## GROUP LIABILITY

### I

Offence committed by groups [1] of persons are of frequent occurrence and courts are called upon to determine the liability of each member for the crime committed by the entire group or by any member or members thereof. The Indian Penal Code contains a few provisions [2] laying down principles of joint and constructive liability in this behalf. Amongst these Sections 34 and 149 present constantly recurring problems in the matter of interpretation of the language used in those sections.

### II

Section 34 runs as follows : "When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." Section 34 is an interpretative provision which lays down the commonsense principle that if two or more persons do a thing jointly it is just the same as if each of them had done it individually. However, judged by the number of cases decided by several High Courts as well as the Supreme Court bearing on the interpretation of the terms of the section, the apparent simplicity of the language has proved to be illusory. To attract the principle of joint liability under S. 34 there should be (a) a criminal act which is jointly committed by several persons, and (b) a common intention animating all of them in furtherance of which the criminal act is committed.

The decisions have mostly centered round the significance of the expression. ".....in furtherance of the common intention of all", which was added in 1870.[3] It is paradoxical that the expression which was added to make the object of the section clear should itself have become the cause of conflicting interpretations as to the scope of the section. It would appear that even before the addition of the expression in 1870 the section was interpreted in the manner contemplated by the amendment.[4]

1. Rioting and Dacoity are regarded as typically Indian Crimes.
2. *e.g.* Sections 34-38 ; 149, 396, 460, Penal Code.
3. The words were inserted in Sec. 34 by Act XXVII of 1870.
4. See *Gorachand Gopee's* case 5 W.R. (Cr.) 45 ; See Gour, Commentary on the Indian Penal Code 3rd Edn. pp. 269-70 regarding the context in which the amendment was made, and Huda "The Law of Crimes in British India" p. 148.

The expression 'common intention' has been variously explained, thus, that it means,

(1) a bare desire to commit a criminal act without any contemplation of the consequences, [5]

(2) the mens rea necessary to constitute the very offence that has been committed, [6]

(3) the intention to commit some criminal act and not necessarily the offence which is actually committed, [7] and that

(4) what common intention connotes depends upon the circumstances of each case and therefore the expression cannot be given a constant meaning.[8] It has also been observed [9] that views (2) and (3) above are each partly correct and that a proper combination of those views together with the provisions of Sec. 35 of the Penal Code would solve every problem.

The acceptance of one or the other of the views stated above gives rise to the following problems:

(a) whether all the participants in a criminal act should be held guilty of the same offence, or whether it is possible while applying Sec. 34 to convict them of different offences. Those who take view (2) and some who adopt view (3) hold that all must be guilty of the same offence. "The law makes no distinction between them or between the parts played by them in doing the criminal act. Each is guilty of the same offence. If Sec. 34 applies it is impossible to convict the conspirators of different offences." [10]

But those who adopt view (1) and some of those who adopt view (3) above stated maintain that it is possible to attribute liability for different offences to the participants depending upon the individual *mens rea* of each of them.[11] This naturally involves an

5. Per Lodge, J., in *Ibra Akanda* v. *Emperor* A.I.R. 1944, Calcutta 339 at pp. 343. See also *Adam Ali Talukdar* v. *Emperor* 31 C.W.N. p. 314, 316.

6. Per Das, J., in *Ibra Akanda* v. *Emperor* (see above); also *Kamaraj Gounder in re* 1960, 1 M.L.J. 12 at p. 15 where it is observed "it is therefore clear that there would be no liability by reason of S. 34 except in a case where there is a common intention to commit the particular offence which resulted."

7. Per Wanchoo, J., in *Saidu Khan* v. *The State* 1951 A.I.R. All. 21 (F.B.) and *Bashir* v. *The State* 1953 Cr. L.J. 1505, 1511.

8. Per Khundkar, J., in *Ibra Akanda* v. *Emperor* A.I.R. 1944, Cal. 339.

9. See V.B. Raju *Commentaries on the Indian Penal Code* Edn. 2, pp. 105-6.

10. *Bashir* v. *The State* 1953 Cr. L. J. 1505, 1511; See also *Sultan* v. *Emperor* A.I.R. 1931 Lah. 749 and *Nga Tha Hin* v. *Emperor* 36 Cr. L.J. 1393, 1396.

11. *See Ghurey* v. *R.* A.I.R. 1949 All 343; *State* v. *Saidu Khan* A.I.R. 1951 All. 21 (F.B.) para 67). P. 33; see also V.B. Raju *Commentaries on the Indian Penal Code* Edn. 2 Vol. I p. 105-6.

investigation not only of the common intention of the several participants but also the particular attitude of mind of each of the participants in relation to the acts of his fellow participants.

(b) A second problem is whether Sec. 34 is applicable to offences that do not involve the mens rea of 'intention' *e.g.*, Sec. 304 Part II ;[12] or any mens rea at all.[13] The problem is that under section 34 we have to prove a common intention on the part of the participants for doing the criminal act. If the words used were only ' an act ', a solution would be simple in that we can separate the intention to do the bare physical act from foresight of the consequences or desire to produce those consequences. Some understand the phrase ' criminal act ' to mean no more than a bare act in a crime ; others understand it to mean a crime or an offence including the *mens rea* needed. The problem therefore is whether a participant could be said to have a ' common intention ' if he had only knowledge of the consequences or did not even contemplate them. The preponderent view is that section 34 is applicable to a case falling under S. 304, Part II.[14] A contrary view has also been expressed by some judges.[15] Besides, a middle course is suggested that joint liability can arise in the case of an offence under S. 304 Part II provided Sections 34 and 35 [16] are both applied but not by applying Section 34 alone.[17]

III

The trend of opinion in several cases has been to lay considerable emphasis on the criminal act being done in *furtherance* of the common

12. Section 304 part II providing punishment for culpable homicide not amounting to murder reads " ...or with imprisonment of either description for a term which may extend to ten years or with fine or both, if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death ".

13. Khundker, J., in *Ibra Ahanda* v. *Emperor* A.I.R. 1944 Cal. 339, 359 considers S. 34 applicable to all cases.

14. *State* v. *Saidu Khan* A.I.R. 1951 All. 21 (F.B.) ; *Adam Ali Taluqdar* v. *Emperor* 31 C.W.N. 314 ; *Nazir* v. *R.* 1947 All. L.J. 417 ; *Muktesur Rahman* v. *The King*, A.I.R. 1950 Assam 98 ; *State* v. *Bhairu* A.I.R. 1956 Bom. 609 ; *Rajindra Kumar* v. *State* A.I.R. 1960 Punj. 310, 312.

15. Per Das, J., in *Ibra Akanda* v. *Emperor* A.I.R. 1944, Cal. 339, 355 ; *Sunder Singh* v. *Emperor* A.I.R. 1939 Oudh 207 ; and *Sahibzada* v. *The Crown* 51 Cr. L.J. 1052, 1056.

16. Section 35 reads : " Whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention ".

17. V. B. Raju *Commentaries on the Indian Penal Code* Vol. I (Edn. 2) P. 112. See however *In re Mallappa Shivappa* 1961 (2) Cr. L.J. 515.

intention, so that common intention is interpreted to connote a general purpose or design with which several people begin to act and proceed to commit individual acts in furtherance of that purpose. Waliullah, C. J., observes. [18] "The common intention animating all those who are acting in concert within the meaning of Section 34 must therefore be an intention to do a particular criminal act or bring about a particular result, not necessarily the act or result which constitutes the crime charged. Here the word 'intention' is used in a much wider sense and is not confined to what is described as volitional intention, *i.e.*, something willed or desired. When a number of persons act in pursuance of a *common design or purpose* each is responsible for the doings of others provided that what others actually do is something which may have been in contemplation of all at the time when the common intention was entertained by them. At any rate it should not be altogether foreign to or entirely dissociated from the aim of the concerted action". Likewise it is observed [19] "what is meant by common intention is the *community of purpose or common design or common intent....* Therefore it will not be wrong to interpret the words 'common intention' to mean 'community of purpose, common design or common enterprise' which are the words used in the English Law" (*Italics supplied*). Having ascertained the common intention in the above sense from the conduct of all the parties, the next step taken is to find out whether the particular offence committed is in furtherance of the common intention. The particular act or acts for which liability has to be fastened on all should not be foreign to the common purpose, *i.e.*, something done by a member of the group on his own initiative—a fresh and independent product of the mind of the wrongdoer. This aspect of the case has to be carefully investigated on the facts and circumstances of each case. "No hard and fast rule can be laid down for judging as to when a criminal act done by an individual doer is one which is the outcome of the common intention or is one independent of it. The difficulty in this connection arises due to the fact that at the time of occurrence the

18. *State* v. *Saidu Khan* A.I.R. 1951 All. 21 (F.B.) at p. 33.

19. *Bashir* v. *The State* 1953 Cr. L.J. 1505 at p. 1508. Mr. Raju in his Commentaries on the Penal Code, Ed. 2 Vol. I (p. 86) observes "On the other hand 'common intention' is the common design or common intent of two or more persons acting together. It is more akin to motive or object. It is remoter than the intention with which each act included in the criminal act is done. It is what the persons jointly decide to achieve. It is the reason or object for doing all the acts forming the criminal act. In some cases the intention which is an ingredient of an offence may be identical with the common intention, but it would still be separate from or in addition to the common intention and not merge in it".

mind of each individual constituting the party gets abnormally active in the course of the occurrence and as a result thereof each mind develops a tendency to act in its own way and not to keep itself confined to the line defined by the common intention. That being so, particular care has always to be taken to analyse facts carefully and to examine the inter-connection between them in order to find out as to what was done in furtherance of the common intention and what was not done in furtherance of it. Moreover the time generally taken by the actual occurrence is usually very short and it leaves practically little opportunity for others to express directly or by implication their dissociation from the particular act which according to them is not in furtherance of the common intention." [20] But once it is determined to be an act done in furtherance of the common intention every member becomes liable. However the problem does not end with this. To determine what offence is actually committed, a further investigation of the *mens rea* of the person committing the particular act or acts is necessary, but this *mens rea* need not be shared by others, as it is automatically imputed to them. "All that remains to do is to find out the offence constituted by the whole criminal act (done by all the conspirators). Each conspirator is to be convicted of it. If the nature of the offence depends on a particular intention or knowledge, the intention or knowledge of the actual doer of the criminal act is to be taken into account. That intention or knowledge will decide the nature of the offence committed by him and the others will be convicted of the same offence because as pointed out above they cannot be convicted of a different offence. The intention of the actual doer must be distinguished from the common intention as already pointed out. It is an igredient of the offence said to be constituted by the criminal act. It is a personal matter". [21] Similarly it has been observed "When by the mere consideration that the criminal act was done in furtherance of the common intention each confederate is deemed to have done the entire act himself it should follow that he should also be deemed to have the same intention which the actual doer had in doing the particular act and its consequences. It is thus clear that every confederate becomes guilty of the actual offence which is made out from the acts comprising criminal acts. It may be repeated that the intention so imputed to such confederates who did not actually commit that particular acts need not be the same common intention which existed

20. *Lal Mahto* v. *The State* A.I.R. 1955 Patna 161 at 169.
21. *Bashir* v. *The State* 1953 Cr. L.J. 1505 at 1511-12.

between all the confederates at the start of the course of conduct which amounted to the criminal act and which resulted in the commission of the offence ".[22] In some cases the view is also expressed that the others must have known it to be likely that the particular offence would be committed. Wanchoo, J., observes: " If the act was done in furtherance of the common intention of all each would be responsible for the result as if he alone had done it and the fact that there was no intention on the part of the various actors to cause that result would not matter, mere knowledge of the result being likely on the part of each of the actors would be sufficient to bring home to each the crime which was finally committed jointly by them all ".[23] The matter is not free from difficulty. As was observed in *Satrughan* v. *Emperor*[24] " the presumption of constructive intent must not be pushed too far. It is obvious that the mere fact that a man may think a thing likely to happen is vastly different from his intending that the thing should happen. The latter ingredient is necessary under S. 34. The former by itself is irrelevant to the Section. It is only when a court can with judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others to bring about the result that S. 34 may be applied ". Further if liability under S. 34 should be based on knowledge of the likelihood of the particular result it may be legitimately asked whether such an intepretation would not amount to widening[25] the scope of S. 34 in terms of S. 149 which makes members of an unlawful assembly punishable not only for what was done in furtherance of the common object of all of them but also for what was known to be likely to be done in furtherance of such common object. There is the further view that Section 35 should be called into aid and that each participant who is to be made

22. *Nazir* v. *Emperor* 1947 All. L.J. 417 at 423. The Court further observed in this case: " In 14 Luck. 660, Hamilton, J., held that for the application of Section 34 Penal Code the intention if any of the actual person who caused death should be shared by others. We do not see why the intention which is to be imputed to the actual person who deals the fatal blow and which intention is mostly to be gathered from his actual conduct should then be looked into in the other persons who had joined him in the incident. Such a reasoning appears to be the reverse of what S. 34 Penal Code requires. We have to see what was the common intention before a person has commenced the criminal act (p. 427, paras 54 and 55).

23. Wanchoo, J, in *State* v. *Saidu Khan* 1951 All 21 (F.B.) at 43 Col. 2. See also *Nazir* v. *The Emperor* where it is observed " We see no justification for others to be not liable for such acts as were likely to be committed in the carrying out of the common intention *and* which would have been normally foreseen or even contemplated by those persons ".

24. A.I.R. 1919 Pat. 111 ; See *Basappa* v. *State* A.I.R. 1951 Mys. 1.

25. See the view of Plowden, J., *Ramanath* v. *R.* A.I.R. 1943 All. 271.

liable must have the same intention or knowledge as the person actually doing the act[26] to be convicted of the same offence. However it is difficult to prove this *mens rea* on the part of each participant. As pointed out in *Bashir* v. *The State* " When A is made responsible for the act done by B, the nature of the offence must necessarily depend upon the intention of B, when A himself has not done the act, *there cannot arise any question of his intention for that act* ". [27] In addition to this one may point out that conducting an enquiry with regard to the mens rea behind each of the acts of each participant that is committed in furtherance of the common intention in addition to the investigation as to the common intention of all may not be in consonance with the spirit of S. 34. Such an enquiry would no doubt be necessary if S. 35 is to be applied along with S. 34, but then the further question arises whether S. 34 has necessarily got to be read with S. 35 or can be applied independently. [28]

It is desirable that these conflicting views be settled and the section redrafted in simpler terms if, as suggested by some judges, what is imputed to each participant is the sum total of the acts of all and not necessarily the offence resulting therefrom. [29]

## IV

In recent years beginning with the decision of the Privy Council in *Mahbub Shah* v. *Emperor* [30] considerable emphasis is laid on proof of a prearranged plan or premeditated concert as being necessary to infer a common intention under Sec. 34. This has imported into the trial an artificial legal test in the place of a simple inference of fact according to well established rules governing proof by indirect or

26. See V. B. Raju *Commentaries on the Penal Code* Vol. I, p. 105-6. See also *Gorey* v. *R.* 1949 All. 191. Waliullah, C.J. in *Saidu Khan* v. *The State* A.I.R. 1951 All. 21 (F.B.) observes (at p. 33) "The question whether any one of them or all of them is or are guilty of any specific crime is necessarily dependent on some other factor *e.g.* the necessary mental condition or guilty knowledge or intention".

27. 1953 Cr. L.J. 1505.

28. V. B. Raju stresses the word 'such an act' in the marginal note to S. 35.

29. "In our opinion S. 34 refers to physical act only. Of course the physical act contemplated should be criminal, that is, should be what is considered a crime which is not defined in the Code and should mean a thing which ought not to be done and which affects the State in addition to the individual against whom the act is done". *Nazir* v. *R.* 1947 All. L.J. 417. A similar view is expressed by Wanchoo, J., in *Saidu Khan* v. *The State*, 1951. All 21 (F.B.). The suggestion has been made that S. 34 may be recast thus: "When in a criminal action two or more persons participate in concert pursuant to a prearranged plan, each of them is liable for each of the acts done by each of them as if it were done by him alone". See J. Chandrasekharam "*S. 34 of the I.P.C. to be recast*" (1960) VII Andhra Law Times, 25.

30. A.I.R. 1945 P.C. 118.

circumstantial evidence. Courts have been embarassed in discovering a prearranged plan in every case and more particularly in cases of sudden occurrences and induced to give artificial explanations. [31] Nevertheless it has also been pointed out that a common intention may arise in the course of the act and not necessarily exist before the act. [32] It is desirable to examine the purpose served, if any, by the requirement of a prearranged plan as a necessary link in the chain of proof in establishing a common intention. It is interesting to note that while dealing with the expression ' common object ' in S. 141 the view should be taken that no prior meeting of minds or prior concert is necessary. The Supreme Court observed " Previous concert is not necessary. The common object required by S. 141 differs from the common intention required by S. 34 in this respect". [33] But a different view has also been expressed. [34]

---

31. See *Gajaraj Singh* v. *Emperor*, 47 Cr. L.J. 814 : *Jwala and Another* v. *The State*, 1954 Cr. L.J. 720. The difficulty involved is explained in *Kinaramdas* v. *The State*, 1955 Cr. L.J. 57. See Balasubrahmanyam, *'Joint liability under S. 34 I.P.C.—Some Aspects'* (1957) Year Book of Legal Studies, Vol. I. p. 86.

32. "In our judgment though common intention implies a prearranged plan or concert between persons there is nothing in the Section which requires that prearranged plan must come into existence before the acts are done and that it cannot come into existence whilst the acts are being committed and that it cannot be inferred from such acts..... If there is any evidence that there was a prearranged plan or concert then the case is simple. But if this is not the case and if the prosecution wants the court to draw an inference from the acts which took place simultaneously with the commission of the crime then the problem is a difficult one. The difficulty arises because the guilt of the accused is to be inferred from circumstantial evidence and the difficulty is no more or no less than the one which arises in all cases which are dependent upon circumstantial evidence. Therefore in all such cases the true rule of law which is to be applied is the rule which requires the guilt is not to be inferred unless that is the only inference which follows from the circumstances of the case and no other innocuous inference can be drawn. If after bearing in mind this rule of the appreciation of the circumstantial evidence on the facts of a particular case the court can reach the conclusion that the events as they developed indicated a common intention then there is no reason why in law, the court should be deterred from drawing such an inference". *Oswal Danji* v. *The State* A.I.R. 1961 Guj. 16 at p. 18.

33. *Motidas* v. *The State of Bihar* 1954 Cr. L.J. 1708 ; Similarly in *Sukha & Others* v. *The State of Rajasthan*, 1956 Cr. L.J. 923 the Supreme Court said "The distinction between the common intention required by S. 34 and the common object set out in S. 149 lies just there. In a case under S. 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five and that they act as an assembly to achieve that object." See also *Mizaji and Another* v. *The State* A.I.R. 1959 S.C. 572.

34. "Existence of a common unlawful object is a requisite for an unlawful assembly under the Code and unless there is proof of an agreement amongst persons

V

Participation of the individual offender in doing a criminal act is an essential feature of S. 34 which differentiates it from other affiliated provisions like criminal conspiracy and abetment. Actual participation, is a condition precedent to fasten liability under the section. Participation may be of a passive character as where a person by being present facilitates the commission of the offence and is ready to play his part when the time comes for him to act. In crimes as in other cases it is true that "they also serve who only stand and wait." [34a] But it is necessary that he should be present at the scene of occurrence. Though his role may become abscure in details, [35] it must be distinguished from those acts which are effected from behind the scene. Courts have emphatically stated that the person must be physically present. In *S. R. Munupalli* v. *The State.* [36] Bose, J., observed "it is the essence of the section that the person must be physically present at the actual commission of crime". It was further observed "the emphasis in S. 34 is on the word 'done by several persons', it is essential that they join in the actual doing of the act and not merely in planning its perpetration."

However in *Desai* v. *The State of Bombay* [37] the Supreme Court would appear to have modified the principle hitherto enunciated. Shah, J. observes: " A Common intention—a meeting of minds to commit the the *crime* invites the application of S. 34. But this participation need not in all cases be by physical presence ". The learned judge further observes, " In offences involving physical violence normally, presence at the scene of the offence, of the offenders sought to be rendered liable on the principle of joint liability may be necessary but such is not the case in respect of other offences, where the offence consists of diverse acts, which may be done at different times and places." The

to do anything or a plan to carry out a design and if this is not possible unless it is shown that an inference in support of it can reasonably be drawn from the relations, acts and conduct of the parties; persons cannot be constructively made liable for others' acts". *Pedda* v. *The State of Mysore* 1953 Cr. L.J. 1001 at 1002-3; See also *In re Ganapati Sarma*, A.I.R. 1923 Mad. 369.

34a. See *Barendra Kumar Ghose* v. *R.* 1925 P.C. 1.

35. See *Indar Singh* v. *R.* A.I.R. 1933 Lah. 819.

36. A.I.R. 1955 S.C. 287 at 293-4. See also *Bashir* v. *The State* 1953 Cr. L.J. 1505 and *Om Prakash* v. *The State* 1956 All. 241. "Participation and joint action in the actual commission of the crime are in substance matters which stand in antithesis to abetments and attempts" *Barendra Kumar Ghose* v. *R.* 1925 P.C. 1 at 9.

37. A.I.R. 1960 S.C. 889 at p. 892. See *Nazir* v. *The Emperor* 1947 All. L.J. 417 where it was a case of an offence involving violence.

above observations tend to obscure the simultaneity of action (though the acts of the participants may be diverse in character) contemplated by S. 34. It is unnecessary to strain the language of S. 34 to meet such cases. The provisions of S. 37 would cover the ground in the case of diverse acts committed at different times and places.[38] Further such an interpretation of S. 34 may have an extended effect of covering cases of conspiracy.[39]

## VI

The inter-relation between Section 34 and Section 149 comes up for consideration frequently. Section 149 reads " 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 ". Section 34 is an explanatory section of an interpretative character [40] whereas Section 149 finds its place in the chapter on 'Offences against Public Tranquility.' [41] It has been explained that Section 149 creates a specific offence.[42]

Several points of distinction between the two sections have been pointed out with reference to their ingredients. One patent difference is, no doubt, the necessity for five persons or more to constitute an unlawful assembly in order to bring into play the provisions of Section 149. There is a difference between object and intention,[43] for, though their object is common, the intentions of the several members may differ and indeed may be similar only in the respect that they are all unlawful, while the element of participation in action which is the leading feature of S. 34 is replaced in S. 149 by membership of the

38. Section 37 reads " When an 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."

39. See Ch. VA Penal Code and the provisions of S. 10 Indian Evidence Act.

40. The section is contained in Ch. II Indian Penal Code dealing with General Explanations.

41. Ch. VIII of the Penal Code.

42. *Barendra Kumar Ghosh* v. *Emperor*, 1925 P.C. 1 ; *William Slaney* v. *The State* A.I.R. 1956 S.C. 116 at 134; *Pandurang* v. *The State* A.I.R. 1955 S.C. 216 at 221; *Nanakchand* v. *The State* A.I.R. 1955 S.C. 274 at 277. In *Surajpal* v. *The State* A.I.R. 1956 S.C. 419 (422) it has been observed that it creates a distinct head of liability. See also *In Re K.C. Subbireddi* A.I.R. 1957 A.P. 14.

43. Further, while the common intention laid down in S. 34 is undefined and may be any intention the common object under S. 149 is controlled by Sec. 141.

assembly at the time of the committing of the offence. The basis of constructive guilt under S. 149 is mere membership of an unlawful assembly ; the basis under S. 34 is participation in some action with the common intention of committing a crime. While S. 34 limits the responsibility of each participant to acts done in furtherance of the common intention S. 149 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is known to be likely that such an offence might be committed in prosecution of the common object.

Both sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may intersect each other but whether or not they are one and the same in effect and application is a difficult problem to answer in the light of conflicting judicial pronouncements. According to one view these two sections postulate two different fact situations which may be similar in some details but are not identical. In *Om Prakash* v. *The State* [44] Beg, J., observed " Under S. 149 the entire emphasis both in respect of the physical act as well as in respect of 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 ". Another view (and this is based on the practice of the courts for reasons of convenience) is that they overlap each other very often so much so that a charge under the one provision can be no impediment to a conviction under the other provision in appropriate cases.[45] In *Karnail Singh* v. *The State* [46] the Supreme Court said " Sections 34 and 149 overlap each other to some extent. In a case where the facts to be proved and the evidence to be adduced with reference to the charge under S. 149 would be the same if the charge were under S. 34 then the failure to charge the accused under S. 34 could not result in any prejudice and in such case the substitution of S. 34 for S. 149 must be held to be a formal matter ". The trend seems to be to regard the inter-relation between the sections as a formal procedural matter to be disposed of with reference to prejudice or absence of prejudice to the accused with reference to the facts of a particular case. Of far

44. A.I.R. 1956 All. 241 at 245 ; See also *S. C. Sukha* v. *The State*, A.I.R. 1956 S.C. 513 ; *Chikkarange Gowde* v. *The State* A.I.R. 1956 S.C. 731 and *Basappa* v. *The State* A.I.R. 1951 Mys. 1.

45. *Lachman Singh* v. *The State* A.I.R. 1952 S.C. 167 ; *In Re Shankarappa* A.I.R. 1958 A.P. 380.

46. A.I.R. 1954 S.C. 204.

greater significance are other trends that tend to obscure the several points of distinction between S. 34 and S. 149 leaving only the unalterable difference as to the number of participants required.[47]

In *Nathu* v. *The State*[48] the Court observed "...although there is a distinction between S. 34 which deals with common intention and S. 149 which deals with constructive liability based on common object, there may not be much difference between intention and object because if there is common intention to commit an offence it must also be assumed that the common object was to commit the offence". Again as was noticed earlier[49] the tendency is to interpret 'common intention' as being akin to the ultimate object of the group and to widen the liability under S. 34 in terms of S. 149.[50] Lastly there is the view endorsed by the Supreme Court[51] that S. 149 is declaratory of the vicarious liability of the members of an unlawful assembly for an offence committed by any one or more of them and that there is nothing in the language of Section 149 to prevent the court from convicting the others for a minor offence of which on the facts of the case knowledge could properly be attributed to them, even when the offence committed by the principal offender is a graver one. It is difficult to reconcile this with the view that Section 149 creates a specific offence, which means either all the members to whom Section 149 applies have to be convicted of the same offence or Section 149 does not apply at all. The above trends lead to a certain amount of confusion in understanding the difference between Sections 34 and 149 and the practice of courts in by-passing the difference as a mere technical error of procedure only aggravates the situation. It is desirable that the scope of each provision be demarcated with greater precision.

47. *In Nibran Chandra Roy* v. *R.* 11 C.W.N, 1085. Mitra and Fletcher, JJ., expressed the opinion that 'S. 149 of the Indian Penal Code lays down the same priciple as S. 34 with this difference that S. 149 refers to an assembly of five or more persons, while S. 34 has no limitation as to the number of persons who may have been acting in pursuance of a common intention'. As Mr. Huda points out, this is only a part and the least important part of the difference between the two sections (See Huda, *Law of Crimes in British India*, p. 149-50).

48. 1960 Cr. L.J. 1329 at 1330. See also *Khachern Singh* v. *The State*. A.I.R. 1956 (S.C.) 546, 548

49. Para III *supra* and foot note 19.

50. Para III *supra* and foot note 23.

51. *Shambhunath Singh* v. *The State* A.I.R. 1960 S.C. 725; see also *Bhagwat Singh* v. *The Emperor* A.I.R. 1936 Pat. 481, 484; *Barkan Singh* v. *The Emperor* 22 Cr. L. J. 279 and *Ahmed* v. *Emperor* 28 Cr. L.J. 61, 64.

## VII

It is felt that in Section 149 the principle of constructive liability is pushed to unduly harsh lengths. As mere membership of the assembly without any participation in the actual crime is sufficient, in several cases as many as 10 persons are sentenced to death and hanged although most of them were not even present near the scene of the actual crime. There is also the danger of false implication in faction cases on account of the temptation for roping in the innocent along with the guilty in cases of rioting attended with murder, and the task of disentangling truth from falsehood is very difficult. In any case there is a strong feeling that the latter part of S. 149 "or such as the members of that assembly knew to be likely to be committed in prosecution of that object" be deleted.