State vs Saidu Khan And Anr. on 11 May, 1950

Equivalent citations: AIR1951ALL21, AIR 1951 ALLAHABAD 21

JUDGMENT

Wali Ullah, J.

1. Two questions have been referred for decision by the Full Bench :

> 1. "Whether it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code ?
>
> 2. Whether to establish a charge under Section 325 read with Section 34, Penal Code, where several persons strike another with lathis, it is necessary to establish specifically that one or more of them actually caused grievous hurt ?"

2. At the time of the hearing before us the second question has been redrafted with a view to bring out more clearly its real implication. Redrafted, the second question stands thus :

> "2 (a). If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is not known who caused the grievous hurt, can all of them be convicted of causing grievous hurt, with the aid of Section 34, Penal Code ?
>
> 2 (b). If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is known which of them caused the grievous hurt, can others be convicted of grievous hurt with the aid of Section 34 ?"

3. With regard to the first question, it may be stated at once, there is a serious conflict of judicial opinion. Learned counsel for the parties have invited our attention to a large number of cases, the more important of which will be referred to and discussed at appropriate places in the course of this judgment.

4. In order to give an answer to the first question it is necessary to examine, first of all, the scope of Section 34 and secondly the scope of Section 304, Part II, Penal Code. Section 34, as it stands today, runs thus :

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." As the section stood originally, the words "in furtherance of the common intention of all" were not there. By Section 1 of Act XXVII [27] of 1870, however, in place of the old Section 34 of the Code, a new Section 34 was substituted

> with the addition of the words "in furtherance of the common intention of all." This was done in order to make the object of this section clear.

5. Section 34 is one of the sections contained in chap. II, Penal Code, headed "General Explanations." It is one of a group of sections which have to be read together, viz., Sections 32, 33, 34, 35, 37 and 38, in order to appreciate its full significance. As a matter of fact, Sections 35, 37 and 38 provide the background against which provisions of Section 34 are to be judged.

6. Section 32 makes it clear that "acts" includes "illegal omissions." Section 33 explains that the word "act" signifies a single act as well as a series of acts. Similarly the word "omission" (as single omission?) as well as a series of omissions. Section 35 reads :

> "Whenever an act which is criminal by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in that act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

7. Section 35, in effect provides for a case where several persons join in an act which is not per se criminal but is criminal only if it is done with a criminal knowledge or intention; in such a case each of those persons who joins in the act with that particular knowledge or intention will be liable for the whole act as if it were done by him alone with that knowledge or intention and those who join in the act but have no such knowledge or intention will not be liable at all.

8. Section 37 provides :

> "When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing one of those acts either singly or jointly, with any other person, commits that offence."

This section, in effect, provides for a case where several persons co-operate in the commission of an offence by doing separate acts at different times or places, which acts by reason of intervening intervals of time may not be regarded as one act or which may not be necessarily committed with a common intention.

9. Section 38 reads :

> "Where 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."

10. This section deals with the principle of liability when several persons are engaged or concerned in a criminal act, having been set in motion by different intentions.

11. Provisions of Section 34 have been reproduced above. The Judicial Committee of the Privy Council has had occasion to consider the scope of this section. I may here refer only to two

important cases decided by their Lordships of the Privy Council : (1) Barendra Kumar v. Emperor, 52 Cal. 197 : (A. I. R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431); (2) Mahboob Shah v. Emperor, 1945 A. L. J. 344 : (A. I. R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689). The case of Barendra Kumar Ghosh was concerned with what is popularly Known as the Shankri Tola Post Office Murder Case. First of all, the case was decided by a Full Bench of five learned Judges of the Calcutta High Court. It is reported in Emperor v. Barendra Kumar Ghosh, A. I. R. (11) 1924 Cal. 257 : 28 C. W. N. 170 : 38 Cal. L. J. 411 : (25 Cr. L. J. 817 F. B.). The Full Bench held that if several persons armed with pistols go to a place with the common intention of robbing another, and if necessary, to kill him, and if one of them fires the fatal shot in furtherance of their common intention, then all of them are guilty of murder under Section 302 read with Section 34, Penal Code. Then the case went up in appeal to the Privy Council. The decision of the Judicial Committee is reported in Barendra Kumar v. Emperor, 52 Cal. 197 : 52 I. A. 40 : (A.I.R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431). Their Lordships held at p. 211 that :

> "Section 34, Penal Code, 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. 'That act' and then again 'it' in the latter part of the section must include the whole of the action covered by the 'criminal act' in the first part of the section."

Further, it was held at p. 217 :

> "A criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, i.e., a criminal offence."

12. In the case of Mahoob Shah v. Emperor, 1945 A. L. J. 344 : (A. I. R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689), the Judicial Committee of the Privy Council again had occasion to consider the scope of this section. It was held :

> "Section 34, Penal Code, lays down the principle of joint liability in the doing of a criminal act .... the essence of that liability is to be found in the existence of 'common intention' animating the accused leading to the doing of a criminal action furtherance of such intention. To invoke the aid of Section 35 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. Intention, within the meaning of the section, implies a prearranged plan, and to convict an accused of an offence applying this section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. It is difficult, if not impossible, to procure direct evidence to prove the intenion of an individual; in most cases it is to be inferred from his act or conduct or other relevant circumstances of the case."

13. As observed by the Judicial Committee, 'common intention' within the meaning of Section 34 implies a pre-arranged plan. The 'criminal act' complained of must, therefore, be an act done in concert pursuant to the prearranged plan. Whether it is necessary for the application of this section

to have a 'common intention' to commit the crime actually committed, is a question on which the decision of the Judicial Committee is not explicit. The result is that this question has given rise to a serious conflict of judicial opinion. What is the 'common intention' in a particular case, would almost invariably depend upon the inferences deducible from the circumstances of the case. 'Same or similar intention' must not be confused with 'common intention.' The dividing line between the two is often very thin. Nevertheless, the distinction between the two kinds of intention is a real and substantial one. The conflict of opinion centres round the interpretation of the expressions 'criminal act' and 'in furtherance of the common intention'. For applying Section 34, the 'criminal act' has to be done in furtherance of the common intention. One view is that 'common intention' in this section has nothing to do with the desire to bring about undesirable consequences, such as death or wrongful loss; 'intention' merely means a desire to do the immediate physical act. In this connection it has been urged that every voluntary act is preceded by a resolution of the will to perform that act and 'common intention' in Section 34 is no more than such a resolution by more persons than one to do one and the same act.

14. The other view is that 'common intention' in this section means mens rea or the mental ingredient required by law to constitute the very offence which has, in fact, been committed. In this connection it is urged that 'common intention' must embrace the consequences of the physical' act done. 'Intention' in this connection has been used in a sense, opposed to mere knowledge that certain consequences may follow.

15. The crucial question, therefore, is which of the two competing views is to be accepted in interpreting Section 34, regard being had to the setting in which this section has been placed by the Legislature. As mentioned in an earlier part of this judgment, the back ground against which provisions of this section have to be judged is provided by the group of sections mentioned above, in particular, Sections 35, 37 and 38. There are quite a large number of cases decided by different High Courts in India in which the one, or the other view, has been accepted.

16. Before examining the relevant decisions on the point it is convenient to set out the provisions of Section 304, Penal Code. Section 304 reads thus :

> "Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life .... if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ;
>
> or with imprisonment of either description for a term which may extend to ten years .... if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."
> As observed by Straight J. in Empress of India v. Idu Beg, 3 ALL. 776 at p. 778 : (1881 A. W. N. 132) :
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> "Section 304 creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted where an intention to kill being present, the act would have amounted to murder, but for its

> having fallen within one of the Exceptions to Section 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is knowledge that death will be the likely result, but intention to cause death or bodily injury likely to cause death is absent. Therefore, it follows that if the act of an accused person falls within either of the Clauses 1, 2 and 3 of Section 300, but is covered by any of the five Exceptions, it is punishable under the first part of Section 304. If, however, the act falls within Clause (4) of Section 300, and is at the same time covered by any of the five Exceptions to that section it will be punishable under the second part of Section 304, Penal Code."

Looking at the matter in another way, if the act of an accused person falls within the first two clauses of cases of culpable homicide as described in Section 299, Penal Code, it is punishable under the first part of Section 304. If, however, it falls within the third class, it is punishable under the second part of Section 304. In effect, therefore, the first part of this section would apply when there is 'guilty intention,' whereas the second part would apply when there is no such intention, but there is 'guilty knowledge.'

17. Now I proceed to consider the cases decided by different High Courts in which the scope of Section 34, Penal Code, or the question of Section 34 as applicable to cases falling in part 2 of Section 304 or both questions- have been considered. First of all I deal with the cases decided by our own Court to which our attention has been invited in the course of arguments at the Bar.

18. The first case is that of Emperor v. Ramnath, 1943 A. L. J. 207 : (A. I. R. (30) 1943 ALL. 271 : 44 Cr. L. J. 624), decided by Plow-den J. It was held :

> "Section 34, Penal Code, cannot be made applicable to the second part of Section 304, Penal Code. Under Section 34 there must be the furtherance of the common intention while under Section 304, second part, there is no question of intention."

There is no other reason given in support of this view.

19. The same learned Judge had again considered the scope of Section 304, part II, in the case of Muni Lal v. Emperor, 1943 A. L. J. 456 : (A. I. R. (30) 1943 ALL. 344 : 45 Cr, L. J. 97), where it was observed :

> "Section 304, second part, must be read with the last few words of Section 299 and has no reference to Section 300 or to the exceptions mentioned therein and must note be confused with culpable homicide not amounting to murder."

Here again, it must be observed, the learned Judge has given no reason in support of his view.

20. The next case is that of Bam Prasad v. Emperor, 1947 A. L. J. 277 : (A. I. R. (34) 1947 ALL. 434 : 48 Cr. L. J. 866), decided by Harish Chandra J. where, dissenting from the decision in Ramnath's case, 1943 A. L. J. 207 : (A. I. R. (30) 1943 ALL. 271 : 44 Cr. L. J. 624), it was held :

> "Section 34, Penal Code, can be applied to a case falling under the second part of Section 304 of the Code. Whether Section 34 can be applied or not would depends upon the particular facts of each case."

21. In that case the learned Judge expressed his view thus :

> "Common intention of the appellants, as appears from the evidence and the circumstances of the case, was to prevent forcibly the field of the deceased Mahadeo Singh from being ploughed and the assault that they committed upon the deceased was apparently in furtherance of their common intention. As I have just said the deceased being a very old man they would, in the circumstances of the present case, be deemed to have acted with the knowledge that their act was likely to cause death and there seems to be no reason why, in the circumstances of the present case, the appellants cannot be held liable under Section 304, part II, read with Section 34, Penal Code."

22. There was no further discussion of the matter nor are there any other reasons given by the learned Judge in support of the view taken by him.

23. The next case is that of Jai Mangal v. Emperor, 1936 A.L.J. 462 : (A.I.R. (23) 1936 ALL. 437 : 37 Cr. L. J. 864), decided by Niamatullah J. where it was observed :

> "It is not necessary for the application of Section 34, Penal Code, to find that there was a pre-arranged plan, of doing something which amounted to an offence. Common intention may be conceived of immediately before or at the time of assault. In general the precise intention of several persons acting in concert is a matter of inference from their conduct."

24. In this case it appears to have been the view of the learned Judge that the common intention spoken of in Section 34 must be the common intention to commit the very act which constitutes the offence. It may, however, be noted that the view expressed by the learned Judge that it is not necessary that there should be a pre-arranged plan appears to be somewhat in conflict with the view expressed by their Lordships of the Judicial Committee in the case of Mahbub Shah, 1945 A. L. J. 344: (A.I.R. (32) 1945 P.C. 118 : 46 Cr. L. J. 689) (ubi supra).

25. I now take the case of Sher Ali v. Emperor, A. I. R. (29) 1942 Pesh. 61 : (43 Cr. L. J. 766), decided by a Bench of that Court. In that case it was held that:

> "The provisions of Section 34 cannot be applied to an offence under the second part of Section 304, Section 34 provides for the punishments of acts which are done with a common intention by more than one person, whereas the second part of Section 304 applies only to acts where there was no intention to cause death but only knowledge that death would be caused."

26. There is no discussion of the principles of either of the two sections, nor is there any reference to any authority bearing upon the question of interpretation of these sections.

27. Next, reference may be made to the case of Empress v. Dharam Rai, 1887 A. W. N. 236, decided by Mahmood J. At p. 237; the learned Judge has considered the scope of Section 34, Penal Code. With reference to the words "in furtherance of the common intention of all," it was observed that "these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act."

The learned Judge has approvingly referred to the views expressed by an American jurist, Bishop, quoted by Mayne, in his Commentary on the Indian Penal Code:

> "But if the wrong done was a fresh and independent wrong, springing wholly from the mind of the doer, the other is not criminal therein, merely because when it was done he was intending to be a partaker with the doer in a different wrong."

28. It would be observed that emphasis is laid here upon the 'fresh and independent character of the act' which actually resulted in the commission of the crime. Such an act would not be deemed to be in furtherance of the common intention of all.

29. The next case is Emperor v. Bhola Singh, 29 ALL. 282 : (5 Cr. L. J. 130), decided by a Division Bench of two learned Judges of this Court, Banerji and Aikman JJ. In this case, three persons attacked a fourth with lathis, and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt which of the three assailants struck that blow. It was held that :

> "The offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder."

The learned Judges expressed the view that in the absence of evidence to show that there was a 'common intention' to cause death or such injury as was likely to cause death, Section 34, Penal Code, would not apply. Further, in the absence of any evidence to show that the appellants or either of them struck the fatal blow, they could not be convicted of the offence punishable under Section 304, Penal Code. The decision of the Madras High Court in Queen Empress v. Duma Baidya, 19 Mad. 483, was approved. Here it may be observed that, according to this decision, the common intention referred to in Section 34 must be a common intention in regard to the criminal act i. e., the actual offence committed.

30. The next case is that of Emperor v. Chandan Singh, 40 ALL. 103 : (A. I. R. (5) 1918 ALL. 209 : 19 Cr. L. J. 150), decided by a learned single Judge of this Court, Sir Pramada Charan Banerji. In this case three persons attacked a fourth with lathis and death ensued through a fracture of the skull of the person so attacked. There was, however, no evidence to show that the common intention of the assailants was to cause death or which of them actually struck the blow which fractured the skull of

the deceased. It was held that the offence of which the assailants were guilty was that of causing grievous hurt and not that of culpable homicide not amounting to murder. The decision of the Division Bench in the case of Emperor v. Bhola Singh, (29 ALL. 282 : 5 Cr. L. J. 130) (ubi supra) was followed.

31. Reference may next be made to the case of Emperor v. Gulab, 40 ALL. 686 : (A. I. R. (5) 1918 ALL. 420 : 19 cr. L. J. 953), decided by a Division Bench of this Court, consisting of Tubdall and Abdul Rauf JJ. In this case a dispute having suddenly arisen concerning the cutting of a sugarcane crop, three men armed with lathis attacked one of the men who was engaged in cutting the crop and beat him so severely that he died, his skull being broken into three pieces. A nephew of the man attacked, having his lathi, with him, attempted to rescue his uncle, and he also received considerable injuries. It was held that :

> "The offence of which the assailants were guilty was not the mere causing of grievous hurt, but culpable homicide, which, however, might in the circumstances, be considered as not amounting to murder by the application of Exception 4 of Section 300, Penal Code."

At p. 688, it was observed:

> "A lathi is a lethal weapon, as has been repeatedly held in this Court for very many years. The person who uses a lathi must know on an occasion like this, that he is very likely to cause death. The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death."

The learned Judges dissented from the decision. in the case of Chandan Singh (40 ALL. 103 : A. I. R. (5) 1918 ALL. 209 : 19 Cr. L. J. 150) (ubi supra).

32. The next case is Emperor v. Kanhai,. 35 ALL. 329 : (14 Cr. L. J. 608), decided by a Bench of this Court. Here four persons armed with lathis attacked and severely beat a fifth, who was unarmed, in a dispute about irrigation. The person attacked died in consequence of this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and also other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground; but the evidence did not disclose which of the assailants caused which of the injuries. It was held:

> "All the four assailants were properly convicted of murder under the fourth clause of Section 300, Penal Code, and that the inference was not justified that common intention of the assailants was not more than the causing of grievous hurt."

In this case the learned Judges took the circumstances of the case into consideration and came to the conclusion that the common intention of all the assailants was to inflict such bodily injury as was

likely to cause death. It was held that the case fell within Clause (4) of Section 300, Penal Code, and the accused were all guilty of murder. The decision in this case appears to be contrary to the decision in the case of Emperor v. Bhola Singh, (29 ALL. 282 : 5 Cr. L. J. 130) (ubi supra), where under very similar circumstances it was held that the common intention of the assailants may be deemed to have been to cause grievous hurt only.

33. The next case is that of Emperor v. Ram Newaz, 35 ALL. 506 : (14 Cr. L. J. 615). In this case three persons, brothers, attacked with lathis a fourth, against whom they bore grudge, and beat him with great severity, so that he died shortly afterwards. His skull was badly fractured, and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. It was held that all the three assailants were guilty of murder.

34. At p. 510, the learned Judges pointed out that :

> "The deceased was cruelly and mercilessly beaten by three men armed with lathis, who continued to use their weapons upon him after he had fallen to the ground. The lathi is a lethal weapon, as has been held more than once by this Court. The circumstances of the case leave no doubt in our minds that the assailants either intended to cause death or had every reason to know that the probable result of their joint act would be death .... Whether there was or was not premeditation is perhaps not clear, but there was concerted action and the attack was so ferocious as to lead almost to the inference that it had been premeditated."

Next, reference may be made to the case of Emperor v. Hanuman, 35 ALL. 560 : (14 Cr. L. J. 685), decided by a Bench of two learned Judges of this Court. In this case, five men members of the same family assaulted an unarmed man and beat him with their lathis. They knocked him down and continued beating him, with the result that he died then and there. Another man, who came to the rescue of the first, was also knocked down and beaten by the same five men with a similar result. It was held that all the five men were guilty of the offence of murder. At p. 562, the learned Judges observed that :

> "The case falls clearly within Clause 4 of Section 300, Penal Code. It cannot be said that any of the exceptions takes the case out of the section .... It is impossible to prove by direct evidence the intention of particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct."

The next case is that of Emperor v. Irshad Ullah Khan, 55 ALL. 607 : (A. I. R. (20) 1933 ALL. 528 : 34 Cr. L. J. 1234), decided by a Bench of this Court consisting of Young and Rachhpal Singh JJ. In this case, the scope of Section 34 was discussed. At p. 613 the learned Judges observed:

> 'The apparent simplicity of the language of this section has been found to be delusive. There are few other sections of the Penal Code in the interpretation of which there

> has been so deep a divergence of opinion in all the High Courts in India as in the case of Section 34, Penal Code."
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> After considering several decisions of other High Courts as well as the well known decision of the Judicial Committee of the Privy Council in the case of Barendra Kumar Ghosh v. Emperor, 52 Cal. 197: (A. I. R. (12) 1925 P. C. 1: 26 Cr. L. J. 431) and the decision of the Bombay High Court in Emperor v. Ranchhod Sursang, 49 Bom. 84 : (A. I. R. (11) 1924 Bom. 502 : 26 Cr. L. J. 1000), the learned Judges expressed the view that Section 34 would be applicable equally to cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual as it is to cases where the criminal act is done by one or more persons than one in furtherance of the common intention (sic) was held to be the sole test of the joint responsibility under Section 34, Penal Code.

35. The facts of that case were : A party of men set out towards a field, with the common intention of attacking another party of men and preventing them from irrigating the field from a well, and one of the attacking party had a gun and the others had lathis, and all of them attacked the other party with the result that two persons died of gunshot wounds and others received different injuries. On those facts, it was held that Section 34, Penal Code, applied and all the participants in the attack could be convicted under Section 302 of murder.

36. The next case decided by this Court may now be considered. It is the important case of Nazir v. Emperor, 1947 A. L. J. 417 : (A. I. R. (35) 1948 ALL. 229: 49 cr. L. J. 271) decided by a Bench of this Court consisting of Sanker Saran and Dayal JJ. In this case, besides the two well-known decisions of the Privy Council, a large number of other cases decided by this Court as well as by other High Courts have been reviewed. The facts of this case were that a woman, while she was proceeding in a tonga with her husband and the husband's brother, was abducted by several persons. In effecting the abduction successfully, the culprits inflicted injuries on the husband as well as on his brother with lathis and tabars. The husband succumbed to his injuries while the brother survived. On the evidence it was found as a fact that N, S and B three of the accused joined together to abduct the woman; that they had planned the abduction before hand. N and S actually beat the husband and his brother with tabar and lathis while B drove away the woman in the tonga. The Court was not in a position to hold definitely as to which of the accused used his tabar in the attack on the husband. The question arose as to the liability of the three accused for offences under Sections 302 and 307 constituted by the attack on the husband and his brother respectively. In this connection the Bench had to consider the applicability of Section 34, Penal Code. Applying the principles laid down by their Lordships of the Privy Council in Barendra Kumar Ghosh v. Emperor, (52 cal. 197: A.I.R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431) (ubi supra) as well as in Emperor v. Mahboob Shah, 1945 A. L. J. 344 : (A. I. R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689), the Bench held :

> "The criminal act in the present case will be the entire transaction composed of the abduction and the beating which proceeded from the common intention of all and were so connected with each other as to constitute one transaction."

Further, it was observed :

> "Whatever acts are done by several persons in furtherance of the common intention of all constitutes as a whole the particular criminal act for which each person will be liable. All such acts which are either contemplated or are to be done ordinarily in furtherance of that common intention will be included in the criminal act."

Again at pp. 422-423 it was observed :

> "Knowledge of a likely result has been held in some cases not to amount to an intention to bring those results and we agree with this view ....
>
> We do not agree with the suggested interpretation of the section to the effect that the 'common intention' must be to commit the offence actually made out .... separate intention of each participator in the criminal act has not to be determined ..... each confederate will also be deemed to have the same intention which the actual doer had in doing the particular act .... Every confederate becomes guilty of the actual offence which is made out from the act comprising the criminal acts . . the intention imputed to such confederate who did not actually commit that particular act leading to the serious consequences need not be the same common intention which existed between all the confederates at the start of the course of conduct which amounted to a criminal act and which resulted in the commission of the criminal offence."

Finally, the Bench observed at p. 423:

> "We are of opinion that each of the persons joining in the commission of a criminal act is liable for any such act committed by any of the persons joining as was done in furtherance of the common intention, and that it is not necessary for the liability of all that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made on account of the actual physical act and its result.... Once they decide to assault another, they should become liable for the actual injuries caused and any other results which would follow from the assault .... Only such acts are not to be deemed to be acts done in furtherance of the common intention as could not have taken place ordinarily in the carrying out of the common intention. Such acts would be mostly unpremeditated ones (done) by some of the persons joining in the criminal act. For such an unpremeditated act of one person all others cannot be made liable. . . . Once they (assailants) decide to assault another, they should become liable for the actual injuries caused and any other result which would follow from the assault. We see no good principle why they should be absolved of the liability of a serious offence even if their primary intention was not to commit that offence."

37. I may now briefly refer to cases decided by other High Courts. Reference may be made to the case of Zahid Khan v. Emperor, 14 Luck. 378 : A. I. R. (26) 1939 Oudh 49 : (40 Cr. L. J. 187) decided

by a Bench of two learned Judges of the Oudh Chief Court, Ziaul Hasan and Yorke JJ. In that case, the injury complained of had been caused by one of several persons, but it could not be said by which of those persons it had been caused. The question arose whether all the persons concerned could be convicted by the application, inter alia, of Section 34. The learned Judges had to consider the scope of Section 34. It was held that : The common intention within the meaning of Section 34 must be to commit the offence actually committed or brought about by the criminal act. As the intention found in that case was only to cause hurt which might extend to grievous hurt, Section 34 was held to be inapplicable to the case of an offence under Section 304, Penal Code. In consequence, it was held that it was impossible to convict persons under Section 304, part II read with Section 34 as such a case fell within the knowledge clause of Section 299, Penal Code.

38. In Sunder Singh v. Emperor, A. I. R. (26) 1939 Oudh 207 : (40 Cr. L. J. 722), decided by Hamilton J. a similar view was taken and it was observed that Section 34 speaks of common intention, therefore, it does not apply to part II of Section 304, Penal Code.

39. Lastly, I may refer to Emperor v. Mahabir, 14 Cr. L. J. 241 : (19 I. C. 497) decided by the Court of the Judicial Commissioner Oudh. In the first instance the case was heard by two learned Judges, and on a difference of opinion between Lindsay J. C. and Rafique A. J. C., it was heard by Pt. Kanhaiya Lal A. J. C. It was held by Rafique A. J. C. that:

> "There are usually three classes of cases of fatal assault where the question of joint responsibility arises viz. (1) where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (2) where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow and there is evidence of the latter's guilt; and (8) where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves it in doubt as to who struck the fatal blow.
>
> In the first case, all the assailants are responsible for the fatal assault; in the second case, the person who is shown by the evidence to have dealt the fatal blow is alone responsible, and in the third case none of the assailants is responsible for the fatal blow."

40. It is clear from the judgment that in this case the "criminal act" was interpreted to mean the very crime with which the accused were charged. On the evidence the common intention was held to-be if not to cause death, at any rate to cause such bodily injury as the assailants knew to be likely to cause death.

41. Next, I may refer to some of the decisions of the Lahore High Court. The first case is that of Sultan v. Emperor, 12 Lah. 442 : (A. I. R. (18) 1931 Lah. 749 : 32 Cr. L. J. 1219) decided by Bhide and Tapp JJ.

42. In this case three persons were prosecuted for offences under Sections 302 and 325, Penal Code in respect of the death of a woman and injuries to some of her companions. On the evidence, it was

found that there was no common intention to cause the death of the deceased and that the fatal blow was inflicted by one of the three persons. It was held to be an unpremeditated act springing from his mind alone. The man proved to have given the fatal blow was convicted under Section 302, Penal Code, and sentenced to transportation for life. Two others were convicted under Section 323, Penal Code alone. It is clear from the judgment that if the intention to cause the death of the deceased had been established, the conviction of all the accused under Section 302 read with Section 304, Penal Code, would have been recorded.

43. Next case is Inder Singh v. Emperor, A.I.R. (20) 1933 Lah. 819: (35 Cr.L.J. 72). In this case the common intention of the culprits was to commit robbery and in furtherance of that intention different acts were committed by different persons. While S, one of the accused had gone to fetch K for carrying that common intention another accused shot down deceased who was the son of K in furtherance of the same. It was held that: Although s was not actually present at the time of murder still as he was also one of the participators in the joint criminal action in the course of which the murder was committed, he was also constructively guilty under Section 302.

44. Three cases of the Rangoon High Court have been brought to our notice, (1) Nga E v. King-Emperor, 8 Rang. 603: A. I. R. (18) 1931 Rang 1 : (32 Cr. L. J. 495 F.B.) decided by Carr, Cunliffe and Otter JJ. It was held by a majority of the Judges that :

> "The common intention referred to in Section 34, Penal Code, is an intention to commit the crime actually committed and each accused person can be convicted of that crime only if he has participated in that common intention,"

No particular reason except a reference to some earlier cases of that Court and the fact that that was the general effect of the cases decided by that Court, is given in the judgment of this case.

45. (2) Emperor v. Nga Aung Thein, 13 Rang. 210: (A.I.R. (22) 1935 Rang 89: 36 Cr. L. J. 605 P. B.), decided by Page C. J. and Mya Bu and Baguley JJ. It was held :

> "Whether or not a criminal act is done by several persons in furtherance of the common intention of all within the meaning of Section 34, Penal Code, is a question of fact to be determined on a consideration of the fact in each case ; and the common intention may be inferred from the circumstances disclosed in the evidence and need not be the subject of an express agreement between the persons concerned."

In such cases the question of fact depends not upon a legal presumption, but upon the inference that the Court draws from the evidence adduced at the trial. In this case, the decision of the Pull Bench, Nag E v. King-Emperor, (8 Rang. 603: A.I.R. (18) 1931 Rang. 1: 32 Cr.L.J. 495 F.B.) (ubi supra) was affirmed. It must, however, be observed that the learned Judges in this case appear to have concentrated their attention on the question whether in the circumstances set out in the question referred to them 'common intention' to murder can be deduced or not. They do not seem to have considered the specific question whether common intention contemplated by Section 34 was the common intention to commit the actual offence committed.

46. (3) In Nga Tha Aye v. Emperor, A.I.R.. (22) 1935 Rang. 299 : (36 Cr. L. J. 1380) decided by Dunkley J. it was held that: "The common intention referred to in Section 34 is an intention to commit the crime actually committed." The learned Judge purports to follow the decisions of the Pull Benches in the cases of Nga E v. King-Emperor, (8 Rang. 603 : A.I.R. (18) 1931 Rang. 1: 32 Cr. L. J. 497) and Emperor v. Nga Aung Thein, (13 Rang. 210 : A. I. R. (22) 1935 Rang. 89: 36 Cr. L. J. 605 F.B.) (ubi supra).

47. The view of the Bombay High Court is expressed in Emperor v. Ranchhod Sursang, 49 Bom. 84 : (A.I.R. (11) 1924 Bom. 502 : 26 Cr. L. J. 1000) decided by two learned Judges of that Court. In this case a contention was raised that Section 34, Penal Code, was not applicable to a case where a criminal act in furtherance of the common intention of several persons was the act of a single individual. It was, however, repelled by the learned Judges. It was held that:

> "The fact that a criminal act done in the furtherance of the common intention of several persona was the act of a single individual does not render the provisions of Section 34 inapplicable."

The learned Judges dissented from the view taken by Stephen J. in the case of Emperor v. Nirmal Kanta Boy, 41 Cal. 1072 : A.I.R. (1) 1914 Cal. 901: (15 cr. l. J. 460) where it was held by Stephen J. that Section 34, Penal Code, applied only where a criminal act was done by several persons of whom the accused charged thereunder was one and not where the act was done by some persons other than the latter.

48. Next, I may deal with the decisions of the Madras High Court. The first case referred to us is that of Queen-Empress v. Dumma Baidya, 19 Mad. 483 decided by a Division Bench of that Court. In that case, three persons assaulted the deceased and gave him a beating in the course of which one of them, struck the deceased on the head which resulted in death. It was held "that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder."

49. In that case one of them was proved to have inflicted a fatal blow with a thick stick or bludgeon which caused the death of the deceased. He alone was convicted of murder but his companions were acquitted of that charge. They were, however, convicted of voluntarily causing hurt under Section 323, Penal Code. There is no discussion of the scope, or meaning, of the expression 'common intention' in Section 34, Penal Code.

50. The next case is In re Nachimuthu Goundan, A. I. R. (34) 1947 Mad. 259 : (48 Cr. L. J. 123) decided by a Division Bench of that Court. In that case a constable was taking two persons A and B in a cart to the police station. Three persons C, D and E intervened to prevent A and B from being taken to the police station. Thereafter C and D feeling annoyed proceeded towards the Court and overtook it on the way. On reaching there one of them said that they would have to give a sound thrashing to the constables and even finish him. After this C, D and E along with A and B who got out of the cart beat the constable and inflicted a large number of injuries in consequence of which he died on the spot. One of the injuries, namely, the one on the head was found to be necessarily fatal.

A and B along with C, D and E were put up on their trial and convicted. On appeal before the High Court, it was argued that as there was no common intention on the part of the accused of killing the constable and no evidence as to which of them caused the fatal blow Section 34 could not be availed of and none of the accused could be said to be guilty of murder, It was held that: (1) the question as to whether there was a common intention was a question of fact and had to be decided with regard to the facts of each case; (2) the words 'finish him' uttered by one of the accused were indicative of the fact that he wanted to kill the constable and in the circumstances of that case it was held that all the accused acted in pursuance of the common intention to kill and various acts were done as a result of that common intention.

51. At p. 261, Chandrasekhara Aiyar J. said with regard Mahboob Shah's case, (1945 A.L.J. 344 : A.I.R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689):

> "Their Lordships do not rule out the possibility of a common intention developing in the course of events though it might not have been present to start with, nor do they say that the intention cannot be inferred from the conduct of the assailants."

It may be noted that in this case the intention found was an intention to kill the deceased.

52. Next I may deal with the cases of the Calcutta High Court which have been cited before us. The first case referred to by learned counsel is that of Aniruddha Mana v. Emperor, A. I. R. (12) 1925 Cal. 913 : (26 Cr. L. J. 827), decided by Walmsly and Mookerji JJ. The facts of this case were that one Baikuntha went to cut paddy grown by him on a plot of land which his father had bought many years previously from the aunt of the appellants. Baikuntha had with him ten labourers. The appellants and others interfered and when he persisted in cutting the paddy they assaulted him and the labourers. The result was that three of the labourers received injuries, which proved fatal. It was held;

> "Section 34 refers to cases in which several persons both do an act and intend to do that act. It does not refer to cases where several persons intend to do one act and some one or more of them do an entirely different act. In the latter type of cases Section 149 may apply but Section 34 cannot apply."

Further it was held:

> "Section 34 which is based on common intention cannot possibly be used with the second part of Section 304 which expressly excludes intention. It is doubtful if Section 34 can be used even with the first part of Section 304, except possibly in very rare eases."

53. Next case is that of Nanda Malik v. Emperor, 41 C. W. N. 575 decided by Cunliffe and Henderson JJ. It was held:

> "The circumstances justifying a charge under Section 304 (II), Penal Code, read with Section 34 are not impossible to conceive but they must be extremely rare in real life and as such the charge having a bearing upon the requisite knowledge under the first section and the requisite intention under the second must be carefully placed before the jury."

At p. 756 it was observed:

> "Section 34 deals with intention, Part II of Section 304 deals with knowledge. The result is that in order to establish this particular charge there is to be a peculiar combination of knowledge and intention which would hardly arise in real life."

Beyond a bald statement about 'intention' and 'knowledge,' there is no discussion here of the real point of difficulty i. e., whether the common intention must be an intention to do the very act which constitutes the crime.

54. Next, I refer to the case of Fazoo Khan v. Jatoo Khan, A. I. R. (18) 1931 Cal. 643 : (33 Cr. L. J. 92) decided by Rankin C. J. and Graham J. In this case four persons were convicted of grievous hurt upon one Jatoo Khan and his wife Khanta Bibi. The conviction was affirmed in appeal. In revision it was contended that the four petitioners had been wrongly convicted of an offence under Section 325 read with Section 34, Penal Code. On a consideration of the provisions of Section 34 it was held that:

> "In order to attract the operation of Section 34 and fix constructive guilt on each one of the several accused under that section, there must be participation in action to commit the crime, with a common intention, although the different accused might have taken different parts; and, quite unlike Section 149 before any of them can be convicted for the offence read with Section 34, the Court must arrive at a finding as to which of the accused took what part if any in furtherance of the common intention. A conviction without such a finding is illegal."

55. The next case is that of Abdul Kader V. Emperor, A. I. R. (33) 1946 Cal. 452 : (48 Cr. L. J. 46), decided by Sharpe and Chakravartti JJ. At p. 458 it was observed :

> "It is true that to convict any particular accused constructively under Section 34 of an offence, say of murder, it is not necessary to find that he actually struck the fatal blow, or any blow, but there mast be clear evidence of some action or conduct on his part to show that he shared in the common intention of committing murder."

56. Lastly, I may refer to the important case of Ibra Akanda v. Emperor, A. I. R. (3l) 1944 Cal. 339 : (45 Cr. L. J. 77l), decided by Khundkar J., on a difference of opinion between Lodge and Dass JJ. In this case four persons were convicted and sentenced under Section 304, part II, read with Section 34, Penal Code.

57. M, while returning home from his hut at about sunset, was waylaid by the four appellants in this case. These appellants were all members of one family. Ibra Akanda stabbed M, with a spear and the other appellants be laboured him with lathis. M was carried home by the people who came to the place of occurrence, being attracted by his shouts. He died two hours later. On appeal, the most important questions raised were the question of interpretation of Section 34, Penal Code, and the connected question whether Section 34 can be applied to a case covered by Section 304, part II-

58. On an elaborate consideration of the scope of Section 34, as judged against the background of the remaining six sections of the group which have to be interpreted together, the -learned Judge Lodge J., recorded his opinion that the phrase "in furtherance of the common intention of all" in Section 34 does not mean that all the participants in the criminal act must 'intend' to commit the same offence or even intend to produce the same result by their joint act. According to him, it would be enough if all of them intend the joint act to be performed. After referring to the provisions of Section 37 which deal with an intention to co-operate in the several acts which result in the commission of an offence which may or may not be the same as an intention common to all, the learned Judge reached the conclusion that the expression "in furtherance of the common intention of all" in Section 34 does not signify "an intention to co-operate in the commission of an offence." According to the views of that learned Judge, when a Court has to deal with the case of an offender which falls under Section 304, part II, it has to find whether first of all, the offender intended the assault and secondly whether from the nature of the assault he must have known that death was likely to result. The same attitude must be adopted in regard to offences committed by a number of persons : the Court must first determine whether all the persons intended the assault e. g., the severe thrashing or beating as the case may be. If so, the Court will then hold each person liable for that assault, or thrashing, or beating, as if he. had done it alone and will then consider separately in the case of each participant, whether he must have 'known' what the result of the act was likely to be. Lastly, the learned Judge observed:

> "The Court is bound to recognize that when a number of persons join together to assault another, each of them must realise that he cannot control his companions and measure the force of his companion's blows and each of them must necessarily be taken to intend an assault of such severity as the number of the assailants and the nature of their weapons portend." In this view of the matter, the learned Judge had no difficulty in applying Section 34 to cases of culpable homicide punishable under Section 304, part II.

59. On the other hand, the other learned Judge, Das J., after a very learned discussion of the principles underlying the provisions of Sections 299, 300 and 304, Penal Code, with reference to decided cases, particularly with reference to the Full Bench decision of the Calcutta High Court in the case of Emperor v. Barendra Kumar Ghosh, (A. I. R. (11) 1924 Cal. 257 : 28 C. W. N. 170 : 38 C. L. J. 411 : 25 Cr. L. J. 817 P. B.), and the decision of the Judicial Committee of the Privy Council on appeal in the same case, summed up his conclusions that a criminal act under Section 34 does not mean a single act. It includes the doing of separate acts similar or diverse, done by several persons which several acts result in a particular offence and these several acts and the effect produced thereby is one whole action. He held that the 'criminal act' in Section 34 must be done by several

persons in furtherance of their common intention to do that very act which is made up of each of the separate acts i. e., their common intention must be to commit the very offence which is ultimately committed. After considering the Bench decision of the Calcutta High Court in the case of Fazoo Khan v. Jatoo Khan, (A. I. R. (18) 1931 Cal. 643 : 33 Cr. L. J. 92) and the Full Bench decision of the Rangoon High Court in the case of Nga E v. Emperor, (8 Rang. 603 : A. I. R. (18) 1931 Rang, 1 : 32 Cr. L. J. 495 F. B.), and the general principles of constructive liability the learned Judge summed up his conclusions with regard to the meaning and import of Section 34 thus :

> "(a) Several persons must have the common intention to commit a particular offence. What the common intention precisely is in a particular case is a question of fact.
>
> (b) All the several persons must participate, i. e., do some act in furtherance of that common intention .. . .. What is necessary is the actual participation. In this connection should be remembered the provisions of Sections 32 and 33, Penal Code and the quotation in the judgment of Lord Summer, 'They also serve who only stand and wait.'
>
> (c) The several acts done by several persons must result in the commission of the offence which it was the common intention to commit.
>
> (d) When the first three conditions are fulfilled each of the several persons is liable for the whole series of acts done by all of them and the effect produced thereby, i.e., for the complete offence."

60. In view of this interpretation of Section 34, the learned Judge proceeded to consider the question which we have to decide in the present case viz., the question whether culpable homicide not amounting to murder can be constructively imputed to several persons so as to make it punishable under Section 304, part II, read with Section 34, Penal Code. He held :

> "Common intention connotes an intention shared by several people by express agreement or tacit or implied understanding."

After a critical analysis of the exceptions to Section 300 as well as of the provisions of Section 299, Penal Code, the learned Judge reached the conclusion that logically it was not possible to apply Section 34 to an offence in which 'intention' is not an ingredient at all i. e., an offence under Section 304, Part II. Such a case, according to the learned Judge, would fall within Clause (c) of Section 299, but outside Clause (4) of Section 300, whether it can or cannot be shown whose act actually caused the death. In such cases of culpable homicide not amounting to murder 'knowledge' of the character and likely consequences of the act is the central idea. 'Intention' does not enter into these cases at all. In fact intention is expressly excluded by Part II of Section 304. Clause (c) of Section 299 and Clause (4) of Section 300 exclude intention, separate or common, and consequently exclude Section 34 by necessary implication.

61. In support of his view, the learned Judge has referred to the cases of Aniruddha Mana v. Emperor, A. I. R. (12) 1925 Cal. 913 : (26 Cr. L. J. 827); Nanda Malik v. Emperor, 41 C. W. N. 575 and Sunder Singh v. Emperor, A. I. R. (26) 1939 Oudh 207 : 14 Luck. 660 : (40 Cr. L. J. 722). He has strongly dissented from the view held in Adam Ali v. Emperor, A.I.R. (14) 1927 Cal. 324: (28 Cr. L. J. 334).

62. The third learned Judge, Khundkar J., has critically examined the two views on the interpretation of the expression "common intention" in Section 34 and reached the conclusion that neither of the two views regarding the interpretation of the expression "common intention" is free from difficulty. He pointed out that "criminal act" is to be done in furtherance of a common intention. If common intention means no more than a physical act, it cannot reasonably be said that, for example, a murder has been committed in furtherance of such an intention. It was quite clear therefore that a meaning has to be found for "common intention" which will fit the description of a criminal act as something done to further the "common intention." The expression "in furtherance of a common intention" points to the conclusion that intention is either the intention to commit the offence which is actually committed or the intention to effect a purpose even at the cost of doing a criminal act which may be necessary for achieving an unlawful purpose intended in common by all.

63. The learned Judge then considered the basic principle underlying the provisions of Sections 34, 35, 37 and 38 and observed at p. 358:

> "The basic principle which runs through all these sections is that an entire act is to be attributed to a person who may have performed only a fractional part of it."

He came to the conclusion that if "common intention" in Section 34 be limited to mens rea, or criminal intention or knowledge, necessary for the commission of the crime actually committed, the provisions of Sections 35, 37 and 38 would become unworkable. He pointed out that it is no doubt true that a certain kind of common intention i.e., to co-operate in the doing of an act animating all the doers of the fractional acts is necessary for the working of the provisions of Sections 35, 37 and 38, yet the common intention within the meaning of those sections was different from an intention common to all within the meaning of Section 34. The observations of the Judicial Committee of the Privy Council in the case of Barendra Kumar Ghosh, (52 Cal. 197 : A. I. R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431) respecting the scope of Section 37 as well as respecting a "criminal act" in Section 34, Penal Code, would, according to the learned Judge, come in conflict if "common intention" is understood in the sense of mens rea which makes the act an offence. Lastly, the learned Judge pointed out very clearly that the expression "where a criminal act is done" as used in Section 34 is also applicable to the criminal act which is punishable as an offence under the Penal Code without the requirement of any mens rex or guilty knowledge or intention, e. g., a public nuisance as defined in Section 268 and made punishable in Section 290, Penal Code. Section 34 is applicable to such offences as it is applicable to any others. It is, thus, clear that "common intention" and '"mens rea" are not necessarily identical.

64. Next, the learned Judge dealt with the principles of English law regarding joint criminal liability. Then after referring to the case of Queen v. Gora Chand Gope, (5 W. R. Cr. 45: Beng. L. R. Sup. Vol.

443) decided in 1866 by Peacock C. J., the learned Judge observed:

> "The truth is that Section 34 .... seems to have been designed to express only a part of the rule relating to joint responsibility, and was by itself in complete."

65. Next, reference is made by the learned Judge to the case of Inder Singh v. Emperor, A. I. R. (20) 1933 Lab. 819 : 14 Lah. 814 : (35 Cr. L. J. 72) in which Bhide J. has commented on the requirement of common intention in Section 34. In that case the common intention found was an intention to commit robbery and in furtherance of that intention different acts were committed by different persons. One of the participants killed Kehar Singh. His object was apparently to strike terror and to disarm opposition and in this he succeeded. All persons sharing the common intention to commit robbery were held guilty of murder under Section 302 read with Section 34, Penal Code. Lastly, the learned Judge recorded his conclusions thus :

> "Common intention cannot be given a constant connotation. What it actually is, varies with the facts of each case. There are oases in which it is identical with mens rea required for the offence actually committed. There are others in which its horizon is wider like the cases in Emperor v. Barendra Kumar, 28 C. W. N. 170: (A.I.R. (11) 1924 Cal. 257 : 25 Or. L. J. 817 F. B.) and Inder Singh v. Emperor, 14 Lah. 814 : (A. I. R. (20) 1933 Lah. 819 : 35 Cr. L. J. 72) where the real common intention was to do a criminal act the accomplishment of which might require some other criminal act to be committed. In these cases the mens rea which makes the ancillary act a crime would be regarded as embraced by the common intention, not as primary intention, but as secondary or contingent intention, not in the forefront of the conscious mind but latent or dormant therein.
>
> Common intention cannot always be made to coincide with what, for want of a better term I may call 'volitional' intention, that is to say, the bare resolution of the will, divorced from any contemplation of criminal consequences, just to do a physical act." The American Law on the point is to be found in Section 439 of the Commentaries of the Criminal Law by Joel Prenties Bishop, an American Jurist of high repute. It is thus expressed:
>
> "The true view is doubtless as follows: Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person, the former is criminally guilty for its results. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he did not contemplate the result in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what might be presumed to have been his understanding of them, he is responsible. But if the wrong done was a fresh and independent wrong springing wholly from the mind of the doer,

> the other is not criminal therein, merely because, when it was done, he was intending to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules."

66. The position in English law is virtually the same as in the American law.

67. On a comprehensive and careful review of the authorities referred to above and, in particular, the provisions of the group of sections beginning with Section 32 and ending with Section 38, Penal Code, it is clear, to my mind, that the expressions "common intention" and "in furtherance of the common intention of all", in Section 34 must be interpreted against the bank-ground afforded by the basic principles of the other sections of the group. If "common intention" be limited to what is known as "mens rea" or guilty mind, necessary for the constitution of the crime actually committed, it would undoubtedly make the basic principles contained in Sections 35, 37 and 38 unworkable. It seems to me, therefore, that the Legislature intended that the two expressions in Section 34 must be interpreted in a wide sense so as to cover even a case where more persons than one act in a co-operative spirit, but not with an intention shared by all to commit a particular crime. The basic role which Section 34 is intended by the Legislature to play is merely to provide the axiom that the doer of a part of the act is legally the doer of the whole of the act. Section 34 nowhere says that all persons who are acting in pursuance of a common plan are necessarily guilty of the same offence. The common intention animating all those who are acting in concert within the meaning of Section 34 must, therefore, be an intention to do a particular criminal act or bring about a particular result, not necessarily the act or the result which constitutes the crime charged. Here the word "intention" is used in a much wider sense and is not confined to what is described as volitional intention, i.e., something willed and therefore intended. When a number of persons act in pursuance of a common design or purpose, each is responsible for the doings of others provided what others actually do is something which may have been in contemplation of all at the time when the "common intention" was entertained by them. At any rate, it should not be altogether foreign to or entirely dissociated from the aim of the concerted action.

68. The "criminal act" obviously may include not only a single act, but also a series of acts or omissions; different actors may be responsible for doing different acts or different omissions. It is, however, necessary that every such act, or omission, or a combination of both must be in furtherance of the common intention shared by all. What is and what is not "in furtherance of a common intention" is necessarily a question of inference from the facts of each particular case. All the natural and probable consequences of the act done in concert must be deemed to be embraced in the "common intention" provided they are so connected as to be parts of one transaction.

69. I now come back to the specific question which we have to answer viz., whether it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code. Section 304, Part II, Penal Code, provides punishment for culpable homicide not amounting to murder when such an offence is committed without any intention either to cause death or to cause such bodily injury as is likely to cause death, but is committed by doing an act with the knowledge that it is likely to cause death. If Section 34 be interpreted as I have endeavoured to do, it seems to me that there is no real difficulty in punishing with its aid a number of persons under

Section 304, Part II. If the common intention of Section 34 is not necessarily confined to an intention to commit the very crime with which the accused are charged, a number of persons may act in pursuance of a common intention with this result that the doer of a fractional part would, in law, be deemed to be the doer of the whole and, if any or all persons participating in the action is or are shown to have a knowledge that the act done either singly or jointly with others is likely to bring about death, every such person can be punished under Section 304, Part II. There is no possible conflict between the kind of 'knowledge' contemplated by Section 304, Part II, and the kind of 'common intention' contemplated by Section 34 in pursuance of which the group of persons in question started the operations. As mentioned above, the axiom laid down by Section 34 and the basic principle running through Sections 35, 36, 37 and 38 mean only this that any one of the joint participators in the act is to be deemed to be the doer of the entire act. The question whether any one of them or all of them is or are guilty of any specific crime is necessarily dependent upon some other factors, e.g., the necessary mental condition, or guilty knowledge or intention. If any one or more of them is proved to have the requisite kind of intention, e.g., the intention expressed in the earlier part of Section 299, Penal Code, he will be punishable either under Section 302 or under Section 304, Part I, as the case may be. If, however, there is only guilty 'knowledge' as distinct from guilty 'intention,' i.e., knowledge that the act which is being performed may result in death, he will be punishable under Part II of Section 304. There is no difficulty in applying Section 34 so interpreted to a case which falls under Section 304, Part II. The common intention in the one case and the knowledge that the act is likely to bring about death in the other, do not come into conflict at all. My answer, therefore, to the first question referred to us is in the affirmative. It is of course assumed that the accused person, in a particular case, is proved to have the requisite kind of 'knowledge' as mentioned in Part II of Section 304, Penal Code.

70. The second question referred to us which has been split up into 2 (a) and 2 (b) is a much simpler question and can be easily answered. Both the parts of this question assume that Section 34, Penal Code, is applicable. The position, therefore, is that several persons (numbering less than five) act in pursuance of a 'common intention.' They attack another person and cause him grievous hurt. It is immaterial which of them is responsible for causing grievous hurt for the simple reason that the question assumes that the principles of Section 34, Penal Code, are applicable. The distinguishing point between the two parts of the question, i.e., 2 (a) and 2 (b) is only this. In 2 (a) it is not known which of the several persons has actually caused the grievous hurt whereas in 2 (b) it is known which of them has done it. By reason of the application of Section 34, however, an enquiry into the question as to which of them is responsible for the injury actually caused is entirely unnecessary.

71. In this connection, there has been a good deal of discussion at the Bar about the principles laid down by a Bench of two learned Judges of this Court, Raghubar Dayal and Wanchoo, JJ., in the case of Dipa v. Emperor, 1947 A. L. J. 208 : (A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858). On the one hand, it has been contended that Dipa's case (1947 A. L. J. 208 : A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) was wrongly decided and that the case of Emperor v. Bishwanath, (1945) A. L. J. 531 : (A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532), decided by Mulla J. laid down the correct law. It seems to me, however, that the decision in Dipa's case (1947 A. L. J. 208 : A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) has been very much misunderstood. It has nothing whatever to do with a case which is governed by the provisions of Section 34, Penal Code. In that case two persons, Dipa and Harbal,

were committed for trial under Section 304, Penal Code. Harbal died during the pendency of the case in the Sessions Court. Dipa, however, was convicted as the result of the trial under Section 325, Penal Code, and was sentenced to three years' rigorous imprisonment. His appeal was before the High Court. Both Harbal and Dipa, who were uncle and nephew, were said to have beaten one Shiama with thin sticks, kicks, slaps and fists; it was a sustained beating as the result of which he received extensive contusions on various parts of his body and also a fracture of two ribs. There was evidence of five witnesses in support of the prosecution case. The Sessions Judge held that Section 34 was not applicable to the facts of the case, He, however, convicted Dipa under Section 325, Penal Code, and sentenced him to three years' rigorous imprisonment.

72. On appeal, the learned Judges of the High Court made it a point to mention that the view of the Sessions Judge that Section 34 did not apply was a correct one inasmuch as neither Harbal nor Dipa could be said to have beaten Shiama in furtherance of any common intention. In the face of the finding that Section 34 was not applicable, the learned Judges had to Jail back upon the constituents of an offence under Section 325, Penal Code. They had to consider what the expression "voluntarily causing grievous hurt" meant. That is set out in Section 322, Penal Code, and in particular the 'Explanation' attached to that section. Next, the learned Judges considered the decision of Mulla J. in Emperor v. Bishwanath, (1945 A. L. J. 531 : A. I. R. (33) 1946 ALL. 158 : 47 Cr. L. J. 532) and pointed out that one aspect of the matter viz., the actual causing of grievous hurt by each individual accused, had been overlooked in that case. Finally, the learned Judges expressed their dissent from the views of Mulla J. in these terms :

> "We are of opinion that when there was no evidence to indicate as to which of those four appellants actually caused those grievous hurts none of them could have been convicted of the offence under Section 325, Penal Code. We, therefore, disagree with the view expressed in that case."

73. Rightly understood, Dipa's case (1947 A. L. J. 208 : A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) to my mind, only lays down this : When Section 34, Penal Code, is not applicable to the facts of a particular case, each of the several participants in the crime with which they are charged must be shown not only to have a particular intention or knowledge to do a wrongful act, e. g., to cause grievous hurt, but also be shown to have actually caused the particular wrongful act or grievous hurt before such a person can be convicted. The requisite kind of intention or knowledge may be presumed from the conduct of several persons striking another with lathis, but the physical act of causing hurt or grievous hurt must be proved by evidence. It cannot rest on mere presumption. What is the proper inference to be drawn in regard to the intention or knowledge must necessarily depend upon the facts and circumstances of each case.

74. It seems to me, therefore, that there is nothing in Dipa's case, (1947 A. L. J. 208 : A.I.R. (34) 1947 ALL. 408 : 48 Cr. L J. 858) which really creates any difficulty or comes into conflict with any of the principles discussed above in connection with the scope of Section 34, Penal Code.

75. My answer, therefore, to the second question is in the affirmative, assuming of course that the criminal act was done in furtherance of the common intention of all.

76. Before I part with this case, I should like to express my appreciation of the very able manner in which the case has been argued before us by Messrs. Gopal Behari and B. D.. Gupta, the learned counsel for the appellants in the two appeals, as well as by Mr. Sri Rama, the learned Assistant Government Advocate for the State.

Sankar Saran, J.

77. I have had the advantage of reading the judgments of my learned brothers Wall Ullah and Wanchoo. The entire case law on the subject has been surveyed by them, specially by Wali Ullah J. and there is not very much for me to say. The questions that I referred to the Full Bench have been recast and read as follows :

> "1. Whether it is possible to convict an accused person of an offence under Section 304, Part II, read with Section 34, Penal Code ?
>
> 2 (a). If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is not known who caused the grievous hurt, can all of them be convicted of causing grievous hurt, with the aid of Section 34, Penal Code.
>
> 2 (b). If a person is attacked by several persons numbering less than 5 and grievous hurt is caused, and it is known which of them caused the grievous hurt, can others be convicted of grievous hurt with the aid of Section 34 ?"

78. There is not the least doubt that so far as the first question is concerned, there is a conflict of authorities in almost all the Courts in this country.

79. Before actually considering the provisions of the sections of the Penal Code it seems to me desirable that the principles upon which these provisions have been based might well be examined because these principles have been accepted without demur by Courts in India. In his Commentary on Section 34, Mayne has relied upon a passage from the American author Joel Prenties Bishop's Commentaries on The Criminal Law. In vol. I, Edn. 6, of this book there is a discussion in chap. XLV on "Combinations of Persons In Crime." I propose to quote extensively from this Chapter. The general principles enunciated by him run as follows :

> "If one employs another to do a thing we commend or blame him precisely as though it were done with his own hands. In like manner, we commend or blame the other, if his will concurred, the same as though he had proceeded self-moved. And if two act together in the doing, it is the same as to each ... The doctrine of combination in crime is, that, when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributed to the wrong doing is in law responsible for the whole, the same as though performed by himself alone. It may be particularized thus. If persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone; and it is the same if, the act

being divided into parts, each proceeds with his several part unaided. Since an act by an agent has in law the effect of a personal act, if one employs another to do a criminal thing for him, he is guilty the same as though he had done it himself. Nor is his guilt the less if the agent proceeds equally from his own desires or on his own account, Finally, by this sort of reasoning we reach the conclusion, that every person whose corrupt intent contributes to a criminal act, in a degree sufficient for the law's notice, is in law guilty of the whole crime. Thus it may be said in a sort of general way, that all who by their presence countenance a riot or a prizefight or any other crime -- especially if ready to help should necessity require,--are liable as principal actors. But this statement needs to be made more exact. A mere presence is not sufficient; nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done. There must be something going a little further; as, for example, some word or act. The party to be charged 'must' in the language of Cockburn, C. J. 'incite, or procure, or encourage the act.' His will must in some degree contribute to what is done...From the proposition that mere presence at the commission of a crime does not render a person guilty, it results, that, if two or more are lawfully together, and one does a criminal thing without the concurrence of the others, they are not thereby involved in guilt. But, however lawful the original coming together, the after conduct may satisfy a jury that all are guilty of what is done...The true view is doubtless as, follows : One is responsible for what of wrong flows directly from his corrupt intentions; but not, through intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not contemplate it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an in-discriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But, if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein merely because, when it was done, he meant to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules."

80. I do not know whether it is possible to summarize the legal position of joint responsibility any better than has been done, if I may say so with respect, by the learned author in his Commentaries on The Criminal Law. The Indian Law has embodied these principles in Sections 32 to 38, Penal Code, specially Sections 34, 35, 37 and 38. Section 34 as it now stands has clarified the position by adding the words "in furtherance of the common intention of all." Where a criminal act is done by several persons the liability of every one of those who participate in the crime is the same. Section 33 contemplates a case where an act is done either with a criminal intension or knowledge. It is necessary in a case governed by this section that the person assisting the accused who does the offending act must be shown to have had that intention or knowledge. If the act is criminal because of the criminal knowledge or intention, every individual who joins in such an act is liable to the extent of his knowledge or intention. Section 37 provides for an offence which is committed by

means of several acts and those who co-operate in the commission of that offence by doing any of those acts commit that offence themselves. Section 38 provides that if several persons are engaged in the commission of a criminal act, they may be guilty of different offences by means of that act. These sections and their illustrations in the Code really para-phrase the principles elaborated by Prentiss Bishop.

81. Thus, briefly put, the responsibility of an individual is not only for what he himself does but also for those consequences that are the direct result of his criminal intentions. If, however, the act was not the direct result but the independent act of another, then he cannot be held responsible. The legal position is that if one envisages the result, he is responsible though things did not happen exactly as he had thought because either his intentions were not clearly expressed or comprehended. The position, however, is different if one of the co-accused does an act which was not in contemplation at the time the criminal intention was formulated in the minds of all those persons who committed the crime. For his independent act the co-accused must be held responsible.

82. Section 34, Penal Code, has been considered in considerable detail by their Lordships of the Privy Council in two cases, Barendra, Kumar Ghosh v. Emperor, 52 Cal. 197: (A. I. R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431) and Mahboob Shah v. Emperor, 1945 A. L. J. 344: (A. I. R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689.) These cases have discussed the full import of the phrase "common intention". It is not necessary for me to discuss these cases because sufficient attention has been bestowed on them by my brothers.

83. In the present case we are directly concerned with the applicability of Section 34 with Section 304, Part II, Penal Code. This matter has been dealt with in several cases to which reference has been made by my learned brothers. The most important of these cases is Ibra Akanda v. Emperor, I. L. R. (1944) 2 Cal. 405 : (A.I.R. (31) 1944 Cal. 339: 45 Cr. L. J. 771). In this case there was a difference of opinion between two learned Judges of the Calcutta High Court, viz., Lodge and Das JJ. and the case was referred to Khundkar J. who agreed with the view of Lodge J. Discussing the applicability of Section 34 with Section 304, Part II, Lodge J. observed :

> "The truth is that the Court satisfied itself that the offender intended the assault, and that the assault was of such a nature that the offender must have known that grievous hurt was likely to be caused. Similarly in cases under Section 304, Part II, the Court finds that the offender intended the assault, and from the nature of the assault the Court infers that the offender must have known that death was likely to result from his act ..... Moreover, the Court is bound to recognise that, when a number of persons join together to assault another, each of them must realise that he cannot control his companions and measure the force of his companion's blows and each of them must necessarily be taken to intend an assault of such severity as the numbers of the assailants and the nature of their weapons portend." His Lordship concluded :
>
> "In the result, therefore, I hold that there is no difficulty in applying Sections 34 and 35 to cases of culpable homicide punishable under Section 304 (II)."

84. On the other hand Das J. in a very elaborate judgment discussed all the oases on the subject and came to the following conclusion with regard to the applicability of Section 34 being read with Section 304, Part II :

> "Common intention connotes an intention shared by several people by express agreement or implied understanding."

85. In His Lordship's view it was not possible to apply Section 34 to an offence in which "intention" is not an ingredient such as Section 304, Part II.

Khundkar, J.

86. frankly admitted the difficulty of the situation and observed as follows : . "Upon a most careful consideration of the two interpretations of the expression 'common intention' in Section 34, and after an examination of the cases above mentioned, as well as others cited at the bar, I am of opinion that each of these two views is fraught with difficulty. I was at one time of the opinion that the interpretation which has found favour with my brother Lodge was the correct one, and in fact that decision in Adam Ali's case, A. I. R. (14) 1927 Cal. 324 : 28 Cr. L. J. 334) (supra) was founded upon an acceptance of the argument advanced from the bar by myself. I now gravely doubt if that argument was sound, for it overlooks the implication of the words 'in furtherance of ..... The expression 'in furtherance of the common intention' points to the conclusion that 'intention' in Section 34 is either the intention to commit the offence which is actually committed,--and that would be in most oases the mens rea for that offence--or an intention to effect a common purpose ('for such an intention is literally covered by the words 'common intention'), even at the cost of doing a criminal act which may be necessary for achieving the unlawful purpose intended in common by all .... The distinction between an ultimate common unlawful purpose and the more proximate intention to do an act which will further that purpose is referred to in the following passage in the judgment of the Privy Council in Sarendra Kumar Ghosh's case, (52 Cal. 197 : A. I. R. (12) 1925 P. C. 1 : 26 Cr. L. J. 481) :

> "Section 87 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 cooperate 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."

87. Lord Sumner in Barendra Kumar Ghosh's case, (52 cal. 197 : A.I.R. (12) 1925 P.C. 1 : 26 Cr. L. J. 431) (supra) made the following observation regarding "a criminal act" which according to his Lordship meant "that unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is in a criminal offence."

88. In Ibra Akanda's case, (A.I.R. (3l) 1944 Cal. 339 : 45 Cr.L.J. 771), Khundkar J. observed as follows :

> "I am led to the conclusion that 'common intention' cannot be given a constant connotation. What it actually is varies with the facts of each case. There are oases in which it is identical with the mens rea required for the offence actually committed. There are others in which its horizon is wider, like the oases of Barendra Kumar Ghosh, (52 Cal. 197: A.I.R. (12) 1925 P. C. 1 : 26 Cr. L, J. 431) (supra) and Indar Singh, (14 Lah. 814 : A.I.R. (20) 1933 Lah. 819 : 33 Cr. L. J. 72) (supra), where the real common intention was to do a criminal act the accomplishment of which might require some other criminal act to be committed. In these oases the mens rea which makes the ancillary act a crime would be regarded as embraced by the common intention, not as a preliminary intention, but as a secondary and contingent intention, not in the forefront of the conscious mind, but latent or dormant therein."

89. With these observations I am in respectful agreement.

90. In Nazir v. Emperor, 1947 A. L. J. 417: (A. I. R. (35) 1948 ALL. 229 : 49 Cr. L. J. 271), a Bench of this Court of which I was a member, held where it was not known which of the two accused had used a tabar which resulted in the death of the victim of a murderous attack that it was "not necessary for the liability of all that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made out on account of the actual physical act and its result. We are of this opinion as we consider it practically impossible for any set of people to decide before and all the acts which may have to be performed in order to carry out the common intention. Only such acts are not to be deemed to be the acts done in furtherance of the common intention as could not have taken place ordinarily in the carrying out of the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one person, the others cannot be made liable. We see no justification for others to be not liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which would have been normally foreseen and even contemplated by those persons."

91. In this view of the matter I would answer the first question in the affirmative. ,

92. The second question which has been split up into two parts (a) and (b) was referred to the Full Bench because of a certain amount of misconception that has arisen regarding a decision by a Bench of this Court in Dipa v. Emperor, 1947 A. L. J. 208 : (A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858).

93. Before discussing the facts and the law laid down in Dipa's case, (1947 A. L. J. 208 : A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) (supra), it appears necessary to consider the view of a single Judge of this Court in Emperor v. Bishwanath 1945 A. L. J. 531 : (A. I, E. (33) 1946 ALL. 153 : 47 Cr. L. J. 532), which placed reliance upon the decision of their Lordships of the Privy Council in Mahboob Shah v. Emperor, 1945 A.L.J. 344: (A.I.R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689). The relevant facts of Bishwanath Tewari's case, (1945 A. L. J. 631: A.I.R. (33) 1946 ALL. 153: 47 Cr. L. J. 532), very briefly are that Bishwanath Tewari and three others were convicted of two offences, one Under Section 304 read with Section 34, Penal Code, and the other under Section 323, Penal Code. The story shortly is that the deceased and his two companions were erecting certain huts when the four appellants came

up armed with lathis and an altercation first ensued between Bishwanath Tewari and the deceased. The deceased asserted his right to the land. Bishwanath thereupon called upon his companions to give the deceased a beating and they all set upon the deceased and began beating him. The question arose, what was the offence committed by each one of the appellants in the circumstances of that case ? The learned Judge of this Court held the view that inasmuch as there was a vital omission to frame a charge under Section 34, Penal Code, the principles underlying Section 34 were inapplicable and that each appellant was responsible for the act committed by himself. He further held that in view of Mahboob Shah's case, (l945 A. L. J. 344 : A. I. R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689), Section 34, Penal Code was inapplicable in the circumstances of the case. The learned Judge was unable to hold that there was a "pre-arranged plan" and that the beating "was done in concert pursuant to the prearranged plan". Having come to that conclusion he held that each of the appellants was responsible only for the act committed by him and the result produced thereby and acquitted them of the offence under Section 304, Penal Code. He, however, observed :

> "At the same time I think when four persons simultaneously attack another person with lathis, it can fairly be presumed against every one of them that he had at least the intention of causing grievous hurt."

94. This phrase "a pre-arranged plan" in my judgment requires to be amplified. A prearranged plan does not mean that there should be a conference where resolutions are moved and a decision arrived at to commit a particular crime. All that appears necessary in such circumstances is that before the actual criminal act is performed, an agreement, not necessarily vocal, should be arrived at amongst those who participate in the crime. As their Lordships of the Privy Council have observed "It is difficult, if not impossible, to procure direct evidence to prove the intention of an individual; in most oases it has to be inferred from his act or conduct or other relevant circumstances of the case." Where four persons, as in Bishwanath Tewari's case, (1946 A. L. J. 531 : A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) simultaneously attack another with lathis, the presumption, it seems to me, would be that the act "was done in concert pursuant to the pre-arranged plan". The plan might have been arranged just half a minute before the actual beating started, e. g., as soon as the assailant arrived on the spot armed with lathis and got engaged in the common act of hitting their victim with their lathis. In Mahboob Shah's case, (1945 A. L. J. 344 : A.I.R. (32) 1945 P. C. 118 : 46 Cr. L. J. 689) (supra) both the men who used their guns emerged from behind the bushes and it does not appear that their act was done in concert pursuant to a pre-arranged plan. There was no evidence that they came together when they fired the guns, but 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."

95. In the view that I take it seems to me that Bishwanath Tewari's case, (1945 A. L. J. 531 : A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) was one of common intention.

96. I might mention in passing one other matter that was raised in Bishwanath Tewari's case, (1945 A. L. J. 531 : A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) viz., that where the prosecution invokes the aid of Section 34, Penal Code for holding one person responsible for the result produced by the act of another, is it necessary to frame a charge under that section? The learned single Judge who

decided that ease answered the question in the affirmative. The preponderance of opinion, however, is against this view. As a matter of fact this question has been set at rest by decisions in several cases, in two of which, namely, Sheo Bam v. Emperor, A.I.R. (35) 1948 ALL. 162 .: (49 Cr. L. J. 129) and Kunwarpal Singh v. Emperor, A.I.R. (35)1948 ALL. 170 : (49 Cr. L. J 140) I was myself a party where it was held "that a person charged with a substantive offence can be legally convicted of that offence read with Section 34, Penal Code, irrespective of the fact that the charge framed against him did not mention Section 34, Penal Code, if the facts of the case justify it and if the accused has not been misled in his defence and it there has been no failure of justice."

97. In Dipa's case, (1947 A. L. J. 208 : A.I.R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) (supra), Dipa and a relation of his, who had died at the time of the hearing of the appeal, beat S with thin sticks, kicks, slap and fists which caused extensive contusions on various parts of his body and resulted in fracture of two ribs. It was held by the learned Sessions Judge that Section 34, Penal Code, was inapplicable in the circumstances of the case. This view found favour with the Bench hearing the appeal in this Court which held that there was "no evidence of any pre-arranged plan." Relying upon the ruling in Bishwanath Tewari's case, (1945 A. L. J. 531 : A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) (supra), the learned Sessions Judge convicted Dipa of an offence under Section 325, Penal Code. The view of this Court was that the learned Sessions Judge was wrong in convicting Dipa under Section 325, Penal Code. The learned Judges observed:

> "It may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt; but such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused unless it be further shown that the accused actually caused grievous hurt."

98. Differing from Bishwanath Tewari's case, (1945 A. L. J. 531 : A. I. R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) the learned Judges observed as follows:

> "We are of opinion that when there was no evidence to indicate as to which of those four appellants actually caused those grievous hurts none of them could have been convicted of the offence under Section 325, Penal Code. We therefore disagree with the view expressed in that case."

99. In the result the learned Judges altered the conviction from one under Section 325, Penal Code, to Section 323, Penal Code.

100. In this view it seems to me that even though an accused person is present in a fight yet, unless evidence is forthcoming that he used his lathi and actually hit someone, it would not be possible to convict him even of an offence under Section 323, Penal Code,

101. The position can be clarified by an illustration. Suppose A were to attack another, X, with a lathi and the eye-witnesses of the incident were far enough to be able to see only the wielding of his lathi by A without seeing it fall on X and if X received grievous hurt A would be convicted under Section 325, Penal Code. If, however, in this very case A was joined by B in the attack and there was no

evidence of a pre-concert or common intention then inasmuch as none of the witnesses saw the lathis of the two men falling on X none of them could be convicted of any offence, even an offence under Section 323, Penal Code. For, it is just possible that one of the two men, it cannot be said who, did not succeed in actually touching the body of their victim. This would lead to an absurd position and in my judgment when certain persons simultaneously attack another with lathis the presumption that every one of them had the common intention of causing grievous hurt is not unreasonable, specially because lathi has always been held to be a lethal weapon.

102. Both in Bishwanath Tewari's case, (1945 A. L. J. 531 : A.I.R. (33) 1946 ALL. 153 : 47 Cr. L. J. 532) (supra) as well as in Dipa's case, (1947 A.L.J. 208 : A. I. R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) (supra) it was found that upon the facts Section 34, Penal Code, did not apply. In these circumstances, the two cases hardly decide anything of importance for the decision of question No. 2 that was referred to the Full Bench.

103. Where Section 34, Penal Code, applies there can be no doubt whatsoever that every one of the accused persons would be responsible for the act of the other co-accused and it would be immaterial as to who actually caused the grievous hurts. All the accused persons, known or unknown, can be convicted of causing grievous hurt with the aid of Section 34, Penal Code.

104. My answer to both parts of question No. 2 is in the affirmative.

Wanohoo, J.

105. In these two appeals a number of persons have been convicted Under Section 304, part II, Penal Code, read with Section 34 of the same Code. When they came up for hearing before my brother Sankar Saran J. he referred two questions for decision to a Full Bench which are as follows :

> 1. Whether it is possible to convict an accused person of an offence under Section 304, part II, read with Section 34, Penal Code ?
>
> 2. Whether to establish a charge under Section 325 read with Section 34, Penal Code, where several persons strike another with lathis it is necessary to establish specifically that one or more of them actually caused grievous hurt ?

106. The second question has been re-drafted by the Full Bench to bring out its implications fully as follows :

> "2 (a). If a person is attacked by several persons numbering less than five and grievous hurt is caused and it is not known which of them caused the grievous hurt, can all of them be convicted of causing grievous hurt with the aid of Section 34, Penal Code ?"
>
> "2 (b). If a person is attacked by several persons numbering less than five and grievous hurt is caused, and it is known which of them caused the grievous hurt, can

> others be convicted of grievous hurt with the aid of Section 34, Penal Code ?"

107. It is not necessary, for the purpose of deciding these questions, to give the facts out of which these two appeals have arisen and I will not, therefore, set them out here Section 304, Penal Code, reads as follows:

> "Whoever commits culpable homicide not amounting to murder shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."

108. Section 34 of the same Code reads as follows :

> "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."

109. The two parts of Section 304 together exhaust the three intents which are mentioned in Section 299, one of which must accompany the act to make it culpable homicide. Two of these intents are included in part I of Section 304, while the third which is in the words "or with the knowledge that he is likely by such act to cause death" is to be found in part II of Section 304, with a further emphasis that the intention which is required for part I of Section 304 is not there.

110. Section 34, Penal Code, came up for interpretation before their Lordships of the Privy Council in Barendra Kumar Ghosh v. King-Emperor, 52 I. A. 40 : (A. I. R. (12) 1925 P. C. 1 : 26 Cr. L. J. 431), That was a case where three persons had gone to the post office with a common intention to rob the postmaster and, if necessary, to kill him. The prosecution case was that the appellant was one of the three men who had fired. But the appellant's statement was that he was the man who was outside and had not actually fired at the postmaster. The question then arose whether Barendra Kumar could be guilty of murder even if it was accepted that he was the man who was standing on guard outside. At p. 51 Lord Sumher, who delivered the judgment, observed as follows:

> "Section 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."

Further at p. 56, Lord Sumner observed as follows:

> "In other words, 'a criminal act' means that unity of criminal behaviour, which results in something for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

111. An analysis of Section 34 shows that it consists of three parts, namely: (1) The doing of a criminal act by several persons. (2) The doing being in furtherance of the common intention of all, and (3) Bach participant is liable for that act as if he alone had done it,

112. The first point that may be noticed is that the section speaks of 'a criminal act' as distinguished from an "offence" which has been defined in Section 40. It is obvious from this that the words 'criminal act' are wider than the word 'offence' as defined in Section 40. If the Legislature intended 'criminal act' to be synonymous with 'offence', it would have used that word as it has done in Section 37. A criminal act, therefore, when committed by a number of persons, means the entire series of acts resulting in something which is punishable under the Penal Code or any other law.

113. Section 34 further provides that each participant is responsible for the entire criminal act as if he alone had done it even though his part in the entire act may have been a minor one. This responsibility of an individual participant for the entire criminal act is made conditional by this section on its being done in furtherance of the common intention of all. There are no words, however, in the section to imply that the common intention of the participants should be to commit the particular offence which is the result of the joint action of them all. If the intention of the Legislature was that the common intention of the participants should be to commit the particular offence which results from their joint action, I should have expected to find some words indicating this occurring after the word 'all' in the section.

114. The difficulty, however, arises mostly in cases of causing hurt to a person. In such cases, a number of persons usually decide to give a beating to the victim. They do not generally decide to cause him grievous hurt or to cause his death. But many a times it happens that grievous hurt or death results from the criminal act of beating. The question, therefore, arises in such cases whether the common intention required by Section 34 must extend to the causing of the result or whether it is enough that there was a common indention on the part of all to commit the crime of beating which would render each of them responsible for the final result. Considering that Section 34 does not specifically say that the common intention of all must be to produce the result which has come about by the joint action of all, it seems to me that it would be enough if there is a common intention to commit a crime, for example, beating, to justify the use of Section 34 and make each of the participants responsible for the final result. It would, therefore, in my opinion, be enough in order to satisfy the requirements of the words 'in furtherance of the common intention of all' to show that there was a common intention to commit a crime and if the result of the committing of that crime, which is the criminal act mentioned in Section 34, is such as would naturally follow from the committing of the crime, the use of Section 34 would be justified and each person would be responsible for the result as if he had done the entire criminal act himself. To my mind, therefore, Section 34 requires a common intention of several persons to commit a crime, that is something punishable under the Penal Code or any other law. These persons do a number of acts in order to carry out their intention of committing a crime. The result of such acts is the criminal act done by

them all in furtherance of their common intention. If the criminal act which results from their acting in furtherance of the common intention is such as is likely to follow from their acts and is not foreign to their common intention, each one of them would be liable for the result as if he alone had done it.

115. I may illustrate this by two examples. Suppose that four persons jointly decide to give a beating to the fifth person with lathis. They have a common intention of committing a crime, in this case at least of causing hurt, as defined in Section 323, Penal Code. In order to carry out their intention, they go and beat the fifth man with lathis. Their act consists in beating the man with lathis. What they have done is in furtherance of their common intention. But the man dies. The result thus produced is death and not merely hurt. As the result produced was likely to follow from their acts and could not be foreign to their intention each one of them is responsible for the result, namely, causing of death as if he alone had caused it and Section 34 would apply. On the other hand, let us suppose, in this very case that one of the four unknown to the other three suddenly whips out a knife from his pocket and stabs the victim who dies thereby. Here the stabbing by the fourth man was not in furtherance of the common intention of all, which was simply to give a beating with lathis and the result produced, namely, death by stabbing was foreign to their common intention. In such a case, Section 34 will not apply and the other three will not be liable for the stabbing. It seems to me, therefore, that the common intention postulated in Section 34 is a common intention to commit a crime, that is, something punishable under the Penal Code or any other law, but not necessarily the offence which results from the joint, act of the doers.

116. Section 34, Penal Code, came up for consideration in a recent ease of the Calcutta High Court, Ibra Akanda v. Emperor, I.L.R. (1944) 2 Cal. 405 : (A. I. R. (31) 1944 Cal. 339 : 45 Cr. L. J. 771.) There was a difference of opinion between Lodge and Das JJ. and the matter was then referred to a third Judge, Khundkar J. Das J. was of the view that the common intention must be to commit the very offence which is ultimately and actually committed. Lodge J., on the other hand, held that the words "in furtherance of the common intention of all" in Section 34 do not mean "in furtherance of common intention of all to commit the particular offence nor they mean that all participants in a joint act must intend to produce the same result."

He considered that it would be sufficient if all of them intended that the joint act be per. formed. When the matter came up before the third learned Judge, Khundkar J. was of the view that the phrase "common intention" in Section 34 cannot be given a constant connotation. Sometimes it may be identical with the mens rea necessary for the offence actually committed but this is not always so. It is also not necessarily identical with the immediate intention to do the physical act. In some cases, the real common intention may be to do a criminal act the accomplishment of which might require some other criminal act to be committed. In such cases, the common intention is really a wider purpose common to all which would embrace the mens rea which makes the ancillary act a crime, not as a primary intention but as a secondary or contingent intention, not in the forefront of the conscious mind but latent or dormant in it.

117. In this case, a large number of authorities were considered by the three learned Judges and it does not seem necessary to refer to them all. In my opinion, the construction put upon the section

by Lodge J. when he said ' it will be sufficient if all of them intend that the joint act be performed" is, if I may say so with respect, the correct one with this addition that the joint act to be performed must be crime that is something punishable under the Penal Code or any other law.

118. Learned counsel have referred to a large number of authorities. But it does not seem necessary to consider all of them one by one because in most of them the point was not considered in extenso. It may, however, be advantageous to mention the view taken by the various High Courts on the precise question whether Section 34 will apply to a case under Section 304, Part II. I have already referred to Ibra Akanda's case, (I. L. R. (1944) 2 Cal. 405: A, I. R. (31) 1944 Cal. 339 : 45 Cr. L. J. 771) in which this matter was discussed at length by three learned Judges and the majority view was that Section 34 applied to Part II of Section 304. In a latter case, however, Abdul Kader v. Emperor, A. I. R. (33) 1946 Cal. 452 : (48 Cr. L. J. 46), a Bench of that Court seemed inclined to the view taken by Das J. in Ibra Akanda's case, (I. L. R. (1944) 2 Cal. 405 : A. I. R. (31) 1944 Cal. 339 : 45 Cr. L. J. 771) though that case was note referred to in the judgment.

119. The view of the Madras High Court also appears to be similar to the view of Das J. in Ibra Akanda's case, (I. L. R. (1944) 2 Cal. 405 : A. I. R. (31) 1944 Cal. 339 : 45 Cr. L. J. 771). In Queen-Empress v. Duma Baidya, 19 Mad. 483, the facts were that three persons had lain in wait for the deceased and had assaulted him. One of them was armed with a bludgeon, the other with a light cane, while the third had apparently no weapon with him. The first struck the deceased a heavy blow on the head with the bludgeon and the second struck him across the chest with the cane, while the third gave him certain fist blows after he had fallen down. It was held that in the absence of proof, so far as the second and third accused were concerned, to inflict an injury likely to cause death, they could not be convicted of murder and the sentence was altered to one under Section 323, Penal Code. In the view, however, that I have taken of the matter, I must respectfully differ front this view as the three persons in this case had the common intention to give a beating to the deceased and the fact, that two of them were armed, one with a bludgeon and the other with a cane, shows that the intention was to cause injuries with these weapons.

120. In a later case of the Madras High Court, In re Nachimuthu Goundan, A. I. R. (34) 1947 Mad. 259 : (48 Cr. L. J. 123), a Bench of that Court seemed to follow the view expressed in Duma Baidya's case, 19 Mad. 483 holding that, on the facts of that case, the intention to kill was there.

121. There are two Full Bench cases of the Rangoon High Court, namely, Nga E v. King Emperor, 8 Rang. 603 : (A. I. R. (18) 1931 Rang. 1 : 32 Cr. L. J. 495 p. B.) and King-Emperor v. Nga Aung Thein, 13 Rang. 210 : (A. I. R. (22) 1935 Rang. 89 : 36 Cr. L. J. 605 F. B.), where Section 34, Penal Code, was considered in connection with a murder case under Section 302, Penal Code_ These cases are not very helpful because the point, namely, the application of Section 34 to the second part of Section 304 was not considered. It was, however, laid down in these cases that the question, "whether or not 'a criminal act is done by several persons in furtherance of the common intention of all,' is a question of fact to be determined on a consideration of the facts in each case."

It was, however, also held in these cases that the common intention to murder could also be inferred from the circumstances present in them.

122. In our own Court, the oldest case is Empress v. Dharam Rai, 1887 A. W. N. 236.

In that case, four persons took part in the incident and two of them were convicted under Section 333, Penal Code, and two under that section read with Section 109. The question then arose whether the two who had been convicted with the help of Section 109 could be guilty under Section 333 with the help of Section 34. Mahmood J. pointed out that:

> "Unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who take no part in that particular act."

123. A later passage in the judgment indicates that Mahmood J.'s view was that there should be a common intention to commit the particular offence for he says at p. 237 :

> "But the evidence falls far short of showing that these two persons ever entered into a premeditated concert with the other two prisoners Dharam Rai and Radiant Rai to inflict grievous hurt upon the constable Sheo Harakh; and therefore if there was a common intention it could not have gone beyond rescue, which intention did not necessarily involve infliction of grievous hurt."

124. In the next case of this Court, Emperor v. Bhola Singh, 29 ALL. 282 : (5 Cr. L. J. 130), three persons attacked the fourth with lathis and one of the assailants struck blow which fractured the skull of the person attacked and caused his death, but the evidence left it in doubt which of the three assailants struck that blow. It was held that :

> "The offence of which the three assailants were guilty was grievous hurt rather than culpable homicide not amounting to murder."

In this case reference was made to the case of Queen-Empress v. Duma Baidya, 19 Mad 483. But if I may say so with respect, that case was not followed logically because on the logic of that case, conviction could not have been under Section 325, Penal Code. This case, therefore, is not of much help in deciding the question whether Section 34 can be used to convict under the second part of Section 304.

125. Then comes the case of Dhian Singh v. King-Emperor, 9 A. L. J. 180 : (13 Cr. L. J. 265). This case follows the case of Queen-Empress v. Duma Baidya, 19 Mad. 483, though that case is not mentioned herein and adopts the same view as has been taken by Das J., in the case of Ibra Akanda, I.L.R. (1944) 2 Cal 405: (A. I. R. (31) 1944 Cal. 339:45 Cr.L.J. 771). This case was, however, not followed in later cases of this Court, for example, Emperor v. Chandan Singh, 40 ALL. 103 : (A. I. R. (5) 1918 ALL. 209 : 19 Cr. L. J. 150) where the conviction under similar circumstances was under Section 325, Penal Code, and Emperor v. Gulab, 16 A. L. J. 731 : (A. I. R. (5) 1918 ALL. 420 : 19 Cr. L. J. 953) where the conviction was under Section 304, Penal Code. The second of these cases was a Bench case. It was pointed out in this case that the case of Dhian Singh v. King-Emperor, 9 A. L. J. 180 : (13 Cr. L. J. 265) referred to above had been distinctly overruled in the case of Emperor v.

Hanuman, 35 ALL. 560: (14 Cr. L. J. 685). This case also dissented from the case of Emperor v. Chandan Singh, 40 ALL. 103 : (A. I. R. (5) 1918 ALL. 209 : 19 Cr. L. J. 150) where the conviction was only for grievous hurt.

126. Coming to a recent case Nathoo v. Emperor, A. I. R. (29) 1942 ALL. 400 : (44 Cr. L. J. 110), I find that Yorke J., changed the conviction from one under Section 304 to that under Section 325. There was, however, no discussion of the question whether Section 34 would apply to a case under Section 304, part II. But the extreme view taken in Dhian Singh's case, 9 A. L. J. 180 : (13 Cr. L. J. 265) by Karamat Husain J., and in Duma Baidya's case, 19 Mad. 483 of the Madras High Court was not accepted.

127. In the case of Emperor v. Remnath, 1943 A. L. J. 207 : (A. I. R. (30) 1943 ALL. 271 : 44 Cr. L. J. 624), Plowden J., was of opinion that Section 34 cannot be made applicable to the second part of Section 304, Penal Code. There is, however, not much discussion on the question except this that, "there must be the furtherance of the common intention under Section 34, while under Section 304, second part, there is no question of intention."

128. In Ram Prasad v. Emperor, A. I. R. (34) 1947 ALL. 434 : (48 Cr. L. J. 866), Harish Chandra J., was of the view that it could not be correctly said that Section 34 could not be properly applied to a case falling under the second part of Section 304 and the question whether Section 34 can be applied or not would depend upon the facts of each case.

129. In the case of Nazir v. Emperor, 1947 A. L. J. 417 : (A. I. R. (35) 19.48 ALL. 229 : 49 cr. L. J. 27l), the question was considered by a -Bench of this Court consisting of Sankar Saran and Dayal JJ. and a large number of authorities of this Court and other Courts were reviewed. I respectfully agree with the view taken by the Bench in that case. At p. 427 occurs the following passage :

> "In our opinion, Section 34 refers to a physical act only. Of course the physical act contemplated should be criminal, that is, should be what is considered a crime, which is not defined in the Code and should mean a thing which ought not to be done and which affects the State in addition to the individual against whom the act is done."

130. A review of these: authorities shows that this Court has never accepted the extreme view which was laid down in the case of Duma Baidya, (19 Mad. 483) by the Madras High Court and, to a certain extent, by Mahmood J. in the case of Empress v. Dharam Rai, 1887 A. W. n. 236. It seems to me, therefore, that in order that Section 34 may be applicable, there must be a common intention to commit some crime, that is, something punishable under the Penal Code or any other law. If that is so, every one would be liable for the result of their joint act in committing the crime, if the result was such as was likely to follow from their joint act in committing the crime intended and was not foreign to their common intention. It is not necessary, in order that Section 34 should apply, that the common intention should have been to cause the particular result which came about in committing the crime.

131. Then comes the question whether in this view of Section 34, it is possible to apply it to a case, under Section 304, Part II. To my mind, there should be no difficulty in applying Section 34 to Part II of Section 304. Once there is a common intention to beat a person, every individual taking part in carrying out that common intention of beating would be responsible for the final result if that result is the death of the victim. This is quite clear from the concluding words of Section 34 which make each of such persons liable for the act as if it was done by him alone. Therefore where the common intention of beating is established and death is the result of the joint beating of several persons, each one would be responsible for the death in the same way as if he alone had committed the entire act. Thus each one would be responsible for all the blows that were struck on the victim. Then the only question that arises is whether each individual would be guilty under Section 304, Part II. That will, in any opinion, depend upon the knowledge which can be imputed to each participant. If it can be inferred that each one of them must have known that death was likely to be caused by their act, which includes the blows given by all, each one of them would be guilty under Section 304, Part II. But if such knowledge cannot be imputed to anyone of the participants and the Court is satisfied that a particular person out of those taking part in the joint act did not have the knowledge that death was likely to be caused, that particular person will not be guilty under Section 304, Part II.

132. It was urged, On behalf of the appellants that Section 304, Part II definitely excludes 'intention' and, therefore, Section 34 cannot be used to convict them under Section 304, Part II, The argument is put in this way. Section 304, Part II postulates that there was no intention on the part of any of the individuals taking part in the joint crime to cause such bodily injury as was likely to cause death. Therefore, there could be no intention common to all to cause such bodily injury as was likely to cause death. But as death was, in fact, caused, some injury must have been such as was likely to cause death. Yet as there was no intention on the part of any one of the joint actors to cause such bodily injury as was likely to cause death, none of them is responsible for that injury and, therefore, Section 34 cannot apply to an offence under Section 304, Part II, Penal Code.

133. There is a fallacy in the argument, on behalf of the appellants when it is said that because each one had no intention to cause such bodily injury as was likely to cause death, no one would be responsible for the injury which actually caused the death. The responsibility, in my opinion, is there because a particular blow was struck and a particular result has followed, though there may have been no intention to cause that result and it is here that Section 34 comes into play. If the act was done in furtherance of the common intention of all each would be responsible for the result as if he alone had done it and the fact that there was no intention on the part of the various actors to cause that result, would not matter. Mere knowledge of the result being likely on the part of each of the actors would be sufficient to bring home to each the crime which was finally committed jointly by them all. I am, therefore, of opinion that it is possible to convict an accused person of an offence under Section 304, Part II read with Section 34, Penal Code, provided the Court is of the opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death. This is my answer to the first question.

134. I now come to the second question referred to this Full Bench which has been re-drafted. The question raised is whether the case of Emperor v. Deepa, I. L. R. (1947) ALL. 678 : (A. I.R. (34) 1947 ALL. 408 : 48 Cr. L. J. 858) has been correctly decided. That was a case decided by a Bench of this

Court to which I was a party and it seems that there is some misapprehension as to the exact import of that case. The cardinal fact in that case Was that that was not a case to which Section 34 applied and it was held that on the evidence on the record it was not proved that the two persons who had taken part in the crime had beaten the victim in furtherance of any common intention. It was then held that where common intention was not proved, it was necessary to show that the person convicted under Section 325, Penal Code, had actually caused grievous hurt before he could be convicted of it. The gist of that case is, therefore, this. It may be presumed from the conduct of several persons striking another with lathis that each of them intended to cause grievous hurt. But in a case to which Section 34, Penal Code, does not apply, such a presumption alone is not sufficient to establish the offence of causing grievous hurt against an accused, unless it is further shown that that accused actually caused grievous hurt. Where, therefore, it could not be shown in a case to which Section 34 did not apply that a particular accused had caused any of the grievous injuries, he could not be convicted under Section 323, Penal Code.

135. It seems to me that the principle which was laid down in that case was sought to be extended and applied in cases to which Section 34 applied. Such an extension took place in the case of Emperor v. Jhallu Singh, 1948 A. L. J. 194: (A. I. R. (36) 1949 ALL. 77 : 49 Cr. L. J. 595) where the principle in Deepa's case, (I.L.R. 1947 ALL. 678: A.I.R. (34) 1947 ALL. 408: 49 Cr. L. J. 858) referred to above was applied to a case to which Section 34 did apply. I should, however, like to make it clear that the principle of that case does not apply to case where Section 34 is applicable.

136. There is no difficulty, therefore, in re. plying to the second question which has been split up into 2 (a) and 2 (b), if the decision in Deepa's case, (I. L. B. 1947 ALL. 678: A.I B. (34) 1947 ALL. 408: 48 Cr. L. J. 858) is rightly appreciated as confined only to those cases to which Section 34 does not apply. The second question which was referred to the Pull Bench postulates that Section 34 does apply and the criminal act has been done in furtherance of the common intention of all, which might have been to give a beating. In such cases, if a person is attacked by several persons numbering less than five and grievous hurt is caused and it is not known who caused the grievous hurt, all of them can be convicted of causing grievous hurt with the aid of Section 34 provided the criminal act was done in furtherance of the common intention of all. Further, if a person is attacked by several persons numbering less than five and grievous hurt is caused and it is known who caused the grievous hurt, in such a case the others can also be convicted of grievous hurt with the aid of Section 34, Penal Code, provided the criminal act was done in furtherance of the common intention of all.

137. This, therefore, is my reply to the second question referred to the Full Bench in this case.

138. By the Court. -- We, therefore, answer the first question in the affirmative and hold that it is possible to convict an accused person of an offence under Section 304, part II read with Section 34, Penal Code, provided the Court is of opinion that each person taking part in committing the crime in furtherance of the common intention of all had knowledge that their act was likely to cause death.

139. We also answer the two parts (a) and (b) of the second question in the affirmative and hold that all of them under part (a) and others under part (b) can be convicted of causing grievous hurt with the aid of Section 34, Penal Code, provided the criminal act was done in furtherance of the common

intention of all.

(Criminal Appeal No. 798 of 1948) Wali Ullah, J.

140. For my replies to the questions referred to the Full Bench in this case, see my judgment in the connected Cri. App. No. 498 of 1948.

Sankar Saran, J.

141. For my replies to the questions referred to the Full Bench in this case, see my judgment in the connected Cri. App. No. 498 of 1948.

Wanchoo, J.

142. For my replies to the questions referred to the Full Bench in this case, see my judgment in the connected Cri. App. No. 498 of 1948.