If our learned brother really meant that whatever is the act done by the conspirators, it must be presumed to have been done in furtherance of their common intention, we respectfully dissent. Had it been a matter of presumption, the words "in furtheran.ce of the common intention" would not have been added by the legislature. If A and B jointly agree to strike X with lathis, then the striking with lathis only can be in furtherance of their common intention and if A shoots X and kills him his act being in opposition to the common intention, cannot be said to be in furtherance of it and B will not be responsible for it. But of course there must be evidence to show that the common intention was to strike with lathis only. If at the time of their joint decision to strike X, A openly carried a pistol and B a lathi, the use of both the weapons must be deemed to have been contemplated and A's shooting with the pistol would be an act in furtherance of the common intention. If, however, A had concealed the pistol and B did not know that he was armed with it and lie suddenly took it out and shot X. it is obvious that the common intention did not contemplate the use of the pistol. When B did not know of its existence, he could not have intended its use and if he could not have intended the use there could have been no common intention to use it. The act of shooting with the pistol would not be said to be in furtherance of the common intention. When there is an agreement between A and B to assualt C with fists and A. of his own impulse, kills C with a weapon suddendly caught up. B would not be responsible for the death because the killing was not an act in pursuance of the common design; see -- 'R. v. Caton', (1874) 12 Cox C C 624 (O). Similar law was laid down by Wanchoo, J. in -- 'AIR 1951 All 21 (B)' at pp. 40-41. If the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged: see -- 'Pettibone v. United States', (1893) 37 Law Ed 419 (P).

18. The use of the words "in furtherance" suggests that Section 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to da one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running aver of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against X is impeded by Y and throws Y aside in order to get at X, the attack upon Y is made in furtherance of the common intention; see Russell on Crime, pages 557 and 558.

19. If the conditions mentioned in Section 34 are fulfilled, then each of the persons or conspirators is responsible for the whole criminal act done by all of them. If A and B do a criminal act to, furtherance of their common intention, each of them is guilty of that offence of which he would have

been guilty if he alone had done the whole criminal act. The law makes no distinction between them or between the parts played by them in doing the criminal act; each is guilty of the same offence. If Section 34 applies, it is impossible to convict the conspirators of different offences.

20. Now is the time to consider the result or effect of the criminal act done by the conspirators because now the Court has to decide what offence each of the conspirators has committed. The nature of the offence committed by an accused depends upon the act done by the accused and the effect produced by it and the sole object of Section 34 is to lay down what act will be deemed to be done by the conspirators. The section is not a punitive section and does not enact a note of evidence. It enacts a common law principle of substantive law. If A and B act in concern and do a criminal act, it makes A liable for all the acts done by him and by B. It makes him liable not out of necessity (because it cannot be determined which act was done by A and which act toy B) but because the law considers him as the doer of the whole act. Even if it is ascertained which act was done by him and which act by B, the law makes each of them responsible for the whole act. The law considers them as one unit and the criminal act, as done by that unit and makes the unit punishable regardless of the question which member of it did which act. Just as when a man assaults another, his guilt does not depend upon whether he assaults him with the right hand or with the left hand; so also when a unit consisting of a number of persons A, B etc. commits an offence in furtherance of its intention, it does not matter whether A commits the offence or B commits it and the unit, that is all the persons, are held guilty of it. It may foes said that Section 34 dispenses with the necessity of ascertaining what are the respective acts done by the various conspirators.

21. All that remains to do is to find oaf, the offence constituted by the whole criminal act (done by all the conspirators); each conspirator is to be convicted of it. If the nature of the offence depends on a particular intention or knowledge, the intention or knowledge of the actual doer of the criminal act is to be taken into account. What intention or knowledge will decide the nature of the offence committed by him and the others will be convicted of the same offence because, as pointed out above, they cannot be convicted off a different offence. The intention of the actual doer must be distinguished from the common intention as already pointed out. It is an ingredient of the offence said to be constituted by the criminal act. It is a personal matter. When an offence requires a particular intention that intention must be harboured by the person doing the physical act. That the intention must be of the person doing the act is laid down in the definitions of the offences themselves. When A is made responsible for an act done by B, the nature of the offence must necessarily depend upon the intention of B, when A himself has not done an act there cannot arise any question of his intention for that act. Though the intention of the actual doer is to be distinguished from the common intention, the intention must not be foreign to or inconsistent with the common intention. It must be consistent with the carrying out of the common intention, otherwise the criminal act done will not be in furtherance of the common intention. If A and B strike X with lathis and one blow causes death, and the others only pain, the offence constituted by the infliction of the fatal blow depends on the intention or knowledge of the actual assailant who dealt it and the offence constituted by the infliction of the other blows is simply that of Section 323, Penal Code. If the person who inflicted the fatal blow had the intention mentioned in Section 300, Penal Code, the offence committed by the infliction of that blow is punishable under Section 302, Penal Code and both A and B will be guilty of it (and also of Section 323, even if they cannot be sentenced

for it in addition). It is not at all necessary to find out who inflicted the fatal blow; all that is necessary to find out is with what intention or knowledge it was inflicted, whomsover inflicted it.

22. Section 34 makes it quite clear that the liability of all the conspirators is for the criminal act actually done and not for the common intention, e.g., the act jointly intended by them. Nothing can be clearer than this and one has only to read Section 34 to know it. What the common intention was, is therefore not to be considered at all in deciding for what the conspirators are liable. The section does not punish the conspirators for the act jointly intended by them; it punishes them for the act actually done. Even if A and B formed a common intention to cause simple or grievous hurt and the simple or grievous hurt caused by them resulted in death, they will be liable for causing the death. A person who causes grievous hurt can be punished under Section 302 or 304, Penal Code if the hurt brings about death. It is often forgotten that one who fractures skull bones can be punished under Section 302 or 304, Penal Code if death results from the fracture. When A, intending to kill B, hits him on the head and he dies, he only breaks the skull bones; the nature does the rest and extinguishes the life. So even when he intends to kill he only fractures the skull. It is, therefore, quite illogical to argue that the conspirators should be convicted under Section 325, Penal Code only because the common intention was to cause grievous hurt, even though the grievious hurt results in death. In the case of -- AIR 1953 All 203 (F)' it was said at page 207:

> "In the absence of any definite evidence that the intention of giving the beating was confined to causing simple hurt or grievous hurt or an injury likely to cause death, the presumption of intention drawn from the nature of the injury actually caused remains unshaken."

The learned Judge has not explained why, even if the common intention was to cause grievous hurt, when it resulted in death, the offence of murder was not committed by the conspirators. With great respect we would point out that the intention that is an ingredient of the offence of Section 300, Penal Code has been confused with common intention. The learned Judge on page 207 writes that if the common intention was to cause simple hurt or grievous hurt, the mere fact that actually an injury that is sufficient in the ordinary course of nature to cause death has been caused would be immaterial and the conspirators who did not cause the fatal injury would be guilty not of murder but of causing simple or grievous hurt as the case may be. The reason for this is said to be that the fatal injury would be deemed to have been caused accidentally or in excess of the common intention. Of course, if an act is done accidentally Section 34 may not apply because it may not be held to be in furtherance of the common intention. If the common, intention is exceeded, it only means that the act done was not in furtherance of it. Therefore the real point is not that the conspirators are punished for the act jointly intended by them, but that they are punished for the criminal act actually done, provided it is in furtherance of their common intention. If there is a common intention to cause grievous hurt and grievous hurt is caused, the result or effect of the grievous hurt is quite immaterial. If it results in death, it does not mean that the grievous hurt was not caused in furtherance of the common intention. When the nature of the offence is to be ascertained, the act done and the effect produced both must be taken into account; so if grievous hurt is caused and that brings about death, the conspirators may be guilty of murder or culpable homicide if the necessary intention or knowledge existed.

23. In the case of -- 'Nazir (A)' the common intention of the conspirators was to abduct and to give a beating with a 'tabal' and a lathi and they were convicted under Section 302 for killing a man. In -- 'Pettibone v. United States', (P), Brewer, J. in his dissenting judgment, said, on page 425:

> "Parties combine to break into a house and commit burglary; while engaged in the commission of that offence, resistance being made, one of the party kills the owner of the house, can there be a doubt that they are all guilty of murder, although murder was not the purpose of the combination, and was not in the thought of any but the single wrongdoer? In other words they who did not intend murder, who did not know that murder was, in fact, being committed, are ruled to be chargeable with the intent to commit murder, and to be guilty of that offence because they were engaged at the time in an unlawful undertaking, and the murder was committed in carrying that undertaking into execution."

When Betts and Ridley agreed to way-lay and rob A after pushing him down and went to the place where he was to be found and Ridley remained in the car while Betts alighted, way laid A and struck him a violent blow on the head, as a result of which he was rendered unconscious and died soon after, it was held that both Betts and Ridley were guilty of murder; see -- 'R. v. Betts and Ridley', (M). If A and B agree to assault C with their fists and C is killed by a chance blow of the fist from either of them, both are guilty of culpable homicide, vide -- 'R v. Caton', (O).

A similar case is -- 'R v. Harrington', (Q) 6 Mews, Digest, Col. 328 (Sic) (1852-5 Cox C C 231 cited in 4 Mew's Digest Col. 1122). which lays down that if two or more persons go out together with a purpose to commit a breach of the peace and in the course of the accomplishment of that common design, one of them kills a man the other also is guilty of man slaughter. In -- 'R. v. Macklin', (1838) 2 Lewin C. C. 225 (R), Baron Alderson said in his charge to the jury:

> "It is a principle of law that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all....The jury must determine whether all these persons had the common intent of attacking the constables -- if so, each of them is responsible for all the acts of the others done for that purpose; and if all the acts done by each, if done by one man, would, together show such violence and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all."

In -- 'Loyd v. U. S.', (1892) 35 Law Ed 1077 (S) it was held that if a number of persons agree to commit, and enter upon the commission of a crime which will probably endanger human life such as robbery, all of them are responsible for the death of a person that ensues as a consequence. In -- 'State v. Hira Dubey', AIR 1952 Pat 135 (T), two persons armed with lathis pursued a victim and gave him several blows one of which proved fatal and both were convicted of murder.

24. Section 34 has to be interpreted in conformity with the English law; see -- 'AIR 1925 PC 1 (C)' at p. 4. The interpretation that we have placed upon the various expressions used in the section is in conformity with the English law. According to Russell on Crime, 10th edn., page 1855, the true rule

of law is that "where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such a common unlawful object, all are guilty."

The rule laid down by Kenny in his "Outlines of Criminal Law". 15th edn. page 161, is :

> "if several persons act together in pursuance of a common intent, every act done in furtherance of it by any one of them is in law done by all."

Hence if persons nave agreed to waylay a man and rob him and if they come together for the purpose armed with deadly weapons and one of them happens to kill him, every member of the gang is held guilty of murder".

25. Applying the law as expounded above to the facts of the instant case, we find that Section 34 applies and that the appellant and his sons all committed the offence of Section 302, Penal Code. They formed the common intention of assaulting Majid with lathis. The appellant gave the order and he and his sons at once, in concert, attacked him with lathis. Each of the assailants shared the intention to beat with the others. Not only each had the intention to beat Majid, but each also acted in concert, with the same purpose in view. It does not matter in the least if they formed the common intention immediately before beating Maud. All the blows inflicted by all were inflicted in furtherance of the common intention. The result of all the acts done by all was the commission of the offence of murder; all of them are, therefore, responsible for the murder. The appellant was, therefore, rightly convicted under Section 302. Penal Code. His conviction under Sections 323 and 447. Penal Code was also correct.

26. We maintain the appellant's conviction and sentence and dismiss his appeal.

27. Leave for appeal to the Supreme Court is refused.