Om Prakash vs State on 20 October, 1955

Equivalent citations: AIR1956ALL241, 1956CRILJ452, AIR 1956 ALLAHABAD 241, ILR (1956) 1 ALL 447

JUDGMENT

Beg, J.

1. This is an appeal by Om Prakash, son of Bahori Singh, resident of village Kantaur, P.S. Marehra, district Etah. The appellant has been convicted under Section 302, I. P. G. by the learned Sessions Judge, Etah, and sentenced to death. The reference for the confirmation of the death sentence is also before us.

2. The appellant was charged answer Section 302, read with Section 34, I. P. C., along with two other persons, namely, Lakhansingh and Babusingh for having committed the murder of one Sarnamsingh on 19-6-1054, at about 7 p.m. in village Kantaur, Babusingh and Lakhansingh were acquitted by the trial Court. The appellant, was, however, found guilty. He was convicted under Section 302, I. P. C., and sentenced as above.

3. The appellant Om Prakash and the deceased Sarnamsingh were relations having descended from a common ancestor. The grand-father of the deceased Sarnamsingh was one Motisingh. Bahorisingh, the father of the appellant Om Prakash, was the grandson of Zorawar Singh, the brother of Motisingh. Chandrapalsingh, who is a prosecution witness in the case, is the son of Thakur Das, a brother of Bahorisingh, and is the first cousin of the appellant Om Prakash. Sheodansingh, another prosecution witness, is the brother of the deceased and the uncle of the appellant Om Prakash.

The appellant Om Prakash and the deceased Sarnamsingh used to reside in the same house in village Kantaur. The appellant used to stay away from the village as he was carrying on his studies at Sujawalpur. He had come back to his house on 19-6-1954 which is the date of the incident. On the same day, Chandrapalsingh, the cousin of the appellant, had come back from his father-in-law's house.

4. The prosecution case in respect of the occurrence is as follows : On 19-6-1954, at about sunset Chandrapalsingh, Bhagwan Singh. Janaksingh, Sahibsingh, Babusingh, Lakhansingh, Sarnamsingh deceased and a number of other persons were sitting in front of the house of Sarnamsingh and conversing together. Chandrapalsingh, who had returned from his father-in-law's house that day, informed the assembly that Om Prakash appellant had married a girl of low caste in village Kharoli.

The persons present had been discussing this matter when Om Prakash appeared on the scene. Sarnamsingh asked him who he had married a girl of low caste. The appellant replied angrily that he had done what he had liked, and is was nobody's concern. Thereupon Sarnamsingh retorted that by marrying in a low caste he had brought a slur to the whole family. This lad to an exchange of hot words between them.

Both of them grappled with each other, but all the people present there intervened. Then Om Prakash left the place and went to late house. He returned in 5 or 7 minutes and began to abuse Sarnamsingh. Sarnamsingh advanced towards Om Prakash to admonish him. Babusingh and Lakhansingh, the two persons who were accused in the trial Court, caught hold of Sarnamsingh. Then Om Prakash at once took our a double-edged dagger which was concealed inside his bush-shirt, and struck three or four blows at the neck of Sarnamsingh.

The persons collected there rushed to his rescue and supported Sarnamsingh as he was falling down. They laid him on a cot. He became unconscious and succumbed to his injuries. Om Prakash, Lakhan Singh and Baku Singh then ran away.

5. A first information report of the above incident was made by Sheodansihgh, the brother of the deceased, at police station Marehra at 12-30 a.m. on 20-6-1954. The station officer Shahid Husain was present at the time. He immediately left for the spot. On arrival there, he prepared the inquest report and sent the dead body for post-mortem examination. He also made a site plan of the locality. He examined the eyewitnesses and conducted the investigation.

6. The post-mortem examination of the deceased Sarnamsingh disclosed that he had one incised wound 2 1/2" x 1/4" x 1" running vertically in front of the left ear and one penetrating wound 1/8" x 3/4" x thorasic cavity deep direction being from behind, forward and in front fracturing the blade of the left scapula and chipping off the lower border of the 4th rib. Death, in the opinion of the doctor, was due to shock and haemorrhage as a result of the injuries which could be- caused by a sharp-edged weapon like a dagger.

7. The appellant pleaded not guilty. He alleged that he had married with the consent of his elders, and that his wife did not belong to any low caste. He denied that he was present in the village on 19-6-1954. He did not allege any specific enmity against any witness, but made a general statement that all the witnesses "belonged to the same family and wanted to get possession of his holding.

8. The prosecution produced nine eye-witnesses of the occurrence. Their names are: (1) Shiv Dan Singh (P. W. 1), (2) Chandrapal Singh (P. W. 2), (3) Bhagwansingh (p. W. 3), (4) Janaksingh (P. W. 4), (5) Sahebsingh (P. W. 5), (6) Bijaypalsingh (P. W. 6), (7) Hirasingh (P. W. 7), (8) Anok Singh (P. W. 8) and (9) Smt. Bhagwati (P. W. 11), the widow of Sarnamsingh deceased.

Out of the aforementioned nine witnesses, Shiv Dan Singh (P. W. 1) is the maker of the first information report. The names of Chandrapalsingh (P. W. 2), Bhagwansingh (P. W. 3), Janaksingh (P. W. 4,) and Sahebsingh (P. W. 5) are mentioned in the said report. The presence of P. Ws. 1, 2, 3, 4 and 5 on the spot having been borne out by the first information report, the trial Court placed

implicit reliance on their testimony.

Shivdan Singh stated that on 19-6-1954, Sarnamsingh was sitting in front of his door. Bhagwansingh, Sahebsingh, Janaksingh and others were also sitting there. Chandrapalsingh, who had returned from his father-in-law's house that day, informed the persons present that the appellant Om Prakash had married in a low caste.

When people were talking, the appellant happened to appear on the scene.

Sarnamsingh questioned him about it. The appellant got enraged. There was an exchange of hot words between the two. The appellant went away to his house. He returned shortly after and abused Sarnamsingh. Sarnamsingh advanced towards him. He was held back by Babusingh and Lakhansingh.

The appellant then took out a dagger and struck three or four blows on the neck of Sarnamsingh. Sarnamsingh succumbed to his injuries. He went to the thana and made a report. This witness is a brother of the deceased. He is also an uncle of the appellant Om Prakash. No adequate reason has been given on behalf of the accused as to why Shiv Dan Singh should falsely implicate the appellant in a heinous offence of this nature.

A suggestion of a general nature was made in his cross-examination that he wanted to obtain the cultivation of Om Prakash. It was repudiated by the witness. He is the own brother of the deceased and there appears to be every reason to think that he would see that the real murderer is brought to book. He gave a consistent account of the occurrence on all material particulars. He was residing in the same house and is a natural witness. His evidence has a ring of truth in it. It is supported by a number of other witnesses also.

9. Chandrapalsingh (P. W. 2) stated that he was married in village Garhia and had returned to his village at about mid-day on the same day. When people were collected at the door of Sarnamsingh in the evening, he had told Sarnamsingh that it was futile to talk of the marriage of Om Prakash as he had already contracted his marriage in a low family in village Kharoli. The appellant then happened to come to the place. Sarnamsingh enquired from him about it.

There was an exchange of hot words between the two, but he, Shivdansingh and others had intervened. Thereafter Om Prakash went back to his house. He came back and abused Sarnamsingh. As Sarnamsingh advanced towards him, Babu Singh and Lakhansingh caught hold of him and Om Prakash whipped out a dagger from his bush-shirt and struck two or three blows at Sarnamsingh. Sarnamsingh died shortly after.

This witness is a first cousin of the appellant Om Prakash and is, therefore, a nearer relation of the appellant than that of the deceased. He and the appellant Om Prakash lived in' the same house. The incident took place in the court-yard in front of the door of the house. His name is mentioned in the first information report. I have no hesitation in placing implicit reliance on him.

10. Bhagwansingh (P. W. 3), Janaksingh (P. W. 4) and Sahabsingh (P. W. 5) were also present at the door of Sarnamsingh. None of these witnesses is shown to be inimical to Om Prakash appellant. No specific enmity is proved against them. The general suggestion made by the appellant that they wanted to get possession of his holding is vague and unconvincing. The. witnesses appear to be quite independent. They have corroborated each other on all material particulars.

Their evidence is supported by the medical report as well as the circumstances and probabilities of the . case. They have been rightly believed by the trial Court. The truth of the facts stated by them was not seriously questioned before us. Under the circumstances, it must be held that the prosecution case has been fully proved by the evidence of the aforesaid witnesses.

11. The appellant Om Prakash has stated that he was not present in village on that day, but he has not disclosed where else he was on that day or at that particular time. He has not produced any defence evidence. Under the circumstances, there can be no manner of doubt that the appellant's guilt has been proved to the hilt by the prosecution.

In fact, the appellant's learned counsel, in the course of his arguments, did not make any real attempt to challenge the prosecution case on merits. His main argument was that the conviction of the appellant was vitiated by a legal flaw in the charge. He strenuously contended that the appellant having been charged under Section 302/34, I. P. C., cannot be legally convicted under Section 302, I. P. C., simpliciter. He, accordingly, claimed that the appellant had a right of retrial.

12. Having heard the learned counsel for the appellant, I find myself unable to uphold the proposition of law advanced by him. In support of his contention the learned counsel strongly relied on a decision of the Supreme Court in -- 'Surajpal v. State of U. P.', (S) AIR 1955 SC 419 (A) and an unreported Bench decision of this Court in -- 'Karansingh v. The State', Cri. Appeal No. 156 of 1955 (All) (B) following 'Surajpal's case (A)'. Both these cases will be discussed later on.

It may, however, be noted at this stage that in 'Surajpal's case (A) the accused were charged under Section 149, I. P. C., and not with the aid of Section 34, I. P. C., as in this case. Before, therefore, embarking on a discussion of the legal question raised by the learned counsel for the appellant, it will be helpful to make certain preliminary observations relating to the two vital differences that exist between Section 34 and Section 149, Penal Code.

These two differences have to be steadily borne in mind to find a satisfactory answer to the question at issue. They are as follows :

> 1. Whereas Section 34, I. P. C. does take into account the fact of the participation of every individual offender in the offence which is therein described as 'a criminal act' as well as his mental state which is therein connoted by the word 'intention', Section 149, I. P. C., completely ignores both these factors.
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> 2. Whereas Section 34, I. P. C., is merely declaratory of a rule of criminal liability and does not create a distinct offence, Section 149, I. P. C., is not a merely declaratory

provision and does create a distinct offence.

At this stage it is necessary to dilate at some length on the two points mentioned above, as they are directly relevant to the point raised before us. Taking point No. 1 mentioned above first, it may be noted that a perusal of Section 34, I. P. C. shows that it deals with an offence from two aspects, the first of which may be described as the physical and the second as the mental aspect.

The physical aspect of the offence referred to above has been described as 'the criminal act' in Section 34. I. P. C. This 'criminal act' according to Section 34, I. P. C., must be 'done by several persons'. The emphasis in this part of the section is on the word 'done'. It naturally follows from this that before a person can be convicted by following the provisions of Section 34, I. P. C., that person must have done something along with other persons.

In other words, he must be shown to have individually participated in the commission of the criminal act. The criminal act, therefore, contemplated in Section 34, I. P. C., is a joint act which is the result of several persons individually acting in a particular manner. Every individual member of the entire group charged with the aid of Section 34, I. P. C., must, therefore, be a sharer in the joint act which is the result of their combined activity.

This is in sharp contrast with the situation under Section 149, I. P. C., under which it is not at all necessary that every individual member of the unlawful assembly should have himself participated in the commission of the criminal act which is termed as 'the offence' in that section.

The result is that under Section 149, I. P. C. a person might be liable for the offence even though he himself did not actually join in perpetrating it nor was the offence committed in his immediate presence. Thus, under Section 149 a person may be liable for the offence not only in cases where he himself does not participate in the commission of the offence, but even in cases where the offence is committed without his knowledge.

It is enough, if it is shown that he was a member of the unlawful assembly when the offence was committed and the offence in question was committed or was likely to be committed in prosecution of the common object. This is not the position under Section 34. When a charge is framed with the application of Section 34, I. P. C. the accused is informed that he is being charged with an offence in which he himself participated along with others.

This is a necessary inference that follows from the provisions of Section 34, I. P. C. itself, and, as everyone is presumed to know the law, the accused must know that when a charge with the aid of Section 34, I. P. C. is recorded against him, his individual role in the joint act is brought into challenge.

On the other hand, when a charge is framed under Section 149, I. P. C., the accused is merely informed that he was a member of the unlawful assembly, and he would be liable for the offence committed by any member of the unlawful assembly whether he himself participated in it or not. The provisions of law do not require that he should himself participate in the actual commission of

the offence. He is, therefore, entitled to presume that the question whether he himself participated in the commission of the offence was foreign to the enquiry.

In such a case, if the accused is convicted for the relative offence without the application of Section 149, I. P. C., he might have a legitimate ground of complaint that he was taken by surprise if the charge did not directly attribute the commission of the offence to him.

13. Section 34, I. P. C., may now be looked at from the other aspect, namely, the mental aspect of the offence contemplated by Section 34, I. P. C. This aspect is termed in Section 34, I. P. C. as the 'common intention' which permeates the criminal act and in furtherance of which the said act is done.

In order that an intention should be common, it should be attributable to every member of the group. This is also clarified by the fact that the section itself characterises the common intention to be the 'common intention of all'. Section 34, I. P. C., therefore, does not ignore the intention of the individual offender.

It only adds some more persons in the com-mission of the offence and postulates that the same intention was jointly existing in the mind of every individual member of the group as well. It may be that the intention was alleged to be common, but that only means that every member shared it along with others and not that some members shared it and others did not.

The common intention required under Section 34, Penal Code need not, however, be identical with the guilty intention or 'mens rea' which is the ingredient of the offence and is to be distinguish-

ed from it. The latter might be coincident with or collateral to the former.

The two might or might not be identical. If they are identical, the guilty intention would be explicitly mentioned in the charge. Even if they are not identical, the charge itself being for the specific substantive offence, the entire definition of the said offence which would include the statement of 'mens rea', if any, in the penal statute will be deemed to be incorporated into it by virtue of Sections 221(5) and 224, Criminal P. C. This matter, however, is relevant only on the question of prejudice and will be further discussed later on. At this stage, all that need be noted is that a person charged with the aid of Section 34 cannot say that the individual intention of the offender, whatever it might be, was not raised into controversy in such a charge or was immaterial to it.

On the other hand, the position under Section 149, I. P. C., is very different. The charge framed under Section 149, I. P. C., disregards the intention of the individual members of the assembly altogether, and concentrates merely on the common abject of the assembly as a whole. The result of this position is that there may be cases in which a person might be guilty of an offence under Section 149, I. P. C. though he himself had no intention to commit it or was even unaware of its commission.

There may even be cases where a person might be found guilty of an offence under Section 149 though it was committed quite contrary to his own intention. Supposing for instance, an unlawful

assembly is formed with the object of wiping out all members of a particular community residing in a mohalla. While this assembly is busy In its unlawful activities, some of its members might come across a member of the other community and might in prosecution of the common object proceed to murder him.

But a particular individual, say X, who is a member of this very unlawful assembly might discover that Y was his old friend. X might not want that this old friend of his should be killed, and in spite of his wishes, and contrary to his intention, Y might be murdered.

If it so happens, then X who was a member of the unlawful assembly, might be held to be guilty of an offence committed by another member of the said assembly, even though the offence itself was committed quite contrary to his desires and even in opposition to his own intention provided it is shown that X continued to remain a member of the assembly at the time of the offence and the offence itself was directly or indirectly within the purview of the common object of the assembly.

The reason is that the criminal liability under Section 149, I. P. C. is determined not by the intention of the various individual members constituting it but by the common object of the assembly as a whole. The result is that when a charge against a person is framed for an offence under Section 149, I. P. C., read with a relative section, and the person is convicted of the offence under the relative section alone, he might legitimately complain that his own mental state having never been put into issue under the charge at all, he was taken by surprise in the matter and thereby misled and prejudiced.

For the purpose of the above discussion I am presuming that a charge framed under Section 149, I. P. C. is the usual charge under which the individual authorship of the offence is not defined or specified, and the offence is alleged in the charge to be the act of an 'undefined member of the assembly. The position under Section 34 is different. The connection here between the offender and the offence is far closer and deeper.

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

To put it in other words, whereas under Section 149, I. P. C. the entire emphasis both in respect of the physical act as well as in respect of the mental state is placed on the assembly as a whole, under Section 34, I. P. C., the weight in respect of both is divided and is placed both on the individual member as well as on the entire group.

Section 34, I. P. C., as contrasted with Section 149, I. P. C., therefore, balances the individual and the general aspect, although while taking into account the individual aspect it conceives it as part and parcel of the general aspect. In this sense, Section 34, I. P. C., is far more restricted than Section 149,

I. P. C. If, therefore, a person is charged with an offence with the application of Section 34, I. P. C., and convicted for the substantive offence only, it is not so easy for him to advance the plea that he was not aware that the matter had any individual aspect.

On the other hand, the argument of prejudice can be advanced with much greater force when in a similar situation the charge is under Section 149, I. P. C., and, particularly so, when the authorship of the offence is left unspecified and undefined in the charge itself.

14. Participation of the individual offender in the criminal act in some form or the other which is the leading feature of Section 34, I. P. C. differentiates it not only from Section 149, I. P. C., but also from other affiliated offences like criminal conspiracy and abetment. A bare agreement between two or more persons to do or cause to be done an illegal act might make a person liable for the offence of criminal conspiracy as defined in Section 120, I. P. C. If the said agreement is to commit offence, then such an agreement is by itself enough to make a man guilty and no overt act apart from the agreement; would be necessary.

If, however, the agreement is to commit an act which is not tantamount to an offence, then some overt act in pursuance thereof is necessary. Such overt act may, however, be performed by any person who is a party to the agreement and not necessarily by the particular accused who might be guilty of the offence without having participated in the act.

On the other hand, under Section 34, I.P.C., a mere agreement, although it might be a sufficient proof of the common intention, would be wholly insufficient to sustain a conviction with the application of Section 34, I.P.C., unless some criminal act is done in furtherance of the said common intention and the accused himself has in some way or the other participated in the commission of the said act. .

15. Similarly a person might be guilty of the offence of abetment by virtue of his previous association with the offence without having actually participated in it. This previous association would consist of his instigation to commit an offence in one of the ways defined in Section 107, Penal Code.

The offence itself would be complete even though the act abetted is not committed; or, even if the act is committed, the abettor himself has not participated in it. Thus, actual participation in the commission of the offence, which is a condition precedent of Section 34 and is its main feature, again distinguishes it from the offence of abetment.

16. Section 34, I.P.C., compendiously summarises the liability imposed under English Law on what are therein called as principal in the first degree and principal in the second degree and assimilates the principles underlying both by compressing them in one section and treating them as what have been called accessories at the fact as opposed to what are termed as accessories before the fact and accessories after the fact.

17. In this connection, the learned counsel for the appellant argued that a person who is present on the spot at the time of the commission of the offence would be guilty by the application of Section

34, I.P.C. although such a person did not do anything. This criticism appears to me to be based on a misapprehension.

A person present on the scene might or might not be guilty by the application of Section 34, I.P.C. If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he is present there merely as a spectator, he would not be guilty.

Thus for example a person who is an eyewitness of the incident is present at the spot as well as a person who is a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime. On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. In other words, presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act.

As observed by their Lordships of the Privy Council in the case of 'Barendra Kumar Ghosh v. Emperor', AIR 1925 PC 1 (C), "It is to be remembered that in crimes as in other things 'they also serve who only stand and wait'". The following observations of Mookerjee, J. in the case of 'Emperor v. Barendra Kumar Ghosh', AIR 1924 Cal 257 (FB) (D) are relevant in this connection;

> "It is the expectation of aid, in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence.
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> It is, therefore, sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for the fulfilment of the same pre-concerted end, and was so situated as to be able to furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise", (p. 280) In a similar strain are the following instructive observations in the judgment of Richardson, J., in the same case:
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> "Moreover, it is impossible to say what might have happened, if one man alone -had set out to accomplish the murder. Without the support moral and physical, of a comrade, his resolution might have failed him and his pistol remained in his pocket or diminution of confidence might have interfered with his aim; or again, he might have been successfully resisted and put to flight", (p. 296).

18. At p. 308 col. (1) of the same case Ghose J. has quoted the following illuminating passage from Foster's Criminal Law:

> " 'Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged.
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> They are all, provided the act be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise'. To sum up persons executing parts of a crime separately in furtherance of a common intention are equally guilty".

It is, therefore, not correct for the appellant's learned counsel to say that a person present on the spot does nothing. He plays a very important part in the scheme of the commission of the offence. The potential utility of a person who is present as a guilty confederate on the scene of offence cannot be overestimated.

The word 'criminal act' is used in Section 34, I.P.C. in the broadest possible sense. It would cover any word, gesture, deed or conduct of any kind on the part of a person whether active or passive, which tends to support the common design, A 'criminal act' in Section 34, I.P.C. consists of the entire bundle of acts or omissions tied together with the chain of common intention that have combined to constitute the offence. The acts that it might comprise within itself may be similar or diverse.

Such acts may be performed simultaneously, successively or at intervals. Instances to illustrate such acts are of a multifarious type. For example, two persons may beat a man at the same time, and if their acts are in furtherance of a common end, Section 34, I.P.C., would be attracted. The acts here are simultaneous.

Again, for example, two jailors whose duty it is to attend alternately on a prisoner may conspire to starve him to death. In pursuance of this conspiracy, they may omit to supply food to him. In this case the conduct consists of omissions and the acts of the accused are successive and not simultaneous. Or, for 'example, two persons may conspire to forge a document.

One may forge a part of it on one day and the other may forge the remaining part of it after a gap of a month. In this instance the acts of both the persons would attract Section 34, I. P. C. even though there is an interval between acts performed by each of the two persons separately.

Such act may consist of a mere gesture or expression or conduct. that may provide a signal for offence or help the confederate in identifying the victim. Thus, for example two persons may conspire to kill a third man. One may know him and the other may not know him.

It may be agreed between the two that the person who knows him will stand near the man who would toe the victim and thereby enable the person to whom the part of killing is assigned to Identify the victim. If the scheme is carried out, both would be guilty under Section 34, I. P. C., even though the man who stood near the victim was merely present on the spot and apparently did nothing. If, however, the scheme is analysed, it would appear that by his presence near the victim he played a very important part.

In fact, it was his presence near the victim that really contributed to the successful commission of the crime. The part may consist of a mere omission. Thus for example, a person who la employed as a sentinel to guard the room of the deceased might agree with the murderer to allow him entry into the room with a view to enable him to accomplish the murderous -deed.

If the murderer turns up according to the pre-arranged plan and the sentinel deliberately omits to prevent his entry into the room, he has done an act which has contributed as effectively to the perpetration of the murder as the actual act of killing itself.

In fact, the murder might not have been possible without the omission on his part. The various acts may be quite diverse in nature. Thus, if two persons conspire to commit theft and devise a plan according to which one of them would lure the shopkeeper away to an adjoining room on the pretext of having conversation with him thereby leaving the shop unprotected in order to enable the other persons to commit theft and the scheme is executed according to the plan, both of them would be, equally guilty of theft by the application of the provisions of Section 34, I.P.C. although their respective acts are of a very different type.

In such a case, although only one man has committed the actual theft and the other has done nothing except entering into a friendly chat with the shopkeeper with a view to secure his removal from the scene, the part played by the latter is no less important than that of the former.

It is, therefore, evident that every person charged with the aid of Section 34, must in some form or the other participate in the offence in order to make him liable thereunder. For the above reason, I find myself unable to endorse the argument of the appellants' learned counsel that a guilty associate merely present on the spot cannot be said to participate in the commission of the offence.

19. The element of participation in the commission of the offence is the chief feature that distinguishes Section 34, I.P.C. from Section 149, I.P.C. and other kindred sections. This has been emphasised in a large number of decided cases.

20. In 'Shreekantiah Ramayya Munipalli v. State of Bombay', (S) AIR 1955 SC 287 (E) while expounding the meaning of Section 34, I.P.C. Bose, J. observed as follows:--

> "It is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape,

> but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed.
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> The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by Section 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter". (p. 293).
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> At page 294, col. (1) of the same judgment it is observed that:--
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> "The emphasis in Section 34 is on the word 'done'. When a criminal act is 'done' by several persons, it is essential that they join in the actual 'doing' of the act and not merely in planning its perpetration".

In the same case, the following observations of their Lordships of the Privy Council in the case in AIR 1925 PC 1 (C) on this point were cited with approval: -

> '"Participation and joint action' in the actual commission of crime' are, in substance, matters which stand in antithesis to abetments or attempts".
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> The distinction between Section 34, I.P.C., and Section 149, I.P.C. in this regard has been brought out by Lord Sunmer in the well known case in AIR 1925 PC 1 (C) thus:
>
> "There is a difference between object and intention, for, though their object is common, the intentions of the several members, may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence".

21. In 'Bashir v. State', AIR 1953 All 668 (F) which is a Bench decision of the Allahabad High Court, it was observed by Desai J. that:--

> "All the persons who are sought to be made liable by virtue of Section 34 must have done some act which is included in the 'criminal act'. One who has not taken any part in doing the criminal act cannot be made liable under the section". (p. 671 col 1).

22. In 'Faiyaz Khan v. Rex', AIR 1949 All 180 (G) it was held that:--

> "Section 34 refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases Section 149 may be applicable, but Section 34 is not". (p. 184 col. 1).

23. In AIR 1924 Cal 257 (D) which is a Full Bench case of the Calcutta High Court, Cuming J. observed that "The expression criminal act done by several persons includes the case of a number of persons acting together for a common object and each doing some act in furtherance of the final result which various acts make up the final act". (p. 312 col. 2).

24. In 'Aydrooss v. Emperor', AIR 1923 Mad 187 (2) (H) it was held that in order to justify the application of Section 34, evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required. (Vide h.n. (b)).

25. To the same effect are the following observations of Sharpe J. in 'Abdul Kader v. Emperor', AIR 1946 Cal 452 (I) which is a Bench decision of the Calcutta High Court:

> "We think it desirable to draw attention to the decision in Fazoo Khan v. Jatoo Khan AIR 1931 Cal 643 (J) in which it has been observed that 'all the accused persons can be found guilty of an offence constructively under Section 34, Penal Code only on a finding that each of them took some part or other in, or towards, the commission of the offence'.
>
> 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 must be clear evidence of some action or conduct on his part to show that he shared in the common intention of committing murder", (pp. 457-456).

26. The net result of the above discussion is that although Section 34 deals with a criminal act which is joint and an intention which is common, it cannot be said that it completely ignores or eliminates the element of personal contribution of the individual offender in both these respects.

On the other hand, it is a condition precedent of Section 34, I.P.C., that the individual offender must have participated in the offence in both these respects. He must have done something, however slight, or conduct himself in some manner, however nebulous whether by doing an act or by omitting to do an act so as to indicate that he was a participant in the offence and a guilty associate in it. He must also be individually a party to an intention which he must share in common with others.

In other words, he must be a sharer both in the 'criminal act' as well as in the 'common intention' which are the twin aspects of Section 34, I. P. C. In view of the above position, it is difficult for the accused to legitimately urge before the Court that owing to the mention of Section 34, I. P. C., in the charge, he was misled or prejudiced in his defence by being persuaded to presume that all consideration of his individual liability was completely shut out as a result thereof. He would be presumed to know the law on the point and if, in spite of it, he deluded himself into any such belief, he would be doing so at his own peril.

27. The second important feature which distinguishes Section 34, I.P.C. from Section 149 is that whereas Section 34 is an explanatory section and merely lays down a principle of criminal liability without creating a separate and distinct offence, Section 149, I.P.C. on the other hand does create a separate and a distinct offence.

It may be noted in this connection that Section 34 is to be found in Chap II of Penal Code, the heading of which is 'General Explanations' whereas Section 149 is to be found in Chap VIII of the Penal Code, which, as its heading says, relates to 'offences against the Public Tranquillity'.

Thus Section 34 as well as Sections 35, 36, 37 and 38 which follow on its heels are all explanatory sections. They are provisions of an interpretative character and, being so, they are automatically imported into the definition of every substantive offence with which an accused is charged. They are, therefore, to be applied in every case according to the facts disclosed by the evidence in that case.

28. The necessary consequence of the above position is that the mention or non-mention of Section 34, I.P.C., in the charge along with the substantive offence cannot be treated as an illegality under the Cr. P. C. necessarily vitiating the conviction or trial of an accused and entitling him to claim a re-trial irrespective of the question of prejudice.

The matter has been emphasised repeatedly in the Criminal Procedure Code itself from multifarious angles in a large number of sections flung and scattered all over its body and, from whichever point of view it is approached, one is irresistibly brought back to the same conclusion.

29. A reference to the various sections of the Code of Criminal Procedure at this stage is necessary to elucidate this point.

30. Section 221, Criminal P. C., which is one of the sections dealing with the form of charges, runs as follows:

> "221 (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.
>
> (5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the

particular case.

(6) and (7) Omitted".

A perusal of the various clauses of the above section would indicate that it only makes the mention of an offence or its definitive provisions necessary in a charge. Section 34 being not itself creative or definitive of an offence would, therefore, fall outside the purview of the ingredients required to be mentioned in the charge under this section.

Illustration (a) appended to this section would show that when A is charged with the murder of B, this would be an equivalent to a statement that A's act fell within the definition of murder. Section 34, I.P.C. being of an interpretative nature would, therefore, have to be read along with the statement of the offence in the charge.

31. Section 222, Cr. P. C., which deals with the particulars of time, place and person to be mentioned in the charge, is as follows:

"222 (1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was, committed, as are reasonably sufficient to giver the accused notice of the matter with which He is charged.

(2) Omitted".

This section specifies the facts necessary to be mentioned in the charge. It shows that all of them relate only to the particulars of the 'offence' committed, namely, the time of the offence, the place of the offence and the person against whom or the thing in respect of which the offence is committed. Section 34 does not create an offence and is, therefore, not touched by it.

32. Section 223, Cr. P. C. reads as follows:

"223. When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose".

Illustration (a) shows that where an accused is charged with the offence of theft the charge need not set out the manner in which the theft was committed. Illustration (e) shows that where A is accused of the murder of B at a given time and place, the charge need not state the manner in which A murdered B. It is not possible in every case of murder to mention the exact manner of the commission of the offence in the charge. There may, for example, be cases in which the evidence may be merely circumstantial. In such cases the manner of the commission of the murder would be known to the accused only.

33. Section 224, Cr. P. C. lays down that -

> "In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable".

This section would again import the definitive and the interpretative provisions relating to all offences in the statement of the offence or offences mentioned in the charge thereby making its explicit mention in the charge unnecessary.

Even if Section 34 were to be regarded as a part of the offence or a necessary particular required to be stated in the charge, then Section 225, Criminal P. C. which deals with the effect of such an error, has made an adequate provision for condoning such defects by providing as follows:--

> "225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

Illustration (b) shows that even where the charge contains an erroneous statement regarding the date of the offence and the name of the murderer the defect would be condoned, if the evidence in the case which was adduced before the accused and heard by him clearly disclosed the correct date and name.

It further indicates that the clarity of evidence in the case could be seen for the" purpose of determining the question whether the accused was misled, and that even an obviously serious error of the nature of a positive misstatement in the charge would be treated as immaterial, if the evidence on the point was so clear as to make it obvious that the accused was not misled thereby.

34. Section 227, Criminal P. C. authorises a Court to alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed. Where such a step is taken, Section 228 entitles the Court to proceed with the trial as if the new or altered charge had been the original charge if, in the opinion of the Court, such alteration or addition is not likely to prejudice the accused or the prosecution.

It is only if the Court is of opinion that such alteration or addition is likely to prejudice either party that the Court is required either to direct a new trial or to adjourn the trial for such period as may be necessary (vide Section 229). Even after an accused has been convicted of an offence in the absence of a charge in respect of it or by an error in the charge the conviction is not necessarily vitiated thereby and the sole test that the Appellate Court or the High Court is required to apply to the cause for determining whether it should order re-trial is the test of prejudice to the accused. This is laid down by Section 232, Cr. P. C. which runs as follows:

> "232 (1) If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chap XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit. (2) Omitted".

35. Section 233 is as follows:

> "For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in Sections 234, 235, 236 and 239".

Section 149 being a distinct offence, a separate charge in respect of it would be necessary under this section, but not in respect of Section 34, I.P.C, which, as mentioned above, does not create a distinct offence at all. The provisions of Sections 236, 237' and 238, Cr. P. C. are applicable to offences only.

Strictly speaking, therefore, they would be applicable to cases under Section 149, I.P.C. but not to cases under Section 34, I.P.C. Even presuming Section 34 to be creative of a distinct offence for the purpose of applying the principles underlying the aforesaid sections, it would appear that the conviction of the appellant would not be vitiated thereby.

36. Section 236, Criminal P. C. lays down as follows:

> "236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having. committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences".

In the present case the prosecution evidence was to the effect that Babusingh and Lakhansingh had caught hold of the deceased. The court found this fact proved, but in the circumstances of the case, it was doubtful as to whether it constituted any offence. The finding of the Court was that --"The action of Babusingh and Lakhansingh accused in holding the deceased can be attributed to their intention to facilitate the commission of the offence by Om Prakash accused or to their intention to prevent any 'Marpeet' taking place between the deceased and Om Prakash accused". In view of the fact that the prosecution evidence did not show any previous concert between these two accused and Om Prakash and the dagger which was suddenly whipped out by the latter was concealed in his shirt, the situation was clearly such as to create a doubt in the mind of the Court and the former accused were entitled to its benefit; hence they were acquitted.

In this case, therefore, the situation being, ambiguous the appellant could be charged in the alternative u/s 302 only. The facts of the case would, therefore, attract the application of Section 236, Cr. P. C. and Section 237, Cr. P. C., would, under the circumstances, automatically come into play.

37. Section 237 Cr. P. C. reads as follows:

> "237 (1) If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence, that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it".

A reference in this connection may be made to the case of 'Begu v. Emperor', AIR 1925 PC 130 (K). In this case the accused were charged under Section 302, I.P.C. but, on evidence, they were found to be guilty of an offence under Section 201, I. P. C. and convicted thereunder. The conviction was upheld by their Lordships of the Privy Council who referred to the illustration appended to the section and observed:

> "A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made", (p. 131 col. 1).

38. Section 238, Cr. P. C., provides as follows:

> 238(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence., and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it".

Strictly speaking when a person is charged with a substantive offence following the provisions of Section 34, I.P.C., the ingredients of the substantive offence remain the same. The only difference is that instead of a single person A having committed an offence, the charge states that, a number of other persons say B and C also joined A in the commission of the same offence with a common intention.

In such a situation, Section 34, I.P.C., lays down a special principle of criminal liability and says that where a number of persons join together in committing the same offence with a common intention, each of them becomes liable to an enhanced penalty which is attachable in law to the result of the joint acts of all.

Where the case under Section 34, I.P.C., fails and the prosecution is able to establish its case only against a single offender, the prosecution cannot be said to have failed to prove the ingredients of the offence, but all that it can be said to have failed to prove is the fact that some persons who are also alleged to have joined the accused with a common intention are not proved to have done so.

The effect, therefore, of mentioning Section 34, I. P. C., is that the prosecution takes upon itself the responsibility of proving some additional facts with a view to make the accused liable for an enhanced punishment. If, therefore, the charge in respect of Section 34, I.P.C., fails because the prosecution is unable to prove those additional facts or particulars, there should be no reason why the conviction of the accused for the substantive offence should not be recorded where .the prosecution has been able to prove all the facts needed to support the conviction of a single individual for the substantive offence.

The effect of such a failure will only be to take the case out of the purview of the joint or enhanced liability principle and to substitute therefor what may be termed as the individual or reduced liability principle. The effect of tacking Section 34 to the charge is, as it were, to add the hands of all others charged with the aid of Section 34 to the hands of the accused. The result of cutting off Section 34 from the charge is that all the extra hands attached to the body of the accused fall off, but his own hands still remain.

It may, however, be noted that strictly speaking Section 238 is not applicable to a case where Section 34 has to be eliminated from the charge, for the offence in such a case need not always be reduced to a minor offence. If, for example, the specific act or acts proved against a particular accused are by themselves enough to bring about the resultant offence which was the subject-matter of charge, the offence would not be reduced to a minor offence at all nor would the liability of the accused thereunder reduced in any manner.

The principle behind Section 238, however, appears to be that where the prosecution undertake in the charge to prove a number of facts involved in an offence, their failure to prove all the facts should be no bar to the conviction of the accused on such facts out of them as the prosecution have succeeded in proving.

This is based on the obvious principle that the whole includes the part and if the accused has notice of the former, he cannot be heard to make a grievance in respect of the latter. The reference to Section 238, therefore, in this connection is only by way of analogy.

39. It may be borne in mind, however that the present case is different from a case in which the accused is charged with substantive offence alone and is convicted of the substantive offence by following the provisions of Section 34, I.P.C., which would be the reverse of the present case.

In such a case it might be argued on behalf of the accused that the prosecution was seeking to rely on certain additional facts which were not notified in the charge; and that he was being saddled with a special liability apart from his normal liability by invoking certain factors which were not expressly specified in the charge.

We are, however, not concerned with such a case. In the present case, the charge had mentioned both Section 34, I.P.C., as well as the substantive offence and the accused is being convicted for the substantive offence alone. The prosecution, therefore, is not relying upon any additional facts, but, on the other hand, it is merely withdrawing some of them. If at all, therefore, in such a case the

charge may be said to have given more than necessary information and not less than necessary information.

40. Finally, the provisions of Sections 535 and 537 Criminal P. C. in this regard are significant. Section 535, Cr. P. C. provides as follows:

> "535 (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.
>
> (2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge".

This section is very widely worded. It would apply not only to a trial where no charge at all has been framed in respect of any offence out also to a case in which no charge has been framed in respect of the particular offence of which the accused is convicted. According to it, even in cases of offences, a failure to frame a charge in respect of the particular offence of which an accused is convicted could be supported by the curative provisions of this section, if the accused was not prejudiced thereby.

The principle would apply with much greater force to a case under Section 34, I.P.C., which is not creative of any offence at all. In this section, the Code has made provision in respect of a case where no charge has been framed at all. There may, however, be cases in which a charge has been framed, but there has been an error, omission or irregularity in respect of it. For such cases the provision has been made under Section 537 of the Code which runs as follows:

> "537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent Jurisdiction shall be re-
>
> versed or altered under Chap. XXVII or an appeal or revision on account-
>
> (a) of any error, omission, or irregularity in the ..... charge ..... or other proceedings before or during trial ..... or other proceedings under this Code, or ((b), (c) and (d) Omitted). , unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.-- In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

41. In 'Subrahmania Ayyer v. King-Emperor', 25 Mad 61 (PC) (L), their Lordships of the Privy Council held that the provisions of the above section cannot apply to non-compliance with a mandatory provision of law relating to a mode of trial. These observations were construed by their

Lordships of the Privy Council in the case of -- 'Abdul Rahman v. King-Emperor', AIR 1927 PC 44 (M), as limited to illegalities or to cases where the procedure adopted was one which the Code positively prohibited and to cases which might have resulted in actual injustice to the accused.

The above examination of the relevant provisions of the Criminal Procedure Code indicates that the mention or non-mention of Section 34, Penal Code in the charge cannot by any means be considered to be an illegality or a breach of any of its mandatory provisions of a prohibitory type. It is, therefore, erroneous to argue that such a procedure would by itself entitle the accused to a re-trial irrespective of the question of prejudice.

42. A reference to some of the decided cases would also support the same conclusion. The first case that may be cited is -- 'Nanak Chand v. State of Punjab', (S) AIR 1955 SC 274 (N). This case was also referred to on behalf of the appellant. In this case one Nanakchand, who was the appellant before their Lordships, was charged under Section 302/149, I. P. C., and Section 148, I. P. C., along with others.

The Additional Sessions Judge held that the charge of rioting was not proved. He, accordingly, found Nanakchand appellant and three others guilty under Section 302/34, I. P. C. The remaining accused were acquitted. On an appeal being preferred by the convicted persons, the High Court found that- the provisions of Section 34, I. P. C., did not apply.

It accordingly, convicted the appellant Nanakchand under Section 302, I.P.C., simpliciter confirming the sentence of death passed on him and altered the conviction of the other appellants to Section 323, I. P. C. Nanakchand appealed before the Supreme Court and the principal question of law that was urged before their Lordships was whether the appellant, who was charged under Section 302/149, I. P. C., could be legally convicted under Section 302, I. P. C., simpliciter when he was not charged with it.

In that connection their Lordships emphasised the distinction between Section 149 and Section 34, I. P. C., that should be borne in mind in determining this question. Referring to Section 34 their Lordships observed:

> "This section is merely explanatory .....
>
> This section does not create any specific offence." (p. 277).

43. Then their Lordships referred to Section 149, I. P. C., and observed that-

> "There is a clear distinction between the provisions of Sections 34 and 149, I. P. C., and the two sections are not to be confused." (p. 277). Their Lordships then referred to the divergence of opinion that existed between the decisions of the Calcutta High Court on the one hand and of the Madras and Allahabad High Courts on the other. On behalf of the appellant reliance was placed on the Calcutta cases viz., -- 'Panchu Das v. Emperor', 34 Cal 698 (O); -- 'Reazuddi v. King-Emperor', 16 Cal WN 1077 (P);

and -- 'Emperor v. Madan Mondal', AIR 1915 Cal 292 (Q).

On the other hand, the prosecution relied upon a Pull Bench decision of the Madras High Court in -- 'In re Theethumalai Gounder', AIR 1925 Mad 1 (R), which followed the view of Sir John Edge in the Allahabad case reported in --'Queen Empress v. Bisheshar', 9 All 645 (S), Their Lordships of the Supreme Court agreeing with the view expressed by the Privy Council in 'AIR 1925 PC 1 (C)', held that the view taken in the Calcutta cases was correct and that Section 149, I. P. C., in contradistinction to Section 34, I. P. C., did create a specific offence. In this connection they observed.

"A charge for a substantive offence under S. 302, or Section 325, I. P. C., etc., is for a distinct and separate offence from that under Section 302 read with S. 149 or Section 325, read with Section 149 etc., and to that extent the Madras view is incorrect.....

Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty." (p. 278).

They finally laid down the law on the point in the following words:

"After an examination of the cases referred to on behalf of the appellant and the prosecution we are of the opinion that the view taken by the Calcutta High Court is the correct view namely, that a person charged with an offence read with Section 149 cannot be convicted of the substantive offence without a specific charge being framed as required by Section 233, Criminal P. C." (p. 279).

It would, therefore, appear that the reason given by their Lordships of the Supreme Court for holding that the conviction of an accused under Section 302, I. P. C., when he was actually charged under Section 302/149, I. P. C., meant his conviction for an offence different from that of which he was charged. This procedure, clearly contravened the provisions of Section 233, Criminal P. C., and therefore, constituted an illegality.

Their Lordships of the Supreme Court themselves held in that very judgment that Section 34, I. P. C., was unlike Section 149, I. P. C., in this regard. On a parity of reasoning, therefore, it would follow that a failure to charge under Section 34, I. P. C., would not constitute any such illegality for there would be no contravention of Section 233, Criminal P. C. As observed by their Lordships later on in the same case:

"By framing a charge under Section 302, read with Section 149, I. P. C., against the appellant the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under Section 302, I. P. C., was to convict him of an offence with which he had not been charged" (p. 280).

It is significant to note that even in this case the matter was not viewed as altogether independent of the question of prejudice as their Lordships further observed:

"Assuming, however, for a moment that there was merely an irregularity which was curable, we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in the absence of a charge under Section 302, I. P. C." (p. 280) It was further found by their Lordships in this case that the defect in the charge in this regard had actually misled the appellant in his defence. After discussing the evidence in the case, they held:

"It is difficult to hold in the circumstances of the present case that the appellant was not prejudiced by the non-framing of a charge under Section 302, 1. P. C." (p. 280 Col. 2) They accordingly ordered a re-trial. An attempt was made on behalf of the appellant before us to rely on this case. For the above reasons, I am of opinion that it does not support the contention of the appellant. The major fact that distinguishes that case from the present one is that whereas in 'Nanakchand's case (N)' the charge was framed under Section 149, I. P. C., in the present case the charge was for the substantive offence read with Section 34, I. P. C. On the other hand, I am of opinion that the reasoning underlying the decision of the Supreme Court in this case would rather militate against the contention of the appellant than support it.

44. In view of the legal position that emerges from the fact that Section 34, I. P. C., is merely explanatory and does not create a new offence, there is a strong current of authorities of the High Courts in India that it is not even necessary to mention it in the charge.

A classic exposition of this view is to be found in a Full Bench case of the Calcutta High Court reported in 'AIR 1924 Cal 257 (D)'. The judgment of that case was approved of and upheld by the Privy Council in the well-known case in 'AIR 1925 PC 1 (C)'. In 'AIR 1924 Cal 257 (D)', Cuming J., observed as follows:

"Section 34 and the connected Sections 35, 36, 37 and 38 create no substantive offence. They are merely declaratory of a principle of law and in charging an accused person it is not necessary to. cite them in the charge." (P. 312, Col. 2) In the same case Richardson J., observed as follows:

"Section 34 and the closely connected Sections 35, 37 and 38 were intended to lay down compendiously, in the fewest possible words, some elementary principles of criminal liability. They do not create offences and, given the common intention, in practice it does not signify which section applies in any particular case. As matter of construction they are interpretative clauses, included in the chapter of General Explanations, and must be read into the Code definitions of substantive offences." (p. 290' Col. 1) Referring to the form of charge in such cases, Richardson J., in the same case made the following significant observations:

"As to the form of the charge ,in my opinion, where an accused is liable under Section 34 as an accessory at the fact and therefore as a principal, a charge simply of the offence of murder under Section 302 without express reference to Section 34 is sufficient. As Section 34 must be read into Section 302, Penal Code, Section 224, Criminal P. C., conies into play -- 'In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable'.

No doubt, it is always open to the prosecution to state in the charge particulars showing that the accused is charged as an accessory at the fact. But it is not necessary, nor always possible, to do so. The prosecution cannot state in the charge particulars of which they are ignorant.

In a case of murder the murdered man cannot be called at the trial and there may be no other eye-witnesses except the actual principals in the crime. If it is not known which or several men fired the fatal shot or delivered the fatal blow, the charge cannot be explicit and nothing is gained by multiplying charges to meet all possible hypotheses.

In England also a principal in the second degree is chargeable with the substantive offence. Sir Mathew Hale, for instance, says this: 'If A be indicted as having given the mortal stroke and B and C as present, aiding and assisting, and upon the evidence it appears that B gave the stroke and A and C Were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all, for it is only a circumstantial variance, for in law it is the stroke of all that were present aiding and abetting'. (Kale's Pleas of the Crown, Ed. 1800 at p. 43 and see Archbold at pp. 1371, 1372 and 1374)." (pp. 297 and 298).

In 'Debi Prasad Kalwar v. Emperor', AIR 1932 Cal 455 (T), Panckridge J., while commenting on the form of charge in a previous case of the Calcutta High Court reported in -- 'Emperor v. Prafulla Kumar', AIR 1923 Cal 453 (U), observed as follows:

"In that case a person had been accused under Sections 302 and 302/34, Penal Code. In my opinion this is not the correct form of a charge at all because Section 34 does not create an offence but merely enacts a principle of criminal liability, and I consider that if the accused is charged under Section 302 he should not also be charged under Section 302/34." (p. 455, Col. 2) The observations in this case probably go too far as the citation of Section 34 need not be considered to be improper or undesirable. They, however, indicate the length to which some judgments have gone in this regard.

45. In 'Khuda Das v. Emperor', AIR 1933 Lah 313 (V), the conviction of the accused for the substantive offence read with Section 34, I. P. C., was upheld even though Section 34, I. P. C., was

not mentioned in the charge on the ground that the accused was not misled in his defence" thereby.

46. 'Hari Lal v. Emperor', AIR 1935 Pat 263 (W) which is a Bench case of the Patna High Court, Courtney-Terrell C. J., dealing with the form of charge in such a case observed as follows:

> "It is sometimes apparently thought that there is a difference between a charge under Section 379 and as it is said a charge 'under Section 379 read with Section 34'. There is in law no distinction between the charges. Section 34 is a mere statement of explanation to be attached to any section which deals with a criminal offence" (p. 265, Col. 2).

47. In 'Nga Tha Htin v. Emperor', AIR 1933 Rang 304 (X), it was held:

> "that although it was desirable that in such a case as the present the application of Section 34, I. P. C., should be expressly set out in the charge, yet so long as it was clear that the accused had not been prejudiced by the omission, it could not affect the validity of his conviction. It was sufficient that it had been made clear in the course of the prosecution that this common intention was imputed to all the persons involved in the crime, (head-note).

48. In 'Waryamsingh Arursingh v. Emperor', AIR 1941 Lah 214 (Y), the facts were that the appellant Waryamsingh was charged along with anotner person for the murder or Makhansingh. Section 34, I. P. C., however, was not specified in the charge. The trial Judge thought that in this situation, it would be illegal for him to convict Waryamsingh on the basis of Section 34, I. P. C., although he was of opinion that on the evidence before him, the accused was guilty of Section 34, I. P. C., was to be applied.

The trial Court, accordingly, took the course of convicting the accused Waryamsingh under Section 307, I. P. C. Waryamsingh appealed to the High Court. Blacker J., in this connection observed as follows:

> "We cannot overlook the other legal error which the learned Sessions Judge has made when he held that where Section 34 has not been specifically mentioned in the charge, a conviction for the offence following the provisions of that section is illegal." (p. 215, Col. 1) After discussing the various authorities, he again observed as follows:
>
> "We have not been shown any authority to the effect that Section 34 has to be mentioned in the charge and we are ourselves of opinion that there is no legal necessity to specify this section. The section is really nothing more than explanatory and embodies in the Code the ordinary common sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually." (p. 215, Col. 2) Although there was no appeal by the Government, the High Court thought that the error committed by the trial Court was so serious as to justify the interference of the High Court 'suo motu' by invoking its revisional powers.

> The acquittal of the appellant by the trial Court under Section 302, I. P. C., was, accordingly, set aside and a re-trial ordered.

49. The case reported in 'Bishwanath v. Emperor', AIR 1946 All 153 (Z), which is a single Judge decision of the Allahabad High Court appears to be the solitary case in which a contrary view is taken to the effect that omission to mention Section 34, I. P. C., is a vital defect with the result that the accused could be held responsible only for result of his own act. The view taken in this case does not appeal to be warranted by the provisions of law and is dissented from, in a subsequent Bench decision of the Allahabad High Court reported In -- 'Sheo Ram v. Emperor', AIR 1943 All 162 (Zl).

50. In 'AIR 1948 All 162 (Z1)', the question of law referred to for decision to the Bench was whether the non-framing of a charge with the aid of Section 34, Penal Code was a bar to the conviction of a person for an offence by following provisions of Section 34, Penal Code or not. In that case the opinion expressed by the Bench on the above point was as follows:

> "We are of opinion that the mere omission to mention Section 34, Penal Code, in the charge does not bar a conviction of the accused for an offence read with Section 34, Penal Code.
>
> Section 34, Penal Code, does not create an offence. It simply lays down a principle of criminal liability. It is, therefore, not necessary to mention it in the charge." (p. 162 Col. 2).
>
> The contrary opinion expressed by Mulla J., in AIR 1946 All 153 (Z), was dissented from. This case was followed in a subsequent Bench decision of the same Court reported in -- 'Kunwarpalsingh v. Emperor', AIR 1948 All 170 (Z2), in which 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 if there has been no failure of justice." (p. 170 head-note c.)

51. To the same effect are the observations in -- 'Narayan v. State', AIR 1953 Hyd 161 (Z3); land -- 'Koli Vagha Lakha v. State of Kutch', AIR 1955 Kutch 1 (Z4). In the latter case 'AIR 1948 All 162 (Z1)', was relied on.

52. The above cases bear out the view that non-mention of Section 34, I. P. C., in the charge is not a bar to the conviction of an accused by invoking the aid of Section 34, I. P. C., if the accused has not been misled in his defence or in any way prejudiced thereby. In this case, however, we are concerned with the converse position. Here the charge did mention Section 34 and the question is whether after the case under Section 34, I. P. C., has broken down, the accused can be convicted of the substantive offence.

The principles involved in both the cases are no doubt analogous but it would, however, appear . that, as already observed above, the converse case with which we are concerned stands on a footing which is different and is more favourable to the prosecution.

53. The learned counsel for the appellant, however, contended that the observations of the Supreme Court in '(S) AIR 1955 SC 419 (A)', are fully applicable to the present case. I, however, find myself unable to endorse his argument. The first point to be noticed is that in 'Surajpal's case (A)', the accused were charged not with the aid of Section 34 but with Section 149, I. P. C. The trial Court had convicted the appellant under Sections 302/149, 307/149 and 148, I. P. C. The High Court set aside the conviction of the appellant under Sections 302/149 and 307/149 and instead thereof convicted him under Sections 302 and 307 alone. In this situation when the matter went to the Supreme Court in appeal, their Lordships observed as follows:

> "One important fact which emerges is that there have been 'no' direct and individual charges against the appellant for the specific offences under Sections 307 and 302, I. P. C. The question that arises is whether, without such direct charges the convictions and sentences for those offences can be maintained.
>
> It appears to us quite clear that a charge against a person as a member of an unlawful assembly in respect of an offence committed by one or other of the members of that assembly in prosecution of its common object is substantially different one from a charge against any individual for an offence directly committed by him while being a member of such assembly.
>
> The liability of a person in respect of the latter is only for acts directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other members of the assembly, provided that it was in prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed.
>
> A charge under Section 149, I. P. C., puts the person on notice only of two alleged facts, viz., (1) that the offence was committed by one or other of the members of the unlawful assembly of which he is one, and (2) that the offence was committed in prosecution of the common object or is such that was known to be likely to be so committed." (p. 422 Col. 2).
>
> The above observations of the Supreme Court would not be applicable to the present case where the charge was made with the aid of Section 34. In such a case, as already observed, the conviction of the appellant for the substantive offence is not for an offence substantially different from the one he was charged with. Further in a charge in pursuance of Section 34 every individual accused is given notice of his participation in the offence and he is liable for the criminal act in which he himself participated in some form or the other.

No doubt both Sections 34 and 149 create a distinct head of criminal liability which has come to be known in law is 'constructive liability', but whereas under Section 149 liability may be wholly vicarious in so far as under Section 149 a particular accused might not be an actual participant in the relative offence at all, under Section 34 it can be. said to be only partly vicarious in so far as every accused in such a case becomes an actual participant in the offence by making a personal contribution however small to the general result which is the sum-total of acts constituting the actual offence.

The basis of the judgment of their Lordships as observed by them later on is that "The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor". These observations again would not apply to a case under Section 34, for, in such a case the conviction is not for a distinct or separate offence at all. Thus the mere fact that 'Surajpal's case (A)', happens to be a case under Section 149 would itself be quite sufficient to distinguish that case from the present case.

Moreover, it may be noticed that even in 'Surajpal's case (A)', the mere fact that the charge was under Section 149, I. P.C., was not considered a sufficient ground for setting aside the conviction, and their Lordships did not view the matter as altogether divorced from the question of prejudice. It is significant to note that, the charge under Section 149 in that case also presented a number of other features which opened the door for the possibility of the accused being seriously misled and prejudiced on that score.

These features are enumerated in the judgment itself. Thus for example in 'Surajpal's case (A)', the charge did not specify the authorship of the pistol fire which had resulted in the injuries giving rise to offences under Sections 302 and 307. The charge as framed in the court of the committing Magistrate was, as observed by their Lordships 'pointedly vague' and of a definitely 'non-committal' type.

It was left unamended in the same vague and undefined condition by the trial court. As observed by their Lordships: "The appellant might well have relied on the absence of any such amendment as being an indication that he was not called upon to defend himself on the footing of his being the author of the pistol fire." Further in 'Surajpal's case (A)', it was not quite certain whether the injuries in question could be caused by the country-made pistol which the appellant was alleged to be carrying in his hands. No arms expert was produced on behalf of the Government to speak on the same.

If the accused had been called upon to defend himself on the basis of his individual participation in the offence, then he might have questioned the medical officer on the point and, as observed by their Lordships, "might well have availed himself of the opportunity to elucidate by cross-examination or positive defence, the nature of the fire-arm which would have caused the actual injuries found on the bodies of P. W. 2

> and of deceased Surajdin."

After adverting to the abovementioned factors, their Lordships concludes as follows:

> "In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellant under Sections 307 and 302, I. P,. C., had materially prejudiced him. We must accordingly set aside the convictions and sentences of the appellant under Sections 307 and 302, Penal Code".

Then their Lordships went on to consider the evidence of the prosecution in respect of the two counts mentioned above, and after examining its shaky nature on merits did not consider it feasible to order a retrial under Sections 307 and 302, I. P.C., and altogether acquitted the accused of the said offences thereby allowing his appeal to that extent. It may, therefore, be noted that even in respect of a charge under Section 149, 'Surajpal's case (A)', cannot be treated as an authority for the bald proposition of law that in every case where a charge is under Section 149 and the accused is convicted of the relative offence, the accused would be entitled to a retrial irrespective of the question of prejudice.

Thus if a charge under Section 149, I. P.C., were also to specify clearly and definitely that a particular accused himself committed the relative offence thereby giving him full notice of his individual liability in respect of the said offence and the prosecution evidence on the point is clear and consistent and further there is nothing in the proceedings to show that the accused was misled or prejudiced in any manner, then it might very well be argued that the observations in 'Surajpal's case (A)', would not be applicable to such a case and the conviction recorded in respect of the relative offence in such a case would be justified and proper.

This question, however, does not arise in the present case. The charge in the case before us was one which was made in pursuance of Section 34; and, for the above reasons, I am of opinion that 'Surajpal's case (A)', cannot be cited as an authority in support of the proposition contended for by the learned counsel for the appellant in the present case.

54. The next case cited on behalf of the appellant is a judgment of this Court in 'Cri Appeal No. 156 of 1955 (All) (B)'. This was a case in which a charge under Section 302/34, I. P.C., was framed against the appellant Karansingh along with another person, namely, Ninami. The trial court having acquitted Ninammi, it convicted the appellant Karansingh under Section 302, I. P. C. Mr. P.C. Chaturvedi who appears, for the appellant in this case appeared for the appellant in that case also.

He relied on the same case of 'AIR 1955 SC 419 (A)', and contended that in view of the observations of their Lordships of the Supreme Court in 'Surajpal's case (A)', the conviction of the appellant was vitiated. No doubt in this case the learned Judges applied 'Surajpal's case (A)', to a case under Section 34, I. P. C. The observations of the learned Judges so far, as the legal point was concerned should, however, be taken to be obiter, as, in their opinion, there was no reliable evidence to sustain the conviction of the appellant and the appeal was accordingly allowed on merits and the appellant acquitted.

In so far as 'Surajpal's case (A)', was applied in 'Karansingh's appeal (B)', to a case under Section 34, I.P.C., I have already given my reason for distinguishing 'Surajpal's case (A)', from a case under Section 34 of the Indian penal Code and it is not, therefore, necessary for me to go further into the matter.

55. In this connection it may be mentioned that even in cases where the charge is under Section 149, I. P.C., according to the view of their Lordships of the Supreme Court, there is no bar to the conviction of an accused of the substantive offence by invoking the aid of Section 34 if the common object specified in the charge embraces the common intention imputed to him. This proposition of law would be borne out by the cases reported in -- 'Lachhmansingh v. State', AIR 1952 SC 167 (Z5); and -- 'Karnailsingh v. State of Punjab', AIR 1954 SC 204 (Z6).'

56. Dealing with this point in 'AIR 1952 SC 167 (Z5)', their Lordships observed as follows:

> "It was also contended that there being no charge under Section 302 read with Section 34, Penal Code, the conviction of the appellants under Section 302 read with Section 149 could hot have been altered by the High Court to one under Section 302 read with Section 34, upon the acquittal of the remaining persons. The facts of the case are however such that the accused could have been charged alternatively, either under Section 302 read with Section 149 or under Section 302 read with Section 34. The point has, therefore, no force." (p. 170 Col. 2).

57. In 'Dalipsingh v. State of Punjab', AIR 1953 SC 364 (27), it was observed that it was not possible in that case to have recourse to Section 34 because the appellants had not been charged with that even in the - alternative and the common intention required by Section 34 and the common object required by Section 149 were far from being the same thing. These observations were, however, clarified by their Lordships of the Supreme Court in 'AIR 1954 SC 204 (Z6)', as being confined to the particular circumstances of that case, and the view taken in 'AIR 1952 SC 167 (Z5)', was reaffirmed. The relevant observations of their Lordships of the Supreme Court in this regard in 'Karnailsingh's case (Z6)', are as follows:

> "We do not read the observations in 'AIR 1953 SC 364 (Z7)', as an authority for the broad proposition that in law there could be no recourse to Section 34 when the charge is only under Section 149. Whether such recourse can be had or not must; depend on the facts of each case. This is in accord with the view taken by this Court in 'AIR 1952 SC 167 (Z5)', where the substitution of Section 34 for Section 149 was upheld on the ground that the facts were such 'that the accused could have been charged alternatively either under Section 302 read with Section 149 or under Section 302 read with Section 34.'" (p. 207 Col. 1) The test for determining whether Section 34 can be substituted for Section 149 was laid down by their Lordships of the Supreme Court in this case as follows:
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> "If the common object which is the subject-matter of the charge under Section 149 does not necessarily involve a common intention, then substitution of Section 34 for

Section 149 might result in prejudice to the accused and ought not therefore to be permitted. But if the facts to be proved and the evidence to be adduced with reference to the charge under Section 149 would be the same if charge were under Section 34, then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter." (p. 207 Col. 1).

Thus even in such cases the matter would hinge on the question of prejudice. The crucial test for determining it would be whether the facts which were required to prove a charge upon which the accused was actually tried were the same as those required to sustain a conviction for the charge upon which he was actually found guilty.

Although in the present case the question is. not whether Section 34 can be substituted for Section 149, yet. the above cases are relevant as indicating, that this course is held to be permissible by Supreme Court even though the substitution of Section 34, for Section 149 would mean the substitution of one-offence for a distinct and separate offence altogether. On the other hand, the deletion of Section 34 from the charge does not involve any such change at all.

No fresh offence is being substituted for the offence charged. The accused was charged with one substantive offence and he is being convicted of the same substantive offence with which he was, charged. Section 34 was mentioned only with a view to obviate any likely objection on the part of the accused on the score of prejudice. The latter case, therefore, is a much stronger case than the former. If, therefore, the substitution of Section 34 for Section 149 cannot be regarded as an illegality vitiating the conviction of the accused regardless of the question of prejudice, then with, much less force it can be argued that the deletion of Section 34 and falling on the substantive offence is an illegality which would entitle the accused to a. retrial irrespective of the question of prejudice.

58. Reference in this connection might also be made to the case of -- 'Kirpal v. State of U. P.', AIR 1954 SC 706 (Z8). In this case, thirteen accused were charged under Section 148, and Sections 323 and 302 read with Section 149, I. P. C. The trial court acquitted ten of them of all charges. The remaining three were also acquitted of the charge under Section 302, but they were convicted under Sections 304(1) and 323 read with Section 34, I. P.C. The three convicted persons filed appeals in the High Court against their convictions and sentences, and the State also filed an appeal against their acquittal under Section 302, I.P.C. The Hight Court dismissed the appeal of the convicted persons and allowed the Government Appeal, finding all the three convicted persons guilty under Section 302. read with Section 34, I. P. C. and sentencing them thereunder.

On appeal having been preferred by the three convicted persons to the Supreme Court, all the persons were found guilty under Section 326/34 as well as Section 323/34 but only one of them was found guilty under Section 302 and sentenced thereunder to death. This case, therefore, provides an

instance of a case in which although all the accused were originally charged under Section 149, I. P. C. yet conviction was eventually recorded by the Supreme Court not only upon a specific substantive offence read with Section 34, I. P. C. but also upon the specific relative offence only.

The obvious explanation for this course is to be found in the fact that the question of prejudice was never raised on behalf of the accused in any Court nor was the legal point connected therewith agitated at any stage throughout the chequered career of the said case.

59. The last case to which reference might be made is a Bench case of the Calcutta High Court reported in -- 'Dastarali v. Emperor', AIR 1931 Cal 625 (Z9). That was a case in which the accused were charged under Sections 467/193 read with Section 34, and convicted under Sections 467/193 only. The following observations in the judgment are directly relevant to the question at issue in this case :

> "The only point worth considering in this appeal is, whether the convictions under Sections 467 and 193, I. P. C. are correct in law in view of the fact that they were charged with offences under those sections read with Section 34.
>
> It has been argued that if a person is charged with an offence read with Section 34, he could not be convicted of the 'substantive' offence. The view does not appear to be correct. By using the words 'substantive offence' it is suggested that the offence under Section 34 is a constructive offence. Under Section 34, a person is charged with having committed the offence along with other persons.
>
> If it is proved that the other persons had no hand in committing the offence, but it was committed by the accused himself, or if the prosecution fails to prove that the other persons committed the offence, but succeeds in proving that one of the accused did it or had a part in 'Committing it there does not seem to be any reason why he cannot be convicted for committing the offence himself." (P. 626 Col. 1).
>
> The above view was taken on the assumption that Section 34 did not create a new offence but was merely a rule of law and applied only when a criminal act was done by several persons of whom the accused charged thereunder was one. In the alternative it was held that:
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> "If Section 34 creates a different offence, the accused may still be convicted of an offence when charged with that offence read with Section 34: vide Section 236 read with Section 237, Criminal P.C." (Page 626, Col. 2)

60. To sum up, a scrutiny of the real Import, nature and ambit of Section 34 of the I. P. Code, a contrast of the same with Section 149 of the I. P. Code, a survey of the relevant provisions of the Code of Criminal Procedure, as also a reference to the decisions of the Supreme Court, the Privy Council and the Indian High Courts would bear out the proposition that where an accused is charged with a substantive offence by invoking the aid of Section 34, I. P.C., there is no legal bar to

the conviction of the accused under the substantive offence simpliciter.

Such a procedure is not in disregard of any mandatory provision of law and does not, therefore, necessarily vitiate the conviction of the accused so as to entitle him to claim a retrial irrespective of the question of prejudice. Even supposing for a moment that it is deemed to be an irregularity, before a re-trial can be ordered, it is incumbent upon the accused to show that it misled him and in fact occasioned a failure of justice thereby materially prejudicing him in his defence.

61. The last question, therefore, that deserves consideration is whether any prejudice has, in fact, resulted to the accused in this case from the frame of the charge. The charge in the present case reads as follows :

> "I, J.S. Srivastava, Mag., I class, Etah, charge you dm Prakash, Lakhansingh and Babusingh that you on 19-6-1954 at about 7 p.m. in village Kantaur, P.S. Marehra in prosecuting the common object of putting to death Sarnamsingh did commit the murder of Sarnamsingh and thereby committed an offence under Section 302, I. P. C. read with Section 34, I. P. C. within the cognizance of the court of session, Etah and I hereby direct you to be tried for the same by the said court."

The charge clearly mentions Om Prakash appellant as one of the persons who had participated alone; with Lakhansingh and Babusingh in committing the murder of Sarnamsingh. The charge further discloses that the common object of all the aforementioned accused was to murder Sarnamsingh. The learned counsel for 'the appellant tried to rely on the use of the word 'object' in place of 'intention', but, to my mind, the difference is merely verbal as the object alleged is identical with the intention imputed to him.

There can, therefore, be absolutely no question of the accused being misled by the mere use of the word "object" for intention. If the charge alleges that the two other persons joined Om Prakash in the commission of the offence of murder with the common intention of murdering Sarnamsingh, it is difficult to understand how the accused can say that the charge did not give him notice of his own individual responsibility in the matter.

The above charge only indicates that initially the prosecution undertook to prove that all the three accused participated in the commission of the crime with a common intention. If, however, the prosecution failed to prove the participation of the other two accused with the same object, all that can be said against the prosecution is that they have failed to prove a part of the allegations in the charge, but it cannot be said that the charge did not give notice to the accused of the remaining part viz., his own participation in the offence which, was also mentioned in the charge.

62. Further the common object in the charge is stated to be that of 'putting to death Sarnamsingh'. The common intention alleged is, therefore, coincident with the intention of the offence of murder. Each of the accused had, therefore, notice not only of his own participation in the offence but also of the intention which is its mental ingredient.

63. Further our attention was invited to the fact that the charge did not state that Om Prakash committed the murder by striking three or four blows with his dagger at the neck of Sarnamsingh. While, therefore, the charge alleged that Om Prakash participated in the murder, it did not allege the exact mode of his participation; in other words the manner of the commission of the offence, was not specified in the charge.

I have already discussed this matter above and observed that under the provisions of the Cr. P.C. the exact manner of the commission of murder is not required to be specified in the charge in a case like this. Reference in this connection has already been made to the illustration (e) appended to Section 223 of the Cr. P.C. which states that where "A is accused of the murder of B at a given time and place the charge need not state the manner in which A murdered B."

Thus if the charge against tfce accused was for the substantive offence only and merely stated that he committed the murder of Sarnamsingh at a particular time and place and omitted bo state that the said murder was committed by him by striking a dagger blow at the neck of the deceased it could not be argued that the conviction was bad because the exact weapon of offence or the specific manner of the commission of the offence was not mentioned in the charge.

In any case, the accused cannot be said to have been prejudiced by such omission as the evidence on the point was throughout consistent clear and specific. Further the entire proceedings of the case already showed that the accused was fully apprised of the exact manner of his participation. In the present case, the particular part assigned to the accused Om Prakash was mentioned in the first information report which stated that-

> "Babusingh and Lakhansingh caught hold of Sarnamsingh, and Om Prakash at once took out & double-edged 'katar' from under his bush-shirt and struck three or four blows on his (Sarnamsingh's) neck, as a result of which he was badly injured .... He became unconscious and shortly thereafter succumbed to his wounds. After causing injuries, Om Prakash, son of Baherisingh, immediately ran away with the 'katar'."

The first information report, therefore, gives a graphic and a detailed description of the manner in which each particular accused participated in the offence and assigns a specific part to him. All the eye-witnesses produced in the case unanimously gave exactly the same picture as is given in the first information report and assigned the same part to Om Prakash appellant as well as to other accused as is given in the first information report. In the Sessions Court, a question to the following effect was put to Om Prakash:

> "Q. Did you go back at the time and then come back soon from inside your house and abused Sarnam and when he ran to admonish you the other two accused held him and you assaulted him with 'katar' of the injuries from which he died?"

A similar question was put to him also in the committing Magistrate's court. In both the courts the answer of the appellant to the said question was in the negative. He did not set up any counter case, nor did he allege that he took any part other than that assigned to him in the prosecution evidence

and put to him in the questions by the enquiry court and the trial court.

On the other hand, his defence was a wholesale denial of all participation in the Offence in any manner whatsoever. His answer to the above question in the trial court was: "This is all wrong." In the circumstances, it is difficult to understand what conceivable purpose can be served by ordering a retrial. No counter case or fresh Sine of cross-examination is suggested, either in the grounds of appeal or in the petition of appeal submitted by the appellant from jail.

No fresh line of approach to the case, if a retrial is ordered, is suggested even by the learned counsel for the appellant in his arguments in this Court. In fact any grievance of prejudice on this score is conspicuous by its complete absence both from the grounds of appeal preferred -by the appellant himself from jail as well as from the grounds of appeal contained in the memo presented to this Court by his counsel.

Under the circumstances, an order of retrial will only result in the protraction of proceedings, waste of public time and money, and harassment of the accused. The important witnesses in the present case being relations of the appellant it is possible that a retrial might result in some influence being brought to bear on them with a view to change their statement. If so, an order of retrial would not be in the interests of Justice either." On the other hand, It might defeat the ends of justice.

Under the circumstances, the point raised on behalf of the appellant appears to me to be a merely technical one. Even supposing that there has been some irregularity in the matter, I am quite certain that the accused has 'not been prejudiced by it in the slightest degree. The arguments of the learned counsel for the appellant on this point appear to me to be devoid of all force and must, therefore, be overruled.

I may mention that I have taken time to consider this matter and give an elaborate judgment in this case incorporating my views on it, as the same point has been repeatedly raised before us in a number of cases by the learned counsel for the appellant as well as by other counsel.

64. For the above reasons, I am of opinion that this appeal should be dismissed, the reference for confirmation of the death sentence should be accepted and the sentence of death passed on the appellant should be carried out according to law.

Chowdhry, J.

65. I have had the benefit of reading the judgment of my learned brother and agree that no retrial is called for in the case and that on an appraisal of the evidence the appellant's conviction should be maintained.

66. The defect in the charge on foot of which retrial of the appellant was pressed was that, while charged constructively with the help of Section 34, the appellant has been convicted for the substantive offence punishable under Section 302, I. P. C. And reliance was placed on (S) AIR 1955 SC 419 (A), and an unreported Division Bench decision of this Court in Criminal Appeal No. 156 of

1955 (All) (B).

67. Now, in view of the provisions of sections 225 and 232 of the Criminal Procedure Code the crucial test for judging whether a defect in the charge is material necessitating a retrial is whether the person convicted of an offence was thereby misled in his defence. This appears to be the rationale of the Supreme Court decision. The charge framed in that case was scrutinized and found, by reason of absence of a specific charge in respect of the particular offence for which the appellant stood convicted, to have materially prejudiced him. And this finding was the basis for the consideration of the further question whether or not a retrial should, be directed.

68. The test adopted was whether the charge framed put the person concerned on notice of fact's on which his direct individual liability depended. The charge framed in that case was examined with reference both to the provisions of Section 149, I. P.C., and to the language of the charge, and it was found that it did not satisfy the test.

In a charge with the help of Section 149 the liability that arises is for acts which may have been done by any of the other members of the unlawful assembly and not necessarily by the person concerned himself. The charge itself was also found to be pointedly vague as to the authorship of the act for which the appellant had been convicted.

69. The fact that the language of the charge was also scrutinized shows that the mere fact of Section 149, I. P.C., being one of the ingredients of the charge may not be decisive. Individual liability for the particular offence, though not strictly required by section 149, may yet be there in the charge as framed. And if that be the case, there could be no question of prejudice or being misled in defence.

70. In the present case also the charge framed was for constructive liability, though that liability was sought to be fastened on the appellant, not with the help of Section 149, but with that of Section 34, I. P. C. There is, however, this distinction between these two sections that the doing of a criminal act and doing it intentionally are elements which are foreign to Section 149 but implicit in Section 34.

In the words of Lord Sumner in AIR 1925 PC 1 (C), which is the locus classicus on the subject, "The element of participation in action which is the leading feature of Section 34, is replaced in section 149 by membership of the assembly at the time of the committing of the offence", and (speaking of the words "in furtherance of the common intention of all" inserted in the section by Section 1 of Act 27 of 1870).

> "The amending words introduced, as an essential part of the section, the element of common intention prescribing the condition under which each might be criminally liable when there are several actors."

71. The only difference between a direct charge for an offence and one with the help of Section 34, where the common intention is to commit the particular offence committed, is that, where-as under the former the criminal act and the intention to commit it are individual to the person charged, under the latter the same are shared by several persons. But the fact that the act and the intention

are shared by one with others does not make one any the less an intentional participator in action.

That being so, even when there is, so to say, a dissolution of the cosharership by elimination of S. 34, the elements of the doing of the criminal act and of doing it intentionally still adhere to the individual concerned surviving the dissolution. And these are the elements notice of which will fix one with liability for the offence. In such a case there would, therefore, be no question of prejudice where, though charged with the help of Section 34, one is convicted for the substantive offence.

72. There are, however, two cases in which difficulty may arise even where charge is framed with the help of Section 34. It has been seen that in (S) AIR 1955 SC 419 (A) even though the charge was one under Section 149, its language was scrutinized in the hope -- a forlorn hope though it turned out to be -- of finding words therein attributing Individual liability to the person concerned. Conversely, a charge, though framed with the help of section 34, may yet be so ill-worded as to bereave it of its essential elements.

In such a case, mere mention of Section 34 in the charge will not act as a charm to remove the bane of prejudice. The other case would be where the vinculumn juris of common intention does not cover the entire bundle of criminal acts constituting the offence committed. In such a case, liability with the help of Section 34 would extend only to the likely result of the joint act, and no further.

See -- 'The State v. Saidu Khan', AIR 1951 All 21 (PB) (Z10) and AIR 1954 SC 706 (Z8). In the latter case, the offence committed was murder but the common intention was found to be only to give a beating. The likely result of that common intention was found to be to cause grievous hurt. Those found guilty with the help of Section 34 were therefore convicted only under Section 326, I. P.C., while one was convicted under Section 302, I.P.C., for his individual liability regardless of Section 34.

In such a case, mere framing of charge with the help of Section 34 would be no guarantee against prejudice. In fact, there is no charm in the mention of one section or another; the thing to do is to scrutinize the language of the charge with a view to finding out a possible defect therein necessitating a retrial.

73. The language of the charge in the present case has been scrutinized by my learned brother and I concur with him that it gave the appellant notice of all those facts which were necessary to make out the offence for which he was convicted.

74. A word about the Division Bench decision of this Court in Cri. Appeal No. 150 of 1955 (All) (B). The judgment in that case was delivered by me. There is no doubt that the principle of the decision in (S) AIR 1955 SC 419 (A) was applied in that case even though the switching on to the substantive offence was from Section 34 and not, as in the Supreme Court ruling, from Section 149.

As the emphasis in that case was on facto rather than on law, the essential difference between the two sections was not scrutinized and the views laid down in the Supreme Court ruling were applied on the ground that liability under Section 3-1 was as much constructive as that under Section 149, I.

P. C. The ratio of their Lordships' decision, however, did not lie in the passage where Section 149 has been referred to as creating a constructive liability, as the above detailed examination of that ruling would show.

From the above examination it would appear that the principle of that decision pertaining to Section 149 is not applicable to a case where a charge with the help of Section 34 has to be considered. It is, however, not necessary to pursue the matter further since, as pointed out by my learned brother, the observations in the Division Bench decision of this Court on the aforesaid legal point were mere 'obiter dicta' inasmuch as it was found that there was no reliable evidence to sustain the conviction of the appellant and the appeal was accordingly allowed on merits and the appellant was acquitted.

75. In the result, I concur with my learned brother that this appeal should be dismissed, the reference for confirmation of the death sentence accepted and the sentence directed to be carried out according to law.

BY THE COURT

76. We, accordingly, dismiss the appeal and accept the reference. The conviction of the appellant under Section 302, I. P. C. is maintained and the sentence of death passed upon him is confirmed. The sentence shall be carried out according to law.

77. Leave to appeal to the Supreme Court is allowed.