

INDIAN PENAL CODE: DETERMINING MENS REA IN COMMON INTENTION

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Introduction

Let us consider an illustration to begin this paper.

Two persons, one the driver, the other a passenger who is in a desperate hurry to transact some business, commonly intend and participate in a criminal enterprise to park a car illegally on a double yellow line. Just as about the car is to be reversed into the space, a pedestrian appears and stands right there. The passenger is not looking and does not know the pedestrian is there. The driver gets it into his head that it is necessary to run the pedestrian down to advance the common intention to park there. He proceeds to run him down. The pedestrian dies. The driver is guilty of murder and must be hanged, but so too must the passenger. Solely because she shared the common intention of illegally parking her car on two yellow lines.

Most would say the reasoning behind this is flawed. An analysis of the passenger's intention should be undertaken, wherein it would be determined whether she actually shared the common intent of killing the pedestrian or was merely intending the primary offence of illegally parking her car.

Let us take an illustration of greater magnitude which would really make the reader sympathise with the accused.

A person, Rohit, along with some other men had planned a robbery of a post office. The men had gone inside the post office while Rohit stood on guard outside, so that he could warn the others inside of anyone's approach. Inside the post office, the men were resisted by the post master in retaliation of which one of them shot and killed him. Except Rohit, they all managed to flee the spot. The issue which was raised was whether Rohit was liable for murder considering he was not an active part of the shooting.

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This is not a mere illustration but the facts of the case which form the *locus classicus* of the law on the point of an act done in ‘*furtherance of common intention*’² as laid out in Section 34 of the Indian Penal Code. Barindra Kumar Ghosh³ is the leading authority on this point followed in India and other code jurisdictions in the common law countries. This case was heavily politicised as Barindra Kumar Ghosh was a young revolutionary who had espoused violence as a medium of struggle against the colonial power.⁴ The Indian National Congress had decided against violence.⁵ He was also a member of Aurobindo Ghosh’s eminent family, further giving importance to this case.⁶ This point was important to be stated, as the legal fraternity of any country is heavily influenced by the political situation of that country as we would see further in the paper. The court raised two propositions in the Barindra Ghosh case, the first being that it is immaterial which participant committed the killing and the second being no requirement of having an active participation by all the members for each of them will be held equally liable.⁷ It was held that it was reasonably foreseen by all the members that overcoming resistance by anyone could lead to killing that person in order to fulfill the primary matter of stealing.⁸ This case could also be perceived as being unfair to Barindra as the court merely imposed liability on him for a crime he may not have consented to, there was no evidence to show that the death of the postman was pre-mediated by the criminals, nor was there any evidence to show that Barindra actively participated in the killing. This leads us to the debate presented in this paper.

Part I of this paper begins by a brief introduction of the topic. Part II of this paper goes to clarify the main point of contention in this paper, i.e. the research question of this paper. Part III of this paper briefly explains the methodology undertaken to research. Part IV explains to the reader what exactly is the provision of Section 34, IPC. It elucidates the complications faced by the court while interpreting the

² The Indian Penal Code, 1860, §34.

³ Barindra Kumar Ghosh vs Emperor AIR 1925 PC 1.

⁴ Barindra Kumar Ghosh, Photo Collection at https://www.aurobindo.ru/images/other/item_00890_e.htm.

⁵ Id.

⁶ Id.

⁷ Barindra, *Supra* note 2.

⁸ Id.

provision. Part V of this paper questions the importance of presence of an individual at the time and scene of the crime. It determines the significance of this factor in determining culpability. Part VI focuses on the main debate of how does one determine the *mens rea* of an individual in common intention cases. It looks into the two approaches followed by courts in most common law jurisdictions. Part VII goes ahead to suggest two novel approaches which may be inculcated by the courts. The paper concludes with the reasoning behind the mannerisms suggested.

Criminal Culpability and Section 34

The most controversial doctrine has been Section 34 of the Indian Penal Code. The words are disingenuously simple:

*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.*⁹

The context in which this doctrine is pulled up are mostly twin-crime cases.¹⁰ A case wherein the primary offence was pre-mediated by the criminal group but a secondary crime is committed in the course of completion of the first crime. This is usually done by one of the members. The question which arises is what is the culpability of the rest of the group? The classic cases have been those where the secondary crime turns out to be murder in furtherance of theft, robbery, assault, kidnapping, etc.¹¹ Section 34 has the power to convict the whole group for the secondary crime in question. The provision is used in cases where it is difficult to address the individual role of every member in the joint criminal enterprise.¹² Therefore in cases *when six people were*

⁹34, *Supra* note 1.

¹⁰Hor, M., & Meng, Y. (1999). Common Intention And The Enterprise Of Constructing Criminal Liability. *Singapore Journal of Legal Studies*, 494-530. Retrieved from <http://www.jstor.org/stable/24868122>.

¹¹Id.

¹²Stanley Yeo, Common Intention in the Indian Penal Code: Insights from Singapore, 50 JILI (2008) 640.

*framed under Sections 148, 302/149 and 307/149, IPC but two people were acquitted, the remaining 4 accused could be convicted with the aid of Section 34, IPC.*¹³

*During the enactment of the Indian Penal Code in 1861, Section 34 placed a vicarious liability, not a criminal one. It is the subsequent shift in criminal law over the years, towards subjective knowledge which has upheld the proving of requisite mental element and individual liability.*¹⁴ The phrase ‘in furtherance of a common intention’ was added on later by *Queen v GorachandGope*¹⁵’s judgement by Peacock CJ. This phrase was added to widen the scope of liability for common purpose while maintaining some limits. *The rationale for insisting on intention is clearly explained in Dharam Pal vs State of Haryana*¹⁶:

*‘As pointed out above, the common intention to commit a crime graver than the one originally designed may develop during the the execution of the original plan. Eg. during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused.’*¹⁷

This places additional burden on the court to determine the *mens rea* of the secondary accused while deciding his culpability.

Another pronouncement of the court was the need to have proof of a pre-mediated plan between the criminal group before determining common intention.¹⁸ This plan need not have developed a considerable time before the actuation of the act but can be developed on the spot.¹⁹ There does not have to be a time lag between thinking to do it and commission of the crime, it can be formed on the spot.²⁰

¹³*Ram Tahal vs State of UP 1972 AIR 254.*

¹⁴*McAuliffe v. R (1995) 183 CLR 108 at para 13.*

¹⁵*Queen vs GorachandGope(1866) Bengal LRSupp 443.*

¹⁶*Dharam Pal vs State of Haryana AIR 1978 SC 1492.*

¹⁷*Id.*

¹⁸*Mehbub Shah vs Emperor AIR 1945 PC 118.*

¹⁹*Lee Chez Kee vs Public Prosecutor (2008) SGCA 20, Bashir v State, AIR 1953 All 668 at 13.*

²⁰*Hari Om vs State 1993 Cr LJ 1383(SC).*

Present or Presence?

The courts have pondered profoundly on the 'presence factor' of an accused at the site of the crime to prove common intention. One finds heavy division by the Indian Courts while deciding on whether the accused has to be physically present on the scene of the crime to be held liable.²¹ The Supreme Court has greatly emphasized that the proof of participation will lead to better determining the mens rea of the accused in question.²²

In a case of house breaking wherein considerable amount of copper wire had been stolen by opening the lock with a duplicate key supplied by one of the accused who was not present at the time of breaking down the godown was not made from evidence.²³ But his presence at a weighbridge where an attempt was made to dispose of the stolen goods made him liable under Section 107/34, IPC.²⁴ Hence presence at the place of the crime is not always necessary.

On the other hand, presence of a person at the scene of the crime does not immediately make him liable for the secondary offence as illustrated by the following case. In *Yadu Yadav vs State of Bihar*²⁵, only one accused had fired at the victim and no overt act was committed by the other accused who was merely present at the scene of occurrence, it was held that common intention was not present and the charge of murder could not be established and the other accused could not be convicted under Section 34, IPC.²⁶

This does not mean that presence of the accused does not play a major factor in determining a person's culpability as it directly assists the court to understand the *mens rea* of the accused. Such as a case where one of the main accuse's aid held the only eye witness present there by his collar and put a knife blade through him, so as to stop him from helping his master get brutally murdered.²⁷ The aid was convicted

²¹Yeo, *Supra* note 16.

²²RATANLAL AND DHIRAJLAL, THE INDIAN PENAL CODE (35TH ED., 2017), *Baba Lodhi vs State of UP* (1987) 2 SCC 352.

²³*Tukaram Ganpat vs State of Maharashtra* AIR 1974 SC 514.

²⁴*Id.*

²⁵*Yadu Yadav vs State of Bihar*, 1992 Cr LJ 1743 (Pat).

²⁶*Id.*

²⁷*Fulchand vs State of Maharashtra* (2011) 1 AIR BOM R 778.

under Section 34, IPC as he had active *mens rea* to kill the master even though he himself did not inflict any injury on the deceased (master).²⁸

One can derive that mere presence along with the principal actor in the absence of pre-meditation is not sufficient to infer common intention. Nevertheless, presence on the spot for facilitating or prompting the commission of the crime is tantamount to the actual participation, proving to the court of his common intention with the principal accused.²⁹

Debate: How does one determine common intention?

The biggest strife in this debate which has been heavily discussed time and again is the mannerism one takes up to determine common intention. This confusion has built up since time immemorial, with courts construing the provision to mean strict liability or the complete opposite, using a subjective manner of interpretation.

Since the legislators have given no clear guidelines as to how this provisions should be applied, the interpretation largely depends on the court. According to the author, there may be multiple mannerisms which may be followed in a particular case.

Objective Foreseeability and Subjective Knowledge are widely debated on by numerous jurisdictions in the common law countries, mainly India, Australia and Singapore.³⁰

I. Objective foreseeability:

This test places liability on the accompanying aid of the principal accused.³¹ It states that the aid should have presumption of the possibility of the secondary crime happening due to certain circumstances bordering the principal act. For example, if two people go to rob a house, with only one of them carrying a gun. During an altercation, the person shoots and kills the victim. If this situation is looked at through the foreseeability test, the aid should have known the possibility of that person killing the victim since he was carrying a gun. This would in turn convict the aid himself on the charge of murder. This sets a low standard of culpability, leading to arbitrary

²⁸Id.

²⁹Barindra, *Supra* note 2, Rewaram v State of MP 1983 Cr LJ 1845, State v Laxman AIR 1986 SC 250.

³⁰Clarifying CI, *Supra* note 8.

³¹Id.

convictions.³²The legislative reasoning to follow this test seems to be its deterrent nature.³³ If a criminal is made liable for *all acts* committed in furtherance of the *primary act*, it weakens one's morale to initiate such heinous crimes.³⁴ This reasoning is highly defective as the jurisprudential purpose behind punishment is deterrence for criminals not born. Yet, one witnesses the rate of crime increasing exponentially as some acts are not planned but are committed at the spur of the moment.

The author agrees with the reasoning that offenders in a group may consent to the primary crime, say stealing, and would be aware of the use of violence used in facilitating the primary crime but not have agreed to the secondary crime, say killing the victim in furtherance of stealing.³⁵ Therefore, this test of foreseeability becomes flawed in the opinion of the author.

II. Subjective Knowledge:

On the other hand, the subjective *knowledge test* requires further evidence to prove that the aid had the required *common intention* with the principal or the act was pre-planned in order to convict him.³⁶ It is a slightly more stringent provision than foreseeability as it requires proof that the accused actually knew the likelihood of the happening of the secondary crime.³⁷ Keeping in mind that the evidence of common intention is derived from the facts and circumstances of each case.³⁸ It mostly depends on the part played by the accused, nature of weapon and surrounding circumstances.³⁹

Despite adaptation of this provision by the courts, Section 34 still remains '*a troubling provision*', as stated in *Daniel Vijay s/o Katherasan vs Public Prosecutor*.⁴⁰ It is difficult to determine if a person has subjective knowledge of what is going to

³²Chen, S. (2011). The Final Twist In Common Intention? *Daniel Vijay s/o Katherasan v. Public Prosecutor*. *Singapore Journal of Legal Studies*, 237-249. Retrieved from <http://www.jstor.org/stable/24870569>.

³³Sornarajah, M. (1995). COMMON INTENTION AND MURDER UNDER THE PENAL CODES. *Singapore Journal of Legal Studies*, 29-55. Retrieved from <http://www.jstor.org/stable/24866735>.

³⁴*Id.*

³⁵*Id.*

³⁶*Lee Chez Kee vs Public Prosecutor* (2008) SGCA 20, *Munna vs State of UP* 1993 Supp (2) SCC 757.

³⁷Clarifying CI, *Supra* note 8.

³⁸Mehbub, *Supra* note 22.

³⁹*Id.*

⁴⁰*Daniel Vijay s/o Katherasan vs Public Prosecutor* (2010) 4 SLR 1119 (CA).

happen. His mere passivity to an act cannot be proof of his *mens rea* and consent for the secondary act to take place.⁴¹

Subjective knowledge may be derived from the actions of the co-accused at the time of the crime. *The principal accused gave a gandhasa blow from the sharp side on the head of the deceased.*⁴² *This was a fatal blow. The co-accused also assaulted the deceased with his gandhasa on the back side near his shoulder.*⁴³ *Held, the co-accused also shared a common intention with the principal accused.*⁴⁴

*Although, subjective knowledge takes into account previous conduct of the parties. Where on being accused by her husband, the wife simply asked her paramour to teach her husband a lesson and the paramour shot him dead, it was held that the wife could not be convicted for murder with the aid of Section 34.*⁴⁵

Therefore, the subjective knowledge test does not suffice the controversies which arise in Section 34, IPC.

Slightly bold suggestions

I. Mitigating Factor

A court first establishes the liability of an accused, then decided his punishment. Determination of punishment takes into account several mitigating factors along with aggravating factors. In criminal law, a mitigating factor, also known as extenuating circumstances, is any information or evidence presented to the court regarding the defendant or the circumstances of the crime that might result in reduced charges or a lesser sentence.⁴⁶

It is public knowledge that common intention cases are joint criminal activities which have a greater influence on the society. They are heinous crimes completely violating an individual's (victim) personal liberty. Keeping this in mind, the author argues that every person involved in the criminal activity should be charged equally. They should be equally held liable across the board, regardless of their personal role in the criminal

⁴¹Id.

⁴²*Charan Singh vs State of Punjab AIR 1998 SC 323.*

⁴³Id.

⁴⁴Id.

⁴⁵*Gurmej Kaur vs State of Punjab 1995 SCC (Cr) 167*

⁴⁶PSA PILLAI, CRIMINAL LAW BOOK (11TH ED., 2012).

activity. This would also, to a certain extent, fulfil the intent of the drafters of this provision who anticipated it to be a strict liability provision. While the culpability will be uniform, the degree of punishment should be altered depending on evidence provided and proved by the prosecution. The factor of '*no knowledge of the secondary act*' should act as a mitigating factor while deciding the punishment of the accused. So, if the principal accused is given a punishment of 10 years, the co-accused will be given 5 years, considering he did not share the *mens rea* for the said offence but was a part of the heinous act.

II. Influence by Socio-Political Situations

It is communal realization to state that any legal fraternity of a country is heavily influenced by the ongoing socio-political situation at the said place. It largely governs how the law works. Numerous cases have been decided by considering the immediate sociological scenario of a country, anticipating repercussions in the near future. Since we live in a dynamic society, wherein the law acts as a guiding principle, it only makes sense for it to develop with time. The law must be amended looking at current sociological and political scenarios. Also, the opinion of the common man is given paramount importance.

Take the *Nirbhaya Rape Case*⁴⁷ as an illustration. There would be unanimity in opinion that all the accused, regardless of age or knowledge, should be hanged to death. Each accused can be said to be mature enough to understand the nature of the heinous crime of rape. There would be accord from all about imposing the same liability and punishment on all the accused, regardless of the individual's role in the crime. This is where Section 34, IPC comes in handy. *It is only a rule of evidence and does not create a substantive offence.*⁴⁸ *It would apply even if no charge was framed provided it is clear that there was a pre-arranged plan to achieve the commonly intended object.*⁴⁹

One can conclusively say that it is the degree of the offence which plays a chief role in determining culpability of an accused. Such is the subjective nature of the Penal Code which requires intervention by the court to analyze each case on its own.

⁴⁷Ram Singh and ors v State Death Sentence Reference NO.6/013. (Nirbhaya Rape Case).

⁴⁸*Garib Singh vs State of Punjab 1973 AIR 460.*

⁴⁹*Id.*

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