

**SUMMARY/GIST OF WORKSHOP PAPERS**

**DATE : 04<sup>th</sup> OCTOBER 2015**

~ ~ TOPIC ~ ~

**DISTINCTION AND NATURE OF PROOF**

**TO ESTABLISH**

**COMMON INTENTION, COMMON OBJECT**

**AND CRIMINAL CONSPIRACY**

~ ~ SUBMITTED BY ~ ~

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**DISTINCTION AND NATURE OF PROOF TO ESTABLISH COMMON  
INTENTION, COMMON OBJECT  
AND CRIMINAL CONSPIRACY**

**TABLE OF CONTENTS**

<b>Sr. No.</b>	<b>Particular</b>	<b>Page No.</b>
	<b><i>Introduction</i></b>	<b>1</b>
1.	<b>Common Intention : <i>Its Object, scope and mode of determination.</i></b> <i>Introduction.</i> <i>Meaning</i> <i>Object</i> <i>Scope</i> <i>Facts to be established for common intention.</i> <i>Mode of Determination</i>	<b>2</b>
2.	<b>Common Object : <i>Relevant Consideration and Nature of proof.</i></b> <i>Introduction.</i> <i>Meaning</i> <i>Object</i> <i>Scope</i> <i>Facts to be established for common object.</i> <i>Nature of Proof</i>	<b>5</b>
3.	<b>Criminal Conspiracy : <i>Ingredients and Mode of proof.</i></b> <i>Introduction.</i> <i>Meaning</i> <i>Object</i> <i>Scope</i> <i>Offence of Conspiracy how proved</i> <i>Facts to be established for Conspiracy</i>	<b>9</b>

4.	Distinction between Common Intention, Common Object and Criminal Conspiracy	<b>14</b>
5.	Proper Framing of Charge for Common Object, Criminal Conspiracy and effect of absence of particular charge.	<b>18</b>
6.	Scope and Applicability of Section 10 and Section 30 of the Indian Evidence Act.	<b>21</b>

***Annexure***

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**DISTINCTION AND NATURE OF PROOF TO ESTABLISH COMMON INTENTION, COMMON OBJECT AND CRIMINAL CONSPIRACY****INTRODUCTION :**

- The general principal of Criminal Liability is that, it is the primary responsibility of the person who actually commits an offence and only that person who has committed crime can be held guilty. However constructive liability may arise under the Indian Penal Code, 1860 (*Hereinafter referred as The IPC for the sake of brevity*).
- A person may be constructively liable for an offence which he did not actually commit. These persons, although, not positively participate in the commission of the offence, but they actively participate in occurrence of the offence;
  - a) By Sharing **Common Intention** as suggested as defined U/sec. 34 of The IPC; Or
  - b) By way of **Common Object** as suggested and defined U/sec. 149 of The IPC; Or
  - c) By way of **Criminal Conspiracy** as suggested and defined U/Sec. 120A of The IPC.

## 1. Common Intention – Its Object, Scope and mode of determination.

- 1.1. **Introduction** : As per Section 34 of The IPC, 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.
- 1.2. *Intention is Determination about an action or result*<sup>1</sup>. *Intention mean conception formed by directing the mind towards an object as aim or plan*<sup>2</sup>.
- 1.3. Common Intention requires a prior concert or a pre-planning. The principle which the section embodies is participation in some action with the common intention of committing crime, once such participation is established, section 34, is at once attracted<sup>3</sup>.
- 1.4. Section 34 of The IPC lays down rule of evidence, and does not create a substantive offence. To gather *Common Intention*, accused must be physically present at the actual crime scene or nearby for the purpose of facilitating or promoting the offence.
- 1.5. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. For application of this section, existence of plan and premeditated prior concert is necessary<sup>4</sup>.
- 1.6. **Meaning** : It really 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<sup>5</sup>. 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

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1 : New Webster's Dictionary.

2 : Oxford Dictionary.

3 : *Bharwad Mepa Dana and Anr. Vs. The State of Bombay*, AIR 1960 SC 289.

4 : *Ramashish Yadav Vs. State of Bihar*, AIR 1999 SC 3830

5 : *B. N. Srikantiah Vs. State of Mysore*, AIR 1958 SC 672.

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 crime is actually being committed<sup>6</sup>. The leading feature of this section is the element of participation in action<sup>7</sup>

- 1.7. **Object** : The section is framed to meet a case in which it may be difficult to distinguish between the act of individual members of a party or to prove exactly what part was played by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support and protection to the person actually committing the act.
- 1.8. **Scope** : The section is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused was responsible for the commission of the actual offence. It is not restricted to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. It can well applied to cases in which offence is committed by only one or two or three persons who all had a common intention. The common intention to bring out a certain result may develop on the spot itself<sup>8</sup>
- 1.9. **Facts to be established for common intention** :- To apply section 34 of The IPC, there should be two or more accused and the following factors must be established.
  - a) The accused share common intention to commit the offence.
  - b) The accused accordingly participated in the offence.
  - c) The offence actually took place.

If common intention is proved, but no overt act is attributed to the

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6 : AIR 1965 SC 264

7 : *Shaikh Nawak Vs. State of Maharashtra*, AIR 1993 SC 169

8 : *Kirpal & others Vs. State of UP*, AIR 1954 SC 706

individual accused, section 34 of The IPC 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<sup>9</sup>.

- 1.10. **Mode of Determination** : To bring the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of section 34, be it pre-arranged or on the spur of moment but it must necessarily be before the commission of the crime<sup>10</sup>.
- 1.11. This provision of law explains the **principle of joint liability**, in doing the criminal act with **common intention**. This section attracts the principle of joint liability. A joint liability of a person is determined according to the manner in which he becomes associated with commission of the crime.
- 1.12. Common Intention is a question of fact, which is subjective, it can also be inferred from the facts and circumstance of the case which includes the conduct of the accused acting in concert to commit the offence<sup>11</sup>. In this section **several person** means two or more than two person, criminal act must be done by several persons.
- 1.13. Direct evidence could be rarely available to establish common intention. The ultimate decision, at any rate would invariably depend upon the inferences deducible from the circumstances of each case and conduct of parties<sup>12</sup>. Mere presence of the accused on the crime scene without anything more can bring him within purview of Section 34 of the IPC, in order to establish his guilt, it has to be proved that the accused did something in furtherance of common intention<sup>13</sup>.

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9 : *Ramashish Yadav (cited supra)*

10 : *Kilari Malakondiah @ Malayadri & others Vs. State of A.P, (2008)15SCC311, Sukhbir Singh Vs. State of Haryana, AIR 2002 SC 1169*

11 : *Maqsoodan & others Vs. State of U.P, AIR 1983 SC 126.*

12 : *Jhinku Nai Vs. State of UP, AIR 2001 SC 2815*

13 : *Ram Briksh Vs. State of UP, 1993(2) C.R.L.C 378*

## 2. Common Object – **Relevant Considerations and Nature Of Proof.**

- 2.1. **Introduction** : One of the essential ingredient of Section 149 is that, the offence must have been committed by any member of unlawful assembly. **Sec. 141** of The IPC makes it clear that, it is one of the essential condition of an unlawful assembly that its member must be more than 5.
- 2.2. Section 149 of The IPC states that, If an offence is committed by any member of unlawful assembly in prosecution of common object of that assembly, or such as the members of that assembly knew to be likely to committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.
- 2.3. To constitute offence under this provision of law, overt act need not be proved, attribution of definite role of accused also not necessary, only requirement is to be found in unlawful assembly<sup>14</sup>.
- 2.4. **Section 141** of The IPC provides that, an assembly of five or more persons is designated as an unlawful assembly if the Common Object of the persons composing that assembly is any of the five object provided thereafter.
- 2.5. Section 149 of The IPC has its foundation on constructive liability which is the *sine qua non* for its operation. The emphasis is on the common object and not on common intention. Therefore, an offence committed by a member of an unlawful assembly in prosecution of any one or more of the five objects mentioned in Sec. 141 of The IPC will render his companions constituting the unlawful assembly liable for the offence with the aid of Section 149 of The IPC<sup>15</sup>.
- 2.6. In prosecution of the common object means that the offence committed was immediately connected with the common object of the unlawful assembly, of which the accused were the members. The act must be one which must have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. Where the common

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14 : *Dani Singh Vs. State of Bihar*, 2005 SCC (Cri.)127

15 : *Allauddin Mian Vs. State of Bihar*, AIR 1989 SC 1456

object is established, the unlawful assembly does not cease to be so by merely splitting itself into two groups for launching the attack. Section 149 of the IPC would be clearly applicable to such a case<sup>16</sup>.

- 2.7. **Meaning** : Section 149 of Indian Penal Code deals with offence in which every member of an unlawful assembly is guilty of offence committed in prosecution of common object. This section simply means that if any member of an unlawful assembly commits an offence in prosecution of common object for which the assembly was formed, if the members of the assembly knew that such act is likely to be committed for achieving that common object, then every person who is a member of that unlawful assembly will be guilty of that offence. The punishment under section 149 is same as that of the offence which is committed in the unlawful assembly.
- 2.8. **Object** : This section is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. **Common object** is defined and is limited to the five unlawful objects stated in **section 141** of The I.P.C. Common Object require under this section must be one of the object mentioned in section 141 of the I.P.C.
- 2.9. **Scope** : Section 149 of The I.P.C is declaratory for the vicarious liability of the members of an unlawful assembly for acts done in prosecution of the common object of that assembly and for such offences as the member of unlawful assembly knew to be likely to committed in prosecution of that object. A person can thus be convicted for his vicarious liability if he is found to be a member of the unlawful assembly sharing the common object in spite of the fact whether he had actually participated in the commission of the offence <sup>17</sup>.

**2.10. Facts to be established for common object**

- a) That offence was committed by any member of the unlawful assembly; and
- b) That such an offence must have been committed in prosecution of

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16 : *Jagdeo Singh Case*, AIR 1981 SC 648, *Ramchandran Vs. State of Kerala*, 2011 (9) SCC 257

17 : *Bhagwan Singh Vs. State of M.P.*, AIR 2002 SC 1836, AIR 2002 SC 1621.

the common object of that assembly or must be such as the members of that assembly knew to be likely to be committed.

- 2.11. For "**common object**", it is not necessary that there should be a prior concert in the sense of a meeting of the members of the unlawful assembly, the common object may form on spur of the moment; it is enough if it is adopted by all the members and is shared by all of them.
- 2.12. In order that the case may fall under the first part the offence committed must be connected immediately with the common object of the unlawful assembly of which the accused were members. Once it is established that the unlawful assembly had common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act. For the purpose of incurring the vicarious liability under the provision, the liability of other members of the unlawful assembly for the offence committed during the continuance of the occurrence, rests upon the fact whether the other members knew before hand that the offence actually committed was likely to be committed in prosecution of the common object<sup>18</sup>.
- 2.13. **Nature of Proof** : Mere presence or association with other members along does not *per se* be sufficient to hold every one of them criminally liable for the offences committed by others, unless there is sufficient evidence on record to show that each intended to or knew the likelihood of commission of such an offending act<sup>19</sup>. However, it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which or what Act<sup>20</sup>.
- 2.14. If the prosecution wants to prove a person guilty under section 149 of IPC, then it has to prove the presence of the person at the site and his participation in the unlawful assembly. This section creates a constructive liability or vicarious liability on the members of the unlawful assembly for the unlawful acts committed in pursuance of the common object.
- 2.15. Common Object has to be gathered from nature of assembly, arms

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18 : *Daya Kishan v. State of Haryana*, (2010) 5 SCC 81; *Sikandar Singh v. State of Bihar*, (2010) 7 SCC 477, and *Debashis Daw v. State of W.B.*, (2010) 9 SCC 111

19 : *K. M. Ravi Vs. State of Karnataka*, 2009 (16) SC 337

20 : *Lalji Vs. State of UP*, 1989 (1) SCC 437

possessed by them and behavior of assembly at or before occurrence. It is an inference which has to be deduced from the facts and circumstances of each case. Each of the accused need not commit some illegal overact. Assembly not unlawful initially but subsequently may become unlawful<sup>21</sup>.

2.16. Once the case of a person falls in this section, the question that he did nothing with his own hands is immaterial. He cannot take the defence that he didn't commit that offence, every person in an unlawful assembly knows the natural and probable consequences of the object to be achieved by the unlawful assembly. Mere part of an unlawful assembly will make all the persons liable for the unlawful act of other members. In this section, the liability of the members other than the principle offender is based on the fact that whether other members knew that the offence that was committed was likely to be caused in pursuance of the common object.

2.17. The basis of the constructive guilt under section 149 of The IPC is mere membership of the unlawful assembly, with the requisite common object or knowledge. Thus once the Court holds that the certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the member of the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was member of the same assembly is to held guilty of that offence. It is not material who actually did the offensive act<sup>22</sup>.

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21 : *Ramesh Vs. State of Haryana*, AIR 2011 SC 169.

22 : *Lalji Vs. State of UP*, AIR 1989 SC 754

### 3. Criminal Conspiracy – **Ingredients and Mode of Proof.**

- 3.1. **Introduction** : 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.
- 3.2. The proviso annexed to this provision states that, no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act beside the agreement is done by one or more parties to such agreement in pursuance thereof. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.
- 3.3. In *State Vs. Navjot Sidhu*<sup>23</sup>, Hon'ble Supreme Court observed that, *the necessary aspects to constitute the offence of criminal conspiracy are*
- a) *Need of Illegal Agreement*
  - b) *No need for over act*
  - c) *Nature of agreement necessary : either Express or Implied.*
  - d) *Extent of comity/agreement/intention on party of conspirator necessary.*
  - e) *Extent of involvement of each conspirator necessary in respect of various parts/intended offence of conspiracy*
  - f) *Extent of temporal involvement of each conspirator necessary*
  - g) *Period for which conspiracy exists.*
- 3.4. The Offence of Criminal Conspiracy under Sec. 120-A of The IPC is a distinct offence introduced for the first time in 1913 in Chapter V-A of The IPC. The very agreement concert or league is the ingredient of the offence<sup>24</sup>.
- 3.5. Section 120A provides for the definition of Criminal Conspiracy and it speaks of that, when two or more persons agreed to do or cause to be done an act which is an illegal act and section 120B provides for the punishment for a criminal conspiracy, and it is interesting to note that in order to prove a conspiracy, it has always been felt that it was not easy to get direct evidence<sup>25</sup>.

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23 : (2005) 11 SCC 600

24 : *Yash Pal Mithal Vs. State of Punjab*, 1977 SC 2433

25 : *Kechar Singh Vs. The State (Delhi Administration)*, AIR 1988 SC 1883.

- 3.6. Conspiracy is defined as, two or more corrupt persons agreeing together to do, by concerted action, something unlawful either as a mean or as an end<sup>26</sup>. The conspiracy is held to be continued and renewed as to all its members where and whenever any member of the conspiracy acts in furtherance of the common desire<sup>27</sup>.
- 3.7. The offence of criminal conspiracy punishable under section 120-B is itself an offence and is different from the offence to commit which the conspiracy was entered into<sup>28</sup>. The gist of the offence is an agreement to break the Law. The parties of such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done<sup>29</sup>.
- 3.8. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be general plan to accomplish the common design by such means as may from time to time be found expedient<sup>30</sup>.
- 3.9. The section renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement. To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every details of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts<sup>31</sup>.
- 3.10. **Meaning** : A criminal conspiracy may be termed as a partnership in crime inasmuch as any act done by any of the conspirators pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor<sup>32</sup>.

3.11. The common law definition of 'criminal conspiracy' was stated first by

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26 : *Bhagwant Swarup Vs. State of Maharashtra*, AIR 1965 SC 682.

27 : *Devendra Pal Singh Vs. State National Capital Territory*, AIR 2002 SC 1661.

28 : *Ajay Agarwal Vs. UOI*, AIR 1993 SC 1637 and *Yogesh Vs. State of Maharashtra*, AIR 2008 SC 299

29 : *E. G. Barsay Vs. State of Bombay*, (1961) 2 SCR 196 at Page 229

30 : *Hussain Umar Vs. Dalip Singhji*, AIR 1970 SC 45

31 : *K. R. Purushottam Vs. State of Kerela*, AIR 2006 SC 35

32 : *Rajiv Gandhi Assassination Case : State Through SP CBI Vs. Nalini & other*, (1999)5 SCC 253

**Lord Denman** in Jones' case (1832 B & AD 345) that an indictment for conspiracy must "charge a conspiracy to do an unlawful act by unlawful means" and was elaborated by Willies, J. on behalf of the Judges while referring the question to the House of Lords in *Mulcahy v. Reg* (1868) L.R. 3 H.L. 306 and the House of Lords in unanimous decision reiterated in *Quinn v. Leatham* 1901 AC 495 at 528 as, "*A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable of for a criminal object or for the use of criminal means.*"

3.12. An important facet of the Law of Conspiracy is that apart from it being a distinct offence, all conspirators are liable for the acts of each other of the crime or crimes which have been committed as a result of the conspiracy. This principle has been recognized right from the early judgment in *Regina v. Murphy* (1873) 173 ER 502<sup>33</sup>.

3.13. **Object** : The provisions of Section 120-A and 120-B, of The I.P.C have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The object with which this provision of law was brought to the statute books was to stuck down the intentions and plans to commit crimes. The intention behind the provision was to provide deterrence to persons agreeing or planning to commit offence. Criminal conspiracy is therefore is an independent offence. It is punishable separately.

3.14. Conspiracy is conceived as having three elements:

- a) Agreement;
- b) Between two or more persons by whom the agreement is effected;  
and
- c) A criminal object, which may be either the ultimate aim of the agreement.

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33 : *Yakub Abdul Razzak Mamon Vs. State of Maharashtra*, MANU/SC/0268/2013

- 3.15. **Scope** : The punishment for a criminal conspiracy is more severe if the agreement is one to commit a serious offence, it is less severe if the agreement is to commit an act, which although illegal, is not an offence punishable with death, imprisonment for life or rigorous imprisonment for more than two years. This section applies to those who are the members of the conspiracy during the continuance. Conspiracy has to be treated as a continuing offence and whoever is a party to the conspiracy during the period for which he is charged is liable under this section. Offence of criminal conspiracy is an exception to the general law where intent alone does not constitute crime.
- 3.16. **Offence of Conspiracy how proved** : There is no difference between the mode of proof of the offence of conspiracy and that of any other offence, it can be established by direct or circumstantial evidence<sup>34</sup>.
- 3.17. There cannot always be much direct evidence about conspiracy, Offence of conspiracy can be proved by either direct or circumstantial evidence<sup>35</sup>. However, conspiracies are not hatched in the open, by their nature, they are secretly planned. Privacy and secrecy are more characteristics of a conspiracy, than of a loud discussion in an elevated place open to public view. Direct evidence in proof of a conspiracy is therefore seldom available. It is not always possible to give affirmative evidence about the date of the formation of the criminal conspiracy, about the persons who took part in the formation of the conspiracy, about the object, which the objections set before themselves as the object of conspiracy, and about the manner in which the object of conspiracy is to be carried out, all that is necessarily a matter of inference. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused<sup>36</sup>.
- 3.18. It was observed by Hon'ble Supreme Court in the case of *Indra Dala Vs. State of Haryana* <sup>37</sup> that, Loosened standards of proof prevail in conspiracy trial. It was further held that a declaration by one conspirator, made in

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34 : *Bhagwan Swarup Lal Vs. State of Maharashtra*, AIR 1965 SC 682 and *Nazir Khan Vs. State of Delhi*, MANU/SC/0622/2003

35 : *State of NCT of Delhi Vs. Navjot Sandhu @ Afsan Guru*, MANU/SC/0465/2005

36 : *Mohd. Khalid Vs. State of W.B.*, (2002)7 SCC 334

37 : MANU/SC/0661/2015

furtherance of conspiracy and during its pendency is admissible against each conspirator. Despite the unreliability of hear say evidence, it is admissible in conspiracy prosecutions. Any statement made by accused after his arrest by police cannot fall within the ambit of Section 10 of the Evidence Act, as said statement is made after cessation of common intention. However, in *State of J. K Vs. Vs. Wasim Ahmed Malik*<sup>38</sup>, it was observed by Hon'ble Supreme Court that, *Confession by an accused is substantive piece of evidence against the conspirator also, but for using it against the co-accused i.e. the conspirator, the rule of prudence would require the Court not to rely thereon unless corroborated generally by other evidence on record.*

3.19. **Facts to be established for conspiracy** :- Section 120-A of The I.P.C reveals that a criminal conspiracy envisages an agreement between two or more persons to commit an illegal act or an act which by itself may not be illegal but the same is done or executed by illegal means. Thus, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence<sup>39</sup>.

3.20. To bring home the charge of conspiracy within the ambit of Section 120-B, it is necessary to establish that, there was an agreement between the parties for doing an unlawful act. It is difficult to establish conspiracy by direct evidence<sup>40</sup>.

- a) That there was an existence of a design to commit an offence.
- b) That such offence was punishable with imprisonment.
- c) That accused concealed existence of such design.
  - By his act or illegal omission or
  - by his knowingly making false representation.
- d) That he did voluntarily.
- e) That he thereby intended to facilitate, or know that he would thereby facilitate commission of such offence.

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38 : MANU/SC/0696/2015

39 : *Suresh Chandra Bahari Vs. State of Bihar*, AIR 1994 SC 2420

40 : *Hira Lal Hari Lal Vs. CBI*, 2003 SCC (Cri.) 1121.

#### **4. Distinction between Common Intention, Common Object and Criminal Conspiracy.**

4.1. **Difference between Common Intention and Common Object :** There is much difference between the scope and applicability of Sec. 34 and Sec. 149 of The IPC. Though both the sections deals with constructive criminal liability, both have some resemblance and are to some extent overlapping.

- a) Section 34 of The IPC does not by itself creates any offence, whereas Section 149 does.
- b) 'Common intention' used in s.34 is not defined anywhere in IPC, while 'common object' in s.149 must be one of the five ingredients defined in s. 141 of IPC.
- c) Common intention requires prior meeting of mind and unity of intention and overt act has been done in furtherance of the common intention of all. It postulates the existence of a prearranged plan implying a prior meeting of minds. Common object may be formed without prior meeting of mind when the common object of the members of the unlawful assembly is one but intention of participants is different. It only requires that criminal act has been done in furtherance of common object. It dose not require proof of prior meeting of minds or pre concert<sup>41</sup>.
- d) For invoking s.34 it is sufficient that two or more persons were involved. However there have to be minimum five persons to impose s.149.
- e) The crucial factor of s.34 is 'participation' while there is no need of active participation in s.149 of IPC.
- f) Common object is different from a Common intention as it does not require prior concert and common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and as they act as an assembly to achieve that object<sup>42</sup>.

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41 : *Chittarmal Vs. State of Rajasthan*, AIR 2003 SC 796

42 : *Rajnath Vs. State of UP*, 2009(1) Supreme 370

- 4.2. The distinction between these two expressions is explained by Hon'ble Supreme Court, in the case of *Chittarmal Vs. State of Rajasthan*<sup>43</sup>, observed that, “It is well settled that Section 34 as well as section 149 deal with liability for constructive criminality, i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become *Rupee Foradiane* punishable as sharers in an offence. Thus they have a certain resemblance and may, to some extent, overlap. But a clear distinction between common intention and common object is that common intention denotes action in concert and necessary postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also, to some extent, overlap and it is a question to be determined on the facts of each case whether the charges under Section 149 overlap the ground covered by Section 34. Thus, if several persons numbering five or more do an act or intend to do it, both Section 34 and Section 149 may apply.”
- 4.3. In the case of *Bhupendra Singh & others Vs. State of U.P.*<sup>44</sup>, it was held that, “‘Common object’ is different from a ‘common intention’ as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. 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. It may be gathered from the course of conduct adopted by the members of the assembly. For determination of the common object of the unlawful assembly, the conduct of each of the members of the unlawful assembly, before and at the time of attack and thereafter, the motive for the crime, is some of the relevant considerations. What the common of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the

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43 : (2003) 2 SCC 266

44 : AIR 1990 SC 3265

*behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful.” Most often an argument is put forth on behalf of defence, in a criminal case that because of discrepancies in evidence of prosecution the evidence ought not be relied upon. Credibility of the witness is also doubted for having some contradictions in his testimony. There may be some cases where the discrepancies or contradictions are such that the basic version of prosecution is not affected thereby, in those cases the discrepancies or contradictions are not material and as such cannot be used to discredit the testimony of a witness or to doubt the evidence of prosecution. Only in those cases where the contradictions and discrepancies are directly related to the incident and are material contradictions affecting the credibility of evidence, the evidence cannot be relied upon. Some contradictions and discrepancies are bound to happen even in the evidence of a truthful witness, due to the normal error of perception or fading human memory”*

- 4.4. **Difference between Common Intention and Criminal Conspiracy :** There is not much substantial difference between conspiracy as defined in section 120-A of The IPC and acting on a common intention, as contemplated under section 34. While in the former, the gist of the offence is bare engagement and association to break the law even though the illegal act does not follow, however the gist of the later provision of law is, the commission of a criminal act in furtherance of a common intention of all the offenders, which means that there should be unity of criminal behavior resulting in something, for which an individual would be punishable, if it were done by himself alone.
- 4.5. Another point of difference is that a single person cannot be convicted under section 120-A and, therefore, where all the accused except one were acquitted, the Hon'ble Supreme Court ordered his acquittal also<sup>45</sup>. Whereas under section 34, read with some other specific offence, a single person can be convicted because each is responsible for the act of all others.

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45 : *Vinayak Vs. State of Maharashtra*, AIR 1984 SC 1793

- 4.6. Two or more persons must be parties to such an agreement and one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself<sup>46</sup>.
- 4.7. Illustrative Difference between Common Intention, Common Object and Conspiracy.

<p>Common Intention Section 34</p>	<p>Six Friends A, B, C, D, E and F were going down the street. X, their common enemy, came from opposite side. Seeing him, A, B and C starts beating him. D, E and F encourages them to beat X. <b>In this case</b> : There was no prior meeting of minds. The common intention sprouted on the spot. There was no prior agreement. The common intention was to beat X.</p>
<p>Common Conspiracy Section 120-A</p>	<p>Six Friends A, B, C, D, E and F decides to kill their common enemy X. They sit together and plans how to execute the murder of X. <b>In this case</b> : There is prior meeting of minds of A to F to commit the offence and they agreed to do the illegal act.</p>
<p>Common Object Section 149</p>	<p>A, B, C, D and E are discussing something with X. Dispute arose between them and they start abusing X. They threaten X to kill. X starts running A to E chase him to assault him. Seeing them chasing X, F joins them and chases X. They catch X and assaults him. Though F may not have given a single blow to X, but joined the unlawful assembly knowing its object. Therefore F would be held guilty for sharing common object <b>In this case</b> : There was no prior agreement or meeting of minds. F was having knowledge about the object of unlawful assembly and voluntarily joined it.</p>

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46 : *Haradhan Chakraborty Vs. UOI, AIR 1990 SC 1210*

## 5. **Proper framing of Charge for Common Object, Criminal Conspiracy and effect of absence of particular charge.**

- 5.1. **Section 2(b)** of the Code of Criminal Procedure Code defines the term Charge. One of the basic requirement of fair trial in Criminal Jurisprudence is to give precise information to the accused as to the accusation against him. This offers him an opportunity to prepare his defence. Because of this reason, accused is always informed about the accusations against him before commencement of trial.
- 5.2. Charge, thus, serves the purpose of notice or information to accused, hence it must be drawn up according to specific language of law, giving clear and unambiguous or precise notice of the nature of accusation that the accused is called upon to meet in course of trial.
- 5.3. Provisions of Criminal Manual provides that, correct framing of charge is of considerable importance in criminal trial. It enables the prosecution to know precisely what factors they have to prove and also gives notice to the accused of the case which has to meet. Duty is therefore casted on the Judges to devote their personal attention to the matter to see that the Charges are framed correctly and give all necessary particulars as prescribed in Section 211 to 213 and 218 to 221(1) of the Cr. P. C.
- 5.4. Where several persons are tried together for different offences committed in the course of the same transaction, there should be separate head of charge for each of those offences.
- 5.5. Where five or more persons are charged with committing an offence, it is ordinarily desirable to frame charges in the alternatively, both under Sec. 34 and Sec. 149 of The IPC. Even though charge is framed under Sec. 149 of The IPC ordinarily it is desirable to frame charges in the alternatively both U/Sec. 34 and 149 of The IPC. It must be specifically stated who is or who are alleged to have committed the particular act constitution offence. Even though no formal charge has been framed U/Sec. 34 of The IPC, if the evidence discloses the commission of the offences in furtherance of the common intention of all as required by Sec. 34 the trial is not vitiated<sup>47</sup>.

- 5.6. Section 34 of The IPC can be applied even though no charge is framed, if the

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<sup>47</sup> : *Dasharath Mahadeo Borate Vs. State of Maharashtra, 1996(2) Bombay Criminal Cases 22*

evidence on record establishes it. In such a situation, the absence of charge, by itself, cannot be said to be fatal and before a conviction can be set aside, it must be shown that absence of charge had caused prejudice to accused<sup>48</sup>. Section 34 is not creating a substantive offence, but it is rule of evidence only.

- 5.7. It is not permissible after recording a finding under Section 149 to convict some of the accused under Section 34 for a graver offence on the ground that their common intention to cause greater harm than the common object of the unlawful assembly. In such situation, prejudice is apparent<sup>49</sup>.
- 5.8. The mere omission to mention section 149 may be considered as an irregularity, but failure to mention the nature of the offence committed by the accused persons cannot be said to be mere irregularity. Where the relevant prosecution allegations so as to bring in the ingredients of the offence punishable U/Sec. 302 r.w Sec. 149 were not incorporated in the charge and the accused were not told that they had to face charge of being the members of unlawful assembly and that the common object of such assembly was to commit murder of the deceased and in furtherance of that common object murder was committed and thereby they had constructive liability, it was held that it was not possible to substitute the conviction for the offence punishable under section 302/149 from one under section 302<sup>50</sup>.
- 5.9. Offence of Criminal Conspiracy punishable under section 120-B of The IPC is a distinct offence. This section cannot be applied simpliciter unless and until some offence is disclosed. There cannot be any conspiracy without any offence. Section 120-B has to be appended with a primary offence. Thus, there cannot be any charge of conspiracy against any accused without the aid of substantive offence. The charge of Criminal Conspiracy must not be indefinite. The illegal purpose and design of the agreement entered into between the accused must be stated with such proper and sufficient certainty as to lead to the necessary conclusion that, it was an agreement to do an act in violation of the law.

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48 : *Willie(William) Slaney*, AIR 1956 SC 116.

49 : *Karnail Singh*, AIR 1954 SC 204

50 : *Bala Seetharamaiah Vs. Perikhe S. Rao*, 2004 Cr. L. J 2034 SC.

- 5.10. For framing charge of criminal conspiracy two or more persons are required and it cannot be framed against alone accused. If two persons are charged and one of them was acquitted the remaining accused would not be convicted as he could not have transpire with himself.
- 5.11. **Absence of particular charge** :- The object of **sections 215 and 464** of Code of Criminal Procedure is to prevent failure of justice where there has been only technical breach of rules not going to the root of the case is such.
- 5.12. These two sections read together lays down that whatever the irregularity in framing of a charge, it is not fatal unless there is prejudice caused to the accused. The object of Section 215 of Code of Criminal Procedure is to prevent failure of justice where there is some breach of the rules in formulation of the charge. However, the section also makes clear that insignificant irregularities in stating the particulars of offence will not effect to trial or its outcome.
- 5.13. In order to decide whether the error or omission has resulted in failure of justice the Court should have regards to the manner in which the accused concluded his defence was to the notice of the objection, the mere omission to frame a charge or a mere defect in the charge is no ground for setting aside a conviction. Procedural Laws are designed to subserve the ends of justice and not to frustrate them by technicalities.
- 5.14. The Proposition of Law is settled by Hon'ble Supreme Court in case of *Anil @ Raju Namdev Patil vs. Administration of Daman and Diu, Daman and Another*<sup>51</sup> as;
- a) The accused should not suffer any prejudice by reason of mis-joinder of charges,
  - b) A conviction for lessor offence is permissible,
  - c) It should not result in failure of justice,
  - d) If there is substantial compliance, mis-joinder of charges may not be fatal and such mis-joinder must be arising out of mere mis-joinder to frame charges.

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51 : 2007(2) Bom CrC 779 SC

## 6. Scope and applicability of Section 10 and Section 30 of the Indian Evidence Act.

- 6.1. As per **Section 10 of the Evidence Act**, things said or done by conspirator in reference to common design; Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.
- 6.2. One of the offences alleged against all the accused is criminal conspiracy under Section 120 (B) of the Indian Penal Code. Section 10 of the Evidence Act falls within Chapter 2 which deals with “relevancy of facts”. That Section renders anything said, done or written by anyone of the conspirators in reference to their common intention as a relevant fact, not only as against each of the conspirators but for proving the existence of the conspiracy itself.
- 6.3. Further, the said fact can be used for showing that a particular person was party to the conspiracy. The only condition for application of the rule in Section 10 is that there must be “reasonable ground to believe that two or more persons have conspired together to commit an offence.
- 6.4. The basic principles which underline in Section 10 of the Evidence Act is the theory of agency and hence every conspirator is an agent of his associate in carrying out the object of the conspiracy. Section 10 permits “anything said, done or written by anyone of such persons in reference to their common intention” to be recorded as a relevant fact as against each of the persons believed to be so conspired.<sup>52</sup>”
- 6.5. It was observed by The Hon'ble Supreme Court<sup>53</sup>, while dealing with the scope of this section that, “ The expression “*in reference to their common intention*” in Section 10 is very comprehensive and is designedly used to

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52 : *State of Maharashtra Vs. Damu Gopinath Shinde*, AIR 2000 SC 1691

53 : *Bhagwan Swaroop Vs. State of Maharashtra*, AIR 1965 SC 682

give it a wider scope than the words “*in furtherance of*” in the English law, with the result, anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only as against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it. It can only be used for the purpose of proving the existence of the conspiracy of that the other person was a party to it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy.”

- 6.6. **Scope of Section 10** - The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence. There must be reason to believe that there was a conspiracy and the accused persons were members of that conspiracy.
- 6.7. The section refers to things said or done by a conspirator in reference to the common intention. Any thing said, done or written “in reference to the common intention” is admissible and therefore the contents of letters written by one in reference to the conspiracy is relevant against the others even though not written in support of it or in furtherance of it.
- 6.8. The expression “in reference to their common intention” in this section is very comprehensive with the result that anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the other before he entered the field of conspiracy or after he left it. It cannot be used in favour of the other party or for the purpose of showing that such a person was not a party to the conspiracy.
- 6.9. As per provision of the **section 30 of The Evidence Act**, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who

makes such confession.

- 6.10. It was observed by The Hon'ble Supreme Court<sup>54</sup> that, “When there is evidence against the co-accused to support his conviction then the confession under section 30 may be used as an additional reason for believing that evidence. The proper way to approach a case of this kind is first, to marshal the evidence against the accused excluding the confession and see whether, if believed a confession can be based on it. If it is capable of belief then of course which is not necessary to take the confession in aid. There may be cases where the Judge is not prepared to act on the other evidence as it stands which if believed would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence.”
- 6.11. An accomplice is a competent witness and his evidence can be accepted to base conviction if there is nothing significant to reject it as false. But the rule of prudence, ingrained in the consideration of accomplice evidence, required first independent corroborative evidence of the offence and next connecting the accused, against whom accomplice evidence is used, with the crime<sup>55</sup>.
- 6.12. The confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance I support of its conclusion deducible from the said evidence<sup>56</sup>.
- 6.13. **Object and evidentiary value** : The object of this section is that where an accused person unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath and so affords some guarantee that the whole statement is a true one.

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54 : *Kashmira Singh Vs. State of MP*, AIR 1952 SC 159

55 : *Haroon Haji Abdulla Vs. State of Maharashtra*, AIR 1968 SC 832

56 : *Haricharan Kurmi Vs. State of Bihar*, AIR 1964 SC 1184

- 6.14. When a person admits his guilt to the fullest extent, and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth. But this is a very weak guarantee. For a confession may be true so far as its maker is concerned, but may be false and concocted through malice so far as it affects others.
- 6.15. It was also held that the confession of a co-accused cannot be used as the basis for conviction on account of the position that it is not strictly evidence.
- 6.16. **Scope and applicability** - Where more persons than one are jointly tried for the same offence, the confession made by one of them, if admissible in evidence at all, should be taken into consideration against all the accused, and not against the person along who made it.
- 6.17. This section is an exception to the rule that the confession of one person is entirely inadmissible against another. The policy of the law in allowing a confession by one accused to be considered against another who is being jointly tried for the same offence, seems to rest on the recognition of the palpable fact that such a confession cannot fail to make an impression on the Judge's mind, which it was therefore better to control within limits than to ignore altogether.
- 6.18. It is further well settled that confession of a co-accused can be 'taken into consideration' against the other accused, but they are not technically evidence within the definition given in section 3 of the Indian Evidence Act, and therefore they cannot alone form the basis of a conviction.
- 6.19. It is at best the evidence of an accomplice and the Court may presume that that accomplice unworthy of credit unless he is corroborated in material particulars.

*Submitted with Great Respect.*

[S. R. Navandar]  
District Judge 1 & Addl. Sessions Judge  
Newasa, Dist. : Ahmednagar

## ANNEXURE

### DISTINCTION BETWEEN COMMON INTENTION; CRIMINAL CONSPIRACY AND COMMON OBJECT.

Sr. No.	Section 34	Section 120-B	Section 149
1.	Rule of evidence. Does not create distinct offence. Enunciates principle or liability.	Creates distinct offence and is by itself a substantive offence.	Creates distinct offence. Enunciates principle of liability.
2.	At least two persons are essential to share common intention.	At least two persons are essential for illegal agreement	At least five persons are essential to share common object.
3.	Creates constructive liability.	Does not create constructive liability or relationship like principal and agent since based on illegal agreement.	Creates constructive liability.
4.	Joint liability based on common intention.	Liability based on illegal agreement.	Joint liability based on common object.
5.	Act must be result of pre-arranged plan.	No necessity of pre-arranged plan as gist of offence is mere engagement & association to break the law.	Pre-arranged plan is not required.
6.	Actual commission of act is an offence.	Mere engagement to do an illegal act is an offence. Actual commission of illegal act is not necessary.	Actual commission of act is necessary.
7.	Common intention need not be one of specified types only.	Illegal act need not be one of specified types only.	Common object must be one of the objects mentioned in Sec. 141 IPC.

## LIST OF RECENT CASE LAWS

### CORE GROUP : CRIMINAL SIDE

1. *J. V. Baharuni Vs. State of Gujrath*, 2014(4) Mh. L. J 192

- If case under section 138 of The Negotiable Instrument Act in substance was not tried as a summons case, it need not be heard de novo and succeeding Magistrate can follow procedure contemplated under Sec. 326(1) Cr. P.C
- No Straitjacket formula to try cases. Law provided is flexible and case can be tried Summarily or otherwise.

2. *Anvar P. V. Vs. P. K. Basheer*, 2015(2) Mh. L.J 135

- Admissibility and appreciation of Electronic Evidence.
- Electronic Record – Produced for inspection of Court is documentary evidence under Sec. 3.
- Documentary evidence by way of an electronic record – Admissibility – Proof of electronic record is to be only in accordance with procedure prescribed under section 65-B.

3. *Balasaheb Barku Kolhe Vs. Jagdish Tryambakrao Mandlik*, 2015(2) Mh. L. J 56

- Dishonor of Cheque – Opinion of Handwriting Expert – Necessity was to be perceived by accused and not by Magistrate

4. *Namdeo Babasaheb Korde Vs. Babasaheb Babarao Korde*, 2015(1) Mh. L.

## **J 888**

- Meaning and Purpose of DNA Test Explained.
- Legal presumption of parenthood – DNA test for establishing paternity – Consideration.

## **5. *Devidas Ramachandra Tuljapurkar Vs. State of Maharashtra*, AIR 2015 SC 2612**

- Obscenity – Judging Obscenity – Mode to be adopted
- Obscenity – Determination – Comparable Test – Not the applicable test.