

Virendra Singh vs State Of M.P on 9 August, 2010

Author: Dalveer Bhandari

Bench: A.K. Patnaik, Dalveer Bhandari

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1316 OF 2002

Virendra Singh

...Appellant

Versus

State of Madhya Pradesh

....Respondent

JUDGMENT

DALVEER BHANDARI, J.

1. This appeal has been preferred by the appellant Virendra Singh against the judgment dated 17.5.2002 passed by the High Court of Judicature of Madhya Pradesh, Bench at Gwalior in Criminal Appeal No. 262 of 1986.

2. Brief facts which are necessary to dispose of the appeal are as under:

Hakim Singh and his two sons Virendra Singh and Kamlesh Singh went to the house of the deceased Bhagirath and asked him to reap their crop the next day. Bhagirath informed that he would not be able to reap their crop as he had to reap the crop grown in his own field. He also informed the accused persons that apart from reaping his crop he would also be busy in 'lagan ceremony' of his son Satyanarain and Tilak ceremony of his grandson, Lakhan which was going to be performed after two days. In spite of his clear explanation for not being able to reap the crop of the accused persons, they pressurized the deceased Bhagirath to reap the crop standing on their field. The accused persons got annoyed on deceased's refusal to reap their crop. Accused Hakim Singh, Kamlesh and Virendra Singh armed with weapons went to the house of Bhagirath the next day at 7.00 a.m. to take revenge for declining to carry out the order of the accused persons. Virendra Singh and Hakim Singh were armed with

lathis and Kamlesh was armed with a rifle. They asked Bhagirath why he had not gone to reap their crop. The deceased replied that he had already informed them that he would not be in a position to reap their crop for the aforementioned reasons. On getting this response, accused persons, namely, Hakim Singh and Virendra Singh got infuriated and started hurling filthy abuses and beating Baburam, son of the deceased. When Hakim Singh and Virendra Singh were assaulting Baburam with lathis, then Lakhan, Rakesh, Satyanarain, son of the deceased, Ramshri, mother of Baburam and Rajkumari, sister of Baburam rushed to save Baburam. Hakim Singh and Virendra Singh also assaulted Lakhan with lathis on the head, shoulder and back. The accused persons also caused injuries to Ramshri and Satyanarain.

3. The deceased Bhagirath intervened. At that point of time Hakim Singh exhorted Kamlesh to shoot Bhagirath. Kamlesh shot at Bhagirath in the stomach, which resulted in his death. Kamlesh also fired at Baburam but the bullets missed him. After commission of the offence the accused persons ran away towards the canal. The incident was witnessed by Ramsahay P.W.11 and Bhoorelal.

4. The trial court, after scrutinizing the entire evidence on record, convicted Hakim Singh, Kamlesh and Virendra Singh under section 302 read with section 34 of the Indian Penal Code (for short, IPC).

5. It was canvassed before the trial court that the deceased had died because of the fire arm injury caused by Kamlesh, therefore, Virendra Singh and Hakim Singh cannot be convicted under section 302 read with section 34 of the Indian Penal Code.

6. Baburam P.W. 6 is an injured eye witness. He had given the graphic description of the entire incident and specifically mentioned that Kamlesh and Virendra Singh had abused him and then Hakim Singh and Virendra Singh had beaten him with lathis. He further deposed that when his mother came to save him, then accused Hakim Singh and Virendra Singh had assaulted his mother also on her hand and head by lathis, which resulted in the fracture of her hand. The accused also assaulted Lakhan on the head by lathi. It was further deposed by Baburam P.W. 6 that Hakim Singh then asked Kamlesh to shoot Bhagirath and Kamlesh shot at Bhagirath. The pellets of the bullet also injured Satyanarain and his sister Rajkumari.

7. Satyanarain P.W.7 had also given the detailed description of the entire incident and specifically stated about the role of the appellant Virendra Singh in the entire incident.

8. Rajkumari P.W.10 has categorically stated that Hakim Singh along with Virendra Singh armed with lathis and Kamlesh armed with a firearm came to the house of Bhagirath and started abusing him and thereafter Hakim Singh and Virendra Singh assaulted Baburam with lathis. When Baburam shouted on getting lathi blows, then his mother Ramshri, Satyanarain and Lakhan rushed to save him. Both Hakim Singh and Virendra Singh also assaulted Ramshri, the mother of Baburam on her hand and head, which resulted into a fracture of her hand. Lakhan was also assaulted.

9. The version of prosecution witnesses is consistent and, despite gruelling and long cross-examination, no dent could be made by the defence on the testimony of the prosecution witnesses. The trial court convicted all the three accused under section 302 read with section 34 of the Indian Penal Code.

10. Hakim Singh died during the pendency of the appeal. In appeal by the remaining two accused Kamlesh and Virendra Singh, the High Court again carefully scrutinized the entire evidence and came to a clear conclusion that the appellant Virendra Singh is also guilty under section 302 read with section 34 of the Indian Penal Code.

11. The High Court observed that all the accused persons went to the house of the deceased Bhagirath with the intention to teach him a lesson. Immediately on reaching the spot Virendra Singh and Hakim Singh started beating Baburam with lathis and when deceased Bhagirath intervened, he was shot at by Kamlesh in furtherance of the commission of offence.

12. In the facts and circumstances of this case, it cannot be concluded that death was caused on account of grave or sudden provocation. On the contrary, it is fully established that all the accused had gone to the house of Bhagirath to teach him a lesson armed with lathis and a rifle, because the previous day the deceased declined to follow their orders of reaping their crops because of his reasons. On Hakim Singh's exhortation, Kamlesh fired at the deceased Bhagirath causing his death. According to the prosecution, the appellant Virendra Singh is clearly guilty of an offence under sections 302 read with 34 IPC. Admittedly, all the three accused in consonance with the prearranged plan had gone to the house of the deceased to teach him a lesson for disobeying their orders. All three of them were armed with weapons, so there was a prior meeting of minds or pre- concert.

13. The High Court, on the basis of the entire evidence on record, came to a definite conclusion that the appellant Virendra Singh is guilty under section 302 read with section 34 of the Indian Penal Code.

14. The appellant being aggrieved by the judgment of the High Court preferred this appeal.

15. We have again scrutinized the entire evidence on record to satisfy ourselves whether the appellant Virendra Singh has been wrongly convicted under section 302 read with section 34 IPC?

16. According to the appellant, in the facts and circumstances of this case, section 34 IPC could not have been invoked. In order to deal with this argument, it has become imperative to deal with section 34 IPC. It reads as under:

"34. Acts done by several persons in furtherance of common intention.- When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

17. Ordinarily, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had the common intention to commit the offence.

18. The words "common intention" implies a pre-arranged plan and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Common intention comes into force prior to the commission of the act in point of time, which need not be a long gap. Under this section a pre-concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the spot, it must, however, be anterior in point of time to the commission of the crime showing a pre- arranged plan and prior concert. The common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference. This has been clearly laid down by this Court in the case of Amrik Singh & Ors. v. State of Punjab 1972 CrLJ 465 (SC).

19. The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.

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

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

22. Section 34 IPC is part of the original Code of 1860 as drafted by Thomas Babington Macaulay, later known as Lord Macaulay. The original Section as it stood was as follows:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

23. However, on account of certain observations made by Sir Barnes Peacock C.J. in Queen v. Gora Chand Gope & Ors. (1866) 5 South WR (Cri) 45, it was necessary to bring about a change in the wordings of the section. Accordingly, in the year 1870 an amendment was brought which introduced the following words after..... When a criminal act is done by several persons..... ".....in furtherance of the common intention...." After this change, the section has not been changed or amended ever.

24. The case of Barendra Kumar Ghosh v. King Emperor AIR 1925 PC 1 is a locus classicus and has been followed by number of High Courts and this court in a large number of cases. In this case, the

Judicial Committee dealt with the scope of section 34 dealing with the acts done in furtherance of the common intention, making all equally liable for the results of all the acts of others. It was observed:

".....the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, 'act' includes omissions to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things 'they also serve who only stand and wait'. By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other."

25. It was further observed that section 34 when it speaks of a criminal act done by several persons in furtherance of the common intention of all, has regard not to the offence as a whole, but to the criminal act, that is to say, the totality of the series of acts which result in the offence. In the case of a person assaulted by many accused, the criminal act is the offence which finally results, though the achievement of that criminal act may be the result of the action of several persons.

26. In another celebrated case *Mehbub Shah v. King- Emperor* AIR 1945 PC 148, the court held that "Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all,' nor does it say 'an intention common to all.'" Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused

of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."

27. In *Pandurang, Tukia and Bhillia v. The State of Hyderabad* (1955) 1 SCR 1083, this Court laid down that it is well settled that common intention in section 34 of the Indian Penal Code presupposes prior concert, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all.

28. In *Mohan Singh & Anr. v. State of Punjab* AIR 1963 SC 174, this Court observed that it is now well settled that the common intention required by Section 34 is different from the same intention or similar intention. The persons having similar intention which is not the result of pre- concerted plan cannot be held guilty for the "criminal act"

with the aid of Section 34.

29. In *State of U.P. v. Iftikhar Khan & Ors.* (1973) 1 SCC 512 it was observed that to attract Section 34 IPC it is not necessary that any overt act should have been done by the co-accused. In this case four accused persons were convicted on a fact situation that two of them were armed with pistols and the other two were armed with lathis and all the four together walked in a body towards the deceased and after firing the pistols at the deceased all the four together left the scene. The finding of fact in that case was also the same. When a plea was made on behalf of those two persons who were armed with lathis that they did not do any overt act, this Court made the above observation. From the facts of that case it can be said that there was no act on behalf of the two lathi holders although the deceased was killed by a pistol shot. The criminal act in that case was done by all the persons in furtherance of the common intention to kill the deceased.

30. In *Ramaswami Ayyangar & Others v. State of Tamil Nadu* (1976) 3 SCC 779, this Court declared that Section 34 is to be read along with preceding Section 33 which makes it clear that the "act" mentioned in Section 34 includes a series of acts as a single act. The acts committed by different confederates in the criminal action may be different but all must in one way or the other participate and engage in the criminal enterprise. Even a person not doing any particular act but only standing guard to prevent any prospective aid to the victims may be guilty of common intention. However, it is essential that in case of an offence involving physical violence it is essential for the application of Section 34 that such accused must be physically present at the actual commission of crime for the purposes of facilitating accomplishment of "criminal act" as mentioned in that section. In this case, it was contended that A2 could not be held vicariously liable with the aid of Section 34 for the act of other accused on the grounds: firstly he did not physically participate in the fatal beating administered by co-accused to the deceased and thus the "criminal act" of murder was not done by all the accused within the contemplation of Section 34; and secondly the prosecution had not shown that the act of A2 in beating PW1 was committed in furtherance of the common intention of all the three pursuant to a pre-arranged plan. Repelling such an argument this Court held that such a contention was fallacious which could not be accepted. The presence of those who in one way or the other facilitate the execution of the common design itself tantamounts to actual participation in the "criminal act". The essence of Section 34 is simultaneously consensus of the minds of persons

participating in the criminal action to bring about a particular result. Conviction of A2 under Section 302/34 of the Code in that case was upheld.

31. In *Rambilas Singh & Ors. v. State of Bihar* (1989) 3 SCC 605, this Court held as under:

"It is true that in order to convict persons vicariously under section 34 or section 149 IPC, it is not necessary to prove that each and everyone of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly."

32. In *Krishnan & Another. v. State of Kerala* (1996) 10 SCC 508, this Court even assuming that one of the appellants had not caused the injury to the deceased, upheld his conviction under Section 302/34 of the Penal Code holding:

"15. Question is whether it is obligatory on the part of the prosecution to establish commission of overt act to press into service section 34 of the Penal Code. It is no doubt true that court likes to know about overt act to decide whether the concerned person had shared the common intention in question. Question is whether overt act has always to be established? I am of the view that establishment of a overt act is not a requirement of law to allow section 34 to operate inasmuch this section gets attracted when "a criminal act is done by several persons in furtherance of common intention of all". What has to be, therefore, established by the prosecution is that all the concerned persons had shared the common intention. Court's mind regarding the sharing of common intention gets satisfied when overt act is established qua each of the accused. But then, there may be a case where the proved facts would themselves speak of sharing of common intention: *res ipsa loquitur*."

33. In *Surendra Chauhan v. State of M.P.* (2000) 4 SCC 110, this Court held that apart from the fact that there should be two or more accused, two factors must be established - (i) common intention; and (ii) participation of the accused in the commission of the offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. Referring to its earlier judgment this Court held:

"11. Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them.

(Ramaswami Ayyangar v. State of T.N. (1976) 3 SCC 779) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (Rajesh Govind Jagesha v. State of Maharashtra (1999) 8 SCC 428). To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established" (i) common intention, and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

34. In Suresh & Another v. State of U.P. (2001) 3 SCC 673, Section 34 of the Indian Penal Code recognizes the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. The common intention pre-supposes prior concert. Such a pre- concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case.

35. In that case, it was also observed that the dominant feature for attracting section 34 of the Indian Penal Code is the element of participation in absence resulting in the ultimate "criminal act". The section does not envisage the separate act by all the accused persons for becoming responsible for ultimate criminal act. If such an interpretation is accepted, the purpose of section 34 shall be rendered infructuous.

36. It was further observed that what is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they share the common intention. Culpability under section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention.

37. In Gopi Nath @ Jhallar v. State of U.P. (2001) 6 SCC 620 it was observed as under:

"8. As for the challenge made to the conviction under Section 302 read with Section 23 IPC, it is necessary to advert to the salient principles to be kept into

consideration and often reiterated by this Court, in the matter of invoking the aid of Section 34 IPC, before dealing with the factual aspect of the claim made on behalf of the appellant. Section 34 IPC has been held to lay down the rule of joint responsibility for criminal acts performed by plurality or persons who jointed together in doing the criminal act, provided that such commission is in furtherance of the common intention of all of them. Even the doing of separate, similar or diverse acts by several persons, so long as they are done in furtherance of a common intention, render each of such persons liable for the result of them all, as if he had done them himself, for the whole of the criminal action - be it that it was not overt or was only covert act or merely an omission constituting an illegal omission. The Section, therefore, has been held to be attracted even where the acts committed by the different confederates are different when it is established in one way or the other that all of them participated and engaged themselves in furtherance of the common intention which might be of a pre-concerted or pre-arranged plan or one manifested or developed at the spur of the moment in the course of the commission of the offence. The common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. The ultimate decision, at any rate, would invariably depend upon the inferences deducible from the circumstances of each case."

38. In *Krishnan & Anr. v. State represented by Inspector of Police* (2003) 7 SCC 56, it was observed that section 34 is dependent on the circumstances of each case. No hard and fast rule can be made out regarding applicability or non-applicability of section 34.

39. In *Girija Shankar v. State of U.P.* (2004) 3 SCC 793, it was observed that section 34 has been enacted to elucidate the principle of joint liability of a criminal act.

"Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same is if each of them has done it individually by himself. The existence of a common intention

amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

40. In *Ramesh Singh @ Photti v. State of A.P.* (2004) 11 SCC 305, it has been observed as under:

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

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

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

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

44. The common intention postulates the existence of a pre-arranged plan implying a prior meeting of the minds. It is the intention to commit the crime and the accused can be convicted only if such an intention has been shared by all the accused. Such a common intention should be anterior in point of time to the commission of the crime, but may also develop on the spot when such a crime is committed. In most of the cases it is difficult to procure direct evidence of such intention. In most of the cases, it can be inferred from the acts or conduct of the accused and other relevant

circumstances. Therefore, in inferring the common intention under section 34 IPC, the evidence and documents on record acquire a great significance and they have to be very carefully scrutinized by the court. This is particularly important in cases where evidence regarding development of the common intention to commit the offence graver, then, the one originally designed, during execution of the original plan, should be clear and cogent.

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

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

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

48. The other section under which a person can be vicariously responsible for the acts of others is section 149 in the Indian Penal Code.

49. We would briefly like to deal with the scope and ambit of section 149 IPC also. Section 149 IPC reads as under:

"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

50. Both sections 34 and 149 IPC deal with combinations of persons who become punishable as sharers in an offence. In both these sections, the persons are vicariously responsible for the acts of

others. Simultaneously, there is a basic resemblance in both these sections and to some extent they also overlap.

51. There is a substantial difference between these two sections with which we would deal in the later part of this judgment. When several persons, numbering five or more, do an act or intend to do it, both sections 34 and 149 IPC may apply. Section 149 IPC is of wider scope than section 34 IPC and in a case where section 149 applies, a constructive liability arises in respect of those persons who do not actually commit the offence.

DISTINCTION BETWEEN SECTION 34 AND SECTION 149 OF THE INDIAN PENAL CODE

(i) Section 34 does not by itself create any specific offence, whereas section 149 does so;

(ii) Some active participation, especially in crime involving physical violence, is necessary under section 34, but section 149 does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in preparation and commission of the crime;

(iii) Section 34 speaks of common intention, but section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention; and

(iv) Section 34 does not fix a minimum number of persons who must share the common intention, whereas section 149 requires that there must be at least five persons who must have the same common object.

Conclusion

52. When we revert to the facts of this case, we arrive at definite conclusion that Hakim Singh and his two sons Kamlesh and Virendra Singh armed with weapons went to the house of the deceased Bhagirath to eliminate him. Kamlesh, on exhortation of his father, Hakim Singh, fired a pistol shot and killed Bhagirath. In view of these facts when section 34 IPC is invoked then on the principle of vicarious or constructive liability the appellant is clearly guilty under section 302/34 IPC along with his father Hakim Singh and his brother Kamlesh. The trial court and the High Court correctly applied the law.

53. The appeal filed by the appellant is totally devoid of any merit and is accordingly dismissed.

.....J. (Dalveer Bhandari)J. (A.K. Patnaik) New Delhi;

August 9, 2010