

Emperor Vs. Barendra Kumar Ghose

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Court : Kolkata

Decided On : Sep-26-1923

Reported in : 81Ind.Cas.353

Judge : Asutosh Mookerjee ;Thomas William Richardson ;C.C. Ghose ;Cuming and ;Page, JJ.

Appellant : Emperor

Respondent : Barendra Kumar Ghose

Judgement :

Mookerjee, J.

1. This is an application for review of a criminal case on the certificate of the Advocate-General under Clause 26 of the Letters Patent. The petitioner Barendra Kumar Ghosh was tried on the 16th and 17th August at the Fourth Criminal Sessions of this year, by Mr. Justice Page and a Special Jury, on a charge of offences punishable under Sections 302 and 394 of the Indian Penal Code. He pleaded not guilty to the first count and guilty to the second count. The Jury returned a unanimous verdict of guilty of murder, with the result that the accused was convicted and sentenced to death under Section 302. On the 22nd August, an application was made on his behalf to the Advocate-General for a certificate under Clause 26 of the Letters Patent. On the 27th August, the Advocate-General heard Counsel for the prisoner in support of the application. On the 29th August, the

Advocate-General granted a certificate in the following terms:

2. 'Certificate of the Advocate General of Bengal under Clause 26 of the Letters Patent of 1865.

3. 'I. Whereas the accused above named was on the 16th August, 1923, charged at the Criminal Sessions holden in this Hon'ble Court in its Criminal Jurisdiction before the Hon'ble Mr. Justice Page and a Special Jury on an indictment as follows:

4. 'First: That he, the said Barendra Kumar Ghosh, together with certain of the other persons on or about the 3rd day of August in the year of our Lord 1923 in Calcutta aforesaid committed murder by causing the death of one Amrita Lal Roy and thereby he, the said Barendra Kumar Ghosh; committed an offence punishable under Section 302 of the Indian Penal Code.

5. 'Second. That the said Barendra Kumar Ghosh together with certain other persons at or about the time and in the place aforesaid were jointly concerned in attempting to commit robbery on the said Amrita Lal Roy and that at the time of committing such robbery voluntarily caused hurt to the said Amrita Lal Roy and thereby he, the said Barendra Kumar Ghosh, committed an offence punishable under Section 394 of the Indian Penal Code.

6. 'II. Whereas it has been represented to me that the accused pleaded guilty to the aforesaid charge under Section 394, Indian Penal Code with the reservation that he did not cause hurt to the Post Master and pleaded not guilty to the charge under Section 302, Indian Penal Code, and the trial was proceeded with thereafter in respect of the latter charge.

7. 'III. Whereas it has been represented to me that the case for the prosecution as opened by the learned Standing Counsel and as disclosed in the evidence of the prosecution was as follows :

8. 'That the accused and three other persons made their appearance at the Shankaritolla Post Office at about 3-30 p.m. on the 3rd of August, 1923, armed with firearms, that three of them including the accused entered the Post Office

through its south-eastern door while the fourth man remained outside, that of the three who came inside, the accused stood in the middle and the masked man on his left and the other man on his right, that they stood within less than 2 yards of the Post Master, of whom all the three demanded money with the words Post Master, rupey deo,' that the Post Master asked 'kiser taka.,' whereupon all the three levelled their weapons and fired at the Post Master's right palm and another struck him on the right side under the right arm pit whereupon he fell down with a cry, that a clerk named Sham Dulal Das who was working in the same room at that time ran to the Post Master's aid whilst Hari Prosad Das, the Post Office packer, ran after the three men who were immediately escaping along with the fourth man who was outside, that the chase was taken up by two other men named Sita Ram and Khapasram employees of one Pro-motho Lal Sircar residing at 15, Mohendra Sircar's Lane opposite the Post Office, that as they got to the turning of Mohendra Sircar's Lane and Sankari-tolla East Lane, the accused ran down the latter lane firing his pistol from time to time whilst the other three ran by Mohendra Sircar's Lane to Creek Row, that the accused was followed by the packer and the two others whose number was swelled by other pursuers who all kept following him until he was arrested in front of St. James Square, and brought back to the Post Office along with his pistol which the accused had thrown away near the said Square but had been picked up by a small boy who gave it to the packer.

9. 'That the prosecution case further was the Post Master had expired within a short interval of being shot, that one bullet was found inside his body which on being extracted fitted into the empty cartridge case picked up inside the room of the Post Office which in its turn was found to be of the same bore as that of the automatic pistol carried by the accused, that the dent of the bullet was found on the wall of 15 Mohendra Sircar's Lane fronting the Post Office, that no other empty cartridge was found inside the same room, that no trace of the third bullet was available in or out of it, and lastly that two revolvers and three daggers were found at premises No, 181, Harrison Road, a Chemist's shop where the accused was employed.

10. 'IV. Whereas it has been further represented to me that the case for the defence as disclosed in the evidence was as follows:

11. '(a) That the case for the defence was embodied in the statement made by the accused in Court which according to him was identical with the statement he had previously made to Inspector Bon Behari Mukherji; a copy of the accused's statement in Court is hereto annexed and marked 'A.'

12. '(b) That the main points in, the accused's version were as follows:

13. '(i) Three and not four persons went to the Post Office, that the accused went there with the assured feeling that no life would be taken by any one, that the accused stayed outside whilst the other two went in, and that only two shots were fired inside and not three.

14. '(ii) That the accused was so taken by surprise on account of the shooting of, the Post Master that he was temporarily robbed of locomotion and self-control and remained back, whilst his two companions ran away, that he recovered himself later on hearing the cry Chor Chor, that he was running by himself, that he for the first time tried to fire his revolver in course of being pursued, that his pistol did not go off when he pulled the trigger, that he thereupon remembered his instructions to pull out a portion of the pistol and as he did so, a live cartridge fell out.

15. '(iii) That the accused kept on firing in the air as he ran along and deliberately refrained from shooting the packer and others who followed him at close quarters.

16. 'V. Whereas it has been further represented to me that the learned Judge charged the Jury and in such charge which was taken down in shorthand completely said as follows :

17. 'Therefore in this case if these three persons went to that place with a common intention to rob the Post Master, and if necessary, to kill him and if death resulted, each of them is liable whichever of the three fired the fatal shot.'

18. "If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob, and if necessary, to kill and death resulted from their act, if that be so you are bound to find a verdict of guilty.

19. "I say if you doubt that it was the pistol of the accused which fired the fatal shot that does not matter. If you are satisfied, on the other hand, that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty."

20. 'VI. Whereas it has been further represented to me that the learned Judge omitted to draw the attention of; the Jury to the defence of the accused, save and except a mere reference to the statement made by the accused.

21. 'VII. And whereas the facts hereinbefore set out have been certified to me by Counsel for the accused as appears from the certificate hereunder written.

22. 'Now I, Satish Ranjan Das, Advocate-General of Bengal, do under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal bearing date the 28th September, 1865, certify that in my judgment whether the alleged direction and the alleged omission to direct the Jury do not in law amount to a misdirection should be further considered by the said High Court. Sd. S.R. Das.

We, the undersigned defended the above accused at his trial by the Hon'ble Mr. Justice Page at the last Criminal Sessions of the High Court on the 16th and 17th instant and were present at his trial throughout and we certify that the facts hereinbefore set out have been correctly stated to the best of our recollection and belief. Sd. B.C. Chatterjee, S.K. Sen, and N.R. Das Gupta, Counsel for the accused.

23. Thereupon, on that very date, Counsel for the prisoner applied to the Chief Justice to appoint a Bench to hear 'the application for review; and the present Bench was constituted by the Chief Justice under Clause 26 of the Letters Patent read with Section 108(2) of the Government of India Act, 1915.

24. When the case was taken up for disposal Mr. B.L. Mitter, Standing Counsel, informed the Court that the statements of facts as given in the certificate of the Advocate-General (which had been granted ex parte), were not all accurate, and he submitted that the certificate was in one respect at least incompetent and

misconceived. In this connection, it may be observed that Clause 26 of the Letters Patent does not indicate the procedure to be followed by the Advocate-General when he is called upon to grant a certificate. But it is clear, on the language of Clause 26, that, as emphasised by Jenkins, C.J., in *Emperor v. Upendra Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.), the Letters Patent requires that the certificate should reflect the judgment of the Advocate-General and is presumably granted in the interests of justice after a careful consideration of all available materials. If that judgment is founded on incomplete materials or inaccurate allegations, its weight is obviously diminished in a corresponding degree.' It was from this standpoint that Jenkins, C.J., in the case just mentioned, hesitated to accept the assertion of Counsel that no note of the evidence had been read by or to the Advocate-General before he granted his certificate. In a case where the error ascribed to the Judge depends on the evidence adduced at the trial, it is plainly desirable that the notes of the evidence as recorded by the Judge, should be laid before the Advocate-General when he is asked to grant the certificate. The requisite materials can always be obtained on application to the Judge. But not only should this be secured, there should also be no departure from what we gather has been the salutary practice, uniformly followed, up till now, in this class of cases. We were assured by Mr. Mitter that on previous occasions the Advocate-General concerned made it a point to hear, not merely Counsel for the prisoner but also Counsel for the Crown before he granted the certificate. This statement was made on the authority of Mr. William Jackson who has been an Advocate of this Court since 1866, and of Lord Sinha who became an Advocate of this Court in 1886 and successively held the Offices of Standing Counsel and Advocate-General. In my opinion, there is no room for controversy that what is thus stated to have been the established practice is the proper course to follow. This does not imply that when the Advocate-General is asked to grant a certificate under Clause 26, he should be guided by the views of the Crown; but he should be aware, before he forms his judgment, that the version of what took place at the trial, as given on behalf of the accused, is disputed by the prosecution. I am further of opinion that the allegations embodied in the petition to the Advocate-General should be verified by Counsel' present at the trial or by other responsible person. In the case before us, no certificate of any description

was attached to the application made to the Advocate-General. The result was that the Advocate-General formed his judgment upon materials, the accuracy whereof was not certified. Counsel for the accused was heard by him, and a draft of a certificate was then prepared: this incorporated some only of the allegations contained in the unverified petition. A certificate was next appended by Counsel present at the trial, to the effect that the facts 'hereinbefore' set out (that is, set out in the certificate of the Advocate-General) had been correctly stated to the best of their recollection and belief. This obviously did not ensure that the judgment of the Advocate-General was formed solely on certified materials. That judgment might have been influenced by the unverified statements contained in the petition which were not reproduced in the certificate. That the danger is by no means imaginary, may be illustrated by reference to two of the paragraphs of the unverified petition presented to the Advocate-General in this case. In paragraph 3, it is stated that the accused pleaded guilty to the charge under Section 394 with the reservation that he did not cause hurt to the Post Master. The court minutes show, on the other hand, that the accused pleaded guilty to the charge under Section 394, and no note of the alleged reservation can be traced. In paragraph 7 it is stated that the case' for the defence as made in the statement under Section 342 of the Criminal Procedure Code was identical with a statement previously made by him to Inspector Bon Behari Mukherji. There is no evidence on the record to establish the alleged identity of the two statements. It is needless to enquire whether these unverified assertions were made under a misapprehension. The fact remains that statements were made in the petition, presented to the Advocate-General, which are either inaccurate or are not supported by evidence on the record; and it is distinctly unfortunate that both these statements are reproduced in the certificate granted by the Advocate-General, to which Counsel appended a certificate that the facts set out therein had been correctly stated to the best of their recollection and belief. In my view, the certificate of the Advocate-general, which reflects his judgment and is naturally, entitled to respect; should be granted after he has heard representatives of the prisoner and of the Crown and has carefully considered all the available materials; whose accuracy had been verified by Counsel or other responsible persons. If this course had been pursued in the present case before the certificate was granted, there would have been no occasion for an unseemly

dispute as to the weight to be attached to the certificate. But whatever may have been left undone which might and should have been done the fact remains that the certificate has been granted, and the Court must consequently deal with the case under Clause 26 of the Letters Patent.

25. The facts material for the appreciation of the questions which have emerged for consideration, may now be conveniently narrated. On the 3rd August last, several persons it is a matter for controversy whether their number was three or four armed with fire-arms entered the Sankaritola Post Office in this city at about 3-30 p.m. The case for the prosecution is that the gang consisted of four persons, and included the accused. Three of these persons--one of whom was the accused--entered the Post Office, through its southeastern door, while the fourth remained outside. Of the three who went inside, the accused stood in the middle; he had a khaddar coat on and a shirt beneath. The man on his left had a mask on his face, the man on the right had a shirt on with black stripes. Inside, the room there were three officers, at three different tables, namely, the Post Master Amritlal Ray, the packer Haraprasad Das, and the Money Order Clerk Shamdulal Das. The Post Master was facing west, the packer east and the Money Order Clerk north. The three men who entered the room said to the Post Master, 'Rupiya dco'. The Post Master stood up and said 'what money.' On this; all the three men fired. The Post Master, was mortally wounded and death was practically instantaneous. The aggressors cleared out and were pursued. They at first proceeded for a short distance eastwards. Three of them then escaped by a lane towards the south. The accused took a turn towards the north and was chased by the packer. He had a pistol in hand which he fired no less than four times during his flight before he was arrested, in St. James Square. He was brought back to the Post Office with his pistol which he had thrown down and was subsequently sent up for trial. On the same day, at 7 p.m., the Police, upon information received, conducted a search of premises No. 181, Harrison Road, where the accused lived and worked as manager of a dispensary. In an almirah, of which one key was kept by the prisoner, was discovered a bundle; this, when opened, was found to contain two revolvers and three daggers. The case against the accused was heard in the first instance 'by the Chief Presidency Magistrate who committed him to the Sessions for trial on charges under Sections 302, 304, 393 read with 398, 394,

307 and 308 of the Indian Penal Code. The charge under Section 398 was struck out by order of Court and the charges under Sections 307 and 308 were withdrawn with leave of Court; consequently the accused was tried on the charge under Sections 302 and 394. The trend of his defence may be gathered from the following statement made by him in Court under advice of his Counsel and in explanation of the evidence which had been adduced against-him:

26. On August 3, Friday, I was reclining, on a couch and reading a book after having had my midday meal when a gentleman whom I knew to be a Godfearing man and a man of learning came in with a bundle in his hand. I asked him to take his seat on the couch. As soon as he took his seat, he wanted me to keep the bundle in my almirah. I asked him why I should keep it in my almirah as it did not appertain to my private business. He said he wanted it kept in the almirah. Then I opened the almirah and he placed the bundle inside it. I locked the almirah and tucked the key into my waist cloth. He then said to me 'You will have to go with me to a certain place.' I said that my compounder and men had not come in and so I could not go. He said 'Come with me to my house, you will have to be away for only one hour, I have got to tell you something very important.' Then one of the men belonging to the dispensary came after taking his meal. I told my man that I 'was going to this gentleman's house and wanted a man to stay in the dispensary. Then the gentleman took me to his house and I was made to wait in his drawing room. There I found two young men seated; I knew one of them but did not know the other. The gentleman then said to me 'you will have to go with me to a certain place and commit dacoity. I was very much frightened. I said what is the dacoity. He took me to a room next to the drawing room away from the two boys. This room was a dark room with all the doors and windows shut. There he began to encourage me saying I would have nothing to do but only to accompany these two boys. He said these two boys will do every thing, you will go there as a mere show.' I told him why should I commit dacoity, I am newly married, I am not in need of money. Instead of replying, he looked at me in the face for some little time. I was sitting quiet, when he called one of the boys into the room. He asked the boy to get the four pistols. The boy went out and in quarter of an hour came back with a bundle in his hand. He opened the bundle and produced four pistols and handed them to me. In a bag there were a number of cartridges. He began to put the

cartridges into the revolvers. He then said to me you go with these men, they will do every thing, you will have to do nothing.' Then I said 'I am a newly married man, why I shall commit dacoity.' I told him 'my brothers are in resposable employment under Government and they draw handsome pay and the money I earn is quite sufficient for my purpose, why shall I go and commit dacoity.' Then I could not speak to him. The gentleman asked the second boy to take this bag (points out bag on Counsel's table) and asked him to place the money in it. The gentleman told the first boy, 'you know every' thing, be very careful. He gave each of us a revolver. I asked the gentleman what I was to do with the revolver. He said 'you will simply have to stand with the revolver in your hand.' I said that I would not be able to use the revolver and refuse to be a party to any act of murder or dacoity. He assured me solemnly that no murder would be committed and I was to stand there merely by way of show. I was then not in a position to argue. On the way, I asked the boys if there would be any murder or assassination. When the gentleman gave me the revolver he pointed out how it was to be used; we then came to the pharmacy near the Sealdah corner. There we engaged a third class Thicca Gharry; the third man gave the driver a rupee saying you will have to go up to Sankaritolla corner. When we came near Sankaritolla corner, the first boy put on a mask. When we came to the Sankaritolla Post Office, the two boys first got out and I followed. The two boys went inside the Post Office. I was standing in courtyard; after a minute or so I heard two sounds like dum dum. I got confused and began to perspire freely and could not see anything, Shortly after that sound I heard cries of Chor Chor. Not finding these men there, I began to run away. I was running very fast but my legs were trembling and could not carry me, for I was followed by a large number of men with great noise. I then drew out my revolver to make a sound; when I pulled the trigger the first time, there was no sound. I then recollected, for the gentleman told me that a portion was to be pulled out first and then the trigger was to be pulled. As soon as I drew out a portion of the pistol a cartridge came out and fell on the ground, when I next attempted to fire a shot to the sky. After going some little distance I fired another shot. When I came to St. James Square, I could not run further and sat down on the ground and threw away the pistol. I was then arrested by three or four men, taken back to the Post Office and handed over to the Police. I heard one witness depose in Court that I fired at

him; I can swear before God that I did not intend to fire at him. If I wanted to kill men I could have done so. I have never in my life assaulted any body or caused any bloodshed. This is my first offence, I will not keep bad company any longer. I throw myself on the mercy of the Court. I was married only three months ago and I pray that I may be saved. The period that I was with these men was only an hour. I am prepared to abide by any sentence that your Lordship metes out. I do not Avish to mention the names of the other men here, but I have already given them to the Police.'

27. It is necessary at this stage to mention an event of an extraordinary character which took place prior to the commencement of the trial at the Sessions. This can be best described in the words of Mr. Justice Page himself as contained in a memorandum prepared by him for his colleagues.

28. 'Two or three days before the hearing B.C. Chatterji and S.K. Sen, Counsel on behalf of the accused, applied to see me in my private room. They then informed me that after careful consideration they were satisfied that there was no defence to the charges and that the accused was guilty. They asked me, if the accused pleaded guilty to murder, whether I would treat him leniently. I told them that I could give them no information as to what I should do at the trial, but if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the accuracy of the witnesses for the Grown, that they were not entitled to set up any substantive defence in opposition to the case for the Crown.'

29. This incident appeared to be so unusual that we considered it desirable to let the Counsel concerned know what had been intimated to us by Mr. Justice Page. Consequently, after the case had been called on and the Standing Counsel had taken the preliminary objection already mentioned, the extract from the memorandum prepared by Mr. Justice Page as set out above was read out in open Court, and Mr. Chatterji, who appeared on behalf of the accused, was asked to consider whether, in view of what was stated, he should conduct the case or whether the accused should have an opportunity of being represented by other Counsel. Mr. Chatterji did not ask for time to enable him to consider the situation, but forthwith made the following statement from his place at the Bar, presumably

without consultation with his colleague Mr. Sen who was not present in Court.

With the greatest respect for His Lordship Mr. Justice Page, I feel bound in duty to state that there must have been a misunderstanding between the learned Judge on the one hand and Mr. S.K. Sen and myself on the other side. We did go to see His Lordship Mr. Justice Page; we went into His Lordship's Chamber and saw him prior to any consultation with the accused, prior to our having seen the accused; and what I remember having said to him along with Mr. Sen was this that we had gone through the brief very carefully ourselves and we thought it was a very difficult case--I am not pretending to give a verbatim report of what I said, but I am giving the sense of what I remember having said--and that if we could feel that a plea of guilty on the part of the accused under Section 394 were acceptable to the Court, subject to what the accused had to say to us in the interview we were going to have with him, we would advise him to plead guilty under Section 394; I would appeal to Mr. Justice Page to remember in this connection; but as far as my recollection serves me, His Lordship Mr. Justice Page told us that in a case like this, he could not accept a plea of guilty on any count lesser than murder, not even on culpable homicide not amounting to murder. After that we saw the accused, and he told us all that he had to say about the facts of the case; and upon full instructions by him, we came to the conclusion that we should be right, in the circumstances of the case, to advise him to plead guilty under Section 394 and that he should be defended on the charge of murder under Section 302. This is the recollection I have of this matter, and it is unfortunate that my learned friend Mr. Sen is not here, because in that case I am sure he would have repeated the same statement as to what happened. There was a misunderstanding between the learned Judge and ourselves with regard to the section, we thought he should be advised to plead guilty. On the other hand, on the instructions received, both Mr. Sen and I and the learned juniors who appeared with us felt very strongly convinced that the accused's case embodied in the instructions he gave us was a true one, that in this case he was not guilty of murder, and that he had not gone inside the Post Office or fired as was represented by the prosecution, and on that basis we defended him. His defence is that he had gone there, but stayed outside, while the other two men had gone inside and fired at the Post Master. It was on that identical basis that we defended him.

30. After Mr. Chatterji had made this statement, the Court adjourned in order to enable him to communicate with the prisoner. He subsequently appeared before the Court and made the following statement:

Pursuant to your Lordship's suggestion; I and my friends appearing with me went to the Alipur Jail accompanied by the Clerk of the Crown and my Attorney. The Attorney spoke to the accused in the presence of the Clerk of the Crown and ourselves, and the accused stated that he wished me to represent him and to argue this case before your Lordships.

31. The case was thereafter argued for five days and the hearing terminated On the 11th September last. At the close of the arguments, Mr. Chatterjee intimated that he would submit a statement signed by himself and Mr. Sen as to what had happened at the interview with Mr. Justice Page. The statement was handed over to the Clerk of the Crown on the next day and was in the following terms:

32. 'We were briefed by Messrs. K.K. Dutt and Co. in this case. We went through our brief independently, and came to the conclusion that the case was a difficult one for the defence.

33. 'We were discussing the different aspects of the case when we came to learn from Mr. A.C. Mukherjee, a fellow member of our Bar, that Mr. Justice Page had in a previous case (Postal Fraud Case) called Mr. Mukherjee and Mr. S.C. Bose, Counsel for the defence and Mr'. A.K. Basu, Counsel for the prosecution, into his Chamber and said to learned Counsal for the defence that without in any way wishing to hold out any inducement, he, the learned Judge, thought that if the accused were to plead guilty to the minor charge, the prosecution should not press the major charge, and ought, in his opinion, to withdraw it. Mr. Basu, we were further told, thereupon asked leave to refer the question to Standing Counsel, and that later, after learned Counsel on both sides had gone into the learned Judge's Chamber and informed him of their agreement on the lines of his suggestion, accused pleaded guilty to the minor charge whereupon the prosecution withdrew the major charge. We were also informed that the prisoner was sentenced leniently as a result of his pleading guilty in the aforesaid manner. Since the learned Judge had done this in a previous case, we thought there would be

nothing wrong in our seeing him in Chamber with regard to the present case with a view to request him that he might deal with our client similarly.

34. 'As neither of us knew Mr. Justice Page well enough, we both went, in the first instance, to another learned Judge of this Court to ascertain his views on the propriety of the course we were contemplating; and the said learned Judge unhesitatingly approved of our going in to see Mr. Justice Page in his Chamber. We may add that we fully explained to this learned Judge the object of our proposed visit to Mr. Justice Page. Accordingly, we went into Mr. Justice Page's Chamber, and told him that, subject to his permission, we should like to speak to him about the case of Barendra Kumar Ghose in which we had been briefed. On the learned Judge nodding his approval, we told him we had not seen our client yet, but had gone through the brief and thought it was a difficult case; and subject to what the client had to say to us, we wished to ascertain from the learned Judge beforehand if he would accept a plea of guilty under Section 394, Indian Penal Code, and be ready thereafter to let the charge under Section 302, Indian Penal Code, be withdrawn against the accused. We reminded the learned Judge of Avhat he had done in the Postal Fraud Case, wheref upon he said that although he had adopted a course like that in the previous case, he could not do so in a case like the present one, that it was a ghastly affair, and that whilst we might be thinking of the poor prisoner in the dock he, the learned Judge, could not but be thinking of the life that was gone-that in this case he could not accept a plea of guilty to anything less than a charge under Section 302, Indian Penal Code, and that not even a plea of guilty to a charge of culpable homicide not amounting to murder would be acceptable to him Before leaving his Chamber we were assured by the learned Judge that in his opinion we had done nothing wrong in speaking to him on behalf of our client in the way we had.

35. (Sd.)--B.C. Chatterji, S.K. Sen.

36. 12th September 1923

37. I have anxiously compared the two statements, viz., the one made by Mr. Chatterji in Court on the 6th September, and the other signed by Mr. Chatterji and Mr. Sen on the 12th September, and I have contrasted them with the passage

in the memorandum prepared by Mr. Justice Page. I regret to place on record my conclusion that I cannot accept the statements made by the learned Counsel as correct in all particulars. I do not wish to extend the application of the well-settled principle that when the Court is called upon to review a case under Clause 26 of the Letters Patent, it will accept as unquestionable the statement of the Trial Judge as to what actually took place before him in Court, as ruled in *Reg. v. Pestonji Dinsha* 10 B.H.C.R. 75 and *Emperor v. Upendra Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 531 (F.B.) on the authority of *Everett v. Yousells* (1833) 4 B. and Ad. 681 : 1 N. and M. 530 : 110 E.R. 612, *Rex v. Grant* (1834) 5 B. and Ad. 1081 : 3 N. and M. 106 : 110 E.R. 1092, *Gibbs v. Pike* (1812) 9 M. and W. 351 : 12 L.J. Ex 257 : 6 Jur. 465 : 152 K.R. 149 : 1 Dowl. (N.S.) 409 : 60 R.R. 749. (24) (1858) *Dears and Bell*: 468 : 7 Cox C.C. 454 and *R. v. Mellor* (1858) *Dears and Bell* 468 7 Cox C.C. 454. The conclusion I have formed is based on the inherent improbability of the version given by the learned Counsel. A plea of guilty in answer to the charge under Section 394 would be of no avail to the prisoner, if he was still to be tried upon the charge of murder with the consequent possibility of capital sentence. The charge under Section 302 could not, at that stage, be withdrawn by the Trial Judge, though, after evidence had been adduced, he might, if satisfied that there was no evidence to go to the Jury, direct the Jury to return a verdict of not guilty. The object of the Counsel, who sought, and secured the interview with the Trial Judge, must have been to bargain with him as to the sentence in respect of, the charge under Section 302, if the prisoner should 'plead guilty to that count. The gravity of their misconduct cannot, in my judgment, be exaggerated. But for what has actually happened, I would have considered it inconceivable that Counsel, who have been engaged to defend a prisoner charged with murder, should proceed to intimate to the Trial Judge that, in their opinion, there was no defence to the charge, or, as they euphemistically express it, that their case was 'difficult;' and should then endeavour to persuade the Judge, before he has heard the evidence, to agree to a particular sentence if the accused should plead guilty. It would be wrong for me to conceal that my surprise is intensified when I find that the Trial Judge who has thus been approached and placed in possession of the view taken of the case by the Counsel for the defence, advises them how the defence should be conducted.

38. On a superficial view of what happened in this case the erroneous assumption may possibly be made that a parallel is furnished by the conduct of Charles Phillips, Counsel for the accused in the celebrated trial of Courvoisier for the murder of Lord William Russell before Tindal, C.J., in 1840. The trial of Courvoisier, which is reported very briefly upon a question of practice only, *R. v. Courvoisier* (1840) 9 Car. and P. 362, is described elaborately in three well-known works; *Celebrated Trials Connected With The Aristocracy*, by Peter Burke, Barrister-at-Law, 1849, pages 461-485 *Modern State Trials* by William Townsend, Queen's Counsel and Recorder of Macclesfield, Volume 1, 1850, pages 244-313, and *Chronicles of Crime* by Camden Phelm, Barrister-at-Law, Volume II, 1886, pages 563-583. The conduct of Charles Phillips, who defended the accused, will be found discussed by Samuel Warren in his *Introduction to Law Study*, Volume I, 1863, pages 389-396, by Serjeant Ballantine in his *Experiences*, Volume I, 1882, Chapter VII, by Serjeant. Robinson in his *Reminiscences*, 1889, Chapter VI, and by Cooley in his *Constitutional Limitations*, 1903, page 478. The statement of Charles Phillips himself is set out in an appendix to the *Essay on Professional Ethics* by George Sharswood, Chief Justice of the Supreme Court of Pennsylvania, first published in 1854 and reprinted as Volume XXXII of the *Reports of the American Bar Association*. The facts are beyond dispute and may be concisely stated.

39. Lord William Russell was found murdered in his bed on the 5th May, 1840. His house was occupied only by himself and three servants, a young Swiss valet by name Courvoisier and two women, a cook and a house maid. Suspicion fell upon Courvoisier, and he was sent up for trial on a charge of murder. His Counsel Charles Phillips went to the trial with a full persuasion of his innocence and conducted the cross-examination of the witnesses closely and zealously, specially of one of the female domestics, with a view to show that there was as much probability that the witness or the other domestic was the culprit, as the prisoner. At the close of the first day's proceedings, the prosecutors were placed unexpectedly in possession of a new and important item of evidence, by the discovery of the plate of the deceased, which had been missed and was found to have been deposited with a lady a week before the murder. The only question remained, whether Courvoisier was the person who had so left it. If he was, it

would increase the probability that it was he, who subsequently committed the murder with the object of plunder. On the morning of the second day of the trial, the person who had made this discovery was shown a number of prisoners in the prison yard; one of these was Courvoisier, whom she instantly recognised as the person who had left the plate with her and had formerly lived in her employ. Courvoisier also suddenly recognised her and was dismayed. The immediate effect of his panic was that, when brought to the Bar of the Court a few minutes afterwards, he spoke privately to his Counsel and confessed his guilt, coupled nevertheless with an expression of his desire to be defended to the utmost. Phillips consulted his junior Clarkson and resolved to abandon the case. His junior remonstrated and suggested that they might take the advice of Baron Parke, who was not trying the cause, upon what he considered to be the professional etiquette under circumstances so embarrassing. They obtained an interview. Baron Parke enquired whether the prisoner insisted on Phillips defending him and on hearing that he did, said that Phillips was bound to use all fair arguments arising on the evidence. This course was considered right, for, in the words of Phillips, 'to have abandoned the prisoner in the midst of the trial would have been virtually surrendering him to death.' I may add that Phillips states explicitly that, as he subsequently learnt from Baron. Parke, the latter did not mention to the Chief Justice what he had learnt from Phillips. The Chief Justice charged the Jury who returned a verdict of guilty and the prisoner was thereupon sentenced to death.

40. The special features which distinguish the case of Courvoisier from that now before the Court may be indicated h'ere: (1) the incident there took place while the trial was in progress; (2) Counsel took action upon confession of guilt by the prisoner himself; (3) Counsel asked for advice from a Judge who was not trying the cause; (4) the Judge so approached did not mention the matter to the Chief Justice who would have to sum up and to pass sentence in the event of conviction and (5) Counsel asked advice upon a matter of professional etiquette only and did not attempt to make a bargain with the Judge upon the question of sentence.

41. The view taken by Baron Parke upon the question of the duty of Counsel for a prisoner when the latter has, in the midst of the trial, confessed to the Counsel that he did commit the offence charged, is in substantial agreement with what was

adopted by the General Council of the Bar in 1915, as appears from the following extract from the Annual Statement for 1915, page 14 :

The Council were asked to advise on the propriety of Counsel defending on a plea of 'Not guilty' a prisoner charged with an offence, capital or otherwise, when the latter has confessed to Counsel himself the fact that he did commit the offence charged. The questions raised were, (1) What is the duty of Counsel under the circumstances? May he, according to modern views defend in such case, and if so ought he to do so? (2) Does the same answer apply where he has already appeared in Court for the prisoner?

42. The Council adopted the following report:

43. 'Different considerations apply to cases in which the confession has been made before the Advocate has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings.

44. 'If the confession has been made before the proceedings have been commenced, it is most undesirable that an Advocate to whom the confession has been made should undertake the defence as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another Advocate.

45. 'Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the Advocate retained for the defence cannot retire from the case without seriously compromising the position of the accused.

46. 'In considering the duty of an Advocate retained to defend a person charged with an offence who in the circumstances mentioned in the last preceding paragraph confesses to Counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind: (1) that every punishable crime is a breach of the Common or Statute Law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether the accused is guilty of the offence charged, never, whether he is innocent; (3) that the

affirmative rests on the prosecution. Upon the clear appreciation of these 'points depends broadly the true conception of the duty of the Advocate for the accused.

47. 'His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

48. 'The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (5) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

49. 'If the duty of the Advocate is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his Counsel is no bar to that Advocate appearing or continuing to appear in his defence, nor indeed does such a confession release the Advocate from his imperative duty to do all he honourably can do for his client.

50. 'But such a confession imposes very strict limitations on the conduct of the defence. An Advocate may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud.

51. 'While, therefore, it would be right to take any objection to the competency of the Court, to the form of an indictment, to the admissibility of any evidence, or to the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence Avhich he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, an Advocate must not (whether by calling the 'accused or otherwise) set up an affirmative case inconsistent with the confession made to him.

52. 'A more difficult question is within what limits, in the case supposed, may an Advocate attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go.

53. 'It must be clearly understood that this report is not intended as anything more than an answer to the specific question submitted. It is based on the assumption that the accused has made a clear confession that he did, 'commit the offence charged,' and does not profess to deal with the very difficult questions which may present themselves to Counsel when a series of inconsistent statements are made to him by the accused before or during the proceedings, nor does it deal with the questions which may arise where statements are made by the accused which point almost irresistibly to the conclusion that the accused is guilty but do not amount to a clear confession. Statements of this kind must hamper the defence, but the questions arising on them are not dealt with here. They can only be answered after careful consideration of the actual circumstances of the particular case.

The above report was submitted to and approved by the then Attorney-General (Sir Edward Carson, K.C.M.P.) and by (Sir Robert B. Finlay, K.C.M.P.).

54. I see no escape from the conclusion that what has happened in this case is not supported either by the advice given by Baron Parke in 1840 or the opinion recorded by the General Council of the Bar in 1915. Counsel who embarked upon such a perilous adventure as to inform the Trial Judge in advance that they were satisfied that the prisoner had no defence to the charges, must have been oblivious of what Baron Bramwell said in *Johnson v. Emerson* (1871) 6 Ex. 329 at p. 367 : 40 L.J. Ex. 201 : 25 L.T.337: 'A man's rights are to be determined by the Court, not by his Attorney or Counsel.... A client is entitled to say to his Counsel, I want your advocacy, not your judgment. I prefer that of the Court.' The same thought was expressed more recently by Lord Halsbury when he observed: 'If an

Advocate were to reject a story because it seemed improbable to him, he would be usurping the office of the Judge, by which I mean the judicial function, whether that function is performed by a single man or by the composite arrangement of Judge and Jury' (Law Notes, 1899). It is significant that this view had appealed equally forcibly to two such divers types of intellect as were represented by Johnson and Erskine (Boswells' Life of Johnson, Volume I and Campbell's Lives of the Lord Chancellors, Volume VIII). I shall not pursue this matter further or examine the vexed question of the duty of an Advocate who has lost faith in the cause he has been engaged to support. This much appears to me to be incontestable that it is not his duty to approach the Trial Judge and to apprise him that in his opinion the man, whose fate has been entrusted to his care, has no defence to make. I venture to add that if, as Trial Judge, I had been placed in such a predicament, I would, without hesitation, have reported the Counsel concerned to the Chief Justice for disciplinary action, and I would have asked to be relieved of the duty of participating in the trial and of passing sentence upon a man whose Counsel had previously assured me that there was no defence to make.

55. Let me now pass on to an examination of the questions specified in the certificate of the Advocate-General.

56. The Advocate-General has certified that whether the direction and the non-direction (as specified by him) amount in law to misdirection, should be further considered by the Court. The direction is alleged to be contained in the three following passages of the summing up:

(a) In this case, if these three persons went to that place with a common intention to rob the Post Master, and if necessary, to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot.

(b) If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob, and if necessary, to kill, and death resulted from their act, if that be so, you are to find a verdict of guilty.

(c) I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied, on the other hand, that the shot was fired

by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty.

57. The non-direction is alleged to consist in the omission of the Trial Judge to draw the attention of the Jury to the defence of the accused, save and except a mere reference to the statement of the accused, recorded under Section 342 of the Criminal Procedure Code. It will be convenient to consider the questions of erroneous direction and non-direction separately.

58. First, as to erroneous direction. The contention has been put forward on behalf of the accused that the direction specified is founded upon an erroneous view of the scope and effect of section 34 of the Indian Penal Code. In support of this argument, reliance has been placed principally upon the judgment of Stephen, J. in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460. In that case, Stephen, J., ruled that Section 34, read according to its own terms without reference to the doctrine of the English Law, applies only where a criminal act is done by several persons of whom the accused charged thereunder is one, and not where the act is done by some person other than the latter. On this basis, Stephen, J., held that where two persons, in furtherance of a common intention of both, fire at another, and one only actually hits and kills him, the other is guilty, not of murder under Section 302 read with Section 34, but of attempt to murder; these offences do not constitute the same act. Stephen, J., conceded that a wider construction had been placed on Section 34 in *Queen-Empress v. Mahabir Tiwari* 21 A. 283; A. W. N. (1899) 76 : 9 Ind. Dec. (N.s.) 876 and as will presently appear, there has been much divergence of judicial opinion on the subject. In my judgment, the question of the true construction and correct application of Section 34 is beset with graver difficulties than appear at first sight, and as I have arrived at a conclusion contrary to the opinion maintained by Stephen, J., who had made a profound study of Criminal Law, both Indian and English, it is only fair that his views should be stated in his own words. The exposition of these views, concisely set out in his judgment in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460 was amplified and re-stated by him in the following extract from a letter published by him in the *Calcutta Weekly Notices*, Volume XVIII, page 222 (ccxxii) short-notes:

59. 'The case made by the prosecution which had to be put before the Jury may, for present purposes, be presented in the familiar style of an illustration thus: A and B set out to murder G. Both fire pistols at him. A hits him and kills him. B misses him.' Does B's act come under Section 34? That section runs--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 the act were done by him alone.' I held that as the act in question was the killing of G and as that was represented as having been done by A alone the section did not apply to the case. I am not now concerned to consider the merits of this decision from a legal point of view, but I believe that it is contrary to the view of the section generally held by the profession hitherto, and it is certainly opposed to the statement of its meaning contained in Mr. Mayne's note thereon in his well-known work. The note is as follows: 'When several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is being committed, and ignorant of what is actually being done.' For reasons that I need not repeat I think that this is wrong; but I believe that I have discovered the source of the error, and if I am right it is a curious example of the difficulty that attends the application of English Law to India, even in the form of a most carefully prepared Code.

60. 'What I believe has happened is that the old English Law as to parties to the commission of an offence has proved too strong for the purifying effect of the Penal Code; and that its complexity has proved so attractive to the most learned of our commentators, and I may add to our highest judicial officers, that they have read a perfectly simple enactment in a highly artificial way in order to retain at least a flavour of it.

61. 'I will, therefore, state as shortly as may be what I understand the English Law to be, and then consider how the Indian Legislature adapted it to India.

62. 'Taking Russell on Crimes, Chapter V, and Stephen's Digest, Chapter IV, as my authority, the English Law put very shortly is as follows :

63. 'A principal in the first degree is the man who commits the crime with his own hands. A principal in the second degree is one who is present aiding and abetting; and (here comes in Mr. Mayne's explanation of Section 34) he may be present though he is not really there, but only thereabouts watching for intruders or standing ready to assist.

64. 'An accessory before the fact is a man who procures, etc., or abets another to commit or in committing a crime, but is not there or thereabouts when it is committed.

65. 'An accessory after the fact is a man who helps the criminal to escape; he completes the group, but otherwise it is unnecessary to consider him for present purposes.

66. 'I omit any consideration of the non-application of these rules to misdemeanours or treason; but a glance at the cases in Russell (and their number might be indefinitely increased) will show how little our predecessors were open to the reproach of neglecting any technical points that possibly would be available for the defence of prisoners.

67. 'Such was the English Law before 1861. But in that year the inconvenience of those clumsy distinctions that had slowly grown up since the time of Hale--it is curious how many inconveniences the English Criminal Law owes to his age, if not to him--was clearly recognised, and advantage was taken of the framing of the Consolidation Acts of that year to correct it. The correction contained in the Accessories and Abettors Act, 24 and 25 Vict., c. 241, is characteristic of English legislation in such matters as it abolishes the distinction and leaves the difference. It consists of an enactment to the effect that accessories before the fact, principals in the second degree and principals in the first degree are each considered as having committed the crime, and may be tried as if they had committed it. (Stephen, Article 45).

68. 'How did the Indian Legislature deal with this position? The Penal Code was after much consideration, finally passed on the 6th October, 1860. The English Accessories and Abettors Act was also, after prolonged investigations, passed in

the following August. The two are, no doubt, closely connected, though I am not able at the moment to trace the connection. In 1846, however, we find the Commissioners who were preparing the Penal Code studying the labours of a commission then performing similar work in England, and evolving in paragraph (8) of their report a rudimentary edition of our Section 34. That paragraph clearly shows that they saw that the distinction between degrees of Principals must be abolished, and in the following paragraphs they consider various difficulties which, no doubt, led them, or rather their successors, to their very short but sufficient method of dealing with Abettors. Ultimately in paragraph 662 to their postscript they are naturally pleased to find that the English Commissioners in dealing with Principals and the punishment of Accessories, propose to follow the same course that has recommended itself to them. These considerations lead me to suppose that the framers of the Penal Code, as we have it, meant to do what I think they in fact did, namely, to distinguish between a man who does a thing--the credit of the simplicity of the phrase is theirs--and the man who abets him, making the latter, however, punishable as though he were the former, and Chapter V of the Code is the result.

69. 'What then, it will be asked, is the use of Section 34? The answer is to be found in Section 3 of the Code of 1837, Macaulay's Criminal Code, and the Illustrations thereto. The section is practically the same as our Section 34, though it is more obscurely expressed. The Illustrations are shortly (1) A digs a pit intending to cause some one's death. B covers it with turf with the same intention. Z falls in and is killed. Both A and B have committed culpable homicide. (2) A and B are gaolers having charge of Z ultimately. They both omit to furnish Z with food, intending to cause his death. Z dies of hunger. Both A and B have committed culpable homicide. The language of the section has been changed, and the illustrations have been dropped; but I believe the law is as Macaulay planned it. That is, the man who does a thing is principal, and one who puts him on or helps him to do it, is an abettor whether he is present or not; and there are no other parties.

70. 'But there remains another little puzzle, and that is Section 114. I need not set out its terms. But what I suspect is that the Commissioners could not help

preparing a little resting place for the ghost, they were laying. What they had in their minds was that a principal in the second degree really differed from an abettor, and must be provided for; they, therefore, intended to say that whereas an abettor was to be punished as if he had done the thing (the phrase will bear repetition); if he was present he was to be deemed to have done it, which, after all, was and is English Law. Practically I cannot see that this makes any difference, as the punishment for the thing is all that need be considered.

71. 'If, therefore, the section said what I think it was intended to say, I should think it superfluous. But it in fact says something else, and when the abetting consists in attempting to do what another man did, which is a most effective method of aiding, the section does not apply, because I think it must be impossible to attempt to do a thing if you are not there. The result is that it will often apply, as it did in my case, to charges which are of no importance in comparison to the abetting. The distinction between Sections 109 and 114 really depends on the difference between being punished as if you had done a thing, and being deemed to have done it, which seems to me merely inconvenient.

72. 'I should, therefore, be glad to see Section 114 repealed. But at the same time the principle laid down in Mr. Mayne's note seems to me quite a sound one and I should like to see Section 114 replaced by an enactment that where several persons take part in the execution of a common criminal purpose, each is to be deemed to have committed every offence committed by any one of them in execution of the purpose. This is the English Law according to Stephen's Digest, Article 30, and we are, of course, familiar with the principle in Section 149. The ground of such an enactment may be covered by Sections 107, 109, in fact I think it usually would be. But some such enactment would make the matter perfectly plain.'

73. It may be observed that the historical investigation undertaken by Stephen, J. in his judgment in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460 and reproduced in the letter quoted above, if at all allowable, does not go far enough. No reference is made to the principles which regulated the liability of principals and accessories at the time of the introduction of

the Indian Penal Code. A very useful historical summary will be found in the well-known Digest of Criminal Law by F.L. Beaufort, 1857, Volume I, pages 40-47 where reference is made to Reg. 53 of 1803, Section 4, the Hedaya, Volume II, pp. 30, 104, 133, Volume IV, p. 302 and decisions of the Nizamat A.dalaut; these took a very stringent view of the liability of joint actors. But such a historical survey is not permissible in the interpretation of Section 34. Such reference to the history of legislation can only be legitimately made, as was done by the Judicial Committee in Maharajah Ishuree Persad Narain Sing v. Lal Chutterput Sing 3 M.I.A. 100 at p. 130 : 1 Sar. P.C.J. 245 : 18 E.R. 435 and Brown v. McLaehlan (1872) 4 P.C. 543 at p. 550 : 9 Moo. P.C. (N.S.) 384 : 42 L.J.P.C. 18 : 21 W.R. 277 : 17 E.R. 559, when reasonable doubt is entertained as to the true construction of a Statute. The operation may, however, be easily carried too far, and may, in the case of codifying Statutes, lead to results which have been emphatically condemned in decisions of the highest authority; see, for instance, the observations of Lord Herschell in Bank of England, v. Vagliano (1891) App. Cas. 107 at p. 144 : 60 L.J.Q.B. 145 : 64 L.T. 353 : 39 W.R. 657 : 55 J.P.676, of Lord Watson in Robinson v. Canadian Pacific Railway Co. (1892) App. Cas. 481 at p. 487 : 61 L.J.P.C. 79 : 67 L.T. 505 and of Lord Macnaghten in Narendra, Nath v. Kamal Basini 23 I.A. 18 : 23 C. 563 : 6 Sar. P.C.J. 667 : 6 M.L.J. 71 : 12 Ind. Dec. (N.S.) 374 (P.C.). (33) 35 C. 34 at p. 55 : 6 C.L.J. 273 (F.B.). The proper course is, in the first instance, to examine the language of the Statute, to interpret it, to ask what is its natural meaning, uninfluenced by considerations derived from the previous state of the law. To begin with an examination of the previous state of the law on the point, is to attack the problem at the wrong end; and it is a grave error to force upon the plain language of the section of an Indian Statute an interpretation which the words will not bear, on the assumption of a supposed policy on the part of the Legislature to adopt or to vary, as the case may be, the rules of the English Law on the subject; see the decisions of the Full Bench in Kirpa Sindhu v. Annada Sundari 35 C. 34 at p. 55 : 6 C.L.J. 273 (F.B.) and Satis Chandra v. Ram Dayal 59 Ind. Cas. 143 : 48 C. 388 : 32 C.L. J 94 : 24 C.W.N. 982 : 22 Or. L.J. 31 (S. B); see also Baleshwar Bagarti v. Bhagarathi Das 35 C. 701 at p. 711 : 7 C.L.J. 563 : 12 C.W.N. 657. We must consequently examine, in the first instance, the terms of Section 34.

74. In the Indian Penal Code, as enacted in 1860, Section 34 was expressed in the following terms :

When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if it were done by him alone.

75. In 1870 the section was amended by the insertion of the expression, 'in furtherance of the common intention of all' after the word 'persons' and before the word 'each.' We have it on the authority of Mr. J.F. Stephen, who was Law Member of the Council of the Governor-General at the time, that the amendment was made 'so as to make the object of the section clear.' It is immaterial whether the amendment was suggested by the judgment of Sir Barnes Peacock, C.J., in *Queen v. Gora Chand Gope* 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177. (12) 6 W.R. 83 Cr as was assumed by Mahmood, J., in *Empress v. Dharam Rai A.W.N.* (1887) 236 at p. 237 or by the judgment of Sir James Colvile in *Ganesh Singh v. Ram Raja* 3 B.L.R. 44 (P.C.); 12 W.R. 38 (P.C.). It is sufficient for our present purpose to note that the section is now expressed in the following terms :

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.

76. This section does not create a new offence; it uses the expression 'criminal act' and formulates a principle of liability. Section 32 shows that act includes an illegal omission save where the contrary appears from the context. Section 33 shows that the word 'act' includes a series of acts and the word 'omission' includes a series of omissions. Section 34 shows that when a criminal act is done by several persons, each is liable as if he did it alone, provided the act is done in furtherance of the common intention of all. Section 35 shows that when an act, criminal only in respect of knowledge or intention, is done by several persons, each person, joining With criminal knowledge or intention, is liable as if he had done it alone with that knowledge or intention. Section 36 shows that when an offence is the effect partly of an act or partly of an omission, it is one offence only. Section 37 shows that when an offence is committed by several acts, each person intentionally committing one of those acts singly or jointly with others, commits the

offence. Section 38 shows that persons jointly engaged in a criminal act may be guilty of different offences. To justify the application of Section 34, it is, consequently, necessary to prove what may be briefly described as a common act and a common intention. The real difficulty emerges when we are called upon to decide, on the concrete facts of a given case, whether the criminal act can be said to have been done by several persons; in other words, what is it that is involved in the expression 'a criminal act is done' when there is more than one person who has contributed to the result. I am persuaded that it is not possible to frame a universal formula which will comprehend all imaginable combinations of circumstances.

77. Reference has been made to opinions of commentators which, in some instances at least, do not go to the root of the matter. The commentary on the Indian Penal Code by Mr. W. Morgan and Mr. A.G. Macpherson may be mentioned as an illustration, though their opinion, so far as it goes, is entitled to the highest respect. Mr. Morgan was clerk to the Legislative Council and assisted Sir Barnes Peacock when the Bill, which was subsequently enacted as the Indian Penal Code, was put into its final form; he was one of the Judges of this Court till he was appointed the first Chief Justice of the Agra High Court. Mr. Macpherson also was for many years a Judge of this Court. The only observation which they have to offer on Section 34 is that 'the actual doers, who are the persons referred to here, are to be distinguished from those who abet the doing of a thing,' they then add that the law concerning principle actors is contained in Sections 34, 35 and 37, while what constitutes an abetment is explained in Chapter V. The question however, remains who are the persons who may, in a particular case, be rightly regarded as the actual doers.

78. Mr. Mayne in the notes on Section 34, in his edition of the Indian Penal Code, quotes with approval the following passage from Section 439 of the Commentaries on the Criminal Law (1856), by Joel Prentiss Bishop, an American Jurist of high repute :

79. 'The true view is doubtless as follows: Every man is responsible criminally for what of wrong flows directly from his corrupt intentions; but no man, intending

wrong, is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person, the former is criminally guilty for its results. If, he contemplated the result, he is answerable though, it is produced in a manner he did not contemplate. If he did not contemplate the result in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what might be presumed to have been his understanding of them, he is responsible. But, if the wrong done was a fresh and independent wrong springing wholly from the mind of the doer, the other is not criminal therein, merely, because, when it was done, he was intending to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules.'

80. This exposition is reproduced by Bishop, with slight variations, in the latest edition of his great work (New Commentaries, 1892, Volume I, Chapter XLV, Section 641). Mr. Mayne, adhered to this view in his work on the Criminal Law of India. (Fourth Edition, 1914, page 238) where the following statement occurs: 'Where several persons unite, with a common purpose, to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually done.' This is manifestly based on the assumption that, in certain circumstances at least, all who assist in the accomplishment of a common purpose to do a criminal act may be deemed to have 'done that act' within the meaning of Section 34. This view of Section 34 does not necessarily render Section 149 superfluous as was urged on behalf of the prisoner. Section 34 speaks of 'common intention' while Section 149 refers to 'common object'. Besides this, Section 149 comes into operation only when there is an unlawful assembly of five or more persons as required by Section 141, and in that event it has a wider scope than Section 34. In this connection reference may be made to the judgment of Field, J., in *Empress v. Jhubboo Mahton* S.C. 739 : 12 C.L.R. 233 : 6 Ind. Jur. 639 : 4 Ind. Dec. (N.S.) 477 where the recondite problem is considered, whether a prisoner, who is constructively guilty of murder under Section 34 can be said to have committed the offence of murder within the meaning of Section 149 so as to

make other prisoners guilty by a double construction.

81. A similar view is indicated by Sir Michael Foster in his Discourse on Crown Law, 1809, page 350:

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

82. Sir Michael Foster adds in a later passage (page 351) that 'in combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law and of sound reason too, as given by every individual present and abetting; the person actually giving the stroke is no more than the hand or instrument by which the others strike,' or, as he phrases it later on, 'the stroke of one is, in consideration of law, the stroke of all'; see Pleas of Crown by Hale, Volume I, pages 437, 463; Volume II, pages 344, 345; Pleas of the Crown by Hawkins, Volume II, Chapter 29, Sections 21, 22; Pleas of the Crown by East, Volume I, page 70. The theory which 'underlies this view is that if one has the criminal intent and another does the criminal act, the intent not contributing to the act, not strengthening it, and not in any way influencing it, there is in the former person no crime; but it is otherwise if there is a unity of intent and act.

83. The subject, as is fairly clear, is by no means free from difficulty and the principle is analysed with great acute-ness by Collett in his Comments on the Indian Penal Code, 1889, pages 2-5. He sums up his conclusion concisely in the statement 'that community of criminal intention determines the community of liability in every instance of accession at the fact,' In illustration, he refers to the two contrasted cases, 'viz., the Sissinghurst House case (1673) 1 Hale P.C. 462,

where an assistant of a constable was killed by some members of a riotous assembly and *R. v. Sarum* (1697) Foster 393, where three soldiers went together to rob an orchard. As instances of cases where the question is as to what constitutes community of action, he refers to the decisions in *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M.C. 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox C.C. 494 : 45 J.P. 270, where three soldiers went to practise firing with rifle, *Reg. v. Coney* (1882) 8 Q.B.D. 531 : 51 L.J.M.C. 66 16 L.T. 307 : 30 W.R. 678 : 15 Cox C.C. 46 : 46 J.P. 404, where a crowd assembled to witness a prize fight, *Queen v. Sabed Ali* 11 B.L.R. 347 : 20 W.R. 5 Cr., where, in an attempt to eject a man from land, a gun was fired which caused the death of one of the party resisting, and *Empress v. Jhubboo Mahton* S.C. 739 : 12 C.L.R. 233 : 6 Ind. Jur. 639 : 4 Ind. Dec. (N.S.) 477, where the nature of the wounds inflicted by different assailants on different parts of the body of the deceased could be ascertained. The divergence of opinion expressed in some of these cases, specially in *Reg. v. Coney* (1882) 8 Q.B.D. 534 : 51 L.J.M.C. 66 : 46 L.T. 307 : 30 W.R. 678 : 15 Cox C.C. 46 : 46 J.P. 404, forcibly illustrates the difficulty inseparable from the application of a general principle like that embodied in Section 34 to the circumstances of an individual case. This is fully realised when the cases to be found in our Reports are closely examined. In this connection, we may usefully recall the weighty observations of Lord Halsbury in *Quinn v. Leathern* (1901) App. Cas. 495 at p. 506 : 70 L.J.P.C. 76 : 65 J.P. 708 : 50 W.R. 139 : 85 L.T. 289 : 17 T.L.R. 749, and of Lord Haldane in *Kreglinger v. New Patagonia Meat and Cold Storage Co.* (1914) App. Cas. 25 at p. 40 : 83 L.J. Ch, 79 : 109 L.T. 802 : 58 S.J. 97 : 30 T.L.R. 114, as to the misuse of judicial precedents. The language of a judicial pronouncement must be understood as spoken in reference to the facts under consideration and limited in meaning by those facts; the generality of the expression which may be found there is not intended to be an exposition of the whole law, but is governed and qualified by the particular facts of the case in which such expressions are to be found. It follows as a corollary that a case is only an authority for what it actually decides and cannot be quoted for a proposition that may seem logically to follow from it.

84. The earliest cases in this Court, such as *Queen v. Jan Mahomed* 1 W.R. 49 Cr. (46) 2 W.R. 39 Cr. (47) 21 W.R. 5 Cr. and *Queen v. Ruchee* 2 W.R. 39 Cr., do not examine the principle, but assume that when two persons take an active part

in a murder, they become principals in the first degree, though one of them only may have been the actual killer. This was apparently the opinion of Sir Barnes Peacock, C.J., as indicated in the case of *Queen v. Gora Chand* 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177, where he stated that if several persons go out together for the purpose of apprehending a man and taking him to the Police Station on a charge of theft, and some of the party in the presence of the others beat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design. On the other hand, all who are present do not necessarily assist by their presence every act that is done in their presence. Markby, J., took a similar view in *Queen v. Hyder Jolaha* 6 W.R. 83 Cr, when he stated that if a master accompanies a servant, knowing the latter's intention to commit murder and is present at the commission of the murder, although he struck no blow, still he is guilty as a principal; the reasonable presumption was that both were acting with a common intent. Markby, J., adhered to this view when in *Queen v. Mahomed Asger* 23 W.R. 11 Cr. he reiterated that if a blow is struck by A in the presence of and by the order of B, both are principals in the transaction. He added that where two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was. The same view was emphasised by him in *Queen v. Gour Chunder Das* 24 W.R. 5 Cr., where he ruled that if each of several persons is proved to have taken part in beating a man so as to break his ribs and cause his death, each is guilty, as a principal, of the murder of the deceased. The next case in this Court which deserves special mention is that of *Queen Empress v. O'Hara* 17 C. 642 : 8 Ind. Dec. (N.S.) 967 (F.B.) which was tried by Norris, J., and a Special Jury, and led to a review under Clause 26 of the Letters Patent. One of the instructions given by Norris, J., to the Jury was that if two shots were fired by two men and both men fired at the deceased with the intent to kill him, and it was not proved who fired the shot which produced the fatal effect, both were guilty of murder. It is significant that Norris, J., when at the Bar, had acted as Counsel for the prosecution in *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M. C 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox. C.C. 494 : 45 J.P. 270, the

decision wherein would support the instruction in question. The Advocate-General certified that the instruction did require further consideration. But the point was left undecided, as the conviction was ultimately set aside on the ground that it had been based on the uncorroborated testimony of an accomplice. There is, however, a long catena of later cases which contain expressions of opinion--some of them obiter dicta--which militate against the restricted interpretation placed by Stephen, J., on Section 34. Amongst these decisions may be mentioned *Sri Prosad v. Empress* 4 C.W.N.193 at p. 196, *Keshwar Lal v. Giris Chandra* 29 C. 496, *Nabiran Chandra, Roy v. King-Emperor* 11 C.W.N. 1085 at p. 1089 : 6 Cr. L.J. 304, *Khudiram Bose v. Emperor* 3 Ind. Cas. 625 : 9 C.L.J. 55 : 10 Cr. L.J. 325, *Gouridas Namasudra v. Emperor* 2 Ind. Cas. 841 : 36 C. 659 : 13 C.W.N 680 : 10 Cr. L.J. 186, *Emperor v. Morgan* 1 Ind. Cas. 814 : 36 C. 302 : 13 C.W.N. 362 : 9 C.L.J. 204 : 9 Cr. L.J. 393, *Jhakri Chamar v. Emperor* 17 Ind, Cas. 1001 : 16 C.L.J. 440 : 13 Cr. L.J. 905, *Reazuddi v. Emperor* 15 Ind. Cas. 646 : 16 C.W.N. 1077 : 13 Cr. L.J. 502, *Jamiruddi Biswas v. Emperor* 16 Ind. Cas. 523 : 16 C.W.N. 909 : 13 Cr.L.J. 715, *Manindra Chandra Ghose v. Emperor* 23 Ind. Cas.1002 : 41 C. 754:18 C.W.N. 580 : 15 Cr, L.J. 402, *Emperor v. Nogendra Nath Sen Gupta* 30 Ind. Cas.128 : 21 C.L.J. 396 : 19 C.W.N. 923 : 16 Cr. L.J.576 and *In the matter of Faezulla* 61 Ind. Cas. 522 : 25 C.W.N.24 : 22 Cr. L.J. 394. In some of these cases, the Court declined to apply Section 34, not because the act could not be said to have been done by several persons, but because there was no proof that it had been done in furtherance of the common intention; these cases furnish a clear indication that the Court would have applied Section 34 if a common intention had been proved. In, one of these cases *Emperor v. Morgan* 1 Ind. Cas. 814 : 36 C. 302 : 13 C.W.N. 362 : 9 C.L.J. 204 : 9 Cr. L.J. 393, the Court expressly relied upon the decision in *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M. C 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox. C.C. 494 : 45 J.P. 270. The bullet which killed the deceased was fired by one or other of the accused, but it was impossible to say which of them had fired it; the Court expressed the opinion that the rule laid down in *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M. C 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox. C.C. 494 : 45 J.P. 270 might be applied. In another case, *Amrita Lal Bose.v. The Corporation of Calcutta* 42 Ind. Cas. 305 : 44 C. 1025 : 26 C.L.J. 215 : 21 C.W.N. 1016 : 18 Cr. L.J. 945, the question was examined from first principles, from a

different standpoint and irrespective of the provisions of Section 34, and it was ruled that as a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone, and consequently each must be separately punished. On the other hand, the decision of Stephen, J., in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460 was followed without question in *Emperor v. Profulla Kumar Mazumdar* 74 Ind. Cas. 267 : 50 C. 41 at p. 47; (1923) A.I.R. (C.) 453 : 24 Cr. L.J. 763. There is thus a preponderance of authority in this Court against the limited construction of Section 34 which found favour with Stephen, J., in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460.

85. A similar divergence of judicial opinion is traceable through the decisions pronounced by the Allahabad High Court: *Empress v. Dharam Rai* A.W.N. (1887) 236 at p. 237, *Queen-Empress v. Mahabir Tiwari* 21 A. 263; A.W.N. (1899) 76 : 9 Ind. Dec. (N.S.)876, *Queen-Empress v. Senta* A.W.N. (1899) 186 : 28 A. 404n, *Emperor v. Nageshwar* 28 A. 404; A.W.N. (1908) 61 : 3 Cr. L.J. 322, *Emperor v. Bhola Singh* 29 A. 282; A.W.N. (1907) 51;4 A.L.J. 207 : 5 Cr. L.J. 130, *Dhian Singh v. Emperor* 14 Ind. Cas. 649 : 9 A.L.J. 180 : 13 Cr. L.J. 265, *Emperor v. Kanhai* 21 Ind. Cas. 657 : 35 A. 329 : 11 A.L.J. 752 : 14 Cr. L.J. 609, *Emperor v. Ram Nawaz* 21 Ind. Cas. 663 : 35 A. 506 : 11 A.L.J. 804 : 14 Cr. L.J. 615, *Emperor v. Hanuman* 21 Ind. Cas. 1005 : 35 A. 560 : 11 A.L.J. 926 : 14 Cr. L.J. 685, *Ghandan Singh v. Emperor* 43 Ind. Cas. 438 : 40 A. 103 : 16 A.L.J. 11 : 19 Cr. L.J. 150, *Emperor v. Gulab* 47 Ind. Cas. 805 : 40 A. 686 : 16 A.L.J. 731 : 19 Cr. L.J. 953 and *Bhagwana v. Emperor* 17 A.L.J. 1095. How the pendulum has swung will be appreciated when we mention that *Queen-Empress v. Mahabir Tiwari* 21 A. 263; A.W.N. (1899) 76 : 9 Ind. Dec. (N.S.)876 which was pressed upon the attention of Stephen, J., in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460, was dissented from in *Queen-Empress v. Senta* A.W.N. (1899) 186 : 28 A. 404n and *Emperor v. Nageshwar* 28 A. 404; A.W.N. (1906) 61;3 Cr. L.J. 322, while *Dhian Singh v. Emperor* 14 Ind. Cas. 649 : 9 A.L.J. 180 : 13 Cr. L.J. 265 was questioned in *Emperor v. Ram Newaz* 21 Ind. Cas. 663 : 35 A. 506 : 11 A.L.J. 804 : 14 Cr. L.J. 615, *Emperor v. Hanuman* 21 Ind. Cas. 1005 : 35 A. 560 : 11 A.L.J. 926 : 14 Cr. L.J. 685, *Jafar v. Emperor* 36

Ind. Cas. 577 : 14 A.L.J. 789 : 17 Cr. L.J. 529, Karan v. Emperor 36 Ind. Cas. 580 : 14 A.L.J. 792 : 17 Cr. L.J. 534, Emperor v. Gulab 47 Ind. Cas. 805 : 40 A. 686 : 16 A.L.J. 731 : 19 Cr. L.J. 953 and Abdul Karim v. Emperor 58 Ind. Cas. 158 : 21 Cr. L.J.734.

86. In the Madras High Court what may be called the liberal interpretation of Section 34, is supported by the high authority of Subrahmaniania Iyer, J., in Queen-Empress v. Raru Nayar 19 M. 482 : 2 Weir 745 : 6 Ind. Dec. (N.S.) 1041 and Queen-Empress v. Duma Baid 19 M. 483 : 1 Weir 29 and 298 : 6 Ind. Dec. (N.S.) 1042. But a discordant note has been recently sounded by the decision in Aydroos v. Emperor 72 Ind. Cas. 360; (1922) M.W.N. 800 : 17 L.W. 21 : 1923) A.J.R. (M.) 187 : 24 Cr. L.J. 360, where it was ruled that to justify the application of section. 34, evidence of some distinct act by the accused which can be regarded as part of the criminal act in question is required; see also In re Thornotti Madathil 1 Weir 495.

87. In the Bombay High Court, Westropp, C.J. in Imperatrix v. Pitambar jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469 apparently inclined to the view contrary to that adopted by Stephen, J. The later decisions in Queen-Empress v. Maganlal 14 B. 115 : 7 Ind. Dec. (N.S.) 535, Subbappa Channappav. Emperor 19 Ind. Cas. 331 : 15 Bom. L.R. 303 : 14 Cr. L.J. 235, Emperor v. Chottalal Babar 14 Ind. Cas. 970 : 36 B. 524 : 14 Bom. L.R. 147 : 13 Cr. L.J. 426 and Emperor v. Hari Bijal 31 Ind. Cas. 345 : 17 Bom. L.R. 906 : 16 Cr. L.J. 745 cannot be claimed as decisive authorities in support of either of the conflicting views.

88. In Lahore, there has been a similar diversity of judicial opinion. But it is worthy of note that two of the latest cases, viz., Harnam Singh v. Emperor 52 Ind. Cas. 395 : 21 P.R. 1919 Cr. 20 Cr. L.J. 635, decided by Chevis and Raoof, J.J., and Bahal Singh v. Emperor 52 Ind. Cas. 791 : 24 P.R. 1919 Cr. 20 Cr. L.J. 711, decided by Rattigan, C.J., and Raoof, J., lend strong support to the opinion expressed by Stephen, J. A different note was, perhaps, sounded in Raja v. Emperor 50 Ind. Cas. 977 : 18 P.L.R. 1919 : 20 Cr. L.J. 369 and Dangarkhan v. Emperor 68 Ind. Cas. 817 : 23 Cr. L.J. 593; (1923) A.I.R. (L.) 104 : 5 L.L.J. 224, where Grown v. Mohna 16 P.R. 1901 Cr., and Queen-Empress v. Mahabir Tiwari

21 A. 263; A.W.N. (1899) 76 : 9 Ind. Dec. (N.S.)876 were followed, while the decision in Allaha Ditta v. Emperor 81 Ind. Cas. 35 : 4 L.L.J. 276; (1922) A.I.R. (L.) 260 : 25 Cr. L.J. 547 really presents no difficulty on its special facts.

89. In Patna, a similar difference of attitude is traceable through the decisions. In Lachho Singh v. Emperor 38 Ind. Cas. 766 : 18 Cr. L.J. 382, four persons formed themselves into a body with the common object, of beating the complainant, and while two of them assaulted him, the other two stood by, armed with lathis, ready to take part, if necessary; it was ruled that the latter two were equally guilty, with the others, of an offence under Section 323, Indian Penal Code. The later decisions in Ritbaran Singh v. Emperor 46 Ind. Cas. 709 : 19 Cr. L.J. 789 : 4 P.L.W. 120 and Sat-rughan v. Emperor 50 Ind. Cas. 337 : 20 Cr. L.J. 289, however, indicate a distinct reluctance on the part of the Court to push the application of Section 34.

90. What irreconcilable difference of opinion is possible in this class of cases is illustrated by the decision in Emperor v. Mahabir 19 Ind. Cas. 497 : 16 O.C. 19 : 14 Cr. L.J. 241, where two of the Judicial Commissioners (Rafique and Kanahia Lal) took a limited view of the scope of Section 34, while the third (Lindsay) adopted a liberal construction, in the application of the principle to a fairly simple state of facts. Reference may also be made to Imperator v. Vahial 15 Ind. Cas. 810 : 5 S.L.R. 247 : 13 Cr. L.J. 538, where the two Judicial Commissioners (Pratt and Fawcett) followed Gouridas Namasudra v. Emperor 2 Ind. Cas. 841 : 36 C. 659 : 13 C.W.N. 680 : 10 Cr. L.J. 186; there A had struck B with a hatchet; B fell down whereupon G hit B and B subsequently died. The Court declined to apply Section 34 on the ground that it was not a necessary inference that C had a common intention with A to kill B. Reference may also be made to King-Emperor v. Kata Nanji 1 Cr. L.J. 920, decided in the Chief Court of Criminal Justice in Kathiawar.

91. The Courts in Burma have been faced, from time to time, with the question of the application of Section 34 to a variety of circumstances, and as might be anticipated the pronouncements are by no means easy to reconcile. Amongst recent cases may be mentioned Nga Po Sein v. King-Emperor 1 L.B.R. 233, King-Emperor v. Pha Laung 3 L.B.R. 264 : 5 Cr. L.J. 414, Nga Tun Ba v. King-Emperor

11 Bur. L.R. 234 : 7 Cr. L.J. 205, Tha My a v. Emperor 4 L.B.R. 271 : 8 Cr. L.J. 472, Emperor v. Cook 23 Ind. Cas. 195 : 7 Bur. L.T. 187 : 15 Cr. L.J. 243 : 7 L.B.R. 319, Nga Ba E v. Emperor 24 Ind. Cas. 572 : 15 Cr. L.J. 484, Nga Shwe On v. Emperor 57 Ind. Cas. 918 : 13 Bur. L.T. 47 : 10 L.B.R. 117 : 21 Cr. L.J. 678, Po Ya v. Emperor 58 Ind. Cas. 525 : 13 Bur. L.T. 44 : 2.1 Cr. L.J. 797 : 10 L.B.R. 99 and Po Myaing v. Emperor 62 Ind. Cas. 835 : 10 L.B.R. 239 : 13 Bur. L.T. 158 : 22 Cr. L.J. 593, while amongst the earlier decisions, the most noteworthy are Maung U v. Queen-Empress L.B.R. (1893-1900), 112 and Hakim Ali v. Queen-Empress L.B.R. (1893-1900) 150.

92. This analysis of the course of decisions in the different Courts which administer criminal justice according to the Indian Penal Code discloses a deep-seated divergence of judicial opinion as to the true interpretation of Section 34. The apparent simplicity of the language of the section is delusive, as it furnishes no test to determine when a particular criminal act may be said to have been done by several persons 'and the consequence has been that the Courts have sometimes, in their reluctance to apply the section to the facts of the case before them, come to the conclusion that the criminal act was not proved with certainty to have been done in furtherance of the common intention of all. In my judgment, the exposition given by Stephen, J. places too narrow an interpretation: upon Section 34, and that the question whether a particular criminal act may be properly held to have been 'done by several persons' within the meaning of the section cannot be answered regardless of the facts of, the case. To show that the problem may require, solution in the most diverse circumstances imaginable, we may refer to Breese v. State (1861) 12 Ohio 146 : 80 Am. Dec. 840. In that case the accused had agreed with others to commit a burglary in a store house at night. As a part of the said agreement and to facilitate the breaking and entry and to lessen the chances of detection, it was agreed that the accused should on that night decoy the owner away from the store where he usually slept, to a music party about a mile distant, and detain him there, while the other confederates were to break and enter the store and remove the goods. The parties did, in fact, perform their respective parts of the agreement, and the burglary was successfully committed. The Supreme Court held that the accused was constructively present at the breaking and entry by his confederates and could be convicted as principal

therein. Peck, J., referred to the decision in *R. v. Standley* (1816) Russell and Ryan 305, as an authority for the proposition that if several persons act in concert to steal a man's goods and he is induced by fraud to trust one of them in the presence of the others with the possession of such goods and another of them entices him away, in order that the man who has the goods may carry them off, all are guilty of felony. Reliance was also placed on *Hess v. State* (1831) 5 Ohio 12 : 22 Am. Dec. 767, where it had been ruled that if 'several' unite in common design to do some unlawful act and each takes the part assigned to him, though all are not actually present, yet all are present in the eye of the law. It was observed that the part assigned by the agreement to the accused, namely, a constant supervision over the owner, while the burglary was effected, formed an essential part of the plan of the burglary agreed upon, quite as much as the rending of the shutter or the forcing of the door. A second illustration is afforded by *State v. Poynier* (1884) 36 Louisiana 672 where it was ruled that if a person whose duty it is to guard property leaves his post so as to facilitate the theft of the property, which to his knowledge has been determined upon, he should be deemed constructively present and liable as a principal. Manning, J., who delivered the opinion of the majority observed: 'The test to determine whether he is principal rather than accessory is, whether he is so situated as to make his personal help available--not actual physical help necessarily, but help of any kind--not help rendered in or by actual presence, but constructive presence as well. Thus if he watched near, or at a distance to prevent his companions being surprised, or stationed himself to give the alarm to favour their escape, or was in such a situation as to come to their assistance, so that the knowledge of his watching or position or situation inspired or was calculated to inspire his companions with additional confidence and enabled them quicker or safer or more effectually to commit their crime, then he is the principal. One need not be either an eye-witness of the criminal act or within hearing of it to make him a principal. If he has knowledge of it and watches so as to assist in any manner, it is enough; or if he does any act in execution of the common design or to aid those who are immediately engaged, to escape. Each person consenting to the commission of an offence and doing any one act which is an ingredient in the crime or immediately connected with or leading to, its commission is a principal: *Reg. v. Flatman* (1880)

14 Cox C.C. 395 : 42 L.T. 159 : 44 J.P. 314, Todd, J., dissented, though he conceded that if a party watches for his companions, the actual perpetrators, to prevent surprise or favour their escape, or give assistance and is near enough to afford it, if required, he may be deemed constructively present. He referred to the decision in *Reg. v. Tuckwell* (1841) C. and M. 215, where, in circumstances very similar, the employee who had, in pursuance of an arrangement with his confederate, left the house so as to enable the latter to commit the robbery, had been held by Coleridge, J., to be not a principal in the crime, but an accessory before the fact. To the same effect is the decision in *Reg. v. Jefferies* (1848) 3 Cox C.C. 85. A third illustration is furnished by the decision in *State v. Hamilton* (1878) 13 Nevada 386 which carries the law probably to its farthest limit. There a plan was arranged to rob an express train on the road; one of the parties to such plan was to ascertain when the express left a certain point and to signal to his confederates by kindling a fire on the top of a mountain in one county which could be seen by them in another county 40 miles distant. This signal was given by him and his confederates, advised by it, met the express; in the attempt to rob it, one of the guards was killed. It was ruled that the man who gave the signal was, in contemplation of law, constructively at the scene of the homicide. Again, in *People v. Batterson* (1888) 50 Hun. 44 : 2 N.Y. Sapp. 376, (110) (1861) 2 Allen 170, it was ruled by Haight, J., that if one of several persons acting in concert leads a girl's escort away, while his confederates rape the girl, he is a principal in the second degree, though not actually present at the time of the rape. I shall mention one further illustration which is furnished by the decision in *Commonwealth v. Lucas* (1861) 2 Allen 170. A person, in pursuance of a pre-concerted plan, remained down stairs in his own house, while his confederates above, stole money from a lodger, brought it down and delivered it to him. Bigelow, C.J., ruled that he was a principal in the larceny and observed as follows:

To charge a person as principal, a strict, actual, immediate presence at the time and place of the commission of the crime is not necessary. Nor is it requisite that he should be so situated as to be an eye or ear witness of the criminal act. It is the expectation of aid, in case it is necessary to the completion of the crime, and the belief that his associate is near and ready to render it, which encourage and embolden the chief perpetrator, and incite him to accomplish the act. By the

countenance and assistance which the accomplice thus renders, he participates in the commission of the offence. It is, therefore, sufficient to hold a party as principal, if it is made to appear that he acted with another in pursuance of a common design; that he operated at one and the same time for the fulfilment of the same preconcerted end, and was so situated as to be able to furnish aid to his associate, with a view to insure success in the accomplishment of the common enterprise. Thus, if two persons agree to commit a burglary, and in order to effect their purpose one of them breaks and enters a house and commits a larceny therein, while the other remains outside, even at a distance, in order to guard against surprise and detection, and to receive the goods, or a portion of them, after the larceny has been committed, there can be no doubt that the latter would be liable as principal, although he did not see his accomplice do any act towards the commission of the offence. He would be, it is true, an accessory before the fact, by advising and procuring the commission of the felony; and after the fact, by receiving the property after it was stolen; but he would also be a principal, because, at the time when the felony was committed, he co-operated with the chief perpetrator, and aided and abetted him in doing the acts which constituted the crime.

93. I shall not multiply instances to show when a man may be said to participate in a criminal act, lest we get lost in an endless maze of decisions remarkable for refined distinctions such as we find in *R. v. Stewart* (1814) R. and R. 363, *Rex v. Soares* (1802) R. and Rule 25 : 2 East P.C. 974, *Rex v. Royce* (1767) 4 Burr. 2073 : 98 E.R. 81, *R. v. Towle* (1814) R. and Rule 314, *Reg. v. McPhane* (1841) Car. and M. 212, *Reg. v. Gaylor* (1857) 71 Cox C.C. 253; *Dears and B.C.C.* 288, *Reg. v. West* (1847) 2 Cox C.C. 237, *Reg. v. Jones* (1841) 9 Car. and P. 761: 2 M.C.C. 85 : 2 Lewin C.C. 119 and 297, *Rex v. Manners* (1873) 7 Car. and P. 801, *Rex v. Butteris* (1833) 6 Car. and P. 147, *Rex v. Kelly* (1820) R. and Rule 421, *Rex v. Badcock* (1813) R. and Rule 249, *Rex v. Else* (1808) R. and Rule 142, *Rex v. Davis* (1806) R. and Rule 113, *Reg. v. Manning* (1849) 2 Car. and K. 887 : 1 Den. C.C. 467; T. and M. 155 : 16 L.J.M.C. 1 : 13 Jur. 962 : 4 Cox C.C. 31, *Reg. v. Whittaker* (1848) 2 Car. and K. 636 : 1 Den. C.C. 310 : 17 L.J. M.C. 127 : 3 Cox C.C. 50, *Rex v. Kelly* (1847) 2 Car. and K. 379, *Reg. v. Vanderstein* (1865) 10 Cox C.C. 177 : 16 Ir. Com. L.R. 574, *Rag. v. Murphy* (1853) 6 Cox C.C. 340, *Reg. v.*

Howell (1839) 9 Car. and P. 437, Rex Jordan (1838) 7 Car. and P. 432, Rex v. Lockett (1836) 7 Car. and P. 300, Rex v. Passey (1836) 7 Car. and P. 282. (131) (1841) 2 M. and Rob. 360. (135) (1821) R. and Rule 446. (135) (1818) R. and Rule 343, Reg. v. Hurse (1841) 2M. and Rob. 360, Rex v. Bingley (1821) R. and R. 446, Bex v. Gogerly (1818) R. and R. 343, Bex v. Standley (1821) R. and. Rule 305, Bex v. Borthwick (1779) 1 Douglas 207 : 99 E.R. 136, Bex v. Owen (1825) 1 Moody C.C. 96. (140) (1830) 1 Lewin C.C. 194. (141) (1857) 7 Cox C.C. 357, R. v. Duffey (1830) 1 Lewin C.C. 194, Reg. v. Jackson (1857) 7 Cox C.C. 357 and R.v. Dacre (1542) Palmer 35 : 1 Hale P.C. 439. The balance of reason and authority is, in my opinion, against the limited interpretation placed by Stephen, J., on Section 34 in Emperor v. Nirmal Kanta Roy 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460, and I must hold accordingly that the first point specified in the certificate of the Advocate-General, namely, that a direction erroneous in law was given, cannot be sustained.

94. Secondly, as to non-direction. The argument advanced, on behalf of the accused is that Mr. Justice Page omitted to draw the attention of the Jury to the case for the defence, save and except the reference made by him, at the request of the Standing Counsel to the statement recorded under Section 342 of the Criminal Procedure Code. This contention has rendered necessary a minute examination of the entire evidence and of the summing up, inasmuch as the defence has to be gathered in this case from the cross-examination of the witnesses for the prosecution and from the statement made by the accused after the close of the evidence. Whether there has or has not been misdirection by reason of non-direction cannot be discussed as an abstract question of law. As Lord Alverstone, C.J., said in Rex v. Stoddart (1909) 2 Cr. App. Rep. 217 at p. 216 : 25 T.L.R. 612 : 73 J.P. 348 : 53 S.J. 578, quoting with approval the words of Lord Esher, M.R., (Brett, M.R.?) in Abrath v. North Eastern Railway Co. (1883) 11, Q.B.D. 440 at p. 453 : 52 L.J.Q.B. 620 : 49 L.T. 618 : 32 W.R. 50 : 47 J.P. 692, affirmed on Appeal (1886) 11 App. Cas. 247 : 55 L.J.Q.B. 457 : 55 L.T. 63 : 50 J.P. 659, mere non-direction is not necessarily misdirection; those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood; see also R. v. Cohen (1909) 2 Cr. App. Rep. 197 at p. 207 and Queen v. Elahee Bux 5 W.R. 80

Cr. Besides, every summing up must be regarded in the light of the conduct of the trial, and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. As Jenkins, C.J., observed in *Emperor v. Upzndrd Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.) the conduct of a case by a Counsel is not a negligible factor even in a Criminal Court, though it may not necessarily conclude the accused, and that it is not without its influence is forcibly illustrated, by the judgment of Lord Alverstone, C.J., in *Rex v. Bridgwater* (1905) 1 K.B. 131 at p. 135 : 74 L.J.K.B.35 : 69 J.P. 26 : 53 W.R. 415 : 91.L.T. 838 : 21.T.L.R. 69 : 20 Cox C.C. 737 with which all the Judges hearing that case agreed. The substance of the matter is that non-direction when it consists in omission to put the material facts or to put the defence to the Jury is sufficient to cause the Court to quash the conviction, if, the Court comes to the conclusion that it is reasonably probable that the verdict of the Jury was affected thereby: *Rex v. Hill* (1911) 7 Cr. App. Rep. 26 : 105 L.T. 751 : 76 J.P. 49 : 28 T.L.R. 15 : 22 Cox C.C. 625, *Rex v. Wilson* (1913) 9 Cr. App. Rep. 124, *Rex v. Sturgess* (1913) 9 Cr. App. Rep. 120, *Rex v. Bailey* (1913) 9 Cr. App. Rep. 94, *Rex v. Wann* (1912) 23 Cox C.C. 183 : 107 L.T. 482 : 76J.P. 269 : 28 T.L.R. 240, *Rex v. Smith* (1920) 84 J.P. 67 : 14 Cr. App. Rep. 101. 153) (1922) 16 Cr. App. Rep. 146 and *Rex v. Willet* (1.53) The points which have been emphasised before us by Counsel for the prisoner may be summarised as follows: (1) Did three or four persons form the party? (2) Did two or three persons go inside the room and fire? (3) Was the prisoner the man who stood outside? (4) Did the prisoner share the murderous intention of the other members of the party? Special stress has also been laid on what has been called the live cartridge incident. The Standing Counsel has urged, on the other hand, that the case as now presented with so much elaboration was not developed in the evidence as elicited by cross-examination of the witnesses for the Crown. He has further maintained that the live cartridge incident was not mentioned when Counsel for the prisoner addressed the Jury. I have come to the conclusion that the importance of the live cartridge incident, whatever its value may be, was not realised by Counsel for the accused at the trial. Purna Chandra Dey, a clerk in the Metreological office, who was examined as a witness on behalf of the prosecution, produced two cartridges which he stated had been made over to him by the Police. He then added that

they were given to him by another man in front of 26, Sankaritola East Lane at about 4 p.m. in the afternoon of the 3rd August, and that he showed to the Police the spot which that man pointed out to him, as the place where they were found. The record ends here, as the witness was not further examined or cross-examined. The Standing Counsel has stated that as soon as the cartridges were produced by the witness, Counsel for the prisoner enquired' whether the prosecution would call the man who, it was alleged, had found the cartridges. The prosecution stated that the man could not be produced as his whereabouts had not been traced. Counsel for the prisoner thereupon objected to the reception of the cartridges in evidence or of a hearsay statement as to the spot where they had been picked up by the unknown man. The objection was allowed and Mr. Justice Page ruled that the cartridges would not go in evidence. But they were not formally struck out of the list of exhibits, and, were shown to Mr. Bavin, Deputy Commissioner, though not to Mr. Todd the gun-maker, when they were subsequently examined as witnesses. The evidence, however, furnishes no indication as to the bearing of the discovery of the cartridges on the case for the defence. No doubt we have been here pressed with the argument that the discovery of the live cartridge shows that the accused fired his pistol for the first time in the course of his flight in the street, that he had not fired his pistol inside the Post Office, that he was consequently not one of the men who went inside the room, that his identification by the witnesses was accordingly unreliable and that he was really the man who stood outside, not participating in the murderous intention entertained by his confederates. This argument is attractive; but if the discovery of the live cartridge was intended to be used as the basis for this theory Counsel for accused should not have objected to the reception of the evidence. When we pass on to the other points emphasised on behalf of the accused his Counsel finds himself in a difficulty but of a different character. The points whereon such emphasis has been laid in the argument before us were not clearly foreshadowed, indeed, they were very imperfectly indicated in the cross-examination. I have read the summing-up with the care it deserves/ The impression left on my mind is that, taken as a whole, it is what is sometimes designated a charge for conviction. But it cannot fairly be said that the facts were not left to the Jury to decide and that the Judge usurped their function, merely

because he gave expression, as he was entitled, to his opinion on the evidence strongly: *Rest v. West* (1910) 4 Cr. App. Rep. 179 *Rex v. Beeley* (1911) 6 Cr. App. Rep. 138, *Rex v. Frampton* (1917) 12 Cr. App. Rep. 202 *Rex v. O'Donnell* (1917) 12 Cr. App. Rep. 219. We must further remember that as Lord Hatherley said in *Prudential Assurance Co. v. Edmonds* (1877) 2 App. Cas. 494 it is not fair to criticise every line and letter of a summing-up which has been delivered by a Judge in trying a case, specially when there is a somewhat imperfect record of it. We are not called upon to consider whether this or that phrase was the best that might have been chosen or whether a direction which has been attacked might have been more fully or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should have been introduced. As Lord Shaw observed in *Channing Arnold v. Emperor* 23 Ind. Cas. 661 : 41 I.A. 149 at p. 168 : 18 C.W.N. 785 : 26 M.L.J. 621 : 15 Cr. L.J. 309 : 1 L.W. 461 : 7 Bur. L.T. 167; (1914) M.W.N. 506 : 16 M.L.T. 79 : 12 A.L.J. 1042 : 20 C.L.J. 161 : 16 Bom. L.R. 544 : 8 L.B.R. 16 : 41 C. 1023 (P. C), a charge to a Jury must be read as a whole; the substantial question is, whether the evidence for the prosecution and the case for the defence were fairly summed up. I am not unmindful that, as ruled in *Emperor v. Upendra Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.), the mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case, cannot justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence; it is the duty of the Judge to draw the attention of the Jury to such possible view of the case, on the evidence, notwithstanding that it may have escaped the Counsel for the accused; in other words, the line of defence adopted by Counsel does not relieve the Judge of his duty: *Rex v. Totty* (1914) 111 L.T. 167 : 10 Cr. App. Rep. 78 : 24, *Rex v. Davis* (1917) 2 K.B. 855 : 13 Cr. App. Rep. 10 : 26 Cox C.C. 98 : 62 S.J. 55 : 34 T.L.R. 25 and *Rex v. Burton* (1922) 17 Cr. App. Rep. 5. But the duty which is thus imposed on the Judge can be discharged only with reference to the evidence adduced at the trial. In the case before us, the real difficulty is that the case for the defence was not adequately developed in such evidence as could be elicited by cross-examination of the witnesses for the Crown. I do not hesitate to record my opinion that the cross-

examination was perfunctory and the defence of the accused became intelligible only when he made his statement under Section 342 of the Criminal Procedure Code, namely, the threefold assertion that he was the man in the courtyard, that he was not one of those who did fire at the Post Master and that he did not share the intention of his confederates to commit a murder. The fact, however, cannot be overlooked that a statement under Section 342 is not made on oath and cannot be tested by cross-examination. The accused is afforded an opportunity to explain any circumstances appearing in the evidence against him, on the principle explained by Tindal, C.J., in *Reg. v. Frost* (1839) 9 Car. and P. 129 : 4 St. Tr. (N.S.) 85, namely, that though the proof of the case against the prisoner must depend for its support, not upon the absence of explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt given by the Crown, yet if he is involved by such evidence in a state of considerable suspicion, he is called upon, for his own sake and for his own safety, to state and elucidate the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence; see *Amritlal Hazra v. Emperor* 29 Ind. Cas. 513 : 42 C. 957 : 21 C.L.J. 331 : 19 C.W.N. 676 : 16 Cr. L.J. 497. The statement of the accused cannot be placed on a higher level than this, and the Court and the Jury are expressly left free to draw such inference from the refusal of the accused to answer or from the answers he gives, as they think just, Mr. Justice Page accurately appraised the function of the statement of the accused, and no exception can be taken on that ground. But his summing up was defective to this extent that it did not at first specifically refer to the statement. The Standing Counsel, however, properly called attention to the point, whereupon Mr. Justice Page made supplementary observations. This might not have been sufficient, if the points which arose on the statement had not already been dealt with by him on reference to the evidence, for as observed in *Rex v. Willet* (1922) 16 Cr. App. Rep. 146, a grave omission to direct the Jury on a cardinal matter in the case cannot be made good merely by Counsel's calling attention to it at the termination of the summing-up; it is one thing to indicate agreement with a submission made by Counsel; it is another to direct a Jury effectively. The vital truth of the matter is, not that the summing-up was inadequate, judged in the light of what had been elicited in the cross-examination of the prosecution witnesses, but that proper foundation

for the defence theory had not been laid in the evidence. This has created serious doubts in my mind as to whether in view of the perfunctory nature of the cross-examination, the accused can be said to have had a fair trial. I am not in a position to explore the reason for this perfunctory cross-examination or to ascertain whether it is attributable to the inaptitude of Counsel who had from a very early stage formed the opinion that the accused had no defence to make and who had been advised that while it was their duty to test by cross-examination the accuracy of the witnesses for the Crown, they were not entitled to set up any substantive defence in opposition to the case for the Crown. How defective the cross-examination was is illustrated by the fact that a very material point was elicited from the packer Hara Prasad Das not on cross-examination by defence Counsel, but in answer to a question by the Court when the witness was recalled at the request of one of the Jurors. What cannot but be regarded as a grave defect in the conduct of the defence case cannot in such circumstances be remedied except by a re-trial, if such re-trial is permissible under the law. I am fortified in this view by another circumstance of fundamental importance which cannot be overlooked, viz., the question of the proper sentence when an accused is convicted under Section 302 read with Section 34. The cases in the books since the decision in *Queen v. Baboo Lall* 1 W.R. 48 Cr. show that in such a contingency the facts must be carefully ascertained before the sentence is determined. This aspect of the matter was indicated by Sir James Colvile in *Ganesh Singh v. Ram Raja* (37). In that case, chiefs of several villages collected people together with the preconcerted purpose of plundering the plaintiff's property; all acted with a common purpose of plunder and each co-operated more or less. The Judicial Committee held that where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other, in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. In such a contingency, each and every person, co-operating to any extent in a plunder of this description, is responsible in a civil proceeding to recoup the party plundered for the loss he has sustained. But in a criminal matter, punishment may be apportioned. In the civil proceeding, it is immaterial what share of the plunder one received or whether one was coerced to join in the transaction, although if the matter culminated in a

criminal proceeding, where the Judge had to inflict a punishment, all that might be taken into account. In my opinion, it would not be right on principle even to consider the punishment, before it has been determined whether the accused is to be convicted under Section 302 alone or under Section 302 read with Section 34. This is precisely a case where a special verdict may appropriately be taken, so as to enable the Judge, who alone fixes the punishment, to ascertain what are the precise facts found by the Jury, on whom after all the duty is imposed to decide which view of the facts is true: *Rex v. Dudley* (1884) 14 Q.B.D. 273 : 54 L.J.M.C. 32 : 52 L.T. 107 : 33 W.R. 347 : 15 Cox C.C. 624 : 49 J.P. 69. Such a course becomes almost essential, where, as here, Counsel for the accused even before the commencement of the trial, has informed the Judge that there is no defence to the charge and has raised the question of punishment. I fully realise that a Judge is sometimes placed inevitably in a difficult situation, such as when he has before him a confession by the accused which is retracted or rejected because obtained by improper means, or where he has before him the fact of previous conviction of the accused, or, where, notwithstanding a plea of guilty by an accused in a capital case, the prosecution, according to established procedure, seeks to prove the case: *Emperor v. Chinia Bhika* 8 Bom. L.R. 240 : 3 Cr. L.J. 337. (168) 10 Ind. Cas. 699 : 19 Bom. L.E. 356 : 18 Cr. L.J. 699 and *Laxmya v. Kmpereor* 40 Ind. Cas. 699 : 19 Bom. L.R. 356 : 18 Cr. L.J. 699. But I am not convinced of the necessity or propriety of an addition, to the embarrassments of a Judge, the formation of whose judgment is subject to the operation of subconscious forces, as has been felicitously expressed by Benjamin Gardozo in his illuminating analysis of the Nature of the Judicial Process: 'There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject, to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in any analysis of the judicial process, they do not stand aloof on these chill and distant heights and we shall not help the cause of truth, by acting and speaking as if they do.' (page 168). This would be an additional reason for re-trial, if the grant of re-trial be, within the power of this Court, and this brings me to the consideration of the scope of Clause

26 of the Letters Patent.

95. Clauses 25 and 26 of the Letters Patent are, in these terms: 25. And we do further ordain that there shall be no appeal to the said High Court of Judicature; a Forb William in Bengal, from any sentence or order passed or made in any criminal trial before the Courts of original criminal jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court, to reserve any point or points of law for the opinion of the said High Court.

26 And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General, that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed, by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.

96. Clause 25 ordains that there shall, be no appeal from any sentence or order passed or made in any criminal trial before the High Court as a Court of Original Criminal Jurisdiction. The Trial Judge, however, is granted discretion to reserve any point or points of law for the opinion of the High Court. Clause 26 contemplates in addition a case where the Advocate-General has certified that in his judgment there is an error in the decision of a point or points of law decided by the Trial Judge, or that a point or points of law which has or have been decided by the Trial Judge should be further considered. Clause 26 provides that in both the classes of cases, that is, where a point of law has been reserved by the Trial Judge or where a certificate has been granted by the Advocate-General, in either of the two forms mentioned, the High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Trial Court and to pass such judgment and sentence as to the High Court shall seem

right.

97. The initial step is for the Trial Judge to reserve a point of law Or for the Advocate-General to grant a certificate. The successive 'stages of the process which follow inevitably may now be enumerated:

98. (i) The Court reviews the entire case or such part of it as may be necessary;

99. (ii) The Court finally determines the point or points of law reserved or certified;

100. (iii) The Court thereupon alters the sentence passed by the Trial Court;

101. (iv). The Court passes such judgment and sentence as shall seem right to the Court.

102. As regards the first stage, it is plain that the Court reviews the case in whole or in part with a view to decide the point of law reserved or certified. This is placed beyond doubt by the use of the word 'necessary', which clearly means 'necessary for the decision of the point of law reserved or certified.' The Court does not at this stage treat the case as open for re-consideration in all its generality, as might have been possible if an appeal had not been excluded by Clause 25.

103. As regards the second stage, it is equally clear that what is finally determined is the point of law reserved or certified. This confirms the view just indicated as to the function of the Court in the first stage.

104. As regards the third stage, where the Court can alter the sentence passed by the Trial Court, the scope manifestly depends upon the true construction of the term 'thereupon.' The term 'thereupon' may be interpreted as equivalent to 'upon final determination of the point of law reserved or certified.' Such an unqualified interpretation, if adopted, would lead to the result that even if the point of law reserved or certified has been decided against the prisoner, he would be entitled to invite the Court to alter the sentence. Such an interpretation, in my judgment, would be unreasonable, and would defeat the fundamental restriction that no appeal lies from the sentence or order of the Trial Judge. When a point of law is reserved 'by the Trial Judge or a certificate is granted by the Advocate-General,

the purpose is to secure an alteration of the sentence on the hypothesis that it is based on an erroneous view taken by the Trial Judge of a point of law. If no error is established, the reason why the prisoner can claim an alteration of the sentence disappears. The term 'thereupon' must consequently be construed with reference to the context; and it may, with good reason, be interpreted as equivalent to 'upon final determination of the point of law reserved or certified in favour of the prisoner.' It is not necessary that the contention of the prisoner should succeed in its entirety; if the opinion of the Trial Judge on the point reserved or certified, which forms an ingredient of the reason for conviction and sentence, is not supported, the conviction cannot be sustained, and it then becomes open to the Court to alter the sentence passed by the Trial Judge.

105. As regards the fourth stage, the context shows that if the third stage has 'been reached and the Court is in a position to exercise the full power and authority vested in it to alter the sentence, the Court is competent to pass such judgment and sentence as to the Court shall seem right. The question must be faced, at this stage, whether the power and authority to pass such judgment, and sentence as to the Court shall seem right include power and authority to direct a re trial. In the determination of this matter, we cannot obviously ignore the judicial decisions pronounced on the subject during the last sixty years.

106. In this Court, Section 26 has been invoked and applied in the cases of *R. v. Yadali* 1 Ind. Jur. 424, *Queen v. Hurribole Chunder Ghose* 1 G. 207 : 25 W.R. 36 Or; 1 Ind. Dec. (N.S.) 132, *Empress v. Pemantle* 8 C. 971 : 7 Ind. Jur. 89 : 4 Ind. Dec. (N.S.) 626, *Queen-Empress v. Shib Chunder Mitter* 10 C. 1079 : 5 Ind. Dec. (N.S.) 721, *Queen-Empress v. Nilmadhab Mitter* 15 C. 595 : 7 Ind. Dec. (N.S.) 980, *Queen-Empress v. Barton* 16 C. 238 : 8 Ind. Dec. (N.S.) 157, *Queen-Empress v. O'Hara* 17 C. 642 : 8 Ind. Dec. (N.S.) 967 (F.B.), *Queen-Empress v. Abbas Alt* 25 C. 512 : 1 C.W.N. 255 : 13 Ind. Dec. (S.S.) 340.(P.B.), *Empress v. Patrick McGuira* 4 C.W.N. 433 (F.B.), *Emperor v. Zawar Rahman* 31 C. 142 : 1 Cr. L.J. 86 (F.B.), *Hurjee Mull v. Imam*, All Sircar 8 C.W.N. 278 : 1 Or. L.J. 124, *Emperor v. Charu Chunder Mukerjee* 76 Ind. Cas. 966 : 38 C.L.J. 309 : 25 Cr L.J. 294, *Emperor v. Khudi Ram* 12 C.W.N. 530 : 7 Cr. L.J. 362, *Rex v. Shaik Taleb* 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193, *Emperor v. Upendra Nath Das* 30

Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.), Fateh Chand Agarwalla v. Emperor 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.), Peary v. Emperor 50 Ind. Cas. 343 : 23 C.W.N. 426 : 20. Cr. L.J. 300 (F.B.) and Emperor v. Panchu Das 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849. In Empress v. Pemantle 8 C. 971 : 7 Ind. Jur. 89 : 4 Ind. Dec. (N.S.) 626, Queen-Empress v. Nilmadhab Hitter 15 C. 595 : 7 Ind. Dec. (N.S.) 980, Queen-Empress v. Abbas Aii 25 C. 512 : 1 C.W.N. 255 : 13 Ind. Dec. (N.S.) 340.(F.B.), Emperor v. Zawar Rahman 31 C. 142 : 1 Cr. L.J. 86 (F.B.) and Emperor v. Panchu Das 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849, points of law had been reserved by the Trial Judge under Clause 25. In Rex v. Shaik Taleb 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193, a point had been reserved by the Trial Judge under Clause 25 and a certificate had been granted by the Advocate-General under Clause 26. In the other cases, certificates had been granted by the Advocate-General. It is worthy of note that Advocate-Generals have, in all modesty, generally granted certificates in the second form, viz., that there is a point or points of law which should be further considered. There are four instances of certificates in the first form, viz., that the point of law has been erroneously decided; in two of these, Rex v. Yadali 1 Ind. Jur. 424 and Rex v. Shaik Taleb 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193, the opinion, expressed in the certificate prevailed; in the other two, viz., Emperor v. Patrick McGuira 4 C.W.N. 433 (F.B.) and Emperor v. Upendra Math Das 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.), the opinion expressed in the certificate was rejected.

107. In each of the cases mentioned, whether the point of law had been reserved or certified, the Court, in the first instance, examined and determined such point and such point alone, and it was only when that point had been decided in favour of the accused that the Court proceeded to consider the question of alteration of the sentence passed by the Trial Court. Where the point reserved or certified was decided against the accused, the Court did not proceed further. This is illustrated by the cases of Empress v. Pemantle (1-71), Queen-Empress v. Shib Chunder Mitter 10 C. 1079 : 5 Ind. Dec. (N.S.) 721, Queen-Empress v. Nilmadhab Mitter 15 C. 595 : 7 Ind. Dec. (N.S.) 980, Queen-Empress v. Barton 16 C. 238 : 8 Ind. Dec. (N.S.) 157, Queen-Empress v. Abbas All 25 C. 512 : 1 C.W.N. 255 : 13 Ind. Dec.

(N.S.) 340.(F.B.), Empress V. Patrick McGuira 8 C.W.N. 278 : 1 Cr. L.J. 124, Emperor v. Zawar Rahman 31 C. 142 : 1 Cr. L.J. 86 (F.B.), Emperor v. Charu Chunder Mukerji 76 Ind. Cas. 966 : 38 C.L.J. 309 : 25 Cr L.J. 294, Emperor v. Upendra Nath Das 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.) and Peary v. Emperor 50 Ind, Cas. 343 : 23 C.W.N. 426 : 20. Cr L.J. 300 (F.B.). The case of Rex v. Yadali 1 Ind. Jur. 424 stands in a class by itself; there the conviction was proper, but the sentence was illegal, inasmuch as rigorous imprisonment, had been directed where simple imprisonment was prescribed by the Indian Penal Code, This was the error certified, and the sentence was accordingly set right.

108. In cases where the point reserved or certified was decided in favour of the accused, the Court proceeded to consider the evidence on the record, in other words, assumed the functions of the Jury. This class comprises the cases of Queen v. Hurribole Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr; 1 Ind. Dec, (N.S.) 132, Queen-Empress v. O'Hara 17 C. 642 : 8 Ind. Dec. (N.S.) 967 (F.B.), Hurjee Mull v. Imam Ali Sircar 8 C.W.N. 278 : 1 Cr. L.J. 124, Emperor v. Khudi Ram 12 C.W.N. 530 : 7 Cr. L.J. 362, Rex v. Shaik Taleb 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193, Fateh Chand Agarwalla v. Emperor 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.) and Emperor v. Panchu Das 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849. In the first of these cases, Queen v. Hurribole Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr; 1 Ind. Dec, (N.S.) 132, the Court, upon consideration of the residue of the evidence, affirmed the conviction and sentence. In the other cases, the Court either set aside the conviction and sentence or affirmed the conviction but modified the sentence. Except in Rex v. Yadali 1 Ind. Jur. 424 in every case that I have been able to discover the conviction was challenged on the ground of what may be comprehensively termed 'misdirection' which includes erroneous direction or non-direction, as also erroneous reception or exclusion of evidence. In cases of misreception of evidence, the Court was faced with Section 167 of the Indian Evidence Act and felt constrained to consider whether the balance of evidence left after exclusion of what had been erroneously admitted was sufficient to support the conviction. In cases of erroneous direction, or non-direction, Section 167 was held inapplicable and yet the Court proceeded to estimate the probative value of

the evidence recorded at the trial. The most important decisions from this point of view are those of *Fateh Chand Agarwalla v. Emperor* 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.) and *Emperor v. Panchu Das* 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849. The construction placed on Clause 26 in the case last mentioned *Emperor v. Panchu Das* 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849, militates against the view that the clause authorises the Court to grant a re-trial. It must be noted, however, that the case then under consideration was that of erroneous reception of evidence which would attract the application of Section 167 of the Indian Evidence Act. I had occasion to point out that the view taken accorded with the accepted interpretation of Section 2 of the Crown Cases Act, 1848, which furnished the model for the provisions of Clauses 25 and 26 of our Letters Patent: *Reg. v. Saunders* (1899) 1 Q.B. 490 : 68 L.J.Q.B. 296 : 63 J.P. 150 : 80 L.T. 28 : 15 T.L.R. 186 and *Reg. v. Gibson* (1887) 18 Q.B.D. 537 : 56 L.J.M.C. 49 : 56 L.T. 367 : 35 W.K. 411 : 16 Cox C.C. 181 : 51 J.P. 742. It was further observed that though *Reg. v. Mellor* (1858) Dears and Bell. 468 : 7 Cox C.C. 454 and *Reg. v. Yeadon* (1861) 9 Cox C.C. 91; L. and C. 81 : 31 L.J.M.C. 70 : 7 Jur. (N.S.) 1128 : 5 L.T. 329 : 10 W.R. 64 might be invoked as authorities in support of the grant of a venire de novo when the trial has been what is called a mis-trial, that is, a trial under such very exceptional circumstances as vitiate it, because it is conducted in a manner unknown to law, weighty authority for the contrary position might be found in the decisions of the Judicial Committee in *Reg. v. Bertrand* (1867) 1 P.C. 520 : 4 Moo. P.C. (N.S.) 460 : 36 L.J.P.C. 51 : 16 L.T. 752 : 16 W.R. 9 : 10 Cox C.C. 618 : 16 E.R. 391 and *Reg. v. Murphy* (1869) 2 P.C. 535 : 6 Moo. P.C. (N.S.) 177 : 38 L.J.P.C. 53 : 21 L.T. 598 : 17 W.K. 1047 : 16 E.E. 693 which dissented from *Reg. v. Scaife* (1851) 17 Q.B. 238 : 2 Den. C.C. 281 : 20 L.J.M.C. 299 : 15 Jur. 607 : 5 Cox C.C. 243 : 117 E.R. 1271 and was mentioned by Bovill, C.J., in *Reg. v. Martin* (1872) 1 C.C. Rule 378 : 41 L.J.M.C. 113 : 26 L.T. 778 : 20 W.R. 1016 : 12 Cox C.C. 204. The view thus taken by this Court in the case of *Emperor v. Panchu Das* 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849 is in accord with the prevailing opinion in Bombay as well as in Madras, as appears from the decisions in *Reg. v. Dayal Jairaj* 3 B.H.C.R. 20 Cr., *Reg. v. Navroji* 9 B.H.C.R. 358, *Reg. v. Pestonji* 10 B.H.C.R. 75, *Imperatrix v.*

Pitamber Jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469, Emperor v. Narayan Raghunath Patki 32 B. 111 : 9 Bom. L.R. 789 : 6 Cr. L.J. 164 : 2 M.L.T. 414, Subrahmania Iyer v. King-Emperor 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 28 I.A. 257 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar. P.C.J. 160 (P.C.) and Muthukumarasawmi Filial v. Emperor 14 Ind. Cas. 898 : 35 M. 397 : 13 Cr. L.J. 352; (1912) M.W.N. 549 : 12 M.L.T. 1.

109. Since the decision of this Court in Emperor v. Panchu Das 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849, the question of re-trial has been examined by the House of Lords in Crane v. Director of Public Prosecution (1921) 2 App. Cas. 299 at p. 331 : 90 L.J.K.B. 1160 : 125 L.T. 642 : 85 J.P. 215 : 15 Cr App. Rep. 183 : 65 S.J. 642 : 37 T.L.R. 788; where the decision of the Court of Criminal Appeal in Reg. v. Crane (1920) 3 K.B. 236 : 89 L.J.K.B. 813 : 15 Cr. App. Rep. 23 : 84 J.P. 210 : 36 T.L.R. 673, was affirmed by a majority. Viscount Finlay maintained that the deliberate policy of the Legislature in the Criminal Appeal Act, 1907, is to prevent any further proceedings, such as would have taken place on an award of a venire de novo by the Court of error or the granting of a new trial by the High Court in criminal cases. Lord Dunedin, Lord Atkinson, Lord Sumner and Lord Parmoor took the contrary view, and upon an analysis of Reg. v. Mellor (1858) Dears and Bell. 468 : 7 Cox C.C. 454 and Reg. v. Yeadon (1861) 9 Cox C.C. 91; L. and C. 81 : 31 L.J.M.C. 70 : 7 Jur. (N.S.) 1128 : 5 L.T. 329 : 10 W.R. 64, held that the award of a venire de novo in the event of mis-trial was competent to the Court of Crown Cases Eeserved and was equally open to the Court of Criminal Appeal Rex. v. Dickman (1910) 74 J.P. 449 : 26 T.L.R. 640 and Rex. v. Wakefield (1918) 1 K.B. 216 : 87 L.J.K.B. 319 : 118 L.T. 576 : 82 J.P. 136 : 13 Cr. App. Rep. 56 : 62 S.J. 309 : 34 T.L.R. 210. To put the matter briefly, the choice, in their opinion, did not lie between affirmation and acquittal.

110. I am not called upon now to decide whether, under any imaginable combination of circumstances which may place a criminal trial in the category of mistrial, that is, no trial in the eye of the law, this Court is competent under Clause 26 to direct a re-trial when it is in a position to exercise full power and authority to pass such judgment and sentence as shall seem right. When such a contingency

happens, the true effect of the decision of the Judicial Committee in *Subrahmaniam v. King-Emperor* 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 28 I.A. 257 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar. P.C.J. 160 (P.C.) will require careful consideration, and the Court will have to determine whether the expression 'pass judgment and sentence' may be so interpreted as to include an order for re-trial. In the case before us, there are several difficulties which bar the path of the prisoner. In the first place, according to the accepted interpretation of Clause 26, the only points open for examination during the first two stages of the proceeding under Clause 26, are the points of law specially mentioned in the certificate of the Advocate-General; cf. the observations of Willes, J., in *Reg. v. Stubbs* (1855) Dearsley C.C. 555 : 25 L.J.M.C.16 : 1 Jur. (N.S.) 1115 : 4 W.E. 85 : 7 Cox C.C. 48. No other points are open for consideration at those stages, even though such points may have emerged from an examination of the materials requisite for the decision of the certified points, or have otherwise come to the knowledge of the Court. The matters which in my judgment have tended to affect the fairness of the trial are not mentioned in the certificate; indeed, they could not, in the circumstances already explained, be expected to appear in a certificate granted upon application made by Counsel who have conducted the defence as they have done. In the second place, as neither of the two points specifically certified has been sustained, we cannot pass from the second to the third stage when alone the question of alteration of sentence can come under consideration. In the third place, even if Clause 26 were construed to include full power and authority to direct a re-trial when there had been no trial in the eye of the law, the question would still remain whether what had happened brought the case within that category.

111. It may seem unsatisfactory that the jurisdiction created by Clauses 25 and 26 of the Letters Patent should be so limited in scope and that its exercise should be subject to such stringent conditions. It must be remembered, however, that these provisions were framed in view of the powers, exercised by the Court of King's Bench under a Writ of Error on the fiat of the Attorney-General and by the Court of Crown Cases Reserved under the Statute of 1848. (For the antecedent state of the law, reference may be made to the charges of Ryan, C.J., and Grant, J., which are set out in the appendix to the edition of the Supreme Court Rules by

Smoult and Ryan). Since then, the Criminal Appeal Act of 1907 has been brought into operation, and yet, notwithstanding the extensive powers of interference conferred on the Court of Criminal Appeal, that Court has occasionally found it impossible to grant relief by way of appeal, though it did not hesitate to express the opinion that the circumstances might justify the intervention of the Secretary of State with a view to the exercise of the clemency of the Crown. Two such instances will be found in the cases of *Rex v. Law* (1913) 9 Cr. App. Rep. 246. (1913) 8 Cr, App, Rep. 198 and *Rex v. Pridmore* (1913) 8 Cr, App, Rep. 198. In the case last mentioned, it was ruled that if two persons are engaged in a common unlawful enterprise, and one of them, to avoid apprehension, attempts murder, both may be found guilty of the felony, if the Jury are satisfied from their conduct at the time that at any moment there was a determination on the part of each to aid the other in escaping arrest; but if it can be ascertained which actually made the attempt, the sentence on him should be the heavier. This fits in with the principle enunciated by Sir James Colvile in *Ganesh Singh v. Ram Raja* 3 B.L.R. 44 (P.C.); 12 W.R. 38 (P.C.), and the concluding observations made by Bhillimore, J., may be recalled here: 'We wish to add a word on another matter. There is a good deal to support the suggestion that the other man fired, and although in law both are guilty, if it is clearly established that one fired the shot, the sentence on the other might well be reduced. If there is additional evidence to show that the other prisoner fired the shot, it would be proper to submit it to the Home Secretary, and we think that if he is satisfied on the point, it would be proper to reduce the sentence on the appellant by the clemency of the Crown; but it is not a matter with which this Court can deal.' Cf. *Queen v. Dabee* (1861) W.R. 27 Cr. If the Court of Criminal Appeal found itself in this position, we cannot put an extended construction, on Clauses 25 and 26 of our Letters Patent.

112. In my opinion, there is no escape from the conclusion that as neither of the two points of law specifically certified by the, Advocate-General can be answered in favour of the accused, his application for review must be dismissed so far as the exercise, of the powers conferred on this Court by Clause 26 of the Letters Patent is concerned.

113. I desire to add finally that the trial of this case has made clearer than ever the necessity for full and accurate shorthand notes of the proceedings at the trial, on the lines indicated in Section 16 of the Criminal Appeal Act. The importance of such shorthand notes was emphasised by Reading, L.C.J., in *Rex v. Dixon* (1920) 15 Cr. App. Rep. 96 and by Trevethiri, L.C.J., in *Rex v. Roy Monkman* (1922) 16 Cr. App. Rep. 115 at p. 116 : 66 S. v. 317 and in the case last mentioned, the following observations were made: 'This shorthand note of the proceedings is not clear. In several cases recently this Court has had to complain of the insunleiciency of the shorthand notes. It must be understood by shorthand writers that their duty is to take in shorthand everything that occurs at the trial, so that if an appeal is brought, this Court may be able to form as good an opinion as is possible when reading the transcript. An abbreviated note is not sufficient. Everything that occurs at the trial must be taken, in the form of question and answer, which should be numbered, to admit of easy reference.'

114. Richardson, J.--At the outset I desire to express my concurrence generally with the observations which have been made by the learned Judge presiding in reference to the duties cast upon an Advocate-General by Clause 26 of the Letters Patent.

115. As to the meaning of Section 34 of the Penal Code, which I regard as the main, question in this case, a question which touches the daily administration of the law, I also agree with the conclusion which has been stated.

116. I need not recapitulate the facts. Amrita Lal Roy, the Post Master of the Sankaritolla Post Office in Calcutta, was killed on the 3rd August last by a bullet fired from an automatic pistol. For my present purpose it is not necessary to decide which of the three or four men including the accused Barendra Kumar Ghose, fired the fatal shot. The accused Barendra was subsequently tried by Page, J., and a special Jury on a charge of murder framed under Section 302 of the Penal Code. The Jury found him guilty and he was sentenced to death.

117. In the course of his charge to the Jury, the learned Judge instructed them in effect, that if the three or four persons, of whom the accused Barendra was oiie, went to the place with a common intention to rob the Post Master and, if

necessary, to kill him, and if the Jury were satisfied that one of them fired the fatal shot in furtherance of that common intention, then they were all equally liable. In those circumstances it was the duty of the Jury to find the accused guilty of murder, whether the fatal shot was fired by him or by one of the others.

118. That is the substance of the direction in respect of which the learned Advocate-General has given his fiat or certificate that matter of Law is raised proper for the further consideration of this Court.

119. Now, the learned Counsel for the accused conceded that judged by the Common Law of England, the learned Judge was not in error. The Law of England on the subject is of old standing as a reference to any well-known textbook and to such cases as *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M. C 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox. C.C. 494 : 45 J.P. 270 and *Reg. v. Coney* (1882) 8 Q.B.D. 534 : 51 L.J.M.C. 66 : 46 L.T. 307 : 30 W.R. 678 : 15 Cox C.C. 46 : 46 J.P. 404 will show.

120. Learned Counsel, however, was careful to remind us, and I do not forget that we are bound to consider Indian and not English Law. But some reference to English Law is still necessary because the point before us cannot well be discussed without using expressions, which, though they have dropped out of use in India because they are not to be found in the Code, are still familiar in England, and were, I think, familiar to Indian lawyers of the middle of the last century, at any rate to those of the Presidency Towns, including Calcutta, where the principal laws were wont to be promulgated. These expressions merely supply a convenient terminology and, when they are understood, I know of nothing in the history of the Penal Code before it became law which throws much, if any, light on the meaning of Section 34. Note.--It may be convenient if I attach a brief note of so much, of the relevant history as I know. [For this note see pages 417 418 of Ind. Cas.--Ed.] The usual rule applies that the intentions of the Legislature are to be gathered from the words used in the context in which they stand. The Code, however, became law in 1860 and in construing any of its provisions, we are entitled to guidance from the course of judicial decisions, even if there be no authority binding on us as a Full Bench. The terms referred to and their meanings are as follows :

121. A principal in the first degree is the immediate perpetrator of an act, the person, for instance, by whose proper hand a death wound is inflicted.

122. A principal in the second degree (1) must be present at the commission of the act and (2) he must be aiding and abetting. The older and perhaps better term 'accessory at the fact' implies both elements. But if this term be employed, it has to be remembered that the person so described is in Law a principal.

123. An accessory before the fact is under the Code an abettor and is dealt with in the Chapter on Abetment.

124. The accessory after the fact has no present interest. Under the Code, he is punishable in particular cases for such separate and independent offences as harbouring or concealing an offender, or facilitating escape from lawful custody and so forth.

125. The difference between the two degrees of principals is clearly explained in the following charge given to a Jury in a case where a man had been killed in a duel and the seconds or one of the seconds was under trial for murder as an accessory at the fact. It does not signify whether the offence committed was murder, as in England, or, as it would be in India, culpable homicide not amounting to murder, (Code, Section 299, Exception 5). The charge runs :

There is no difficulty as to the law on this subject. Principals in the first degree are those by whom the death wound is inflicted, principals in the second degree, those who are present at the time it is given, aiding and abetting, comforting and assisting, the persons actually engaged in the contest. Mere presence alone will not be sufficient to make a party an aider and abettor, but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals' (that is the principals in the first degree). 'If either of the persons sustained the principal' (that is the principal in the first degree) 'by his advice or presence, or if 'you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not do or say anything, yet if he was present and assisting and encouraging when the pistol was fired, he will be guilty, of the offence imputed by the indictment.

126. That charge was approved in Coney's case (1882) 8 Q.B.D. 534 : 51 L.J.M.C. 66 : 46 L.T. 307 : 30 W.R. 678 : 15 Cox C.C. 46 : 46 J.P. 404 by Cave, J., with whose judgment the eight Judges comprising the majority generally agreed.

127. Coming then to the Code, I propose in the first instance to deal with the point which arises as though it were *res Integra*.

128. Section 34 and the closely connected Sections 35, 37 and 38 were intended to lay down compendiously, in the fewest possible words, some elementary principles of criminal liability. They do not create offences and, given the common intention, in practice it does not signify which section applies in any particular case. As matter of construction they are interpretative Clauses, included in the Chapter of General Explanations; and must be read into the Code definitions of substantive offences.

129. The precise point for determination, as I conceive, is whether the liability imposed by Section 34 with which we are chiefly concerned extends only to principals in the first degree or whether it also extends to principals in the second degree or accessories at the fact. The narrower view is urged for the accused, the wider one for the Crown.

130. If the narrower view be adopted the liability of accessories at the fact must depend entirely on provisions in the Chapter on Abetment such as Sections 107, 109 and 114. Another way, therefore, of stating the question is this :

131. As the Code does not use the terms principal in the first degree, and principal in the second degree, the inference is that it was thought unnecessary to retain the distinction. What is the result? Are accessories at the fact classed with principals under Section 34 or are they classed under the later provisions with abettors

132. Section 34 speaks of a criminal act being done by several persons in furtherance of the common intention of all, and it pronounces that 'each of such persons is liable for that act in the same manner as if it were done by him alone.'

133. The objection to giving the section the wider meaning is founded on the opening phrase: 'When an act is done by several persons.' It is argued that when,

for instance, one man is stabbed by another in the presence of the latter's confederates, the act of stabbing is done by the one man and not by his confederates. That is no doubt true in one sense of the words. But it is argued on the other side, that to stop at the opening words is to give no force or value to the words which follow, 'in furtherance of the common intention,' that the reference to common intention introduces the notion of common responsibility, and that if the language as a whole be given its full sense, the act done is the joint act, or the act of the immediate perpetrator and his confederates, because it is done in furtherance of the common intention of them all.

134. The fact that the words 'in furtherance of the common intention' were inserted by an amending Act of 1870, makes no difference to the meaning. In either view of the section, the qualification, if not expressed, would necessarily have to be implied.

135. No assistance again for either view is to be obtained from Section 33 which says that 'the word 'act' denotes as well a series of acts as a single act.' For clearly Section 34 must be so construed as to have an intelligent meaning when applied to the case of a single act done by several persons.

136. Nor do I think that anything turns, as the learned Standing Counsel suggested, on any difference between a criminal act and an offence. Leaving out 'special' and 'local' laws, and confining myself to the Penal Code, a criminal act would seem to be an act forbidden by and punishable under some provision of the Code, if the requirements of that provision as to the intention or state of mind of the doer are satisfied. By definition, therefore, (section 40), a criminal act is an offence and it, may be an offence under more than one provision. The limit of punishment awardable may depend on the quality of the intention with which the act is done and on the effect produced. The offence at its highest is then the complete whole comprising the act done with the concomitant criminal mind, or intent, or mens rea, and the effect produced. An unjustifiable blow is a criminal act and an assault. If it causes death, the offence may amount to murder. If the injury is not fatal, the offence will amount to something less than murder.

137. The following analysis may perhaps be of assistance.

138. An effect, e.g., death, may be caused--

139. (a) by a single act done by one man,

140. (b) by a series of acts done by one man at the same time and place, e.g., a succession of blows,

141. (c) by acts done by different men at the same time and place, e.g. two men inflicting separate wounds each of which, apart from the other would be fatal, or one man holding a ladder while another ascends and kills the occupant of the room above.

142. The acts of the different, men may each be a single act or a series of acts.

143. (d) by separate acts (or series of acts) done by the same man, or by different men, at different times or places, e.g., the case in illustration (a) of Section 37, of a man being killed by small doses of poison administered at different times.

144. The question is, does the group of sections render liable accessories at the fact to these various acts.

145. According to the wider view, an act (or a series of acts) is done by several persons when one man in the presence of confederates gives another a blow (or a succession of blows). According to the same view, the case of a series of acts done by different persons at different times and places, each separate act possibly in the presence, of different confederates, is governed by Section 37. This result is intelligible.

146. The other view of the section presents great difficulty when applied to a single act done by several persons. Learned Counsel for the accused said that Section 34 postulates not only identity in intention but also identity in act. But when, do several persons do the same act in the narrow sense suggested? The question, so far as I know, has no place in criminal law and has never been discussed in India or in England. Take the case suggested in the argument, of three men pulling a heavy roller over a sleeping child. The three men are not doing the same act. There are three men doing different acts of pulling, possibly with different degrees

of strength. One man might say by way of excuse or palliation that the pulling was done by the other two and that he merely had his hand on the handle bar. Or suppose that three men hold the dagger which is driven into the victim. The driving force might come from one man. The hold of the other two men on the dagger might merely show that their minds and consent went with the act. What is the difference between these two men and the man who, without putting a useless hand on the dagger, stands by aiding and assisting, as for instance, by preventing the victim from struggling or by keeping watch? The latter participates or co-operates in the act just as much as the two men. The act is done by them all. Other cases suggested by learned Counsel do fare no better.

147. Take the case of the two men pulling taut from opposite directions, the noose which they have put round, a third man's neck. Here again it would be open to one of the two men to say that he at his end of the rope did no pulling and the deceased was killed by the rope being sharply jerked by the man at the other end.

148. Similarly, in the cases suggested of several men causing death by drowning by holding a man under water or upsetting him out of a boat. The individuals concerned in these offences do not each and all do the same act. In the case of two men drowning a third, one of the two men might plead that while he only committed an assault by pushing the deceased over the bank, it was the other who held the head of the deceased under the water and so drowned him.

149. The truth is that in all these cases what is single is the effect produced. The different men who take part in the offence may do similar acts. But their acts are not the same. They are different acts. Even if mere similarity were sufficient, it would be impossible to prove. As shown above pleas destructive of similarity, still more of identity, might be put forward in excuse. Murders of the sort suggested are not usually committed in broad daylight in the presence of witnesses able to take stock of the precise part taken by different offenders.

150. In the wider view of Sections 34 and 37, these cases would present no difficulty. Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several

confederates, the act would be done by them all within the meaning of Section 34. If death followed the different acts of different confederates at the same time and place, then again Section 34 would probably suffice. Every confederate would be regarded as having done every criminal act and would, therefore, be liable as if he had done them all alone. The responsibility is mutual--if necessary, however, Section 37 might be resorted to and it would not matter which section applied, provided that one or other section covered all reasonable hypotheses.

151. So far, therefore, I take the wider view of Section 34 and the connected sections. I have next to deal with the contention founded on the Code provisions relating to abetment.

152. Abetment is an independent offence whether the abetted offence is committed (section 109) or not committed (sections 115 and 116).

153. We are concerned with the case where the abetted offence is committed. There must then be an abettor on the one hand and an abettee who is a principal on the other. Even where the offender acts by the hand of an innocent person, such as a person not capable by law of committing an offence, the Code (section 108) treats the former not as principal but as abettor. It certainly does not follow as of course, that the Code regards accessories at the fact as abettors and not as principals.

154. It is true that under the definition in Section 107, abetment may take the forms of instigation, conspiracy or aid, and that by Explanation 2, 'Whoever either prior to, or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.' But as I read the section it does not contemplate the abettor being present, when the abetted criminal act or offence is committed. The aid given at the time of commission referred to in Explanation 2 seems to mean aid given at the time but at such a distance from the scene that the abettor cannot be said to be present. The case of *Kashi Nath Naek v. Queen-Empress* 25 C. 207 : 1 C.W.N. 681 : 13 Ind. Dec. (N.S.) 140 is typical. The Explanation may have been intended to obviate any difficulty arising out of the expression accessories before the fact.

155. If I am right, then A, B and C being together, if A says to B, 'kill C,' and B thereupon shoots C, A would be punishable not under Section 109 but under Section 302 construed in the light of Section 34. This result accords with the opinion of Markby, J. in *Queen v. Mohamed Asger* 23 W.R. 11 Cr. where the word accessory is used as meaning 'accessory before the fact' or abettor. (See also Mayne, Criminal Law, Part II, Section 246).

156. It may be said that 'instigation' and 'conspiracy' must occur before the offence, even if, in the case of instigation it is only just before. But abettors by these modes seem to be thought of as separated from the commission of the offence not only by time but also by place. Abetment is not thought of as coincident with the offence. If the general term 'abettors' included accessories at the fact, Explanation 2 would be superfluous. Persons who, having previously abetted (as accessories before the fact) are also present when the offence is committed are dealt with in Section 114.

157. Section 114, the only section in the Chapter which speaks of the abettor being present on the scene, supports the foregoing construction of Sections 107 and 109. It provides that when any person 'who, if absent, would be liable to be punished as an abettor,' is present at the commission of the act or offence abetted, 'he shall be deemed to have committed Such act or offence.' It was held, as early as 1867, in *Queen v. Niruni* 7 W.R. 49 Cr. that to bring an accused within these words, it is necessary first to make out the circumstances which constitute abetment, so that 'if absent' the accused would have been liable to be punished as an abettor, and this ruling has since been followed : *Abhi Misser v. Lachmi Narain* 27 C. 566 : 4 C, WT N, 546; 14 Ind. Dec. (N.S.) 372, *Keshwar* 25 C. 207 : 1 C.W.N. 681 : 13 Ind. Dec. (N.S.) 140. *Ial v. Giris Chandra* 29 C. 496. If present at the time, the person who would otherwise be an abettor is treated as a principal.

158. An illustration will be found in a recent case which came before the Court of Criminal Appeal in England: *Rex v. Edith Thompson* (1922) 17 Cr. App. Rep. 71. The prisoner there was present when her husband was killed by her lover, Bywaters. Though present, it is doubtful whether she would have been convicted as an accessory at the fact, if it had not been for the incriminating letters which she

had previously written to Bywaters. Under Section 114, if absent, she would have been liable as an abettor, and, therefore, her mere presence when the murder was committed, would have rendered her guilty of that offence.

159. Section 114 would appear to serve two purposes. Firstly, it marks the fact that where it can be proved that the accused, if absent, would be liable as an abettor, his mere presence when the offence is committed, is, without more sufficient proof of common intention to make him an accessory at the fact or principal. Secondly, it marks the fact that in those circumstances the accused cannot be punished twice, once for the abetment and once for being present as an accessory at the fact. The section resembles Section 34 in this, that it rather regulates procedure and punishment than creates an offence (cf. *Gould and Co. v. Houghton* (1921) 1 K.B. 500 at p. 519 : 90 L.J.K.B. 369 : 121 L.T.46 88 J. P: 93 : 19-L.G.R. 85 : 26 Cox C.C. 693 : 65 S.J. 344 : 37 T.L.R. 291, and see Collett's Comments on the Indian Penal Code, published in a collected form in 1889].

160. Section 114, therefore, is not wide enough to include all accessories at the fact. It would not apply for instance where one man is assaulted by several Others and the assault is unpremeditated. It only applies where the accused, if absent, would be liable as an abettor, and there are many cases in which no such liability can be proved.

161. But supposing that I am wrong and that a person present aiding and abetting the commission of a criminal act or offence is punishable under Section 109, a conviction thereunder could only be sustained if the part played by the abettor as accessory at the fact could be distinguished from the part played by the principal in the first degree. The principal in the first degree does not, as such, abet the abettors. Section 109 would not supply a general rule that accessories at the fact are equally liable as principals with the principal in the first degree. The result would merely be that Section 109 would to some extent overlap Section 34 in its wider interpretation. If there be this overlapping, we are not thereby precluded from giving a reasonable meaning to Section 34. On the contrary it seems improbable that the framers of the Code would have forgotten to lay down the general rule. And if the general rule cannot be found in Section 109 or Section 114

it can only be found in Section 34.

162. It was suggested that if Section 34 bore the wider meaning, Section 149 of the Code was unnecessary. Section 149 is doubtless a special application of the general principle of Section 34, but as the language is different so may be the precise meaning or shade of meaning. As Mookerjee, J., said in *Jhakri Chamar v. Emperor* 17 Ind. Cas. 1001 : 16 C.L.J. 440 : 13 Cr. L.J. 905, 'the essence of Section 34 is common intention, as the presence of a common object is requisite to establish a case under Section 149.' In any case the special provision may have been thought desirable because in the country parts of India, disputes relating to land or boundaries, frequently lead to riots ending in grievous hurt or loss of life.

163. 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 *Reg. v. Salmon* (1880) 6 Q.B.D. 79 : 50 L.J.M. C 25 : 43 L.T. 573 : 29 W.R. 246 : 14 Cox. C.C. 494 : 45 J.P. 270 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.'

164. 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. 80 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.

165. 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 recognized.

166. This view of Section 34 gives it an intelligible content, in conformity with general legal 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.

167. The wider view, therefore, accords with what a priori the law might have been expected to be. The true doctrine that which leads to fruitful and valid legal consequences must depend on the notion of agency or representation. In the offence of criminal conspiracy, (sections 120 A and 120 B) as in civil law, representation is carried a step further. Conspirators are like partners. They are all principals, The immediate doer of an overt act in pursuance of the conspiracy is the agent of all the others, whether they are present at the time or not (Evidence Act, Section 10). In the case of accessories at the fact, confederates present at the time, representation occurs in its simplest form. If two persons are present, aiding and abetting a third who kills their common enemy with a shot from a revolver or a blow with a knife, every lawyer, and, I think, every reflecting layman would pronounce all three equally guilty. Common intention makes the shot or the blow the act of them all. It is as if the six hands belonged to one body, controlled by one mind, and it matters not by which hand the bullet is sped or the blow is given. As Sir Michael Foster puts it: 'In combinations of this kind, the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike.' (Foster's Crown Law, Edition 1809, page 351). And in a case cited by Mayne, *Ganesh Sing v. Ram Raja* 3 B.L.R. 44 (P.C.); 12 W.R. 38 (P.C.), their Lordships said this: 'Where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose, as the purpose is common, so must be the responsibility.' That principle is as valid in criminal as in civil law.

168. It would be surprising if the law were otherwise. A premium would be put on crime. There would be safety in mere numbsrs. The more cowardly, secret, and Brutal the crime, the greater would be the chance of the guilty escaping the full measure of justice for their misdeeds.

169. As to authority, the weight of judicial opinion has from the first been in favour of the wider view of Section 34, very clearly so, in my opinion, in this Court and in the High Courts of Bombay and Allahabad.

170. One of the earlier cases in this Court, *Queen v, Gora Chand Gopee* 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177, is significant 'because the judgment was delivered by Sir Barnes Peacock, C.J., who in the capacity of Vice-President of the Legislative Council had piloted the Penal Code Bill through its different stages. I will not say that the judgment is conclusive upon the point before us because Section 34 is not expressly referred to. But dealing with the question of mere presence on the scene, the learned Chief Justice pointed out 'that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.' The importance of the observation lies in the use of the word 'principals' as including accessories at the fact. The word was used in the same sense by Mark by, J., in *Queen v. Hyder Jolaha* 6 W.R. 83 Cr and again in *Queen, v. Mohamed Asger* 23 W.R. 11 Cr. Later cases explicitly refer to Section 34. A compact and sufficient illustration will be found in *Sri. Prosad Misser v. Emperor* 4 C.W.N. 193 at p. 196. In that case, a Pathan had killed a Nawab by successive blows with a tulwar. Four other men were present at the time. The Court (Sir Francis Maclean, C.J., and Banerjee J.) observed: ' The Judge ought to have called the attention of the Jury to the facts, and then said that it was for them to consider whether, from those facts, they concluded that the criminal act was done by the several persons in furtherance of the common intention of all, and if they so concluded then to direct them that the case came within Section 34 of the Penal Code and that each of them would be liable for that act, in the same manner as if it were done by him alone.' That this view of the law has predominated is shown again by the judgment of Mitra and Fletcher, JJ., in *Nibaran Chandra Roy v. King-Emperor* 11 C.W.N. 1085 at p. 1089 : 6 Cr. L.J. 304. The current of decision in this Court was not, I

think, disturbed till Stephen, J., delivered his judgment in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460.

171. That case is the sheet-anchor of the learned Counsel's argument. I state only the facts now material, A Police Officer, Inspector Nripendra Nath Ghose, had been murdered in Calcutta. The prisoner and another had both fired at him with revolvers but as the bullets found in the officer's body could not have come from the prisoner's revolver, it was not the prisoner's shots which caused the fatal injuries but those of his comrade. Stephen, J., held that these facts would not support a charge against the prisoner under Section 302 read with Section 34. The act of shooting the officer, he said, had been done by the prisoner's comrade and not at all by the prisoner, whose act amounted merely to an attempt. The judgment, I gather, was delivered after the Jury, on the learned Judge's direction, had found the prisoner not guilty on the charge referring to Section 34. The Jury had differed on another charge under Sections 302 and 114 and the learned Judge had directed a fresh trial of that charge. The learned Judge was dealing mainly with the question whether the acquittal on the charge referring to Section 34 was a bar to this fresh trial. He overruled the plea and as things fell out, on the fresh trial, that is, of the charge under Sections 302 and 114, the Jury again disagreed. Then the Advocate-General entered a *nolle prosequi* and the prisoner was discharged.

172. With the greatest respect for the learned Judge's view on this subject, it appears to me that as the authorities stood, the learned Judge should have taken the verdict of the Jury on the charge referring to Section 34. If the Jury had convicted on that charge, the learned Judge might have reserved any question of law on which he felt a doubt for consideration by a Bench of the Court.

173. The learned Judge recognised that he was departing from tradition. He referred to two Indian cases in which a wider view of Section 34 had been taken. He said that those cases were in accord with Mr. Mayne's paraphrase of the section with which he disagreed. After referring to the history of the matter in England and in India, he expressed the opinion that section 34 was to be read without reference to any doctrines derived from the English Common Law. In

substance I agree but I regret that the learned Judge gave no indication of the meaning which he attributed to the section on that footing.

174. The learned Judge then turned to the abetment sections. He stated as to Section 109 that there was no reason for supposing that a man must be absent in order to abet under that section. If he then looked to Section 114 to fill the gap left by his view of Section 34, he was putting a forced construction on one Section to avoid what appeared to him a forced construction of another.

175. Finally, he said: ' In reference to English Law, it seems to me that the effect of Sections 109 and 114 is to supersede all the English Law relating to principals of the first and second degrees and accessories before the fact.' I do not see, however, how Sections 109 and 114 can touch principals of the first degree. If the learned Judge had said that the group of sections including Section 34 together with the abetment sections superseded all the English Law on those topics, I could have understood it. But then the difficulty would have remained whether accessories at the fact are to be treated as principals or abettors.

176. In the case before the learned Judge, the prisoner was clearly an accessory at the fact. But if he and his comrade had used revolvers of the same calibre and the officer had been killed by one bullet, it would have been impossible to say which of the two men was principal and which accessory. Then, on the view of the learned Judge, neither man could have been convicted as an abettor, for he might be the principal, nor as principal, because he might be the abettor. Such a difficulty might perhaps be surmounted by framing charges in the alternative under Section 236 of the Procedure Code, but that seems a clumsy expedient to put before a Jury.

177. I do not see how all distinctions between principals of the two degrees and accessories before the fact can be superseded unless, where the abetted act is committed, they are all brought under one common category as principals, that is to say, unless the step further were taken which has been taken in the general law of conspiracy. Apart from some such comprehensive provision, distinctions which exist in the nature of things, necessitate a line being drawn somewhere. According to the general scheme of the Code, abettors are a separate class, and the

question whether accessories at the fact are principals or abettors must, therefore, find an answer. The only advantage I can see in classing them as abettors is that the question of the physical limits within which a man may be said to be present at the commission of a crime would not arise. The question has been discussed in England: *Rex v. Borthwick* (1779) 1 Douglas 207 : 99 E.R. 136, *R. v. Stewart* (1814) R. and R. 363; Archbold's Criminal Pleadings and Practice, 25th Edition 1368: but under modern legislation it is probably no longer of any importance. I have suggested above that the Code solution of the difficulty is to be found in Explanation 2 to Section 107. The person aiding at the time but at a distance is an abettor.

178. The treatment of the accessory at the fact as a principle will not be more productive of technicality than his treatment as an abettor. The most glaring and indefeasible technicalities of English Law seem to have gathered not so much round the principal in the second degree as round the accessory before the fact. In Sir James Stephen's History of the Criminal Law (II, 234) an excuse is found for those technicalities in the harsh severity of punishment under the old criminal law. Under milder conditions and legislation, the technicalities have for the most part disappeared along with the excuse for them. And happily, in India, under a modern Code, such as the Penal Code, redress by mere technicality is not required. That, of course, is not to say that an accused person is not always entitled as of right to a fair trial according to the established forms of law 'In all criminal cases it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence. Everything should be strictly and accurately pursued; and if in any one of these three points a 'substantial defect should appear, it would be a ground for revising the proceeding:' *Ex parte Van Sandau* (1844) 1 Ph. 445 : 15 L.J. Bk. 13 : 1 Dec. 55 8 Jur. 193 : 41 B.R. 701, *In re Vallabhdas Jairam* 27 B. 394 : 5 Bom. L.R. 343. It is a miscarriage of justice 'to deprive an accused person of the protection given by essential steps in Criminal Procedure.' [Per Lord Sumner, *Crane v. Director of Public Prosecution* (1921) 2 App. Cas. 299 at p. 331 : 90 L.J.K.B. 1160 : 125 L.T. 642 : 85 J.P. 215 : 15 Cr. App. Rep. 183 : 65 S.J. 642 : 37 T.L.R. 788]. In that connection the distinction is observed between irregularities, which a Court exercising appellate jurisdiction may disregard, if the accused has not been prejudiced, and illegalities which render the trial void and of

no effect: *Subrahmania Iyer v. King-Emperor* 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 28 I.A. 257 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar. P.C.J. 160 (P.C.).

179. Whether consistently or not with his postulate of identity in act, the learned Counsel further contended that in cases of the type where two men assault, and inflict, one a grave and the other a less grave injury on a third, Section 34 only applies where death or grievous hurt results from the combined injuries. But apart possibly from the language of Field, J., in *Empress v. Jhubboo Mahton* S.C. 739 : 12 C.L.R. 233 : 6 Ind. Jur. 639 : 4 Ind. Dec. (N.S.) 477, which may be accounted for by the facts of the case, the emphasis in cases of this type is not on the fact that both men caused injuries, still less on the fact that the effect resulted from the combined injuries. The emphasis is on this, that the fact of both men taking, an active part in the assault is proof positive of some common intention, the extent of the common intention being, of course, a question of fact.

180. Is the common intention less apparent where two men shoot at a third, one hitting and wounding him mortally and the other missing him? The solution that in such a case (apart from Section 114), one man has committed murder and the other only an attempt at murder, shows at least the common intention. And is the solution tenable? Does it not lead, again with great respect, to an impossible result? Suppose both men cause wounds each of which would by itself be mortal. Are two murders committed? And if so, would it be necessary to determine whether or not the deceased had died before the second shot entered his body? Apart from two wounds being inflicted, suppose that the shock and terror of seeing two men fire at him, contributed to the fatal result? Moreover, it is impossible to say what might have happened, if one man alone had set out to accomplish the murder. Without the support, moral and physical, of a comrade, his resolution might have failed him and his pistol remained in his pocket; or diminution of confidence might have interfered with his aim; or again, he might have been successfully resisted and put to flight. It appears to me that this solution cannot possibly have come within the intention or contemplation of the Legislature and is not contemplated by the language of Section 34. The language is compatible with the reasonable solution, namely, that both shots, the shot that took effect, and the shot 'that missed, are the joint acts of the two men. Each man in the eye of the law

does both acts. The result follows that they are severally but equally liable for the effect produced, in accordance with the principle, I again quote my brother Mookerjee, 'that all who participate in the commission of a crime are severally responsible to the State as though the crime has been committed by any one of them acting alone:' *Amrita Lal Bose v. Corporation of Calcutta* 42 Ind. Cas. 305 : 44 C. 1025 : 26 C.L.J. 215 : 21 C.W.N.1016 : 18 Cr. L.J. 945. The fact that the attack is made by two men and not by one may well be an aggravation and not a palliation of the crime. The attack is cowardly so far as the criminals look to superiority in numbers for security and courage.

181. The second case on which the learned Counsel relied, that of *Emperor v. Profulla Kumar Mazumdar* 74 Ind. Cas. 267 : 50 C. 41 at p. 47; (1923) A.I.R. (C.) 453 : 24 Cr. L.J. 763, came before the present Chief Justice and Panton. J., on a reference made by the Sessions Judge of Dacca under Section 307 of the Procedure Code. To my mind, the case carries the matter no further. It is obvious from the terms of the Court's judgment, delivered by the learned Chief Justice, that the discussion was not taken beyond the stage at which the judgment of Stephen, J., had left it. No reference appears to have been made to the view of the law taken in this Court before and after *Nirmal Kanta Roy's* case 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460. No reference was made to the argument in *Emperor v. Narendranath Sen Gupta* 30 Ind. Cas. 128 : 21 C.L.J. 396 : 19 C.W.N. 923 : 16 Cr.L.J. 576 or to the ruling of the Court in that case (Page 401Page of 21 C.L.J.--[Ed.]) or to the case of *In the matter of Faezulla* (57) which came before C.C. Chose, J., and myself. Nor was the difficulty as to the precise meaning of Section 114 indicated. The point was not fully argued, if it can be said to have been argued at all, and the Court did not come to a considered conclusion upon it. If the judgment be carefully read, it will be seen that the decision comes to no more than this, that inasmuch as there might be a doubt whether the accused could properly be convicted under Section 302 and Section 34, the safer course in the circumstances was to direct his re-trial on a charge framed under Section 302 and Section 114.

182. In line, I entertain the opinion that the wider construction of Section 34 is the right one, not only because I should myself so construe the words in their context,

not only because principle seems to me to demand such a construction but also on the firmer ground of a long course of decisions in this and other Courts, interrupted in this Court only recently and in effect only once. There is this further to be said that the Penal Code has been amended not a few times and if the prevailing view had been wrong, presumably the Legislature would have taken some opportunity to correct it might be said that we are dealing with settled jurisprudence but if there be a doubt as to the law, our labour will not be in vain if that doubt is dispelled.

183. As to the form of the charge, in my opinion, where an accused is liable under Section 34 as an accessory at the fact and, therefore, as a principal, a charge simply of the offence of murder under Section 302, without express reference to Section 34, is sufficient. As Section 34 must be read into Section 302 of the Penal Code, Section 224 of the Criminal Procedure Code comes into play: 'In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.' No doubt, it is always open to the prosecution to state in the charge particulars showing that the accused is charged as an accessory at the fact. But it is not necessary, nor always possible, to do so. The prosecution cannot state in the charge particulars of which they are ignorant. In a case of murder the murdered man cannot be called at the trial, and there may be no other eye witnesses except the actual principals in the crime. If it is not known which of several men fired the fatal shot or delivered the fatal blow, the charge cannot be explicit and nothing is gained by multiplying charges to meet all possible hypotheses.

184. In England also a principal in the second degree is chargeable with the substantive offence. Sir Mathew Hale for instance, says this: 'If A be indicated as having given the mortal stroke and B and C as present, aiding and assisting, and upon the evidence it appears that B gave the stroke and A and C were only aiding and assisting it maintains the indictment, and indictment shall be given against them all for it is only a circumstantial variance for in law it is the stroke of all that were (present, aiding, and abetting' (Hale's Pleas of the Crown, Edition 1800 at page 43 and see Archbold at pages 1371, 1372 and 1374).

185. I come now to the second ground on which the learned Advocate-General granted, his certificate, namely, that the learned Judge in charging the Jury did not sufficiently refer to the defence put forward by the accused. This objection involves a consideration of the defence made at the trial and the merits. There were two charges. To the charge of attempted robbery under Section 394 of the Code, the accused pleaded 'guilty' in open Court not meaning that he with his own hand caused hurt to the Post Master but meaning that he and others went to rob the Post Master, and that in attempting to commit the robbery, the Post Master was injured--fatally injured as the fact is--by one of the party.

186. To the charge of murder the accused pleaded 'not guilty.'

187. From the point of view of Counsel for the accused, though on the facts the defence on that charge might be difficult, the case was of a simple character. Unless the evidence showing that the accused fired the fatal shot could be discredited, there was nothing more to be said in any view of the law. For the rest, the case turned on the element of intention. For if the accused was not privy to any intention, including murder, he could not have fired the fatal shot, or have fired at all at the Post Master, and any circumstance, suggestion or argument tending to show that the accused did not fire at the Post Master might also be pleaded for what it was worth as relevant in regard to his intention.

188. In the view of the law taken by the learned Judge, a view of which learned Counsel must have been aware during the trial, the issues were, whether the accused fired at the Post Master and if not, what intention should be imputed to him. The former issue, however important, was subordinate to the latter. The defence was that the accused had no part in any common intention going as far as murder.

189. Now, no one who reads the charge can doubt that the learned Judge put that defence to the Jury not once but several times. The Jury were fully instructed that the charge of murder involved participation by the accused in a common intention not only to rob, but also, if necessary, to kill, the Post Master. The point might have been put less specifically. A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance, or evading capture by taking

life is sufficient. The Jury were a Special Jury and I see no reason to suppose that they did not fully appreciate the legal position. Without mincing matters, the ascription of a common intention to add murder, if necessary, to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise, are proved to have carried fire-arms and fire-arms have been used with fatal effect.

190. The objections taken to the charge, so far as they seem to me to call for mention at all, are based on the statement made by the accused at the close of the case for the prosecution. It is said that the learned Judge did not advert, or sufficiently advert, to certain suggestions--I cannot put them higher--contained in that statement.

191. There is first the suggestion that only three, and not, as the prosecution say, four men, were concerned. With regard to that it appears to me that the cross-examination of the material witnesses, and especially that of the packer, Hara Prosad Das, was directed to making out that the accused was not one of the men who entered the room but was the man who stood outside on the doorstep or just below. The suggestion that only 3 men went to the Post Office and only 2 went inside, was, however, not foreshadowed, at any rate as clearly as it might have been. The point of the suggestion is that, if only two men entered the room, the accused even if he was the middle man of the three, as the witnesses said, might have been the man outside who did not fire. But let that pass. The learned Judge, as I read the charge, left it to the Jury to make up their mind, if necessary whether there were 3 or 4 men.

192. The next suggestion was, perhaps more clearly an afterthought. The statement as to the live cartridge falling-out of the pistol as the accused was running away down the lane on the North of the Post Office (Mahendra Sircar Lane) was intended to support a suggestion to this effect, namely, that inasmuch as a pistol of the kind which the accused carried, automatically cocks itself after being fired, and inasmuch as the accused found in Mohendra Sircar Lane that his pistol was not cocked or that the safety catch was not down, therefore the accused could not have fired in the Post Office. If the point so put had been in the minds of

those conducting the case for the defence, the importance of the live cartridge and the place where it was picked up must have been fully recognised. But what occurred at the trial was this. A witness, Puma Chandra Dey, spoke to having received the live cartridge and an empty cartridge case (Exhibits X and XI) from another man. He was prepared to indicate the spot where this other man had said he had picked them up. But as the learned Standing Counsel stated that the prosecution were not in a position to produce the other man, the learned Counsel for the accused objected, as he was entitled to do, to hearsay evidence being given. Nothing further was said at the time and there is no evidence where the live cartridge was picked up. The learned Judge's recollection is that during the trial nothingmore was said about these two exhibits and that he told the Jury that they went out of the case. The learned Judge's statement of what took place is conclusive. It is here abundantly confirmed by the fact that the gun-maker, an expert witness, who went later into the witness-box, was not even asked whether, the live cartridge fitted the accused's pistol. Assuming in accordance with what seems to have been the case for the prosecution, that it did fit the pistol, the gun-maker was not questioned as to the circumstances in which a live cartridge might drop out, or be ejected, from an automatic pistol. There are such things as mis-fires and mis-fits. It does not seem beyond the bounds of possibility that an ill-graduated cartridge should be forced by the mechanism too far into the breach and so be beyond the proper reach of the striker when the trigger is pulled. Such a cartridge might be ejected in the ordinary course of firing without a dent or a visible dent on the cap. I have no wish to speculate. All I am saying is that the matter was not pursued and that no sufficient foundation was laid in cross-examination for any plea founded on the live cartridge.

193. There is more to be said on this point. At the best, the evidence left open a mere suggestion that the live cartridge dropped out in Mohendra Sircar Lane in the manner described by the accused. It is surprising, therefore, to find in the application made to the learned Advocate-General for a certificate, the positive statement, more than once repeated, that this live cartridge was picked up in Mohendra Sircar Lane. It is admitted that the application, though apparently not signed or verified, was drawn up for the accused by his legal advisers. Beyond referring to the resolution of the Judges in *Reg. v. Skimmin* (1882) 15 Cox C.C.

122 cited in Emperor v. Nogendra Nath Sen Gupta 30 Ind. Cas. 128 : 21 C.L.J. 396 : 19 C.W.N. 923 : 16 Cr.L.J. 576, I will say no more on this topic, because in the result the learned Counsel frankly admitted that the positive statements as to the live cartridge ought not to have been made and might be attributed to the haste and hurry of the moment.

194. The last suggestion is that in running away, the accused fired in the air to frighten his pursuers and not to kill them. On his own showing, therefore, it is a mere chance that he did not kill, if not one of his pursuers, then some other person inside or outside a house. Such firing in the streets of a city was itself evidence of a criminal intent sufficient to go to the Jury in support of the charge of murder. But, apart from that, here again, the suggestion, such as it is, was not led up to by the cross-examination' of the witnesses. The medical student, Purnendu Nath Mookerjee,--he was not a pursuer he was approaching the accused from the opposite, direction--states that the accused fired at him and that he heard the whiz of the bullet as it went past his left ear. This witness was not cross-examined, and there may have been good reason at the time for not cross-examining him.

195. When I say of these suggestions or any of them that they were afterthoughts, what I mean is that regard being had to the conduct of the case in Court, the suggestion could not have formed part of any instructions given to learned Counsel before the trial or before the witnesses were examined.

196. I have not so far referred to the first part of the accused's statement. Evidence had been given of the finding in an almirah' in the living room occupied by the accused of a bundle which contained tAvo revolvers and three ugly looking daggers. The accused endeavoured to account for the possession of this armoury by saying that the bundle had been given to him for safe custody by a gentleman unnamed. Having stowed away the bundle, he was taken by the same gentleman to his house, where he seems to have been somewhat easily persuaded, to join in an enterprise in the nature of a dacoity. The pressure brought to bear on him was apparently moral, and not physical, but he says he was not in a position to argue. He speaks of four pistols, one of which was given to him. He was taught by the unnamed gentleman how to use the pistol. That I suppose was to account for his

firing as he ran away. The pistol was then loaded and a start was made. I cannot think that such a story would, or ought to make, much impression on a Jury and I have heard no grievance made of any failure of the learned Judge to deal fully with this part of the statement.

197. The trial having taken its course, the Jury returned a verdict of guilty. I doubt whether the fact that the verdict was unanimous [see *Emperor v. Upendr Nath Das (G)* per Holmwood, J., and *West India Electric Co. v. Roberts* (1920) A.C. 1025]. Again there were materials not certainly without weight on which the Jury could find that it was the pistol of the accused which killed the Post Master. But I do not go into that because the verdict does not necessarily mean that in the Jury's opinion the accused fired the fatal shot. On the law as laid down to them, the verdict is in that respect ambiguous. But it does mean that the accused was privy to a common murderous intention.

198. I should have been surprised if the Jury had returned any other verdict in this case. It is established, not only by the sworn testimony of the witnesses but by the admission of the accused himself, that he and two or three others were at the Post Office, all harbouring a wicked design and all carrying loaded fire-arms. Hardly had the innocent and unfortunate Post Master uttered a word of remonstrance or surprise, before three of the four, or two of the three, shot at him from a distance of two or three paces and killed him on the spot. He was given no chance. It was not even a case of 'hands up or we will fire.' A hue and cry was raised. In running away the accused was behind the others, possibly as a rearguard or possibly, as he says, because he was unnerved and late in starting--if he did not enter the Post Office, he would naturally have been one of the first to run. Two or three of the men escaped. The accused, though he used his pistol to prevent capture, did not escape. He was captured as it may be said, red-handed. His pistol, which he had thrown away when it became useless, the magazine having been emptied, was picked up close by. As to the presence of the accused on the scene, no question of identity arises; no alibi is possible. Apart from the question of common intention the facts are admitted. And it appears to me that the facts, themselves speak so loudly that the defence offered was as desperate as any defence could well be. On the facts it would seem almost as easy to say that the original design was murder,

pure and simple, as to say that it was robbery first and murder only if necessary. In the view of the law which we rejected the denial by the accused that he fired at the Post Master might have been regarded as a defence. Otherwise his statement was more like a plea in extenuation. I cannot entertain any doubt as to the justice of the verdict.

199. On a careful and anxious examination of the case, I can only say that to my mind the complaint of non-direction amounting to misdirection is not sustainable. In my opinion, on the evidence as it stood, the substantial questions and issues involved, for the defence as well as for the prosecution, were fairly put to the Jury. Their minds were not perplexed by a minute discussion of every detail of the evidence, or of every suggestion made at the close of the evidence. After a trial extending over two days, after the accused had made his statement, after the learned Standing Counsel and the learned Counsel for the accused had delivered their addresses, the case was left to the Jury by the learned Judge broadly on its merits.

200. It is, as I entirely agree, an elementary principle that a defence made by or for an accused, or apparent on the evidence for the prosecution, should be fairly presented to the Jury, and I have before now drawn attention to this principle. As Lord Watson said in *Bray v. Ford* (1896) A.C. 44 : 65 L.J.Q.B. 213 : 73 L. T 609: 'Every party to a trial by Jury has a legal and constitutional right to have the case which he has made, either in pursuit or in defence, fairly submitted to the consideration of that Tribunal.' In India, so far as the criminal law is concerned, that right is embodied in Section 297 of the Procedure Code. In the present case, however, a very plain one as I see it, it does not appear to me that the learned Judge's charge was insufficient as regards the defence. The charge was doubtless on the whole adverse to the accused: in the circumstances it could hardly be otherwise--but the learned Judge was entitled to express his opinion, and the issue was not taken out of the hands of the Jury. The learned Judge, again, laid down the law on the subject of common intention with some force of language, but he was within his province in so doing and we are not dissenting from what he said.

201. I will add that if a defence is substantially put to the Jury, a mere omission to refer to this or that circumstance or suggestion is not non-direction which amounts to misdirection. It is not the function of the Judge to repeat to the Jury every argument or suggestion urged by the learned Counsel for the accused. It is a satisfaction to me that we have heard the learned Counsel at length but on this part of the case his argument covered 'topics proper only to be addressed to the Jury at the trial' [In re Mason (1908) 1 Cr. App. Rep. 73], and I much doubt whether the omissions, of which he complained, were in any instance of the sort of which it can be said that non-direction amounts to misdirection in law: Rex v. Stoddart (1909) 2 Cr. App. Rep. 217 at p. 216 : 25 T.L.R. 612 : 73 J.P. 348 : 53 S.J. 578 cited in Fateh Chand Agarwala v. Emperor 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.).

202. If the learned Advocate-General had not felt pressed by the question of law turning on Section 34, it may well be that he would not have granted any certificate on the question of non-direction, particularly if the facts had been more carefully stated in the application submitted to him.

203. There is still an incident which occurred some days before the trial to which I am compelled to make some reference. I do not propose to enter into the details of the incident, for the reason that I am not now prepared, I do not consider it necessary, for any purpose material to the accused, to express an opinion on the, conduct of the learned Counsel in seeking the learned Judge, whether notice of the intention to do so had or had not been given to the learned Standing Counsel. Still less am I prepared to discuss the course taken by the learned Judge in listening to the learned Counsel and in advising them as he says he did. The questions raised may be questions on which a difference of opinion is possible. They may call for further consideration when the full Court re-assembles after the vacation, not with reference to this case but with reference to the future. The accused is entitled to have any point in his favour considered, but with submission, it appears to me dangerous to convert the trial of the accused into the trial of others officially connected with the proceedings, against whom no specific charge calling for an answer has been made.

204. So far as the accused is concerned I had thought that the incident was disposed of on the first day of the hearing, before us. After the relevant part of the learned Judge's note of the proceedings, which he had prepared for our information, had been read out in Court to the learned Counsel, Mr. Chatterji, we adjourned the hearing from 11 A.M. to 2-30 P.M. in order that the learned Counsel, might see his client and ascertain from him whether he desired in the circumstances that his case should be argued by the learned Counsel or by some, other Counsel. We were told in due course, as I understood, that the accused had full confidence in the learned Counsel and desired him to argue the case, which he proceeded to do. The hearing lasted for four days and a-half and, as I had thought, every material aspect of the case was fully placed before us. I cannot avoid saying that it is embarrassing to find after so full a hearing that this incident is again brought into question.

205. It is not suggested that the Tribunal, which tried the accused, was in any respect incompetent or that the trial was a nullity.

206. The learned Judge has told us that the learned Counsel came to him before he had read the papers in the case, and were with him for a very short time, but he had no interest in the matter except to do his public duty to the best of his ability. No objection was taken to him presiding at the trial and apart from the complaints made in regard to his charge to the Jury--complaints which I held to be quite unfounded--it has not been suggested before us, and, in my opinion, it could not properly have been suggested that the learned Judge did not preside with strict impartiality and fairness.

207. As to the Jury who tried the facts, they had no knowledge at all of the incident. The verdict was that of a Jury against whom nothing has been or can be said.

208. Lastly, as to the learned Counsel, we have been told that their action was taken without previous consultation with the accused. It is to be presumed, however, that before the trial the learned Counsel had received, their instructions from the accused's attorney and had also seen the accused. The accused himself pleaded guilty to the charge of attempted robbery, and he doubtless did so after

consultation with his legal advisers. He must then have come to learn their view generally of his case, and I can find no ground for any suggestion that his confidence in them was misplaced in the sense that his Counsel did not afterwards do all that could be done to secure his acquittal on the charge of murder. From what the learned Counsel, Mr. Chatterji, has told us of the substance of his address to the Jury, I do not conceive that he could have said more than he did say.

209. It appears to me that the learned Counsel who appears to have gone to the learned Judge in what they considered to be the interests of their client, did not feel themselves at all hampered by anything which may have fallen from the learned Judge. I have not detected any want of freedom or enterprise in their conduct of the defence or in the mode in which they put before the learned Judge and the Jury the case for the accused on the two crucial questions, the question whether the accused was one of those who fired at the Post Master and the question of common intention.

210. No witnesses for the accused were called and in such a case and in such circumstances it would be surprising if any were called., The defence was necessarily of a negative rather than an affirmative character. The only hope was by cross-examination to shake the prosecution evidence telling most strongly against the accused. I have already indicated my belief that the learned Counsel too only acted up to their original instructions but possibly exceeded those instructions. So far as I can see they left no stone unturned and, in my opinion, the accused was in no way prejudiced at his trial.

211. I have made these observations out of respect for the difficulty which has been felt by my learned brother Mookerjee, J. But as the position appears to me, we were constituted a Bench to try matters arising out of the certificate of the learned Advocate General and I am not to be understood as conceding that this incident in any way comes within that description. So far as I am aware, the learned Advocate-General knew nothing of it and it is not one of the grounds upon which he acted. No complaint has been made by or on 'behalf of the accused that his Counsel failed in any way in their duty to him. The question, which in my view

of it is not one of law, is raised by the Court itself on the merits, as it, appears to me, upon a mere possibility or Conjecture that the accused may have been prejudiced.

212. No one will dispute that our powers as a Court of review or A Court for cases reserved, or certified--whatever be the correct designation--are circumscribed by the terms of Clause 26 of the Letters Patent. As I read the clause, the certificate of the Advocate-General does not give us a roving Commission to enquire into every incident connected with the case which may have occurred before or at the trial. When the question or questions of law raised by the certificate for our consideration are determined in a sense adverse to the accused, our function ends. We have then no power to re-try the case and the judgment and sentence of the Trial Court stand.

213. As at present advised, I hold that to be the constitutional position and for authority I should go no further than the case of Emperor v. Upendra Nath Das 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.). In that case Sir Lawrence Jenkins, C.J., said 'if there was no misdirection or other error as certified, the certificate was misconceived, and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then that must be not by this Court, but by some other, authority vested with the requisite power.' This view) was specifically, endorsed by Woodroffe, J., and by my learned brother Mookerjee, J., and received the concurrence of the other two members of the Bench, Stephen and Holmwood, JJ.

214. As to a re-trial on the merit's, I see no ground for considering whether a re-trial should be directed. But apart from that even if we were accepting and not repelling the learned Advocate-General's certificate, we should have no, power to direct a re-trial, at any rate on any ground short of an illegality which made the trial abortive and no trial at all. The question is concluded by the authorities reviewed by Mookerjee, J., in Emperor v. Panchu Das 58 Ind. Cas. 929 : 24 C.W.N. 501 : 31 C.L.J. 402 : 47 C. 671 : 21 Cr. L.J. 849.

215. I conclude that AVC should pronounce the certificate of the learned Advocate General to be misconceived. I am glad to think that in so concluding I am in

agreement with the learned Judge who has presided over our deliberations. [Note by Richardson, J., on previous, history of Section 34 and Sections 33, 37, and 38.]

216. The draft Code prepared by Lord Macaulay and his colleagues was Completed in 1837. It began with a Chapter bearing the same heading--'General, Explanations'--as the present Chapter II. Notes on various Chapters are appended to the draft but it does not seem: to have been thought, necessary to furnish, any note on the 'General Explanations which, are in the nature of interpretation clauses. The following observations, however, occur in two paragraphs of the first report dated 23rd July) 1846, of a subsequent body of Indian Law Commissioners:

217. '181. There is no distinction of principals in the first degree and principals in the second degree in the Indian Code. In the 3rd clause of the Chapter on General Explanations it is laid down once for all that 'wherever the Causing of, a certain effect with a certain intention or with a knowledge: of certain circumstances, is an offence, it is to be, understood that if more persons than one jointly cause that effect, every one of them who has that intention or, that, knowledges commits that offence.

218. 182. The definitions of substantive offences, construed with reference to this general explanatory clause, take in all, who actually cause or assist in causing the effect which constitutes the, offence, without distinction of leaders or followers principals or subordinate agents...

219. The Indian Law Commissioners go on to refer to the corresponding articles under the heading ' Criminal Agency and Participation,' of the Digest of the English Law prepared at a time when thoughts were entertained of codifying that law, a project afterwards abandoned.

220. Then in a postscript, dated 5th November, 1846, there is the following paragraph :

662. With reference to our observations... upon the provisions of the Code compared with the, English Law of Principal and Accessory, we have now to point out that.... Her Majesty's Commissioners propose to abolish the difference of

punishment between principals in the first and second degree and accessories, and the technical distinction between principals in the first and second degree, and to make the offence of being an accessory a substantive offence. By the change proposed the law of England will correspond with the Indian Code on these points.

221. The word 'accessory' is here used as meaning 'accessory before the fact' and the reference would appear to be, or may be taken, to be, to the¹ recommendation of the English Criminal Code; Commissioners set out in Sir James Stephen's History of the Criminal Law at page 236, as follows :

222. 'Every one is a party to and guilty of an indictable offence who

223. '(a) Actually commits the offence, or does or omits' to do any act, the doing Or omission of which forms part of the offence; or

224. '(b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or

(c) Directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid.

225. Clause (a) contemplates the offenders known in England as principals in the first degree, the immediate perpetrators of the act done, Clause (b) those known as principals in the second degree or accessories at the fact, and Clause (c) those known as accessories before the fact. In English Law, principals in the first degree and principals in the second degree are equally principals and are, as such, distinguished from accessories before the fact.

226. It will be observed that in the Code as finally passed by the Legislature in 1860, Clause 3 of the original draft is drawn out into the Sections 34, 35, 37 and 38. This difference of language may, of course, have affected the meaning. I have no knowledge when or by whom the change was made, or for what reasons the language adopted was chosen.

227. As to the relation of Section 34 and the connected section to abetment, in the original draft, 'abetment' was defined as being of two kinds, previous abetment and

subsequent abetment. Clearly Lord Macaulay and his colleagues were thinking of accessories before the fact and accessories after the fact. Accessories after the fact, as 'I have said in my judgment, are now' dealt with separately,' and in the Code as passed abetment is not expressly' qualified by the word 'previous.' Does the omission of that word make any difference to the meaning? Or was it omitted, simply' because it became unnecessary to distinguish previous abetment from subsequent abetment.

228. Here again I am not aware how the chapter on abetment came to take its present form. Considerable changes were made between 1847 (the year of the Commissioner's second report) and 1860, but of the reasons for those changes I know nothing.

229. Ghose, J.--One Barendra Kumar Ghose, having at the last Criminal Sessions' been convicted by a special Jury of the murder of one Amrita Lal Roy, was sentenced to death by Mr. Justice Page. Thereafter the accused through his Counsel applied to the Advocate-General for a certificate under Section 26 of the Letters Patent for the further consideration by this Court of certain matters of alleged misdirection and non-direction; arising out of the summing up of the learned Judge' to the Jury.

230. The facts are as follows: The accused abovenamed was on the 16th August, 1923, charged at the Criminal Sessions before Mr. Justice Page and a special Jury on an indictment as follows:

231. First, that he, the said Barendra Kumar Ghose, together with certain other persons on or about the 3rd day of August in the year of our Lord 1923 in Calcutta aforesaid committed murder by causing the death of one Amrita Lal Roy and thereby he, the said Barendra Kumar Ghose, committed an offence punishable under Section 302 of the Indian Penal Code.

232. Second, that he, the said Barendra Kumar Ghose, together with certain other persons, at or about the time and in the place aforesaid were jointly concerned in attempting to commit robbery on the said Amrita Lal Roy and that at the time of committing such robbery voluntarily caused hurt to the said Amrita Lal Roy, and

thereby he, the said Barendra Kumar Ghose, committed an offence punishable under Section 394 of the Indian Penal Code.

233. It is stated that the accused pleaded guilty to the aforesaid charge under Section 394, Indian Penal Code, with the reservation that he did not cause hurt to the said Amrita Lal Roy and pleaded not guilty to the charge under Section 302, Indian Penal Code, and thaj; the trial was proceeded with thereafter in respect of the latter charge.

234. The case for the prosecution was as follows: That the accused and three other persons made their appearance at the Sankaritola Post Office at about 3-30 P.M. on the 3rd August, 1923, armed with fire-arms; that three of them, including the accused, entered the Post Office through its south-eastern door, while the fourth man remained outside; that of the three who came, inside, the accused stood in the middle and the masked man 'on his left and the other man on his right; that they stood within less than two yards of Amrita Lal Roy, who was the Post Master, of whom all the three demanded money with the words 'Post Master, rupeya deo '; that the Post Master asked ' kishcr tafca,' whereupon all the three levelled their weapons and fired at the Post Master simultaneously; that one of the bullets went through the Post Master's right palm and another struck him on the right side under the right armpit, whereupon he fell down with a cry; that a clerk named Sham Dulal Das, who was working in the same room at the time ran to the Post Master's aid, whilst Hara Prashad Das, the Post Office packer, ran after the three, men, who were immediately escaping along with the fourth man, who was outside; that the chase was taken up by two other men named Sitaram and Jhapsaram employees of one Pro-motho Lal Sircar residing at 15, Mohendra Sircar Lane, opposite the Post Office; that as they got to the turning of Mbhendra Sircar Lane and Sankaritola East Lane, the accused ran down the latter lane,; firing his pistol from time to time, whilst the other three ran by Mohendra Sircar Lane to Creek Row; that the accused was followed by the packer and the two others whose number was increased by other¹ pursuers, who all kept following him until he was arrested in front of St. James' Square and brought back to the Post Office along with his pistol, which, the accused had thrown away near the said Square but which had been picked up by a small boy, who gave it to the

packer.

235. That the prosecution case further was that the Post Master had expired within: a short interval of being shot; that one bullet was found inside his body, which on being extracted fitted' into the empty cartridge case picked up inside the room of the Post Office, which in its turn, was found to be of the same, bore as that, of the automatic pistol carried by the accused; that the dent of a bullet was'1 found on the wall of 15, Mohendra Sircar Lane in front of the Post Office; that no other empty cartridge was found inside the said room; that no trace of the third bullet was available in or but of it and lastly that two revolvers and three daggers were found at premises No. 181, Harrison Road, a Chemist's shop, where the accused was employed.

236. The case for the defence was embodied: in a statement made by the accused in the Court, the main points in which-were; as follows:

237. 1. Three and not four persons went to the Post Office; that the; accused went there with the assured feeling, that no life would be taken by anyone; that, the accused stayed outside whilst the other two went in; and that only two shots were fired inside and not three.

238. 2. That the accused was so taken by surprise on account of the shooting of the Post Master that he was temporarily robbed of locomotion and self-control, and he remained back whilst his two companions ran aWay; that he recovered himself later on hearing the cry of ' chor, chor'; that he was running by himself; that he for the first time tried to fire his revolver in course of being pursued; that his pistol did not go of? when he pulled the trigger; that he thereupon remembered his instructions to pull out a portion of the pistol and to release the safety-catch, and as he did so, a live cartridge fell out.

239. 3. That the accused kept on firing in the air as he rah along and refrained from shooting the packer and others who followed him at close quarters.

240. No evidence was called tin behalf of the accused and the accused contented himself with making the statement referred to above. There was evidence, as

indicated above, before the Jury that immediately on the demand for money being made of the Post Master by the three men who had entered the room, in which the Post Master was working, the packer, Hara Parasad Das, at once ran up towards the Post Master's table and saw three men at the door of the room and that the accused was one of the three and' that there was another man in the courtyard near the steps leading to the door, The packer's word were as follows;--'The Post Master stood up and said'what money'. Immediately afterwards all the three men fired their pistols'...' From the time I saw prisoner first till he was arrested I never lost sight of him. I am certain that he fired and was one of those in the room. They all three fired simultaneously.' The evidence of Sham Dulal Das, the clerk, who was employed at the Post Office, was as follows: ' I first heard a noise and a voice 'rupeyd deo.' I looked round. 'I saw three men armed with revolvers standing in front of the Post Master three or four cubits away and another man outside the fobhi with a revolver, The three men, were in, the room. The prisoner was in the middle. The man on the left had a mask on. It was a mask like this (produced). I saw weapons in the hands of the three men. The prisoner was wearing a khdddar coat on. It was one like this (produced). The Post Master was closing the mail and had about Rs; 2,000 in notes and money on the table before him. He stood up at rupeyd deo and shouted out what money.' All three men fired at him immediately.'

241. The learned Judge charged the Jury at some length and in such charge said; amongst others, as follows :

Therefore, in this case if these persons went to that place with a common intention to rob the Post Master and, if necessary, to kill him, and if death resulted, each of them is liable, whichever of the three fired the fatal shot.

If you come to the conclusion that these three or four persons came into the Post Office with that intention, to rob and; if necessary, to kill; and death resulted from their act, if that be so, you are bound to, find a verdict of guilty.

I say if you doubt that it was the pistol of the accused which fired the fatal shot, that does not matter. If you are satisfied on the other hand that the shot was fired by one of those persons in furtherance of the common intention, if that be so, then it is your duty to find a verdict of guilty.

242. The summing up of the learned Judge was placed before the learned Advocate-General for his consideration and it was further represented to him that the learned Judge had 'omitted to draw the attention of the Jury to the defence of the accused save and except a mere reference to the statement made by the accused.'

243. The learned Advocate General thereafter; by virtue, of the powers entrusted to him by the Letters Patent, bearing date the 28th September, 1865, certified that in his judgment whether the alleged direction and the alleged omission to direct the Jury did riot ill law amount to a misdirection should be further considered by this Court, and the matter has accordingly come before this Court for consideration.

244. The certificate of the learned Advocate-General raises two questions, namely, whether there was misdirection on a question of law, and whether there was non-direction with regard to the case for the defence; but before I proceed to deal with these matters, it is necessary to examine the scope and extent of Clause 26 of the Letters' Patent of 1865 under which the learned Advocate-General has given his fiat.

245. Clause 26 of the Letters Patent runs as follows: 'And we do further ordain, that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.' In Clause 25 of the Letters Patent it is definitely laid down that there shall be no appeal from any sentence, or order passed or made in any criminal trial before the Court of original criminal jurisdiction which may be constituted by one or more Judges of the High Court, but it shall be at the discretion of any such Court to reserve any point or points of law

for the opinion of the High Court, Clauses 25 and 26 of the Letters Patent, therefore, make it plain that, when a point or points of law has or have been reserved or certified by the Advocate-General as erroneously decided or as worthy of further consideration, the High Court has full power and, authority ' to review the case or such part of it as may be necessary, and, finally determine upon such point or points of law, and thereupon to, alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right.' As has been observed by Mookerjee, J., in the case of Fftteh Chanel, Agarwallq, v. Emperor 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.); 'It is obyious that the intentipn is that the case shqiild fee finally decided on review and not remitted fpr re-trial. It has also been ruled that when the Court qn review holds on the point of law in favqur of the accused, it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The Bombay High Court followed this procedure in the cases of Reg. v. Navroji 9 B.H.C.R. 358 and Imperatrix v. Pitamber Jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469, in each instance although the Court decided the questionof law in fayour of the accused, yet, upon a review of the whole case and an examination of the merits,. affirmed the conviction. In this, Court, the sarne procedure was adopted in the cases of Queen v. Hurribote Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr; 1 Ind. Dec, (N.S.) 132 and Queen-Empress v. Q'Hflra 17 C. 642 : 8 Ind. Dec. (N.S.) 967 (F.B.), in each instance, the point of law was decided, in favour of the accused; but on a review of the whole evidence, while the conviction was affirmed in the former, case, it was set aside in the latter instance. The cases of Queen-Empress v. Shib Chunder Mitter 10 C. 1079 : 5 Ind. Dec. (N.S.) 721 and Emperor v. Upendra Nath Das 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.) do not directly touch the present question, inasmuch as the alleged error of law was not established in either instance.' In'the ease pi Queen-Empress v. Shib Chunder Mitter 10 C. 1079 : 5 Ind. Dec. (N.S.) 721, a Rule was obtained under the provisions of Clause 26 of the Letters, Patent calling upon the Law Officers of the Crown, to show cause why the prisoner, Shib Chundra Mitter, should not be acquitted or why there should not be a new trial on the ground that the learned Judge, Mr. Justice Eield, who tried him had misdirected the Jury on a point of law. Sir Richard. Garth, C.J., observed

as follows: 'That being so, we consider that there was no misdirection; and, as in this case it is not shown that in his charge to the Jury the learned Judge committed any error of law, we consequently discharge the Rule.' 'In the case of Emperor v. Upendra Nath Das 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.), Sir Lawrence Jenkins, C.J., observed as follows: ' In this view of the case, it is not within my power to re-open the case and I regard myself as not entitled to express any opinion as to its merits. In fact, I am not in a position to deal with the merits; for they have not been discussed before us, nor have those conditions been established on which alone they could be considered by us. Our powers are circumscribed, for we can only act in conformity with Clause 26 of the Letters Patent. If there was no misdirection or other error as certified, the certificate was misconceived and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then that must be not by this Court, but by some other authority vested with the requisite power'. In the same case, Woodroffe, J., observed as follows: ' With the merits, however, we are not concerned until it is established that there has been an error in law which opens out the case for our judgment. The same ground, precludes me from dealing with the question of sentence, which may arise on the facts above stated, and the possibility, if the verdict be correct, of the act having been committed without premeditation on a sudden access of passion. This is, however, a matter for the Crown to consider, I can only hold that no error of law has been shown which entitles me to re-open a verdict or to consider a sentence which has already been passed.' Mookerjee, J., in the same case stated as follows: '-In the view I take, no error of law has been established, and, consequently, the Court is not called upon to express an opinion as to the propriety of the conviction and sentence, although, as Woodroffe, J., has pointed out, if the Court could examine the case on the merits, there might be matters for careful consideration.'

246. The question next arises as to whether the; High Court, on a reference under Clause 26 of the Letters Patent, is entitled to direct a new trial. The cases decided in this Court since the case of Queen v. Hurribole Ghunder Ghose 1 C. 207 : 25 W.R. 36 Cr; 1 Ind. Dec. (N.S.) 132, show conclusively that the case reserved or certified has got to be finally decided by the High Court on review and that an order for re-trial is not comDete.it [See Emperor v. Panchu Das 58 Ind. Cas. 929 :

24 C.W.N. 501 : 31 C.L.J. 402:47 C. 671:21 Cr. L.J. 849] I think the authorities referred to above are binding on us and that we must proceed upon the footing that there is no power in the High Court to direct a trial.

247. I am not unmindful of the fact that it has recently been held in England that in cases of mis-trial the Court of Criminal Appeal has power under the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23) to order a new trial: *Crane v. Director of Public Prosecution* (1921) 2 App. Cas. 299 at p. 331 : 90 L.J.K.B. 1160 : 125 L.T. 642 : 85 J.P. 215 : 15 Cr. App. Rep. 183 : 65 S.J. 642 : 37 T.L.R. 788. In that case there was a trial before a Jury of two persons on separate indictments and it was held that the trial was a nullity and was not a mere irregularity. The Court of Criminal Appeal, as also the majority of the noble and learned Lords in the House of Lords went at great length into the question of the powers of the Court for the consideration of Crown cases reserved under the Crown Cases Act of 1848 and into the powers of the old Court of Queen's Bench on a writ of error and held that the trial being a nullity, it was competent to the Court of Criminal Appeal to order a new trial. Now, it is to be observed that the words of the Crown Cases Act of 1848 are wider than the words used in Clause 26 of the Letters Patent and no proper analogy can be drawn therefrom. Further it may be noticed that the Court of Error sat, as has been said, 'not for the exercise of the sound and legal discretion of the Judges but for the benefit of an imperative rule of law,' and that it was in cases among others, where the trial was *coram non iudice* that the Court, of Error used to grant a *venire denovo*. That contingency, for the reasons which will be found later, has not arisen in this case and I will not, therefore, pause to elaborate it, or to desert the sure anchorage of an established rule, so far as this Court is concerned.

248. There is one other matter to which I desire to make a passing reference before I come to the matters which properly arise on the learned Advocate-General's fiat. It appears from the information which has been placed before this Court by Mr. Justice Page that two or three days before the trial began before him in the Sessions Court, Mr. B.C. Chatterji and Mr. S.K. Sen, Counsel for the accused, applied to see Mr. Justice, Page in his private room. According to Mr. Justice Page, they informed him that after careful consideration they were

satisfied that there was no defence to the charges and that the accused was, guilty. They asked him if the accused pleaded guilty to the charge of murder, whether he would deal with the accused leniently. Mr. Justice Page told learned Counsel that he could give them no information as to what he should do at the trial, but if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the accuracy of the witnesses for the Crown, they were not entitled to set up any substantive defence in opposition to the case for the Crown.

249. In view of what took place before the trial in Mr. Justice Page's room, it was thought proper that an opportunity should be afforded by the Court to Mr. B.C. Chatterji (Mr. S.K. Sen was absent at the hearing before us) to consider whether he should appear on behalf of the accused at the hearing before us, or whether the accused should not have an opportunity of being 'represented by other Counsel. A short adjournment was granted and arrangements were made so that Mr. Chatterji might interview the accused in the Presidency Jail. Later on, Mr. Chatterji informed us that the accused had definitely stated that he wished him (Mr. Chatterji) to represent him at the hearing before us and to argue the case on his behalf. Thereupon the hearing proceeded. It is unnecessary for me to dwell further on the incident referred to above or to refer to the statement made by Mr. Chatterji from his place at the Bar, or to the written statement handed in to the Court on behalf of Mr. Sen and himself, or to elaborate the duty of Counsel, assuming that they are impressed with a belief in their client's guilt.

250. Now, it was said that the accused had pleaded guilty to the charge under Section 394, Indian Penal, Code, with the reservation that he did not cause hurt to the Post Master. With reference to this allegation, however, the learned Judge who presided at the trial has informed us of what precisely happened at the trial when the accused was asked whether he was guilty of the offences charged against him, and we have the learned Judge's word that in respect of the charge under Section 394, Indian Penal Code, the accused pleaded guilty to the same and that there was no such reservation as is mentioned in the application, on behalf of the accused to the learned Advocate-General for his fiat. I think the true rule is that we have no more power of contradicting the statement of a learned

Judge in a matter of this description than we have the power of contradicting any allegation which may appear upon the record. As was said by Martin, B., in the case of *Reg. v. Mellor* (1858) *Dears and Bell*. 468 : 7 Cox C.C. 454. 'We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court, which of itself implies an absolute verity.' Therefore, the only charge that remained to be enquired into was the charge under Section 302, Indian Penal Code, and the accused pleaded not guilty to the same.

251. It has been contended before us on behalf of the accused that if three men fired at another intending to kill him and if one of the shots only proved fatal and if it could not be ascertained which of the three had fired the fatal shot, then in such event all the three men could not be held guilty under Section 302, Indian Penal Code read with Section 34, Indian Penal Code. The argument is that not only must there be a common intention among the persons charged but that the criminal act itself must be jointly, i.e., physically done by all the persons charged in furtherance of the said common intention. In other words, it is argued that the criminal act itself must be participated in by all the persons entertaining a common intention. And if the word 'criminal act' is taken to denote a series of criminal acts, then the 'series of criminal acts must, according to learned Counsel for the accused, be participated in by all the persons who have a common intention. It is contended that if these two elements are not satisfied on the evidence adduced by the prosecution, the persons engaged in the doing of the criminal acts of the description referred to herein cannot be held to be guilty under Section 302, Indian Penal Code. It is further contended that the learned Judge impliedly told, the Jury that if three or four persons came into the Post Office with a common intention to rob the, Post Master, and if necessary to kill him, and death resulted from their act, the man who stood outside the Post Office room, and in the courtyard would be equally guilty with the men who were inside the Post Office room, and that in this the learned Judge, was wrong. It is argued that if these submissions are correct the learned Judge misdirected the Jury in the passages which have been quoted above.

252. It therefore, becomes necessary to ascertain, what is the true meaning of Section 34 of the Indian Penal Code, 'Section 34 runs as follows;--'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.'

253. To start with, it is reasonably clear that the section does not create a distinct offence and it merely lays down a principle of liability: [In the matter of *Faezulla*, (57).] What is this principle? It is, to use the words of their Lordships of the Judicial Committee of the Privy Council, this, that 'where parties go with a common purpose to execute a common object each and every one becomes responsible, for the acts of each and every other in execution and' furtherance of their common purpose; as the purpose is, common so must be the responsibility.' [see *Ganesh Singh v. Ram Raja*, 3 B.L.R. 44 (P.C.); 12 W.R. 38 (P.C.)], This view was expressed in 1866 by their Lordships in a civil appeal arising out of a case in, which the defendants, had plundered the plaintiffs property; but before that, in 1866, Sir Barnes Peacock, C.J., in the case of *Queen v. Gora Chand Gopee* 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177, in delivering the judgment of the Full Bench had observed as follows: 'If the object and design of those who seized Qomadee was merely to take him to the thana on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is, laid down that, when several persons, are in company together-engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the other commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention.' This is so because it is a well recognized canon of criminal jurisprudence that the Court cannot distinguish between co-conspirators, nor can it enquire, even if it were possible, as to the part taken by each in the crime. As was observed by Markby, J.: 'If two persons join in beating a man and he dies, it is not necessary to ascertain exactly what the effect of each blow was.' [See *Queen v. Mohaftied Asger* 23 W.R. 11 Cr.]. In other words, since a common act and evil intent constitute crime and since a thing which a person does through the agency of another is the same in law as though he had performed it himself, one who

contributes his will to a crime, by whomsoever the physical act of wrpng is done, is guilty of the crime; that is to pay, when two or more persons unite to accomplish a criminal act, whether through the physical act of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrong-doing is in law responsible for the whole, as if the same were performed by himself alone. Numerous illustration's can be given of the application of this doctrine in varying circumstances. Where one assailant slakes a blow which is not fatal and a confederate follows it up with a fatal blow, both are equally liable. If several persons combine to forge an instrument, and each executes by hjnaself a distinct part of the forgery in pursuance of a conilnon intention, they are all equally guilty of forgery, thqugh they niay not be together when the forgery is completed by one of them, adding the signature. [Bee Rfx v. Bingely (1821) R. and R. 446, Rex v. Dade (1825) 1 Moody C.C. 307; Rex. v. Kelly (1820) R. and R. 421]. If several persons act in concert to steal a man's, goods, and he is induped by fraud tq trust one of thena, in the presence of others, with the possession of the goods and another of them entices him away, so that the one who has the gpods may carry them away, all are equally guilty of theft. [See Rex v. Standley (1821) R. and R. 305]. The foregoing examples serve to visualise the principle that if persons combining in intention perform a criminal act jointly the guilt of each is the same as if he had done it alone and it is the same, if the act being divided into parts, each proceeds with his part unaided. In other words, if several persons unite in one common design to do some criminal act and each takes the part assigned to him though all are not or may not be actually present, yet all are present in the eye of the law. For instance, if one person in furtherance of a common intention to comm it a criminal act stands guard, it is immaterial how distant from the scene of the crime his vigil is maintained, provided it gives some promise of protection to those actively engaged in the commission of the act. It is unnecessary to elaborate this further, but I will content myself with quoting a significant passage from Foster's Criminal Law;--'Several persons set out together, or in small parties, upon one common design be, it murder or other felony, or for any other purpose unlawful iji itself, and each taketh the part assigned to him; some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to, favour, if need be, the escape of those who are more immediately engaged. They are all, provided the

fact be committed, in the eye, of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant toward the same common:' end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise.' To sum up, persons executing parts of a crime separately in furtherance of a common intention are equally guilty. This seems to me to be the meaning of Section 34 of Indian Penal Code, and this view is in accordance with that taken in the vast majority of decisions in this, Court. [See for instance the cases, Queen v. Gora Chand Gopee 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177, per Peacock, C.J.; Queen v. Hyder Jolaha (12) per Mark by, J.; Queen-Empress v. O'Hara, 17 C. 642 : 8 Ind. Dec. (N.S.) 967 (F.B.) per Morris, J.; Khudiram Bose v. Emperor 3 Ind. Cas. 625 : 9 C.L.J. 55 : 10 Cr. L.J. 325, per Brett, J.; Emperor v Morgan 1 Ind. Cas. 814 : 36 C. 302 : 13 C.W.N. 362 : 9 C.L.J. 204 : 9 Cr. L.J. 393 per Holmwood, J.] Gouvidas Namasudra, v. Emperor 2 Ind. Cas. 841 : 36 C. 659 : 13 C.W.N. 680 : 10 Cr. L.J. 186 per Maclean, C.J.; Sri Prosad v. Empress 4 C.W.N. 193 at p. 196, Jamiruddi Biswas v. Emperor 16 Ind. Cas. 523 : 16 C.W.N. 909 : 13 Cr. L.J. 715 per Holmwood, J.; and In the matter of Faezulla (57)]. No doubt a different view of the scope of Section 34 has been taken in the case of Emperor v. Nirmal Kanta Roy 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460, which was cited apparently with approval by the Chief Justice in the case of Emperor v. Profulla Kumar Mazumdar 74 Ind. Cas. 267 : 50 C. 41 at p. 47; (1923) A.I.R. (C.) 453 : 24 Cr. L.J. 763, and it has been held that Section 34 applies only where a criminal act is done by several persons, of whom the accused charged thereunder, is one, and not where an act is physically done by some persons other than the latter. In other words, it has been held that where two persons fire at another and one actually hits and kills him, the other is not guilty of murder under Sections 302 and 34, Indian Penal Code,' but of attempt to murder, which offences do not constitute the same 'act'. Giving the words of Section 34 their plain and natural meaning, I am unable to take the restricted view of Section 34, which apparently found favour with the learned Judges who decided the two cases just referred to. In my judgment, the effect of Section 34, Indian Penal Code, would be entirely nullified if such a restricted meaning of this section is accepted.

254. The above being my reading of Section 34, Indian Penal Code, I have carefully examined the summing up of the learned Judge in this case and I have come to the conclusion that the summing up is-not open to the charge of misdirection as has been contended for by learned Counsel for the accused. The expression 'criminal act' need not necessarily mean one single indivisible act. I think the proper interpretation of Section 34 in the light of the facts of the present case is to read it in manner something like the following: 'When a criminal apt,' e.g., the killing of the Post Master 'is done,' that is, brought about or carried out 'by several persons in furtherance of the common intention of all, each of such persons is liable for that act,' that is, for such killing, 'in the same manner as if it,' that is, the killing, 'were done' or brought about or carried out 'by him alone.' The section can also be read in the light of the facts in the present case in the following manner: When a series of acts involving or resulting in a crime to wit the destruction of the Post Master is done by several persons in furtherance of the common intention of all, each of such persons is liable for that series of acts in the same manner as if the whole series were done by him alone. In my view, therefore, so far as the learned Judge's charge to the Jury is concerned, there has been no misdirection and the first point taken in the learned Advocate-General's fiat, therefore, fails.

255. The view taken as set out above in the decisions of this Court of the true meaning of Section 34, Indian Penal Code, finds support, so far as the Madras High Court is concerned, in the case of Queen-Empress v. Raru Nayar, 19 M. 482 : 2 Weir 745 : 6 Ind. Dec. (N.S.) 1041; so far as the Bombay High Court is concerned, in cases of Imperatrix v. Pitam-bar Jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469 and Emperor v. Chhota-lal Bohar 14 Ind. Cas. 970 : 36 B. 524 : 14 Bom. L.R. 147 : 13 Cr. L.J. 426; and so far as the Allahabad High Court is concerned in the cases of Queen-Empress v. Mahabir Tiwari 21 A. 263; A.W.N. (1899) 76 : 9 Ind. Dec. (N.S.)876, Pamper or v. Nageshwar 28 A. 404; A.W.N. (1908) 61 : 3 Cr. L.J. 322, Emperor v. Bhola Singh 29 A. 282; A.W.N. (1907) 51 : 4 A.L.J. 207 : 5 Cr. L.J. 130, Emperor v. Kanhai 21 Ind. Cas. 657 : 35 A. 329 : 11 A.L.J. 752 : 14 Cr. L.J. 609, Emperor v. Ram Newaz 21 Ind. Cas. 663 : 35 A. 506 : 11 A.L.J. 804 : 14 Cr. L.J. 615, Chandan Singh v. Emperor 43 Ind. Cas. 438 : 40 A. 103 : 16 A.L.J. 11 : 19 Cr. L.J. 150 and Emperor v. Guiab 47 Ind. Cas. 805 : 40 A. 686 : 16 A.L.J. 731

: 19 Cr. L.J. 953. The Patna High Court has taken the same view in the cases of Ritbaran Singh v. Emperor 46 Ind. Cas. 709 : 19 Cr. L.J. 789 : 4 P.L.W. 120 and Strughan Patar v. Emperor 50 Ind. Cas. 337 : 20 Cr. L.J. 289. So far as the Punjab Court is concerned, the case of Emperor v. Nirmal Kanta' Roy 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460 has been followed in the case of Bahal Singh v. Emperor 52 Ind. Cas. 791 : 24 P.R. 1919 Cr.; 20 Cr. L.J. 711. It is not to be understood that the above is an exhaustive summary of the cases on Section 34, Indian Penal Code. There are a great many more decisions on that section, but I have only selected the typical ones, more specially so because of the fact that a full discussion of them is contained in the judgment of Mookerjee, J.

256. I now pass on to consider the second question raised on the fiat of the learned Advocate-General, namely, that the learned Judge had 'omitted to draw the attention of the Jury to the defence of the accused save and except a mere reference to the statement made by the accused.' In order to appreciate the precise significance of this contention, the facts of the case, which have already been referred to by me, have got to be borne in mind and, bearing the same in mind, the learned Judge's charge to the Jury has got to be examined. The case for the defence as far as one can make out from the cross-examination of the prosecution witnesses and from the statement made by the accused: when questioned under the provisions of Section 342, Criminal Procedure Code, was this :

257. 1. That he stood outside the Post Office room and in the courtyard ;

258. 2. That he did not fire; and

259. 3. That he did not intend to kill the Post Master.

260. In other words, the real questions on the case for the defence were :

261. a. Did three or four men form the party and did two or three men go inside the Post Office room and fire?

262. b. Was the prisoner outside the Post Office room and in the courtyard?

263. c. Did the prisoner have any murderous intention?

264. Now the principle which should guide us in determining whether there has been non-direction amounting in law to misdirection is what has been laid down by Lord Aylmerstone, L.C.J., in the case of *Rex v. Stoddart* (1909) 2 Cr. App. Rep. 217 at p. 216 : 25 T.L.R. 612 : 73 J.P. 348 : 53 S.J. 578. Lord Alverstone observed as follows :

265. 'As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing up, but of the whole conduct of the trial. Objections were raised which, if sound, ought to have been taken at the trial. Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended, over a period of 20 days, would fail to be open to some objection.' To quote Lord Esher's words in *Abrath v. North-Eastern Railway Co.* (1883) 11, Q.B.D. 440 at p. 453 : 52 L.J.Q.B. 620 : 49 L.T.618 : 32 W.R. 50 : 47 J.P. 692, affirmed on Appeal (1886) 11 App. Cas. 247 : 55 L.J.Q.B. 457 : 55 L.T. 63 : 50 J.P. 659: 'It is no misdirection not to tell the Jury everything which might have been told them: there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at great length which were never suggested at the trial and

which are only the result of criticism directed to discover some possible ground for argument.' These observations have been approved of and acted upon in the Full Bench case of *Fateh Chand Agarwalla v. Emperor* 38 Ind. Cas. 915 : 21 C.W.N. 33 : 24 C.L.J. 400 : 44 C. 477 : 18 Cr. L.J. 385 (F.B.) and in the case of *Emperor v. Upendra Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.). In the last mentioned case Sir Lawrence Jenkins, C.J., observed as follows: ' The duty of the Judge is, in my opinion, to lay down the law in reference to the case presented to the Court and the facts of the case, and not to perplex the minds of the Jury with considerations that are outside the legitimate scope of the enquiry. It is, I think, the duty of the Judge to keep the Jury within proper limits, and, for this purpose, to simplify as far as he can the issues fairly and properly before the Court, and direct the minds of the Jurors to those issues and those issues alone.'

266. Now, applying the above principles to this case the question arises whether on a fair and reasonable reading of the evidence and of the statement made by the prisoner, and of the learned Judge's charge to the Jury, it can be said in this case that the learned Judge had ' omitted to draw the attention of the Jury to the defence of the accused, save and except a mere reference to the statement made by the accused.' To start with, according to the evidence of Hara Prosad Das, the packer, there were four men, three inside the room and one outside and that the three men who were inside the room had fired. The evidence of Sham Dulal Das, the Post Office clerk, is also to the same effect. The witness, Sitaram, says there were four men; he heard three shots being fired and he saw four men running away. The witness, Jhupsaram, states that he saw four men run away. The point about the number of the men who had formed the party is one of very great importance, because of the description of the clothes the men had on themselves as given by the packer and the Post Office clerk. In my opinion, it was most material to know with certainty the exact number of men who had assembled at the Sankaritola Post Office on the afternoon of 3rd August, 1923, because if there were only three men and if out of the three two were inside the room, namely, the man who had the mask on and the man with a striped coat, the third man, who according to the evidence had a white coat, on, must have been, having regard to the plan of the Post Office and of the courtyard, the man who stood outside the

Post Office room and near the steps leading thereto; but there is no cross-examination upon this most vital point and it is impossible for me to found my judgment in favour of the accused in the absence of cross-examination. There is, however, enough in the learned Judge's charge to the Jury which indicates to my mind that he had not overlooked the question raised in the first point indicated above. In at least three passages in that charge the learned Judge directed, and properly directed, the attention of the Jury to this matter.

267. Now, as regards the second issue, viz., was the prisoner outside the Post Office room and in the courtyard, the learned Judge did draw the attention of the Jury to the suggestion made on behalf of the defence, although no doubt he pointed out, as he was entirely right in doing so, that there was no evidence in support of the suggestion made by the defence.

268. As regards the third issue, viz., whether the prisoner had any murderous intention, the learned Judge has time after time in the course of his charge to the Jury referred to the question of the common intention of the men who had joined in the enterprise and he very properly left the entire matter to the Jury to decide. The intention of the participants in the criminal act was to be gathered by the Jury from the circumstances disclosed in the evidence and as I read the learned Judge's charge to the Jury, he pointedly drew the attention of the Jury to the fact that they had to be satisfied that the criminal act in question was done by several persons in furtherance of the common intention of all. In other words, the common murderous intention had to be inferred from a network of facts cast around the accused and the Jury had to act on just and reasonable conviction founded upon just and reasonable grounds.

269. Therefore, so far as these three issues of fact are concerned, there are no valid grounds for the suggestion that the learned Judge had omitted to direct the Jury thereon. But it is said by the learned Counsel for the accused that the learned Judge did not, remind the Jury that they were absolute Judges of facts, that he did not tell the Jury that a large crowd had collected at the Post Office immediately after the occurrence and that in the melee it was impossible to ascertain whether the empty cartridge case which has been produced was the only one which had

dropped out; that he gave undue prominence to the evidence of the packer and did not remind the Jury that the packer was contradicted in material particulars by the witness, P. K. Sircar; that he omitted to read and explain to the Jury the various sections of the Indian Penal Code on which the charge against the accused was based and that he did not explain to the Jury the bearing of Exhibits 10 and 11 when coupled with the evidence before the Jury. Many of the points indicated above fade into insignificance if the importance of the last point is once realised. The suggestion therein is that not until the accused had run away into Mohendra Sircar Lane, did a live cartridge fall out of the automatic pistol that he was carrying, that this live cartridge had not fallen out before because the accused had forgotten to release the safety catch on the pistol and further that if Exhibit 10 is that live cartridge which had fallen out of the accused's pistol, then the inference may safely be drawn that the accused had not fired at all until he was chased. In the first place, it is noteworthy that the suggestion that has now been made before us was never made before the Trial Judge and Jury. In the second place, having regard to, what happened at the trial when the witness, Punio Chandra De, was examined, and having regard to the facts which have been stated to us by the learned judge showing conclusively that Exhibit 10 went out of the case altogether, it is, not open, in my opinion, to learned Counsel for the accused at this stage of the case to hark back to Exhibit 10 and to make use of it for the purpose of supporting his theory. In the third place, having regard to the fact that the gun expert, Mr. Todd, was not examined on the point as to whether Exhibit 10 could fit into the automatic pistol which was in the hands of the accused, it would be mere speculation to enlarge further on the question. I am satisfied on the evidence and on the statement of the learned Judge that the case now raised on behalf of the Accused was not made at the trial and was not even remotely indicated during the progress of the trial and that it is an afterthought. So much for the theory of the live cartridge. As regards the other points referred to above, under this head, I do not think it is necessary for me to go into them in detail, the more so because I am satisfied from the tenor and general effect of the whole summing up that substantially the Jury were given a proper direction. No two minds approach a subject from quite the same angle and it may be that another Judge would have framed his charge in different, though I do not say better language. See in this

c'bhhection the judgment of Lord Shaw, in Chaining Arnold's case 23 Ind. Cas. 661 : 41 I.A. 149 at p. 168 : 18 C.W.N 785 : 26 M.L.J. 621 : 15 Cr. L.J. 309 : 1 L.W. 461 : 7 Bur. L.T. 167; (1914) M.W.N. 506 : 16 M.L.T 79 : 12 A.L.J. 1042 : 20 C.L.J. 161 : 16 Bom L.R. 544 : 8 L.B.R. 16 : 41 C. 1023 (P.C.). But the test to be applied in this, as in every case is, Whether on the facts of this particular case, the summing up can in the light of the principles discussed above be legitimately challenged. In my judgment Mr. Justice Page's summing Up cannot be so challenged.

270. In this case, certain considerations arising out of what was stated to and by the learned Judge before the trial were forced upon our attention and we have had to consider whether the accused has had a fair trial. After much anxious consideration I have come to the conclusion that nothing was left unsaid or undone which could have been said or done on behalf of the accused on the facts of this particular case. The considerations to which I have alluded may call for our judgment on a future occasion; for the present I prefer not to say anything further on the same. But I have this satisfaction that all the facts in connection with this trial have been made known to us. The extreme importance of avoiding any grounds for suspicion in trials, civil and criminal, cannot be too strongly emphasised; suspicion feeds on secrecy and the best way to get rid of suspicion is to let all the facts be known. That has been done in this case. The object of a trial is the administration of justice in a Court as free from doubt or chance of miscarriage as merely human administration of it can be--not in the interest of either the Crown or the accused. I have tried to steadily keep this in view and the conclusion I have come to is that the two points raised on the learned Advocate-General's fiat fail and that this application should be dismissed.

271. Cuming, J.--I have given my best attention to the elaborate arguments that have been addressed to us by Mr. Chattetji and the Standing Counsel and after giving them my most careful consideration am of opinion that this certificate of the learned Advocate-General is misconceived and this application for review under Clause 28 of the Letters Patent should be refused.

272. It is unnecessary for me to set out the facts of the case which will be found in the judgment of my learned brother Mookerjee.

273. Mr. Chatterji has urged three points.

274. His first point is that Mr. Justice Page in his charge to the Jury laid down the law as follows:

Therefore, in this case, if these three persons went to that place with a common intention to rob the Post Master and, if necessary, to kill him, and if death resulted each of them is liable whichever of the three fired the fatal shot.

275. Mr. Chatterji's argument 'seems to be that this may be the law in England, he does not seem to dispute that it is so, but he would contend that it is not the law in India. His contention seems to be that those who did not actually fire the fatal shot might be charged with abetment but not as principals. That in the present case, there is no charge of abetment neither did the learned Judge put such a case to the Jury. Further that Section 34 and the cognate Sections 35, 38, or 37 of the Indian Penal Code have no application to the present case and that the persons who did not actually fire the fatal shot that killed the Post Master, could not be guilty as principals. The major portion of his argument has centered round the correct interpretation of Section 34, Indian Penal Code, and with that argument I now propose to deal. That section runs as follows :

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.

276. Mr. Chatterji admits that the expression 'act' includes a 'series of acts' but he would contend that the section contemplates that each of the persons should participate in each of the acts or series of acts and that it does not cover a case where one act of the series is done by one person and another by another person even though these individual acts had a common intention and result or different persons do different parts of the same act even though they were acting with a common intention.

277. Now in considering whether the learned Judge correctly put the law to the Jury we are not necessarily restricted to the provision of Section 34.

278. Section 34 and the connected Sections 35, 36, 37 and 38 create no substantive offence. They are merely declaratory of a principle of law and in charging an accused person it is not necessary to cite them in the charge. If, therefore, the view of the law given by the learned Judge to the Jury fall within anyone of these sections it will be sufficient. Taking first of all Section 34 I am not prepared to accept the extremely restricted view which has been urged by the learned Counsel. The expression criminal act includes also a series of acts.

279. A criminal act may well consist of parts each of which is more or less necessary to the accomplishment of the act. Thus one man may keep guard at the door, while another man holds the victim and a third man kills him. Or one man may be there in order by his presence to encourage, support or protect the man who is actually killing the victim. They would to my mind be all of them doing: some parts of the act because it may well be that without their support the act could not be done. They must, therefore, be considered to be all doing the act though each is executing a different part of the act.

280. Further, if the expression act includes a series of acts then all the different acts of the conspirators such as keeping guard, terrorising the onlookers or victim must be considered as one act. It is impossible to conceive two individuals doing the identically same act. Such a thing is impossible. Therefore to have any meaning the expression 'criminal act done by several persons' must contemplate an act which can be divided into parts each part being executed by a different person, the whole making up the criminal act which was the common intention of all. To put it in another way, the one criminal act may be regarded as made up of a number of acts done by the individual conspirators the result of their individual acts being the criminal act which was the common intention of them all.

281. I think that the expression 'criminal act done by several persons' includes the case of a number of persons acting together for a common object and each doing some act in furtherance of the final result which various acts make up the final act.

282. Mr. Chatterji has cited in support of his contention a number of authorities drawn from every High Court in India. I do not myself propose to travel beyond the decisions of our own Court.

283. Mr. Chatterji has laid much stress, on the ruling of Stephen, J. in the case of Emperor v. Nirmal Kanta Roy 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460. No doubt this case strongly supports his contention but it must be pointed out with great respect to the learned Judge, that it is the decision of a Single Judge sitting on the Original Side and, therefore, cannot be considered as an authority so far as we are concerned. It is, moreover, in direct conflict with a large number of cases in this Court and so far as I can see has never been followed. I will first of all consider the case of Gouridas Namasudra v. Emperor 2 Ind. Cas. 841 : 36 C. 659 : 13 C.W.N. 680 : 10 Cr. L.J. 186, where the late learned Chief Justice remarked: 'Recourse has, therefore, to be had to Section 34 of the Indian Penal Code, but in the circumstances of this case we are not prepared to hold that the appellant who; did not strike the fatal, blow must have contemplated the likelihood of such a blow being struck.'

284. Another case which may be referred to is the case of Keshwar Lal v. Giris Chandra 29 C. 496. In this case, the servant received the money in payment for ganja sold by his master, both master and servants being present. The learned Judges, one of whom was Stephen, J., held that both master and servants were guilty applying the principles of Section 34 and that Section 114 was not applicable. Now in this case it will be seen that the two men did different-parts of the criminal act which was the sale of the ganja for one handed out the ganja and another took the money. It cannot, therefore, be said that they each did the whole act for they each did a distinct part of the criminal act.

285. In the case of Khudiram Bose v. Emperor 3 Ind. Cas. 625 : 9 C.L.J. 55 : 10 Cr. L.J. 325, Brett, J., states:

We may add that even if such had been the case the guilt of the accused would have been equal. If he and Dinesh went that night with the intention of committing murder by means of the bomb and if in prosecution of this common object the accused stood by and held the heavy articles and the coat of Dinesh so as to

facilitate the commission of the offence by Dinesh and to facilitate his escape afterwards, and if Dinesh threw the bomb the accused (Khudiram) would be equally guilty with Dinesh of committing the offence of murder (section 34, Indian Penal Code).

286. In the case of *Nibaran Chandra Roy v. King-Emperor* 11 C.W.N. 1085 at p. 1089 : 6 Cr. L.J. 304, the learned Judges (Mitra and Fletcher, JJ.) remark:

If, however, two persons are found under circumstances as assumed in the hypothetical case, with guns in their hands and they had been acting in concert, or that each was an assenting party to the action of the other, the criminal act done by one must be presumed to have been done in furtherance of the common intention of both, and Section 34, Indian Penal Code, may be invoked to impose penal liability on any one of the persons in the same manner as if the act was by him alone.

287. In support of this proposition the learned Judges refer to *Queen v. Gora Chand Gopee* 5 W.R. 45 at p. 48 Cr.; 1 Ind Jur (N.S.) 177.

288. The case of *In the matter of Faezulla* (57) on which Mr. Ghatteji apparently relies really supports the case of the prosecution for the learned Judges held 'that when two or more persons join actively in an assault on a third person there is ample authority for the view that they are directly responsible for the injuries caused to the extent to which they had a common intention' and surely to fire a pistol at a man or to stand guard at the door with a loaded pistol is actively joining in murdering him.

289. The learned Counsel has further contended that if Section 34 is read as Page, J., would read it in his charge, the enactment of Section 149, Indian Penal Code, would be entirely unnecessary. But a consideration of Section 149 will show that it is wider in its scope than Section 34 for it covers not only the acts committed in prosecution of the common object but also any act that the members of the assembly knew to be likely to be committed. I am, therefore, of opinion that Page, J., correctly laid down to the Jury the law in this portion of his charge. It is the interpretation which has consistently been put on the section by this Court and I

see no' reason to differ from it.

290. Mr. Chatterjee has then urged that the learned Judge misdirected the Jury in that portion of his charge where he stated:

291. 'If you come to the conclusion that these three or four persons came into the Post Office with that intention to rob and, if necessary, to kill and death resulted from their acts, if that be so, you are bound to find a verdict of guilty.' The learned Counsel contends that the implication in that portion of the charge is that one person stood outside the room (which was the defence set up by the accused). He contends that the learned Judge should have specifically put to the Jury that they should consider whether the man who stood at, the door could be affixed with the same intention as those who entered the room, and whether he could be held to know that murder would be done.

292. The accused's case in his statement is that he was the man who stood outside.

293. The answer to this argument must, I think, depend on the facts of the case. The evidence shows that three men entered the Post Office and the fourth stood on the step. He was within a foot or two of the three who actually entered the Post Office door. This man was according to the evidence armed with a pistol and the accused who contends that he was this man also admits he was so armed; In view of his proximity to the other three and the fact he was also armed, it is difficult to set how: the learned Judge could have differentiated his case from the other three or asked the Jury to do so and separately consider it.

294. Mr. Chatterji has next contended that the learned Judge omitted to put the defence of the accused to the Jury beyond making a mere reference to the statement of the accused.

295. He argues that Section 297 applies to High Court.

296. Section 297 provides that in cases tried by Jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the Jury, summing up the evidence for the prosecution and defence and

laying down the law by which the Jury are to be guided.

297. Now it is difficult to see what evidence the learned Judge could have put to the Jury on behalf of the accused. The accused himself had examined no witnesses. Mr. Chattersji, however, argues that there was evidence to support the case of the accused that a live cartridge came out of his pistol and he says this evidence was the finding of a live cartridge. But there is no evidence on the record to prove this live cartridge was found. The prosecution was unable to put into the box the man who found it as he could not be found and the defence opposed any other evidence as to the finding of the live cartridge. Nor is there any evidence that this live cartridge Exhibit 10 fitted the accused's pistol. No attempt was made by the accused to examine Mr. Todd, the gun-maker, on this point. There is no evidence, therefore, to connect this live cartridge with the present case and, clearly, no evidence on the point for the learned Judge to put to the Jury; Another point which Mr. Chatterji contends should have been put to the Jury is that Mh Bavin had deposed that the accused was severally beaten after his arrest and the packer denied he was beaten. Mr. Ohatefji contends that the contradiction should have been put to the Jury to show the untrustworthiness of the packer's evidence.

298. The difficulty here is that the accused himself never suggested he had been beaten nor indeed does Mr. Savin. Mr. Bavin states that the accused was in a state of collapse and had bruises on him. That is not the same thing as saying that he had been beaten. Mr. Chatterji then suggests that the learned Judge should have drawn the Jury's attention to the fact that Sarkar's evidence contradicts the packer. The evidence has been put before us and I am bound to say I do not see that Sarkar's evidence does contradict the packer. Mr. Chatterji says he did put this to the Jury. If so, the Jury had the argument in their mind. The learned Counsel then argues that the learned Judge did not put to the Jury the argument and comments that he (Counsel) had advanced in support of the accused's case. But it seems to me that it is imposing an impossible task on the Judge to ask him to repeat again to the Jury every argument and comment put forward either by the defence or the prosecution's Counsel.

299. The Jury had these arguments in their mind for the defence had in this case the right of reply. The contention that the Judge should in such Circumstance endeavour to repeat to the Jury the arguments they had just heard is imposing on him all impossible mnemonic feat and which could only Confuse the Jury for it is difficult to see how the Judge could put them exactly as the Counsel did. The probable result of such an attempt could only be an inaccurate version of what Counsel said. Section 297 provides that the Judge must put the evidence for the accused to the Jury and as far as I can see this is what the learned Judge did. I cannot find that beyond his own state-in eut which was put to the Jury there is any evidence on his behalf which could have been put to the Jury and which was not put. Putting-the accused's case to the Jury cannot possibly mean putting to the Jury every argument and comment of the learned Counsel for the defence. A charge to the J ury must be read as a whole and also in the light of the questions raised by Counsel during the conduct of the trial. The Crown case was that there were four men one of whom stayed outside and did not fire and that accused was one of those that entered and fired. The accused's case was that there were three men one of whom stayed outside. The learned Judge did put this case of the accused to the Jury. See pages 20-22.

300. Mr. Chatterji then argues that the learned Judge was bound to read the s(3d ions of the Code to the Jury.

301. Now the law on murder is contained in Sections 299, 300, 301, and 302 and I am prepared to say that to read these sections to a number of laymen would be to convey nothing to them and to hopelessly confuse them. Then again with regard to Section 34, apparently Mr. Chatterji argues that this section should have been read to the Jury and they should have been left to put their own construction on it.

302. Seeing that it had taken learned Counsel some three days to argue what the section does mean, it seems at the best doubtful if anything would have been gained by reading it to the Jury. The learned Judge put to the Jury in simple language what he considered was the principle which the section contained and this to my mind is the proper way of putting the law to the Jury.

303. In view of the above findings, it is unnecessary to consider what course the Court should adopt in the event of it being found that there had been a misdirection or error on a point of law. With regard to the sentence I do not think, bearing in mind the findings come to above, that there has been no error in law, is it open to the Court to review the sentence passed by the learned Judge in this case.

304. It is not contended that the sentence is an illegal one.

305. Clause 25 of the Charter provides that there shall be no appeal from any sentence or order passed or made on any criminal trial before the Court of Original Jurisdiction which may be constituted by one or more Judges of the said High Court but it shall be in the discretion of such Court to reserve any point or points of law for the opinion of the High Court.

306. Clause 26 provides that on such point or points of law being reserved or on it being certified by the Advocate-General that in his judgment there is an error in the decision of a point or that a point requires to be further considered, the High Court shall have full power to review the case or such part as may be necessary and finally determine such point or points of law and thereupon to alter the sentence passed and to pass such judgment and sentence as the High Court may seem right.

307. The expression 'thereupon' would, I think, show that it is only where there has been an error in law that the High Court has any power to re-open, review and deal with the case. If there had been no error in law I do not think there can be any power to deal with the case further. Otherwise the position would become this. An accused person who could obtain a certificate that there had been an error in law or that the law required to be further considered, even though unsuccessful, could obtain an appeal on the severity of his sentence while the accused person in whose favour a certificate could not be obtained would not enjoy the same privilege. Such an anomalous position could not be contemplated.

308. A little further consideration would show that what the Advocate-General would in this view of the law be doing when he granted a certificate would be

granting leave to appeal to the High Court against an order which Clause 25 expressly says is not appealable.

309. In the view which I take of the meaning of Clause 26 I am supported by the case of *Emperor v. Upendra Nath Das* 30 Ind. Cas 113 : 19 C.W.N. 653 : 21 C.L.J. 377 : 16 Cr. L.J. 561 (F.B.). 'That case was similar in many respects to the present case. In that case which was also a capital sentence case, a certificate had 'been granted by the Advocate-General that certain points of law had been wrongly decided by the Trial Judge (Stephen, J.) and hence that the Jury had been misdirected.

310. The Full Bench decided that the certificate of the Advocate-General was misconceived and that no error of law had in fact been made: The learned Chief Justice, Sir Lawrence Jenkins concluded his judgment as follows :

311. 'In this view of the case it is not within my power to re-open the case and I regard myself as not entitled to express any opinion on its merits. In fact I am not in a position to deal with the merits; for they have not been discussed before us, nor have those conditions been established on which alone they could be considered by us.

Our powers are circumscribed for we can only act in conformity with Clause 26 of the Letters Patent. If there was no misdirection or other error as certified, the certificate was misconceived and we have no power to interfere. If the merits of the case or the sentence are to be further considered, then that must be not by this Court, but by some other authority vested with the requisite power.

312. Woodroffe, J., remarked: ' With the merits we are not concerned until it is established that there has been an error in law which opens out the case for our judgment. The same ground precludes me from dealing with the question of sentence which may arise on the facts above stated and the possibility, if the verdict be correct, of the act having been committed without premeditation on a sudden access of passion. This is, however, a matter for the Crown to consider. I can only hold no error of law has been shown which entitles me to re-open a verdict or to consider a sentence which has been already passed.'

313. Mookerjee, J., concluded his judgment with these words: 'In the view I take, a legal error of law has been established and consequently the Court is not called upon to express an opinion as to the propriety of the conviction and sentence although as Woodroffe, J., has pointed out if the Court could examine the case on the merits, there might be matters for careful consideration.'

314. Two cases have been brought to my notice in which on a certificate from the Advocate-General the Full Bench did interfere with the question of sentence: *Rex v. Sheikh Taleb* 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193 and *Emperor v. Narayan Raghunath Patki* 32 B. 111 : 9 Bom. L.R. 789 : 6 Cr. L.J. 164 : 2 M.L.T. 414.

315. But an examination of these two cases makes it at once apparent that they are distinguishable and in fact support my opinion. In the case of *Rex v. Sheikh Taleb* 2 Ind. Cas. 931 : 10 C.L.J. 13 : 10 Cr. L.J. 193 it was found that evidence had been wrongly admitted. This mis-reception of evidence was held to be a point of law. Then the case was re-opened and reviewed. The Court excluded the inadmissible evidence and dealt with the case.

316. In the other case, *Emperor v. Narayan Raghunath Patki* 32 B. 111 : 9 Bom. L.R. 789 : 6 Cr. L.J. 164 : 2 M.L.T. 414, the same point arose. It was held that inadmissible evidence had been admitted and the Court dealt with the whole case on the evidence properly admitted. The same principle was followed in *O'Hara's case* (13). I am aware of no case in which the Court where it has found the certificate misconceived has dealt with the case and interfered with the sentence.

317. In my opinion, therefore the certificate in this case has been misconceived and the application must fail.

318. Certain other points and incidents have arisen during the hearing of this case, and in the course of this trial. These points have not been argued by Counsel and form as far as I know no part of the case of either party. In these circumstances I do not think it necessary that I should discuss them and I have confined myself to the case of the parties as presented to me in Court.

319. Page, J.--I should have felt it to be my duty to state in my own words what I conceive to be the meaning and effect of Section 34 and the kindred sections of the Indian Penal Code, were it not that I have had an opportunity of reading the judgments which have been delivered by my brothers Richardson, Ghose and Cuming.

320. In more felicitous language, and with greater analytical power, than I could command, they have expressed my own view as well of the law as of the facts to which it is to be applied.

321. To re-state their arguments in different language, would be a work of supererogation.

322. At the trial I found myself unable to accept the construction which Stephen, J., had placed upon Section 34 in *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460. With great respect to the learned Judge I stated--and I adhere to what I then said--that if Section 34 have the meaning attributed to it by Stephen, J., the section would prove to be a menace and not a, safeguard to the community. The case of *Emperor v. Nirmal Kanta Roy* 24 Ind. Cas. 340 : 41 C. 1072 : 18 C.W.N. 723 : 15 Cr. L.J. 460 at any rate so far as it relates to the construction of Section 34, must now be regarded as having been incorrectly decided.

323. Notwithstanding the exhaustive argument of Counsel for the accused I have been unable to persuade myself that issue of law presents any real difficulty and the decision of this' Court follows in the wake of a long and almost unbroken series of judicial pronouncements in the Calcutta High Court and other High Courts in India. With respect to the facts I will content myself with saying that if the charge was sound in law, arid the Jury accepted the evidence which was adduced before them, the issue of fact, in my opinion, was as simple an one as ever was tried. The Jury found an unani mous verdict; it was adverse to the accused, and there was ample evidence to support it.

324. In these proceedings the Court has decided that there was no misdirection or non-direction as set out in the certificate of the learned Advocate-General. The

certificate, therefore, is misconceived, and, in my opinion, the jurisdiction of this Court is exhausted, and the matter is at an end.

325. Certain other questions relating to procedure and the conduct of Counsel who had appeared for the accused, were canvassed at some length before us, but as to these I express no opinion. With great respect I take leave to postpone consideration of these matters until they can effectively be determined. In my opinion, this is not a suitable occasion, and this Court is not the proper Tribunal for disposing of them.

326. There is only one other matter to which I desire to refer. That Judges exercising original civil or criminal jurisdiction should be compelled to transact business without the assistance of shorthand writers is false economy, and an anachronism which I trust in the near future will come to an end. But shorthand writers are not infallible, and these proceedings emphasize the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive: It is not to be criticized or circumvented; much less is it to be exposed to animadversion.

327. Page, J.--(Post script)--As I was seriously ill when judgment was given and had no notice of the statement which Mookerjee, J., thought it right to make as to what he would or might have done if Counsel had sought an interview with him, I desire to place on record that it was well-known that the two Counsel who came to my Chamber were appearing for the accused Ghose, who might have been prejudiced if they had withdrawn from the case at the last moment. I understood that Counsel were anxious to obtain my advice in the difficult position in which they were placed, and that they, proposed to advise the accused to plead guilty to the charge of murder if, having regard to the alleged facts disclosed in the depositions I thought that the offence did not merit the infliction of the extreme penalty. I told them that I could give them no information as to what might happen at the trial; that they must make up their own minds as to whether they should conduct the defence or not, but that if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the evidence of the witnesses, they were not entitled to set up a substantive case, such as an alibi, in opposition to the

case for the Crown.

328. It now appears that after a conference with the accused these Counsel came to the conclusion that the accused possessed a sound defence, and that they conducted the defence at the trial upon that assumption, and in accordance with instructions which they had received from the accused without regard to what had passed at the interview in my Chamber. The question raised by Mookerjee, J., who presided in this Court after having received the same information which I possessed before the trial, would seem to be an ethical rather than a legal one, about which more than one view may legitimately be held. But as, in my opinion, it is not germane to any issue in this case, I think that the question is not one which may properly be discussed in these proceedings and I say no more about it.

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