

# THE INDIAN PENAL CODE

## CHAPTER II GENERAL EXPLANATIONS

THIS Chapter is for the most part an elaborate interpretation clause. It is a key to the interpretation of the whole Code. The leading terms used are here defined and explained and the meanings thus, announced are steadily adhered to throughout the subsequent chapters.

**[s 31] "A will".**

**The words "a will" denote any testamentary document.**

### COMMENT—

'Will' is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.<sup>164.</sup>

<sup>164.</sup> The [Indian Succession Act](#) (XXXIX of 1925), section 2(h).

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### **[s 32] Words referring to acts include illegal omissions.**

**In every part of this Code, except where a contrary intention appears from the context, words which refer to acts <sup>1</sup> done extend also to illegal omissions. <sup>2</sup>**

### **COMMENT—**

This section puts an illegal omission on the same footing as a positive act.

**1. 'Acts'.—**An 'act' generally means something voluntarily done by a person. 'Act' is a determination of the will, producing an effect in the sensible world. This word includes writing and speaking, or, in short, any external manifestation. In the Code it is not confined to its ordinary meaning of positive conduct of doing something, but includes also illegal omissions.

**2. 'Omissions'.—**Liability for an omission requires a legal duty to act; a moral duty to act is not sufficient. A duty arises from the former when an offence is defined in terms of omission. This is the situation where the legislature has made it an offence. A legal duty to act may also be created by a provision of either criminal or civil separate from the offence charged. Since there is no moral difference between (i) a positive act and (ii) an omission when a duty is established, it is to be borne in mind that cases of omissions, the liability should be exceptional and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a genuine implication to this effect. <sup>165.</sup>

An 'act' generally means something voluntarily done by a person, but in [IPC, 1860](#) the term 'act' is not confined to its ordinary meaning of positive conduct of doing something but includes also illegal omission. The effect of [sections 32 and 33, IPC, 1860](#) taken together is that the term 'act' comprises one or more 'acts' or one or more illegal omissions. The Code ([IPC, 1860](#)) makes punishable omissions which have caused, which have been intended to cause or which have been known to be likely to cause certain evil effect in the same manner as it punishes acts provided they were illegal and when the law imposes on a person a duty to act, his illegal omission to act renders (him) in liable to punishment. <sup>166.</sup>

### **[s 32.1] Penalty for omission.—**

Maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be re-thought

in each case. Indeed, the [Indian Penal Code, 1860](#) does include explicitly the liability due to omissions. And even Indian courts have affirmed so.<sup>167.</sup>

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<sup>165.</sup> *Dr PB Desai v State of Maharashtra*, 2013 (11) Scale 429 [LNIND 2013 SC 815] .

<sup>166.</sup> *Raj Karan Singh v State of UP* 2000 Cr LJ 555 (All).

<sup>167.</sup> *Dr PB Desai v State of Maharashtra*, 2013 (11) Scale 429 [LNIND 2013 SC 815] .

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**[s 33] "Act" "Omission";.**

**The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.**

### COMMENT—

An omission is sometimes called a negative act, but this seems dangerous practice, for it too easily permits an omission to be substituted for an act without requiring the special requirement for omission liability such as legal duty and the physical capacity to perform the act. Criminal liability for an omission is also well accepted where the actor has a legal duty and the capacity to act. It is said that this rather fundamental exception to the act requirement is permitted because an actor's failure to perform a legal duty of which he is capable, satisfies the purposes of the act requirement or at least satisfies them as well as an act does. Specifically these two special requirements for omission liability help to exclude from liability cases of fantasizing and irresolute intentions, important purposes of the act requirement.<sup>168</sup> The effect of section 32 and this section taken together is that the term 'act' comprises one or more acts or one or more illegal omissions. The word 'act' does not mean only any particular, specific, instantaneous act of a person, but denotes, as well, a series of acts.<sup>169</sup>

<sup>168</sup>. *Dr PB Desai v State of Maharashtra*, 2013 (11) Scale 429 [LNIND 2013 SC 815] .

<sup>169</sup>. *Om Parkash v State Of Punjab*, AIR 1961 SC 1782 [LNIND 1961 SC 201] : 1961 (2) Cr LJ 848

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**170. [[s 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<sup>1</sup> of all, each of such persons is liable for that act in the same manner as if it were done by him alone.]**

### COMMENT—

**Introduction.**—Ordinarily, no man can be held responsible for an independent act and wrong committed by another. However, [section 34 of the IPC, 1860](#) makes an exception to this principle. It lays down a principle of joint liability in the doing of a [criminal act](#). The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a [criminal act](#) in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person is liable for the result of that as if he had done that act himself.<sup>171</sup> The soul of [section 34, IPC, 1860](#) is the joint liability in doing a [criminal act](#).<sup>172</sup>

### [s 34.1] History.—

[Section 34 IPC, 1860](#) is part of the original Code of 1860 as drafted by Lord Macaulay. The original section as it stood was "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." However, on account of certain observations made by Sir Barnes Peacock, CJ, in *Queen v Gora Chand Gope*,<sup>173</sup> 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.

### [s 34.2] Object.—

The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v State of Punjab*,<sup>174</sup> 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.<sup>175</sup> *Barendra Kumar Ghosh v King Emperor*,<sup>176</sup> stated the true purport of section 34 as:

The words of s.34 are not to be eviscerated by reading them in this exceedingly limited sense. By s.33 a [criminal act](#) in s.34 includes a series of acts and, further, 'act' includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By s.37, when any offence is committed by means of several acts whoever intentionally cooperates 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'.<sup>177</sup>

### **[s 34.3] Principle.—**

This section is only a rule of evidence and does not create a substantive offence. [Section 34 IPC, 1860](#) lays down the principle of constructive liability. The essence of [section 34 IPC, 1860](#) is a simultaneous consensus of the minds of the persons participating in criminal action to bring about a particular result. [Section 34 IPC, 1860](#) stipulates that the act must have been done in furtherance of the common intention. 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.<sup>178</sup> Therefore, [section 34, IPC, 1860](#), would apply even if no charge is framed under that section provided of course from the evidence it becomes clear that there was pre-arranged plan to achieve the commonly intended object.<sup>179</sup> Thus, where six persons were charged under sections 148, 302/149 and 307/149, [IPC, 1860](#), but two were acquitted, the remaining four accused could be convicted on the charges of murder and attempt to murder with the aid of [section 34 of the Penal Code](#).<sup>180</sup> This section really means 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.<sup>181</sup> If the [criminal act](#) was a fresh and independent act springing wholly from the mind of the doer, the others are not liable merely because when it was done they were intending to be partakers with the doer in a different [criminal act](#).

### **[s 34.4] Scope, ambit and applicability.—**

[Section 34 of the Indian Penal Code](#) recognises the principle of vicarious liability in criminal jurisprudence. The said principle enshrined under Section 34 of the Code would be attracted only if one or more than one accused person act conjointly in the commission of offence with others. It is not necessary that all such persons should be named and identified before the liability under [Section 34 of the Indian Penal Code](#) can be invoked. So long as the evidence brought by the prosecution would disclose that one or more accused persons had acted in concert with other persons not named or identified, the liability under Section 34 of the Code would still be attracted. Once the other accused stands acquitted in absence of said evidence, the vicarious liability under section 34 of the Code would not be attracted so as to hold the accused liable for the offence with the aid of Section 34 of the Code. However, the accused would still be liable for the offence if the injury or injuries leading to offence can be attributed to him.<sup>182</sup> A bare reading of this section shows that the section could be dissected as follows:

- (a) **Criminal act** is done by several persons;
- (b) Such act is done in furtherance of the common intention of all; and
- (c) Each of such persons is liable for that act in the same manner as if it were done by him alone.
- (d) But, it is not necessary that all such persons should be named and identified before the liability under **Section 34 of the Indian Penal Code** can be invoked.<sup>183.</sup>

In other words, these three ingredients would guide the court in determining whether an accused is liable to be convicted with the aid of section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once the **criminal act** and common intention are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The **criminal act**, according to **section 34 IPC, 1860** must be done by several persons. The emphasis in this part of the section is on the word "done".<sup>184.</sup> The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate **criminal act**. If such an interpretation is accepted, the purpose of section 34 shall be rendered infructuous.<sup>185.</sup> Under **section 34 of the Indian Penal Code**, a pre-concert in the sense of a distinct previous plan is not necessary to be proved.<sup>186.</sup> It is a well settled law that mere presence or association with other members is not *per se* sufficient to hold each of them criminally liable for the offences committed by the other members, unless there is sufficient evidence on record to show that one such member also intends to or knows the likelihood of commission of such an offending act.<sup>187.</sup>

### [s 34.5] Three leading Cases.—

The case of *Barendra Kumar Ghosh v King Emperor*,<sup>188.</sup> is a *locus classicus* and has been followed by number of High Courts and the Supreme 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 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.

In another celebrated case *Mehbub Shah v King-Emperor*,<sup>189.</sup> 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 s.34 successfully, it must be shown that the **criminal act** complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the **criminal act** was done in concert pursuant to the pre-arranged plan.

Approving the judgments of the Privy Council in *Barendra Kumar Ghosh (Barendra Kumar Ghosh v King Emperor)*,<sup>190.</sup> and *Mahbub Shah* <sup>cases</sup><sup>191</sup> a three-Judge Bench of Supreme Court in *Pandurang v State of Hyderabad*,<sup>192.</sup> held that to attract the applicability of section 34 of the Code the prosecution is under an obligation to

establish that there existed a common intention which requires a pre-arranged plan 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 all. The Court had in mind the ultimate act done in furtherance of the common intention

### **[s 34.6] Common intention and *mens rea*.—**

Under section 34, every individual offender is associated with the [criminal act](#) which constitutes the offence both physically as well as mentally i.e. he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between "common intention" on the one hand and *mens rea* as understood in criminal jurisprudence on the other. Common intention is not alike or identical to *mens rea*. The latter may be coincidental with or collateral to the former but they are distinct and different.<sup>193.</sup>

### **[s 34.7] Participation.—**

Participation of several persons in some action with the common intention of committing a crime is an essential ingredient; once such participation is established, section 34 is at once attracted.<sup>194.</sup> Thus, 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.<sup>195.</sup> The Supreme Court has held that 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 crime is actually being committed.<sup>196.</sup>

The Supreme Court has emphasised that proof of participation by acceptable evidence may in circumstances be a clue to the common intention and that it would not be fatal to the prosecution case that the culprits had no community of interests.<sup>197.</sup>

Sometimes, however, absence of actual participation may serve an important purpose as it happened, for example, where in a love triangle the paramour killed the woman's husband and she remained sitting with the dead body inside the house without opening the door. The main accused having been acquitted, the Supreme Court held that the woman alone could not be convicted under section 302 read with section 34 particularly in view of the fact that the nature of the injuries (*gandasa* blows with a heavy hand) made it explicit that they were the handiwork of masculine power and not that of feminine hands.<sup>198.</sup> It is also necessary to remember that mere presence of the offender at the scene of murder without any participation to facilitate the offence is not enough.<sup>199.</sup> By merely accompanying the accused one does not become liable for the crime committed by the accused within the meaning of [section 34, IPC, 1860](#).<sup>200.</sup> The degree of participation is also an important factor.<sup>201.</sup> The court restated the two ingredients for application of the section which are:



common intention to commit a crime, and

- (ii) participation by all the accused in the act or acts in furtherance of the common intention. These two things establish their joint liability.<sup>202.</sup>

Where one of the accused persons focussed light on the victim with a torch so as to enable others to assault him, otherwise it is a dark night. The court said that his conduct prior and subsequent to the occurrence clearly showed that he shared the common intention so far as the assault on the deceased was concerned. Hence, he was rightly roped in under section 34.<sup>203.</sup> If participation is proved and common intention is absent, section 34 cannot be invoked.<sup>204.</sup> The co-accused was standing outside the house, where the incident took place, while the others committed the murder. There is no evidence of his having played any part in the crime. He did not even act as a guard; he did not prevent the witness from entering the house. There is no evidence of the formation or sharing of any common intention with the other accused. No weapon was seized from him, nor was any property connected with the crime, confiscated from him. It was therefore, held that, it was not safe to convict the co-accused of the offence of murder with the aid of sub-sections 34 and 120(B).<sup>205.</sup>

### **[s 34.8] Physical Presence not *sine qua non*. –**

Physical presence at the very spot is not always a necessary ingredient to attract the action. The Supreme Court decision in *Shreekantiah Ramayya v State of Bombay*,<sup>206.</sup> is the authority for the aforesaid proposition. Vivian Bose, J, speaking for the Bench of three Judges stated thus:

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.

What is required is his actual participation in the commission of the offence in some way or other at the time when the crime is actually being committed. The participation need not in all cases be by physical presence. In offence involving physical violence, normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different times and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case.<sup>207.</sup> Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract [section 34 of the IPC, 1860](#), e.g., the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. There may be other provisions in the [IPC, 1860](#) like sub-sections 120B or 109 which could be invoked then to catch such non-participating accused. Thus, participation in the crime in furtherance of the common intention is *sine qua non* for [section 34 IPC, 1860](#). Exhortation to other accused, even guarding the scene etc. would amount to participation. Of course, when the allegation against an accused is that he participated in the crime by oral exhortation or by guarding the scene the court has to evaluate the evidence very carefully for deciding whether that person had really done any such act.<sup>208.</sup>

The absence of any overt act of assault, exhortation or possession of weapon cannot be singularly determinative of absence of common intention.<sup>209.</sup>

### [s 34.9] In furtherance of common intention.—

The Supreme Court referred to the Oxford English Dictionary where the word "furtherance" is defined as an "action of helping forward." Russell, in his book on Criminal Law adopted this definition and said:

It indicates some kind of aid or assistance proceeding an effect in future and that any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting the felony." The Supreme Court has also construed the word "furtherance" as "advancement or promotion."<sup>210.</sup>

**1. 'Common intention'.—**The phrase 'common intention' means a pre-oriented plan and acting in pursuance to the plan. The common intention to give effect to a particular act may even develop at the spur of moment between a number of persons with reference to the facts of a given case.<sup>211.</sup> In *Amrik Singh's* case it has further been held that though common intention may develop in course of the fight but there must be clear and unimpeachable evidence to justify that inference.<sup>212.</sup> Before a Court can convict a person for any offence read with section 34, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.<sup>213.</sup> Where the act of murder by the main accused was facilitated by two others by catching hold of the victim but without knowing nor having the intention of causing death, it was held that the only common intention that could be inferred was that of causing grievous hurt.<sup>214.</sup> Where the accused had inflicted *lathi* blows causing injuries only on the eyewitness and not on the deceased, he could not be said to have shared the common intention of committing murder of the deceased. He was acquitted for the charge of murder and was convicted under section 325.<sup>215.</sup>

Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each one of them be known to the rest of them and shared by them.<sup>216.</sup>

What to speak of similar intention even same intention without sharing each other's intention is not enough for this section.<sup>217.</sup> In a case like this each will be liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others.<sup>218.</sup> In fine, if common intention cannot be inferred from the evidence of facts and circumstances of the case, [section 34, IPC, 1860](#), cannot be invoked.<sup>219.</sup> A party of farmers was cutting their crop. The deceased took away a portion of the harvested crop. That night when he was returning from a *barat* 16 persons waited for him on the way. They came towards him and the convict who was carrying a knife gave him a stab wound on the neck which proved fatal. The others did not know that he had a knife and all of them being with bare hands, it could not be said that they had the common intention of causing death. They could as well have thought that after surrounding the accused he would be called upon to return or pay for the harvest taken away by him.<sup>220.</sup> A person gifted his land to one of his grandsons. His other son along with his wife fully armed, the man with a *lathi* and the woman with a *gandasa* came to protest. The man lost control and both grandson and his father intervened to save the situation but they received *lathi* blows and died. The woman struck only her brother-in-law with the *gandasa* causing a non-fatal injury. Her husband was convicted for murder but her punishment was reduced to causing grievous hurt because it appeared that the whole thing was a spot happening and not a planned affair.<sup>221.</sup>

Where the genesis of the verbal wrangle between the neighbours was not known, but it appeared to have arisen suddenly, there being no chance for common intention to be formulated, each attacker was held to be punishable for his individual acts.<sup>222.</sup>