2025 INSC 221

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.593 OF 2022

VASANT @ GIRISH AKBARASAB SANAVALE & ANR. APPELLANT(S)

VERSUS

THE STATE OF KARNATAKA RESPONDENT(S)

O R D E R

1. This appeal arises from the judgment and order passed by the High Court of Karnataka, Dharwad Bench in Criminal Appeal No. 100168 of 2016 dated 6th October 2020 by which the High Court allowed the appeal filed by the State of Karnataka and thereby quashed and set aside the judgment and order passed by the VIth Additional District & Sessions Judge, Belagavi in S.C. No. 151 of 2013 acquitting the appellants herein of the offence punishable under Sections 498A, 302 and 504 read with Section 34 respectively of the Indian Penal Code, 1860 (for short "the IPC") and Sections 3 and 4 respectively of the Dowry Prohibition Act, 1961.

2. It is the case of the prosecution that the deceased named Geetha married to the appellant no.1 herein viz. Vasant @ Girish

Akbarasab Sanavale past 8 years from the date of the incident. In the wedlock three children were born. It is alleged that after a period of one year from the date of marriage the husband and his family members started harassing the deceased. The deceased was being harassed for dowry and in connection with the domestic house hold work.

3. On the date of the incident at around 8.00 p.m. while the deceased was at her matrimonial home, her mother-in-law i.e. the appellant no.2 herein is alleged to have poured kerosene on her body and set her on fire. The deceased suffered extensive burn injuries.

4. The neighbours residing in the vicinity rushed to the place of the incident and immediately shifted her to the hospital. The deceased succumbed to the burn injuries after a period of one week. The cause of death as usual is septicemia.

5. The mother of the deceased Tippavva Chandru Patil, lodged an FIR dated 03-01-2013 which came to be registered as crime No. 2 of 2013 in Mudalagi Police Station, Mudalagi Circle, District Belagavi, Karnataka. The first information report reads thus:-

> **"The accused persons mentioned herein are the husband, mother-in-law and father-in-law of Geetha, daughter of the complainant and the said accused persons looked after Geetha cordially for 1 year after marriage but then they have not only ill-treated her physically and mentally by insisting her to wake up early in the morning and do the household chores and to go to the house of others to work but also pressurized her to bring an amount of Rs.5,000/- from her maternal house and since she did not bring money from her maternal house, the accused person had the intention to kill**

her and poured kerosene on her and set fire and tried to kill her and thereby committed offence."

6. On the FIR being registered the investigation started. The Tehsiladar of the area was requested to reach the hospital for the purpose of recording of the dying declaration of the deceased. The Tehsildar within four hours of the incident reached the hospital and recorded the dying declaration Exhibit-46.

7. The statements of various witnesses, more particularly, the neighbours who had brought the deceased to the hospital were recorded under Section 161 of the Criminal Procedure Code, 1973(for short "the Cr.P.C."). After the deceased passed away her body was sent to post mortem examination. The other articles collected in the course of the investigation like clothes etc. were sent to the Forensic Science Laboratory for the purpose of chemical analysis.

8. At the end of the investigation, Police filed charge-sheet against the husband and mother-in-law respectively for the offence enumerated above. The case being exclusively triable by the Sessions Court came to be committed to the Court of Sessions Under Section 209 of the Cr.P.C.

9. The trial court proceeded to frame the charge against the accused persons under Sections 498-A, 302, 114, 323 and 504 r/w Sec.34 of

IPC respectively and Sections 3 and 4 respectively of Dowry Prohibition Act to which they pleaded not guilty and claimed to be tried.

10. The prosecution examined the following witnesses in support of its case:-

> **"PW1 Anand Shankar Sanawale**
> **PW2 Laxman Ramappa Sanawale.**
> **PW3 Sushila Dilip Sanawale.**
> **PW4 Shabbir Samsher Sanawale.**
> **PW5 Latha Shashikant Sanawale.**
> **PW6 Julekha Gulabsab Sanawale.**
> **PW7 Smt. Yallawwa Ramu Karale.**
> **PW8 Krishna Mukappa Shivalli.**
> **PW9 Malik Chandru Patil.**
> **PW10 Prakash Shankar Sanawale.**
> **PW11 Smt. Tippavva Chandru Patil.**
> **PW12 Hanumanth Bhima Nayak.**
> **PW13 Dastagir Abdulsab Inamdar.**
> **PW14 Dr. Adam Allasab Nadaf.**
> **PW15 Dr.Gopal Ramu Wagamude.**
> **PW16 Shivanand Basavanthappa Dhulai.**
> **PW17 Suresh Shankar Murgod.**
> **PW18 Maruti Yallappa Padadalli.**
> **PW19 Anil Balappa Padedar.**
> **PW20 Lakkappa Durgappa Taddi.**
> **PW21 Oudram Hammabba Beary**
> **PW22 Sureshbabu Rudrappa Bandiwaddar.**
> **PW23 Sharanappa.M.Olekar.**
> **PW24 Mrthunjay Irayya Mathapati.**
> **PW25 Dr.N.Sujatha Nanjegouda"**

11. The prosecution also led the following pieces of documentary evidence:-

> **"(i) Ex.P.8 Mahazar of place of occurrence**
> **(ii) Ex.P.27 Post Mortem Report**

(iii) Ex.P.30 Opinion of the Doctor before recording the Dying Declaration (PW15)
(iv) Ex.P.30 Opinion of the Doctor before recording the Dying Declaration (PW25)
(v) Ex.P.46 Dying Declaration
(vi) Ex.P.54 FSL Report"

12. Upon closure of the recording of the evidence, the trial court recorded the further statement of both the accused persons under Section 313 of the Cr.P.C. in which both the accused said that they were innocent and had been falsely implicated.

13. Upon appreciation of the oral as well as documentary evidence on record, the trial court recorded a finding that the prosecution had failed to establish its case beyond reasonable doubt and accordingly acquitted both the accused.

14. The State being dissatisfied with the judgement and order of acquittal passed by the trial court went in appeal before the High Court. The High Court reversed the finding of acquittal and held both the accused guilty of the alleged offence. The High Court ultimately sentenced them to life imprisonment with fine.

15. In such circumstances, referred to above, the appellants are here before this Court with the present appeal.

16. Mr Faeek-ul-Farooq, the learned counsel appearing for the appellants vehemently submitted that the High Court committed an

egregious error in reversing a well-reasoned judgement of the acquittal. According to him, even if a different view is possible on the evidence on record, the High Court as an Appellate Court should be slow in reversing the acquittal unless the High Court comes to the conclusion that the findings recorded by the trial court are perverse or contrary to the evidence on record.

17. He would submit that the High Court committed a serious error in relying upon the dying declaration of the deceased recorded by the Tehsildar. According to him having regard to the medical evidence on record the dying declaration should be discarded as the deceased at the relevant point of time was not in a fit condition of mind to speak anything.

18. He submitted that so far as the appellant no.1 i.e. the husband is concerned, there is no case at all against him.

19. He would submit that the deceased neither in the oral dying declaration made before the Doctor nor in the dying declaration recorded by the Tehsildar has said anything against the husband. On the contrary, according to the learned counsel the deceased in the dying declaration before the Tehsildar has said that the husband poured water on her to extinguish the fire.

20. In such circumstances, referred to above, the learned counsel prayed that there being merit in his appeal the same may be allowed and the accused persons be acquitted.

21. On the other hand, Mr.Singhvi, the learned counsel appearing for the State submitted that no error not to speak of any error of law could be said to have been committed by the High Court in reversing the acquittal and holding the appellants herein guilty of the offence of murder. He would submit that the only thing that weighed with the trial court in disbelieving the dying declaration is the fact that all other witnesses, more particularly, the neighbours had turned hostile and failed to support the case of the prosecution.

22. According to Mr. Singhvi, the oral dying declaration made by the deceased before PW-15 Dr.Gopal Ramu Wagamude and the dying declaration before the Tehsildar exhibit P-21 is sufficient enough to at least hold the appellant no.2 guilty of the alleged crime.

23. In the last Mr. Singhvi tried to develop an argument that although the husband may not be directly involved or in other words has not been directly implicated in the alleged crime still it is established that he was present in the house and it was expected of the husband to take all necessary precautions or steps to save his

wife and the failure or omission on his part would indicate the common intention shared by him along with his mother.

24. Mr. Singhvi also tried to invoke Section 106 of the Evidence Act arguing that something within the personal knowledge of the husband should have been disclosed by the husband in his further statement recorded under Section 313 of the Cr.P.C. In the absence of any plausible explanation the High Court rightly held the husband also guilty with the aid of Section 34 of the IPC.

25. In such circumstances, referred to above, Mr. Singhvi prayed that there being no merit in this appeal, the same may be dismissed.

ANALYSIS:

26. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the High Court committed any error in passing the impugned judgement?

27. We first start with the dying declaration recorded by the Tehsildar.

28. The dying declaration exhibit-46 recorded by the Tehsildar reads thus:-

> **"Question No.1: Are you conscious and in a sound state of**

mind?
Answer: Yes
Question No.2: Are. you in a state to speak?
Answer: Yes
Question No.3: Where are you now?
Answer: General Hospital, Gokak.
Question No.4: When and who brought you here and by what means?
Answer: The people belonging to my lane brought me here yesterday in ambulance at about 8~30 p.m.
Question No.5: Who attacked you?
Answer: My mother-in-law poured kerosene on me and my mother-in-law Jaitunabi lit matchstick and threw on me and set fire.
Question No.6: Give their name and address?
Answer: Jaitunabi Sanavale
Question No. 7: How do you identify her?
Answer: I identify her.
Question No.8: How did you sustain injury?
Answer: I have sustained injuries by fire.
Question No.9: What are the weapons used and describe the shapes?
Answer: Kerosene and matchstick.
Question No.10: In which place you are attacked?
Answer: In the house situated in Mudalagi.
Question No.11: Can you identify wounds on your body?
Answer: Yes.
Question No.12: How and in what manner you have sustained injuries?
Answer: Burnt by pouring kerosene.
Question No.13: What was the intention behind the attack?
Answer: I was in house and in the evening there was quarrel due to my children and at that time my mother-in-law Jaitunabi Sanavale got enraged due to quarrel and poured kerosene on me and when I was going to bathroom, my mother-in-law Jaitunabi lit matchstick and threw it on me. My husband Vasant splashed water on me but the fire did not extinguish and at that time the residents of the lane gathered and took me in ambulance to General Hospital at about 8.30 p.m."

29. In the aforesaid context we shall now look into the oral evidence of the Tehsildar. The Tehsildar PW-21 namely Oudram in his examination in chief has deposed thus:-

"On 3-1-2013 when I was discharging my duty as Tahsildar Gokak. I, received requisition from Mudalagi police station as per Ex.P.42 which was received in my said office.
On the same day I went to Govt. hospital Gokak and wrote a letter to Medical Officer, Govt hospital Gokak as per Ex.P.32 seeking his opinion whether Geeta was able to give any statement, which bears my signature Ex.P. 32 (b). The said Medical Officer in Ex.P.32 has endorsed that patient was able to give oral statement.
Accordingly, I have recorded dying declaration of the said Geeta. She for questioning who, when and how she was brought to hospital, she answered that the residents of her lane brought her on previous night at 8.30 pm by ambulance.
For questing who assaulted her, she replied her mother-in-law had poured kerosene and aunt, namely- Jaitunabi, set her fire my matchstick.
For questioning whether she could identify her, she replied that she could. For questioning how she sustained injuries, she replied she sustained burn injuries. For questioning where crime was committed, she replied that at home at Mudalagi.
For questioning the intention of the crime she replied when she was there in house in the evening, there was quarrel because of her children. Her mother-in-law enraged by the said quarrel poured kerosene on her. When she was going to bathroom her mother-in-law Jaitunabi, lighted match stick and threw on her. Her husband, Vasant, splashed water on her. The fire did not extinguish. At that time the people from her lane gathered and took her to hospital at 8.30 pm by an ambulance.
Since her palms were burned I took finger impression of her left toe on the said dying declaration.
Afterwards I have signed said dying declaration and the Medical Officer has also signed the same. On 4-2-2013 I received requisition, marked Ex.P. 44, seeking to issue true copy of dying declaration of deceased Geeta. On 4-2-2013 I sent a letter, with one true copy of dying declaration and one sealed envelope containing original dying declaration to CPI, marked, Ex.P.45, which bears my signature Ex.P.45(a)
(In the open court a sealed cover received from Addl. JMFC, Gokak is opened.)
The dying declaration of Geeta is Ex.P.46;my signature is Ex P.46(a)(b);The left toe impression of Geeta there-in is Ex.P.46(c); The signature of medical officer there-in is Ex.P.46(d). I have recorded the dying declaration of Geeta

on 3-1-2013 from 12.15 p.m. to 12.25 p.m."

30. Unfortunately, there is no cross examination worth the name of the Tehsildar. Nothing substantial could be elicited through the cross examination thereby to disbelieve that the deceased was not in a fit state of mind to give a dying declaration

31. We now proceed to look into the evidence of Dr. Gopal Ramu Wagamude Exhibit 17 (PW-15). Dr. Gopal Waghmude in his examination-in-chief as deposed as under:-

> **"I have been serving as Senior Specialist in General Hospital, Gokak, since 2011. On 02.01.2013 at about 9.30 p.m., Anand S. Sanavale had brought Geetha Vasant Sanavale, aged about 28 years; R/o Mudalagi, to our Hospital requiring treatment for burn injuries. As per the information given by Geetha; her mother-in-law poured kerosene on her and set her ablaze. She also informed that this incident occurred on the same day at about 8.00 p.m. On examining her, she was in conscious state. She was telling that she was feeling thirsty. When she was examined, her B.P was 90/70 and her pulse was palpitating and kerosene smell was coming out of her body. On examining her, normal burn injuries were found on her face and neck, Deep burn injuries were found on her right hand, left hand, right leg and left leg. Deep burn injuries were found on abdomen and back and all these injuries appeared reddish in colour. All these injuries were grievous in nature and also fresh in nature. Nearly 90% of burn injuries were found. I have given treatment to the said as in-patient. I have also given treatment to her on 03.01.2013. Except me, General Surgeon has also provided treatment to this patient. On 03.01.2013, A.S.I of Mudalagi Police station gave a requisition requesting to know whether the patient is in the condition to give statement or not. The document which is shown to me now is the office copy**

of the requisition which was given to me on that day. It has been marked as Ex.P.30. Ex.P.30 bears my signature about receiving it. In Ex.P.30, I have written my opinion that the patient is in the condition to give statement. It has been marked as Ex.P.30 (a). I have furnished wound certificate about the injuries. The document which is shown to me now is the wound certificate that I have furnished. It has been marked as Ex.P.31. The signature of witness has been marked as Ex.P.31 (a). The document which is shown to me now is the office copy of the requisition given by the Tahsildar to N. Sujatha, Junior Specialist of our Hospital. The said requisition bears signature of N. Sujatha. The said document has been marked as Ex.P.32. In Ex.P.32, Junior Specialist Sujatha has given opinion and affixed signature by stating that the patient is in the condition to give statement. It has been marked as Ex.P.32 (a). When a person pours kerosene on another person, there are chances of sustaining injuries found in Ex.P.31. The above-mentioned patient was referred to KIMS Hospital, Hubballi from our hospital for further treatment."

32. Again, there is no cross examination of Dr. Wagamude. Nothing substantial could be elicited through the cross examination of the Dr. so as to disbelieve the oral dying declaration made by the deceased before him.

33. However, what is pertinent for us to note is that nowhere the husband figures. It is only the mother-in-law, who figures in the dying declaration as well as oral evidence of the Doctor and the Tehsildar.

34. We also looked into the evidence, so as to ascertain whether the deceased was in a fit condition to make the dying declaration or not.

There is nothing on record to indicate that she was unable to talk or was not conscious.

35. To a very pertinent question put by us to Mr. Singhvi as to what weighed with the High Court in holding the husband guilty of the alleged offence, he invited the attention of this Court to para 30 of the impugned judgement. In para 30, the High Court has observed thus:-

> **30. From the very statement of Geetha, cruelty to her in the hands of the accused persons is established invariably and without iota of doubt. The cause of death is burn injuries and the burn injuries are established to have been inflicted by accused Nos.1 and 2, they are charged with common intention. If the accused No.1 was really about to save his wife, he could have done it when she was in murderous condition by sustaining injuries to the extent of 90-95% inflicted in his person in his presence and in the presence of hostility of himself and his wife, he never bothered even to take her to treatment. He wanted to ensure that she dies. In this connection, the offence may be with respect of commission or omission."**

36. The plain reading of para 30 referred to above would indicate that what weighed with the High Court in holding the husband-appellant guilty is the fact that he never bothered to take his wife to the hospital as he wanted to ensure that she does not survive. Therefore, according to the High Court, the husband could be said to be guilty having shared common intention with his mother. We have not been able to understand exactly what the High Court wants to convey.

37. Be that as it may, we have reached the conclusion that there is

no cogent and reliable evidence to hold the husband-appellant guilty of the alleged offence even with the aid of Section 34 of the IPC. Section 34 of the IPC reads thus:-

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

38.If there is one decision explaining Section 34 IPC which could be termed as *locus classicus* then the same is the Allahabad High Court decision in the case of *Om Prakash v. State reported in 1956 CrLJ 452*. Justice M.H. Beg (as His Lordship then was) has beautifully explained the provision and its applicability.

39. In order that an intention should be common, it should be attributable to every member of the group. This is also clarified by the fact that the section itself characterises the common intention to be the 'common, intention of all'. Section 34, I.P.C., therefore, does not ignore the intention of the individual offender.

40. It only adds some more persons in the commission of the offence and postulates that the same intention was jointly existing in the mind of every individual member of the group as well. It may be that the intention was alleged to be common, but that only means that every member shared it along with others and not the some members shared it and others did not.

41. The common intention required under Section 34 Penal Code need

not, however, be identical with the guilty intention or 'mens rea' which is the ingredient of the offence and is to be distinguished from it. The latter might be coincident with or collateral to the former.

42. On the other hand, the position under Section 149, IPC, is very different. The charge framed under Section 149, IPC, disregards the intention of the individual members of the assembly altogether, and concentrates merely on the common object of the assembly as a whole. The result of this position is that there may be cases in which a person might be guilty of an offence under Section 149, IPC though he himself had no intention to commit it or was even unaware of its commission.

43. There may even be cases where a person might be found guilty of an offence under Section 149 though it was committed quite contrary to his own intention. Supposing for instance, an unlawful assembly is formed with the object of wiping out all members of a particular community residing in a mohalla. While this assembly is busy in its unlawful activities, some of its members might come across a member of the other community and might in prosecution of the common object proceed to murder him.

44. But a particular individual, say X, who is a member of this very unlawful assembly might discover that Y was his old friend. X might not want that this old friend of his should be killed, and in spite

of his wishes, and contrary to his intention, Y might be murdered.

45. If it so happens, then X who was a member of the unlawful assembly, might be held to be guilty of an offence committed by another member of the said assembly, even though the offence itself was committed quite contrary to his desires and even in opposition to his own intention provided it is shown that X continued to remain a member of the assembly at the time of the offence and the offence itself was directly or indirectly within the purview of the common object of the assembly.

46. The reason is that the criminal liability under Section 149, IPC is determined not by the intention of the various individual members constituting it but by the common object of the assembly as a whole. The result is that when a charge against a person is framed for an offence under Section 149, IPC, read with a relative section, and the person is convicted of the offence under the relative section alone, he might legitimately complain that his own mental state having never been put into issue under the charge at all, he was taken by surprise in the matter and thereby misled and prejudiced.

47. For the purpose of the above discussion I am presuming that a charge framed under Section 149, IPC is the usual charge under which the individual authorship of the offence is not defined or specified, and the offence is alleged in the charge to be the act of an undefined member of the assembly. The position under Section 34 is different.

The connection here between the offender and the offence is far closer and deeper.

48. Under Section 34 every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally. That is, he is a sharer not only in what has been described as a common act but also in what is termed as the common intention, and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different.

49. To put it in other words, whereas under Section 149, IPC the entire emphasis both in respect of the physical act as well as in respect of the mental state is placed on the assembly as a whole, under Section 34, IPC, the weight in respect of both is divided and is placed both on the individual member as well as on the entire group.

50. Section 34, IPC, as contrasted with Section 149, IPC, therefore, balances the individual and the general aspect, although while taking into account the individual aspect it conceives it as part and parcel of the general aspect. In this sense, Section 34, IPC, is far more restricted than Section 149, I.P.C. If, therefore, a person is charged with an offence with the application of Section 34, IPC, and convicted for the substantive offence only, it is not so easy for him to advance

the plea that he was not aware that the matter had any individual aspect.

51. Participation of the individual offender in the criminal act in some form or the other which is the leading feature of Section 34, IPC differentiates it not only from Section 149, IPC, but also from other affiliated offences like criminal conspiracy and abetment. A bare agreement between two or more persons to do or cause to be done an illegal act might make a person liable for the offence of criminal conspiracy as defined in Section 120, IPC. If the said agreement is to commit offence, then such an agreement is by itself enough to make a man guilty and no overt act apart from the agreement would be necessary.

52. If, however, the agreement is to commit an act which is not tantamount to an offence, then some overt act in pursuance thereof is necessary. Such overt act may, however, be performed by any person who is a party to the agreement and not necessarily by the particular accused who might be guilty of the offence without having participated in the act.

53. On the other hand, under Section 34, IPC, a mere agreement, although it might be a sufficient proof of the common intention, would be wholly insufficient to sustain a conviction with the application of Section 34, IPC, unless some criminal act is done in furtherance of the said common intention and the accused himself has

in some way or the other participated in the commission of the said act.

54. The offence itself would be complete even though the act abetted is not committed; or, even if the act is committed, the abettor himself has not participated in it. Thus, actual participation in the commission of the offence, which is a condition precedent of Section 34 and is its main feature, again distinguishes it from the offence of abetment.

55. Section 34, IPC, compendiously summarises the liability imposed under English Law on what are therein called as principal in the first degree and principal in the second degree and assimilates the principles underlying both by compressing them in one section and treating them as what have been called accessories at the fact as opposed to what are termed as accessories before the fact and accessories after the fact.

56. In this connection, Mr. Singhvi the learned counsel for the State argued that a person who is present on the spot at the time of the commission of the offence would be guilty by the application of Section 34, IPC. although such a person did not do anything.

57. A person present on the scene might or might not be guilty by the application of Section 34, IPC. If he is present on the scene for the purpose of participating in the offence, he would certainly be guilty as a participator in the offence. On the other hand, if he

is present there merely as a spectator, he would not be guilty.

58. Thus, for example a person who is an eyewitness of the incident is present at the spot as well as a person who is a confederate of the assailant. The former is not guilty because he is present merely to see the commission of the crime. On the other hand, the latter is guilty because he is present for the purpose of seeing that the crime is committed. In other words, presence on the spot for the purpose of facilitating or promoting the offence is itself tantamount to actual participation in the criminal act.

59. As observed by the Privy Council in the case of Barendra Kumar Ghosh v. Emperor, AIR 1925 PC 1 (C), "It is to be remembered that in crimes as in other things 'they also serve who only stand and wait'". The following observations of Mookerjee, J. in the case of Emperor v. Barendra Kumar Ghosh, AIR 1924 Cal 257 (FB) (D) are relevant in this connection:

> **"It is the expectation of aid, in case it is necessary to the completion of the crime and the belief that his associate is near and ready to render it which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the countenance and assistance which the accomplice thus renders, he participates in the commission of the offence.**

60. It is, therefore, sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for the fulfilment of the same pre-concerted end, and was so situated as to be able to

furnish aid to his associates with a view to insure success in the accomplishment of the common enterprise", (p. 280)

61. In a similar strain are the following instructive observations in the judgment of Richardson, J., in the same case:

> **"Moreover, it is impossible to say what might have happened, if one man alone had set out to accomplish the murder. Without the support moral and physical, of a comrade, his resolution might have failed him and his pistol remained in his pocket or diminution of confidence might have interfered with his aim; or again, he might have been successfully resisted and put to flight", (p. 296).**

62. At p. 308 col. (1) of the same case Ghose J. has quoted the following illuminating passage from Poster's Criminal Law:

> **"Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the act be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise. To sum up persons executing parts of a crime separately in furtherance of a common intention are equally guilty".**

63. It is, therefore, not correct for the appellant's learned counsel to say that a person present on the spot does nothing. He plays a very important part in the scheme of the commission of the offence. The potential utility of a person who is present as a guilty

confederate on the scene of offence cannot be overestimated.

64. The word 'criminal act' is used in Section 34, IPC in the broadest possible sense. It would cover any word, gesture, deed or conduct of any kind on the part of a person whether active or passive, which tends to support the common design.

65. A 'criminal act' in Section 34, IPC consists of the entire bundle of acts or omissions tied together with the chain of common intention that have combined to constitute the offence. The acts that it might comprise within itself may be similar or diverse.

66. Such acts may be performed simultaneously, successively or at intervals. Instances to illustrate such acts are of a multifarious type. For example, two persons may beat a man at the same time, and if their acts are in furtherance of a common end, Section 34 IPC, would be attracted. The acts here are simultaneous.

67. Again, for example, two jailors whose duty it is to attend alternately on a prisoner may conspire to starve him to death. In pursuance of this conspiracy, they may omit to supply food to him. In this case the conduct consists of omissions and the acts of the accused are successive and not simultaneous. Or, for example, two persons may conspire to forge a document.

68. One may forge a part of it on one day and the other may forge the remaining part of it after a gap of a month. In this instance the acts of both the persons would attract Section 34, IPC even

though there is an interval between acts performed by each of the two persons separately.

69. Such act may consist of a mere gesture or expression or conduct that may provide a signal for offence or help the confederate in identifying the victim. Thus, for example two persons may conspire to kill a third man. One may know him and the other may not know him.

70. It may be agreed between the two that the person who knows him will stand near the man who would be the victim and thereby enable the person to whom the part of killing is assigned to identify the victim. If the scheme is carried out, both would be guilty under Section 34, IPC, even though the man who stood near the victim was merely present on the spot and apparently did nothing. If, however, the scheme is analysed, it would appear that by his presence near the victim he played a very important part.

71. In fact, it was his presence near the victim that really contributed to the successful commission of the crime. The part may consist of a mere omission. Thus, for example, a person who is employed as a sentinel to guard the room of the deceased might agree with the murderer to allow him entry into the room with a view to enable him to accomplish the murderous deed.

72. If the murderer turns up according to the pre-arranged plan and the sentinel deliberately omits to prevent his entry into the room, he has done an act which has contributed as effectively to the

perpetration of the murder as the actual act of killing itself.

73. In fact, the murder might not have been possible without the omission on his part. The various acts may be quite diverse in nature. Thus, if two persons conspire to commit theft and devise a plan according to which one of them would lure the shopkeeper away to an adjoining room on the pretext of having conversation with him thereby leaving the shop unprotected in order to enable the other persons to commit theft and the scheme is executed according to the plan, both of them would be equally guilty of theft by the application of the provisions of Section 34, IPC although their respective acts are of a very different type.

74. In such a case, although only one man has committed the actual theft and the other has done nothing except entering into a friendly chat with the shopkeeper with a view to secure his removal from the scene, yet the part played by the latter is no less important than that of the former.

75. It is, therefore, evident that every person charged with the aid of Section 34, must in some form or the other participate in the offence in order to make him liable thereunder. For the above reason, I find myself unable to endorse the argument of the appellants' learned counsel that a guilty associate merely present on the spot cannot be said to participate in the commission of the offence.

76. The element of participation in the commission of the offence is

the chief feature that distinguishes Section 34, IPC from Section 149, IPC and other kindred sections. This has been emphasised in a large number of decided cases.

77. In Shreekantiah Ramayya Munipalli v. State of Bombay, (S) AIR 1955 SC 287 (E) while expounding the meaning of Section 34, IPC Bose, J. observed as follows:—

> **"It is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room; he can, for instance, stand guard by a gate outside ready to warn his companions about any approach of danger or wait in a car on a nearby road ready to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or other at the time the crime is actually being committed. The antithesis is between the preliminary stages, the agreement, the preparation, the planning, which is covered by S. 109, and the stage of commission when the plans are put into effect and carried out. Section 34 is concerned with the latter", (p. 293).**

78. At page 294, col. (1) of the same judgment it is observed that:—

> **"The emphasis in S. 34 is on the word 'done'. When a criminal act is 'done' by several persons, it is essential that they join in the actual 'doing' of the act and not merely in planning its perpetration".**

79. In the same case, the following observations of their Lordships of the Privy Council in the case in AIR 1925 PC 1 (C) on this point were cited with approval:

> **"Participation and joint action' in the actual commission of crime' are, in substance, matters which stand in antithesis to abetments or attempts".**

80. The distinction between Section 34, IPC, and Section 149, IPC in this regard has been brought out by Lord Sumner in the well-known case in AIR 1925 PC 1 (C) thus:

> **"There is a difference between object and intention, for, though their object is common, the intentions of the several members, may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of S. 34, is replaced in S. 149 by membership of the assembly at the time of the committing of the offence".**

81. In Bashir v. State, AIR 1953 All 668 (F) which is a Bench decision of the Allahabad High Court, it was observed by Desai J. that:—

> **"All the persons who are sought to be made liable by virtue of S. 34 must have done some act which is included in the 'criminal act'. One who has not taken any part in doing the criminal act cannot be made liable under the section", (p. 671 col 1).**

82. In Faiyaz Khan v. Rex, AIR 1949 All 180 (G) it was held that:—

> **"Section 34 refers to cases in which several persons both intend to do and do an act. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases S. 149 may be applicable, but S. 34 is not", (p. 184 col. 1).**

83. In AIR 1924 Cal 257 (D) which is a Full Bench case of the Calcutta High Court, Cuming J. observed 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", (p. 312 col. 2).**

84. In Aydrooss v. Emperor, AIR 1923 Mad 187 (2) (H) it was held that in order to justify the application of Section 34, evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required. (Vide h.n. (b)).

85. To the same effect are the following observations of Sharpe J. in Abdul Kader v. Emperor, AIR 1946 Cal 452 (I) which is a Bench decision of the Calcutta High Court:

> **"We think it desirable to draw attention to the decision in Fazoo Khan v. Jatoo Khan AIR 1931 Cal 643 (J) in which it has been observed that 'all the accused persons can be found guilty of an offence constructively under Section 34 of the Penal Code only on a finding that each of them took some part or other in, or towards, the commission of the offence".**

86. It is true that to convict any particular accused constructively under Section 34 of an offence, say of murder, it is not necessary to find that he actually struck the fatal blow, or any blow, but there must be clear evidence of some action or conduct on his part to show that he shared in the common intention of committing murder", (pp. 457-458).

87. The net result of the above discussion is that although Section 34 deals with a criminal act which is joint and an intention which is common, it cannot be said that it completely ignores or eliminates the element of personal contribution of the individual offender in both these respects.

88. On the other hand, it is a condition precedent of Section 34, IPC, that the individual offender must have participated in the offence in both these respects. He must have done something, however slight, or conduct himself in some manner, however nebulous whether by doing an act or by omitting to do an act so as to indicate that he was a participant in the offence and a guilty associate in it. He must also be individually a party to an intention which he must share in common with others.

89. In other words, he must be a sharer both in the 'criminal act' as well as in the 'common intention' which are the twin aspects of Section 34, IPC. In view of the above position, it is difficult for the accused to legitimately urge before the Court that owing to the mention of Section 34, IPC, in the charge, he was misled or prejudiced in his defence by being persuaded to presume that all consideration of his individual liability was completely shut out as a result thereof. He would be presumed to know the law on the point and if,

in spite of it, he deluded himself into any such belief, he would be doing so at his own peril. [See: Om Prakash(supra)]

90. As held by this Court in Suresh Sakharam Nangare v. The State of Maharashtra, 2012 (9) Judgements Today 116, if common intention is proved but no overt act is attributed to the individual accused, Section 34 of the code will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and common intention is absent Section 34 cannot be invoked. In other words, it requires a pre-arranged plan and pre supposes prior concert therefore there must be meeting of mind.

91. Section 106 of the Evidence Act was also pressed into service by Mr. Singhvi appearing for the State. We are of the view that it has no application in the present case. It is true that when crime is alleged to have been committed inside the four walls of the house and that too in secrecy then the family members residing in the house are the best persons to know and explain as to what had actually happened. Let us for the time being proceed on the footing that the husband was very much present at the time of the incident however there is nothing to indicate that he shared common intention with his mother. When the mother-in-law poured kerosene on the deceased and set her on fire, it is possible that the husband out of sheer fright might have run away from his house after trying to extinguish fire by pouring water on the burning body of his wife. For

applicability of Section 106 so as to implicate the husband also in the alleged crime the prosecution has to lay the foundational facts first *prima facie* indicating his involvement or participation in the alleged crime. His sudden disappearance after the incident is not sufficient to infer common intention.

92. In the overall view of the matter, we have reached the conclusion that the High Court rightly held the mother-in-law guilty of the alleged crime. However, the High Court at the same time committed an error in holding the husband-appellant no.1 guilty of the offence of murder with the aid of Section 34 IPC.

93. In the result, this appeal succeeds in part. The judgement and order of conviction passed by the High court so far as the appellant no.2 is concerned is hereby affirmed. So far as the appellant no.1 is concerned, the appeal succeeds and is hereby allowed. The appellant no.1 is acquitted of all the charges.

94. We are informed that mother-in-law is already in jail.

95. We are further informed that husband-appellant no.1 is also in jail. He shall be released forthwith, if not required, in any other case.

96. The appeal stands partly allowed in the aforesaid terms.

97. Pending application(s), if any, stand disposed of.

.....J.
[J.B.PARDIWALA]

.....J.
[R. MAHADEVAN]

New Delhi
11th February, 2025
cd