IN DEFENCE OF THE DOCTRINE OF COMMON PURPOSE

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ABSTRACT

The doctrine of common purpose has been subject to much criticism, especially concerning its use under apartheid. However, the doctrine predates the apartheid era and I argue that it should now be recognised as a tool to achieve justice. The constitutionality of the doctrine was confirmed in *Thebus and Another v S* 2003 (6) SA 505 (CC). Despite agreeing with the outcome, it is my view that the judgment would have been stronger had the Court acknowledged that, by dispensing with the requirement of causation, the doctrine must be subjected to a proportionality inquiry to determine whether there was 'just cause' to deprive the appellants of their freedom. I argue that depriving persons who engage in joint criminal activity of their freedom is just as it is necessary to ensure crime control and safety in communities and there are no effective less restrictive means available to achieve this purpose. While misapplication of the doctrine is a legitimate concern, this does not make the doctrine itself unjust. It is incumbent upon courts to scrutinise the evidence against each accused and only convict them under the doctrine where a common purpose can be proved. The recent Constitutional Court judgment in *Tshabalala v S; Ntuli v S* 2020 (3) BCLR 307 (CC) expresses the importance of the doctrine in combating crimes (especially those of a sexual nature) committed by persons acting in concert. The doctrine ensures prosecution of collective criminal activity, and liability thereunder can be avoided where an accused effectively dissociates from a common purpose. It is submitted that the doctrine is a proportionate means to achieve justice and is in fact necessary in a country like South Africa, ravaged by high levels of collective criminal activity.

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CHAPTER ONE

The Content and History of the Common Purpose Doctrine

Introduction

The doctrine of common purpose has been part of our criminal law for over a century but is often perceived as an instrument invented by the apartheid government to further oppress large numbers of black South Africans.[1] However, there is an important difference between an unjust law and a law applied in an unjust manner.[2] It is therefore essential that courts apply the doctrine impartially and only where all elements of common purpose liability can be proved beyond reasonable doubt. The doctrine was correctly found to be constitutional in *Thebus and Another v S*.[3] It can and should be used innovatively, as was done in the recent Constitutional Court judgment in *Tshabalala v S; Ntuli v S*[4] where the doctrine was held to apply to the crime of rape where not all members of the common purpose themselves raped the complainant. In this way the doctrine may be seen as a tool to achieve justice and protect citizens.

In this introductory chapter the content of the common purpose doctrine will be discussed along with its application in a number of high profile apartheid era judgments. Whether the doctrine may validly be criticised for appearing to enable apartheid ideology and policies also receives attention in this chapter. In Chapter Two various criticisms of the doctrine are explained and evaluated. The chapter concludes with a discussion and critique of the seminal judgment in *Thebus*. Chapter Three considers the viability of a number of possible alternatives to common purpose liability, such as accomplice liability and public violence. Chapter Four demonstrates how the courts have embraced the doctrine, most notably in *Tshabalala*. Other judgments are also employed to explain the necessity of the doctrine for purposes of crime control, an essential aspect of community safety. Lastly, in Chapter Five, the limits of the

[1] J Turner 'Do the English and South African Criminal Justice Systems Share a Common Purpose' (2013) 21 *African Journal of International and Comparative Law* 299.
[2] Ibid at 300.
[3] 2003 (6) SA 505 (CC).
[4] 2020 (3) BCLR 307 (CC).

doctrine are discussed and the conclusion made that it is a proportionate response to addressing the high levels of collective crime in South Africa.

An explanation of the doctrine

According to Burchell, a common purpose exists where 'two or more people agree to commit a crime or actively associate in a joint unlawful enterprise' in which case each becomes 'responsible for [the] specific criminal conduct committed by one of their number which falls within their common design'.[5] It is their common purpose to commit an offence which gives rise to liability.[6] The doctrine of common purpose has been described as a set of common law rules which regulate 'the attribution of criminal liability' to one who undertakes jointly with other individuals to commit a crime.[7] The common purpose rule comes from English law and entered our legal system through the then Native Territories Penal Code.[8] As regards the application of the rule, Burchell[9] notes that it was used in the 1920s to convict two hundred protesting students in the case of *R v Taylor*[10] and striking miners in *R v Garnsworthy*.[11]

Where a group has been charged with the commission of a consequence crime, such as murder or assault, the State need not prove beyond reasonable doubt that every member of the group committed an act which causally contributed to the unlawful outcome.[12] What is required of the State is to prove that the group members all agreed to commit a certain crime or that they 'actively associated themselves with the commission' thereof by one of the group members and that they had the requisite fault (*mens rea*).[13] *Mens rea* is one of the most important elements which separates an innocent bystander who does not intend the unlawful consequence from a true participant in a common purpose. Where the State can establish

[5] J Burchell *Principles of Criminal Law* 5 ed (2016) 477 (hereafter Burchell *Principles*).
[6] Ibid.
[7] *Thebus* supra note 3 para 18.
[8] Burchell *Principles* at 479.
[9] J Burchell 'Joint Enterprise and Common Purpose: Perspectives in English and South African Criminal Law' (1997) 10 *SACJ* 132.
[10] 1920 EDL 318.
[11] 1923 WLD 17.
[12] Burchell *Principles* at 477.
[13] Ibid.

that a common purpose exists, the conduct (*actus reus*) of the perpetrator who causes the unlawful consequence, and thereby the causation of that consequence,[14] will be imputed to all the members of the group by operation of the doctrine, and all of the participants become co-perpetrators.[15] Burchell and Hunt submit that the formation of a common unlawful purpose comprises the *actus reus* (unlawful conduct) on the part of each participant, meaning that it is unnecessary for the State to prove that each one committed 'a specific act towards the attainment of the joint object'.[16] Instead it is the association in the common purpose which allows the main perpetrator's act to become the act of all the members.[17] To impute the conduct of the main perpetrator(s) to the other members, it is essential that all members of the common purpose act in concert.[18] The accused must therefore consciously share the common purpose with another. The accused will not be liable under the doctrine for the conduct of the perpetrator where the former's act is merely 'coincidentally and independently the same' as that of the perpetrator.[19]

Hoctor explains that the common purpose doctrine assists the State greatly in situations where multiple persons have 'been involved in the commission of a crime, and where it is extremely difficult to ascertain which [of them] was responsible for which act'.[20] He explains that this is common in cases of mob violence, where proof of causation in respect of each participant is notoriously difficult to establish.[21] Snyman notes in respect of murder that it is typically not difficult to find that all the accused's conduct was unlawful and that each participant in a group had the intention to kill. However, there is often difficulty in establishing that each member's conduct satisfied the causation requirement.[22] If the ordinary rules of causation between an individual's conduct and the unlawful consequence applied in such situations, it is likely that 'lesser liability or even no liability for the harm' may result.[23] Hoctor

[14] *Tsotetsi v S* 2019 (2) SACR 594 (WCC) para 20.
[15] Burchell *Principles* at 477.
[16] *S v Safatsa* 1988 (1) SA 868 (A) at 899.
[17] Ibid.
[18] *S v Mgedezi* 1989 (1) SA 687 (A) at 712.
[19] Ibid.
[20] S Hoctor 'Of Housebreaking and Common Purpose: *S v Leshilo* 2017 JDR 1788 (GP)' (2018) *Obiter* 825.
[21] Ibid.
[22] *Tsotetsi* supra note 14 para 19.
[23] Hoctor op cit note 20.

explains that the doctrine, through its imputation of the *actus reus* to the other participants in the common purpose, circumvents entirely the challenge of proving causation.[24] The doctrine also assists the State because it does not need to prove which member of the group caused the unlawful consequence, provided it can establish that one member of the group did so.[25]

A common purpose can be formed in one of two ways – either through a prior agreement to commit a crime, which may be express or implied, or through an active association with a joint unlawful enterprise. The requirements which must be met to establish the common purpose differ for the two forms. Paizes explains that with a common purpose based on a prior agreement, the act will be imputed to others where it 'falls within the borders of the mandate or agreement'.[26] A mandate is typically an express agreement but 'its ambit will include all acts incidental to the conduct expressly agreed upon which the parties must have accepted as being impliedly within its compass'.[27] The prior agreement form of common purpose requires actual agreement between members of the group. Communication is necessary to set boundaries concerning the type of conduct envisaged and the extent to which the members are prepared to go to realise the agreed purpose.[28] When a member of the group fulfils that conduct as agreed, any act which falls within the scope of that agreement is attributable to all of the other members of the common purpose (also known as the remote parties).[29] Hoctor adds that where the common purpose is based on a prior agreement 'proof of agreement with a general common design (rather than association with a specific act) will suffice for liability'.[30]

On the other hand, for a common purpose based on active association to be established, certain requirements must be proved, as set out in the seminal case of *S v Mgedezi*.[31] Where there is no proof of a prior agreement, an accused who cannot be proved to have causally

[24] Hoctor op cit note 20.
[25] Burchell *Principles* at 477.
[26] *Tsotetsi* supra note 14 para 24.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] S Hoctor 'A New Category of Common Purpose Liability?' (2016) *Obiter* 667.
[31] 1989 (1) SA 687 (A).

contributed to the unlawful conduct will be liable for the crime only where the following prerequisites can be proved beyond a reasonable doubt: the accused was present at the crime scene; they were aware of the unlawful conduct being perpetrated; they 'intended to make common cause with those who were actually perpetrating' the unlawful conduct; they 'manifested [their] sharing of a common purpose with the perpetrators' of the unlawful conduct by themselves 'performing some act of association with the conduct of the others'; and finally, they possessed the requisite *mens rea*.[32] Botha JA in *Mgedezi* explained that the fault element in a killing can be direct intention to kill, or that the accused foresaw 'the possibility of [the deceased] being killed and performed [their] own act of association with recklessness as to whether or not death was to ensue'.[33] In *Van Wyk and Another v S*[34] the Supreme Court of Appeal (SCA) emphasised that courts should be careful not to lightly infer 'an association with a group activity from the mere presence' of the accused at the scene of the crime.[35] In *Dewnath v S*[36] the SCA, echoing *Mgedezi*, stated that

> (i) there must be a clear proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.[37]

Paizes notes that the active association form of common purpose considers 'what the remote party actually does at the scene of the crime in associating' themselves with the immediate party's conduct which has caused the unlawful consequence.[38] In *Jacobs and Others v S*[39] the Constitutional Court noted that where a prior agreement exists, 'presence or participation by each [member] when the fatal assault is administered' is not required, but where the common purpose is based on active association, there must be 'presence at or before the fatal blow'.[40]

[32] *Mgedezi* supra note 31 at 705-6.
[33] Ibid at 706.
[34] [2013] JOL 30289 (SCA).
[35] Ibid para 16.
[36] (269/13) [2014] ZASCA 57.
[37] Ibid para 15.
[38] *Tsotetsi* supra note 14 para 24.
[39] 2019 (5) BCLR 562 (CC).
[40] Ibid para 106.

Burchell explains that where a group agrees to commit a certain crime, for example robbery, and in the course of committing that crime, they commit a separate crime, such as murder, then all members of the group will be liable for murder provided each had the requisite intention, either in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis*.[41] The first refers to a situation where the accused actually intended to commit the specific crime, the second refers to where their aim was not to cause the specific unlawful conduct or consequence but they foresaw that outcome as nearly certain[42] and the third refers to a form of intention where the accused's aim is not to cause the specific crime but they foresee 'the possibility of the circumstances existing or the consequence ensuing' and they proceed with their conduct, reckless as to the outcome.[43]

Assessing fault in a common purpose

Fault for the purposes of common purpose liability can take the form of *dolus (in)directus*, *dolus eventualis* or negligence.[44] One uncertainty is *when* fault should be assessed in the case of a common purpose. Burchell prefers the view of the minority in *S v Nkwenja en 'n Ander*[45] that the 'critical moment for judging the *mens rea* of the participant in a common purpose [is] when the unlawful conduct' is perpetrated.[46] This is important because a participant's mental state could change prior to the crime being completed.[47] The contemporaneity rule, which requires that the 'unlawful conduct and the fault must exist contemporaneously',[48] necessitates the consideration of a change in a participant's mental state. For example, X may enter into a common purpose to rob with no foresight of death occurring as a result. However, during the course of the robbery but prior to the victim's death, X may foresee that someone in the group could kill the victim. If X then continues to associate with the common purpose, his failure to withdraw may result in liability for murder.[49] As Burchell notes, if X's mental

[41] Burchell *Principles* at 478.
[42] Ibid at 350.
[43] Ibid at 351; case law includes *S v Ngubane* 1985 (3) SA 677 (A) and *S v De Bruyn* 1968 (4) SA 498 (A).
[44] Burchell *Principles* at 495.
[45] 1985 (2) SA 560 (A).
[46] Burchell *Principles* at 496.
[47] Ibid at 497.
[48] Ibid at 445.
[49] Ibid at 497.

state can only be considered at the time at which the common purpose is formed, then he will not possess the requisite intention for murder in this situation.[50]

The Appellate Division has said that negligence in the case of an unlawful killing may suffice for liability under the doctrine.[51] Therefore, if a participant in a common purpose to commit robbery did not foresee the possibility of the main perpetrator killing another but a reasonable person in their position would have, and would have taken steps to prevent that conduct, then the participant will be guilty of culpable homicide.[52] There may thus be a common purpose to rob whereby certain members foresee death as a reasonable possibility or in fact intend for it to occur and they will then be guilty of murder, 'while another member is merely negligent in relation thereto and thus guilty only of culpable homicide'.[53]

When a common purpose arises

The Appellate Division in *S v Motaung*[54] held that there must be a distinction between 'participation in a common purpose to kill which begins before the deceased has been fatally wounded and such participation which begins thereafter, but while the deceased is still alive'.[55] Hoexter JA concluded that where it is reasonably possible that the joiner-in joined the common purpose to kill after the deceased was already fatally wounded and they did not by their conduct do anything to accelerate the death then they could be guilty only of attempted murder.[56] The Court in *Tsotetsi v S*[57] held that there can be '[n]o liability in terms of the doctrine […] for acts committed after the attainment of the common purpose'.[58]

There is often difficulty in establishing *when* the fatal blow was administered and this can have consequences for common purpose liability. This issue was of particular relevance in *S v*

[50] Burchell *Principles* at 497.
[51] Ibid at 498.
[52] Ibid at 499.
[53] Ibid.
[54] 1990 (4) SA 485 (A).
[55] Burchell *Principles* at 494.
[56] Ibid.
[57] 2019 (2) SACR 594 (WCC).
[58] Ibid para 23.

Singo.[59] The appellant was part of a mob which killed an elderly woman by stoning her. The appellant threw two stones, one of which hit the deceased, but thereafter was struck with a stick and left the scene of the attack as he was concerned about his injury.[60] On appeal, the Court found that the appellant leaving the scene constituted an end to his participation in the attack and that there was 'at least a reasonably possible inference that he also abandoned his intent to kill'.[61] The Court found that there had been effective dissociation on the part of the appellant from the crowd's conduct prior to the deceased being fatally wounded.[62] His conviction was replaced with one of attempted murder. This outcome is sound as it adheres to the contemporaneity rule.

Paizes argues that the appellant in *Singo* surely still intended for the deceased to be killed by the group.[63] He suggests that even if the appellant did abandon his intention for the deceased to be killed, 'he must, at the very least, have foreseen the real possibility that she would be killed' by someone in the group, which would suffice for establishing *dolus eventualis*.[64] Paizes argues that if it were not for the appellant being injured, it is likely (based on the evidence) that he would have continued throwing stones or otherwise continued to make common cause with those who were throwing stones.[65] This, Paizes argues, should logically make him guilty under the doctrine. Rather fortuitously for the appellant, though, the Court correctly found him not guilty of murder as the State could not prove all the requirements for an active association-based common purpose beyond reasonable doubt. Paizes may well be correct that *but for* his injury, the appellant would have remained and associated and been guilty under the doctrine. However, once the appellant left the scene, it must be accepted, prior to the fatal blow being administered to the deceased, it cannot be said that he actively associated himself with her death with the requisite *mens rea*. Paizes concedes that it is necessary in deciding such a case to acknowledge what actually occurred 'rather than what would or might have taken place'.[66] Paizes concludes that the doctrine, especially in its active

[59] 1993 (2) SA 765 (A).
[60] A Paizes 'Common Purpose by Active Association: Some Questions and Some Difficult Choices' (1995) 112 *SALJ* 561.
[61] Ibid at 562.
[62] Ibid.
[63] Ibid at 563.
[64] Ibid.
[65] Ibid at 565.
[66] Ibid at 569.

association form, 'is already an exception, albeit justifiable, to the principle that one is responsible only for one's own conduct'.[67] Furthermore, 'the doctrine, although necessary, disturbs the smooth lines of our theory, introduces greater complexity, and produces results that are sometimes counter-intuitive'.[68] Paizes thus acknowledges the need for and justifiability of the doctrine, while recognising that it is an exception to basic principles of our criminal law. On balance, Paizes finds that the Court was correct in finding the appellant guilty of attempted murder instead.[69]

The following section focuses on the critique that the doctrine was used to entrench apartheid ideology. Two notable apartheid cases which invoked the doctrine are *S v Safatsa*[70] and *S v Nzo and Another*.[71] These cases attracted widespread criticism and are often used as examples for why the doctrine should be abolished. It is useful to consider these cases in determining whether the criticism is valid and whether the invocation of the doctrine in these cases reveals a fatal flaw with the doctrine itself.

S v Safatsa

The 'Sharpeville Six' were convicted of murder through an application of the doctrine of common purpose in *S v Safatsa*. An aspect of this judgment which made it so controversial was that the application of the doctrine resulted in the six appellants receiving the death penalty, which would not have been imposed had they been convicted of lesser charges such as public violence, arson or malicious damage to property. *Safatsa* was a unanimous decision of the Appellate Division.

In this case, a group had stoned and burned the deceased, who was the deputy mayor of the town council of Lekoa, to death but 'it was not possible to determine which specific members had participated directly in the killing'.[72] This case involved the active association form of

[67] Paizes op cit note 60 at 571.
[68] Ibid.
[69] Ibid.
[70] 1988 (1) SA 868 (A).
[71] 1990 (3) SA 1 (A).
[72] Burchell *Principles* at 480.

common purpose. The six accused had, variously, wrestled the deceased for his gun, thrown stones at him and his house, encouraged the crowd to kill him, 'slapped a woman who had remonstrated with the crowd not to burn' him, made petrol bombs and set the deceased's house alight while he was still in it.[73] When the deceased emerged and attempted to flee, he was attacked by a small group who dispossessed him of his firearm.[74] Shortly thereafter, he was felled by a stone thrown by a person in the crowd, followed by many more stones being thrown from the crowd.[75] Once motionless, the deceased was dragged into the street by the crowd who then poured petrol over him and set him alight. At this point a woman pleaded with the crowd not to burn the deceased, which resulted in accused four slapping her. The deceased was left to burn and the crowd of over one hundred people 'sang loudly and gave the Black Power salute', arguably indicating that they made common cause with the acts of those who killed the deceased.[76] Botha JA found that the conduct of all six accused 'manifested active association with the acts of the mob which caused the death of the deceased'.[77] He held that they all 'shared a common purpose with the crowd to kill' him and that they did so with the requisite intention for his death. Therefore, the mob's act of killing the deceased was imputed to all six accused.[78]

It is now useful to consider the criticism against the application of the doctrine to various accused in this case. It is submitted that accused three was wrongly convicted. There was no direct evidence against him but the Court used inferential reasoning to place him on the scene and find that he had dispossessed the deceased of his firearm.[79] This was because accused one had taken the police to accused three's house where, upon being asked, the latter said that he had a firearm in his possession and produced it. Accused three told the police he had taken the firearm from some children, which the Court rejected. Cameron persuasively argues that the conviction of accused three on the basis of his supposed involvement in the attack on the deceased fails on the second leg of the *Blom* test, namely that it was not the only

[73] Burchell *Principles* at 480.
[74] *Safatsa* supra note 70 at 889.
[75] Ibid.
[76] Ibid.
[77] Ibid at 901.
[78] Ibid.
[79] Ibid at 890.

reasonable inference to be drawn.[80] Furthermore, it is arguable that the Court's finding does not even pass the first leg of the *Blom* test, namely that '[t]he inference sought to be drawn must be consistent with all the proved facts'.[81] This is because accused three's actions in admitting possession of and retrieving the firearm for the police – part of the proved facts – is arguably not 'compatible with the inference that he [wrestled it away] from the deceased in the course of a murderous assault'.[82]

Cameron argues that the clearest inference 'from accused three's actions is that accused one handed the weapon to him for safekeeping or even for concealment'.[83] Cameron notes that the 'reasonable inference that accused three received the weapon from one and that he was unwilling to sign one's death warrant by exposing one's request to him [to the police] leaps from the proved facts'.[84] It is therefore a reasonable possibility that accused three was instead an accessory after the fact to murder. In terms of section 257 of the Criminal Procedure Act[85] the punishment of such an accused 'shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory'. However, du Toit notes that in practice accessories typically receive more lenient punishment than perpetrators. Accused three could thus have been found guilty as an accessory after the fact to murder (if the evidence permitted such a finding) and in all likelihood the death sentence would not have been imposed.[86]

The criticism of the judgment in respect of accused three's conviction is thus well founded – the evidence was not sufficient to infer, and thereby prove beyond reasonable doubt, that he had formed a common purpose with the mob to kill the deceased. Cameron expresses the view that both the trial and appeal court had a duty to acquit accused three, and that they failed to do so. The application of the doctrine to accused three was therefore flawed but that does not mean we should do away with the doctrine. However, I will now argue that the conviction under the doctrine of the remaining accused was correct.

[80] E Cameron 'Inferential Reasoning and Extenuation in the Case of the Sharpeville Six' (1988) 1 *SACJ* 250.
[81] Ibid at 249.
[82] Ibid at 252.
[83] Ibid at 253.
[84] Ibid at 257.
[85] 51 of 1977.
[86] E du Toit et al 'Commentary on the Criminal Procedure Act' (1987).

Accused four's conviction of murder under the doctrine has also been criticised. Sisilana suggests that all accused four had done was 'sing "freedom songs" and slapped […] somebody who had [pleaded] with the crowd not to burn the deceased'.[87] Sisilana submits that the freedom songs may literally suggest an intention to kill but the words could be interpreted differently and that this, on its own, is insufficient to prove an intention for murder.[88] However, it is clear from the judgment that accused four 'shouted repeatedly: "Hy skiet op ons, laat ons hom doodmaak"' (*he is shooting at us, let us kill him*) after the deceased fired a shot which hit a person in the crowd.[89] Given this context and the fact that Sisilana does not contend that accused four's words constitute a phrase from a freedom song, his argument that she had simply sung freedom songs which should have been interpreted figuratively as opposed to literally is flawed. Furthermore, the Court noted that members of the crowd would undoubtedly have heard her words.[90] This clearly indicates accused four's verbalised intention for the deceased to be killed.

In addition, accused four slapped a woman who tried to dissuade the crowd from burning the deceased. Sisilana argues that nothing turns on this, as he correctly, in all likelihood, states that that woman would not have succeeded in her attempt to stop the burning, given the volatility and violence of the situation. Sisilana says that if 'she couldn't have succeeded in her noble pleas, what is the significance of accused no. 4's slapping of her, particularly in relation to the death of the deceased? None'.[91] However, this is incorrect, because what accused four slapping the woman indicates is that she intended for the deceased to be killed. She was opposing resistance to the killing, essentially, and thus indicated her intention for the deceased to be murdered. This act also counts as an act of association with the murder by the perpetrators, thus making a far stronger case for accused four having acceded to the common purpose than if she had only sung with the crowd. The fact that the woman would in all likelihood not have succeeded in preventing the crowd from killing the deceased is not important, because accused four's actions, in terms of the common purpose doctrine, need not have contributed causally to the death. Sisilana says that there is no significance in accused four slapping the woman, but he is mistaken – it clearly establishes the requisite

[87] L Sisilana 'What's Wrong with Common Purpose' (1999) 12 *SACJ* 303.
[88] Ibid at 304.
[89] *Safatsa* supra note 70 at 892.
[90] Ibid.
[91] Sisilana op cit note 87 at 304.

mens rea as well as an act of association with the murder of the deceased, which along with the other requirements as laid down in *Mgedezi* of presence, awareness and intention to make common cause with the perpetrators having been met, quite correctly makes accused four part of the common purpose to kill.

The convictions of accused one and two do not appear to have been criticised to the same extent as those of the other appellants. Accused one grabbed hold of the deceased in an attempt to dispossess him of his pistol. He also threw the first stone which felled the deceased.[92] Accused two threw stones at the deceased's house and later threw a stone which hit the deceased on his back.[93] Although there was much criticism aimed at these accused receiving the death sentence, they were correctly convicted under the doctrine as they had actively associated with the killing.

Sisilana criticises the form of the doctrine applicable in *Safatsa* by asking *what* it is with which a person must associate to be part of a common purpose by active association. He references accused seven in *Safatsa*, who had made petrol bombs, poured petrol on the deceased's kitchen floor and set it alight, and assisted in pushing the deceased's car into the street.[94] Sisilana argues that while accused seven's conduct was overt, it was not an act of association with the murder. Sisilana submits that his conduct was instead 'consistent with malicious damage to property'.[95] He explains that if the requisite *mens rea* is in relation to the murder, then accused seven did not possess it. However, the throwing of petrol bombs and setting alight of the kitchen floor happened *before* the deceased fled his house. It is unclear how Sisilana could argue that accused seven, who set part of the house alight and made petrol bombs which were also used to set the house alight, did not intend or at least foresee the deceased's death as a result of these actions – in other words, it is not reasonably possible that accused seven lacked either *dolus directus* or *dolus eventualis* in respect of the

[92] *Safatsa* supra note 70 at 890.
[93] Ibid at 891.
[94] Sisilana op cit note 87.
[95] Ibid.

deceased's death. Even if accused seven's actions did not factually cause the deceased's death, it is clear that he actively associated with the mob's actions which killed the deceased.

The trial Court summed up the guilt of accused seven (and for that matter accused eight who made petrol bombs and handed them out to people in the crowd with instructions on where and how to throw them into the house) in the following passage (translated):

> There can be no doubt that the crowd had the intention to kill the deceased at the stage where his house was set alight as each person there then realised that either the deceased would burn inside or he would flee the house and, upon fleeing, would be attacked. When he did indeed flee, he was immediately dispossessed of his weapon and thereafter bombarded with stones until he lay motionless and then, to ensure that he was dead, his body was dragged outside and set alight.[96]

The Appellate Division correctly held that this approach was 'fully justified on the evidence'.[97] As such, Sisilana's argument that accused seven (and eight) did not possess the requisite *mens rea* for murder cannot be supported.

In respect of the six, the Appellate Division found all to have 'actively associated themselves with the conduct of the mob, which was directed at the killing of the deceased'.[98] Botha JA held that the evidence supported the trial Court's finding. He emphasised that the accused's conduct 'assessed in the light of the surrounding circumstances' led to the inescapable inference that the intention for murder was present.[99] Except in respect of accused three, I would agree that this is a textbook case of common purpose. It should be noted that ultimately none of the six appellants were sentenced to death.[100]

The Appellate Division decided *S v Nzo* two years later in 1990 which in my view was far more controversial than *Safatsa* in finding that there was sufficient evidence to apply the doctrine. The facts of *Nzo* are such that it is arguably more worthy than *Safatsa* of the criticism that the doctrine was used to suppress political dissent and target black persons during apartheid.

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[96] *Safatsa* supra note 70 at 893.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] P Diar *The Sharpeville Six* (1990) at 290.

S v Nzo

Nzo entailed the conviction of two ANC members, X and Y, for the killing of a potential informer, Mrs T, although the actual killer, Joe, escaped and was not apprehended. X had overheard Mrs T threatening to 'lay a charge against her husband for harbouring an ANC member', James.[101] X then told Joe about the threat and Joe, without consulting either X or Y, murdered Mrs T. Y was found guilty of murder based on the doctrine, as the Court found that he had a common purpose with Joe to commit acts of sabotage and thus fatalities had to have been foreseen.[102] It was held that X had effectively dissociated himself from the common purpose prior to the killing of Mrs T by voluntarily giving the police evidence about his involvement with the ANC.[103] The Appellate Division confirmed the conviction of Y, holding that 'there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences'.[104] In a compelling dissent, Steyn JA argued that neither accused was guilty of murder 'since a broad, overarching common purpose to commit sabotage […] is not sufficient to lead to conviction of the appellants for the murder of the deceased'.[105] The dissenting judgment found that there was no prior agreement to commit the murder, nor was there any active association on the part of the accused in the murder, meaning that there could not have been a common purpose between the accused and Joe in respect of the killing. I agree with the dissenting judgment in this matter as the majority judgment appears to spread the net of liability under the doctrine beyond what is intended. This is because it adopted an overly broad approach to attributing intention to the accused such that any act which could seemingly be linked to the purpose of sabotage could be said to have been intended by X, Y and Joe.

Burchell argues that there was no prior agreement in *Nzo* to kill the deceased as Joe committed the murder without consulting either X or Y, the latter apparently not even having been aware of Mrs T's threat. This meant that for X and Y to be liable for murder, a common purpose based on active association had to be proved.[106] Clearly, requirements such as presence at the scene and the manifestation of an intention to make common cause with Joe

[101] Burchell *Principles* at 481.
[102] Ibid.
[103] Ibid at 482.
[104] Ibid.
[105] Ibid.
[106] Ibid at 500.

by committing an act of association were lacking on the part of X and Y.[107] Burchell submits that '[s]ubscribing to the overarching policies of the ANC' in the form of committing acts of sabotage was insufficient to link X and Y to Joe's murder of Mrs T.[108]

Hoctor, on the other hand, argues that *Nzo* 'is singled out as unjustifiably extending the ambit of the common purpose doctrine'.[109] He writes that the majority of the Appellate Division saw X, Y and Joe as 'three individuals who formed the "active core" of the ANC cell in Port Elizabeth, and who functioned as "a cohesive unit in which each performed his own allotted task"'.[110] Hoctor argues that the common purpose between X, Y and Joe in respect of Mrs T's murder was based on a prior agreement to commit acts of sabotage in terms of their 'terrorist campaign', and that the murder of a potential informer was foreseeable and ancillary to the common design. Hoctor says that common purpose liability must be premised on the accused's intention in respect of the crime in question.[111] It is, however, not clear that X or, more especially, Y could have had this intention since neither were consulted before Joe murdered Mrs T. Hoctor notes that the Appellate Division established that X foresaw the possibility of Mrs T being killed, 'having informed [Joe] of her threats to go to the police, and that [X was] reconciled to this possibility for the sake of silencing the potential informer in order to protect the group', meaning that *dolus eventualis* was established beyond reasonable doubt.[112] However, X was acquitted of the murder on the basis of his dissociation, so his foresight is irrelevant. Yet Y was still found guilty of murder despite seemingly having no knowledge of Mrs T's threat or of Joe's plan to murder her. In my view the foresight of death in the carrying out of acts of sabotage cannot extend to Y having the intention to have Mrs T murdered by Joe. However, Hoctor explains the Court's reasoning as follows:

> It was held that liability for murder could follow where saboteurs (in this case) were engaged, by virtue of a pre-existing plan, in waging operations to overthrow the Government, and such saboteurs foresaw the possibility of such activities necessitating the killing of anyone who stood in the way of their achieving their objectives.[113]

[107] Burchell *Principles* at 501.
[108] Ibid.
[109] Hoctor op cit note 30 at 667.
[110] Ibid at 668.
[111] Ibid at 669.
[112] Ibid at 670.
[113] Ibid at 673.

Making such foresight the basis of an intention for murder goes too far – it would essentially make an individual liable for anything that their co-perpetrators do, which is not the purpose of the doctrine. I would argue that foresight of death in carrying out acts of sabotage is applicable where Joe blew up a railway in the furtherance of his common purpose with X and Y and thereby killed a conductor who was on the scene. Such killing could well fall within the mandate of sabotage to which all three participants had agreed, and the murder could be imputed to X and Y under the doctrine on the basis of *dolus eventualis*.[114] However, Joe murdered Mrs T without consulting X or Y. Her killing was too far removed from the acts of sabotage which fell within the scope of the prior agreement between the three. It appears that the killing of Mrs T constituted a frolic of his own on Joe's part, for which Y should not have been held liable as *dolus eventualis* cannot be proved beyond reasonable doubt where the accused could not have foreseen the particular murder being committed.

Another controversial case which invoked the doctrine was that of the 'Upington 25'.[115] The facts of this case are similar to those of *Safatsa* but saw a much larger group of persons accused of murder. This case clearly represents a misapplication of the doctrine.

The Upington 25 case

A policeman was killed by protesters who had gathered around his house. They threw stones on his roof and, upon him fleeing his house, he was felled by the group, 'beaten over the head with his own rifle, and set alight with petrol'.[116] Twenty-five of the twenty-six accused in this case were found guilty of murder on the basis of doctrine, fourteen of whom were sentenced to death.[117] As with the Sharpeville Six, a disquieting aspect of the doctrine's application in this case was that a conviction of murder attracted the death penalty. In this respect, a

[114] I am grateful to Advocate Marion Willis-Smith for suggesting this example in discussion of the case.
[115] *S v Kenneth Pinkie Khumalo and 25 others* (Orange Circuit Local Division at Upington) unreported case no 83/86 of 27 April 1988.
[116] A Durbach 'Of Trials, Reparation, and Transformation in Post-Apartheid South Africa: The Making of a Common Purpose' (2015) 60 *New York Law School Law Review* 410.
[117] Ibid.

conviction of murder in terms of the doctrine under apartheid carried far more serious consequences than it does today.

Most of the accused in this matter did not causally contribute to the deceased's death but the Court found that all of them had thrown stones at the deceased's house and held that this constituted adequate conduct to conclude that 'the crowd had a shared purpose to drive the policeman from his home so that he might be killed' and that this amounted to active association with his murder.[118] Durbach explains that the State, in reliance on the doctrine, 'cast the net of criminal liability so wide as to bring together twenty-five people who had no apparent common enterprise or unmistakable individual intention to kill'.[119] Upon appeal to the Appellate Division the murder convictions of twenty-one of the twenty-five accused were overturned and all death sentences were set aside. This clearly illustrates how the evidence did not warrant the application of the doctrine. However, this does not mean that the doctrine itself is flawed. Durbach expresses the reality of how brutally the deceased was killed. She notes that a group of more than one hundred people had gathered around the deceased 'and irrefutably, members of that crowd were responsible for his death'.[120] The brutality of this murder is a reminder of the need to effectively prosecute those involved in collective criminal activity while only convicting persons under the doctrine where the evidence clearly establishes all the requirements for common purpose liability.

The controversy surrounding the doctrine concerned not only its ability to hold numerous accused liable for murder (despite the absence of a causal connection between their conduct and the death) but the fact that such conviction could result in all receiving the death penalty. Prior to its abolition in *S v Makwanyane and Another*[121] an accused who faced the death penalty could only escape such if the court found extenuating circumstances present. Lund notes that in certain cases of common purpose the courts have found extenuating circumstances where the accused has not actively participated in the killing or where their

[118] Durbach op cit note 116 at 412.
[119] Ibid at 413.
[120] Ibid at 422.
[121] (CCT3/94) [1995] ZACC 3.

role in the killing was a minor one.[122] However, since the death penalty can no longer be imposed, courts would now consider mitigating factors in deviating from minimum sentences.

In light of the ongoing controversy it is necessary to consider whether the criticism of the doctrine as an instrument of apartheid is valid.

Is the doctrine simply a 'tool of apartheid'?

Turner explains that the view that the doctrine is a tool of apartheid 'relates to its extensive use by the White minority government […] during the years of Apartheid, to target groups of black individuals'.[123] He makes a compelling point in arguing that the doctrine 'will always have a disproportionate effect on [those] whose only potential strength and security is in their numbers' which the doctrine then turns into a weakness.[124] Turner argues that it is a mistake to label the doctrine as a tool of apartheid – this, he says, does not accurately reflect its origin or early use.[125] Instead, the doctrine, as applied in certain cases under apartheid, was 'a just law unjustly applied'.[126]

Reddi explains that the doctrine is not unique to South Africa but its application in the country has attracted significant controversy.[127] She attributes this to 'the notion that the doctrine was a creation of the apartheid regime' meant to serve the interests of the National Party.[128] The doctrine has been used to convict accused in cases of treason, housebreaking, robbery and assault but it is most frequently applied in cases of murder.[129] Reddi notes[130] that even prior to the 1969 case of *S v Thomo*[131] many Appellate Division judgments upheld murder convictions based on the doctrine where there was no proof of a causal connection between

[122] J Lund 'Extenuating Circumstances, Mob Violence and Common Purpose' (1988) 1 *SACJ* 265.
[123] Turner op cit note 1.
[124] Ibid.
[125] Ibid.
[126] Ibid at 300.
[127] M Reddi 'The Doctrine of Common Purpose Receives the Stamp of Approval' (2005) 122 *SALJ* 59.
[128] Ibid.
[129] Ibid.
[130] Ibid at 60.
[131] 1969 (1) SA 385 (A).

the accused's actions and the death of the deceased, such as in *S v Malinga*.[132] In that case five accused were in a vehicle on their way to commit housebreaking with intent to steal and one had a gun, of which the others were aware. On their way to commit the crimes, a policeman tried to stop their vehicle. He was shot and killed by the armed member of the group.[133] All five members were found guilty of murder since they all knew the one was armed and would use the firearm if met with resistance. The Court held that the common purpose between the accused involved housebreaking with intent to steal and theft as well as the getaway, and that 'as far as individual *mens rea* is concerned, the shot fired by [the armed member was], in effect, also the shot of each of the appellants'.[134]

In *S v Madlala*[135] the Appellate Division approved *Malinga* and added the following:

> [A]n accused may be convicted of murder if the killing was unlawful and there is proof –
>
> (a) that he individually killed the deceased, with the required *dolus* […]; or
>
> (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or
>
> (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred.[136]

These two judgments – *Malinga* and *Madlala* – were considered by Botha JA in the *Safatsa* judgment, thus making it clear that long before *Safatsa* was decided, 'a party to a common purpose to kill could be found guilty of murder even in the absence of a causal link between [their] conduct and the death'.[137] Botha JA held that there was no good reason to depart from the established law.[138]

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[132] 1963 (1) SA 692 (A).
[133] Reddi op cit note 127 at 61.
[134] Ibid.
[135] 1969 (2) SA 637 (A).
[136] Reddi op cit note 127 at 61.
[137] Ibid.
[138] *Safatsa* supra note 70 at 900.

Reddi therefore shows that dispensing with causation on the part of each participant in a common purpose 'did not originate with *Safatsa*'.[139]

Reddi reiterates the point that just because the law has been incorrectly applied in the past does not make the law wrong.[140] She argues that the problem with *Safatsa* is that the Court failed to exercise proper care in evaluating the evidence against each accused before applying the doctrine to them.[141] As mentioned above, I agree with this criticism to the extent that it applies to accused three in *Safatsa*. Reddi states that the doctrine was not created to serve the apartheid government's interests but, as with any law, it 'was open to being incorrectly applied to the facts of the case in which its use was being invoked'.[142]

The constitutionality of the common purpose doctrine was confirmed in the 2003 case of *Thebus and Another v S*. A discussion and critique of this judgment appears in the following chapter, as part of a consideration of the criticism that the doctrine has faced.

[139] Reddi op cit note 127 at 61.
[140] Ibid at 65.
[141] Ibid.
[142] Ibid.

CHAPTER TWO

Criticism of the Doctrine of Common Purpose

In this chapter criticism of the doctrine in both its prior agreement and active association forms will be considered. The criticism is essentially aimed at the fact that the prosecution need not prove causation in respect of each accused in a common purpose. Burchell argues that imputation of the *actus reus* and causation of the crime by the immediate party to the remote parties represents a 'distortion of general principles of criminal law'.[1] This chapter explains and addresses the criticism, and provides an analysis of the *Thebus*[2] judgment which confirmed the constitutionality of the doctrine.

The difficulty with the doctrine

Burchell has described the decision to uphold the constitutionality of the common purpose doctrine in *Thebus* as surprising given the image of the doctrine's application in cases such as *Safatsa* and *Nzo*.[3] He argues that the concept of *active* association is 'inherently vague and might fail the standards of reasonable clarity' required by the principle of legality.[4] It appears that his criticism of the doctrine lies mainly in its active association form. He notes that crowd behaviour 'is notoriously difficult to predict or deconstruct' and it is often volatile and varied between the members. Burchell argues that a mob violence situation is very different to that of a small, cohesive group of criminals who plot crimes, and suggests that it is unjust to equate these two situations as regards 'the ultimate *co-perpetrator* liability of participants'.[5]

Other authors have criticised the doctrine in both its prior agreement and active association forms. Grant criticises the doctrine for violating the principle that 'evil thoughts alone are not

[1] J Burchell 'Joint Enterprise and Common Purpose: Perspectives in English and South African Criminal Law' (1997) 10 *SACJ* 137.
[2] *Thebus and Another v S* 2003 (6) SA 505 (CC).
[3] J Burchell *Principles of Criminal Law* 5 ed (2016) 485 (hereafter Burchell *Principles*).
[4] Ibid at 488.
[5] Ibid at 485, footnote 73.

enough to attract liability'.[6] He argues that in both the prior agreement and active association forms, 'common purpose allow[s] for liability to be imposed for conduct which the accused did not commit, but is deemed to have committed, by virtue of having an evil mental state in respect of that conduct'.[7] In the case of a prior agreement, that which the accused contemplated forms the extent of their mandate and this agreement to commit the crime allows the *actus reus* of the main perpetrator to be imputed to the remote parties.[8] Sisilana argues that the doctrine is 'wrong and conceptually indefensible'.[9] He suggests that the true basis of liability for the prior agreement (mandate) form of common purpose is actually foresight and not agreement, because if the parties agree to commit crime A 'but foresee that, as a consequence of doing A, they might have to do B' and if only one member then commits crime B, all the others can be held liable for it on the basis of their common purpose, but then their common purpose *for crime B* is based on foresight and not on agreement.[10] Sisilana argues that foresight cannot be equated with a form of tacit consent, and that even if a group of robbers, for example, expressly agreed not to kill anyone but *foresaw* that one of their members may do so if met with resistance and such member then proceeded to kill, they would all be guilty of murder by virtue of the common purpose doctrine.[11] He explains that tacit consent or agreement 'comprehends an intimate understanding by one party that the other party would readily assent to a proposition if it were put to him' while foresight does not.[12] This is a compelling critique and one which seeks to restrict the ambit of common purpose liability to only those acts which the group agrees to commit. The justification for this extension of the application of the doctrine is primarily one of effective prosecution and the fact that it can be difficult to prove what was actually agreed to by the parties, versus what could have been foreseen (which will likely be based on inferential reasoning).

Sisilana notes that agreeing with a person to commit a crime and voluntarily accepting each other's conduct as their own is based on autonomy, and such a foundation for a common

[6] J Grant 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2014) 30 *SAJHR* 10.
[7] Ibid at 11.
[8] Ibid.
[9] L Sisilana 'What's Wrong with Common Purpose' (1999) 12 *SACJ* 287.
[10] Ibid at 288.
[11] Ibid at 289.
[12] Ibid.

purpose is wholly acceptable.[13] Still, he maintains that the issue is the dispensing of the causation requirement for common purpose liability. He argues that agreement cannot replace or be superior to causation, and that while agreement may be 'a *necessary* condition for liability, it is not a *sufficient* one'.[14] He suggests that agreement aligns the remote party with the conduct which causes the unlawful consequence but that this link is too tenuous to make members who did not themselves perpetrate that crime liable for it.[15] Sisilana provides the example of two people agreeing to kill another by poisoning, but while the one is getting the poison, the other is so impatient that they shoot the deceased. He suggests that the poison procurer should not be liable for murder, but that application of the doctrine would make both liable, as they had agreed to commit the crime and each had the requisite *mens rea* for murder.[16] Because the manner in which the killing occurs is not an element of liability, and one of them has committed the agreed act of killing, the conduct of the killer becomes the conduct of the remote party.[17] Sisilana notes that this runs contrary to *S v Goosen*[18] which held that 'where there is a marked difference between the foreseen occurrence of, say, death and the manner in which it actually occurred, then Y, who had not foreseen that Z would die by shooting, but rather by poisoning, would not be guilty of murder'.[19] Sisilana seems to suggest that the *Goosen* dictum should apply to cases of *dolus directus* as well as *dolus eventualis*, noting that Van Heerden JA in *Goosen* 'accepted that even in cases of *dolus directus*, in certain circumstances […] mistake as to the causal sequence would negative an accused's means rea'.[20] Sisilana notes, though, that in this case, there is a mistake as to the causal act as opposed to the causal sequence, which negates the accused's *mens rea*.[21] However, this is not an argument against the common purpose doctrine. He argues that the conduct resulting in death should be that which was foreseen by the participants in a common purpose.[22] However, I would argue that the position of the poison procurer may, at least in terms of their moral blameworthiness, be similar to that of the person, X, who hires a hitman

[13] Sisilana op cit note 9 at 290.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Ibid at 291.
[18] 1989 (4) SA 1013 (A).
[19] Sisilana op cit note 9 at 291.
[20] Ibid, footnote 9.
[21] Ibid.
[22] Ibid at 291.

to kill another. If the hitman deviates from the manner in which the killing was planned but nevertheless commits the killing, should X not still be liable for murder? Since there was a prior agreement, the poison procurer would have had to dissociate effectively to no longer be part of the common purpose to kill, and this does not happen – in fact they were on their way to obtain the poison for the killing.

Although much of the criticism of the doctrine is aimed at the active association form (typically mob violence situations), Sisilana provides a compelling critique of the prior agreement form. There is a recognition in the active association form that the participant must at least *do something* during the commission of the crime while with a prior agreement, they become somewhat ensnared in the agreement even if they themselves then do nothing to realise that outcome. However, such an agreement does not bind the participant indefinitely, as they have the ability to dissociate themselves from the common purpose.

Intuitive concerns about the doctrine

Criticism of the common purpose doctrine, according to Grant, reveals 'deeply-seated intuitive concerns about holding people liable for conduct they – by definition – did not actually commit, but are deemed, by operation of law, to have committed'.[23] Grant considers comments made by Lewis JA in the Supreme Court of Appeal judgment in *Thebus*. Lewis JA, in sentencing the accused, emphasised that they did not actually shoot the deceased or cause the complainants' injuries, and that while they were legally and morally responsible for these acts, the 'difference in the degree of participation' between the accused and the actual perpetrators is significant.[24] Grant says that the law considers all the accused to have shot the deceased but that Lewis JA's intuitions reflect that 'it is not right to regard the accused as having done what they did not actually do'.[25]

He furthermore argues that it is illogical to impute the conduct of the perpetrator to the other members of the common purpose as the latter could never have exercised control over that conduct and so there is a lack of capacity on their part.[26] Grant also refutes the claim that

[23] Grant op cit note 6.
[24] Ibid, footnote 42.
[25] Ibid.
[26] Ibid at 14.

criminal capacity and voluntariness (requirements for common purpose liability) are applicable at the time of entering into the common purpose, as this treats common purpose as a 'liability cloud' which, according to Grant, extends liability too far. He argues that to base liability on the imputation of 'conduct over which an accused had no control' represents a disregard for the elements of voluntariness and capacity. Grant argues that the doctrine therefore imputes more than conduct and causation, but also the voluntariness of the act and the capacity of the perpetrator.[27] However, Grant does not acknowledge the importance of an accused's autonomy in entering into a common purpose – the stage at which their capacity and voluntariness must be of relevance. Furthermore, the counter to Grant's liability cloud argument is the possibility of dissociation, which provides a solution to an accused who no longer wants to be associated with the conduct of the perpetrators.

Reddi counters authors like Sisilana and Grant, who argue for the doctrine to be abolished, by stating that they want 'to throw out the baby with the bathwater'.[28] She describes it as fortunate that the doctrine was upheld, in light of its necessity in South Africa as the country experiences 'a pandemic of serious crimes committed by collective individuals acting in concert'.[29] Even if common purpose liability does not deter would-be offenders, it at least allows for their prosecution and conviction following the crime.

An analysis of Thebus and Another v S

Facts and Background

This case, like *Safatsa* and *Mgedezi*, dealt with common purpose in its active association form. The appellants were part of a protesting group who shot at alleged drug dealers, after one opened fire at the protesters. A child was fatally shot in the crossfire. The first appellant had stood by a vehicle with a pick handle, while the second retrieved 'spent cartridges discharged from the firearms' of other group members.[30] The second appellant also had a firearm,

[27] Grant op cit note 6 at 15.
[28] M Reddi 'The Doctrine of Common Purpose Receives the Stamp of Approval' (2005) 122 *SALJ* 66.
[29] Ibid.
[30] Burchell *Principles* at 482.

although they were not seen using it. The trial Court, through an application of the doctrine, found both guilty of murder as well as attempted murder of two people wounded in the shooting.[31] The trial Court found that the appellants 'appreciated the possibility that violence could erupt' and that death could result from the use of firearms[32] and that by 'remaining part of the group, they accepted' that risk.[33] The appellants were therefore held to have possessed *dolus eventualis* in respect of the murder. Furthermore, their actions meant that they had adequately associated themselves with the crimes perpetrated. The appellants argued that the requirements of common purpose liability unjustifiably limited their constitutional rights to dignity (section 10), freedom and security of the person (section 12) and the presumption of innocence (section 35(3)*(h)*).[34] They urged the Court to develop the doctrine to require that an accused's actions be proved to have facilitated the commission of the crime, meaning that their act must have contributed to the unlawful consequence.[35] Both the Supreme Court of Appeal and the Constitutional Court upheld the convictions. Moseneke J, writing for the majority, held that the prerequisites which must be met for a common purpose based on active association to have been established, as per *Mgedezi*, were constitutional.

Presumption of Innocence

Moseneke J found that the doctrine, by dispensing with the causation requirement, does not presume an accused's guilt as the prosecution must 'prove beyond a reasonable doubt all the elements of the crime charged under common purpose'.[36] He reasoned that there was no infringement of this right because when the doctrine 'is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to [their] guilt'.[37] This is because to establish guilt under the doctrine, causation on the part of each accused need not be proved.

[31] Burchell *Principles* at 482.
[32] Ibid at 483.
[33] *Thebus* supra note 2 para 10.
[34] Ibid para 23.
[35] Ibid para 33.
[36] Ibid para 43.
[37] Ibid.

Dignity

Moseneke J did away with the argument that the doctrine infringes the accused's dignity very briefly, simply finding that 'prosecution and conviction [do] not infringe dignity'[38] as they do not de-humanise the accused.[39] However, the appellants did not argue that prosecution and conviction infringed their dignity (nor could they reasonably have done so) but instead they argued that the way the doctrine applies makes them merely 'nameless, faceless parts of a group'[40] as opposed to individuals guilty only of their own conduct. Grant argues that dignity requires that accused be treated as humans and not 'mindless zombies', which, according to him, they become where another's conduct can be imputed to them. He argues that this disconnection between the mind and actions of the immediate party and those of the remote parties who then have that conduct and causation imputed to them amounts to a rejection of a person's inherent dignity.[41] This is because the doctrine, according to Grant, 'punishes people for the conduct of others over which they have no control'.[42] It is arguable that the doctrine does not infringe the dignity of the appellants because they made a choice to engage in the common purpose through their active association, and thus expressed their autonomy which is an important aspect of a person's dignity. However, Moseneke J's response to this allegation is insufficient and thus invites criticism of the judgment.

Freedom and Security of the Person: Was there 'Just Cause' for the Deprivation of Freedom?

The appellants contended that conviction under the doctrine deprived them of freedom arbitrarily because it permits 'the most tenuous link between individual conduct and the resultant liability'.[43] Moseneke J, however, found that the right to freedom and security of the person had not been infringed. He noted that section 12(1) of the Constitution permits prosecution and conviction of persons provided this occurs pursuant to 'a procedurally and substantively fair trial' and entails 'a permissible level of criminal culpability'.[44] Where the

[38] Grant op cit note 6 at 17.
[39] *Thebus* supra note 2 para 36.
[40] Ibid para 35.
[41] Grant op cit note 6 at 17.
[42] Ibid at 22.
[43] *Thebus* supra note 2 para 35.
[44] Ibid para 36.

level of criminal culpability is compliant with the Constitution 'an appropriate deprivation of freedom is permissible'.[45] Moseneke J noted that conduct constitutes a crime where so declared by law and that this is typically done with the intention of protecting the public interest. He explained that criminal norms differ between societies and vary over time, in line with what the community considers 'harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences'.[46] This reflects an understanding of the doctrine of common purpose contextually and does not merely take it at face value, which, it is submitted, many authors who are opposed to common purpose do. It is important that our criminal justice system considers not only the individual accused who face liability under the doctrine but also victims and the *boni mores* of society as a whole.

Moseneke J explained that the primary purpose of the doctrine 'is to criminalise collective criminal conduct' which is necessary for crime control as violent crimes perpetrated by groups comprise 'a significant societal scourge'.[47] Requiring causation on the part of each participant in such cases 'would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual'.[48] The necessity of the doctrine was expressed in the following terms:

> Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design.[49]

The justification for dispensing with the proof of causation on the part of each accused in a common purpose is the evidentiary challenge of proving such.[50] Burchell acknowledges that causation is 'not a definitional element of every crime' but that 'it *is* part of the common-law definitional elements of crimes such as homicide [and] robbery' which are often the subject of a common purpose.[51] Burchell laments that dispensing with the causation requirement

[45] *Thebus* supra note 2 para 36.
[46] Ibid para 38.
[47] Ibid para 34.
[48] Ibid.
[49] Ibid para 40.
[50] Burchell *Principles* at 491.
[51] Ibid.

completely negates the concept of individual autonomy which is central to our understanding of criminal liability.[52]

Moseneke J reasoned in *Thebus* that the doctrine does not arbitrarily deprive a person of their freedom as it is 'rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise'.[53] Collective criminal acts 'strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals' and thus prosecution of these crimes is an urgent social need.[54] This may be so, but Moseneke J did not adequately respond to the allegation that, by dispensing with causation, the doctrine infringes the section 12(1)*(a)* right not to be deprived of freedom arbitrarily or without just cause.

The fact that the State need not prove causation in respect of each accused in a common purpose establishes 'a lower standard for criminal liability'.[55] Schwikkard criticises the judgment for not providing guidance 'as to what the minimum content of the criminal norm of culpability must be in order to avoid depriving a person of their freedom arbitrarily or without just cause'.[56] *Thebus* can be criticised[57] for not following the approach to an alleged infringement of section 12 as set out in the 1998 Constitutional Court decision in *De Lange v Smuts NO and Others*.[58] In that case, Ackermann J noted that where section 12(1)*(a)* is alleged to have been infringed, the court must consider first whether the deprivation of freedom is arbitrary (i.e. there was no satisfactory reason therefor) and even where this is not an issue because there exists 'a rational connection between the deprivation and some objectively determinable purpose', the court must further inquire whether the reason for the deprivation amounts to 'just cause'.[59] Schwikkard explains that there is precedent for a rational connection existing 'where the purpose is to further the objectives of crime control'.[60] Rationality does not present a particularly high threshold as it requires merely the ability for the means to achieve the desired end – those means need not be the best or most suitable

[52] Burchell *Principles* at 492, footnote 113.
[53] *Thebus* supra note 2 para 40.
[54] Ibid.
[55] PJ Schwikkard 'Instrumental Arguments in Criminal Law: A Mirage of Tensions' (2004) 121 *SALJ* 300.
[56] Ibid at 301.
[57] Y Davidson *The Doctrine of Swart Gevaar to the Doctrine of Common Purpose: a Constitutional and Principled Challenge to Participation in a Crime* (published LLM thesis, University of Cape Town, 2017) 45.
[58] 1998 (3) SA 785 (CC).
[59] Ibid para 23.
[60] PJ Schwikkard 'Do we have a constitutional theory of criminal liability' in PJ Schwikkard and S Hoctor (eds) *A Reasonable Man: Essays in honour of Jonathan Burchell* (2019) 82.

way of achieving the particular end. The deprivation of freedom as a result of conviction under the common purpose doctrine cannot be said to be arbitrary – there is a rational connection between depriving the appellants, members of a common purpose, of their freedom and the goal of controlling joint criminal activities. Successfully prosecuting and convicting persons who engage in joint criminal conduct effectively removes them from society and prevents them further engaging in such acts during their incarceration. However, there is uncertainty as to whether the goal of crime control constitutes just cause for dispensing with the causation requirement, thus creating a lower standard of liability to deprive accused of their freedom.

In *De Lange*, Ackermann J provided a more in-depth consideration of what constitutes just cause than Moseneke J did in *Thebus*.[61] Ackermann J noted that just cause 'must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution'[62] these primarily being dignity, equality, freedom and the rule of law. Schwikkard, in discussing *Thebus*, writes that 'just cause presumably is to be found in the fault requirement applicable to the unlawful conduct minus the element of causation'.[63] This means that, given the nature of common purpose and its accompanying difficulties in proving causation on the part of each participant, this lower standard of liability seemingly suffices to meet the threshold of just cause. Deciding whether there is just cause for the deprivation of freedom involves a balancing exercise, not dissimilar to determining justifiability of the limitation of a right under section 36 of the Constitution.[64] Authors like Burchell, Sisilana and Grant make compelling points regarding the deviation of common purpose liability from the standard principles of criminal law, but do not engage sufficiently with whether such a deviation is justifiable. They appear immediately to consider whether there are less restrictive means, argue that there are, and then conclude that the limitation is unjustifiable. However, whether there is just cause for a deprivation of freedom requires a consideration and balancing of a number of

[61] Davidson op cit note 57 at 46.
[62] *De Lange* supra note 58 para 30.
[63] Schwikkard op cit note 60 at 87.
[64] Davidson op cit note 57 at 46.

factors, and the failure to engage thoroughly with this analysis leaves their arguments wanting.

Ackermann J stated that individuals 'are entitled to rely upon the state for the protection and enforcement of their rights' in accordance with the rule of law. This supports the argument that ordinary citizens, including (potential) victims of crime, should be able to rely on the State to effectively prosecute those involved in joint criminal enterprise.[65] Schwikkard contends that since dignity is a fundamental constitutional right and value meaning all persons are 'of equal worth' then it should allow 'us to demand a certain level of conduct from others'.[66] There may be a conflict between an individual's dignity and a community's rights but those individuals who participate in crime 'undermine the very conditions necessary for the enjoyment [by all] of the rights to dignity and freedom' amongst others.[67] Schwikkard contends that there is accordingly a duty on all citizens to ensure that they refrain from committing crime.[68]

According to South Africa's National Development Plan, the vision for the country by 2030 emphasises the building of safe communities and considers safety to be 'a core human right'.[69] This recognition of communities' rights to safety is seemingly grounded in the section 12(1)*(c)* right in the Constitution 'to be free from all forms of violence from either public or private sources'. A realisation of this right involves the eradication of crime and violence. Safety is recognised as a vital human right which the State is 'constitutionally obliged to respect, protect, promote and fulfil'.[70] However, the State must equally protect and promote the rights of accused persons, and the relevant right – freedom – is one of our foundational constitutional rights. The right to freedom is of utmost importance in South Africa, especially

[65] *De Lange* supra note 58 para 31.
[66] Schwikkard op cit note 60 at 94.
[67] Ibid at 95.
[68] Ibid.
[69] Saferspaces 'What is the situation in South Africa?' available at *https://www.saferspaces.org.za/understand/entry/what-is-the-situation-in-south-africa*, accessed on 26 January 2021.
[70] Ibid.

given our history of arbitrary deprivations of freedom, including detention without trial,[71] and therefore this right can only be limited where there is just cause for doing so.

In determining just cause, Ackermann J also considered the public interest. For the criminal justice system to enjoy the legitimacy required for its functionality it must accept the argument that 'ensuring that a significant portion of those guilty of [committing crimes] are convicted is necessary to protect the rights accruing to all citizens'.[72] Schwikkard, however, cautions that rights cannot be overridden based solely on a 'utilitarian cost-benefit' analysis, but that this would be a factor to consider in assessing 'how to best protect the overall framework of rights'.[73] Schwikkard refers to a well-known phrase used to support the right to be presumed innocent which states that 'it is better that ten guilty people go free than one innocent person be convicted'.[74] She goes on to explain that the ratio is important and that 'if the cost of rights is that only one in [one hundred] criminals is convicted, perhaps we cannot afford them' but cautions that determining these ratios requires us to consider whether the reason for escaping conviction was due to upholding the accused's constitutional rights, or other reasons such as poor training or resource allocation to institutions like the South African Police Service.[75] With instances of common purpose, it may well be the case that where causation on the part of each accused is required to prove guilt, one hundred or more persons may be acquitted despite having participated in collective criminal conduct. It is the nature of persons acting in a common purpose which makes determining causation on the part of each accused toward the ultimate unlawful event especially difficult, and not external problems such as inadequate policing. As a result, where causation is insisted upon, 'all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system' as Moseneke J lamented. The purpose of the limitation of the right to freedom and security of the person is therefore an important one – it seeks to ensure safer communities and to punish those who willingly engage in joint criminal ventures. It is now well established that what deters persons from committing crimes is not the severity of punishment that they

[71] In terms of the General Laws Amendment Act 37 of 1963.
[72] Schwikkard op cit note 55 at 291-2.
[73] Ibid at 300.
[74] Ibid at 293.
[75] Ibid.

will face if convicted but instead 'the certainty of prosecution'.[76] In *Thebus*, innocent victims were killed and injured in a cross fire and while invoking the doctrine against these groups who commit such offences may not deter other would-be offenders from doing so, prosecution and conviction does at least prevent those accused from further perpetrating unlawful acts during their incarceration.

The consequences of violent crimes must be considered as part of this balancing exercise. The 'costs of a traumatic experience can be multifaceted for the victim' ranging from medical costs to lifelong pain and suffering.[77] The consequences of crime are clearly part of a much larger issue, beyond the scope of application of the common purpose doctrine, but are nevertheless relevant as Moseneke J mentioned how collective criminal activity is more abhorrent to society as the threat to victims and the community is larger where more persons are involved in perpetrating crime. Crime in communities detrimentally affects a range of constitutional rights of victims as well as 'community cohesion, […] the economy and public health'.[78] Saferspaces explains that 'robbery and murder are the two most reliable indicators of public safety' and represent 'the types of crime that cause the most public fear'.[79] Robbery and murder are crimes often committed by groups sharing a common purpose.[80] High levels of crime fuel 'a climate of fear' among South Africans which is another reason in favour of prosecuting those involved in collective criminal activity.[81] Furthermore, evidence 'suggests that violence [and thus violent crime] occurs at higher rates in societies with high levels of economic inequality'.[82] It is thus individuals in our society who are already particularly vulnerable who are most likely to be the victims of crime, including crimes committed by perpetrators who act in concert.

The extent of the limitation on freedom, however, is severe – as Burchell points out, the State need not show causation on the part of a remote party at all. This can result in a person being

[76] C Ballard 'Crime and punishment don't add up' *Mail & Guardian* 7 May 2015, available at *https://mg.co.za/article/2015-05-07-crime-and-punishment-dont-add-up*, accessed on 26 January 2021.
[77] J Fourie 'The cost of crime' *fin24* 15 August 2018, available at *https://www.news24.com/fin24/Finweek/Opinion/the-cost-of-crime-20180815*, accessed on 26 January 2021.
[78] Saferspaces op cit note 69.
[79] Ibid.
[80] Burchell *Principles* at 491.
[81] Saferspaces op cit note 69.
[82] Ibid.

imprisoned despite not actually causing the unlawful consequence and this differs from the situation involving a single accused, who will be acquitted where the State cannot prove causation (both factual and legal) on their part. This factor weighs heavily in favour of a finding that there is not just cause for the deprivation of freedom but it must be considered against other factors.

Ackermann J found that there would be just cause for a deprivation of freedom where it was 'very closely tailored to the purpose it is intended to serve and [went] no further than [was] absolutely necessary to achieve its objective'.[83] The relation between the deprivation of freedom and the achievement of, in the case of *Thebus*, crime control, is therefore an important aspect to consider. In theory, prosecution of those involved in joint criminal ventures would deter would-be offenders and thus promote crime control objectives. However, the Court did not appear to rely on statistics or other evidence to prove that this was the case. Nevertheless, as Snyman points out, in the absence of the doctrine and consequent dispensing of the causation requirement on the part of each participant, a person who wants to murder another can do so most effectively by simply not acting alone.[84] This person need 'only ensure that the murder, committed by a number of people, is committed in such a way that a court cannot afterwards identify' a main perpetrator despite it being clear 'that the murder was committed by an identifiable number' of persons acting in concert.[85] He explains that the more people involved in the murder, the smaller the chance is that the court can convict any of them, and that such a situation would be unacceptable to the community as well as the legal order.[86] This would undoubtedly frustrate the proper functioning of the criminal justice system and may encourage collective crime as prosecution of joint criminal activities would be significantly less effective absent the doctrine.

Finally, Ackermann J considered whether there were less severe means which could result in the desired outcome. Grant argues that there are 'perfectly appropriate and applicable alternatives' to common purpose liability.[87] However, the problem with alternative charges is that the most applicable one in many cases, namely accomplice liability, requires that

[83] *De Lange* supra note 58 para 41.
[84] CR Snyman *Criminal Law* 5 ed (2008) 264.
[85] Ibid.
[86] Ibid.
[87] Grant op cit note 6 at 23.

causation be proved on the part of the accused and, as has been established, this is often extremely difficult to prove in common purpose cases. As such, and for the reasons discussed in the following chapter, it is my view that there are not effective alternative means to control collective crime outside of using the common purpose doctrine. Therefore, while freedom is a significant right which is severely restricted by allowing conviction despite the State not having proved causation on the part of each accused, the purpose of restricting this right (namely, the achievement of crime control and community safety) is especially important and dispensing with causation is an effective means to achieve such purpose. Furthermore, crime control and community safety cannot adequately be achieved through less restrictive means. It is my view that on balance the deprivation of freedom is just.

Ackermann J considered the section in question in *De Lange* to have 'in-built safeguards' which enhances the case for it to justifiably deprive a person of their freedom.[88] As will be discussed in the final chapter, there are clear limitations to the application of the doctrine which constitute safeguards against a deprivation of freedom without just cause.

Moseneke J reasoned that the 'doctrine of common purpose sets a norm that passes constitutional scrutiny' but I would argue that this finding has been stated rather than demonstrated.[89] The judgment emphasises the need for the doctrine without engaging sufficiently with whether there was just cause to deprive the appellants of their freedom. Schwikkard describes the *Thebus* judgment as 'boldly utilitarian' and notes that 'the Constitutional Court in its application of s 12(1) of the Constitution to criminal liability has set a standard that is considerably more utilitarian than the psychological approach adopted by the common law'.[90] However, she notes that where our theory of criminal liability is underpinned by the 'interconnectivity and the embeddedness of humaneness within relationships', considered 'a central characteristic of *ubuntu*', then punishment can be justified on the basis of a failure to care.[91] Schwikkard suggests that such an underlying communitarian theory could better explain how the Court came to confirm the

[88] *De Lange* supra note 58 para 41.
[89] *Thebus* supra note 2 para 43.
[90] Schwikkard op cit note 60 at 87-8.
[91] Ibid at 92.

constitutionality of the common purpose doctrine. She explains that a 'duty of care for the community's interest would include a duty not to actively engage in activities that might result in the commission of a crime'.[92] Schwikkard concludes that if the basis for criminal liability is a duty to care, then a justification of the doctrine will not simply be utilitarian in nature but instead premised on the accused's blameworthiness for their failure to respect their 'duty to care for others'.[93]

While there is clearly a need to dispense with the causation requirement for common purpose liability to ensure prosecution of accused, the Court in *Thebus* should have embarked on a more thorough analysis of this issue. Nevertheless, I would argue that it was still reasonable to find that there was just cause for depriving the appellants of their freedom, meaning the 'internal limitation' in section 12(1)*(a)* was met and so the right was not infringed.

Concluding Remarks

Moseneke J identified two criticisms of the doctrine in its active association form, namely that the active association requirement had 'been cast too widely or misapplied' and that there are less invasive, and thus more favourable, alternatives to common purpose liability.[94] However, having already found the doctrine to be constitutional, these arguments were deemed irrelevant because no proportionality inquiry was necessary. As has been argued, the Court should have considered these alternatives in determining whether there was just cause for depriving the appellants of their freedom. As a counter to the first criticism, Moseneke J emphasised 'the duty of every trial Court, when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person'.[95] As such, it is of paramount importance that courts apply the doctrine carefully and only to cases where all elements of the crime are established beyond reasonable doubt. Moseneke J thus acknowledged that the problem is not the doctrine itself but instead how

[92] Schwikkard op cit note 60 at 93.
[93] Ibid.
[94] *Thebus* supra note 2 para 44.
[95] Ibid para 45.

courts have misapplied it in the past. This accords with my view – our focus should be on improving the application of the doctrine, not abolishing it.

Both the trial Court and the Supreme Court of Appeal found that there was sufficient active association on the part of both appellants to warrant a finding that they had formed a common purpose with the shooters. As the Constitutional Court did not find that the doctrine infringed any constitutional right, it could not interfere with the trial Court's or the Supreme Court of Appeal's application of the doctrine as that did not constitute a constitutional matter. Moseneke J concluded with a nod to the doctrine's controversial history in the following terms:

> Despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, I am of the view that the common law doctrine of common purpose in murder […] does pass constitutional muster.[96]

All of the concurring judgments (by Goldstone and O'Regan JJ, Yacoob J and Ngcobo J) agreed with Moseneke J's judgment as it pertained to the constitutionality of the common purpose doctrine. Therefore, not one judge of the Constitutional Court took issue with the constitutionality of the doctrine, and all agreed with Moseneke J's reasoning in that regard. This is surprising in light of how controversial the doctrine appeared to be at the time, and it is interesting that none of the other judges argued that there should have been a more rigorous engagement with whether there was just cause for the deprivation of freedom, even if they ultimately agreed that the doctrine should be found constitutional.

Despite the Court's finding in *Thebus*, many authors continue to argue that there are in fact less restrictive means than common purpose liability to control collective criminal activity. The following chapter provides an analysis of these alternatives to determine their viability.

[96] *Thebus* supra note 2 para 50.

CHAPTER THREE

The Proposed Alternatives to Common Purpose Liability

This chapter assesses the viability of alternative forms of liability for remote parties in a common purpose engaged in criminal acts. The elements of liability for the various charges, namely accomplice liability, incitement, conspiracy and public violence, will be considered to determine their efficacy as alternatives to conviction under the common purpose doctrine.

The argument for fair labelling

Burchell suggests that there are effective alternative charges to convicting a person under the doctrine, such as accomplice liability, public violence and conspiracy.[1] He argues that the accused in *Safatsa* could have been liable for incitement or public violence. The appellants in *Thebus* could instead have been convicted of public violence which is a competent verdict. Such punishment may well have been severe enough to act as a deterrent and to 'give vent to the society's feeling that such conduct should be condemned'.[2] Burchell suggests that a participant in a common purpose whose role in the execution of the offence is relatively minor should rather be considered an accomplice than a co-perpetrator. He argues that if the emphasis was on actual accomplice liability as opposed to imputed co-perpetrator liability under the doctrine, then courts could appropriately consider the accused's verdict and sentence in light of the degree of their participation in the common purpose.[3] Burchell suggests that 'constitutional arguments are stronger against the pure active association variety of imputed co-perpetrator liability in the context of large and sometimes amorphous groups of people', for example persons involved in a protest which becomes violent. It is important to recognise that the participants may have different degrees of participation.[4] Burchell seems to want to make a distinction between small organised groups of perpetrators and large protesting crowds, which seems a reasonable distinction to make but begs the

[1] J Burchell *Principles of Criminal Law* 5 ed (2016) 487 (hereafter Burchell *Principles*).
[2] Ibid.
[3] Ibid.
[4] Ibid at 488.

question – at which point does the group change from one to which application of the common purpose doctrine is appropriate, to one where it is not? Burchell suggests that the Constitutional Court would have done well to invalidate common purpose liability in its active association form as it pertained to mob violence situations, as the participants would be liable for alternative lesser crimes regardless.[5] It is submitted that this is not necessarily the case, as those lesser crimes require all the elements thereof to be proved (often requiring proof of causation) which could make convicting such accused more difficult or even impossible.

Burchell notes that no one is suggesting that the remote parties should get off scot free. Instead, he argues that fair labelling requires that a remote party in a common purpose who can be proved to be an accomplice, or liable for an offence such as public violence, should instead be convicted of such offence.[6] Burchell argues that an approach based on fair labelling is preferable to 'allowing fundamental principles of individual justice […] to be bent simply to accommodate evidential difficulties' that the State faces.[7] The issue of fair labelling does not necessarily mean that the crime with which the remote party is charged will change. On the charge sheet, the crime with which they are being charged may still be the actual crime committed, for example, they may be an accomplice *to murder*. So while accomplice liability has its own definitional elements and will often carry a lighter sentence than being liable as a perpetrator, the labelling still relates to the same crime. However, the argument in favour of these alternative charges to co-perpetrator liability under the doctrine relates to their ability to ensure an appropriate or proportionate sentence. As Burchell explains, the 'determination of the appropriate degree of criminal guilt of participants in a common purpose' is an aspect of fair labelling.[8]

There is a clear distinction now between (co-)perpetrators and accomplices. There are three ways in which a person may be considered a perpetrator – the first is where they personally satisfy 'the definitional elements of the crime'; the second is where the common purpose doctrine applies and although the person does not themselves fulfil each element of the

[5] Burchell *Principles* at 488.
[6] Ibid at 491.
[7] Ibid.
[8] Ibid at 485, footnote 73.

crime, they have the requisite capacity and *mens rea* and so the actual perpetrator's conduct is imputed to them; and the third is where one 'procures another person […] to commit a crime'.[9] Only where a person cannot be considered a perpetrator in any of these categories is it possible for accomplice liability to arise.[10] The Appellate Division's failure to adhere to this procedure led to criticism of its decision in *S v Williams*[11] where the accused was convicted as an accomplice, rather than a perpetrator under the doctrine.[12] This is interesting as Sisilana relies on *Williams* to argue for the 'theory of participation in crime' to replace the doctrine. He argues that remote parties are accessories and that holding them liable as perpetrators results in injustice to these accused.[13] The feasibility of alternatives to common purpose liability for remote parties will now be considered.

Accomplice liability

Whether a person is a perpetrator or an accomplice depends on the degree of their participation prior to the crime's completion.[14] Accomplice liability is premised on the accused's 'own unlawful conduct and fault (*mens rea*), but is also liability which is *accessory* in nature', meaning that for there to be an accomplice, there must be a perpetrator.[15] The accomplice is thus liable for their own crime, and not the crime of the perpetrator. Perpetrators fulfil all the definitional requirements of an offence, while an accomplice lacks the perpetrator's *actus reus* but still 'associates himself wittingly with the commission of the crime by the perpetrator or co-perpetrator in that he knowingly affords [them] the opportunity, the means or the information which further the commission of the crime'.[16] Such assistance constitutes the unlawful conduct of the accomplice and includes '[f]acilitating, encouraging, giving advice or ordering the commission of the crime'.[17] There must be a causal connection between the assistance provided by the accomplice and the conduct of the

[9] Burchell *Principles* at 475.
[10] Ibid at 477.
[11] 1980 (1) SA 60 (A).
[12] Burchell *Principles* at 477, footnote 11.
[13] L Sisilana 'What's Wrong with Common Purpose' (1999) 12 *SACJ* 309.
[14] Burchell *Principles* at 509.
[15] Ibid at 505.
[16] Ibid.
[17] Ibid at 506.

perpetrator in committing the offence.[18] This already presents a problem for many cases in which a common purpose has been formed in that it is often difficult to prove that the actions of individual members of a group (especially a mob) actually furthered the commission of the crime. As such, a causal connection between the remote party's conduct and perpetrator's conduct must be established for accomplice liability but as this often cannot be proved in common purpose cases, it is likely that such individuals would be acquitted if charged.

Burchell notes that where a common purpose cannot be established 'causation (both factual and legal) on the part of *each* co-perpetrator must *individually* be established'.[19] This means that convicting persons under the common purpose doctrine presents less difficulty than proving accomplice liability. As regards fault, the accomplice 'must have intentionally furthered or assisted in the commission of the crime by someone else' and such intention includes *dolus eventualis*.[20] Negligence is not sufficient for accomplice liability. Burchell notes that an accomplice typically plays a lesser role than the perpetrator in the commission of the crime and will thus likely receive a more lenient sentence than the latter. However, the accomplice can play 'a more substantial role in the preparation and execution of the crime than the principal offender' and accordingly receive a harsher punishment than the latter.[21] However, in a case of common purpose, it is likely that the remote parties will be punished less severely if they are labelled accomplices as opposed to perpetrators. It is submitted that if courts convict all members of a common purpose, they should then consider each accused's role in the perpetration of the crime (where such is known) as a factor in mitigation or aggravation of sentence.

Incitement

It is a crime to incite another person to commit a crime. Incitement should technically be confined to the situation where the incitee does not commit the crime, 'for if the crime has been committed the inciter is guilty of the substantive crime itself either as a perpetrator or

[18] Burchell *Principles* at 505.
[19] Ibid at 508.
[20] Ibid at 512.
[21] Ibid at 513.

as an accomplice'.[22] It would appear that if a person successfully incites another to commit a crime, then there may be no difference between their guilt as a perpetrator individually or under the doctrine of common purpose. Burchell describes an inciter as 'one who unlawfully makes a communication to another with the intention of influencing [them] to commit a crime' and it is this communication – verbal or by conduct – which constitutes the unlawful conduct for incitement.[23] It is necessary for the communication to 'actually reach the mind of the incitee' for the accused to be guilty.[24] Furthermore, it is essential that the inciter knew that the act they were inciting the incitee to commit constituted a crime.[25] Incitement can become conspiracy where the incitee agrees to commit the crime.

There is statutory liability for incitement in terms of the Riotous Assemblies Act.[26] Section 18(2)*(b)* was recently held to be unconstitutional in the case of *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*[27] and, while the order of invalidity remains suspended, reads as follows:

> Any person who incites, instigates, commands or procures any other person to commit any serious offence […] shall be guilty of an offence and liable on conviction, to the punishment to which a person convicted of actually committing that offence would be liable.[28]

Burchell notes that 'in practice the court's discretion has usually resulted in the inciter being more leniently treated'.[29] Therefore both issues of fair labelling (the crime itself and the punishment) may be argued as grounds for charging a person with incitement rather than the alleged common purpose crime. However, it would not be in the interests of justice to charge an accused with a lesser offence where a charge of murder can be proved. For example, while accused four in *Safatsa* could have been charged with incitement, she met the requirements for a conviction of murder using the doctrine and so this was the appropriate charge.

[22] Burchell *Principles* at 531.
[23] Ibid.
[24] Ibid at 532.
[25] Ibid at 537.
[26] 17 of 1956.
[27] (CCT201/19) [2020] ZACC 25.
[28] Ibid para 78.
[29] Burchell *Principles* at 539.

Conspiracy

'A conspiracy is an agreement between two or more persons to commit, or to aid or procure the commission of, a crime'.[30] In South Africa conspiracy is not often resorted to because much reliance is placed on the common purpose doctrine to sanction collective criminal activity.[31] Burchell argues that conspiracy provides an appropriate back-up to conviction under the doctrine such that group criminality 'be curbed by punishing agreements to commit crimes'.[32] Conspiracy is a statutory offence in terms of section 18(2)*(a)* of the Riotous Assemblies Act. Burchell recommends that conspiracy should only cover the situation where the crime is not subsequently committed because where it 'is committed, a conspirator who incited, or took part in, its commission is liable for the crime itself'.[33]

The agreement constitutes the unlawful conduct. While all the details of the crime need not have been worked out, 'the parties must not be still negotiating towards agreement'.[34] They must in their minds concur to commit the crime. As regards the fault element, the 'conspirators must have intended to commit the crime in question' and Burchell argues that there would need to be knowledge of unlawfulness.[35]

Common purpose in its prior agreement form entails conspiracy to commit crime. Burchell argues that the defence of dissociation from a common purpose based on prior agreement may have developed due to the 'existence of the fall-back option of a conviction of conspiracy to commit the criminal conduct'.[36] Burchell notes that where a conspiracy results in that crime being committed, then whether the conspirator should be liable as a perpetrator or merely liable for conspiracy would depend on the degree of their participation in the offence.[37] In terms of sentencing, section 18(2) of the Riotous Assemblies Act applies. As with the inciter, the conspirator typically receives a more lenient sentence than the actual perpetrator.[38]

[30] Burchell *Principles* at 541.
[31] Ibid at 540.
[32] Ibid.
[33] Ibid at 541.
[34] Ibid.
[35] Ibid at 543.
[36] Ibid at 545.
[37] Ibid at 546.
[38] Ibid, footnote 55.

Public violence

Public violence is a competent verdict to a charge of murder, as was the case with accused five and six in *Safatsa*. Public violence is defined as 'the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions that are intended to forcibly disturb the public peace or security or to invade the rights of others'.[39] Punishing this conduct ensures public peace and order, which are in the interests of the community. Grant explains that public violence 'is invariably committed in mob-attack scenarios'.[40] Public violence is essentially a crime of association – it does not require violence to have been committed by each party but merely that the party must have 'associated with the group of people who collectively perpetrated acts of violence'.[41] The accused must personally associate with the group with the requisite intention (*dolus eventualis* suffices) and furthermore be proved to have unlawfully and intentionally been 'party to the conduct of those who acted jointly'.[42] It is the violence and interference with others' rights which turns a protest into public violence. Burchell explains that what makes certain conduct public violence has to do with 'the dimensions of the violence' as opposed to the actual number of persons involved.[43] The persons must act together and 'evolve a common purpose [which may be spontaneous or even tacit] to forcibly disturb the public peace or to invade the rights of others'.[44] Premeditation is not required. There must be violence, or the threat thereof, as opposed to mere force.[45] This violence can be aimed at people, property or both and 'need merely be *intended* to disturb the peace or invade rights'.[46]

The accused must have unlawfully been a participant in the gathering, meaning they need to have committed an act which adequately associates them with the crowd's conduct. This sounds very much like the active association form of common purpose. The accused's conduct must form 'part of the concerted action of the group' and not merely be a frolic of their own.[47]

[39] Burchell *Principles* at 777.
[40] J Grant 'Common Purpose: Thebus, Marikana and Unnecessary Evil' (2014) 30 *SAJHR* 21.
[41] Burchell *Principles* at 778.
[42] Ibid at 779.
[43] Ibid.
[44] Ibid at 780.
[45] Ibid.
[46] Ibid at 781.
[47] Ibid at 782.

Response to the proposed alternatives

Burchell considers the English law concept of joint enterprise liability which is essentially the same as our common purpose liability, and notes that in the case of *R v Stewart and Schofield*,[48] Hobhouse LJ distinguished this form of liability from accessorial liability by recognising that in a joint enterprise, one party has 'participated in the criminal act of another' which has resulted in the unlawful consequence, making all parties to that common purpose 'criminally liable for the acts done in the course of carrying out that joint enterprise'.[49]

Joint enterprise liability allows for the conviction of accused where their conduct differs from that of a person who 'satisfies the definition of accessory or accomplice liability'.[50] A participant in a common purpose need not have assisted in the commission of the offence for which all the accused are tried, but merely needs to have aided 'the *basic* offence', in other words, been a participant in the common purpose by meeting all the requirements of either the prior agreement or active association form.[51] The distinction between accomplice and common purpose liability lies in the difference between the conduct of these parties as opposed to their fault.[52]

The most apparent counter to these 'obvious possible [alternative] options' is the effectiveness of these charges, considering the difficulty in many cases of collective criminal conduct of proving what each individual did toward the unlawful outcome.[53] Furthermore, Snyman argues that the *Safatsa* judgment 'has effectively excluded the possibility of [an accused] being convicted as an accomplice to murder if it is proved that he was a party to a common purpose to kill and that death resulted from the combined conduct of the group'.[54] Snyman therefore submits that 'it is impossible for somebody to be an accomplice to murder' as it is not 'possible to *further* the victim's death without simultaneously also *causing* it'.[55]

[48] [1995] 1 Cr App R 441, CA.
[49] J Burchell 'Joint Enterprise and Common Purpose: Perspectives in English and South African Criminal Law' (1997) 10 *SACJ* 127.
[50] Ibid at 128.
[51] Ibid.
[52] Ibid.
[53] Ibid at 139.
[54] CR Snyman *Criminal Law* 5 ed (2008) 277.
[55] Ibid at 276-7.

Grant states that it is 'difficult to conceive of an offender who would be convicted as a common purpose perpetrator, who could not be convicted as an accomplice'.[56] Now in theory that may be sound but in practice the issue comes in with having to prove the causation element of accomplice liability, namely that the conduct of the accomplice aided or assisted the commission of the crime by the perpetrator. This often cannot be proved, especially in the case of a common purpose based on active association, meaning that if the State relies on accomplice liability to charge the remote parties, the likely outcome will be acquittal and it is submitted that this cannot better serve justice than liability under the common purpose doctrine. So while the concept of accomplice liability does seem more attractive than conviction under the doctrine of those who cannot be shown to have causally contributed to the unlawful consequence, it is fallacious to recommend this as an alternative to common purpose liability where the issue in many of these cases is still that the State cannot prove causation in respect of the individual accused. As mentioned above, Snyman also exposes the vulnerability of a criminal justice system without the doctrine by explaining that an accused would be less likely to face conviction if they acted in concert with others, such that the prosecution could not establish who in the group actually caused the unlawful consequence.[57] The fact that accused could easily exploit the system to evade liability cannot accord with the need to give effect to communities' rights to safety and to hold persons to account for the crimes they have committed.

Grant argues that the 'concern with offenders "getting away with murder" or receiving inadequate sentences appears entirely misplaced' but I would argue that the supposed effective alternative of accomplice liability in the case of a common purpose is what is misplaced.[58] Furthermore, while accused could in certain circumstances be charged with a lesser offence such as incitement, it is submitted that charging them with a more serious crime using the doctrine is in the interests of justice in that it will likely have a greater deterrent effect on similar would-be offenders, and furthermore sends a strong message that the protection of citizens' rights is a priority in our constitutional dispensation.

[56] Grant op cit note 40 at 21.
[57] Snyman op cit note 54 at 264.
[58] Grant op cit note 40 at 22.

As such, the oft-proposed alternatives to common purpose liability, while appearing proportionate and more appropriate, are in fact not viable either because their requirements are unlikely to be met in the case of collective criminal acts or they do not give adequate expression to the effects of group criminality on the rights of citizens. Furthermore, there are numerous judgments which illustrate the importance of the doctrine, both practically and symbolically, as is discussed in the following chapter.

CHAPTER FOUR

The Need for the Doctrine of Common Purpose: An Analysis of Case Law

An analysis of Tshabalala v S; Ntuli v S

Tshabalala v S; Ntuli v S[1] is a significant recent Constitutional Court judgment which clarified the law concerning the application of the common purpose doctrine to the common law crime of rape. The Court held, in a unanimous judgment, that the doctrine did apply to rape cases and that the 'instrumentality' argument concerning the commission of rape was inapplicable. This case importantly entrenches a proper understanding of the crime of rape, and seeks firmly to denounce the concept of rape as a merely sexual crime, affirming that it is one of domination of one person over another, which includes a loss of dignity and power on the part of the victim.

In the very first paragraph of the judgment, the Court notes that 'male control over women and notions of sexual entitlement feature strongly in the social construction of masculinity in South Africa'.[2] Context matters, and the fact that the Court acknowledges this already suggests a departure from a narrow-minded understanding or view of what rape is, and how it should be prosecuted. The applicants in this matter relied on the instrumentality argument to negate the application of the common purpose doctrine in cases of rape. They argued that rape, by its nature, 'can only be committed by a male using his own genitalia'.[3]

This judgment results from various crimes perpetrated in 1998, before the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[4] (SORMA). At the relevant time rape, 'as defined, required the unlawful insertion of the male genitalia into the female genitalia'.[5] The applicants submitted that the doctrine could not apply 'as by definition, the causal element cannot be imputed to a co-perpetrator' and this comprises the instrumentality argument.[6] The facts of this case can be summarised as follows: a group of

[1] 2020 (3) BCLR 307 (CC) (hereafter *Tshabalala*).
[2] Ibid para 1.
[3] Ibid para 2.
[4] 32 of 2007.
[5] *Tshabalala* para 33.
[6] Ibid.

men, including the applicants, terrorised residents in the township of Tembisa in Gauteng – they ransacked various houses, attacked individuals and raped numerous women. A vital aspect of this case is that the group had adopted a 'preordained pattern of attack' and there was thus a prior agreement to commit these crimes.[7]

Several members of the group raped women on the night in question while others stood outside and acted as look-outs. The latter may not have physically raped the women themselves but should be viewed in the same light as one who is part of a common purpose to assault or murder in that they intended the commission of the crime and furthermore facilitated it.

The accused were found guilty of rape in the High Court based on the application of the doctrine. The High Court found that the doctrine applied as the group had 'acted as a "cohesive whole"' in the commission of the crimes, which revealed a 'systematic pattern'.[8] The Court reasoned that the scene was essentially set for certain members of the group to rape women, as male occupants of the various households had their heads covered with blankets and were restrained. Furthermore, those group members who did not rape the women were 'posted outside as guards'.[9] This clearly indicated the execution of a planned attack, and not the spontaneous occurrence of violent crimes by certain members of the group. The High Court held that 'the rapes were executed pursuant to a prior agreement in furtherance of a common purpose'.[10]

The Court identified the issue as whether an accused could be convicted of rape using the doctrine where they themselves did not penetrate the victim.[11] This question had not been answered consistently by various divisions of the High Court. There was a need for clarity in this area of the law, especially given South Africa's extremely high levels of violent crime and gender-based violence, including rape.

[7] *Tshabalala* para 6.
[8] Ibid para 10.
[9] Ibid.
[10] Ibid.
[11] Ibid para 22.

In *S v Kimberley*[12] the Court found the doctrine to be inapplicable in rape cases since rape was defined as 'the unlawful and intentional sexual intercourse between a man with a woman without her consent', meaning that the rape by the perpetrator could not be imputed to another individual.[13] This case, however, was decided before the enactment of SORMA.

In *S v Thebe*[14] the doctrine was used to convict the accused of rape. The Court applied the doctrine in the case of a common purpose based on active association, which differs from the present case with its common purpose based on prior agreement. Importantly, *Thebe* shows that as far back as 1961, the Appellate Division was prepared to apply the doctrine to the crime of rape, albeit in the active association form.

Snyman suggests that rape is an instrumental crime and that someone who facilitates a rape but does not themselves rape the victim can only be held liable as an accomplice.[15] An instrumental crime, as rape was deemed under the common law, is a crime which 'can only be committed personally' and not 'through the agency or instrumentality of another'.[16] Under the common law, rape was defined as the 'unlawful insertion of the male genitalia into the female genitalia' and the implications of such a definition were twofold. First, it implied that the conduct of the perpetrator could not be imputed to anyone else as no one else's body had been instrumental in the commission of the offence, and secondly, this understanding of rape was significant in perpetuating the view of rape as an act which is primarily sexual in nature as opposed to an act characterised by the exertion of power and dominance of one person over another. The State contended that the instrumentality argument was problematic and inconsistent with the application of the common purpose doctrine to other crimes such as murder and robbery, in that an individual can be held liable for murder on the basis of the doctrine despite not actually 'pulling the trigger' which causes someone's death. The State argued that there had been a prior agreement to commit these crimes, including rape, and the doctrine was thus applicable 'because the conduct of each accused in the execution of that [common] purpose is imputed to the other'.[17]

[12] 2004 (2) SACR 38 (E).
[13] *Tshabalala* footnote 10.
[14] 1961 PH H 247 (A).
[15] *Tshabalala* para 34.
[16] J Burchell *Principles of Criminal Law* 5 ed (2016) 617 (hereafter Burchell *Principles*).
[17] *Tshabalala* para 39.

The State also submitted that including rape as a common purpose crime was in line with modern international standards.[18]

It was argued by an amicus curiae, the Commission for Gender Equality, that the instrumentality argument is wholly flawed. The Commission argued that the approach was artificial in distinguishing cases of rape from assault or murder just because the former typically involves the use of one's body while the latter may involve an inanimate object, such as a weapon. The Commission argued that excluding rape from common purpose liability inhibited 'the State's ability to prevent and combat gender-based violence'.[19] Furthermore, the instrumentality argument acts as a regression from 'the expanded definition of rape under SORMA', as this definition allows for rape 'to be committed using not only one's body but any inanimate object'.[20] Excluding rape from common purpose liability would result in an arbitrary application of the doctrine – it 'would apply in the case where an inanimate object is used in commission of the crime, but not a body part, and for no principled reason [thus defying] logic and common sense'.[21]

The Court stated that '[i]nsofar as the doctrine is concerned there is *nothing wrong with the current law, the problem relates to the application*' (emphasis added).[22] This statement reiterates the approach of the Constitutional Court in *Thebus* where the doctrine was found to be constitutional.

The Court noted that no member of the group had dissociated themselves from the conduct of the main perpetrators, meaning that that conduct could be imputed to the applicants. The Court explained that the incidents of rape were neither unexpected nor independent of the group's mandate. The other group members must have been aware of the rapes – the complainants were made to cover their heads and ordered not to look at the perpetrators, which 'is consistent with the notion that they were part of the criminal enterprise'.[23] The Court then explained the necessity of understanding 'the relationship between rape and

[18] *Tshabalala* para 40.
[19] Ibid para 43.
[20] Ibid.
[21] Ibid.
[22] Ibid para 45.
[23] Ibid para 51.

power' in determining whether the doctrine could be applied to cases of rape.[24] The Court stated that the definition of rape premised on the genitalia of both parties was unsustainable and that in cases of group rape 'the mere presence of a group of men results in power and dominance being exerted over women victims'.[25] This is a persuasive counterargument to the instrumentality argument, which is concerned with the physical act of rape as opposed to the true nature thereof, which is to exert power over another person. The Court quoted the following from *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*[26]:

> Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is […] the aggression that is expressed in a sexual manner under conditions of coercion".[27]

The Court expressed the need to send a strong message regarding society's intolerance and abhorrence of such brutal crimes. It is clear that to 'jettison the sound doctrine […] would do a grave injustice to direct and indirect victims of gender-based violence' and give undue power to rapists.[28] Therefore, application of the doctrine to cases of rape is, along with being legally and logically consistent with its application to other crimes, also able to send out a strong message that perpetrators of such callous crimes will face the full might of the law.

The Court rejected Snyman's instrumentality argument as perpetuating gender inequality and promoting discrimination. The argument failed because using a part of one's body to commit rape is not logically distinct from using one's body to commit a crime such as murder (for example by strangling a person with one's bare hands). It is nonsensical for the common purpose doctrine to apply to the remote parties who did not wring the deceased's neck but not apply to the remote parties who stood guard while one of their members raped another person. The Court found that to permit accused in the position of the applicants to escape liability under the doctrine was 'unsound, unprincipled and irrational'.[29]

[24] *Tshabalala* para 51.
[25] Ibid.
[26] 2007 (5) SA 30 (CC).
[27] *Tshabalala* para 51.
[28] Ibid para 52.
[29] Ibid para 53.

The Court unequivocally established that the instrumentality argument is an affront to our Bill of Rights, which prioritises the freedom, equality and dignity of everyone. The Court acknowledged that this argument is rooted in patriarchy, and that rape can be committed by accused who have not penetrated the victim.[30] Furthermore, since the introduction of SORMA in 2007, instrumentality is no longer a requirement for the crime of rape, meaning that this judgment is also in line with prevailing legislation. The definition of rape at the time the crimes were perpetrated was premised on the use of genitalia and in terms of the rule of law the Court could not retroactively apply the SORMA definition of rape to convict the accused. Nevertheless, the Court relied on logic and a proper understanding of the crime to find that rape may be perpetrated by more than one accused, provided the others intended to exert dominance over their victims, through their presence at the crime scene.[31]

The Court described the purpose of the doctrine as overcoming 'an otherwise unjust result which offends the legal convictions of the community' and it found 'no reason why the doctrine [could not] apply' to the crime of rape.[32] The doctrine's object is to 'criminalise collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises' which it is submitted can effectively be done through application of the doctrine to cases of rape.[33] The Court found no good reason to treat the look-outs differently from the accused who raped the complainants. The remote parties were present and actively facilitated the crime, and in no way disassociated themselves from their co-accused's conduct. The presence of the remote parties allowed for the rapes to occur and clearly showed that all members of the group were 'complicit and acted in cahoots'.[34] The Court reiterated that applying the doctrine to cases of murder and assault but not rape creates an arbitrary distinction, and that 'equality, dignity [and] protection of bodily and psychological integrity […] should be afforded to the victims of sexual assault'.[35] The Court emphasised the scourge of violent crime, including rape, in the country. It is logically and legally sound to charge co-perpetrators who do not themselves rape a complainant with rape where a common purpose to commit such crime can be established.

[30] *Tshabalala* para 54.
[31] Ibid.
[32] Ibid para 56.
[33] Ibid para 57.
[34] Ibid para 59.
[35] Ibid para 60.

Khampepe J, in a concurring judgment, neatly summed up the finding of this case by stating that there is 'neither legal nor normative reason that would justify the exclusion of the application of the doctrine' to the crime of rape.[36] Khampepe J emphasised that the experience of rape for the victim is not sexual and is instead characterised by 'immense powerlessness and degradation'.[37] She relied on statistics to illustrate that rape is unfortunately not uncommon or deviant but is instead 'structural and systemic'.[38] This is another obvious reason for the doctrine to apply to rape cases.

Victor AJ, in a concurring judgment, noted that the application of the doctrine to rape cases 'does not compromise the rules of evidence and does not subvert the accused's right to a fair trial'.[39] He concluded that national as well as international duties obliged the confirmation of the doctrine's application to cases of rape.[40]

The *Tshabalala* judgment does more than clarify that the common purpose doctrine applies to the crime of rape. It also reflects a move away from the connotation of common purpose with gross human rights violations under apartheid to the doctrine now being used to address the scourge of gender-based violence in the country. *Tshabalala* illustrates the relevance and usefulness of the doctrine to the lives of South Africans now and should be seen as a tool to realise justice, unlike how it was used under apartheid. SAPS recorded that there were over 42 000 rapes committed in 2019/2020, amounting to a daily 'average of 116 rapes'.[41] However, it is accepted that official statistics are inaccurate and fail to reflect the true extent of this crime.[42] As such, it is vital that rape and other sexual offences are effectively prosecuted and that the common purpose doctrine is utilised to ensure that justice is served.

[36] *Tshabalala* para 69.
[37] Ibid para 70.
[38] Ibid para 76.
[39] Ibid para 87.
[40] Ibid para 99.
[41] Africa Check 'FACTSHEET: South Africa's crime statistics for 2019/20' published 4 August 2020 available at *https://africacheck.org/factsheets/factsheet-south-africas-crime-statistics-for-2019-20*, accessed on 1 December 2020.
[42] L Vetten 'Rape and other forms of sexual violence in South Africa' *Institute for Security Studies (ISS) Policy Brief 72* November 2014 available at *https://www.saferspaces.org.za/uploads/files/PolBrief72V2.pdf*, accessed on 1 December 2020.

Tshabalala is a watershed judgment which should be welcomed for its endorsement of a proper understanding of both rape and the common purpose doctrine but it is far from the only case which reveals the necessity of the doctrine to address collective crime. The following section provides an analysis of various judgments which emphasise the need for, and justification of, the doctrine in our criminal law.

The need for the doctrine as illustrated in other cases

The following analysis of case law demonstrates the practical necessity of the doctrine in holding persons accountable for their role in the commission of collective crimes. While the need for crime control comprises an instrumental argument in favour of allowing conviction under the doctrine, with its dispensing of the causation requirement, it is important to bear in mind the constitutional rights of all citizens, some of whom will be the victims of joint criminal enterprise. The doctrine may be used to hold accused liable for crimes committed by one of their members where a main perpetrator cannot be identified. It would be unjust and unwarranted for groups to be able to commit crimes with impunity because their numbers allow them to shield each other from being identified as the main perpetrator, and thus escape conviction. This would not accord with the basic right to safety of all South Africans. Furthermore, while not having been explicitly accepted by our courts as an underlying theory of our criminal liability, the concept of *Ubuntu* has informed much of the Constitutional Court's early jurisprudence.[43] Schwikkard explains how *Ubuntu* can be understood to create reciprocal duties of care on the part of all members of a society.[44] The breaching of such a duty of care toward others by engaging in joint criminal activities is an argument in favour of finding just cause for depriving accused in a common purpose of their freedom, as their actions directly negatively affect other members of society. In the recent Constitutional Court case of *Jacobs and Others v S*[45] the applicants acknowledged 'that the legal convictions of the community establish that the doctrine is vital in order to further the pressing social need to successfully prosecute violent crimes and to accord with the societal distaste for violent

[43] Starting with *S v Makwanyane* (CCT3/94) [1995] ZACC 3.
[44] PJ Schwikkard 'Do we have a constitutional theory of criminal liability' in PJ Schwikkard and S Hoctor (eds) *A Reasonable Man: Essays in honour of Jonathan Burchell* (2019) 93.
[45] 2019 (5) BCLR 562 (CC).

crimes'.[46] It is clear therefore that even those subject to the doctrine accept its legitimacy and necessity. In *Nkabinde and Others v S*,[47] which entailed a cash-in-transit heist and the killing of at least one person, the Court held that all members of the common purpose had equal blameworthiness. The Court noted that 'communities expect the courts to impose severe sentences for these [dangerous and frequent] crimes'.[48] This statement can be understood as a recognition of a duty to care which is placed on all citizens, as well as the concomitant punishment which is justified where such a duty is breached.

S v Mgedezi[49] is an important illustration of the necessity of the doctrine. None of the accused were seen by State witnesses to have injured any of the deceased in a way 'which caused or contributed causally' to their death, nor was any accused seen physically to have assaulted Nhone, in respect of whom the accused were charged with attempted murder.[50] This meant that the accused could only be convicted of the charges if the State could prove that they had 'acted in common purpose with those whose acts caused the deaths' or the assault.[51] In this case a group of mine workers attacked team leaders at the mine who were residing in room 12 of block 1 of a compound which constituted the living quarters of the workers. The group set room 12 alight and attacked the occupants with various weapons. The attack was brutal and the reality of the evidence in this case meant that if the doctrine was not applied, no one could be found guilty of murder despite the fact that four men were undoubtedly killed by the actions of the group. Such an outcome would be unjust. As it turned out, Botha JA acquitted a number of the accused as the evidence did not establish that they had formed a common purpose with the others to kill.

Mgedezi importantly clarified the requirements for a common purpose founded on active association and, in so doing, illustrated that the requirements were not overbroad**.** For example, Botha JA noted that the State witnesses could only place three accused in the vicinity of room 12 (the scene of the crime) and that the other three accused could not

[46] *Jacobs* supra note 45 para 27.
[47] 2017 (2) SACR 431 (SCA).
[48] Ibid para 53.
[49] 1989 (1) SA 687 (A).
[50] Ibid at 698.
[51] Ibid.

'notionally be transplanted to the vicinity of room 12 by way of a generalisation'.[52] There was no evidence to show a prior agreement to kill, and therefore a common purpose had to be established on the basis of active association. Botha JA explained that the attack by the group 'was confined to room 12 and its occupants. Consequently any enquiry into common purpose [had to] be directed at the events that occurred there'.[53]

In respect of the first and fourth accused, Botha JA was satisfied that all of the prerequisites for establishing a common purpose between them and the perpetrators were satisfied beyond reasonable doubt. Even if accused one did not himself inflict any of the (mortal) injuries, Botha JA found that those acts could be imputed to him because he 'led the mob in the attack against room 12 and its occupants, the object of which undoubtedly was to kill' and he manifestly actively associated with the mob's attack.[54] Furthermore, his actions displayed that he possessed *dolus directus* for the killing. Accused four threw stones and declared that they had killed off the traitors (i.e. the room 12 occupants) thus indicating that he associated himself with the murders and attempted murder, with the requisite *mens rea*.[55]

The common purpose doctrine is also invoked in cases of vigilante groups who seek to take the law into their own hands and summarily punish those thought to have wronged them. The danger, besides the fact that a suspected criminal is not afforded fair trial rights in such a situation, is that the vigilante group may punish and even kill an innocent person. In *Tsotetsi v S*[56] the deceased was suspected by the community of having stolen the cell phone of the appellant's niece. As a result, members of the community apprehended him 'and then a vigilante mob assaulted him' before dragging him to the appellant's property 'by which time he was naked and bound by the hands and feet'.[57] This case highlights the danger and devastation that result from vigilante action. Liability under the common purpose doctrine may act as a deterrent against vigilantism and this is another reason to retain it. If not for the doctrine, many individuals could frequently engage in such action, encouraging brutal acts

[52] *Mgedezi* supra note 49 at 703.
[53] Ibid at 705.
[54] Ibid at 711.
[55] Ibid at 713-5.
[56] 2019 (2) SACR 594 (WCC).
[57] Ibid para 3.

and even death without repercussion, leading to an increase in vigilantism. The appellant had hit the deceased with pliers and dragged him into her yard from the road while a crowd stood around her house.[58] The appellant indicated to a state witness that she would kill the deceased herself, and objected to an ambulance being called for the deceased who at that stage was still alive. The Court noted the importance of considering both the timing and nature of the appellant's involvement in the deceased's assault. The Court found that the deceased had been 'killed in a vigilante mob attack' and noted that the 'state witnesses were generally not keen to testify, possibly in fear'.[59] This provides another reason to punish individuals who involve themselves in collective criminal activities, as such acts generally lead to widespread violence and subsequent fear of testifying against the perpetrators within communities. The Court found that there was no evidence of a prior agreement between the appellant and the mob or her having actively associated with them prior to the deceased being brought onto her property. The Court found that the appellant formed a common purpose with the mob 'albeit that it was not proved beyond reasonable doubt that she did so before the deceased was mortally wounded', essentially making her a joiner-in.[60] The Court held that the appellant was guilty of attempted murder.

Snyman's concern of persons getting away with murder (or other crimes) committed in a common purpose in the absence of the doctrine can best be illustrated through case law. Two judgments – *Fillieks and Others v S*[61] and *Mkhize and Others v S*[62] – entail scenarios where an identifiable group of persons had killed someone but it could not be established who in the group caused the unlawful death. In *Fillieks*, the appellant and two other accused returned to their vehicle without the woman who had been with them. When the other passengers asked where she was, they were threatened. The Court noted that '[n]one of the State witnesses observed what took place in the vicinity of the dam', i.e. the crime scene, meaning the State had to rely on circumstantial evidence regarding the commission of the crime.[63] The Court was satisfied that the State had made out a *prima facie* case against the accused. It was

[58] *Tsotetsi* supra note 56 para 4.
[59] Ibid para 26.
[60] Ibid para 27.
[61] (A330/13) [2014] ZAWCHC 34.
[62] [2020] 3 All SA 380 (SCA).
[63] *Fillieks* supra note 61 para 6.

common cause that the three men had had a discussion prior to accused three walking off with the deceased toward the dam. Absent any contradictory evidence, the Court reasoned that 'the only inference to be drawn is that the three accused discussed and planned the sequence of events which followed immediately thereafter', resulting in the deceased's murder.[64] The discussion, it was held, constituted a common purpose to commit murder, and the Court found that this was supported by the fact that 'the appellant [placed] himself on the scene while the deceased was alive and [during] the stabbing'.[65] The Court upheld the regional magistrate's application of the common purpose- and circumstantial evidence principles. This case illustrates the usefulness and necessity of the doctrine in holding all of the accused liable for murder, because it cannot be proved who actually killed the deceased, but all three returned from the dam, drenched, without her. Without the doctrine, causation would have to be proved before any of the accused could be found guilty of murder. With no direct evidence as to what occurred during the killing, this would likely be impossible and so the State would not be able to prove any of the accused's guilt beyond reasonable doubt. Without the doctrine, these men, who clearly were all involved in the deceased's killing, could have walked free simply by shielding one another through their silence.

Mkhize is a similar case, in that a death had occurred but it could not be proved who of the group of police officers had killed the deceased, who was being interrogated at the time. The Regional Court found the appellants guilty of culpable homicide. The magistrate found that all the appellants were in the office during the interrogation and held that they had 'acted in common purpose and that a reasonable person would have taken steps to guard against the possibility of death [where] the appellants failed to take such steps'.[66] In this case again, there was no direct evidence and so circumstantial evidence was used to convict the appellants. The Court held that the policemen who were in the office and had witnessed the attack, despite not participating in it, had a duty in law to terminate it. The Court inferred that the policemen assaulted the deceased whilst he was being interrogated. The Court found that if the officers were not complicit, they could be expected to deny their involvement at the time

[64] *Fillieks* supra note 61 para 12.
[65] Ibid.
[66] *Mkhize* supra note 62 para 2.

or later at the trial but instead each 'adopted an attitude of shielding one another or the real perpetrator at the expense of their constitutional duties as police officers'.[67] The Court stated that their silence prevented identification of the true perpetrator(s). It therefore, like with *Fillieks*, becomes clear that these individuals could not have been held accountable without the doctrine, as ordinary principles of criminal liability require proof of causation, which was impossible to establish in either of these cases. Thus, without the doctrine, these individuals would be acquitted. That surely cannot constitute justice, and would arguably encourage individuals to act in collective criminal enterprises and not implicate each other, as then, without proof of causation, no one could be held liable. Such a situation would clearly be untenable and lead to rampant collective criminal activity.

Coming back to the facts of *Mkhize*, to convict the appellants of murder or culpable homicide, the State had to prove that they had all acted in a common purpose. As no prior agreement to kill was proved, the requirements for an active association common purpose had to be established. All were present in the room at the time of the deceased's death but it could not be proved who the principal perpetrator was.[68] While the evidence could not establish *dolus eventualis* on the part of each officer, they could still be found guilty of culpable homicide if it could be established that a reasonable person in their position, observing the attack, 'would have foreseen the possibility of death resulting and have taken steps to guard against' it by putting a stop to the assault.[69] The Court held that the appellants 'omitted to prevent the assault and consequent death in circumstances where there was a duty on them to do so'.[70] In light of the 'severity of the injuries and assault', negligence could be established on the part of each appellant.[71] The Court thus found that all the requirements of common purpose had been met, namely presence, awareness of the assault, intention to make common cause with those perpetrating the assault as well as their omission as police officers to prevent it, which can be considered their 'act of association' for the purposes of liability under the doctrine, and finally, fault in the form of negligence.

[67] *Mkhize* supra note 62 para 21.
[68] Ibid para 23.
[69] Ibid para 24.
[70] Ibid.
[71] Ibid.

In 'its original form in English law, the common-purpose principle had application to relatively small groups of persons who banded together to commit specific crimes'.[72] It is submitted that the doctrine is needed for more than that today, namely application to mob violence situations, which can include vigilantism, as was the case in *Tsotetsi* (above). In that case the Court found that state witnesses generally did not wish to testify, possibly due to fear of backlash from the community. If individuals do not identity perpetrators and testify at trials, no one will be held liable for these often brutal crimes, sometimes targeting innocent victims. The doctrine is needed to prevent persons taking the law into their own hands. I would argue that the doctrine is needed now more than ever. Navsa JA in the Supreme Court of Appeal judgment in *Thebus* expressed that the 'case clearly demonstrates that law and order break down even further with catastrophic consequences when vigilante action is resorted to'.[73] He stated that it should be clear to those who seek to take the law into their own hands, without regard for other people's lives 'and the breakdown of law and order, [that they] will face the full force of the law'.[74] The Court in *Tsotetsi* was understanding of the community's frustration with the police but highlighted the 'reality of lawlessness, mob violence and its tragic consequences' in explaining that vigilante action could not be excused.[75]

The necessity of the doctrine in convicting accused in a common purpose is therefore clear. The following chapter explores the limitations of the doctrine's application and the ways in which accused can escape conviction, thus enhancing the argument that the doctrine is a legitimate and proportionate means to address group criminality.

[72] Burchell *Principles* at 482.
[73] *S v Thebus and Another* [2002] 3 All SA 781 (SCA) para 29.
[74] Ibid para 33.
[75] *Tsotetsi* supra note 56 para 31.

CHAPTER FIVE

The Scope of Application of the Common Purpose Doctrine

In this final chapter I consider a number of judgments which reveal the limitations of the doctrine's application in practice. Thereafter I argue that the doctrine is not draconian as any participant can dissociate themselves from the crime prior to its commission, meaning that accused express their autonomy in choosing to remain part of unlawful conduct.

Limitations on the application of the doctrine

It is important to distinguish a remote party in a common purpose from an innocent bystander. Botha JA in *Mgedezi* noted that a spectator in a crowd could not 'be held liable for violence committed by others in the crowd' and that it was imperative on the court to 'carefully examine the individual role of each alleged participant in a common purpose and the specific evidence against [them] and not "tar each accused" with the same brush'.[1] In *Gama v S*[2] the appellant was found not to have formed a common purpose with his jogging partners who instigated a robbery. If a person does not actively associate themselves with or agree to be part of a criminal group then they cannot be convicted of the crime using the doctrine. As Theron J pointed out in *Jacobs*, the active association requirement serves 'to curb too wide a liability'.[3] The doctrine does not operate in a draconian manner such that it punishes everyone who was present at the crime scene or who was part of the relevant crowd. The perpetrators had demanded that the complainant hand over her cell phone and one pricked her hand with a knife. The appellant was essentially a bystander to the crime, as there was no evidence to support the finding that he had actively associated with the perpetrators' conduct, with the requisite *mens rea*.[4] He was accordingly acquitted. The Court emphasised the need for the State to prove fault on the part of each accused in respect of the unlawful consequence at the time it was committed.

[1] J Burchell *Principles of Criminal Law* 5 ed (2016) 500 (hereafter Burchell *Principles*).
[2] 2016 (2) SACR 530 (GJ).
[3] *Jacobs and Others v S* 2019 (5) BCLR 562 (CC) para 79.
[4] *Gama* supra note 2 para 26.

Van Wyk and Another v S[5] entailed a similar factual scenario to that of *Fillieks* above but in *Van Wyk* the Supreme Court of Appeal (SCA) held that the appellant could not be found guilty on the basis of the doctrine. The Court *a quo* found that the appellant had formed a common purpose with the perpetrators, who killed the deceased. This was apparently on the basis that he had returned into the bush (where the deceased was) with the group, received the knife used to stab her, asked where her heart was and failed 'to disassociate himself from the group and its actions at the material time'.[6] The SCA, however, held that this evidence was insufficient to show that he had associated himself with the group's conduct in assaulting and killing the deceased. The Court noted importantly that the appellant returning to the bush merely constituted his presence at the scene of the crime, but did not by itself fulfil the remaining *Mgedezi* requirements. The Court also found that there 'was absolutely no evidence of an agreement between them to kill her' upon their return to the bush[7], which differs from the facts of *Fillieks* where the accused stood talking before executing the killing. *Van Wyk* illustrates that just because a person has moral blameworthiness in a situation in that they did not prevent the crime does not mean that all the requirements for proving a common purpose have been met. The SCA held that even if there was foresight of the deceased's death on the part of the appellant, there was 'no evidence of any act of association' on his part.[8] The Court found that the appellant taking the knife (as an order) and inquiring as to where the deceased's heart was located could not prove that his intention was to make common cause with the perpetrators nor could it constitute an act of association with the killing.[9] The State had not proved the appellant's guilt beyond reasonable doubt and his appeal therefore succeeded.

Mens rea is one of the most important elements which can be relied on to prevent application of the common purpose doctrine to an accused. In *Sithole and Another v S*[10] a woman was shot and her husband was killed by burglars. The appellant acted as a look-out and whistled the warning call to his co-accused, who were in the house, when the victims drove into their

[5] [2013] JOL 30289 (SCA).
[6] Ibid para 17.
[7] Ibid para 19.
[8] Ibid para 18.
[9] Ibid.
[10] (A777/15) [2017] ZAGPPHC 169.

yard.[11] Thereafter the appellant left the property. It was established that he agreed to join the perpetrators 'for the purposes of house breaking and theft' but the State did not prove his intention for murder or robbery.[12] Furthermore, the Court found that him running away upon hearing gun shots constituted dissociation from the common purpose. The shooting went beyond the agreement to break and steal, meaning the co-accused in doing so had acted 'outside the agreed mandate'.[13] There was also no evidence that the appellant knew that the shooter had a gun. The Court found that the appellant could only be convicted of attempted house breaking with intent to steal.

Burchell also explains that the Appellate Division in *Goosen*, which concerned *dolus eventualis* for murder, held that 'the accused's foresight of the manner in which death occurs must not differ markedly from the actual way in which death occurs' and that this provides 'a most valuable way of limiting liability in common-purpose cases'.[14] The Court in *Motaung* also explained that the 'net of common purpose [liability] will enmesh only an accused who consciously recognises that his mind and that of the actual perpetrator are directed toward the achievement of a common goal'.[15]

Dissociation from a common purpose

Burchell explains that the essence of liability under the common purpose doctrine 'is based on association with the commission of the crime by the other participants'.[16] This means that to escape common purpose liability, an individual must dissociate themselves from the conduct of the group. Burchell further indicates that whether a member's dissociation is effective in absolving them of guilt for the group's crimes is essentially a value judgment.[17] There are numerous factors which must be balanced to determine 'whether [the] dissociation is legally effective or not'.[18] In *S v Ndebu*[19] the accused purported to withdraw from the

[11] *Sithole* supra note 10 para 15.
[12] Ibid para 29-30.
[13] Ibid para 33.
[14] Burchell *Principles* at 493.
[15] *Jacobs* supra note 3 footnote 61.
[16] Burchell *Principles* at 501.
[17] Ibid.
[18] Ibid.
[19] 1986 (2) SA 133 (ZS).

common purpose shortly before the fatal shot was fired, and the Court found that this could not absolve them of guilt under the doctrine but had relevance as a mitigating factor at the sentencing stage.[20] Burchell notes that the extent to which the crime has progressed is an important factor used to determine whether the purported dissociation from the common purpose constitutes a timeous withdrawal.[21] The voluntariness of the withdrawal is also a relevant factor.[22] The case of *S v Nomakhlala*[23] provided the following factors in addition – first, whether there was 'positive dissociating conduct' (for example, leaving the scene or refusing to comply with an order) as opposed to simply an omission, and secondly, 'whether the accused appreciated that the consequences might ensue'.[24]

In *S v Singo*[25] the Court found that 'the appellant had effectively dissociated himself from the common purpose to kill by leaving the scene of the initial assault (positive conduct) and abandoning intention to kill the deceased'.[26] Grosskopf JA effectively held that where, in a common purpose based on active association, either intention or active association in respect of the crime cease, then there would have been effective dissociation.[27] In *S v Nduli*[28] the Court stated that effective dissociation required the party to give their co-conspirators a 'timely and unequivocal notification […] of the decision to abandon the unlawful common purpose'.[29] The party must communicate their 'change of mind to the others' which serves to inform the latter that, 'if they proceed with the [crime], they do so without' the assistance of the dissociator.[30]

In *Musingadi and Others v S*[31] the 'appellants purported to disassociate themselves from the murder (they refused to be part of the poisoning) but not from the robbery (they went off

[20] Burchell *Principles* at 501.
[21] Ibid.
[22] Ibid at 502.
[23] 1990 (1) SACR 300 (A).
[24] Burchell *Principles* at 502.
[25] 1993 (2) SA 765 (A).
[26] Burchell *Principles* at 502.
[27] Ibid.
[28] 1993 SACR 501 (A) at 502.
[29] L Sisilana 'What's Wrong with Common Purpose' (1999) 12 *SACJ* 297, footnote 26.
[30] J Burchell 'Joint Enterprise and Common Purpose: Perspectives in English and South African Criminal Law' (1997) 10 *SACJ* 131.
[31] [2004] 4 All SA 274 (SCA).

with the money and shared it)'.[32] The appellants realised that the robbery was turning into a murder facilitated by their earlier conduct. They left the scene and left the deceased to her eventual fate. The Court found that the appellants did not take any steps to dissociate themselves effectively from the killing and were thus held to have 'acquiesced in the expansion of the common purpose'.[33] The Court noted that it is trite that our law provides for the defence of dissociation, also known as withdrawal from a common purpose.

The Court emphasised that 'not every act of apparent disengagement will constitute an effective dissociation'.[34] An effective dissociation is dependent on the circumstances, including 'the manner and degree of an accused's participation', 'how far the commission of the crime has proceeded', 'the manner and timing of disengagement' and 'in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime'.[35] The Court noted that this was not a closed list of factors. It was held that, practically, courts proceed from the premise that 'the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation'.[36] The Court found that the appellants had not done enough to dissociate themselves from the common purpose to murder the deceased. Leaving the scene with her 'tied up and at the mercy of accused [two] who, they knew, was intent on killing her' was insufficient.[37] Effective dissociation, the Court said, would at least have required them to untie her. The Court held that the appellants had the requisite *mens rea* in the form of *dolus eventualis* and were accordingly found guilty of murder on the basis of their common purpose with accused two.

Improving the application of the doctrine

It is submitted that the improvement of the doctrine's application rests on each court relying thereon to convict accused involved in joint criminal conduct. In other words, the best practice of courts in dealing with common purpose cases will aid the improvement of the

[32] *Musingadi* supra note 31 para 34.
[33] Ibid.
[34] Ibid para 35.
[35] Ibid.
[36] Ibid para 39.
[37] Ibid para 40.

doctrine's application.[38] Botha JA in *Safatsa* argued that application of the doctrine to a common purpose based on active association did not present 'unmanageable problems' but instead merely required an assessment of all the facts of a case. He added that 'the factual issue to be resolved is no more difficult to resolve than many other factual issues encountered in any criminal case'.[39] Moseneke J's warning in *Thebus* is of utmost importance for all courts – it is their duty when applying the doctrine 'to exercise the utmost circumspection in evaluating the evidence against each accused person'.[40] It is submitted that this is what the criticism of the doctrine, shorn of its use to impose the death penalty on multiple accused, comes down to – an application of the doctrine that eschews this warning.

Conclusion

I have argued that although the common purpose doctrine was correctly found to be constitutional in *Thebus*, the judgment would have been more compelling had the Court embarked on a more rigorous analysis of whether there was just cause for depriving the appellants of their freedom despite the State not having proved that they caused the unlawful consequence. *Tshabalala* illustrates the need for the doctrine in order to combat the scourge of collective criminal activity in South Africa. It is my view that the doctrine should today be seen as a tool to realise justice. It is, however, of utmost importance for courts to ensure that all requirements for common purpose liability are met in the case of each accused before applying the doctrine to them. Given the need for effective crime control, the difficulties of proving causation on the part of each member of a common purpose, as well as the defined limits of the doctrine and the ability to escape liability through dissociation, it is my view that the doctrine is not only useful to ensure justice but is vital.

[38] I am grateful to my supervisor, Prof PJ Schwikkard, for this observation.
[39] *S v Safatsa* 1988 (1) SA 868 (A) at 901.
[40] *Thebus and Another v S* 2003 (6) SA 505 (CC) para 45.

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