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LECTURE-16

Explanation; An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

Section 109 provides that, whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation- An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Section 34 of the Penal Code deals with common intention: it merely enunciates a principle of joint liability for criminal acts done in furtherance of common intention of the offenders. It means, that if two, or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually.

postulates an agreement between two or more persons to do or cause to be done an illegal means. It differs from ss. 34 and 109, P.C., in that here a mere agreement is made an offence even if no step is taken to carry out the agreement.

The application of Section 34 is well illustrated in the decision of the case *Barendra Kumar Ghosh v. Emperor* by Privy Council.^[10] In this case the appellant was charged under section 302 of the Indian Penal Code with the murder of Post-Master. On August 3rd 1923, the Sub-Post-Master at Sankaritolla Post Office was counting money at his table to the back room, when several men appeared at the door, demanded of him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places and died almost at once. Without taking any money the assistants fled, separating as they ran. One man was pursued by other post office assistants and was caught with a pistol in his hand. He was the accused Barendra Kumar Ghose. In the subsequent trial for murder his contention was that he was standing outside and he had not fired at the deceased. He was compelled to join others for alleged robbery and had no intention to kill the Post-Master. The trial judge directed the jury that if they were satisfied that the Post-Master was killed in furtherance of common intention of all three men, then the prisoner was guilty of murder whether he fired the fatal shot or not. It was held by the Calcutta High Court and the Privy Council that upon the true construction of Section 34 of the Code the direction was correct and Barendra Kumar Ghosh was held guilty with the murder of the Post-Master.

In *Sheoram Singh and Another v. The State of U.P.*^[11] the Supreme Court held that common intention may develop all of a sudden during the course of the occurrence, but still unless there is cogent evidence and clear proof of such common intention, an accused cannot be vicariously held guilty under s. 34. In

this case where a father and son had trespassed into the house of H with the object of killing d, and H met with death at the shot of the father when H refused to send out D from his house, the court held that the son cannot be held guilty of the offence of murder of H, as there was no cogent evidence to show that the son had any intention to kill H. The common object of father and son was to kill, who happened to be in the house of H. The son too had fired at D their common enemy which causes his death, for which he had been rightly held guilty under s. 307 of the I.P.C. But he was acquitted of the charge under s. 302 read along with s. 34, for the death of H which was due to the firing by the father. The latter was found guilty under s. 302, I.P.C.

In the case of *Abdur Rahim vs. State*,^[12] it was held that a common intention may develop on the spot between the participants. To apply section 34, the persons must be physically present at the actual commission of the crime. Thus again, even in regard to an offence involving physical violence it is not necessary that every accused must take an active part in the attack on the victim.

The ingredients of an unlawful assembly are:(a) an assembly of five or more persons.(b) they must have a common object(c) the common object must be one of the five specified in the section 141 of the Penal Code.

We have noticed that when more persons than one is involved in an offence, all of them may be tried together in the circumstances as stated in section 239 of the Cr.P.C. But the principle of joint liability in a criminal act has been described in section 34, 109 and 149 of the Penal Code. If more than one person commits an offence, any of the above sections may be applicable. The above sections do not create any distinct offence.

When more than one person commit an offence in furtherance of common intention than all of them shall be charged by adding section 34 with the principal section of the offence. When an offence is committed by one and others abet it then section 109 is to be added along with the substantive offence against those who abetted the offence. When it is not clear as to who actually committed the offence because there was no eye witness, then all may be charged with the offence by adding section 109.

The allegation was that 'A' and 'B' called the victim from his house and before calling the victim both of them and 'C' were talking with the victim in a field near his house. After about one hour, dead body of the victim was found near a bus stand. In this case it was not known which of the three accused murdered the victim. In such a circumstance, charge is to be framed against all the three u/s 302/109 of the Penal Code.

When an offence is committed by a member of an unlawful assembly, all the persons forming unlawful assembly shall be charged by adding section 149 if the allegation is that the offence was committed in prosecution of the common object of that assembly. An unlawful assembly is an assembly of five or more than five persons if the common object of the assembly is one of the objects as enumerated in section 141 of the Penal Code.

To add section 149, it is to be seen whether the accused persons constituted an unlawful assembly and whether the offence was committed by any one of that assembly in prosecution any common object or objects as enumerated in section 141. But in case of adding section 34 of the penal Code, it is to be seen whether the accused persons committed the offence in furtherance of a common intention. The expression 'common intention' is not defined in the Penal Code. However, from judicial pronouncements we find that two conditions are required: (i) the presence of the accused persons at the place of occurrence coupled with actual participation in any form; and (ii) a pre-concert or previous meeting of mind. However, from the later decisions of the Appellate Division, it is now an accepted principle that previous meeting of mind or pre-concert is not essential and a common intention may develop on the spot[14].

To add section 109 of the Penal Code it is to be seen whether there was any abetment. What is abetment is explained in section 107 of the Penal Code. According to this section, abetment is constituted (a) by instigating a person to commit an offence; or (b) by engaging in a conspiracy to commit the offence; or (c) by intentionally aiding a person to commit the offence or intentionally aids by any act or illegally aids by any act or illegal omission the doing of that thing. So, to add this section it is not necessary that there shall be actual participation in an offence; a conspiracy will make a person liable to be charged for abetment u/s 109.

Section 149 is not a substantive penal section. This section deals with constructive liability i.e., liability of one person for an offence not committed by himself but committed by another person. So, this section can be added to the charge of any substantive offence.

In this case, some accused were convicted under section 304 part II, but all were convicted under section 149, all could be convicted under section 304 part II/149 but none can be independently convicted under section 149[15].

It is true that abetment is not mentioned as an offence in the above Act and abetment is an offence under the Penal Code. It has been decided in the case of Hossain Mohammad Ershad Vs the State[16] that even if the offence of abetment is not mentioned as an offence in a special law, a person may be charged for abetting an offence punishable under such a special law.

At night, the victim was called by the accused persons and thereafter, the dead body of the victim was found in the following morning. As the taking away of the victim from the house has been proved, the accused is to explain what happened to the victim after he was called by them. There is no material to show that the accused persons have been falsely implicated due to any previous enmity. So, the evidence of the informant and his mother may be considered as sufficient and cogent evidence to convict the accused persons in this case.

Conviction cannot be given in this case under section 302/34. There is no evidence of any pre-concert. The murder has been proved but it is not proved as to which of the accused caused the murder, so in this case instead of section 34, section 109 shall apply.[17]

In the case of **Abdul Awal Vs. The State**[18] the accused married the victim and demanded dowry of TK. 10,000/- which the father of the victim could not give. The accused on one day came to the house of his father-in-law to take his wife with him and actually he left the house of his father-in-law along with his wife. After several days when the father sent some one to know whether his daughter was in the house of the accused, he came to know that neither the accused nor his daughter were in that house. Thereafter, a dead body of a woman was found and the father identified the same as the dead body of the daughter. The police after investigation submitted charge-sheet against the accused and five others who used to visit the house of the accused. Charge was framed against them u/s 302/34. At the time of trial, as there was no eye witness the prosecution could not prove as to who actually murdered the victim. But four witnesses proved that they saw the accused taking the victim with him. The accused made a confession before a competent magistrate stating that he took his wife with him and other accused ravished her and thereafter murdered her in his presence. At the time of examination u/s 342, the accused also repeated what he said in his confession and begged mercy of the Court. It was held that the husband was found guilty for abetment under section 302/109 though charge was not framed under section 34 of Penal Code.

In the case **State Vs. Md. Abdus Samad Azad**[19] It was held that though, charge was not framed under section 302/109 of the Penal Code conviction was awarded for offence of sections 302/109 of the Penal Code on the basis of evidence led by prosecution and learned trial Judge was well justified in the decision in convicting condemned prisoner Sharifa and convict-appellant Arif for offence of sections 302/109 of the Penal Code.

In the case of **Kapu Mahamud & Others Vs. The State**[20] learned Sessions Judge Nilphamary convicted and sentenced six accused persons under section 302/149 of the Penal Code. High Court Division set aside those conviction and sentence and made a comparison between section 149 & section 34 in the following manner:

- (i) It requires an assembly of five persons. (ii) the common object must be one of those specified in section 141 of the Penal Code. (iii) the offence actually committed is required by section 149 to be one which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object. (iv) section 34 requires some act, however small, to be done whereas under section 149 mere membership of the assembly is sufficient. (v) Section 34 enunciates a mere principle of liability but creates no offence, section 149 creates a specific offence.

MCQs-

i. The maxim ‘de minimus non curat lex’ means:

- A. law would not take action on small & trifling matter
- B. law does not ignore any act which causes the slightest harm
- C. law would not take action in serious matters
- D. all the above.

ii. The principle 'de minimus non curat lex' is contained in:

- A. section 92 of IPC
- B. section 93 of IPC
- C. section 94 of IPC
- D. section 95 of IPC

iii. The right of private defence is contained in:

- A. section 94 of IPC
- B. section 95 of IPC
- C. section 96 of IPC
- D. section 98 of IPC.

iv. The right to private defence is based on the natural instinct of:

- A. self-preservation
- B. self-respect
- C. self-sufficiency
- D. self-reliance.

v. The right to private defence is:

- A. unrestricted
- B. subject to restriction contained in section 99 of IPC
- C. subject to restrictions contained in Chapter IV of IPC
- D. subject to restrictions contained in any other provision of IPC