



# **Vicarious Liability**

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- *“Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that even the kith and kin, close relatives, friends, neighbors and passerby who happen to witness the occurrence are threatened and though initially give statements to the police, invariably turned hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters” – **Union of India Vs. V. Sriharan, 2016 (7) SCC 1***

- Constructive liability means the liability of a person for an offence he has not himself committed.
- The phrase constructive liability means and connotes the sense that a person is liable in law for the consequences of an act of another even though he has not done it himself.
- Vicarious liability is one those liabilities that is imposed on one person for the wrongful action of another person.
- In practice both terms are used interchangeably

- The commission of crime in most cases require joint action or assistance and co-operation of one or more persons. Unless all those are not made punishable the object of the code shall not be fully realized.
- The criminal liability under the Indian Penal Code for criminal acts committed by the groups have a distinct imprint of the English Common Law which makes a distinction between the principal offender and accessories to the crime.

- **Principal offenders** who takes part in actual execution of the crime.
- **Accessories** - Those who counsel, procure or command the execution.
- **Accessories before the fact-** Chapter-V from Section 107 to 120
- **Accessories at the fact** – Section 34 to 38 Under chapter – II and section 149 of the IPC
- **Accessories after the fact-** are scattered in different provisions namely 130, 136, 157, 212 and 216 under the title Harbours.
- Section 34 to 38 do not create a substantive offence, they interpretative clause.

# Section 34 IPC

- Ingredients :
- In common intention
- Participation in the act by two or more persons
- Prior concert of meeting of mind
- **Mehboob Shah Vs. King Emperor, AIR 1945 PC 148** - The section does not say “the common intentions of all” nor does it say an intention common to all. The section uses the expression “in the furtherance of common intention of all”. This show the requirement of a pre-concert or a pre-arranged plan
- Virtual presence- **Suresh Vs. State of U.P., 2001(3) SCC 673**
- It has been held in this case that where one of such persons in furtherance of common intention, overseeing the actions from a distance through binoculars gives instructions on mobile section 34 will apply.

- “In Crime as well as in life, he also serves who merely stands and waits”

Lord Sumner in Birendra Kumar Ghosh Case

- **Free Fight – State of Bihar Vs. Surendra Singh Rautela, 2001 Cr.L.J. 1650 (Jhr.)** - In case of free clash between several persons when injuries have been received by several persons of each group section 34 IPC cannot be invoked
- **Sudden Fight** – Normally section 34 IPC would not apply, if the fight begins suddenly, every person would be taken as responsible for his individual act.
- Same intention may become common intention.

- The essence of section 34 is simultaneous consensus of mind of persons participating in the criminal actions to achieve a particular result – **Mohan Singh Vs. State of Punjab, AIR 1963 SC 174.**

- Q: Can an accused be convicted under section 304 part II with aid of section 34?

- This question has been answered in **Afrahim Seikh Vs State of WB AIR 1964 (SC) 1263**: *The question is whether the second part of S.304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating that the requirements of S. 304, Part II are not satisfied in the case of each of them?*

*If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why Section 304, Part II cannot be read with S. 34. The common intention is with regard to the criminal act i.e. the act of beating. If the result of the beating is the death of the victim , and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, i.e., beating, there is no reason why S. 34 or S. 35 should not be read with the second part of S. 304 to make each liable individually.*

- **VICARIOUS LIABILITY OF COMPANY**
- **HDFC Securities Ltd Vs State of Maharashtra 2017(1) JBCJ: AIR 2017(SC) 61**
- The IPC , does not provide for vicarious liability for any offence alleged to be committed by a company. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefore, NI Act 1881. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company.

- **Sharad Kumar Sanghi Vs Sangat Rane (2015)12 SCC 781**
- The allegations which find place against Managing Director in his personal capacity seem to be absolutely vague. When a complainant intends to rope in the Managing Director or any officer of the Company, it is essential to make requisite allegation to constitute the vicarious liability.

- **Maksud Sayed Vs. State of Gujarat, 2008 (5) SCC 668** - Where a jurisdiction has exercised on a complaint petition filed in terms of section 156 (3) or Section 200 of the Cr.P.C. the Magistrate is required to apply his mind. IPC does not contain any provision for attaching vicarious liability on the part of the Directors of the company when the accused is the company.

- **GCL Employee Stock option trust Vs. Nimesh Ramesh Mehta, 2013 (4) SCC 505** – Compliant not making any specific allegation against respondent nos, 2 to 7 – Magistrate not recording his satisfaction about prima facie case against respondent nos. 2 to 7 and the role played by them- Issue of summons is abuse of the process of court- High Court rightly quashed process against respondent no. 2 to 7.

- **Section 35 – When such an act is criminal by reason of its being done with a criminal knowledge or intention** – 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.

- Under S/ 34 enacts that each and every person who performs even the fractional part of the act in the furtherance of common intention is deemed to be regarded as the performer of whole of it. But where the performer has the requisite intention of the individual **fractional act, but not the common intention for the whole** then in term of Section 35 he will be liable only for his fraction act alone.

- Section 35 only speaks of a number of persons doing an act with certain criminal knowledge or intention and not under a common intention, **so that a pre-concerted plan will not be necessary to make this section applicable.**
- **Bhopal Gas Tragedy, JT 1996 (8) SC 136, Keshub Mahindra Vs. State of M.P.**

- **Section 36 – Effect caused partly by act and partly by omission** – Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or an omission is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same.
- Illustration – A intentionally causes Z's death partly by illegally omitting to give the Z food and partly by beating Z. A has committed murder.
- In **Sushil Ansal Vs CBI 2002 CriLJ 1369** relating to the Upahar fire tragedy case, framing of charge under Ss 304 A, 337 and 338 r/w 36 of the IPC was upheld by the Delhi High Court considering the cumulative omissions leading to the offence of negligence leading to fire tragedy consequent death and injuries.

- **Section 37- Co-operation by doing one of several acts constituting an offence -**
- The difference with section 34 can be better appreciated by one illustration of conjoint assault by several persons, some giving blows, some stick blows, some knife injury and some gunshot injury. The acts done by them can not be treated as several within the meaning of S.37. They are doing one criminal act and their different acts being done in the furtherance of common intention to murder the victim and S.34 will apply squarely. The reason is that although several persons joined together in committing the crime and the injuries may have been caused by various acts, all their acts constitute, from a common sense point of view, only single act and not several different acts,

- **Section 38 – Persons concerned in criminal act may be guilty of different offences –**  
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.
- **Sections 34, 35 and 38 interrelation :**
- Section 34 and 35 creates responsibility for the total result, Section 38 fastens individual responsibility only.

- **The next question arises about the criminal liability of the persons who did not actually participate in the crime, but was the member of the unlawful assembly and an offence is committed in the prosecution of the common object?**
- Section 149 is an answer to such a situation and in such an eventuality, while the principal offender will be charged with the main offence and Section 148, others will be charged with the main offence r/w 149 IPC and Section 148.

# Section 149

- The accused must be a member of the unlawful assembly.
- An offence must be committed by another member of the assembly.
- The offence must have been committed in the prosecution of common object of that assembly or ;
- The members of the assembly must have known that such offence was likely to be committed in prosecution of the common object of the assembly

- Prior formation of an unlawful assembly with a common object is not necessary as the common object could develop *eo instanti*.
- What is an unlawful assembly has been laid down under section 141 IPC.
- Conviction of less than five persons sustainability.
- The Apex Court in **Kalu Masih Vs. State of M.P.** rejected the contention that when only four persons are found guilty there cannot be conviction u/s 149 IPC.

- **Sikandar Singh Vs. State of Bihar 2010 (7) SCC 477-** The 'common object' of an assembly is to be ascertained from the acts and language of the members composing it, and from a consideration of all the surrounding circumstances like the conduct of each member of the unlawful assembly, before, at the time and thereafter, and the motive of the crime are some of the relevant considerations.

- **Maheshwar Vs. State of Orissa – 1983 Cr.L.J. 1029** – When accused persons are acquitted under section 147 or 148 IPC they cannot be convicted u/s 302 / 149 IPC.
- Another defect was found that the charge does not disclose the common object of the unlawful assembly.
- Is it necessary to frame charge u/s 147 or 148 in addition to the charge for an offence with the aid of section 149?
- Held – that is was not obligatory but it may be useful to guard against failure of charge for an offence under section 149. 1966 AIR SC 302.

- Can a judgment of conviction be passed against less than five persons with the aid of section 149 of IPC?
- Where the charge is framed only against five persons, can a judgment of conviction be passed against four persons with the aid of section 149?

- **1963 AIR 174 SC, Mohan Singh Vs. State of Punjab** – If the charge has been framed against three persons and others then on evidence a conviction order can be passed against two persons. But, where the charge does not disclose the involvement of five or more persons named or unnamed then conviction with aid of section 149 for persons less than five shall be unsustainable.

# Abetment Ss 107 to 118

- **Section 107**-Abetment of a thing.—A person abets the doing of a thing, who—
- **First.**—Instigates any person to do that thing; or
- **Secondly.**—Engages with one or more other person or persons **in any conspiracy** for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
- **Thirdly.**—**Intentionally aids**, by any act or illegal omission, the doing of that thing.

- The word **instigate** denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite.
- **Law does not require instigation to be in a particular form or that it should only be in words.** The instigation may be by conduct. Whether there was instigation or not is a question to be decided on the facts of each case.

- **Second Clause – Conspiracy**
- The offence of abetment created under the second clause of Section 107 requires that there must be something more than mere conspiracy. There must be some act or illegal omission in pursuance of that conspiracy. That would be evident by Section 107 (secondly), "engages in any conspiracy...for the doing of that thing, if an act or omission took place in pursuance of that conspiracy".
- An offence of criminal conspiracy is, on the other hand, an independent offence. It is made punishable under Section 120B for which a charge under Section 109 is unnecessary and inappropriate.

# Aid by Act

- It has been held that howsoever insignificant the aid may be, it would be abetment if it would be given with the requisite intention or knowledge. The test is not to determine whether the offence would or would not have been committed if the aid had not been given. But whether the act was committed with the aid of abettor in question.

- **Gallu Shah Vs. State of Bihar, AIR 1958 SC 813** – The charge against the appellant accused was under section 436/ 109 IPC for ordering another person named Budi Shah to set on fire the hut of one widow. For want of evidence the charge against Budi Shah failed. Question was whether Gallu Shah can be held guilty of abatement when the charge against the principal offender had failed?
- It was held that there are exceptions particularly when there is evidence which establishes that offence abetted is committed in consequence of abatement.

- **Bank of India Vs. Yeturi Maredi Shankar Rao, AIR 1987 SC 821**, accused was Accounts Clerk in the bank who obtained the passbook of the victim for posting upto date entries and never returned the same. After about a month Rs. 6000/- was withdrawn from her account by a withdrawal form. During investigation forgery of withdrawal was proved. The first appellate court convicted the accused under section 467 /109 and section 471. The Hon'ble HC acquitted him under section 467/109 and consequently set aside his conviction also under section 471. Hon'ble Apex Court admitted that the forgery of signatures could not be connected with the accused, but based on circumstances he was convicted under 467/109 and section 471 of IPC.

- **S.108 Abettor**

- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.
- **Explanation 1.**--The abetment of the **illegal omission** of an act may amount to an offence although the abettor may not himself be bound to do that act.
- **Explanation 2.**--To constitute the offence of abetment it is **not necessary that the act abetted should be committed**, or that the effect requisite to constitute the offence should be caused.

- **Illustration**
- (a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.
- (b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.
- **Explanation 3.**--It is **not necessary that the person abetted should be capable** by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.
- Illustrations
- (a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence, if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.
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- (b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act in the absence of A and thereby causes Z's death. Here, though B was not capable by law of committing an offence. A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.
- (c) A instigates B to set fire to a dwelling-house, B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment, provided for that offence.
- (d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith, believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

- **Explanation 4.**--The abetment of an offence being an offence, the abetment of such an abetment is also an offence.
- **Illustration**
- A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and, as A instigated B to commit the offence, A is also liable to the same punishment.
- **Explanation 5.**--It is **not necessary** to the commission of the offence of abetment by conspiracy **that the abettor should concert** the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.
- **Illustration**
- A concert with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this section and is liable to the punishment for murder.

# Collateral Acts

- **1994 SCC(Cri) 1150 Manbir Singh Vs State of UP**
- When it was established that the co-accused had the gun and the belt of cartridge and during altercation between the deceased and the principal accused who took the gun, and loaded it, co-accused had exhorted the principal accused to shoot the deceased, then the instigation is clear that clearly amounts to abetment that resulted in the shooting of deceased by principal accused hence the co-accused is liable to be convicted under Section 302 /109 of the IPC.

- **Section.110 Punishment of abetment if person abetted does act with different intention from that of abettor**
- Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

- **Matadin Vs State of Maharashtra AIR 1999 SC 138**
- In this case the charge was framed under Ss 302/34 of the IPC against the two accused. On the exhortation of the appellant Matadin the other co-accused inflicted the fatal knife cut injury.
- Held : We, therefore, set aside the conviction and sentence of Matadin under Section 302 read with Section 34 IPC and instead convict him under Section 324/110 IPC.

- **Section 111** – When an act is abetted and a *different act is done*, the abettor is liable for the act done, in the same manner, and to the same extent, as if he had directly abetted it.
- Provided the act done was *probable consequence* of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

- **Section 113 – Liability of an abettor for an effect caused by the act abetted different from that intended by the abettor--**When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes ***a different effect*** from that intended by the abettor, the abettor is liable for the effect caused, in the same manner, and to the same extent, as if he had abetted the act which the intention of causing that effect, provided ***they knew that the act abetted was likely to cause that effect.***

- Section 111 speaks of probable consequence and both sections 113 and 149 speaks of the collateral offences being likely to happen.
- Practically while appreciating evidence in cases of collateral offences the nature of offence also need to be considered. In group and organized or gang crime like robbery, arson, rioting there is a higher probability of a prior concert and awareness of the probable collateral consequences. However, in common crime there need to be some tangible evidence of such an awareness.

- **Section 114 Abettor present when the offence is committed--**
- Whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.
- This section will not apply in the absence of the proof of the two ingredients :
- (i) Abetment prior to the commission of the offence
- (ii) Abettors presence at the time of such commission.

- **AIR 1981 SC 1417 State of Karnataka Vs Hema Reddy**
- Where accused, A, a mortgagee abetted the execution in his favour of a forged sale deed in respect of the mortgaged property by another accused B, B will be liable to be convicted under Section 467 r/w 114 IPC
- **AIR 2005 SC 1271 Mukti Prasad Rai Vs State of Bihar**
- Where the two appellants armed with lathis entered into the house and instigated other to beat the deceased and his son, it would be safe and appropriate to convict the two appellants under S.324 r/w 114 of the IPC. The accused persons were charged under sections 302/34, 307 and 302/114 of the IPC.

- Evidence required to make an accused liable for collateral acts in cases of vicarious liability.
- Distinct approach for common crimes and organized crimes like robbery, dacoity, rioting etc.

## CRIMINAL CONSPIRACY

- **S.120(A) Definition of criminal conspiracy**
- When two or more persons agree to do, or cause to be done,--
- **(1) an illegal act, or**
- **(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:**
- Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy **unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.**
- **Explanation.**--It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.]

- **Section 10** of the Evidence Act
- **Chandra Prakash Vs State of Rajasthan  
2014(3) JLJR 224(SC)**
- In case of conspiracy there can not be any direct evidence. Express agreement between the parties can not be proved. Circumstances proved before , during and after the occurrence have to be considered to decide about the complicity of the accused.

- **Difference between Criminal Conspiracy and Abetment -**
- (i) Agreement to commit an offence is the essence of criminal conspiracy. For abetment the second clause under section 107 requires that some act or illegal omission must take place in pursuance of the conspiracy.
- (ii) Conspiracy under section 107 and 108 always connotes a conspiracy to commit an **offence** under section 120A the agreement to commit an illegal act or a legal act by illegal means is a conspiracy.

- Q: When to apply charge under section 34, 149, 120B and that under section 109, 114 IPC

# Charge with substantive offence and conviction for Constructive offence and vice versa--

- Where a person is charged with substantive offence it is known to him that he has been charged to have committed the offence, but when an accused is charged constructively to have committed an offence by the said section 149 or Section 34 of the IPC, it makes him understand that he is the accused because some body in furtherance of the common intention or for the prosecution of the common object has committed the substantive offence.

- The question arises whether a person charged for having committed an offence constructively with the help of Section 149 or Section 34 IPC can be convicted for having committed the substantive offence for which he had not been charged.
- The main authorities on this point are :
- AIR 1958 SC 672 B.N.Srikanthia Vs Mysore State**
- William Slaney Vs State of MP AIR 1956 SC 116**

**Question : Can a person charged for the principal offence be convicted for the abetment?**

•**No.** When only the principal offence has been charged, and no charge of the abetment framed and accused has no notice of fact constituting abetment, conviction on a charge of abetment is improper.--- **Prasana Kumar Vs Ananda Chandra AIR 1970 Ori 10.**

•**Sohan Lal Vs. State of Punjab, 2003 Cri.L.J. 4569 SC** – Accused charged under section 304B cannot be convicted with section 109 because abatement is a substantive offence and absence of charge cause prejudice to the accused.

**Question: Can a person charged with abetment, be convicted for the principal offence?**

**•Yes, Gujarat High Court in N.C. Shah Vs State of Gujrat 1972 Cri LJ 200(Guj) relied on AIR 1953 Pat 394 in which it was held that , where it has been held that an accused can be convicted of the substantive offence if he is charged only with abetment of the offence, but not when he has been prejudiced in his defence of a case based on substantive charge.**

**Question Where a charge simplicitor u/s 302 is not framed and the accused is charged u/s 302 by 34 of the IPC, Whether a judgment of conviction can be passed u/s 302 if section 34 is not proved?**

**•Ans : Yes** William Slainey AIR 1956 SC 116 the object of the code is design to further the ends of justice and not to frustrate them by the introduction of endless technicalities.

**Question Whether a conviction can be passed regarding the principal offence are r/w section 34 where the charge is framed u/s 149**

**Ans State of Bihar Vs Biswanath Rai 1997 CrLJ 4426 SC** a charge u/s 149 is no impediment to conviction by application of 34 if the evidence discloses the commission of the offence in furtherance in common intention

**Thank You**