

## CALCUTTA HIGH COURT

Ibra Akanda

Vs

Emperor

(Lodge, J.)

08.02.1944

### JUDGMENT

#### **Lodge, J.**

1. This is an appeal from convictions and sentences under Section 304 (2), Penal Code, read with Section 34. The four appellants were tried by the Sessions Judge of Pabna and Bogra and a common jury. There was a charge under Section 304/34 against all four appellants, and a separate charge under Section 324, Penal Code, against appellant Ibra Akanda. The jury returned a unanimous verdict of guilty under Section 304 (2)/34, Penal Code, against all four appellants, and of not guilty in respect of the separate charge under Section 324, Penal Code, against Ibra Akanda. The learned Judge agreed with and accepted this verdict; he acquitted Ibra Akanda of the charge under Section 324, Penal Code, and convicted all four accused on the remaining charge. He sentenced Ibra and Rayis, appellants, under Section 304 (2)/34, Penal Code, each to undergo rigorous imprisonment for ten years; and in view of the age of the one and the youth of the other, he sentenced Abad and Josi under Section 304 (2)/34, Penal Code, each to undergo rigorous imprisonment for five years. Hence this appeal.

2. The prosecution story is briefly as follows:

3. On 8th June 1942, Mafiz of Narayanpur, P.S. Dhunat was returning home from the hut at about sunset. He was waylaid by the four appellants, who all belong to one family, Ibra Akanda appellant, stabbed him with a spear (fala) and the other appellants belaboured him with lathis. At that time a constable and some other men were assembled in the house of Manik Munshi near by, in connexion with the investigation of a theft case. Attracted by Mafiz's shouts they came to the place of occurrence, recognised the assailants and heard Mafiz's account of the incident. Mafiz was carried home, but died about two hours later. The usual investigation followed, and charge sheet was submitted against the four appellants with the result stated above.

4. Mr. Sudhansu Mukherjee appeared as amicus curiae and argued the appeal on behalf of the appellants, and drew our attention to a number of alleged defects in the charge. He also placed before us all the authorities bearing on the interpretation of Section 34, Penal Code, which was the most important question raised in this appeal.

5. Mr. Mukherjee complained that in the charge to the jury the learned Judge, in discussing the first information report observed: The first information report should be used not as substantive evidence but for other subsidiary purposes such as corroboration of prosecution evidence etc. and the learned Judge did not emphasise that the first information report might also be used to contradict the prosecution evidence. An examination of the record shews that not a single question was put to the first informant, indicating that the first information report contradicted his evidence in Court. In other words, no attempt was made in this case to use the first information report for the purposes of contradiction, in the only way sanctioned by law.

6. Therefore if it were justifiable to infer from the use of the term, etc., and the absence of specific reference to contradiction in the heads of charge, that the jury were not instructed on this point, the omission would not be of any importance in the present case.

7. Mr. Mukherjee next drew our attention to the following passage in the charge: Exhibit 5(a) another diary entry, dated 24th June 1942. This has been admitted to show that the accused had hostility with the complainant. This is an entry at the instance of the accused party making certain allegations against Mafiz and his brothers.

8. Mr. Mukherjee has argued that this is in effect using the statement of one accused as evidence against his co-accused and is therefore wrong. I am not impressed by this argument at all. Exhibit 5 (a) has not been used as evidence of the truth of its contents. It is merely an instance of conduct on the part of one accused, cited as evidence of enmity felt by all the accused. The entry (irrespective of its truth or falsehood) is certainly proof of conduct indicating enmity on the part of the informant; and the Courts are continually being asked to hold that proof of enmity on the part of A against B is usually evidence of enmity on the part of A's brothers and relatives against B.

9. The direction merely contains a slight verbal inaccuracy inasmuch as it states that the entry was made at the instance of the accused instead of stating that it was made at the instance of one of them. There is no other defect in the direction; and inasmuch as the entry itself was placed before the jury, it is obvious that they could not have been misled.

10. Mr. Mukherjee next referred to the map and index prepared during investigation. In the index occurs the following: A is the house of Manikulla Munshi 7 rashes west from place of occurrence

and where witnesses assembled for a certain enquiry.

11. It is argued that this contains a statement made to a police officer during investigation and is inadmissible under Section 162, Criminal P.C.

12. It was in evidence that a police constable was in Manikulla Munshi's house holding an enquiry into a theft case at the time of the occurrence. This fact was not disputed by the defence. It is true that some of the prosecution witnesses were cross-examined to shew that they were not present at the enquiry in Manikulla's house; but there is nothing to indicate that the assembly in Manikulla's house was denied.

13. The statement in the index does not indicate that any of the individuals examined as prosecution witnesses in this case were at Manikulla's house at that time.

14. In these circumstances, even if it be conceded that this statement in the index was inadmissible, owing to the provisions of Section 162, Criminal P.C. it seems to me obvious that the statement could not have affected the verdict of the jury.

15. Mr. Mukherjee next commented on the omission of the learned Judge to give any caution to the jury regarding Ex. 1 the entry in the diary of the constable of a statement made by the injured man regarding the identity of his assailants. I am unable to hold that there was any misdirection to the jury on this point.

16. The most important criticism of the charge to the jury was regarding the learned Judge's explanation of the law as contained in Section 34, Penal Code.

17. It has been argued that Section 34, Penal Code, cannot be read together with Section 304, part 2, Penal Code; that the verdict of the jury finding the accused guilty under Section 304 part 2 read with Section 34, Penal Code, is self-contradictory and therefore erroneous; and that the verdict is erroneous owing to misdirections in the charge as to the meaning of Section 34, Penal Code.

18. This question has come before the Court on a multitude of occasions. A few of the cases are reported; the great majority have not been reported. Some learned Judges have found no difficulty in combining Section 34, Penal Code, with Section 304 Part 2; other learned Judges seem to think that the two sections cannot be combined; still other learned Judges have expressed the opinion that though cases can be imagined in which the two sections may be combined, such cases must be rare and due to a combination of circumstances which is almost incapable of arising in real life.

19. I propose to examine the sections with some care to explain why, in my opinion, there is no difficulty whatever in combining Section 34 with Section 304 (2) or with any other section which punishes an offence requiring knowledge that a particular result will be brought about without an intention to bring about that result.

20. To understand Section 34, Penal Code, it is, necessary to consider Sections 32, 33, 34, 35, 36 and 38, Penal Code.

21. By Sections 32 and 33, the word 'act' includes an omission as well as a 'series of acts.' Section 36 makes it clear that the series of acts may be a series made up partly of acts and partly of omissions

22. These sections must be borne in mind when considering Sections 34 and 35.

23. Section 34 reads:

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.

24. 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.

26. Section 38 reads:Where 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.

28. All these sections deal with the case of one act being jointly performed by a number of persons. They indicate that the performers of the joint act may be guilty of different offences (Section 38) and that some of the performers may not be guilty of any offence at all (Section 35).

29. Neither Section 34 nor Section 35 provides that all who take part in the act are guilty of the same offence; they merely provide that each of the performers shall be liable for the act in the same manner as if the act were done by him alone.

30. Those learned Judges who have held that it is not possible to combine Section 34 with Section 304 Part 2 have interpreted Section 34 as if it read when a criminal act is done by several persons in furtherance of the common intention to commit a particular offence each of such persons is liable for that act as if it were done by him alone and they have held that an offender cannot be guilty under Section 304 part 2 read with Section 34, Penal Code, unless there was a

common intention to commit an offence under Section 304 part 2.

31. If the section means that an offender can only be guilty of a particular offence by virtue of this section if there is a common intention to commit that offence, this contention would seem to be correct.

32. Culpable homicide (Section 299) is defined thus:Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

If therefore two or more persons have a common intention to commit culpable homicide they must have a common intention to cause death by doing an act &c. &c. That is to say they must intend to cause death.

33. But Section 304, part II provides the punishment 'if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death or such bodily injury as is likely to cause death.'

34. Obviously two or more persons cannot have a common intention to cause death by doing any act ... without any intention to cause death.

35. Therefore if a man could only be guilty under Section 304 read with Section 34 if there was a common intention to commit culpable homicide, a verdict of guilty under Section 304, part II read with Section 34 would be a contradiction in terms.

36. Walmsley J. was obviously taking this view in *Aniruddha Mana v. Emperor* when he observed: There is yet another objection to the charges and the verdict. It is that Section 34 which is based on a common intention cannot possibly be used with the second part of Section 304 which expressly excludes intention.

37. Most, if not all, criminal offences consist of an act intentionally performed, together with a particular result, and the intention to produce that result or the knowledge that that result is likely to be produced.

38. Even offences punishable under Section 304, part 2 require an act to be intentionally performed. It is not the intention to perform the act which determines whether an offence is punishable under part 1 or part 2 of the section, but the intention to produce the result, i. e., to cause death.

39. It seems to me that Walmsley J. assumed that because under Section 304, part 2 there must be absence of intention to cause death, there must therefore be absence of an intention to commit a criminal act at all. But if this view were correct, Section 304, part 2 would scarcely be applicable to any criminal offence whatever. In this connexion it is interesting to consider illus. (d) under Section 300 (fourthly). The firing of a piece of heavy artillery is a complicated series of acts performed by a gun crew. Is there any doubt that all members of the gun crew would be guilty of murder in this case-though none of them had the intentions set out in Section 299 ?

40. Before attempting to state what the section does mean, two illustrations may be considered, e. g., illus. (1): A pushes X into the River Hooghly, with the result that X is drowned. A has no intention to cause the death of X or to cause such bodily injury as is likely to cause the death of X; but A knows that the River Hooghly is such a treacherous river that he is likely by his act to cause the death of X. A commits culpable homicide not amounting to murder (Section 304, part 2). Illustration (2): A and B, two seamen on a ship in the River Hooghly, find X a stowaway in the hold. They bring him on deck and throw him into the river, one holding X by the legs and the other holding X by the head or arms.

41. Throwing X overboard may be considered one act jointly performed. A and B both intended to throw X overboard. The throwing of X overboard is an act done by two persons in furtherance of the common intention of both. Taking the plain meaning of the words of Section 34, A and B will each be liable as if he alone had thrown X overboard. Therefore if A knows that he is likely by his act to cause death, he will be guilty under Section 304, part 2. If B has no reason to believe that anything worse than a ducking will be the result, he will be guilty of a simple assault under Section 352. A and B may be guilty of different offences: vide Section 38.

42. But if Section 34 requires that both A and B shall have the intention of committing the same offence neither can be guilty under Section 304. Each can be guilty only under Section 352 though A may know that he is likely by his act to cause death.

43. The words "in furtherance of the common intention of all" did not occur in the section when the statute was first enacted; they were inserted by the Indian Penal Code Amendment Act 1870 "so as to make the object of the section clear" according to the Law Member of the Council of the Governor-General.

44. Before this amendment, Sections 34 and 35 were complementary sections laying down similar principles in the case of acts which are criminal in themselves and in the case of acts which are criminal only by reason of their being done with a criminal knowledge or intention.

45. If the words 'in furtherance of the common intention of all' mean "in furtherance of the

common intention of all to commit a particular offence" they cannot possibly apply to Section 35 which contemplates that some of the performers of the act may have no intention to commit a criminal offence at all. If however the words may mean only "in furtherance of the common intention of all to do the joint composite act" the words could apply with equal force to Section 35 though they have not actually been incorporated in that section.

46. If however the words mean "in furtherance of the common intention of all to commit a particular criminal offence" the result is to my mind remarkable. It is as follows:

47. If a criminal act is done by several persons each of whom intends the joint act and each of whom intends thereby to commit a different offence, nobody will be held liable for the joint act, and each will be held liable only for his individual contribution to the joint act and will be guilty only of attempting to commit the offence which he intends to commit by the joint act.

48. If however the joint act is of such a nature that one of the participants is wholly innocent, then Section 35 will apply and each of the others will be liable for the entire joint act in the same manner as if the act were done by him alone with his own particular criminal knowledge or intention.

49. This result seems to me so illogical that it ought not to be accepted if the words of the section can possibly be interpreted otherwise.

50. It may of course be argued that there are so few acts which are criminal irrespective of whether they are done with a criminal intention or knowledge, that Section 35 is the section which is ordinarily applicable and that Section 34 has in fact been consistently misapplied. In this view the whole argument is merely academic.

51. Again, if the phrase means "in furtherance of the common intention of all to commit a particular offence," Section 34 becomes merely a particular instance of the wider Rule contained in Section 37.

52. It seems to me that this view, namely, that all the participants in the act must have the common intention to commit the same offence, is inconsistent with Section 38, which clearly provides that the participants may be guilty of different offences. If two persons do the same act intending to commit the same offence and produce the same result they must necessarily commit the same offence.

53. It should be noticed that Section 38 like Section 34 refers to a criminal act and not to an act which is merely criminal if done with a particular knowledge or intention. In other words,

Section 38 is an explanation to Section 34.

54. I am satisfied therefore, that the phrase 'in furtherance of the common intention of all' in Section 34 does not mean that all the participants must intend to commit the same offence.

55. It has next been contended that if the phrase does not mean that all the participants must intend to commit the same offence, it must mean that they all intended to produce the same result. In the illustration to Section 38 both A and B intended to cause the death of X, and therefore each was liable as if he alone had caused the death of X; and the offences of each were different because there were additional circumstances mitigating A's offence.

56. The illustration to Section-38 is consistent with this view, but there is nothing in the section to indicate that the section is limited to those cases in which one or other of the participants in the act can prove circumstances bringing his case within one of the exceptions to criminal liability. The words of the section are quite general, and apply equally to cases in which all the participants in the joint act intended the same result, and to cases in which the various participants intended different result from the joint act.

57. Consider another illustration:

Illustration (3): A, B, C and D unite to push a large boulder over a hillside. The boulder crashes down the hillside and causes the death of X.

58. The pushing of the boulder over the hillside may be regarded as one joint act done A,B,C and D. Inasmuch as all of them intend to push it over the hillside, the pushing of it over the hillside is done in furtherance of the common intention of all. Therefore according to the ordinary meaning of the words of Section 34, A, B, C and D are each liable as if he alone had pushed the boulder over the hillside. All four may intend the same offence; or all may intend to produce the same result, without intending the same offences; or each of them may intend to produce a different result.

59. Let us take an extreme case. Suppose that A knows that X is just below and in the path which the boulder is likely to take, and intends by the joint act to cause the death of X. Suppose that B has no knowledge that X is below, but knows that there is a road below on which there may be passers-by. Suppose that C has no knowledge that X is below or that there is a public road below, but does know that there are tea plants belonging to an enemy which he wants to damage. Suppose that D is blind and entirely unaware that any damage is likely to be caused. I can see nothing in the plain meaning of the words of Sections 34 and 35 to prevent a Court invoking those two sections and finding A guilty of murder under Section 302, B guilty of culpable

homicide not amounting to murder under Section 304 part 2 or of causing death by a rash and negligent act under Section 304A, C guilty of mischief under Section 426 and D not guilty of any offence.

60. But if Section 34 requires either that all shall intend to commit the same offence, or that all shall intend to produce the same result by their joint, act then each of them has merely attempted to commit an offence and A might be guilty under Section 307, 0 under Section 426/511, Penal Code.

61. If I am right in holding that the plain words of the sections apply to such a case as this, is there any reason why they should not be applied ? I can see none. I cannot see that any injustice would be done by applying the sections to such a case. On the other hand to hold that only an attempt to commit an offence had been committed by any one in such a case seems to me utterly unreasonable. If I am right in holding that Section 34 and 35 apply to such a case, it must follow that the words 'in furtherance of the common intention of all' do not mean that all the participants in the joint act must either intend to commit the same offence or intend to produce the same result by their joint act. It will suffice if all of them intend that the joint act be performed.

62. The supposed difficulty of applying Section 34 to acts committed by a number of persons has never been considered in such cases as those I have discussed above. It has always been considered in cases where a number of persons have combined to inflict wounds on their victim.

63. Two illustrations will explain my view of these cases. Section Illustration: (4) A lies in ambush, armed with a lathi. As X approaches A leaps out from his ambush and belabours him with the lathi. X dies from his injuries.

64. I am aware that some learned Judges consider that Section 304, part 2 cannot apply to such a case, and consider that A is guilty either of murder or of voluntarily causing grievous hurt. But this Court has, times without number, approved a conviction under Section 304, part 2 in such a case, holding that A knew that he was likely to cause death but did not intend to cause death or to cause such bodily injury as was likely to cause death. In the circumstances, I consider that it must be taken to be settled law that Section 304, part 2 may apply to such a case.

65. Illustration: (5) A, B, C and D lie in ambush, armed with lathis. As X approaches, they leap out from ambush to belabour him, A stumbles and falls: B, C and D belabour X with lathis. Neighbours appear before A has time to get up and join in the assault. A, B, C and D retire. X dies from his injuries. It seems to me that if the belabouring of X by B, C and D can be regarded as one act; and if that joint act was intended by A, B, C and D then each of the four is guilty as if that act was done by him alone. Under ordinary circumstances each would be guilty under

Section 304, part 2; but if for any reason, one of them did not know that death was likely to be caused by the joint act, he would be guilty only under Section 325 read with Section 34 and the others might still be guilty under Section 304 read with Section 34.

66. I can find no greater difficulty in applying Section 304, part 2 to a multiple assault committed by a number of assailants than to a multiple assault committed by a single assailant.

67. The only questions for determination in my opinion are;

(i) were the individual assaults so connected together as to constitute one criminal act ?

(ii) did all the participants intend that criminal act?

(iii) what result did each participant intend to produce by that act or know that they were likely to produce by that act?

68. The correct interpretation of Section 34, Penal Code, was considered by a Full Bench of this Court in 2. Emperor v. Barendra Kumar , and again by the Privy Council in an appeal from the decision of that Full Bench.

69. It is clear that in that case the attention o both Courts was fixed on the words 'criminal act' and there was no express intention of interpreting the words "in furtherance of the common intention of all." Therefore it may not be justifiable to take sentences from those judgments to support any of the views contended for now. Some of the sentences however are definitely in support of the view I take.

70. The judgment of Cuming J. states again and again that the requirement of the section is that the criminal act shall be the common intention of all.

71. The judgment of the Judicial Committee contains the following significant sentence.

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.

72. The words underlined (here italicized) do suggest that the "intention common to all" need not be the same as "an intention to co-operate in the offence."

73. The only reported decision which seems clearly inconsistent with the view I have expressed is Aniruddha Mana v. Emperor , to which I have referred above. The view expressed in that case

by Walmsley J. was considered in *Adam Ali v. Emperor*, The learned Judges observed:

our attention has been drawn to a decision of Walmsley and Mookerjee JJ. (Appeal No. 248 of 1924, decided on 19th August 1924.) In that case there are the following remarks of Walmsley J.:

'There is yet another objection to the charges and verdict. It is that Section 34 which is based on a common intention cannot possibly be used with the second part of Section 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention in furtherance of a common intention. It is the badly framed charge and the defective summing up that have led the jury to their illogical verdict.' With great respect to the learned Judge I am not quite able to discover whether he did or did not decide the point. He certainly does not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of Section 34. The learned Judge's remarks therefore on the applicability of Section 34 to Section 304, Part 2, may therefore be considered as obiter dicta.

74. Though the question of the true interpretation of Section 34 has been considered in many reported cases, in the majority of those cases the term "Criminal act" was examined and the Courts did not attempt to explain the meaning of the phrase "in furtherance of the common intention of all."

75. In *Emperor v. Morgan* ('09) 36 Cal. 302, two soldiers set up a target and fired several shots at it. There was a public road near by, but invisible from the place where the soldiers stood to fire.. A bullet struck a man on the public road and caused his death.

76. This Court held that both accused persons were guilty under Section 304A. The learned Judges observed:

The law in India is in accord with what was laid down in (1880) 6 Q.B. D. 79. It is unnecessary to call in aid Section 34 or Section 107 even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of 'negligence' only.

77. With the greatest respect for the learned Judges who decided that case, I cannot understand how one of the soldiers could have been held responsible for the shot fired by his companion, without invoking Sections 34 and 35 or Section 114.

78. On the other hand I find no difficulty in applying Section 34 to the facts of that case, and holding that the firing of a number of shots by the two soldiers was essentially one joint act, that there was a common intention on the part of the two soldiers that those shots should be fired, and that each of the soldiers was therefore liable under Section 34 as if he had fired all the shots himself. In this view it seems to me, if I may say so with respect, that the decision was clearly correct. But I cannot justify the decision on any other ground.

79. In *Gouridas v. Emperor* ('09) 36 Cal. 659, the deceased was way laid by four persons and assaulted out of revenge. The deceased received six injuries including three severe injuries on the head, one of which fractured the frontal bone and was the cause of death.

80. This Court invoked the provisions of Section 34, but in the circumstances was not prepared to hold that the appellant, who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck and found him guilty under Section 326 read with Section 34. This decision, seems to me consistent with the view I have expressed above. The statement of facts in the report is very brief but it seems that the appellant was held liable for the entire assault as if committed by himself alone, but the nature of his offence was determined by his own knowledge and intention. Otherwise, I cannot understand how he could have been held to have caused grievous hurt.

81. In *Foezullah v. Emperor* ('21) 8 A.I.R. 1921 Cal. 241, the learned Judges observed:

In cases of the present type when two or more persons join actively in an assault on a third person, there is ample authority for the view that they are directly responsible for the injuries caused to the extent to which they had a common intention to cause those injuries, and what their common intention was must be gathered from the circumstances.

82. This statement is sufficiently accurate for the majority of cases, where the intention of each assailant can be gathered only from the nature of the joint assault and Where therefore each assailant will ordinarily be presumed to intend the same consequence from the joint act.

83. I do not regard this case as an authority inconsistent with the view I have expressed.

84. In *Debi Charan v. Emperor* ('37) 41 C. W. N. 570, the learned Judges expressed the opinion that cases in which Section 34 is combined with Section 304 (1) may be theoretically possible but must be rare, and the reason given is that in such a case it is necessary to establish not merely that all the participants in the joint act intended to cause death, but that they all intended to cause death in circumstances coming within one or other of the exceptions mentioned in Section 300, Penal Code, e.g., that they all intended to exceed the right of private defence. It seems. to me that

Section 38 provides a complete answer to this line of reasoning. If all intend to cause death, then one may be within one of the exceptions and be liable under Section 304(1) and the other may be guilty under Section 302.

85. In *Nanda Mallik v. Emperor* ('37) 41 C.W.N. 575, Henderson J. observed, whereas Section 34 deals with intention part 2 of Section 304 deals with knowledge. The result is that in Order to establish this particular charge there has to be a peculiar combination of knowledge and intention which would hardly arise in real life. I do not say that the jury cannot possibly convict on such a charge ....

86. The learned Judges in this case apparently abandoned the reasoning of Walmsley J. in *Aniruddha Mana v. Emperor* , in that they seem to have conceded that Section 34 can in rare cases be combined with Section 304 (2) whereas according to the reasoning (which I have attributed to Walmsley J.) a verdict of guilty under Section 304 (2) read with Section 34 is a contradiction in terms. The learned Judges do not indicate how Section 304 (2) can be combined with Section 34, and consequently do not indicate what the difficulty is, nor how it can be overcome.

87. But later in the same judgment, Henderson J. seems to adopt the reasoning of Walmsley J. for he observes:

It was suggested by the learned Deputy Legal Remembrancer that one might alter the conviction into one under Section 325. Now, here again, that is a section to which it is not easy to apply Section 34. Grievous hurt is a pure creation of the statute, and it cannot be easy to say that it was the common intention to cause one particular form of hurt rather than other.

88. The learned Judges did not decide the case on this ground and these remarks must be regarded as obiter dicta. The average man does not think in terms of the Penal Code. If he sets out to commit an offence 'affecting the human body' he necessarily intends to do a criminal act. In exceptional cases, he may intend to murder his victim. In such cases he must intend to cause death. But, except in cases where he intends to cause the death of his victim, he does not contemplate in his own mind that he will 'commit culpable homicide,' or 'voluntarily cause grievous hurt with a dangerous weapon.' All he contemplates is that he will give his intended victim 'a good beating' or 'a sound thrashing' etc. I am unable to believe that in the ordinary case punishable under Section 325, Penal Code, the offender actually thinks of breaking his victim's bones; and it is quite unthinkable that any man assaults another with the intention of inflicting a hurt which will 'cause the sufferer to be during the space of 20 days, in severe bodily pain or unable to follow his ordinary pursuits'. Yet no Court has found any difficulty in convicting an

offender under Section 325, Penal Code. The truth is that the Court satisfies itself that the offender intended the assault, and that the assault was of such a nature that the offender must have known that grievous hurt was likely to be caused. Similarly, in cases under Section 304, part 2 the Court finds that the offender intended the assault, and from the nature of the assault the Court infers that the offender must have known that death was likely to result from the act.

89. If the same attitude is adopted to offences committed by a number of persons, the Court will first determine whether all the persons intended the 'severe thrashing' or 'good beating', etc. If so the Court will then hold each person liable for that thrashing as if he had done it alone, and will consider separately in the case of each participant, whether he must have known what the result of the act was likely to be. Moreover the Court is bound to recognise that when a number of persons join together to assault another, each of them must realise that he cannot control his companions and measure the force of his companion's blows and each of them must necessarily be taken to intend an assault of such severity as the numbers of the assailants and the nature of their weapons portend. There can be no question of the Court speculating whether A intended exactly the blow struck by B if the blow struck, by B was the kind of blow which any reasonable man would expect to be struck in an assault of that particular, type.

90. This seems to me justified by the provisions, of Sections 34 and 35, Penal Code, and I can see no reason why in offences committed by a number of persons the Court should adopt a standard which it refuses to adopt in offences committed by a single individual.

91. With great respect to the learned Judges who decided *Debi Charan v. Emperor* (37) 41 C. W. N. 570, and *Nanda Mallik v. Emperor* (37) 41 C.W.N. 575, I can find no difficulty whatever in applying Section 34 to offences punishable under Section 304 (1), 304 (2) or Section 325, Penal Code; and if the interpretation of Section 34 which I have adopted is correct, there can be no difficulty, e.g., what would be the offence if three or four men fire a volley at their attackers and thereby cause death where the, circumstances are such that the right of private defence exists but does not extend as far as voluntarily causing death ? What would be the offence if two young men overhear their mother so insulted that they are deprived of the power of self-control and intentionally cause the death of the insulter ?

92. What would be the offence if a man above the age of 18 consents to taking the risk of death, and is killed by the joint action of two others ?

93. Surely in all these cases the offence is culpable homicide punishable under Section 304 (1) read with section 34.

94. If it is once conceded that Section 34, Penal Code, does not require that all the participants in

the joint act must have the common intention of committing the same offence or must have the common intention of producing the same result by their joint act, all the difficulties disappear. I have given my reasons above for holding that such a limited interpretation cannot be put upon the words of the section.

95. In the result therefore I hold that there is no difficulty in applying Sections 34 and 35 to cases of culpable homicide punishable under Section 304 (2) and that there is no reason for holding that there is any error in the verdict of the jury owing to misdirection on this point.

96. After careful consideration of the entire evidence and the arguments put before us I see no reason to interfere with the convictions or with the sentence. In my opinion the appeal should be dismissed.

Das, J.

97. As I have arrived at a different conclusion on the points argued before us I consider it necessary to state my reasons in detail. It is needless for me to state that I do so with a certain amount of diffidence, for my conclusions and the reasons therefor have not the approval or concurrence of my learned brother for whose vast knowledge and experience in these matters I entertain the highest respect.

98. The facts of this appeal have been already stated by my learned brother and I shall not repeat them. I shall at once take up the points urged by Mr. Sudhansu Mukerjee as *amicus curiae* and deal with them one by one (i) We were referred to the following passage in the charge to the jury:

Exhibit 2 F.I.R ...This was recorded at 4-30 P.M. at the thana. The first information report should be used not as substantive evidence, but for other subsidiary purposes like corroboration of prosecution evidence, etc. Its value depends on the promptness with which it was recorded.

99. Mr. Sudhansu Mukherjee complained that in this passage the learned Judge only emphasised the value of the first information report as cor-roboration of the present evidence of the prosecution witnesses and then, having so emphasised its value as corroborative evidence, the learned Judge referred to it no less than 11 times as supporting the prosecution case. The learned Judge only once referred to the first information report for the purpose of showing that a certain statement of prosecution , witnesses was not noted in it. The learned Judge did not bring it to the notice of the jury, generally or even in connexion with the last mentioned omission, that the first information report could also be used for the purpose of contradicting and falsifying the prosecution story. I agree with Mr. Sudhanshu Mukherjee that the learned Judge should have also expressly and specifically mentioned that aspect of the matter to the jury. In *Abdul Latiff v.*

Emperor , Bartley J. pointed out that such an omission in the charge was a grave error of law. The above observation was made in respect of the charge of this learned Sessions Judge in that case and it is surprising that he should make the same mistake again. Of course this time the learned Sessions Judge added the word "etc." after the word "corroboration" and I do not know whether the learned Judge in addressing the jury in Bengali adverted to that aspect. While I am of opinion that, having regard to the clear ruling of Bartley J., the learned Sessions Judge should not have left the matter in doubt, I should hesitate to say that this omission, by itself, would, in the circumstances of this case, be sufficient to vitiate the verdict. (ii) Mr. Sudhanshu Mukherjee's next attack was against the manner in which a General Diary entry dated 24th June 1942 (Ex. 5A) was explained to the jury. While collecting and enumerating the documentary evidence in the case the learned Judge observed as follows:

Exhibit 5 (a) another General Diary entry, dated 24th June 1942. This has been admitted to show that the accused had hostility with the complainant. This is an entry at the instance of the accused party making certain allegations against Mafiz and his brothers.

Then while discussing the question whether the accused persons shared the intention of committing culpable homicide the learned Judge charged as follows:

The accused are inter-related, Ibra, Ahad and Rayis being brothers and Jasi being a son of Ahad. We may also refer to the previous hostility. There is Ext. 5 (a) General Diary entry to show this. If there was hostility between the parties, then there is likelihood of there being a common intention.

100. Mr. Sudhansu Mukherjee complained that the learned Judge overlooked the fact that the General Diary entry Ex. 5A was recorded at the instance of Rayis Akanda alone and did not pointedly or at all bring that fact to the notice of the jury and the result was that the statement of a co-accused was used against the other accused. I am not of opinion that this complaint is without any substance. The learned Sessions Judge not only referred to the fact of a diary having been entered but also in a way referred to the contents thereof. The statement of an accused may be taken into consideration as against his co-accused only if the statement be in the nature of a confession as provided in Section 30, Evidence Act. I know of no other provision of law which would permit such use of a statement of an accused against his co-accused. In *Dargahi Miah v. Emperor* , a Bench of this Court deprecated the use of a statement of one accused in his examination under Section 342, Criminal P.C. as evidence against his co-accused. The same principle should also apply to this case. Further, the alleged old enmity was an important part of the prosecution case and from that point of view Ex. 5A was certainly an important piece of evidence if it could be regarded as recording or reflecting the mental attitude of all the accused. It

was used for such purpose and it is impossible to say that such use of this document has not influenced the minds of the Jury. It is true that the accused persons are related to one another and it may well be that in getting that General Diary entry recorded Rayis acted for the family but it may also be an act of his own with which the other accused had nothing to do. It does not necessarily follow, from the mere fact of the accused being closely related, that everything said or done by one-must have been on behalf or in the interest of all of them. It was, in my opinion, clearly incumbent on the learned Sessions Judge to have specifically and explicitly drawn the attention of the jury to the fact that this General Diary Entry, Ex. 5A, was on the face of it recorded at the instance of Rayis and then to have left it to them to conclude whether or not it was done on behalf of all of them and to have warned them that if they found that it was done by Rayis on his own behalf it would not be any evidence against the others. In my judgment there has been a material misdirection in relation to Ex. 5A.

(iii) Mr. Sudhanshu Mukherjee's third objection was with reference to the Map and the index being Ex. 4. This Map and index were prepared and signed by Sub-Inspector, G. Waheb who was the investigating officer in this case and both of them have been exhibited. In the Map certain huts are marked with the letter "A". In the Index it is explained that " 'A' is the house of Manikulla Munshi, 7 rashis west from place of occurrence and where witnesses assembled for certain enquiry." The fact stated in this explanation was certainly derived from statements made to the Sub-Inspector as investigating officer and as such was clearly inadmissible in evidence as hearsay and also particularly having regard to the provisions of Section 162, Criminal P.C. I think Mr. Sudhanshu Mukherjee was right in this contention and is clearly supported by the decision in *Bhagirathi v. Emperor* ('26) 13 A.I.R. 1926 Cal. 550, The identification of the accused persons depended, apart from the dying declaration of the deceased, on the evidence of certain prosecution witnesses who were alleged to have assembled in the house of Mani-kullah Munshi. The defence case, as it appears from the cross-examination of the prosecution witnesses and particularly of P. Ws. 4, 5 and 6, was that those witnesses were nowhere near the house of Manikulla Munshi at the time of occurrence. Therefore, the question whether they had assembled at Manikulla Munshi's house at the time was a very important one and it may well be that the statement involved in the explanation in the index to the map was taken by the jury as a contemporaneous statement of the witnesses and as such establishing the truth of their evidence in Court. In my opinion, there has been a clear violation of the provisions of Section 162, Criminal P.C.

(iv) Mr. Sudhanshu Mukherjee's last objection to the charge to the jury was that the learned Judge did not administer any caution to the jury in relation to Ex. 1, being the entry in the diary of the constable, who is alleged to have been in the house of Manikulla Munshi and to have come to the

place of occurrence with the other persons assembled there and taken down the statement of Mafizuddin the deceased. The learned advocate admitted that this piece of evidence was not hit by Section 162, Criminal P.C. but maintained that as a matter of ordinary prudence the learned Judge should have warned the jury that they should not attach such importance to this exhibit as they would attach to the sworn testimony of a witness who had been subjected to cross-examination or to a regular dying declaration recorded by a Magistrate after observing the formalities of the law. I do not think there is much substance in this contention. I rather agree with Mr. Debabrata Mukherjee, the learned Assistant Deputy Legal Remembrancer, that the mere omission to give a caution to the jury in relation to this Ex. 1 did not amount to any serious misdirection or at any rate to such misdirection as would vitiate the verdict of the jury.

(v) Finally Mr. Sudhanshu Mukherjee raised a point as regards the charge as framed, which is, of considerable general importance, namely, whether it is proper and permissible under the law to frame a charge under Section 304 read with Section 34, Penal Code, and to put several persons on trial on such a charge or convict them under Section 304, part 2 read with Section 34 or in other words, whether culpable homicide not amounting to murder can be imputed to several persons by invoking and applying the provisions of Section 34, Penal Code, which postulates the criminal act as having been done in furtherance of the common intention of all the participators in the crime.

101. At the time of the admission of this appeal there was a clear difference of opinion between Blank J. and Pal J. Blank J. was apparently of opinion that such a charge and conviction were permissible under the law and the appeal should be summarily rejected, while Pal J. was of opinion that the appeal should be admitted so that this point of law might be cleared up. The appeal was accordingly admitted. There can be no doubt of the importance of the point of law involved in this appeal. There is a marked divergence of judicial opinion in the matter which is also exemplified by the fact that this very appeal was admitted on a difference of opinion and is ending in another to-day. Perhaps at a future date the fundamental difference of opinion will be set at rest by an authoritative decision of a Full Bench of this Court.

102. The same point of law was also raised by Mr. Sudhanshu Mukherjee in appeal No. 104 of 1943 (Pathia Kaibarta and others v. The Emperor) and by Mr. Section C. Talukdar in Appeal No. 98 of 1943 (Moslim and others v. The Emperor). Mr. Debabrata Mukherjee appeared for the Crown in all the three appeals which have been heard one after another. The points of law involved in all the three appeals have been argued at the bar at some length and, I may add, with admirable ability and learning. Speaking for myself, I am, indeed, indebted to all the learned advocates for their very lucid exposition of the law and I now proceed to state the conclusions I have come to and my reasons for doing so.

103. The accused persons in all these cases were charged under Section 304 read with Section 34, Penal Code. It is necessary, therefore, to carefully examine those sections. The marginal note to Section 304, Penal Code is: "Punishment for culpable homicide not amounting to murder." It will be seen from the marginal note and the language used in the body of this section that this section only purports to prescribe punishment for culpable homicide not amounting to murder. It will be further observed that different punishments are prescribed for the offence of culpable homicide not amounting to murder according to the different state of mind of the offender with which the act by which the death is caused is done. Thus if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death the offender shall be punished with transportation for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine, but if the act by which the death is caused 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 he shall be punished with imprisonment of either description for a term which may extend to ten years or with fine or with both. In short the degree of punishment is made commensurate with the degree of culpability evidenced by the state of mind of the offender with which the act by which the death is caused is done. This section, however, does not fully indicate what is culpable homicide not amounting to murder. It is true it refers to the act by which death is caused and the intention or knowledge with which the act is done but that is not conclusive, for, as will be presently seen, the very act done with the very intention or knowledge mentioned in this section may equally be murder or culpable homicide not amounting to murder according to different circumstances in which the act is done. In other words this section does not define culpable homicide not amounting to murder but it is what, by its marginal note and the language employed in its body, it purports to be, namely, a section prescribing punishment for culpable homicide not amounting to murder; see the observations of Straight J. in *13. Empress of India v. Idu Beg* ('81) 3 All. 776, at p. 778. In order, therefore, to ascertain what is culpable homicide not amounting to murder one has to look at other sections of the Penal Code.

104. Chapter 16, Penal Code, deals with offences affecting the human body. The group of sections from 299 to 311 deals with offences affecting life. Section 299 defines the offence of culpable homicide. The illustrations and explanations that follow only clarify the meaning of the section. It will be observed that to constitute the offence of culpable homicide as defined in Section 299 the death must be caused by doing an act:

(a) With the intention of causing death, or

(b) With the intention of causing such bodily injury as is likely to cause death, or

(c) With the knowledge that the doer is likely by such act to cause death.

105. These are the three requisites of the act constituting culpable homicide.

106. Then comes Section 300 which deals with murder. This section provides that except in the cases thereafter excepted culpable homicide is murder if the act by which death is caused is done with certain intention or knowledge in relation to that act. Leaving aside for the moment the exceptions referred to in the opening words of the section and which are set out at the end thereof, it will be observed that under this section culpable homicide is murder if the act by which the death is caused is done (1) with the intention of causing death, or (2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or (3) with the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or (4) with the knowledge that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death and without any excuse for incurring the risk of causing death or such injury as aforesaid.

108. These are the four requisites of the act constituting murder.

109. Having ascertained what is murder within the meaning of the earlier part of Section 300 I now proceed to consider the exceptions which are set out in the latter part of the section. The exceptions are five in number. The very first thing I notice in these exceptions is that each of them refers pointedly to certain occasions or circumstances in which the death is caused. The act by which the death is caused may be done with the intention or knowledge enumerated in Clause 1, 2, 3 and 4 of the earlier part of the section yet each of the exceptions provides that the resulting culpable homicide will not be murder if that act with that intention or knowledge is done in the circumstances and subject to the conditions specified in the five exceptions. When I examine these exceptions more closely I find that each of them is based on certain intelligible principles. Thus irresistible impulse born of passion generated by grave and sudden provocation or in a sudden fight and finding expression in a spontaneous act causing death is acknowledged as an extenuating circumstance in exceptions (1) and (4). The natural and legitimate propensity for the preservation of one's person and property and the public policy of protecting and encouraging the sense of duty of public officers for the advancement of public justice are recognised in exceptions (2) and (3), respectively. The consent of the victim forms the foundation of exception (5). Broadly speaking, in the cases falling within any of the exceptions, what saves the causing of the death from being a murder is primarily the circumstance which precedes and, as it were, prompts the doing of the act by which the death is caused. In short it is the extenuating circumstance which reduces murder to culpable homicide not amounting to murder.

110. Then when I examine the extenuating circumstances recognised in the exceptions I notice that in each case the extenuating circumstance is extraneous to the person who causes the death, in the sense that it does not depend on his volition. The grave and sudden provocation in exception (1) has to come from the victim. The violation of the sanctity of one's person or the invasion of one's property must first proceed from the victim so as to bring the act of killing in defence of one's person or property within exception (2). The act or conduct of the offender against public justice must precede the act of the public officer in discharge of his duty as contemplated by exception (3). It requires two-parties to give rise to a sudden fight referred to in exception (4). Lastly, the consent mentioned in exception (5) must first come from the victim. If the provocation or the invasion of person or property or the conduct of the offender against public justice or the sudden fight or the consent of the victim is sought or provoked or procured by the person doing the act by which the death is caused, then the act causing death done in circumstances so produced by the offender him-self will not be protected by the exceptions at all.

111. The last thing I gather from the language of exceptions 1, 2, 3 and 4 is that when the extenuating circumstance arises, independently of the person who does the act which causes the death that person, to be within the exceptions must do the act spontaneously and without premeditation. Spontaneity and absence of premeditation are the essential ingredients in these exceptions. If the link of spontaneity between the extenuating circumstance and the act causing the death is broken by the intervention of meditation or deliberation then the person who does the act which causes the death is not protected, because the act cannot then be referable directly to the extenuating circumstance. The position is clearly and plainly obvious as regards exceptions 1 and 4. As regards exceptions 2 and 3 it may be said that one may, in anticipation, make up one's mind to use force to defend his person or property or a public officer may make up his mind beforehand to use force to apprehend the offender against public justice or to prevent him from offending against public justice I can well conceive such a case. But by making up one's mind to use force if necessary one commits no crime. Nor does one commit any crime by using force which is necessary, in the one case to defend one's person or property (see Sections 96 to 106) and in the other case to prevent an offence against public justice. Even if on the spur of the moment in either of the two cases force is used Spontaneously but in excess of what is necessary and death is caused, yet the culpable homicide will not be murder. But if one makes up one's mind, whether before or after the extenuating circumstance arises, to use force in excess of what will be necessary and uses excessive force pursuant to such preconceived intention and. death is caused thereby, then his act is premeditated and evinces ill will and the person who does the act which causes the death in such circumstances must be outside the pale of protection of exceptions 2 and 3 alike.

112. Such, I conceive, are the underlying principles of the exceptions. To summarise, therefore, we find that under Section 300 culpable homicide is murder if the act by which the death is caused is done with the intention or knowledge specified in Clause (1) (2) (3) and (4) of the earlier part of the section. Then we find that culpable homicide is not murder if the same act by which death is caused is done in certain extenuating circumstances and subject to certain conditions specified in the five exceptions set out in the latter part of the same section.

113. The question then arises: do these exceptions exhaust the list of culpable homicide not amounting to murder, or are there other cases of culpable homicide not amounting to murder? For an answer to this question we have to look into the sections more minutely and ascertain whether, apart from the exceptions, there can be any culpable homicide which does not amount to murder. I do not propose to embark upon a lengthy discussion on this point and I shall content myself with only referring to the decision of Sir Barnes Peacock C. J. in *Queen v. Goraohand Gope* ('66) 5 W. R. Cr. 45, and to the very lucid observations of Melvill J. in *Reg. v. Govinda* ('75-77) 1 Bom. 342, which has been followed in *Emperor v. Ratan* ('32) 19 A.I.R. 1932 Oudh 186,7 If, in the light of the above-mentioned decisions, we compare the three requisites of the act constituting culpable homicide under Section 299 which I have marked as (a) (b), and (c) with the four requisites of the act constituting murder under Section 300 which I have marked as (1) (2) (3) and (4) it will be found that Sections 299 and 300 are not co-extensive and that Section 299 is somewhat wider than Section 300. In other words, Section 299 is the genus and Section 300 is the species in an aggravated form. Both (a) of Section 299 and (1) of Section 300 predicate an intention to cause death and are co-extensive and therefore culpable homicide committed by an act done with the intention to cause death will always be murder unless it comes within any of the exceptions of Section 300. Item (b) of Section 299 and items (2) and (3) of Section 300 alike predicate an intention to cause bodily injury, the intention in the first case being to cause such bodily injury as is likely to cause death and in the second case the intention being to cause such bodily injury as the offender knows is likely to cause the death of the particular victim or is sufficient in the ordinary course of nature to cause death. It has been said that the difference is fine but appreciable, that it is a question of degree of probability and in ultimate analysis resolves itself into a consideration of the weapon used. Thus a blow from a stick on a vital part may be likely to cause death and a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death. In other words (b) of Section 299 is wider than (2) and (3) of Section 300. Neither (c) of Section 299 nor (4) of Section 300 connotes any intention at all and both of them are based on the knowledge of the dangerous character and the likely or probable consequence of the act. Whether the offence committed by an act done with such knowledge is murder or is culpable homicide not amounting to murder, depends upon the refined distinction between the one kind of knowledge and the other, to be drawn from the

degree of risk to human life. If death is likely result, it is murder. Indeed as Sir Barnes Peacock C. J., pointed out in Queen v. Goraohand Gope ('66) 5 W. R. Cr. 45, There are many cases falling within the words of Section 299 "or with the knowledge that he is likely by such act to cause death" that do not fall within Clause 2, 3 or 4 of Section 300, such for instance, as the offences described in Section 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in cl. 2 or cl. 3 of Section 300.

Furious driving and firing at a mark near the public road done with knowledge of the dangerous character and the likely effect of the act and resulting in death are cited as examples of culpable homicide not amounting to murder by Melvill J. It must be remembered that in some palpable cases you may infer intention from knowledge. Those cases logically should fall within 1, 2 or 3 of Section 300. Both (c) of Section 299 and (4) of Section 300 deal with cases where intention does not come in. These cases are only concerned with the knowledge of the kind specified therein.

114. The result we arrive at, therefore, is that culpable homicides not amounting to murder may be classified into three groups:

Group (1): The cases which fall within any of the five exceptions in Section 300.

Group (2): The cases which fall within (b) of Section 299 but not within (2) or (3) of Section 300 by reason of the lesser degree of probability or risk to human life due mainly to the nature of the weapon used; and Group (3): The cases which fall within (c) of Section 299 but not within (4) of Section 300 by reason of the lesser degree of risk to human life and which are illustrated by rash or negligent act done with knowledge of the likelihood of its dangerous consequences, e. g., furious driving or firing at a mark near the public road and the like.

115. If we now pass on to Section 304 we shall find that, broadly speaking, culpable homicides not amounting to murder which come within groups (1) and (2) mentioned above are punishable under the first part of Section 304 and those which come under group (3) are punishable under the second part of Section 304. The punishment under the first part of Section 304 is heavier than that under the second part because in the cases within groups (1) and (2) the act by which death is caused is done with certain specified intentions and is therefore more culpable than the act which constitutes culpable homicide not amounting to murder which comes under group (3) and

in which intention has no place and plays no part.

116. Having thus ascertained the different kinds of culpable homicides not amounting to murders and the appropriate punishment thereof our next task is to see whether Section 34 can be properly invoked so as to make several persons constructively liable for such an offence.

117. First, of all let us ascertain the true meaning and effect of Section 34. It is by no means easy to construe this Section 34. Formerly, there were two views about this section. One view which was called the wider view construed the words "a criminal act" as including a series of acts done by several persons resulting in an offence. The other view called the narrower view limited those words to a single act done by several persons jointly. The matter has been elaborately discussed in the Full Bench case (popularly known as the Sankaritola Post Office murder case) reported in Emperor v. Barendra Kumar , The case went up to the Judicial Committee and the judgment of the Judicial Committee will be found reported in Barendra Kumar v. Emperor , The Full Bench and the Judicial Committee dissented from the narrower view expressed by Stephen J. in Emperor v. Nirmal Kanto ('14) 1 A.I.R. 1914 Cal. 901, and adopted the wider view. It was held by the Judicial Committee that the words "a criminal act" mean that unity of criminal behaviour which results in a criminal offence. That case was concerned with a charge under Section 302 read with Section 34, Penal Code, and the point directly in issue in that case was as to the meaning and import of the words "a criminal act." The point we are now discussing, namely, the propriety or legality of a charge under Section 304 read with Section 34, in view of the requirement of common intention referred to in the latter section, was not directly in point in that case. There are, however, observations both in the judgments of the learned Judges constituting the Full Bench and in the judgment of the Judicial Committee which, I conceive, clearly indicate that the expression "common intention" in Section 34, Penal Code, means intention shared by all the participators to produce all that is meant and implied by the expression "a criminal act" in the earlier part of the section, that is to say, the crime that is actually committed. Reference may be made to the 3 passages in the charge to the jury delivered by Page J., in that case quoted in the reports, the observations of Mookerjee J. at pp. 189-191 of 28 C.W.N. and those of Richardson J. at p. 214. The observations of Cuming J., at pp. 244-245 are helpful on the point now under consideration. Thus observed his Lordship:

Section 34 and the connected Sections 35, 36, 37 and 38 create no substantive offence. They are merely declaratory of a principle of law and in charging an accused person it is not necessary to cite them in the charge. If therefore the view of the law given by the learned Judge to the jury fall within any one of these sections it will be sufficient. Taking first of all Section 34 I am not prepared to accept the extremely restricted view which has been urged by the learned counsel. The expression "criminal act" includes also a series of acts.

A criminal act may well consist of parts each of which is more or less necessary to the accomplishment of the act. Thus one man may keep guard at the door, while another man holds the victim and a third man kills him. Or one man may be there in Order by his presence to encourage, support or protect the man who is actually killing the victim. They would to my mind be all of them doing some parts of the act because it may well be that without their support the act could not be done. They must therefore be considered to be all doing the act though each is executing a different part of the act.

Further, if the expression "act" includes a series of acts then all the different acts of the conspirators, such as keeping guard, terrorising the onlookers or victim must be considered as one act. It is impossible to conceive two individuals doing the identically same act. Such a thing is impossible. Therefore to have any meaning the expression "criminal act done by several persons" must contemplate an act which can be divided into parts each part being executed by different persons, the whole making up the criminal, act which was the common intention of all. To put it in another way the one criminal act may be regarded as made up of a number of acts done by the individual conspirators, the result of their individual acts being the criminal act which was the common intention of them all.

I think that the expression "criminal act done by several persons" includes the case of a number of persons acting together for a common object and each doing some act in furtherance of the final result, which various acts make up the final act.

118. I now pass on to the judgment of the Judicial Committee delivered by Lord Sumner and reported in *Barendra Kumar v. Emperor* his Lordship stated as follows:

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that 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 omission 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 persons, 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." 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.

119. Then his Lordship compared Section 34 and Section 149 and showed that there was no conflict between them and at p. 52 explained that there was a difference between "intention" and "object." His Lordship finally summed up his interpretation of Section 34 at p. 56 in the following words:

In other words, "a criminal act" means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

On my reading of the charge delivered by Page J. and the judgments of the learned Judges constituting the Full Bench and the judgment of Judicial Committee delivered by Lord Sumner and particularly the passages I have underlined (here italicised) I deduce the following propositions:

- (a) That Section 34 does not create a new offence but formulates a principle of liability.
- (b) That the expression "a criminal act" in the beginning of the section does not mean a single act done by several persons, for logically several persons cannot do the same act as one of them does.
- (c) That Section 34 deal's with the doing of separate acts, similar or diverse, by several persons which several acts result in a particular offence and treats the several acts and the effect produced thereby as one whole action and calls it "a criminal act."
- (d) The words "a criminal act" in the earlier part of the section mean that unity of criminal behaviour which results in a criminal offence.
- (e) That the words "that act" and "it" in the latter part of the section include the whole action covered by the expression "a criminal act".
- (f) That to come within Section 34, the "criminal act" so understood must be done by several persons in furtherance of their common intention to do that very "criminal act" which is made up of each and all the separate acts, that is to say, their common intention must be to commit the

very offence which is ultimately and actually committed.

120. The conclusion I have arrived at as to the meaning and import of the expression "common intention" in Section 34 also finds support from subsequent judicial decisions. Thus in *Fazoo Khan v. Jatoo Khan*, where four persons were convicted of grievous hurt with the aid of Section 34, Rankin C. J. observed at p. 464 as follows:

If there had been five of these people and they had come to assert a right by show of force so as to bring into operation such a section as Section 149, then no doubt if any one of them hit the woman over the head with a lathi in pursuance of the common object, the whole of the party might have been found guilty constructively by virtue of Section 149 read with Section 325, Penal Code. But this is not that case. There were only four people present. We are concerned not with Section 149 but with Section 34. Section 34 is not applicable except in a case where there is participation in action to commit a crime with a common intention. If, for example, one of these people had prevented Jatoo from running away and another had held him down and a third had struck him over the head with a lathi, they could all rightly be convicted under Section 325 read with Section 34. The element in Section 149 of being a member of the unlawful assembly has a counterpart in Section 34, viz., participation in action to produce grievous hurt. But it is quite wrong to say that because they had a common intention to assert a right to the bamboo clump therefore without showing which of these people took any part in beating either Jatoo or his wife, they can all be convicted because one of them we do not know who-committed a grievous hurt. There must be participation in action with a common intention to produce grievous hurt, although the different accused might have taken different parts.

I have underlined (here italicized) the passages which, to my mind, indicate the true meaning and scope of the expression "common intention" in Section 34, Penal Code.

121. The same conclusion was reached by a Full Bench of the Rangoon High Court in *Nga E v. Emperor* (31) 18 A.I.R. 1931 Rang. 1, I content myself with setting out the head, note and underlining (here italicized) the portion I consider important for our present purpose:

The common intention referred to in Section 34, Penal Code, is an intention to commit the crime actually committed and each accused person can be convicted of that crime only if he has participated in that common intention.

The intention of an accused person must be judged from the proved facts of the particular case itself, and no general Rule applicable to cases of this class can be drawn as to what presumption may be drawn on any given state of facts.

122. On the authorities I have referred to and on broad general principles of constructive liability therefore the meaning and import of Section 34 appear to me to be as follows:

(a) Several persons must have the common intention to commit a particular offence. What the common intention precisely is in a particular case is a question of fact. In a very large majority of cases it will be difficult to get any direct or positive evidence. It will have to be inferred from evidence of previous association of the offenders, the preparation, the nature of the arms or weapons used, the nature and intensity of the acts done, the result produced thereby and all other surrounding circumstances.

(b) All the several persons must participate, i. e., do some act in furtherance of that common intention. It does not matter whether one does an important act and another does a minor act. What is necessary is the actual participation. In this connexion should be remembered the provisions of Sections 32 and 33, Penal Code, and the quotation in the judgment of Lord Sumner: "They also serve who only stand and wait."

(c) The several acts done by several persons must result in the commission of the offence which it was their common intention to commit.

(d) When the first three conditions are fulfilled each of the several persons is liable for the whole series of acts done by all of them and the effect produced thereby, i. e., for the complete offence.

123. Thus interpreted and understood there will be no conflict between Section 34 and Section 35, 37 and 38. Each of these sections formulated a principle and the liability of several persons engaged or concerned in act or acts resulting in an offence or offences has to be determined according to one or other of these principles. Thus if you find that several persons are doing separate acts, similar or diverse, in furtherance of a common intention to produce the crime that is ultimately committed, Section 34 will come into operation and make each of them liable for the whole series of acts and the resulting offence. If you find that several persons are engaged in doing what is not per se criminal but is criminal only if it is done with a criminal knowledge or intention then under Section 35 each of those persons who joins in the act with such knowledge or intention will be liable for that act as if done by him alone with that knowledge or intention and those who joined in the act but had not such knowledge or intention will not be liable at all. You may find that several persons are co-operating in the commission of an offence by doing separate acts at different times or places, which acts by reason of intervening intervals of time may not be regarded as one act or which may not necessarily be the outcome of a common intention. Such a case will fall within Section 37 as explained by Lord Sumner in *Barendra Kumar v. Emperor*. Again you may find several persons' engaged or concerned in a criminal act,

having been set in motion by different intentions they may under Section 38 be liable for different offences as explained by Lord Sumner. I see no reason to think that Section 34 was intended to cover all conceivable cases where several persons may be concerned or engaged in committing act or acts which result in an offence or offences.

124. Such being my view of the meaning of Section 34, I have now to see whether culpable homicide not amounting to murder can be constructively imputed to several persons so as to make them punishable under Section 304 read with Section 34 at all and, if yes, to what extent the two sections may be read together.

125. I have already enumerated what are culpable homicides not amounting to murder and classified them into three groups. Let me now take group (1) which comprises those cases which fall within any of the five exceptions specified in Section 300. I have already analysed and explained what I conceive are the underlying principles of these exceptions. If I am correct in that analysis of exceptions 1, 2, 3 and 4, it is impossible to hold that any person can be logically said to have conceived or formed the intention of committing culpable homicide not amounting to murder which will fall within any of the exceptions 1, 2, 3 and 4. The very premeditation will take the case out of those exceptions and the causing of death with such premeditated intention will be nothing but murder. If this is so with reference to a single individual, the case of several persons, in anticipation, entertaining a common intention to commit culpable homicide not amounting to murder which fall within exceptions 1, 2, 3 or 4 is still more impossible to comprehend. "Common intention" referred to in Section 34 being the intention to commit the crime which is actually committed, in my opinion, there can be no room or scope for invoking the aid of Section 34 in such cases. In cases falling under exception 5, however, Section 34 may conceivably be applied.

126. It is suggested that the common intention may be formed after the extenuating circumstance arises. Thus, where three brothers see their mother to be assaulted or outraged by an assailant and all three of them, under the same grave and sudden provocation, spontaneously give three blows to the assailant, each of the brothers equally intending to cause his death or to cause such bodily injury as each of them knows to be likely to cause his death or as is sufficient in the ordinary course of nature to cause death and the assailant is killed and it is not known which of the blows killed the assailant, or it is known that one hit at the leg, the other on the arm and the third on the head, it is said that each of the three brothers who had the same intention will be guilty, not of murder because of exception 1, but of culpable homicide not amounting to murder by virtue of the provisions of Section 34, Penal Code, although it is not known which blow caused the death or even if it is known that his own act did not cause the death. This argument seems to me to confound "common intention" with similar intention and to ignore one of the essential elements of grave and sudden provocation. Common intention connotes, to my mind,

an intention shared by several people by express agreement or tacit or implied understanding. In the illustration mentioned above each of the brothers has a similar intention but not a common intention such as I conceive is required by Section 34. Further, in Order to bring a case within the exception of grave and sudden provocation, there must be a direct link between the provocation and the resulting impulse which finds expression in the fatal blow. If that link of spontaneity is broken by the intervention of a "common intention" formed, after the provocation arises, as a result of an express agreement or tacit understanding between the three brothers after deliberation, however swift and imperceptible, then the extenuating circumstance is at an end and the fatal blow is then proximately and directly referable to the 'common intention' so conceived and not to the grave and sudden provocation which preceded that common intention and will therefore be nothing but murder and each of the brothers will be liable for murder by virtue of Section 34. If there fore the case is to remain within this exception there cannot be common intention and if common intention is absent then Section 34 will not come into play at all. Similar considerations will apply to the other exceptions. I repeat that deliberation or premeditation which must in the ultimate analysis be the foundation of common intention, is inconsistent with the underlying principles of these exceptions. You cannot interpose common intention and yet retain the case within the exceptions.

127. In my judgment therefore it is impossible to impute culpable homicides not amounting to murder which come within these exceptions 1, 2, 3 and 4 to several persons by applying the principles of Section 34 and make them punishable under. Section 304 in so far as the latter section provides punishment for culpable homicides not amounting to murder which fall within exceptions 1, 2, 3 and 4.

128. Theoretically the two sections may be read together in relation to a case falling within exception 5. In modern times and for obvious reasons such cases are bound to be very rare indeed and we may leave this exception out from further consideration.

129. Next I take up the cases of culpable homicide not amounting to murder which I have hereinfore classified under group (2). They consist of those culpable homicides which fall within (b) of Section 299 but are outside (2) and (3) of Section 300. I have shown that there is an appreciable difference between the one intention and the other. In majority of cases in practical life the act done with the intention of causing fatal bodily injury will ordinarily if death is caused, be murder and come under (2) or (3) of Section 300 but it must be recognized that there may be cases which are outside these categories yet within the category (b) of Section 299. The fine distinction cannot be ignored altogether. In these last mentioned cases the causing of bodily injury is intentional and logically may be the subject-matter of the "common intention" of two or more persons. In other words, culpable homicide not amounting to murder falling within this group (2)

may be imputed to the several persons who share the common intention and participate in the commission of the crime by doing something in furtherance of such common intention. Such persons may be logically punished under the first part of Section 304 read with Section 34, Penal Code. But I again emphasise that in the vast majority of cases where several persons, armed with daos or axe or spear (or fala as in this case) set out to inflict bodily injury on their enemy to satisfy an ancient grudge or to steal paddy or fish from their neighbour's field or tank and if necessary to inflict bodily injury to the neighbour and they actually use force and inflict numerous serious and nasty bodily injuries in vital parts of the body of the victim with those weapons and cause sure death, it may not be difficult to find, from all surrounding circumstances, that the common intention of the assailants was nothing short of causing death or causing such bodily injury as was sufficient in the ordinary course of nature to cause death. In such a case to attempt to whittle down murder to culpable homicide not amounting to murder and take the case out of the category 1, 2 or 3 of Section 300 and place them within category (b) of Section 299 may be showing consideration which the criminals do not deserve. The refined distinction between the one kind of intention and the other which eminent Judges and lawyers have evolved on a comparison of the two words "likely" and "sufficient" should ordinarily be reserved for meeting the ends of justice in more meritorious cases. If, however, from all surrounding circumstances and particularly from the nature of weapon used and injuries caused it appears that the common intention was to inflict the lesser degree of bodily injury, then it is equally necessary to see that the lives of the assailants may not be put in jeopardy by bringing a charge under Section 302. In those cases a charge under Section 304 part 1 read with Section 34 will suffice.

130. Lastly, I proceed to consider the cases of culpable homicides not amounting to murder which I have classified under group (3). They consist of those culpable homicides which are outside (4) of Section 300 and yet within (c) of Section 299. Again comes in the refined distinction between the one kind of knowledge and the other which exists but is hard to conceive or explain. This group has been illustrated by Sir Barnes Peacock C. J. by reference to Sections 279 to 289, Penal Code. The illustrations mentioned by Melvill J. are furious driving or firing at a mark near a public road. The offences which fall within the last mentioned sections are punished because of the inherent danger of the acts specified therein irrespective of knowledge or intention to produce the result and irrespective of the result. In other words, those sections fix their attention on the acts themselves and make the acts likely/ to cause death or injury to human life punishable. If acts of this kind are done with knowledge of the dangerous consequences that they are likely to produce, then the culpability is greater and if death is caused then the law punishes not merely for the act but also for the resulting homicide and the case comes within Section 299 or Section 300 according as the act was done with one kind of knowledge or the other. The distinction between this part of the two sections on the basis of which such culpable

homicides are placed within the category of murder or in the category of culpable homicide not amounting to murder is founded on the degree of risk to human life. In cases falling within this group knowledge of the character and likely consequences of the act is the central idea. Intention does not enter into these cases at all. In fact intention is expressly excluded by part 2 of Section 304 under which these cases are punishable. If intention must play no part in these cases and if knowledge, such as I have mentioned, is the only ingredient, as I think it is, then it is, to my mind, difficult to conceive how Section 34 can be applied so as to make several persons guilty of culpable homicide not amounting to murder which falls within (c) of Section 299 but outside (4) of Section 300, whether it can or cannot be shown whose act caused the death. As soon as you say that the offender must be presumed to know and therefore to intend the consequences of his act you inevitably take the case out of this category and bring it within the categories where intention is the main ingredient. If this is so with reference to a single individual it must be so also where several persons are concerned. If the common intention referred to in Section 34 is an intention, shared by all the offenders, to commit the offence actually committed, as on the authorities I have cited it must be, then logically Section 34 cannot possibly apply to an offence in which intention is not an ingredient at all. It is an obvious contradiction in terms to say that several persons are to share an intention which does not and must not exist (c) of Section 299 and (4) of Section 300 exclude intention, separate or common, and consequently exclude Section 34 by necessary implication. Part 2 of Section 304 expressly excludes intention and, in my judgment, cannot possibly be read with Section 34, Penal Code.

131. Reference has been made to the English case in (1880) 6 Q.B. D. 79. where three persons went out to practise rifle shooting in a field in proximity to certain roads and houses and each fired shots and a boy in a neighbouring garden was killed. All the three persons were held guilty of man-slaughter although it was not known whose shot had killed the boy. It has been suggested that this case has been applied in this country and the three persons placed in similar circumstances in this country will be guilty of culpable homicide not amounting to murder under (c) of Section 299 read with Section 34, Penal Code. A single person doing any rash or negligent act likely to cause death, with knowledge that it is likely to cause death but without any intention to cause death may conceivably be brought within (c) of Section 299 or (4) of Section 300 (compare illus. 4 under Section 300) but if two or more persons are engaged or involved in doing such a rash and negligent act and it is not known whose act has caused the death, then they cannot be brought under either of these sections by reading it with Section 34, for, as we have seen, the latter section does not come into play at all in the absence of a common intention to commit the crime actually committed. They will, therefore, have to be caught under some other section of the Penal Code. It will have to be considered if Sections 35, 37 or 38 will fit in with the case. If they do not, then recourse may be had to Section 304A. Failing that, it seems to me

that the case will have to be dealt with under one of Sections 279-289 or 336, 337 and 338 for only the negligent or rash act and that without the aid of Section 34 or Section 107. That I apprehend is the real principle underlying the judgment in the very case in Emperor v. Morgan ('09) 36 Cal. 302, where (1880) 6 Q.B. D. 79, was applied, although I find it difficult to reconcile the reasoning with the actual decision. In Emperor v. Morgan ('09) 36 Cal. 302, the two soldiers had been charged under Sections 304A/114, Penal Code and not under Section 304/34, Penal Code at all. The following observations to be found at pages 307 and 308 will make the position clear:

We do. not think Section 304A, Penal Code, creates any new offence. The object of the Legislature in passing Section 336 was to render criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others. The mere, doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence ... We think therefore that both the accused can legally be convicted and punished under Section 304A, Penal Code, because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of Section 304A. We, therefore, think that the law in India is in accordance with what was laid down in (1880) 6 Q.B. D. 79. and that it is not necessary to call in aid Section 34 or Section 107, even assuming that either of these sections could possibly apply when the facts showed that at most the accused were guilty of negligence only.

132. It will be noticed that the learned Judge saw the difficulty in applying Section 34 which postulates common intention to a case where intention is absent and thought that the negligent act itself, irrespective of the resulting death, should be punished. Logically, therefore, the two soldiers should have been punished under Section 336 and not under Section 304A, for it could not be proved whose bullet killed the man.

133. In some cases homicide may thus go unpunished but that appears to me to be no cogent reason for straining the language of Section 34 and putting upon it a construction which it cannot bear. I am not of opinion that Section 34 was designed to cover all cases where several persons are engaged in criminal acts. If it were necessary to devise a section so wide and elastic as to cover all cases which the ingenuity of the legal mind may conceive and illustrate by imaginary examples, the task should better be left to the Legislature.

134. On a consideration, therefore, of the nature of the three groups of culpable homicides not amounting to murders, and the appropriate punishments provided in Section 304 and the real meaning and import of Section 34, Penal Code I come to the following conclusions:

(a) That Section 34 cannot be read with Section 304 in so far as the latter section provides punishment for culpable homicide not amounting to murder falling within the first four exceptions of Section 300 which come within what I have called group (1).

(b) That the two sections maybe read together in relation to the rare cases falling within exception 5 of Section 300.

(c) That the two sections maybe read together in cases falling within what I have called group (2) of culpable homicide not amounting to murder, i. e., within (b) of Section 299 but outside (2) or (3) of Section 300.

(d) That the two sections cannot be read together in relation to cases falling within what I have called group (3), i. e., within (c) of Section 299, but outside (4) of Section 300.

135. I now proceed to discuss the few decisions of this Court on the point now under consideration which have been brought to our notice.

136. The first case is that of *Aniruddha Mana v. Emperor* , In this case the complainant Baikuntha went to cut paddy grown by him on a plot of land which his father had bought many years previously from the aunt of the appellant. Baikuntha had with him ten labourers. The appellants and others interfered and when Baikuntha persisted in cutting the paddy the appellants and others assaulted Baikuntha and the labourers. The result of the assault was that three of the labourers received injuries which proved fatal. The learned Sessions Judge framed three separate charges under Section 304 read with Section 34. Walmsley J. severally criticised the charges so framed and noted the confusion made by the Sessions Judge between Sections 34 and 149 and commented upon the deficiencies in the Judge's summing up. Towards the end of his judgment the learned Judge with the concurrence of Mukherjee J. let fall the following observations:

There is yet another objection to the charges and the verdict. It is that Section 34 which is based on a common intention cannot possibly be used with the second part of Section 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However, the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention, in furtherance of a common intention. It is the badly teamed charges and the defective summing up that have led the jury to this illogical verdict.

I respectfully agree with the above observation. The rare cases referred to by the learned

Judge comprise, as I think they do, the cases which fall within the categories which I have just marked with the letters (b) and (c) in my conclusion.

137. The second case is that of Adam Ali v. Emperor , In this case Cuming and Gregory JJ. took a different view which may best be stated in their own language which is as follows:

Mr. Talukdar argues that to apply Section 34 there must be a common intention and that as there was no common intention to cause death or such bodily injury as is likely to cause death because the definition of Section 304, Part-2, excludes such intention, Section 34 cannot apply. The simple answer to this contention is that although to constitute an offence under Section 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause-death but have no intention of causing death, yet they may certainly have the common intention to do that act. No one will dispute that such an act is a criminal act. Clearly Section 34 can apply to a case under Section 304, Part 2.

With the utmost respect to the learned Judges I cannot endorse their view. My objection is that the above observations proceed on a complete-misapprehension of the two meanings of the expressions "a criminal act" and "common intention" referred to in Section 34. These observations appear to me to be opposed to the observations made by one of the learned Judges, namely,, Cuming J. himself, in the Full Bench case which I have quoted and underlined (here italicized) above. If "a criminal act" in this section means the whole of the different parts of the act resulting in or making up the criminal act namely the causing of death and if "common intention" means the intention to commit that criminal act which is made up of all the different parts of the act, as, I conceive, has been laid down by the Judicial Committee and by his Lordship in the Full Bench case and by other learned Judges in subsequent cases, their Lordships' present observations in Adam Ali v. Emperor , cannot possibly be supported or accepted. Their Lordships in the later case fix their attention on the individual acts only irrespective of the result likely to be produced thereby and limit the common intention to the doing of those acts only and call each of those acts a criminal act capable of being done in furtherance of a common intention and then by applying Section 34 make the perpetrators liable, not only for those acts which it was their common intention to do but, also for the result of those acts which it was not their common intention to produce. This, with great respect, is wholly illogical and a misconstruction of Section 34 and opposed to the decisions I have referred to. In my judgment, properly understood, Section 34 makes the "criminal act" and the "common intention" and the liability co-extensive. Further the knowledge required by Section 299 must t be personal knowledge of each assailant of the

probable consequences of his own act. How can one share the knowledge of others ? For reasons stated above, the observations in *Adam Ali v. Emperor* , appear to me to be illogical and wrong on principle and opposed to the true meaning of Section 34 as I read and understood it and I record my respectful but emphatic dissent therefrom. Their Lordships purported to treat the observations of Walmsely J. in *Aniruddha Mana v. Emperor* , which I have quoted above as obiter, but I may observe that if a case is decided on several grounds, none of them ought to be or can be treated as obiter. It does no good to disguise the fact that their Lordships were dissenting from the view expressed by Walmsely J. As I have said, perhaps at a future date that difference of-opinion may be resolved by a Full Bench of this Court but until then, for my part I prefer to respectfully accept and follow the views of Walmsely J.

138. In *Nanda Mallik v. Emperor* (37) 41 C.W.N. 575, which comes next in Order of time Mr. Sudhanshu Mukherjee successfully raised the question of the impropriety of a charge under Section 304, part 2 read with Section 34, Penal Code; in connexion with the death of a man named Lachman. In that case there was no evidence which would have entitled the jury to say that the appellant actually caused the unfortunate man's death and accordingly the appellant could only be convicted with the aid of Section 34, Penal Code. After pointing out that the proper way to put the case before the jury, was to frame a charge of murder read with Section 34 and in the alternative a charge of grievous hurt read with Section 34, Henderson J. made the following observations at page 576:

But that was not the way in which the case was actually put before the jury. The charge was one punishable under Section 304, Part 2, Penal Code. As I had to point out only the other day, the moment the: prosecution drop the murder charge, the only common intention is one to give a beating; whereas Section 34 deals with intention, Part 2 of Section 304 deals with knowledge. The result is that in Order to establish, this particular charge there has to be a peculiar combination of knowledge and intention which would hardly arise in real life. I do not say that the jury cannot possibly convict on such a charge; but before they do so the matter must be thoroughly explained to them. The evidence bearing upon the intention on the one hand and the knowledge on the other must be carefully put before the jury. Nothing of that kind was done in the present case and it is therefore, impossible to uphold this verdict.

Cunliffe J. adverted to the disinclination on the part of the jury to bring in verdicts which might entail the infliction of the death penalty and deprecated the practice adopted by Sessions Judge of accepting the line of least resistance by framing a charge under Section 304. The Court altered the conviction in this case into one under Section 323 and reduced the sentence. In this case Henderson J. used very guarded language and kept the remote possibility of the jury convicting on such a charge under Section 304, part 2 read with Section 34 open. But it seems to me, for

reasons stated above, that Section 34 can in no case be read with part 2 of Section 304 and I am prepared to go further than Henderson J. went in this case.

139. The views expressed by Henderson J. in this case were amplified in the later case *Debi Charan v. Emperor* (1937) 41 C. W. N. 570, where the appellants had been charged and convicted under Section 304 part 1 read with Section 34, Penal Code. Their death was caused to one of the complainant party in a fight over the right to catch fish in a tank. The defence was that the complainant party had invaded the tank which belonged to the accused party and the latter resisted such invasion in exercise of their right of private defence and that at the end of the fight it was found that one of the complainant party had died and that it was impossible to say who was responsible for his death. *Cunliffe J.* again deprecated the practice of giving to the jury what he called a "loophole." The learned Judge stated as follows at p. 572:

Section 304 (1) is in reality an artificial section in the Penal Code. If a Judge directs a jury that they can on certain facts bring in a verdict of common intention to commit culpable homicide not amounting to murder, he has, in fact, said to them, You can on the evidence in this case consider that there was a common intention to commit culpable homicide which does not amount to murder because the persons who committed the crime are protected by one of the four exceptions in Section 300,' and a more confusing way of putting a case before a jury cannot imagine. Quite apart from the fact that it is almost impossible to visualise the practical mentality that can conceive such a common intention, I can understand a common intention to kill someone to defend oneself at all costs. I can understand a common intention to cause hurt to some one in a general sense. But I find it very difficult to comprehend a common intention, among three possibly quite uneducated villagers, to commit culpable homicide not amounting to murder in the language of the Indian Penal Code and manslaughter in the English Common Law.

140. After stating the prosecution case and the defence case Henderson J. at p. 574 made the following observations:

This being the position with regard to the evidence it became very necessary for the learned Judge to give a clear explanation of what would be the effect of this on the prosecution case. Although the charge is lengthy and full of repetition, he entirely omitted to give any such explanation. The verdict of the jury implies not merely that there was a common intention to use force, because on the defence case the appellant's party were entitled to use some amount of force, but also that there was a common intention to exceed the right of private defence. That, to my mind, is absolutely unreal and in nearly every practical case must be ridiculous. The common intention of persons who are defending themselves would be ordinarily either to protect their person or their property. If the attacking party decided that discretion was the better part of

valour, no force would be used at all and no injury would be caused to anybody. I do not suppose that two or three persons who have the right of private defence would even in real life have a sort of discussion to reach the common intention of exceeding that right. As the learned Judge did not explain the implication of this to the jury at all, it is possible that, they had not the remotest idea of what they were doing and, therefore, they brought in this startling verdict. It is not enough merely to explain the application of Section 34. The learned Judge should then have gone on to deal with the evidence to point out what, if any, there was to support such a theory. Had he done that I have no doubt at all that he would have reached the conclusion that the theory was merely fantastic.

I respectfully agree with the above statement of the law. The unreality and ridiculousness of imputing common intention of exceeding the limit of the right of private defence in relation to exception (2) of Section 300 adverted to by Henderson J. appear to me to apply equally to the other exceptions except the rare cases falling under exception 5. As I have tried to explain in the earlier part of this judgment it is illogical and impossible to conceive two or more persons forming a common intention of committing culpable homicide not amounting to murder which fall within exceptions 1, 2, 3 and 4 of Section 300 and which I have classified in group (1) of culpable homicides not amounting to murder, firstly because the extenuating circumstances which reduce the crime from murder to culpable homicide not amounting to murder, are extraneous to the offender and are not in his control and cannot be brought about by him, and secondly because, the formation of a common intention, before or after the extenuating circumstances referred to in the exceptions come into being connotes or implies deliberation or premeditation, however swift or imperceptible, resulting in a sort of agreement or understanding between the offenders, express or tacit, which will by itself take the case out of these exceptions and make the offenders guilty of nothing less than murder. The only other case that I need refer to is that in *Sunder Singh v. Emperor* ('39) 26 A.I.R. 1939 Oudh 207, After setting out the ingredients of Sections 299 and 300 and referring to Section 34 Hamilton J. observed at pages 663-664 as follows:

A common intention is an intention shared by the person who has caused death and by the other assailants who did not themselves cause death. If the act which caused death is neither murder nor culpable homicide because the person who dealt that blow did not have such intention as is specified under Sections. 299 or 300, Penal Code, but only the knowledge which is specified in either of these two sections, there is no intention which can be shared by all the assailants who did not strike the fatal blow and therefore Section 34 cannot apply. The knowledge referred to in SSection 299 and 300 is personal knowledge of the person who struck the blow and it is difficult to see how it can be shared by his co-assailants, but in any case, Section 34 is restricted to

common intention and does not embrace any knowledge.

I respectfully accept the above statement of law which accords with my own view which I have tried to explain above.

141. Applying then what I conceive to be the true principles underlying Sections 299, 300, 304 and 34, Penal Code, and which I have discussed and set forth above, to the facts of the case now before us, I am of opinion that the charge in this case under Section 304/34, Penal Code, without any reference to the part of Section 304 under which the alleged offence was sought to be punished was highly prejudicial to the appellants and was improper. We have seen that under part 1 of Section 304 are punished those culpable homicides not amounting to murder which fall within what I have called groups (1) and (2) and under part 2 of Section 304 are punished those culpable homicides not amounting to murder which fall within group (3). We have seen that Section 34 can have no application to cases falling within group (1) (except those within Excep. 5 of Section 300) or group (3). In these circumstances it is obviously necessary to indicate clearly that the charge was for an offence falling in group (2) and punishable under part 1 of Section 304 and as this was not done in this case the charge was defective in material particulars and not permissible in law. Although, in my opinion, it is entirely wrong to try and bring cases under (b) of Section 299 when the surrounding circumstances and particularly the weapons used and the injuries caused indicated clearly that a charge under (2) or (3) of Section 300 would be more appropriate yet I have to acknowledge that by a process of refined reasoning and distinctions less serious cases may logically be brought within (b) of Section 299 and Section 34 may be applied and the offenders may be punished under part 1 of Section 304. But that refined process would necessarily require such clarity and amount of explanation as I do not certainly find in the present charge to the jury at all and the result has been an illogical verdict of guilty under Section 304, part 2 read with Section 34, which cannot be supported at all.

142. The result, therefore, is that, on the grounds of misdirection, improper admission of evidence and improper charge as framed and insufficient summing up by the learned Judge resulting in an illogical verdict the conviction and sentence in this case should, in my judgment, be set aside and the accused persons should be retried on a charge under Section 323 read with Section 34. As the jury did not find the accused guilty under Section 304, part 1 and as Ibra Akanda has been acquitted of the charge under Section 324, this appears to me to be the only course left open to the prosecution.

Khundkar, J.

143. This matter comes before me under the provisions of Section 429, Criminal P.C. as there

has been a difference of opinion between my brothers Lodge and Das, in Criminal Appeals Nos. 28, 98 and 104 of 1943.

144. In all three appeals my learned brothers have differed upon the question whether the principle of joint liability enunciated in Section 34, Penal Code can apply to a case where several persons are jointly charged with, tried for, or convicted of an offence punishable under Part 2 of Section 304, Penal Code which resulted from the joint acts of all.

145. Section 34 is in these terms:

Where 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 it it were done by him alone.

146. The relevant portion of Section 304 reads as follows:

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with 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.

147. The facts of each of the cases, out of which these three appeals arose, were that a number of persons had jointly committed an assault which resulted in the death of the victim, and in each of these cases the jury found that the assailants did not entertain any intention to cause death, or to cause such bodily injury as was likely to cause death, but that they had nevertheless acted with the knowledge that the assault which they were jointly perpetrating was likely to cause death.

148. A very clear distinction being drawn in Section 304 between intention and knowledge, the question arises whether the principle of joint liability embodied in Section 34 which speaks of "common intention," can be made to apply where the offence committed is one in which intention plays no part, but knowledge is the mental ingredient. This question has been considered before, and two divergent views have been expressed. Before I refer to them, I should attempt to show what, I think, is meant by "act" and "criminal act" as understood in Sections 33 to 38, Penal Code. By "act" is meant a doing of something-the bare physical act. By Section 33 it includes a series of acts By Section 36 the word "act," in certain circumstances, includes an omission. "Criminal act" means an act which produces certain effects or results so undesirable as to make it necessary that the act should be punishable. From this it would follow that when the word "offence" is used, it means an act which has certain undesirable effects or consequences, and which is punishable by law. This is consistent with the definition of offence in Section 40, Penal Code.

149. Coming to Section 34, one view is that "common intention" in that section does not mean the mens rea necessary in law to constitute the criminal act an offence, or, in other words, it is not the same thing as the mental ingredient which the Penal Code requires for the offence committed. "Intention" in Section 34 has nothing to do with the desire or willingness to bring about undesirable consequences, such as death, or hurt, or wrongful loss, which is what mens rea contemplates. "Intention" here is merely the desire or willingness to do the immediate physical act. Every voluntary act is preceded by a resolution of the will to perform that act. "Common intention" in Section 34 is no more than such a resolution formed by more persons than one to do one and the same act. A simple example would be where several persons beat another person to death. The criminal act done is the killing. The intention, using intention in the sense of the mens rea necessary to convert the criminal act into the offence of murder, is the desire or willingness to cause death or such bodily injury as is likely to cause death. But preceding the act there is also a more immediate intention in the mind of each assailant, and that is the resolution to perform the physical acts of beating. It is this more immediate intention to do a physical act, as distinct from the intention to bring about effects or consequences, which is the "intention" of which Section 34 speaks. If this is what "common intention" in Section 34 means, then there is, it is said, no difficulty in applying the principle of that section to cases where a criminal act is done with knowledge that certain consequences are likely to follow, but without the intention to bring those consequences about. This was the view taken in *Debi Charan v. Emperor* ('37) 41 C. W. N. 570, and it is the one adopted by Lodge J. In *Nanda Mallik v. Emperor* ('37) 41 C.W.N. 575, it was observed by Henderson J. that, though such a combination of knowledge and intention would hardly arise in real life, it would not be impossible. In *Debi Charan v. Emperor* ('37) 41 C.W.N. 570, the same learned Judge observed with reference to an offence punishable under part 1 of Section 304, that theoretically it was not impossible to apply the principle of Section 34 to such an offence also.

150. The other view is that "common intention" in Section 34 means the mens rea or mental ingredient required by law to constitute the very offence which has in fact been committed, and must therefore embrace the results of consequences of the physical act of the accused, and further that it means intention in the narrow sense as opposed to mere knowledge that certain consequences may follow. This is the view of Das J. who prefers to follow the decisions in *8 Rang. Nga E v. Emperor* (31) 18 A.I.R. 1931 Rang. 1, *Aniruddha Mana v. Emperor*, and *Sunder Singh v. Emperor* ('39) 26 A.I.R. 1939 Oudh 207, The observations of Sen J. in *Mujjaffar Sheikh v. Emperor*, also would appear to be in conformity with his opinion.

151. Upon a most careful consideration of the two interpretations of the expression "common intention" in Section 34, and after an examination of the cases abovementioned, as well as others

cited at the bar, I am of opinion that each of these two views is fraught with difficulty. I was at one time of the opinion that the interpretation which has found favour with my brother Lodge was the correct one, and in fact the decision in *Adam Ali v. Emperor*, was founded upon an acceptance of the argument advanced from the bar by myself. I now gravely doubt if that argument was sound, for it overlooks the implication of the words: "In furtherance of." Let me take one of the illustrations utilised by Lodge J.:

A and B, two seamen on a ship in the river Hooghly, find X a stowaway in the hold. They bring him on deck and throw him into the river, one holding X by the legs and the other holding X by the arras. Throwing X overboard may be considered one act jointly performed. A and B both intended to throw X overboard. The throwing of X overboard is an act done by two persons in furtherance of the common intention of both.

152. I would pause here to assume that X drowns; and that both A and B intended to drown X; there being evidence that they each knew that X could not swim, and that other persons had overheard them saying to each other X should be killed. The common intention, *ex hypothesi*, is to perform the act of throwing overboard, and the criminal act is the murder. Can it be said that murder was committed "in furtherance of the common intention" to throw overboard? Clearly not, but it can be said that drowning was done in furtherance of the common intention to drown. It can also be said that the criminal act of assault was done in furtherance of the common intention to drown.

153. Let me suggest another example. A and B intend to kill X by poison. A mixes the poison in a drink. B offers the drink to X. X drinks and dies. Murder has been committed by A and B. If "common intention" means no more than to do the physical acts of mixing the poison and offering the drink, then it would have to be said that the murder had been committed in furtherance of the intention to mix the poison and offer the drink, which would be an absurd construction of Section 34. It is quite clear that a meaning has to be found for "common intention" which will fit the description of the criminal act as something done to further the common intention. Now when the offence intended is committed, the act which constitutes the offence is clearly in furtherance of the intention to commit the offence. Again, to take another example, when robbery is intended, and assault is committed because the victim resists and will not part with his belongings till he is overpowered, the assault is a criminal act done in furtherance of the common intention to rob. The expression "in furtherance of the common intention" points to the conclusion that "intention" in Section 34 is either the intention to commit the offence which is actually committed-and that would be in most cases the *mens rea* for that offence or an intention to effect a common purpose (for such an intention is literally covered by the words "common intention"), even at the cost of doing a criminal act which may be necessary

for achieving the unlawful purpose intended in common by all. This was, upon the facts found, exactly the position in *Emperor v. Barendra Kumar*, *Barendra Kumar v. Emperor*, There the facts, as found by the jury, were that a number of men had set out to rob a post office and if necessary to kill. Some of them fired pistols at the post-master and one bullet killed him. It was held that the act of killing was in furtherance of the common intention to rob, and so each of the men was guilty of murder, not excluding the one who never even entered the room, but stood guard at the door. The distinction between an ultimate common unlawful purpose, and the more proximate intention to do an act which will further that purpose, is referred to in the following passage in the judgment of the Privy Council in *Barendra Kumar v. Emperor*, 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.

154. The other interpretation, that "intention" in Section 34 must be confined to the mens rea for the offence actually committed, and cannot embrace anything else, and further that it is intention in the narrower sense as opposed to knowledge, is in my opinion equally unworkable. My brother Das has attempted to draw security for this view from the provisions of Sections 299 to 304, which he has analysed with great care and clarity. Valuable as his exposition of those sections is, I do not propose to follow him into that discussion, since, in the view I take of the meaning of "common intention," it is quite unnecessary for the purpose of deciding the question raised in this reference. The interpretation which has commended itself to Das J. contains some infirmities which become apparent only upon a close scrutiny of Sections 34, 35, 37 and 38.

155. The basic principle which runs through all these sections is that an entire act is to be attributed to a person who may have performed only a fractional part of it. Sections 35, 37 and 38 begin by accepting this proposition as axiomatic, and each of them then goes on to lay down a Rule by which the criminal liability of the doer of a fractional part (who is to be taken as the doer of the entire act), is to be adjudged in different situations of mens rea. The axiom itself is laid down in Section 34 in which emphasis is on the act. This is more clearly apparent from the section as it originally stood, that is prior to 1870 when the words "in furtherance of the common intention of all" were introduced into the section by an amendment. The original section ran:

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

156. This aspect of Section 34 is brought out in the following passage in the judgment of Lord Sumner in *Barendra Kumar v. Emperor*, In other words, a criminal act means that unity of

criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

157. What has to be carefully noted is that in Section 35 and in Section 37 and in Section 38 this axiom that the doer of the fractional act is the doer of the entire act is taken up as the basis of a further rule. Without the axiom these sections would not work, for it is the foundation on which they all stand. Now what has the amendment done to the axiom? It has said that the axiom is not an axiom unless each separate doer of fractions of the whole act entertains an intention which is common to all the doers. The result is that there must be a common intention before the whole act can be attributed to the fractional doer, which means that there must be a common intention before Section 35 will work, or Section 37 will work or Section 38 will work. Without a common intention each of these sections falls to the ground. Das J. holds the view that intention is the mens rea of the crime actually committed, and it must be intention in the very narrow sense as opposed to mere knowledge of the consequences which may follow. Therefore, before Sections 35, 37 or 38 will work, there must be common intention in this narrow sense. But one of the situations which Section 35 legislates for, is precisely the opposite, for it is a situation in which intention is absent and knowledge present. Then take Section 37. If common intention means the intention which forms the mens rea of the offence actually committed, it must be the same intention as is referred to in the words "intentionally co-operates in the commission of that offence." But it has been observed by the Privy Council in a passage which I have already quoted above, that 'an intention to co-operate in the offence' may not necessarily "be the same as an intention common to all." But obviously, an intention common to all must be present before the whole act which is the offence may be attributed to the doer of one individual separate act. In Section 38 the difficulty is more apparent. There also the entire criminal act is the act of each person "engaged or concerned in the commission of" it. By reason of Section 34 as it now stands, that is so only if all the persons had a common intention. But if common intention is the mens rea which makes the act an offence, all would be necessarily guilty of the same offence, and not of different offences as the section provides, and the illustration to the section exemplifies.

158. To my mind there are other difficulties also. For one thing, Emperor v. Barendra Kumar, would become difficult to understand. There obviously the common intention found by the jury was to commit robbery and if necessary, to kill. The intention to kill was latent or implicit in the intention to rob, but it was not the same intention. The intention to rob was one distinct intention, and the intention to kill was another distinct intention. I may put it thus: In Emperor v. Barendra Kumar, the finding of fact was that the men set out with an intention to rob, plus an intention to kill provided killing became necessary. This is clear from the summing up of Page J., the trial Judge. The intention with which they set out was the common intention. It was a wide intention

because it embraced both robbery and murder. The intention to kill was a narrower and a contingent intention. They would kill only if killing became necessary. This intention later assumed effective, deadly and destructive form in the minds of some of the men when they shot at the post-master. This was the criminal act actually committed, the shooting of the post-master, and the mens rea was the narrower contingent intention to kill. But according to my brother, Das, the mens rea and the common intention must be identical. Now the man who stood guard outside the door not only fired no shot, but in his mind the narrow contingent intention to kill never assumed effective, deadly or destructive form. Therefore, according to this view he had no share in the common intention and he could never be held guilty of murder. But the Privy Council said "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.' " As I understand the judgment, it was held that he was the doer of a fractional act, at the very least, such an act as standing by or guarding the door, and further that he participated in the common intention which, if it was not the narrower contingent intention only to kill, was, at any rate, the wider intention, equally shared by all, which was the absolute intention to rob, plus the contingent intention to kill if need be.

159. There is still another difficulty. The axiom in Section 34 requires the presence of common intention. But the section says "where a criminal act is done." Now there are criminal acts, which are punishable as offences but for which the Penal Code requires no mens "rea in the sense of intention or knowledge, e. g., a public nuisance as defined in Section 268 and made punishable by Section 290. In such acts mens rea may be absent but common intention must be present if Section 34 is to apply to them. Therefore, mens rea and common intention are not necessarily identical in the sense in which Das J. has understood them to be.

160. It will now be clear that the expression "common intention" in Section 34 is not free from ambiguity, and therefore in Order to ascertain its real meaning it is permissible, and indeed necessary, to consider what are the principles of joint criminal liability in the English Common Law. In The English law these principles fall into three broad categories those which relate to principals in the second degree (otherwise called accessories at the fact), those which relate to accessories before the fact, and those which relate to accessories after the fact. It is the first category which calls for examination here.

161. The objection that the Penal Code is not to be construed in the light of English authorities may be met in words of Mayne (Preface to Edn. 1 of Mayne's Criminal Law of India):

It may, perhaps, be charged against me, that I have adopted a line of discussion which has frequently been reprobated by the Judicial Committee that of attempting to explain the Code by

reference to English authorities. My chief answer must be that, in doing so, I am following the example of the Indian Courts, as will be seen in every volume of their reports. It is quite certain that whenever an appeal is preferred to the High Courts, if any question of law is not covered by Indian authority, it will be discussed with reference to English text books and decisions. I have attempted to supply the local Bar and Bench with the authorities by which their proceedings will undoubtedly be tested on appeal. In most cases, however, the objection is itself inapplicable. The Penal Code supplies a series of clear and definite rules, which are to be found in numbered sections, instead of having to be hunted for through a library of law books. The application of the rules depends upon the facts of each case, which shade away by infinite degrees from absolute certainty to the slightest suspicion. In such cases the recorded experience of centuries of English experts must be of the highest importance.

I have to acknowledge my continual obligation to the great works of late Sir James Stephen, which can never be overlooked by any one who is interested in criminal law. I have also constantly borrowed from the Code of English Criminal Law, drawn up and reported on in 1879. The first draft of this Code was prepared by Sir James Stephen under instruction from the Government. It was introduced as a Bill in the House of Commons by the Attorney-General, and was at once referred to a Committee consisting of Lord Blackburn, Luch L. J., Barry J (an eminent Irish Judge) and Sir James Stephen. By them it was minutely examined line by line, and again issued with their emendations, and with a report, which was written by Sir James Stephen. There the matter ended as regards Parliament but although the draft Code will probably never become law, it and the report upon it will remain as an authentic record of what the English Criminal Law was believed to be by the greatest Criminal Lawyers of the day.

162. In *Barendra Kumar v. Emperor* , the Privy Council observed at page 192:

It is however equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as principal in the first or the second degrees but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed.

163. I do not propose to burden my judgment with the English cases which illustrate the working of the rules which apply to principals in the second degree (accessories at the fact). The most important of these, together with statements of the principles which these cases illustrate will be found in Halsbury Vol. 9, Arts. 30 to 32; Russell on Crimes, Vol. 2, pages 1470 and 1472 to 1481; Archbold's Criminal Pleadings, Edn. 28, pages 1446 to 1450.

164. The classic attempt, referred to by Mayne, to express in codified form the principles of the English Criminal Law was an undertaking which followed upon the first publication of Stephen's "Digest of the Criminal Law, Crimes and Punishments" Chap. 4 in Edn. 7 of Stephen's "Digest of the Criminal Law" treats of parties to the Commission of Crimes, Principal and Accessory. Article 53 in that chapter is headed "Common Purpose," and I think it would be instructive to set out the whole of that article, together with the illustrations appended to it which are all deduced from decided cases:

ARTICLE 53 COMMON PURPOSE When several, persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of. that purpose.

If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree nor accessories unless they actually instigate or assist in its commission.

Illustrations (1) A constable and his assistants go to arrest A at a house in which are many persons. B, C, D and others come from the house, drive the constable and his assistants off, and one of the assistants is killed either by B, C, D or one of their party. Each of their party is equally responsible for the blow, whether he actually struck it or not.

(2) Three soldiers go to rob an orchard. Two get into a fruit tree. The third stands at the door with a drawn sword, and stabs the owner, who tries to arrest him. The men in the tree are neither principals nor accessories, unless all three came with a common resolution to overcome all opposition.

(3) Smugglers fight with revenue officers. In the fight a smuggler fires a gun which kills another smuggler. The gun was not fired at any of the revenue officers. The man who fired the gun is responsible for the act, but not his companions.

(4) Two parties of persons fight in the street about the removal of goods to avoid a distress. One of the persons engaged kills a looker-on, totally unconcerned in the affray. The other persons present are not responsible for his crime.

(5) Two persons go out to commit theft. One, unknown to the other, puts a pistol in his pocket, and shoots a man with it. The other person is not responsible for the shot.

(6) Three persons go out to practise with a rifle and manage their practice so carelessly that a person is killed by a shot fired by one of them; all are guilty of man-slaughter.

165. With regard to this last illustration, I would observe in parenthesis here that in English law, mens rea in this instance would presumably be considered to be compounded of knowledge of the possible fatal consequences, coupled with an attitude of indifference towards those consequences.

166. Upon an analysis, the principle stated in Article 53 of Stephen's Digest is seen to resolve itself into the following propositions:

Where several persons are animated with the desire to carry out one and the same criminal purpose whatever that purpose may be, then:

(1) If in the execution of that purpose, A does criminal act X and B does criminal act Y, B is to be regarded as the doer not only of Y but also of X. Thus A and B entertain the common criminal purpose of committing robbery with violence. The common purpose embraces the element of violence. A commits that offence and B is present and assists him. A has committed robbery with violence, and B has committed robbery with violence. But in the course of the operation A kills the victim. A has committed murder and B has committed murder. This Rule applies even when B has not specifically consented to the degree of violence which was in fact used. 23. *Rex v. Betts & Ridley* (1930) 22 Cr. App. Rule 148, It is to be noted that the criminal act of A becomes the criminal act of B and vice versa.

(2) If in the operations carried out for the purpose of executing a common criminal purpose conceived by A, B and C, A by himself alone does a criminal act which is foreign to that purpose, such criminal act does not become the criminal act of B or of C. If A, B and C, with the common criminal purpose of stealing fruit, go to an orchard, and B and C climb a tree, while A stands at the gate to keep watch, and the owner comes along and A kills the owner, the criminal act of killing does not become the criminal act of B and C unless they along with A entertained the additional intention to overcome all opposition at all costs. This is illus. 2 above to Article 53 in Stephen's Digest, and it is taken from Foster's Crown Cases p. 353. It is to be noted that there are two possible alternative ways of looking at this rule, both of which lead to the same result, which is that B and C are not liable for the crime of murder. It may be said that the act of A does not become the act of B and C, or it may alternatively be said that whereas the act of A does indeed become the act of B and of C, these latter are nevertheless not liable for the crime of murder which the act in law constitutes, because they never possessed the mens rea, viz., the intention to kill, which at one time came into existence in the mind of A, and which is in law needed to make the killing the crime of murder.

These are the principles of joint criminal liability which seem to have been carried out in

Sections 32 to 38, Penal Code (other principles are to be found in Chap. 5), but the method of treatment is somewhat different. The principles with which we are here immediately concerned are considered and discussed in Mayne's Criminal Law of India, Part II, Chap. 4, the opening paragraph of which is as follows:

The object of this chapter is to examine various sections of the Code in which the accused, though he has not with his own hand committed the substantive offence, has become in a subordinate or secondary manner mixed up with it. Such modes of crime are treated in English law books under the head of principles in the first or second degree, and accessories before or after the fact. In the Code they are dealt with according to the particular manner in which the defendant becomes associated with the crime.

167. Mayne draws freely upon English cases to illustrate the principles underlying the rules which are embodied in these sections of the Penal Code. Dealing with joint acts, he says:

Where an offence is committed by means of several acts, whoever does any of these acts in furtherance of the common design, is guilty of the whole offence (Section 37). If one person steals goods in a house, and hands them to an accomplice outside who carries them away, both are guilty of theft. *R. v. Perkins* (1852) 2 Den. C. C. 459; 21 L. J. (M. C.) 152, if, however, the person outside knows nothing of the intention to steal till the goods were handed to him, he could not be charged with the theft, his offence would be that of receiving stolen property. *R. v. Hilton* (1858) Bell C.C. 20,

168. Later on the learned author proceeds:

If several unite for the purpose of committing a particular offence, such as housebreaking, and in the committal of it one of the inmates of the house is killed, it does not necessarily follow that those who were watching outside would be guilty of murder. It would be a question of fact whether it was the common purpose of all, not only to break into and rob the house, but to effect their object by violence if resisted. If those who entered the house had arms, and were known by the others to have them, such an inference would be legitimate: *Daarecase* (1842) 1 Hale P.C. 439 (1842); *Duffy's case* (1830) 1 Lewin 194. *Queen-Empress v. Jabanulla* ('96) 23 Cal. 975, at p. 978. The inference would, of course, be still stronger against those who were actually present when the violence was committed, though themselves unarmed. Where a number of persons combined to take a man by force to the tannah on a charge of theft, and some of them, beat him on the way, *Peacock C. J.* pointed out that while, on the one hand, it did not necessarily follow that the beating was part of the common design, so as to render those liable who were present, but did not join in the beating; so, on the other hand, the fact that they were present and did

nothing to dissuade the others from their violent conduct, might very properly lead to an inference that they were all assenting parties, and acting in concert, and that the beating was in furtherance of a common design, Queen v. Goraohand Gope ('66) 5 W. R. Cr. 45: Beng. L. R. Sup Vol. 443 (FB).

169. The case reported in 5 W. R. (Cr.) 45 is the case of Gora Chand Gopee Queen v. Goraohand Gope ('66) 5 W. R. Cr. 45: Beng. L. R. Sup Vol. 443 (FB), at a time when Section 34 read 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 were done by him alone.

170. Even though there was no express reference-in Section 34 to common intention or common purpose, Peacock C. J. said:

It is laid down that, when several persons are in company together engaged in one common purpose lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.

171. The learned Chief Justice, it should be noted, was visualising a case where "knowledge or consent" (which are words implying mens rea for the offence actually committed), was absent from the minds of some of the doers of the entire act, yet nevertheless a common intention or "common purpose" was present in the minds of all, and "the act done was in some measure in furtherance of the common intention."

172. It is clear that Peacock C. J. regarded the element of common intention or common purpose as implicit in the Rule which Section 34 embodied, though the section itself contained no words expressly indicating such an element. That element had indeed always to be read into the section to save it from absurdity, for if one had to confine oneself strictly to the language of the section as it stood before the amendment, some startling results would have followed, and criminal acts could have been attributed even to innocent agents. If I secretly mixed poison in a drink and handed it to a servant to offer to a guest, and the latter drank it and died, the criminal act of murder would have had to be regarded not only as my act, but also as my innocent servant's act; a result which would be monstrous. The truth is that Section 34 in the Code of 1860 seems to have been designed to express only a part of the Rule relating to joint responsibility, and was by itself incomplete. It drew attention only to the criminal act which it attributed to all the doers of fractional portions of the act, and it did not say what criminal offence any doer of a fractional portion was to be adjudged guilty of. The offence was to be fastened on the doer of a fractional

portion according to his own individual mens rea, and the rules which regulated the function of fastening the offences on the doers of fractional portions were embodied in the subsequent sections. These I shall discuss later. Here I will content myself by merely pointing out that it was this incompleteness of the original Section 34 which occasioned the amendment of 1870.

173. It is to be carefully noted that the addition of the phrase "in furtherance of the common intention of all" was not for the purpose of enunciating the self-evident proposition that "mens rea" was necessary before a "criminal act" could be treated as an offence. The requirement of mens rea is laid down in each section of the Code which creates an offence. As already indicated, the real operation of Section 34 was to take a completed criminal act, and then to attribute the whole of that criminal act (by which is meant the physical act plus its effects or consequences, e. g., beating plus death or beating plus hurt), to each separate doer of a fractional portion of the act (e. g., each person who struck a blow). The new words were introduced, into the section merely for making express what was already implicit, which was that the section would not have its operation of attributing the entire criminal act to one individual doer of a fraction of that act, unless the fractional act was one which helped on a purpose which was shared by all the individual doers. The object of the amendment was to make it plain that this Rule would have application only where a nexus existed between the minds of individual doers. To express the mental nexus the phrase "common intention" was used, and this it is that has given rise to some confusion in a matter which ought to be essentially simple. Regarding the amendment, Lord Sumner in *Barendra Kumar v. Emperor*, says at p. 192 of the report:

In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition under which each might be criminally liable when there are several actors .... Really the amendment is an amendment in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises.

174. The Privy Council in *Barendra Kumar v. Emperor*, were not dealing with the exact nature of the mental nexus, or in other words with the precise meaning of the phrase "common intention". What they were directly concerned with was an argument regarding the meaning of the words, "criminal act," and "that act" in Section 34. The argument with which the Privy Council dealt was previously advanced in *Barendra Kumar Ghose's* case before a Full Bench of this Court, the judgment of which is reported in *Emperor v. Brendra Kumar*, The question which arose for consideration was succinctly stated by Richardson J. in the following words, at p, 212 of the report:

The precise point for determination as I conceive, is whether the liability imposed by Section 34, with which we are chiefly concerned, extends only to principal in the first degree or whether it also extends to principals in the second degree or accessories at the fact. The narrower view is urged for the accused the wider one for the Crown.

175. That having been the argument, Lord Sumner delivering the judgment of the Privy Council said:

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. *Barendra Kumar v. Emperor* .

177. Later on at p. 192, Lord Sumner says:

In other words, 'a criminal act' means that unity of criminal behaviour which results in something; for which an individual would be punishable if it were all done by himself alone, that is, in a criminal offence.

178. Although, as I have stated, the Privy Council were not dealing with the question which has arisen for determination in the present case, the conclusion at which they arrived is in accord with the view that "common intention" in Section 34 is not necessarily identical either with the immediate intention to do a physical act, or with the mens rea required for the offence actually committed, and that it may amount to what is really a wider purpose in which mens rea for the offence actually committed is included as a dormant factor. As I have already shown, the jury's verdict in *28 Emperor v. Brendra Kumar* , involved the finding that all the persons concerned with the offence set out with the purpose of committing robbery, and of killing provided killing became necessary. The purpose in furtherance of which the killing was done embraced more than the latent and contingent intention to kill. It extended to the avowed and absolute intention which was to rob. It is in this sense that common intention has been interpreted in *Indar Singh v. Emperor* (33) 20 A.I.R. 1933 Lah. 819, The head-note of the report which is a correct summary of the judgment is as follows:

Four persons went armed with guns to the house of K.S. to commit a robbery. K.S. being absent, s.s. and another of the robbers got the minor son of K.S. to take them to the field where K.S. was working. During their absence the other two robbers remained at the house, one of them I.S. taking his stand near the main door which he closed. Two grown-up sons of K.S. who were at their shop close by, having had their suspicions aroused, then came to the house and pushed open

the main door, whereupon I.S. fired at them and killed Kehr Singh, one of the brothers. I.S. was convicted under Section 302 and s.s. under Sections 302/34. It was contended that Section 34 was not applicable as s.s. was absent at the time of the murder and could therefore not have participated in the crime.

Held, that the contention must be overruled. All that Section 34, Penal Code, requires is that the accused is one of the participators in the joint criminal action in the course of which the murder is committed, and in the present case the accused s. s. though temporarily absent, was participating in the joint criminal action in the course of which the murder was committed.

179. Regarding the common intention Bhide J. said:

In the present instance the common intention of the culprits was obviously to obmmit robbery and in furtherance of that intention different acts were committed by different persons. Sardara Singh had gone to fetch Kishen Singh for carrying out that common intention while Indar Singh shot down Kehr Singh in furtherance of the same. The decision to shoot Kehr Singh was taken by Indar Singh alone but there can be no doubt that it was taken in furtherance of the common intention. The object of Indar Singh apparently was to strike terror and disarm all opposition and in this he succeeded; for there was no attempt to offer any offective resistance to the robber thereafter.

181. With this reasoning I respectfully agree.

183. I would now consider the relevant sections one by one. In his judgment in the Full Bench case in Emperor v. Barendra Kumar , Richardson J. observed at p. 211 of the report:

Section 34 and the closely connected Sections 35, 37 and 38 were intended to lay down compendiously, in the fewest possible words, some elementary principles of criminal liability. They do not create offences and, given the common intention, in practice it does not signify which section applies in any particular case. As matter of construction they are interpretative Clause s, included in the chapter or General Explanations, and must be read into the Code definitions of substantive offences.

184. Section 34 begins by speaking of "a criminal act," it starts with the assumption that a criminal act has been committed. Now a criminal act may be an offence of one of two kinds: (a) one which is punishable even if there is no mens tea, such as ap offence under Section 283 or Section 290, Penal Code; (b) one which requires the mens rea stated in the section of the Code which defines the offence which that criminal act may turn out to be. As regards class (a), there is no difficulty, for it is per se an offence, and, by operetion of what Section 34 goes on to enact,

each and every person who performs a fractional part of the act is to be regarded as the performer of the whole of it. But class (b) raises a very obvious difficulty, for one of the doers of a fractional portion of the act may not have the necessary mens rea. Is he to be considered as culpable as other doers who have mens rea. As already pointed out such a result has been avoided by the introduction of the words "in furtherance of the common intention of all," which means that before a particular doer of a fractional portion of the criminal act can be fastened with criminal liability for the entire act, it will have to be shown that he shared the common purpose of all the doers, and also that the entire criminal act furthered the accomplishment of that purpose. Before the amendment of 1870, the section as it then stood literally rendered liable class (b) as well as class (a). But at that time Section 34, in so far as it was express, was only a partial enunciation of the real principle. As far as its language went, it was incomplete, and the remainder of the principle had to be provided for in other sections.

185. Section 35 took the matter up, and it started at the point where Section 34 left off. Class (a) being offences for which no mens rea was requisite, it had been already completely legislated for by Section 34. But as to class (b), it was necessary to say something further in Order to make it clear that culpability in this class of offence depended upon the nature of the offender's mens rea. Section 35 accordingly started with the words Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention I would pause here for a moment to point out that Section 35 like Section 34 assumes that a "criminal act" has been committed. It says "an act, which is criminal." Except in the grammatical structure of the phrase, I can see no difference between these words and the expression "criminal act", which is what occurs in Section 34. An act which is criminal is obviously the same thing as a criminal act. Next, Section 35 goes on to enact that if the offence which the criminal act is found to constitute, requires knowledge then only that fractional doer who was possessed of such knowledge is to be adjudged liable for the offence. This is clear from the closing words of the section, "as if the act (meaning the whole act) were done by him alone with that knowledge."

187. I would again pause, this time to point out, that the difficulty which prevented my brother Das from holding that Section 34 could ever be read with the second part of Section 304 is now seen to disappear. Section 35 has actually contemplated and spoken of such a situation. It may be, as observed more than once by Henderson J., that the situation is of rare occurrence and not usually met with in real life. But it is not an inconceivable situation, and Section 35 expressly provides for it. True it is that if this particular principle of joint responsibility is to be invoked, the proper section to appear in the charge would be not Section 34 but Section 35. But as the Full Bench held in *Emperor v. Barendra Kumar*, it is quite unnecessary to refer to Section 34 in any charge, and I should therefore think that the framing of charges in cases where the prosecution

contends that each of several accused persons is criminally responsible for the joint act of all, never calls for inclusion of any of the sections 34 to 38. See also 30. *Bhodu Das v. Emperor* ('29) 16 A.I.R. 1929 Pat. 11,

188. To proceed, Section 35 also enacts that if the offence which the criminal act is found to constitute, requires intention, then only that fractional doer who was animated by such intention is to be adjudged liable for the offence. Here again this is made plain by the closing words of the section, "as if the act (meaning the whole act) were done by him alone with that .. .intention."

189. At this stage it may be observed that Sections 34 and 35 have between them covered a considerable area of the field of joint criminal responsibility. But there still remains something more to be said. So far consideration has been bestowed only upon those cases in which the joint completed act is one offence. But as one criminal act may be performed by one person with one mens rea, and by another with some other mens rea, it is possible that the same criminal act may in law amount to one offence in the case of one fractional doer, and to another offence in the case of another. The tale is here taken up by Section 38, which deals with several fractional doers of a joint act in circumstances where it is possible that one had one kind of mens rea, and another had another kind of mens rea. The Rule is so clearly and simply expressed in the language of the section and in the illustration to it, that no discussion is called for. I shall therefore content myself with a bare setting out of the section and the illustration.

Where 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.

Illustration.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

190. Section 36 presents no difficulty in the present case for it merely says that "act" and "omission" are to be regarded as interchangeable terms in those cases where the causing of a certain effect, or an attempt to cause that effect, by an act or by any omission, is an offence.

191. Section 37 commences by assuming that an offence has been committed, which implies a criminal act plus mens rea. It further assumes that the criminal act is made up of distinct acts done by different persons as exemplified in the illustration. And then it provides that each of

those persons is guilty of the offence provided he performed his own act with the mens rea which the offence requires. This mens rea, as the Privy Council pointed out in *Barendra Kumar v. Emperor*, need not necessarily be the same thing as the intention common to all, or in other words the purpose by which all the performers were animated. Looked at from one point of view, the section, in effect, says that in the circumstances assumed, it is no defence for the doer of any of the distinct acts, who had the mens rea for the offence, to say that as his own act was one entire completed act, the offence which was constituted by the totality of all the separate acts of the individual performers, was not his offence.

192. It will be seen from what I have said before, that the introduction of the words "in furtherance of the common intention of all" into Section 34 has caused a certain overlapping with Section 35. In those cases where on the facts common intention is, as it may very well be, exactly the same in its actual range as the mens rea needed to convert the criminal act into an offence, the same principle is contained in Section 35 as is stated in Section 34. *Indar Singh v. Emperor* ('33) 20 A.I.R. 1933 Lah. 819, provides an instance of where it would be appropriate to employ Section 34 rather than Section 35. The common intention there was to commit robbery, and the intention to resist interference even to the length of killing, was included in the intention to rob, not prominently but in a latent or dormant form. To use a homely phrase, the intention to kill was at the back of the robbers' minds. It was this wide "common intention" that made the act of killing (done in furtherance of it) the criminal act, and also the offence, of the absent accused. But take another case a man has two enemies both of whom set out with the single purpose of murdering him, and then one of them stabs him to death while the other holds him by the arms. The common intention is to kill. The stabbing is done in furtherance of that common intention. It is Section 34. It is also Section 35, because the criminal act of stabbing requires mens rea in Order to be the offence of murder, the act was done by both assailants, and each of them had the requisite mens rea, that being the intention to kill.

193. I am led to the conclusion that "common intention" cannot be given a constant connotation. What it actually is, varies with the facts of each case. There are cases in which it is identical with the mens rea required for the offence actually committed. There are others in which its horizon is wider, like the cases in *Emperor v. Brendra Kumar*, and *Indar Singh v. Emperor* ('33) 20 A.I.R. 1933 Lah. 819, where the real common intention was to do a criminal act the accomplishment of which might require some other criminal act to be committed. In these cases the mens rea which makes the ancillary act a crime would be regarded as embraced' by the common intention, not as a primary intention, but as a secondary and contingent intention, not in the forefront of the conscious mind, but latent or dormant therein.

194. The objection may be taken that this is reducing Section 34 to Section 149, but that is not

so. Section 149 differs from Section 34 in the following respects: (1) It requires an assembly of five persons. (2) The common object must be one of those specified in Section 141, whereas according to the strict language of Section 34 "common intention" may be any intention at all. (3) The offence actually committed is required by Section 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. It need not be a criminal act in actual furtherance of the common object which under Section 34 it has to be. (4) Section 34 requires some act, however, small to be done whereas under Section 149 mere membership of the unlawful assembly is sufficient. (5) Section 34 enunciates a mere principle of liability, but creates no offence; Section 149 creates a specific offence.

195. It follows that, as already indicated, I cannot concur with my brother Das in the view that the principle of Section 34 can never be applied to an offence punishable under the second part of Section 304. I am further of the opinion, for the reason stated in the earlier portion of my judgment, that "common intention" cannot always be made to coincide with what, for want of a better term I may call 'volitional' intention, that is to say, the bare resolution of the will, divorced from any contemplation of criminal consequences, just to do a physical act. This is sufficient to dispose of the common question raised in the three appeals.

196. Before I leave this subject, however, I ought to add that I am inclined to endorse the observations of Henderson J., that in actual fact, cases in which the principle enunciated in Section 34 can be applied to an offence punishable under the second part of Section 304, are not of very frequent occurrence. Cases of the type out of which the appeals here dealt with have arisen, are really cases in which the offence committed is in fact murder punishable under Section 302. In order to allay the qualms of juries who, in this province, are notoriously averse to returning affirmative verdicts on capital charges, Judges frequently go to artificial lengths, in leaving open an avenue to a verdict under Section 304, part 2, when the evidence shows that it is either murder or nothing.

197. In my opinion, Judges, in charging juries in cases like the present, would do well to explain in their own words so much as may be necessary of the entire principle of joint responsibility. To confine the jury's attention to Section 34 alone, as is nearly always done, may be quite wrong, for even as it now stands that section does not embody all the aspects of the principle, which is really spread out between Sections 34 to 38. As already indicated above, none of these sections need be specified in the charges framed, and it follows that, if one of them is mentioned, the Judge is still free to gather the Rule which actually applies to the fact of the case from the other sections.

198. My brothers Lodge and Das have differed on other points in Criminal Appeal No. 28 of 1943, but for a disposal of this appeal it is necessary to consider only one of them. The point

relates to the index to the sketch map prepared by the investigating police officer, Ex. 4. On the map certain spots are indicated by letters of the alphabet. In the index occurs the statement "A is the house of Manikulla Munshi, 7 rashis west from the place of occurrence and where witnesses assembled for certain enquiry." Now the fact that the house of Manikulla Munshi was 7 rashis from the place of occurrence is a fact which the investigating officer presumably ascertained by personal observation. If this was so, the fact should have been established by the evidence of the officer at the trial. Thus established, this fact would not be open to objection. The same cannot be said of the other facts embraced in the statement. How did the officer come to learn that Manikulla Munshi was in possession of the house which stood at the spot marked A in the map? How again did he get to know that persons who later claimed to be witnesses of the occurrence were assembled at Manikulla's house at the time of the occurrence? Obviously he was told as much by witnesses during police investigation. The first fact could and should have been brought out in the examination of Manikulla or of some other inmate of his house, and the second fact should have been proved by the evidence of those witnesses who claimed to have been at Manikulla's house when the occurrence took place. As far as I have been able to ascertain however, the first fact was imported into the record from the map and the index and the evidence of the investigating officer. Such a procedure was a clear violation of the provisions of Section 162, Criminal P.C. as pointed out in *Bhagirathi v. Emperor* ('26) 13 A.I.R. 1926 Cal. 550, following the earlier cases in *Emperor v. Abinash Chandra Bose*, and *Emperor v. Mofizel Peada*, I would observe in this connexion that information derived from witnesses during police investigation, and recorded in the index to a map, must be proved by the witnesses concerned, and not by the investigating officer. If sought to be proved by the evidence of the latter, this kind of information would manifestly offend against Section 162, Criminal P.C.

199. In my opinion the situation which arose here is not saved by Section 167, Evidence Act, because this was a jury trial and it is impossible to say that the verdict was not influenced by what was contained in the index of the map. The fact that some of the identifying witnesses were there at all was challenged by the defence. The prosecution maintained that just before the occurrence they were at Manikulla's house. That this house was close to the place of occurrence-in fact at the spot marked A in the map-was therefore of the utmost importance, and it was partly established by the index to the map which contained statements hit by Section 162, Criminal P.C.

200. This appeal (No. 28/43) must accordingly be allowed. The convictions of the appellants and the sentences passed on them are set aside, and it is directed that they be re-tried according to law.

201. Criminal Appeal No. 104 of 1943 is dismissed, as the only question in that appeal is whether Section 34 can have operation where the offence charged is one punishable under part 2

of Section 304 and that question has been answered by me in the affirmative.

202. Criminal Appeal No. 98 of 1943 is dismissed for a similar reason.

203. I would like to add a word of appreciation for the assistance I have had from the arguments, and for the care and thoroughness with which the main question has been presented by Mr. Dinesh Chandra Roy and Mr. Anil Chandra Roy Choudhury.