* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CRIMINAL APPEAL NO. 484/2011**

Reserved on: 7th May, 2013

% **Date of Decision: 31st** May, 2013

MOHD. SALEEM ..... Appellant

Through Mr. R. M. Tufail and Mr. Vishal Raj Sehijpal, Advocates.

Versus

THE STATE ..... Respondent

Through Ms. Richa Kapoor, APP for the State.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE VED PRAKASH VAISH

SANJIV KHANNA, J:

1. Mohd. Saleem by this appeal challenges his conviction under Section 302 read with Section 34 Indian Penal Code, 1860 (IPC) for having caused death of Head Constable Naresh; Section 307 read with Section 34 IPC for having attempted to cause death of ASI Jagpal; Section 427 for causing damage to the PCR van i.e. public property and under Sections 4 and 5(1) of Delhi Agricultural Cattle Preservation Act for transporting and selling cow meat. By order on sentence dated 25th March, 2011, for the offence under Section 302 IPC the appellant has been sentenced to life imprisonment; under Section 307 IPC imprisonment of 10 years with fine of Rs.10,000/-, in default of payment of which, the appellant has to undergo imprisonment of six months; under Section 427 IPC rigorous imprisonment of 1 year and under Section 12 of Delhi Agricultural Cattle Preservation Act, 3 years' rigorous imprisonment and fine of Rs.5,000/-, in default of

payment of fine, he has to undergo imprisonment of 3 months. The sentences are to run concurrently.

2. The other co-convict Mohd. Azim was subsequently declared juvenile and the appellate proceedings against him stand closed. At this stage, we may record that the two other co-accused, namely, Aas Mohd. and Mohd. Naushad , who were chargesheeted, have been acquitted. State has not preferred any appeal against their acquittal.

3. The prosecution case in brief is that in the intervening night of 14th and 15th May, 2008 at about 3.45 a.m., PCR van Zebra-85 received a message from Zebra-90 that a tempo bearing registration number UP-14X-9976 loaded with slaughtered cow meat was coming from Dhool Siras. The said vehicle had not stopped despite signal by police officers of Zebra-90. On receipt of this message, PCR van Zebra-85 was parked at Najafgarh T-point, on the road coming from the side of the drain. ASI Jagpal, the driver of Zebra-85 and Head Constable Naresh Kumar came out from the vehicle and stood at the side to stop the tempo coming from Dhool Siras. On seeing the tempo, they signaled the driver to stop. The tempo driver, instead of stopping or passing through the open portion of the road, hit the PCR van. ASI Jagpal was thrown at a distance and Head Constable Naresh was dragged by the tempo. PCR van overturned and got entangled with tempo which eventually stopped at some distance. The tempo, a TATA 407 vehicle, stopped in a heap of rubbish. Driver of the tempo along with his associates ran away from the spot. ASI Jagpal was removed to Safdarjung Hospital by Zebra 90 and Head Constable Naresh was taken to RTR Hospital by Zebra 84, where he was declared brought dead.

4. On the basis of the registration number of tempo TATA 407, investigation was started, which led to Mahesh Chand Gupta (PW-12), the registered owner. PW-12 has deposed that he had expressed interest to purchase the said vehicle from one Iqbal, who did not have documents. Iqbal had promised that he would get the documents prepared from the RTO office. PW-12 had gone to the RTO, Ghaziabad and signed the sale letter on the asking of Iqbal. Subsequently, when the documents were received, PW-12 noticed that in the fitness certificate, the vehicle was described as a 'tanker'. PW-12 informed Iqbal that he wanted to purchase an open vehicle and not a tanker, to which Iqbal promised that he would make efforts to get the word 'tanker' deleted. This, however, did not materialize and the deal was treated as cancelled and the vehicle remained with Iqbal. Iqbal had promised to refund the money within 15 days. PW-12 has deposed that he did not know how the vehicle was used by Iqbal.

5. Mohd. Iqbal appeared as PW-15. He has testified that he was in the business of transport and had purchased TATA 407 vehicle bearing registration number UP-14X-9976 in an auction in December, 2007, but the vehicle remained unused till March, 2008. In March, 2008, Mahesh Chand Gupta (PW-12) met him and showed interest in purchasing the vehicle. Full consideration of which was to be paid after PW12 had obtained finance. PW-12 issued him post dated cheque and gave Rs.75, 000/- in cash. Even the vehicle was got insured. The vehicle was transferred in the name of PW-12. It was however noticed that in the fitness certificate the word 'milk tanker' was mentioned. PW-12 wanted an open body vehicle and not a milk tanker. Therefore, he refused to abide by the transaction. Aas Mohd., one of the accused who has been acquitted by the trial court, a

mechanic had shown interest in purchasing the vehicle. He was apprised of the facts and had stated that he would obtain NOC on his own. Next day, Aas Mohd. came with his chacha Nafis Khan and the vehicle was financed by India Motors in the name of Nafis Khan. Necessary documents were prepared and vehicle was hypothecated with India Motors on 6th May, 2008. On the next day i.e. 7th May, 2008, Nafis Khan, Aas Mohd. and father of Aas Mohd. came and insisted that they required the vehicle on the said date and the vehicle would be transferred in routine within 2-3 days. On their request, PW-15 handed over physical possession of the vehicle to them. He got the vehicle photographed from a digital camera. The photographs were marked Ex.PW15/A1 and Ex.PW15/A2. The aforesaid persons had promised that they would bring back the vehicle next day, but they did not return. PW-15 has substantially supported the prosecution version. The said witness was not cross-examined.

6. After enquiries from PW15, the police contacted Aas Mohd., who admitted that he had purchased the said vehicle and informed that the present appellant-Mohd. Saleem, and Mohd. Azim had taken the vehicle from him on 14th May, 2008. Mohd. Saleem and Mohd. Azim were brothers who were earlier involved in a cow slaughter case and detained at police station Sultanpuri, Rajasthan.

7. The appellant was arrested in connection with FIR No.699/2008 under Arms Act, police station Seohara, Bijnor, U.P. Appellant Mohd. Saleem was formally arrested in the present case on 11th June, 2008 at 12.00 P.M. and brought to Delhi. He remained in muffled face, but refused to participate in the test identification proceedings (TIP, for short).

8. The appellant was identified in the Court by the injured eye witness, namely, ASI Jagpal (PW-31) of PCR No. Zebra 85 and two others Constable Vijay (PW-3) and Head Constable Bal Kishan (PW-4) of PCR Van No. Zebra 90. Learned counsel appearing for the appellant has contested identification in the Court pleading that PW-3 and PW-4 hardly had any opportunity to see the appellant. Similarly, PW-31 could not have identified the appellant as he was standing on the road and PW-31 at best had a fleeting glimpse. Further as it was night time and tempo's headlights were switched on, they would have caused a blinding effect.

9. ASI Jagpal (PW-31) was the driver of the PCR van Zebra-85 and was present at Bajghera T-Point Dhool Siras, Najafgarh Road with the deceased Head Constable Naresh Kumar. He has deposed that on 15th May, 2008 at about 3.45 a.m. a message was received by them that a tempo bearing registration number UP 14X 9976 carrying slaughtered cow meat should be stopped. Accordingly, PCR van Zebra-85 was parked towards Najafgarh road leaving enough space on the side for another vehicle to pass at a slow speed. Within 4-5 minutes a tempo came from the side of Dhool Siras at a very fast speed and instead of passing from the side of the PCR, it intentionally struck the PCR van. PW-31 and deceased Head Constable Naresh, who had already got down from the PCR van and were standing on a side, had signaled the tempo to stop, but in vain. Head Constable got dragged by the tempo. PCR van also got damaged and stopped in a heap of garbage. As a result of the impact of the tempo, the PCR van struck PW-31 and he flew (lifted) and fell down at a distance. Three persons came down from the tempo and ran away. He was taken to Safdarjung Hospital by PCR van Zebra-90, which had followed the tempo. He

was unconscious and had suffered multiple fractures on his right leg. He identified Mohd. Azim in the Court as one of the persons, who had run away from the spot. Initially he denied that Mohd. Saleem was one of the persons, who had run away, but corrected himself immediately and stated that Mohd. Saleem along with Aas Mohd. had run away after getting down from the tempo. In cross-examination, PW-31 has stated that he was standing on the driving side of the PCR and Head Constable Naresh was ahead of him. He was standing in front of the bonnet of the PCR van. The tempo had struck the PCR van and the Head Constable at the same time. They had identified the tempo at a distance of about 250 feet, but PW-31 was unable to see number of persons present in the tempo at that time. As a result of the impact, he fell down at a distance of 4-5 feet from the vehicle and at that time he was conscious. There was an electrical pole, which was the source of light. He was confronted with his statement (Ex.PW31/A) to the effect that the driver of the tempo along with his associates had run away, but the number of persons, who had run away, were not indicated. The tempo had stopped at a distance of about 10-15 feet from their vehicle after the collusion. He regained consciousness within half a minute.

10. Constable Vijay Kumar (PW-3) was on duty in PCR Zebra-90 and had seen the tempo bearing registration number UP-14X-9976. He has stated that he had seen three persons sitting on the front seat. The tempo was asked to stop, but instead of stopping, the vehicle accelerated and was driven towards Chhawla drain. They chased the vehicle and also sent a message to Zebra-85 to stop the vehicle after placing barricades as they were suspicious. When they reached ahead, they found that the vehicle i.e. TATA 407 had struck Zebra-85 as a result of which injuries were suffered by the staff of Zebra-85. They

saw In-charge of Zebra-85, Head Constable Naresh lying on one side and ASI Jagpal (PW-31) was lying on the other side of the PCR van. PW-31 was removed to Safdarjung Hospital in Zebra-90. He has deposed that he had seen four persons running away from the spot. He identified Mohd. Saleem and Azim but could not identify Aas Mohd. and Mohd. Naushad. In the cross-examination he has stated that speed of the tempo was about 40 to 50 kilometers per hour and they had chased the tempo for about 3-4 kilometers. Three persons were sitting in the cabin and they were between 25 to 30 years of age. Two of them were wearing T-shirts and third one was wearing a shirt, but this fact was not mentioned in his statements Ex.PW3/DA, Ex.PW3/DB, Ex.PW3/DC and Ex.PW3/DD.

11. Head Constable Bal Kishan (PW-4) has deposed on similar lines and has stated that when they reached T-point Najafgarh Road, they saw ASI Jagpal lying on the side of the road and Head Constable Naresh was lying on the other side. The tempo had got entangled in a heap of waste material. 3-4 persons came out from the tempo and started running. They tried to apprehend them, but because of the heavy bushes the said persons could not be caught. PW-4 identified the appellant Mohd. Saleem, Mohd. Azim, Mohd. Naushad and Aas Mohd. In the cross-examination, in an answer to a question, he has stated that Azim was driving the vehicle and speed of the vehicle was increased to about 100 kilometers per hour. They had chased the vehicle for about 8 to 10 kilometers. They had tried to nab the accused. They also heard cries of the injured police officials and took them to the hospital. He has accepted as correct that at the time when they were chasing TATA 407 there was rain and dusty wind.

12. On the question identification of the appellant, we are inclined to accept the statement of PW-3, 4 and 31 that he was present in the vehicle, though he was not driving the same. The appellant in his statement under Section 313 Code of Criminal Procedure, 1973 (Cr.P.C.) has accepted as correct that he was arrested in FIR No.699/2008 under Arms Act, police station Seohara, Bijnor, U.P. and thereafter he was arrested in the present case. He has also accepted that he refused to participate in the TIP proceedings, but did not give any reason in his statement. He did not lead any defence evidence. On the question of arrest of the appellant, statement of SI Jagdish Kumar (PW-20) is relevant. He has stated about how notices were issued to Mahesh Chand Gupta under the Motor Vehicles Act and they contacted Iqbal and came to know about Mohd. Saleem and Mohd. Azim. Subsequently, they came to know about their arrest in FIR No.699/2008, police station Sihora. The appellant's presence as deposed by PWs-3, 4 and 31 thus gets corroborated from the court statements of Mahesh Chand Gupta (PW-12) and Mohd. Iqbal (PW-15).

13. Two moot questions arise for consideration. Did Mohd. Azim committed murder under Section 302 IPC by causing death of Constable Naresh and offence under Section 307 IPC for having attempted to cause death of ASI Jagpal or Mohd. Azim had committed lesser offence i.e. offence under Section 304, Part I or Part II or 304A IPC. The second question is whether the appellant herein Mohd. Saleem shared a common intention under Section 34 IPC with Mohd. Azim and was a co-perpetrator of the crime and jointly liable. Two issues are mixed questions of law and fact.

14. We have seen the photographs (Ex.PW-32/1 to Ex. PW-32/18) and the two site plans, Ex.PW9/A (scaled site plan) and Ex.PW20/DB (un-scaled site plan). There is a difference between the two site plans as to the exact location where the PCR van was standing and where the vehicles i.e. Zebra-85 and TATA 407 were found after the incident. In the un-scaled site plan (Ex.PW20/DB) the measurements are not given. However, the location of PCR Zebra-85 is clearly indicated on the small road next to the canal and not on the main road. In the scaled site plan (Ex.PW9/A) location of Zebra-85 is not recorded on the small road next to the canal, but on the bend portion towards the main road. This does not explain and is not in conformity with the position of the said PCR van and the tempo as shown in unscaled site plan (Ex. PW-20/DB) made soon after the accident. In case the tempo had come and struck the PCR van standing on the small road, site plan (Ex.PW9/A) has to be discarded and should not be accepted and the site plan (Ex.PW20/DB) as to the location where Zebra-85 was standing should be accepted. The photographs (Ex.PW-32/1 to Ex. PW-32/18) show that the PCR van had not tumbled or overturned. It did not get entangle with TATA 407. PCR van had suffered damage on the right side or the driver side front portion i.e. near the headlight on the right side. No damage can be seen in the photographs on the back side of the PCR van or on the left side as the said head light was not damaged or broken. There are no photographs of the sides to show if any damage was caused. Presumably no damaged was caused on the sides. In the two site plans, width of the small road next to canal is fairly narrow. The PCR van Zebra-85 has been wrongly described as a Maruti Zypsy and in fact it was a Toyota Qualis, a much longer vehicle. Learned Additional Public Prosecutor during the course of

arguments had referred to the statement of retired ASI Devender Kumar (PW-36), who had carried out the mechanical inspection and had submitted his reports Ex.PW36/A and B. The said report clearly states that the right side body frame and the right side front fender of the Toyota Qualis were damaged. The front right side wind shield glass was also broken. In the inspection report of the TATA 407 it is recorded that the front bumper, body and number plate were damaged. Engine radiator system was also damaged.

15. Constable Vijay Kumar (PW-3) has stated that TATA 407 after it had crossed and not stopped, had raced to 60 kilometres an hour but contradicted himself by stating that they chased the said vehicle for about 3-4 kms in 10-15 minutes. A vehicle being driven at a speed of 60 kms. per hour, would have completed the distance of 3-4 kms within 5 minutes. Similarly, statement of Head Constable Bal Kishan (PW-4) that TATA 407 was driven at the speed of 100 Kmph for 8 to 10 Kms. has to be discarded. The road in question is narrow as noted above. We however agree that TATA 407 was being driven fast but its exact speed cannot be stated and has not been accurately deposed to.

16. Keeping in view the aforesaid facts, it is difficult to agree and accept that a case under Section 304 or 302 IPC is made out. The circumstances and the facts pointed out above do not indicate that there is any factual basis or justification to hold that the accused Mohd. Azim had the necessary mental intention or knowledge. It is apparent that this is a case of rash and negligent driving. (see ***State Vs. Sanjeev Nanda*** AIR 2012 SC 3104 and ***Alister Anthony Pareira Vs. State of Maharastra*** 2012(1) Scale 189; the legal ratio expounded in the said judgments is not being reproduced to avoid prolixity).

17. Even on the second issue, we do not think that the appellant Mohd. Saleem can be attributed common intention under Section 34 IPC to commit murder or even an offence under Section 304 IPC. The underlying basic assumption or foundation in criminal law is the principle of personal culpability. A person is criminally responsible for act or transactions in which he is personally engaged or in some other way had participated. However, there are various modes and capacities in which a person can participate in a crime. He can instigate, be a facilitator or otherwise aid execution of a crime. Section 34 IPC incorporates a principal of shared intent i.e. common design between the two perpetrators, which makes the second or other participants also an equal or joint perpetrator as the main or principal perpetrator. (We have used the said terms, for want of a better phrase. Section 34 IPC does not postulate such distinction).

18. In ***Suresh versus State of U.P.***, (2001) 3 SCC 673 R.P. Sethi, J. in his concurring judgment (for himself and B.N. Agarwal, J.) has observed:

> "**38.** Section 34 of the Indian Penal Code recognises the principle of vicarious liability in criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the commonsense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each

case to be proved mainly as a matter of inference from the circumstances of the case.

39. The dominant feature for attracting Section 34 of the Indian Penal Code (hereinafter referred to as "the Code") is the element of participation in absence resulting in the ultimate "criminal act". The "act" referred to in the later part of Section 34 means the ultimate criminal act with which the accused is charged of sharing the common intention. The accused is, therefore, made responsible for the ultimate criminal act done by several persons in furtherance of the common intention of all. The section does not envisage the separate act by all the accused persons for becoming responsible for the ultimate criminal act. If such an interpretation is accepted, the purpose of Section 34 shall be rendered infructuous.

40. Participation in the crime in furtherance of the common intention cannot conceive of some independent criminal act by all accused persons, besides the ultimate criminal act because for that individual act law takes care of making such accused responsible under the other provisions of the Code. The word "act" used in Section 34 denotes a series of acts as a single act. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they shared the common intention. Culpability under Section 34 cannot be excluded by mere distance from the scene of occurrence. The presumption of constructive intention, however, has to be arrived at only when the court can, with judicial servitude, hold that the accused must have preconceived the result that ensued in furtherance of the common intention. A Division Bench of the Patna High Court in *SatrughanPatar* v. *Emperor* [AIR 1919 Pat 111 : 20 Cri LJ 289] held that it is only when a court with some certainty holds that a particular accused must have preconceived or premeditated the result which ensued or acted in concert with others in order to bring about that result, that Section 34 may be applied."

19. Exhaustive and detailed elucidation of earlier judgments has been made in this decision and the following passage from the judgment of Richardson, J. in ***King Emperor versus Barendra Kumar Ghose***, AIR 1924 Calcutta 257 has been quoted with approval:

> "It appears to me that Section 34 regards the act done as the united act of the immediate perpetrator and his confederates present at the time and that the language used is susceptible of that meaning. The language follows a common mode of speech. In *R.* v. *Salmon* [(1880) 6 QBD 79 : 50 LJMC 25 : 43 LT 573] three men had been negligently firing at a mark. One of them — it was not known which — had unfortunately killed a boy in the rear of the mark. They were all held guilty of manslaughter. Lord Coleridge, C.J., said: 'The death resulted from the action of the three and they are all liable.' Stephen, J., said: 'Firing a rifle' under such circumstances 'is a highly dangerous act, and all are responsible; for they unite to fire at the spot in question and they all omit to take any precautions whatever to prevent danger'.
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> Moreover, Sections 34, 35 and 37 must be read together, and the use in Section 35 of the phrase 'each of such persons who joins in the act' and in Section 37 of the phrase, 'doing any one of those acts, either singly or jointly with any other person' indicates the true meaning of Section 34. So Section 38 speaks of 'several persons engaged or concerned in a criminal act'. The different modes of expression may be puzzling but the sections must, I think, be construed as enunciating a consistent principle of liability. Otherwise the result would be chaotic.
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> To put it differently, an act is done by several persons when all are principals in the doing of it, and it is immaterial whether they are principals in the first degree or principals in the second degree, no distinction between the two categories being recognised.
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> This view of Section 34 gives it an intelligible content in conformity with general notions. The opposing view involves a distinction dependent on identity or similarity of act which, if admissible at all, is wholly foreign to the law, both civil and criminal, and leads nowhere."

20. Accordingly, to attract applicability of Section 34 IPC, the prosecution is under an obligation to establish that there existed a common intention before a person can be vicariously convicted for the criminal act of another. The ultimate act should be done in furtherance of common intention. Common intention requires a pre-arranged plan, which can be even formed at the spur of the moment or simultaneously

just before or even during the attack. For proving common intention, the prosecution can rely upon direct proof of prior concert or circumstances which necessarily lead to that inference. However, incriminating facts must be incompatible with the innocence of the accused and incapable of explanation by any other reasonable hypothesis. In the aforesaid judgment of Sethi, J. in ***Suresh's*** case (supra), the Supreme Court also examined whether a passive co-perpetrator can be liable under Section 34 IPC. A passage from the opinion of the Judicial Committee in ***Barendra Kumar Ghose versus King Emperor***, ILR (1900) 27 Calcutta 566 was quoted. In the said passage it has been observed that by Section 33, a criminal act in Section 34 IPC includes omission to act. Thus, a co-perpetrator who has done nothing but has stood outside the door, while the offence was committed, may be liable for the offence as in crimes as in other things "they also serve who only stand and wait". Thus, common intention or crime sharing may be by overt or covert act, by active presence or at distant location but there should be a measure of jointness in the commission of the Act. Even a person not doing a particular act but only standing as a guard to prevent any prospective aid to the victim may be guilty of common intention. (***Tukaram Ganpat Pandare versus State of Maharashtra***, (1974) 4 SCC 544). Normally, however, in a case of offence involving physical violence, physical presence at the place of actual commission is considered to be safe for conviction but it may not be mandatory when pre-arranged plan is proved and established beyond doubt. Facilitation in execution of the common design may be possible from a distance and can tantamount to actual participation in the criminal act. The essence and proof that there was simultaneous consensus of mind of co-participants in the criminal

action, is however, mandatory and essential (See ***Ramaswami Ayyangar versus State of Tamil Nadu***, (1976) 3 SCC 779). In ***Krishna versus State of Kerala***, (1996) 10 SCC 508 it has been observed that overt act is not a requirement of law for Section 34 to operate but prosecution must establish that the persons concerned shared the common intention, which can be also gathered from the proved facts. In S***urender Chauhan versus State of M.P.***, (2000) 4 SCC 110 it has been observed as under:

> "*11.* Under Section 34 a person must be physically present at the actual commission of the crime for the purpose of facilitating or promoting the offence, the commission of which is the aim of the joint criminal venture. Such presence of those who in one way or the other facilitate the execution of the common design is itself tantamount to actual participation in the criminal act. The essence of Section 34 is simultaneous consensus of the minds of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot and thereby intended by all of them. (*RamaswamiAyyangar* v. *State of T.N.*[(1976) 3 SCC 779 : 1976 SCC (Cri) 518 : AIR 1976 SC 2027]) The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purpose of common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence. (*Rajesh GovindJagesha* v.*State of Maharashtra* [(1999) 8 SCC 428 : 1999 SCC (Cri) 1452]) To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention, and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

21. It is necessary that each co-perpetrator should have the necessary intent to participate or otherwise have requisite awareness or knowledge that the offence is likely in view of the common design. It also follows from the above that merely accompanying the principal accused does not establish common intention. Thus, physical presence of Mohd. Saleem in the truck does show that he had shared common intention under Section 34 IPC to commit murder or an offence under Section 304 IPC. Appellant Mohd. Saleem, as per the prosecution version, was sitting in the truck, which was being driven by a third person, Mohd. Azim. The appellant Mohd. Saleem and the driver were carrying cow meat and to this extent they had common intention. They also had common intention to evade detection and deliberately had not stopped and evaded inspection when they were directed to stop by the police officers of PCR van Zebra-85. They also shared common intention to speed up and drive the truck in a rash and negligent manner so as to evade inspection of the cargo or arrest, thereafter. Damage or loss to property was probable and likely. Thus, the appellant shared common intention for the offence committed under Section 427 IPC. However, it cannot be said that this common intention shared by Mohd. Saleem extended and went as far as to include intent or knowledge to commit murder or culpable homicide not amounting to murder, by or driving over police officer or by dashing or hitting the tempo into the PCR van or by driving into a person who would obstruct their way and prevent them from driving away with the cargo. It cannot be said that the "act" attributed to the appellant Mohd. Saleem in furtherance thereof extended and included within its broadest boundaries, possibility, awareness or desire to cause/commit murder or culpable homicide. It would be relevant to

reproduce here the two examples given by a Division Bench of Allahabad High Court in ***Bashir vs. State,*** AIR 1953 All 668, which read as under:-

> "18. The use of the words "in furtherance" suggests that Section 34 is applicable also where the act actually done is not exactly the act jointly intended by the conspirators to be done, otherwise, the words would not be needed at all. The common intention can be to do one act and another act can be done in furtherance of the common intention. It may be a preliminary act necessary to be done before achieving the common intention; or it may become necessary to do it after achieving the common intention or it may be done while achieving the common intention. Going to the spot in a motor car is an act in furtherance of the common intention to commit a crime there; but if while going there the driver runs over and kills a pedestrian, the collision is merely incidental and the running aver of the pedestrian is not in furtherance of the common intention. If, however, a conspirator who wishes to commit a crime involving violence against X is impeded by Y and throws Y aside in order to get at X, the attack upon Y is made in furtherance of the common intention; see Russell on Crime, pages 557 and 558."

The examples explain the contours of Section 34 IPC.

22. Facts of the present case viz. the appellant Mohd. Saleem are worse than the first example noted above, but are much better than the second example. The vehicle was being driven rashly and negligently and at a high speed so as to outrun or out manoeuvre the chasing PCR van. However, this would at best amount to sharing the common intention, that the tempo be driven in a rash and negligent manner. We would like to clarify that we should not misunderstood to state that a co-passenger would be liable under Section 304A IPC in case the driver drives the vehicle in a rash and negligent manner. A co-passenger may not be liable even if he is in hurry and wants the driver to drive fast. It is for the driver of the vehicle to drive carefully and

abide by law. Rash and negligent driving is normally attributed only to the driver and not to the other sitting or co-passengers. In the present case, the tempo was asked to stop but in view of the goods, which were loaded in the vehicle, the driver of the tempo did not stop and went on to hit the PCR van. The co-passenger was aware of the cargo and did not want that the police should apprehend them or inspect and seize their cargo. They wanted to evade inspection, arrest and prosecution. There was a chase by the police resulting in the incident. There is, therefore, ample evidence and material to show that Mohd. Saleem shared common intention as far as offence under Section 304A IPC is concerned, but not beyond that. Supreme Court in ***Afrahim Sheikh and Others Vs. State of West Bengal*** *AIR 1964 SC 1263* referred to with approval the following quote on the expression "act" explained by Judicial commissioner in ***Barendra Kumar Ghosh's case*** (1925) ILR 52 Cal. 197:- "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 i.e. a criminal offence". This "criminal act" under section 34 IPC, it was held, applies where a criminal act is done by several persons in furtherance of common intention of all. The criminal offence is the final result or outcome but it may be through achievement of individual or several criminal acts. Each individual act may not constitute or result in the final offence. When a person is assaulted by a number of accused, the "ultimate criminal act" normally will constitute the offence which finally results or which may result i.e. death, simple hurt, grievous hurt, etc. This is the final result, outcome or consequence of the criminal act i.e. action or act of several persons. Each person will be responsible for his own act as stipulated in Section 38 IPC. However, Sections 34 and 35

expand the scope and stipulate that if the criminal act is a result in common intention, every person, who has committed a part of the criminal act with the common intention, will be responsible for the offence. It was accordingly held as under:-

> "14. Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which s. 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case Sections 34 or 35 again come into play. Here, the common intention was to beat Abdul Sheikh, and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in s. 299, I.P.C. applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and s. 34 also speaks of intention.
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> 15. 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, 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 s. 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."

23. Recently in Crl. Appeal No. 429/2013 titled ***Babloo @ Babu vs. State,*** vide judgment dated 10th May, 2013, we had occasion to dwell on the contours of Section 34 IPC and had observed;-

> "Section 34 makes a co-perpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 to apply there should be common intention between the co-perpetrators, which means that there should be community of purpose and common design or pre-arranged plan. However, this does not mean that co-perpetrators should have engaged in any discussion, agreement or valuation. For Section 34 to apply it is not necessary that the plan should be pre-arranged or hatched for a considerable time before the criminal act is performed. Common intention can be formed just a minute before the actual act happens. Common intention is necessarily a psychological fact as it requires prior meeting of minds. In such cases, direct evidence normally will not be available and in most cases whether or not there exists a common intention has to be determined by drawing inference from the facts proved. This requires an inquiry into the antecedents, conduct of the co-participants or perpetrators at the time and subsequent to the occurrence. The manner in which the accused arrived, mounted the attack, nature and type of injuries inflicted, the weapon used, conduct or acts of the co-assailants/perpetrators, object and purpose behind the occurrence or the attack etc. are all relevant facts from which inference has to be drawn to arrive at a conclusion whether or not the ingredients of Section 34 are satisfied. We must remember that Section 34 comes into operation against the co-perpetrators because they have not committed the principal or main act, which is

undertaken/performed or is attributed to the main culprit or perpetrator. Where an accused is the main or final perpetrator, resort to Section 34 is not necessary as the said perpetrator is himself individually liable for having caused the injury/offence. A person is liable for his own acts. Section 34 or the principle of common intention is invoked to implicate and fasten joint liability on other co-participants. Further, the expression/term "criminal act" in Section 34 IPC refers to the physical act, which has been done by the co-perpetrators/participants as distinct from the effect, result or consequence. In other words, expression "criminal act" referred to in Section 34 is different from "offence". For example, if A and B strike Lathi at X, the criminal act is of striking lathis, whereas the offence committed may be murder, culpable homicide or simple or grievous injuries. The expression "common intention" should also not be confused with "intention" or "mens rea" as an essential ingredient of several offences under the Code. Intention may be an ingredient of an offence and this is a personal matter. For some offences mental intention is not a requirement but knowledge is sufficient and constitutes necessary mens rea. Section 34 can be invoked for the said offence also. (Refer ***Afrahim Sheikh & Ors. Vs. State of West Bengal***, *AIR 1964 SC 1263*). Common intention is common design or common intent, which is akin to motive or object. It is the reason or purpose behind doing of all acts by the individual participant forming the criminal act. In some cases, intention, which is ingredient of the offence, may be identical with the common intention of the co-perpetrators, but this is not mandatory.

16. Section 34 IPC also uses the expression "act in furtherance of common intention". Therefore, in each case when Section 34 is invoked, it has to be examined whether the criminal offence charged was done in furtherance of the common intention of the participator. If the criminal offence is distinctly remote and unconnected with the common intention, Section 34 would not be applicable, but if the criminal offence was done or performed is attributable, is primarily connected or was a known or reasonably possible outcome of the preconcert/ contemporaneous engagement or a manifestation of the mutual consent for carrying out common purpose, it will fall within the scope and ambit of the act done in furtherance of common intention. Thus, the word "furtherance" propounds a wide scope but the same should not be expanded beyond the intent and purpose of the statute. ***Russell on Crime***, 10th

> edition page 557, while examining the word "furtherance" had stated that it refers to "the action of helping forward" and "it indicates some kind of aid or assistance producing an effect in the future" and that "any act may be regarded as done in furtherance of the ultimate felony if it is a step intentionally taken for the purpose of effecting that felony." An act which is extraneous to the common intention or is done in opposition to it and is not required to be done at all for carrying out the common intention, cannot be said to be in furtherance of common intention. [Refer judgment of R.P. Sethi J. in ***Suresh Vs. State of U.P.***, (2001) 3 SCC 673]."

24. The aforesaid paragraphs clearly bring out the distinction between the criminal act and the mental intention to commit the criminal act by the co-perpetrator and the actual offence committed by the principal or the main perpetrator. However, the words "in furtherance of common intention" are important and their significance cannot be lost sight of and ignored. A co-perpetrator, who shares a common intention, will be liable only to the extent that he intents or could or should have visualized the possibility or probability of the final act. If the final outcome or offence committed is distinctly remote and unconnected with the common intention, he would not be liable. This test obviously is a case or fact specific and no strait jacket universal formula can be applied. Two examples quoted in Bashir's case are relevant and explain the widest and broad boundaries of Section 34. Allahabad High Court however warned that the ambit of section 34 IPC should not be extended so as to hold a person liable for remote possibilities, which were not probable and could not be envisaged.

25. At this stage, we would like to note and repel one of the contentions raised by the appellant on the difference between the milk tanker and the open body Tata-407, which was found at the place of the occurrence. The submission is that the appellant cannot be

connected or associated with the damaged vehicle an open body truck found at the spot/place of occurrence and the milk tanker vehicle of which delivery was obtained, if we accept the statement of Mohd. Iqbal (PW-15). We have accepted the statement of Mohd. Iqbal. It is accepted and not denied that the truck found at the place of occurrence had the registration No. UP-14X 9976. The milk tanker also had the same registration number. This is clear from the photographs Exhibit PW-15/A-1 and A-2 and the photographs of the damaged truck taken at the spot. As per PW-15, Mohd. Iqbal, he had delivered the vehicle to Nafis Khan, Ash Mohd and father of Ash Mohd. on 7th May, 2008. The accident in question had taken place in the intervening night of 14th/15th May, 2008, i.e.,7-8 days after they had taken delivery of the said vehicle. Mohd. Nafis Khan (PW-18) no doubt turned hostile but had to admit in his deposition that he had given twelve cheques for finance of the vehicle and Mohd. Iqbal had sold the vehicle to him but refused to accept that Ash Mohd. had purchased the said vehicle. In spite of being ambiguous, PW-18 has stated that the number of vehicle may be UP-14X 9976. PW-18, it is obvious, has tried to conceal and not state the true and correct facts. Photographs Exhibit PW-15/A-1 and A-2 show Ash Mohd. holding hands with another person in front of the vehicle bearing registration No. UP-14X 9976. At this stage, it would be relevant to refer to deposition of Suleman (PW-17), who has stated that he was a mechanic, who was doing welding work. He used to manufacture dalas for Tata-407 vehicles and on asking of Ash Mohd. about 10-12 months back had prepared a dala and had charged Rs.2,200/-. On being cross-examined by the public prosecutor, he could not remember the number of the said truck but corrected himself that he had worked 1½ years back. In the cross-examination, he

clarified that dala is fabricated to ensure that the goods loaded in the vehicle do not fall down. Thus, after taking delivery of the milk tanker UP-14X 9976, it was modified and converted into an open bodied truck with dala, as can be seen from the photographs at the spot of occurrence Exhibit PW-32/1 to 18.

26. The last question relates to whether offence under Sections 4 and 5 of the Delhi Agricultural Cattle Preservation Act, 1994 is established and proved beyond doubt as held by the trial court. We do not have forensic or laboratory test report to prove that cow meat was being transported. To this extent, the appellant is right but we do have depositions of the police officers PW-20, 25, 26 and 28, who had the occasion to see the contents in the truck and have uniformly deposed that cow meat was loaded in the offending vehicle. Trial court has rightly observed that the assertions by the said witnesses remained unchallenged. PW-26 Constable Dharmender had specifically stated in the cross-examination that there were three heads of slaughted cows in the said truck. Photographs Exhibit PW-32/1 to 18 show cow heads were there in the truck. Thus, in our opinion, the trial court has rightly convicted the appellant under Section 12 of the Delhi Agricultural Cattle Preservation Act.

27. In view of the aforesaid discussion, we partly allow the present appeal and set aside the conviction of the appellant under Sections 302 and 307 read with Section 34 IPC for having committed murder of Head Constable Naresh and having attempted to cause death of ASI Jagpal. The appellant-Mohd. Saleem is convicted under Section 304A read with Section 34 IPC and sentenced to Rigorous Imprisonment for a period of two years. He shall also pay fine of

Rs.25,000/- and in default of payment of fine undergo Simple Imprisonment for five months. The appellant's conviction and sentence under Section 12 of the Delhi Agricultural Cattle Preservation Act are maintained. Similarly conviction and sentence under Section 427 IPC is maintained. As per the nominal roll, it appears that the appellant has already undergone the said sentence including sentence for default in payment of fine. If it is correct, the appellant will be released forthwith unless he is required to be detained in any other case in accordance with law. The appeal is accordingly disposed of.

(SANJIV KHANNA)
JUDGE

(VED PRAKASH VAISH)
JUDGE

MAY 31st, 2013
NA/kkb