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A critical analysis of the doctrine of common purpose- special reference to South Africa, Zimbabwe, England and New South Wales.

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PREFACE

The aim of this paper is to examine the application of the doctrine of common purpose.The jurisdictions of South Africa, Zimbabwe, England and New South Wales have been chosen as points of reference, as the doctrine is still used by the prosecution in these jurisdictions in handling criminal matters where there is more than one defendant or accused person participating in the same unlawful enterprise. Most interesting is the fact that, these jurisdictions often refer to and rely on the decisions of each other, and sometimes even adopt the laws of the other jurisdiction to form part of the domestic law. This is apparent between South Africa and Zimbabwe; Zimbabwe and England; and England and New South Wales. Zimbabwe has shown a tendency to rely on South African law on common purpose as South Africa has managed to refine its laws on common purpose over the years. While South Africa would not hesitate to refer to Zimbabwean decisions as persuasive authority especially on the issue of dissociation, it is reluctant to refer directly to English law on dissociation.The irony however lies in the fact that, the Zimbabwean law on dissociation was in fact adopted from England without any changes at all and is in fact English law in all respects. This will become clear as one reads through this work. New South Wales law on both common purpose and dissociation has been greatly influenced by English law, in fact, the law on dissociation is purely English law which was adopted. However, New South Wales stands out above the rest of the jurisdictions in so far as it distinguishes between "foundational crime" and "incidental crime" when dealing with offences perpetrated by parties to a common purpose.The whole legal scenario makes the examination of the application of the common purpose doctrine in the four jurisdictions not only interesting but exciting as well.

It will be noted that in South Africa legal scholars have shown considerable zeal and interest in examining and dealing with issues pertaining to the application of the doctrine.Quite a number of articles by South African scholars are referred to in this paper. Some of the articles were prompted by court decisions made in matters involving political unrest during the apartheid era, while others were written purely as a matter of scholarly academic interest. Unfortunately for Zimbabwe there are very, very few articles on the issue, and hence for the purpose of this paper there was heavy reliance on case law. As regards England and New South Wales, fairly recently published books were of invaluable assistance as they gave the most up to date information on how the doctrine of common purpose operates in England and in New South Wales. Case law was also heavily relied on.

The paper not only relates how the doctrine has been perceived in each of the three jurisdictions but, there was also an attempt to display how the doctrine works, how issues of conduct and the mental element are dealt with, and finally any concerns which either the courts, the legal scholars or the writer find themselves confronted with.

INTRODUCTION

The doctrine of common purpose is a widely used doctrine which has found favour among different jurisdictions which include South Africa, Zimbabwe, England and New South Wales.The doctrine has been employed in each of the mentioned jurisdictions for more or less the same purpose, that is, to seek conviction where a number of people with a common purpose are involved in the commission of a crime. Although the doctrine of common purpose can be used in relation to crimes like public violence, housebreaking, treason and so forth, the writer will confine herself to the crime of murder and some reference will be made to the offence of housebreaking.The aforementioned jurisdictions have placed different emphasis on different aspects of the doctrine as will be seen as the paper unfolds.The different formulations of the doctrine will be given when the writer deals with each of the jurisdictions.This paper will look at how the doctrine has been applied in each of the different jurisdictions and highlight any similarities and differences.Criticisms will also be made and finally the writer will look at the future of the doctrine in South Africa.

It is very interesting to consider the application of the doctrine especially in relation to South Africa in that many allegations have been levelled to the effect that the courts were using this doctrine as a political tool to ensure convictions at all costs during the apartheid era. The writer will deal with these allegations later and try and find out if indeed the allegations were justified or not. A close look at how the doctrine was applied in the apartheid era will reveal whether the doctrine was indeed abused. Now that South Africa is in a new era it is worthwhile to consider whether the doctrine still has a role to play in the courts of the New South Africa. Juxtaposing South Africa with other countries especially Zimbabwe and England provides an excellent insight into the way this doctrine has affected the ordinary principles of liability and how the doctrine has been used by the courts in different situations where convictions would be difficult without the employment of

this doctrine.One hastens to add that this doctrine has not been applied blindly in these jurisdictions, each jurisdiction has devised (albeit to different extents)rules of applying the doctrine to ensure that both ends of justice are met, that is, balancing the interests of the accused and those of the state. It is now therefore proper to consider how each of the jurisdictions has employed this doctrine.

SOUTH AFRICA

Despite the fact that the doctrine of common purpose originated from England it has very much developed and taken root in the South African criminal law. There has been disagreement as regards the legal basis of the doctrine .One school of thought maintained that the doctrine is premised upon the principle of mandate[1] whilst the other trend of thinking is that the doctrine is based on the principle of active association.[2] The mandate theory when applied means that each person who is a party to the common purpose is taken to have given another an implied mandate to bring about or to commit and execute the unlawful enterprise. As for those who would not have delivered the fatal blow liability would be based on "whether the criminal mandate was within the mandate given."[3] Great criticism was levelled at this line of thought and , the critics held that mandate was not fit for application in the criminal law sphere as it was a concept in civil law.Further it was argued that a mandate to commit an offence is both invalid and against good morals in which case it would be improper for a court to base criminal liability on such a mandate.[4] Up until the case of S v Safatsa[5] the courts were actually using the mandate notion. Although, whilst presiding in the Safatsa case Botha JA in his dicta

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[1] E.M Burchell and J.M.Burchell subscribe to this school See ***South African Criminal Law and Procedure Volume 1***(2ed)(Juta & Co 1983)at 430-431

[2] See C.R.Snyman ***Criminal Law*** (3ed)Butterworths Durban 1995 at 251

[3] C.R.Snyman loc cit

[4] C.R.Snyman op cit at

[5] 1988 SA 868 (A)

referred to the mandate theory, the court finally endorsed that the doctrine of common purpose is based on the concept of active association. Thus the question of the legal basis of common purpose was finally laid to rest by the court's finding in the Safatsa case.

The doctrine has been part of South African law since 1923 when it was formulated in the case of R v Gainsworthy 1923 WLD 17. Judge President Wilson Dove described the doctrine thus:

"Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object."

Although this definition is a good description of the doctrine there have been other formulations which further clarify what this doctrine is all about.Another formulation of the doctrine has been that:

"where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise each will be responsible for specific criminal conduct committed by one of their number which falls within their common design ."[6]

Each of the two definitions has something to offer, the first one by Justice Dove puts much light on the issue of mens rea by using the words "if what was done is what they knew or ought to have known, would be the probable result of their endeavouring to achieve their object" while the other one highlights the issue that the people involved "agree to commit a crime or actively associate ." The aspects raised by these two definitions will be seen at work later.

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[6] J:Burchell and J: Milton Principles of Criminal Law (Juta & Co) 1st edit.1991 p.334 - 335

RATIONALE

In order to understand the whole notion behind the doctrine one must take note of the fact that central to the doctrine of common purpose is the notion of imputing the act or conduct of one offender which falls within the scope of the common purpose to all parties who participated in the common purpose.The reason for the importation and use of the doctrine is that, in situations where a number of people were involved in a common purpose to commit an offence and the state is unable to establish who would have struck the fatal blow, it becomes "difficult for the prosecutors to establish with certainty whether the conduct of the specific participants contributed causally to the death."[7]

In other instances the perpetrator might be established but there is need to convict those that actively associated with him.The doctrine of common purpose thus operates to alleviate or lessen the burden which falls upon the state or which rests on the prosecution to establish beyond reasonable doubt that the unlawful conduct of each offender is causally linked to he death.No doubt this is a departure from the general rules of liability where consequence crimes are concerned which require that the state leads evidence that the conduct of an offender is causally linked to the offence.

One can really appreciate the reasons behind the employment of the doctrine, in that in a mob attack if the state were to be required to establish the causal link between each accused´s unlawful conduct and the death of the deceased there is a danger that most of or even all the accused would get away with it.The problem with South Africa however was that during the apartheid era the

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[7] supra p.339
See also P:J:Visser & M:C:Mare ***General Principles of Criminal Law Through the Cases*** (3rd edit) Butterworths Durban 1990 at 691

doctrine was employed against protestors,strikers and generally in instances arising from political arrests.

The other reason for the use of the doctrine is that it is a tool to control crime.The employment of it and how it operates is such as to prevent people from banding together to commit crimes.Thus the doctrine works to prevent gangsterism, which is a commendable thing.Suffice to say Zimbabwe, England and New South Wales have used the doctrine for more or less the same reasons (less the political undertones) which have characterised the use of the doctrine in South Africa during apartheid.

Creation of Common Purpose

The creation of common purpose involves a number of facets which have to be discussed.Questions like "how does a common purpose come into being ?" and "when can it be said that a common purpose has come into being?" are some of the questions which have to be looked at.

Common purpose can arise in two different situations: namely where there is prior agreement to commit a crime or where there is no prior agreement but there is active association.[8] In a situation where the parties agree the agreement can be express or implied.Express agreement "involves the articulated achievement of consensus ad idem between the parties that one of them should bring about the death of the deceased...."[9] Where there is no agreement the court can imply from the conduct of the accused during the commission of the offence that the parties where indeed in

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[8] J:Burchell & Milton ***Principles of Criminal Law*** onp.231 see also N.Boister "Common Purpose:Associaton and Mandate" 1992 SACJ 167 at 168

[9] N.A.Matzukis "The Nature and Scope of Common Purpose SACJ 1988 p.227 at 231

agreement. The instance of active association, in the words of N.Boister, is a far wider concept which may cover many situations other than agreement.[10]

There is much talk about active association in South Africa and it is a well entrenched and common version of common purpose.In Zimbabwe as shall be seen there is such a concept but it is not stated expressly that it is active association.Active association involves not only looking at the conduct of the accused but also at other issues pertaining to the surrounding circumstances.It is interesting to note that it was held in S v Khoza[11] that a prior agreement on the common purpose is not a pre-requisite, it suffices if "collaboration began without pre-meditation and on the spur of the moment." Thus there is no need to prove prior conspiracy.

The question when does a common purpose arise is very important as it has a bearing on the issues of liability, it affects the extent to which a joiner-in is liable if he joins or becomes party to a common purpose after a fatal wound has been inflicted. In the case of S v Khoza the judges could not agree on when precisely a common purpose arises.The issue at hand was whether there should be a difference in law between "participants in a common purpose to kill which commences before the deceased has received a fatal or mortal wound and such participation which commences after the deceased has been fatally or mortally wounded but while he is still alive."[12] The issue was finally laid to rest in the case of S v Motaung[13] where in a unanimous decision the court held that where there was evidence pointing towards a reasonable possibility that a member of the group with a common purpose joined in and "acceded to a common purpose to kill after the deceased had been fatally injured by another and that joiner-in does perpetrate conduct which expedites the death of

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10 supra at p.232
11 1982 (3) SA 1019 (A)at 1033D-H
12 See S v Khoza and also Burchell & Milton p.340
13 S v Motaung 1990 (4) SA 485(A)

the deceased then he may be liable as a co-perpetrator in his own right ."[14] This is a good decision because there definitely has to be a difference on the blameworthiness of someone who participates in the common purpose from the start before the infliction of the fatal blow and a late comer who joins when the death knell has been sounded.

South African law is thus clear on the issue of when exactly it can be said that a common purpose has come into being or arisen.

Issues of Imputation and Culpability

1.Unlawful Conduct (the actus rea)

All the four jurisdictions that are to be discussed present a striking similarity on how the conduct of one party to a common purpose is imputed to the other parties.In the words of Burchell & Milton the principle of imputation lies at the heart of the doctrine of common purpose. In so far as it is not necessary for the prosecution to prove beyond reasonable doubt that the conduct of each and every party to a common purpose is causally linked to the death of the deceased this constitutes a departure from the general principles of liability in so far as the unlawful conduct element of liability is concerned. "Prior agreement whether express or implied, to commit a crime, where there is no such prior agreement, active association in the common purpose makes the act of the principal offender the act of all."[15] It is the participation in the common purpose which constitutes the unlawful conduct. Where active association is at play certain prerequisites have to be met before the principle of imputation can apply.N.A Matzukis[16] submits that "it seems clear that some kind of overt conduct(objectively ascertainable active association) on the part of the accused is necessary in indicating a common cause with the other party who commits the murder."This conduct will thus

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[14] Burchell & Milton ***Principles of Criminal Law*** supra note 6 at 341

[15] op cit at 345

[16] N.A Matzukis: "The Nature and Scope of Common Purpose" supra note 9 at 232

constitute or comprise the accused´s actus reus.This is correct but it is the case of S v Mgedezi[17] that the court laid down the requirements which the state has to prove before a participant in a common purpose where there was no agreement can be found liable for murder.The requirements which the prosecution must satisfy by proving are that the accused must:

a) have been present at the scene of the assault of the victim.

b) have been aware of the assault.

c) have intended to make common cause with those who were actually perpetrating the assault.

d) have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others.

e) have had the requisite mens rea in respect of the killing of the deceased, he must have intended the deceased to be killed or he must have foreseen the possibility of the death and performed his own act of association with recklessness as to whether or not death was to ensue as a result.[18]

It will be noted that these requirements encompass both the requirements for the conduct and indeed the mental elements.It is only those elements that have something to do with conduct that will be looked at now.

It is clearly accepted that mere presence at the scene of the commission of the offence[m1][19] is not sufficient to prove active association. The case of Mgedezi went further to clarify this issue by holding that a spectator in a crowd cannot be held liable for offences committed by members of the crowd and the court emphasised that care and caution must be exercised so as not to "tar each accused with the same brush." This in effect means that the individual role of each participant in the common purpose has to be assessed and the specific evidence against each participant has to be

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[17] 1989 (1) SA 687 (A)

[18] Sv Mugedezi op cit at 705I-706B See also V.W Duba "What was Wrong With the Sharpeville Six Decision 1990 SACJ p.182-183"

[19] S v Memani 1990 (2) SACR 4 (TKA)

examined.Thus where active association is concerned the court does not just automatically impute conduct but there is a process to determine whether the offender was party to a common purpose and the scrutinisation of his conduct is carried out.This constitutes a good safeguard against the danger of being irrational and imputing the perpetrator´s conduct to a party whose conduct was not consistent with the elements of the offence.

The Fault Element (mens rea)

The fault element can either be in the form of actual intent, or dolus eventualis or even negligence.Where actual intent is concerned there is no problem as the court will convict on the basis that the offender intended to bring about the intended unlawful consequence. It has to be noted that the doctrine of common purpose involves the imputation of conduct and only conduct alone, when it comes to intention the state has to prove intention with regard to each of the participants. This means each participant must be proved to have possessed the requisite guilty mind before he can be convicted of the crime. It can thus be safely said that the doctrine does not involve a departure from the ordinary principles used in assessing fault. One has to point out that the question as to whether negligence should be a basis for a conviction where common purpose is involved has generated some debate. This will be discussed later. More interesting is the debate on when or at what stage the mens rea of a person participating in a common purpose should be assessed. When mens rea should be assessed is a crucial issue as it has a bearing on the question of liability.

When dealing with parties to a common purpose dolus can also be constituted by the foresight of the possibility that the other party will commit an act bringing about the deceased's death.[20] The state will have to prove that the other parties to the offence really wanted to associate themselves

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[20] N.A.Matzukis' supra note 9 at 233

with the murderous acts of the perpetrator.It should be noted that "the accused's desire to associate with the wrongdoer's act is a subjective notion which will have to be proved by inference from the objective surrounding factors in the case."[21]

With dolus eventualis it must be noted that there are two aspects to it namely that, the party should foresee the possibility of the unlawful consequence occurring, and secondly, that the party should reconcile himself to this possibility.[22] By reconciling to this possibility it means the person is being reckless as to whether the result (death) would occur or not.It has to be noted that although a person may foresee the possibility if he believes that the result will not ensue then he lacks dolus eventualis.

Dolus eventualis is an interesting form of intention when it comes to the doctrine of common purpose in that, whilst a party to a common purpose may foresee that death will ensue from the actions of one of the members who for example carries a gun in a venture to rob, if the death ensues in a manner which is different from the one he had contemplated or foreseen then the conduct or the act of the perpetrator can not be imputed to the other party, in that he would be lacking the requisite intention in the form of dolus eventualis.It was thus held in S v Goosen[23] that "where dolus eventualis is in issue in a murder case the accused's foresight of the manner in which death occurs must not differ markedly from the actual way in which death occurs." This means that when a member to the common purpose foresees an event as happening in a certain way and it happens in a markedly different way, the court will hold that the offence at hand is not the same one that the party contemplated and therefore the actions of the perpetrator can not be attributed to him.So when the causal chain changes , then there is lack of foresight of that change

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21 loc cit
22 C.R.Snyman ***Criminal Law*** (3rd edit) Butterworths Durban 1995
23 1989 (4)SA 1013(A)

and hence there can be no foresight of the result. N.Boister rightly comments that the principle in Goosen´s case has provided a tool with which to deal with complicated situations where unanticipated means result in anticipated consequences."[24] The stance and legal position established by the court in the Goosen case has been hailed as sound and an invaluable way of limiting liability in common purpose cases.[25] It is interesting to note that of all the jurisdictions that are to be discussed the stance taken by South Africa on the issue of culpability where dolus eventualis is concerned is quite progressive and the law is clear on that aspect.The Goosen case is also important for it brought in a new development in law because prior to the decision in this case, it had been laid down in R v Chenjere[26] that liability of people who were party to a common purpose depended on whether the result produced by the perpetrator actually fell within the ambit of the common purpose and was not concerned by the means with which the result was brought upon.This stance was changed by the Goosen case in so far as it held that where there is change in the causal chain and the resultant offence occurs in a markedly different way as that contemplated by the accused then the accused can not be held liable for the perpetrator`s acts.

The question of whether a party to a common purpose can be convicted of an offence involving negligence has created quite some interest.There have been arguments that the very nature of common purpose makes it impossible for the court to find someone guilty of an offence involving negligence.Burchell and Milton argue that since the doctrine of common purpose involves imputing the act of the perpetrator to other parties to the common purpose, in effect the other parties become co-perpetrators and "a co-perpetrator`s liability can in other circumstances be grounded or

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[24] N:Boister "Common Purpose: Association and Mandate" 1992 SACJ 167-172 at 172

[25] J.Burchell & Milton ***Principles of Criminal Law*** supra note 6 at 340

[26] 1960(1)SA 473 (FC)

founded on negligence."[27] The Appellate Division seems to be of the view that there are instances in which negligence may be sufficient for the liability of a participant in a common purpose.This is apparent in the Goosen case.

The question of when the mens rea of a party to a common purpose should be assessed raises a number of interesting questions.In the case of S v Nkwenja[28] the court through a majority held that the mens rea of a person participating in a common purpose must be assessed as at when the common purpose was formulated. However Rabie CJ and Miller JA dissented and were of the view that this assessment should be made as at the time when the unlawful conduct of the perpetrator was committed. Briefly the facts of the Nkwenja case were that : the two appellants agreed to rob. On confronting the victim they attacked him but the injuries inflicted were of a light nature although they resulted in the death of the deceased.It is important to note that at the time the appellants inflicted the injuries on the victim death was not foreseen and there was no strong evidence to suggest that death was reasonably foreseeable. Despite all this, the court held the appellants liable on the basis that when they entered into the common purpose death was reasonably foreseeable. The finding by the majority that mens rea should be assessed at the time the parties agree on the common purpose brings about a number of problems in that it does not take into account the fact that a participant who might have foreseen death when the common purpose was formulated, might see death as a remote possibility or might not even foresee it at the time when the offence is committed. This therefore means that while the offender did not foresee death occurring he will still be convicted because the possibility was clear to him when the venture was agreed to. With due respect to the judges who were in the majority, their ruling is unsound when one considers the principles of liability. It is a fundamental principle of the law of liability that the "the culpability and

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[27] J.Burchell and Milton supra note 25 at 343
[28] 1985 (2) SA 560 (A)

the unlawful act must be contemporaneous."[29] Conversely, a participant who did not foresee death occurring at the beginning might later on realise that the possibility exists and if his mental state is to be assessed as at the formulation of the common purpose then he will be found not guilty.In practice however, if it is proved that a participant to the common purpose later developed foresight or gained knowledge that death might ensue and nevertheless associated himself with the common purpose, then his failure to act e.g. withdrawing from the common purpose may be seen as unlawful and he could be held liable for murder.[30] This demonstrates all kinds of problems that will arise by assuming the principle set in the Nkwenja case. There is much in the case of S v Mitchell and Another[31] to point to the fact that the court assessed the second appellant's mens rea as at the time the offence was committed. However in the absence of a decision by the Appellate Division overruling the stance the court adopted in the Nkwenja case the unfortunate situation remains that mens rea is assessed as at the time the common purpose was entered into. South Africa is not the only jurisdiction with problems pertaining to the issue of culpability, it shall be noted that England also has its own problems with regard to mental capacity although they are different from those apparent in South Africa.

Dissociation

Where a party to a common purpose dissociates himself from the common purpose he cannot be found guilty of the offences that were committed after his withdrawal, provided that his withdrawal was effective.This position of the law applies to all the jurisdictions under discussion namely South Africa, Zimbabwe, England and New South Wales. With regard to South Africa it has been found difficult to define with certainty what is meant by effective withdrawal; " however despite this

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29 C.R.Snyman supra note 22 at 135
30 J.Burchell & Milton supra note 6 at 342
31 1992(1)SACR 17

uncertainty surrounding the meaning there is vast evidence pointing out that, in various legal systems something more than a change of heart is needed."[32] It is clear that in all the jurisdictions under examination a mere change of mind will not suffice; something more concrete is required to demonstrate the accused's change of mind. Hales correctly points out that "to what extent an accused will have to go in order to establish such a change of heart or his dissociation from the common purpose may depend upon the approach adopted by a particular legal system."[33] The whole concept of dissociation from common purpose raises a number of questions which have to be looked at and considered before a court can make a ruling on liability. The questions arising range from issues of form to issues of content. Khuluse identifies some of the questions as the following: a) whether the dissociation from the common purpose must be express or whether it can be implied from the conduct .

b) whether the dissociation has to be communicated to the other parties to the common purpose. If the answer is positive, how this is done?

c) up to what stage is it possible to dissociate from the common purpose.

d) whether the person can be liable for conspiracy or incitement in respect of the crime which is the object of the common purpose and later accomplished by the other members of the common purpose?

This is not an exhaustive list of the questions arising or the questions the courts find themselves confronted with when faced with a defence of dissociation.Both the conduct and the mental state of the accused will have to be scrutinised to determine whether a party to a common purpose indeed has dissociated himself from the common purpose to such an extent that he is not liable for the acts committed after his withdrawal.

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[32] H.L.Hales "Effective Dissociation from Common Purpose" 1992 SACJ 187-193 at 188

[33] loc cit.

Unlike Zimbabwe, and to some extent England , "South African courts have not yet developed very specific rules relating to the circumstances in which withdrawal will effectively terminate an accused's liability." [34] In spite of this there can be extracted from a number of cases a fair reflection of what the law is on the issue of dissociation. It has been alleged[35] that the only definitive judgements on the issue of dissociation are S v Ndebu, S v Nomakhlala, and S v Nzo.[36] Parmanand has however contended that none of the decisions provide an absolute formula to determine the exact circumstances in which one can be said to have dissociated oneself from the common purpose.[37] It is important that S v Nzo raised interesting points on dissociation but the judgement itself has been attacked as being unsound as far as the application of the law is concerned.The case of S v Nzo will be dealt with in detail later.

Needless to say South Africa has relied heavily on Zimbabwean cases on the question of dissociation from common purpose, and conversely the Zimbabwean courts have shown consistency in the application of English law principles. Whilst South Africa has not expressly adopted the English position there is a resemblance between the Zimbabwean approach and the South African approach as depicted from the cases.

Snyman gives an impressive list of five propositions that reflect the current position on the issue of dissociation.[38]

i)The accused must have a clear and unambiguous intention to withdraw from the common purpose.

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[34] C.R.Syman ***Principles of Criminal Law*** supra note 3 at 254

[35] S.K.Parmanand "Dissociation in Common Purpose- A View from Venda" 1992 SACJ p180-186 at 186

[36] S v Ndebu 1986(2) SA 133(ZSC), S v Nomakhlala 1990(1)SACR 300; S v Nzo and Another 1990(3)SACR 1

[37] S.K.Parmanand supra note 35

[38] C.R.Snyman ***Criminal Law*** supra note 2

The aspect of intention is very important because whilst the law provides for the imputation of conduct of the perpetrator the court will always assess mens rea on an individual basis.Thus where one withdraws from the common purpose but still possesses the mens rea that identifies with the acts of the other parties to the common purpose then he is still liable, and correctly so, for the crimes committed by his colleagues. In S v Singo[39] Grosskopf JA held that if a person desists from actively participating "whilst still retaining his intent to commit the substantive offence in conjunction with the others the result would normally be that his initial actions would constitute a sufficient active association with the attainment of the common purpose to render him liable even for conduct of the others committed after he had desisted."

Intention to withdraw from a common purpose can either be express or it can be implied from conduct. At the end of the day what matters is that the intention to dissociate is reflected clearly. In the Singo case Grasskopf JA correctly remarked that in order for the withdrawal to exculpate the accused , the withdrawal must be such that it may be construed as the consequence or manifestation of the accused's conscious dissociation[40].

Grosskopf JA's remarks in the Singo case are a correct restatement of the law on the mens rea element of liability where dissociation is concerned.

ii)The accused must perform some positive act of withdrawal.This brings in the notion of active dissociation. The accused will not escape liability merely by being passive. Something more positive has to be done which will constitute a sign of withdrawal. What has to be done will depend on the circumstances of the case. The English and Zimbabwean courts have clearly taken a stance that what has to be done will depend on the extent and degree of the accused's participation

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[39] 1993 (2)SA 765 at 776B-C
[40] op cit at 772

in the common purpose.[41] The South African jurists and courts seem to be drawn to this line of thinking.

The requirement that some positive act be done by a person who seeks to withdraw from a common purpose is seen at work in the case of S v Nomakhlala.[42] In this case the 1st appellant had driven a car in which a 73 year old was held by other people. He drove the car to a rugby field where he was subsequently given a knife and told to stab the deceased. He refused to comply with the instructions and he left the scene. The 73 year old was stabbed, shot and finally burnt . The trial court held that the accused had not effectively withdrawn from the common purpose and was therefore guilty of murder. The Appellate Division reversed this decision and held that the appellant's act of refusing to stab the deceased and indeed the act of leaving the scene were indicative of the appellant's intention not to take part in the attack and also constituted sufficient dissociation.

It is important to note that the court took into consideration the surrounding circumstances in deciding whether what was done constituted effective withdrawal.The court also took cognisance of the fact that the appellant had played a limited role and this conversely had a bearing on the conduct which would be sufficient to constitute withdrawal.

The state had argued that the appellant should have tried to protect the deceased or dissuade the other parties to the common purpose not to go ahead, for him to be able to rely on withdrawal from the common purpose. The court rejected this argument. The Appeal Court was of the view that, due regard being given to the fact that the appellant was not a comrade and also that the situation prevailing in the Townships at the time was volatile, it would not have been wise for

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41 S v Beahan 1992 (1)SACR 307

42 supra note 36.

appellant to try and dissuade his colleagues from harming the old man. The court´s reasoning lays down good law in so far as the requirement that there be some positive acts by the accused to demonstrate withdrawal from the common purpose is adjudged with reference to the circumstances of the case. There is thus much truth in the statement by Parmanand to the effect that dissociation depending on the acts will always be a question of degree.[43]

The question of what type of act or action the accused has to take for there to be effective withdrawal needs serious consideration . As said earlier on a number of facts come into play.While it is difficult to formulate rules and requirements which will canvass all possibilities, case law is valuable on this point as it gives an insight into what the law expects. ***Where it is possible,*** informing other parties of the intention to withdraw and trying to persuade them to abandon the common purpose will definitely enhance the chances of successfully relying on the ground of withdrawal. The case of S v Nomakhlala[44] shows that this is not a hard and fast rule because the Appellate Division stated that in that case the appellant could not have been expected to do more than what he did, although he did not try to persuade the others to abandon the enterprise. Where, however, the accused has and opportunity to try an persuade his companions not to carry on, it is not necessary that he should succeed and he does not have to actually frustrate the plan. "A mere attempt on his part to do so may be sufficient to qualify as an effective withdrawal."[45] This does not mean that for an accused to succeed on a defence of withdrawal he must have tied to frustrate the commission of the offence. Each case will always depend on its facts as what may amount to dissociation in one case may be insufficient in another.

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43 S.K.Parmanand supra note 35
44 supra note 36
45 C.R: ***Snyman Criminal*** Law supra note 22 at 256

In S v Malinga[46] the accused informed the police of the conspiracy to commit an offence and this was held to be effective withdrawal. The accused, however, was present at the scene having been authorised to participate in the scheme. The court excused him from liability for the criminal acts done by the group. In S v Nzo[47] the first appellant who had volunteered information to the police about his involvement in ANC activities was held to have dissociated himself from the common purpose before the murder and was accordingly found not guilty of murder.

Under South African law the courts also consider the role played by an accused in divising the plan to commit the offence or the part played in the execution of the common purpose. This incidentally has a strong bearing on the conduct required to effect withdrawal. The Zimbabwean case of S v Beahan has generally been referred to on this point by South African courts. Where one plays a minor role it would be easier to escape conviction than where a major role was played. Whilst abandoning the group might be sufficient, this may not suffice where the role played by the party was prominent. South African courts have quoted with approval Gubbay CJ in the Beahan case where he said:

" Where a person has merely conspired with others to commit a crime but has not commenced an overt act towards the successful commission of that crime , a withdrawal is effective upon timely and unequivocal notification to the conspirators of the decision to abandon the common unlawful purpose.Where however there have been participation in a more substantial manner something further than a communication to the conspirators is required."[48] The position set by the Zimbabwean courts equally applies to South Africa.

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[46] 1963 (1) SA 692
[47] 1990 (3)SA 1
[48] S v Beahan supra note 41 at 324C

iii)In order to be effective the withdrawal has to be voluntary. Thus if the accused forced to withdraw because the plot has been uncovered by the security agents, then the act of withdrawal would not constitute a defence as it would have come too late. In this light Hefer JA in clarifying this issue in the case before him in S v Nzo and Another, remarked that "this is not a case of a suspect who confesses his guilt realising that the game is up and that he might as well confess."[49] The fact that the appellant volunteered information to the police on being confronted (on a different issue, viz about his identity papers) at Aliwal North, and, later on when he was in security hands at Port Elizabeth, was held to be an act of abjuration and as indicating that the first appellant had dissociated himself from the common purpose. Although this case sheds light on what voluntary dissociation is conceived to be, the Nzo case has been criticised in that what was considered as a common purpose on the murder charge was in fact not one. Despite this complaint which shall be dealt with later, the court´s reasoning on voluntary dissociation from common purpose remains valid.

iv) When exactly withdrawal should take place is important.

The South African position is that the withdrawal has to take place "before the course of events reach a stage when it is no longer possible to desist from or frustrate the commission of the offence."[50] In deciding whether or not the commencing stage of execution has been reached depends on the crime at hand and on the facts of each case; hence it is a variable requirement. In dealing with murder cases there is reference to the fatal blow or shot or mortal wound. It is a settled point of law that where the accused dissociates himself from the common purpose prior to

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[49] supra note 47 at 10I-J

[50] C.R.Snyman ***Criminal Law*** supra note 22 at 254

the infliction of the fatal injuries a conviction of murder will not stand. In S v Singo[51] a mob had attacked the deceased twice, alleging that she was a witch and the appellant had only taken part in the initial attack at the beginning of it. The court was faced with the question whether at the critical stage when the deceased received her mortal wounds the accused was still party to the common purpose to assault the deceased. In this case the Appellate Division held since there was reasonable doubt whether at the critical stage (when the deceased received the fatal wounds) the accused was still party to the common purpose, the court gave the appellant the benefit of doubt.

The court of appeal raised an interesting point on withdrawal vis-à-vis intention. The appellant whilst taking part in the initial assault had accidentally received a blow from a stick wielded by one member of the crowd. Feeling sore from the blow he went home, and this was before the fatal wounds were inflicted on the deceased. The court held that when he withdrew it was a possible inference that he had also abandoned his initial intent to kill and it was ***irrelevant that his change of mind was not caused by moral considerations.*** This is a good finding because whilst morality underlies criminal law in general, the law per se is not about morals: It has set principles on the issue of intention and therefore what leads to a change of intention is irrelevant. It is the mental state (mens rea) and not the value judgement of an accused that is scrutinised.

v)The effect of successfully raising the defence of withdrawal from the common purpose.

In all the jurisdictions under discussion, the fact that one successfully raises the defence of withdrawal does not mean that he will go scot-free. The person may still be convicted of conspiracy to commit the offence contemplated or of attempting to commit the offence. In S v Singo the appellant was acquitted on a charge of murder but was found guilty of attempted murder for

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[51] S v Singo supra note 39

actively participating in the initial assault with an intention to kill. This approach has nothing wrong with it because the effect of dissociation is to absolve the accused from further acts committed by other parties to the common purpose after his effective withdrawal but he still has to be punished for the acts in which he took part or associated with, with the necessary mens rea, before his withdrawal.

It is also important to mention that compulsion to remain a member of or a participant in the common purpose is not a defence where the accused foresaw the possibility that the group might pressurise him to remain part of them.[52]

CRITICISM

There is great evidence to show that South Africa still has to come up with or develop specific rules on dissociation.[53] Up till now the courts seem to have relied heavily on Zimbabwean judgements namely S v Ndebu, S v Chinyerere[54] and lately S v Beahan . There is no one decision which provides an absolute formula to determine the exact circumstances in which one can be said to have dissociated oneself from the common purpose.[55] Hales is of the same opinion and he submits that unless the case of S v Nzo is regarded as authority on the issue , one can say that South African law has no clearly defined or formulated law on dissociation from common purpose. However, as Snyman correctly puts it, there can be extracted from a number of cases a fair reflection of what the law is on the subject. It is sincerely hoped that a case will arise which will give the court a chance to adopt a specific stance and formulate rules or state comprehensive factors that have to be looked at in considering dissociation from common purpose. A case with the magnitude of S v Mgedezi: In that case, for example, the court was able to set out clearly what constitutes active association and went on to clearly formulate factors to be looked at in determining liability where the state relies on

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52 J.Burchell and Milton ***Principles of Criminal Law*** supra note 6 at 342
53 C.R Snyman ***Criminal Law*** supra note 22 at 254
54 1980 (2) SA 576 (RAD)
55 S.K.Parmanand supra note 35 at 180

active association. In dealing with dissociation from common purpose Zimbabwe has achieved this through the Beahan case. In the meanwhile when dealing with dissociation the South African courts have had to make do with searching for the applicable rules in different South African cases like S v Nomakhlala, and various Zimbabwean cases. A legal system needs clearly defined rules as random search for applicable rules and random reliance on different cases can lead to discrepancies in judgements and ultimately to confusion in law.

It has been alleged that "common purpose casts the net too widely."[56] This is due to the fact that where the doctrine is applied, especially where active association is concerned, a number of people end up being convicted as perpetrators even though the roles they played were very minor. This argument was strongly raised in South Africa during the apartheid days when the doctrine was regarded as a legal bludgeon and a political tool used to suppress movements by organisations like the ANC.[57] This characterisation of the doctrine of common purpose was not made without basis, because if one looks at the decisions in S v Safatsa and S v Nzo, the application of the doctrine left much to be desired. Both cases related to incidents of political unrest and in the process death had resulted; and since the decisions that the court arrived at were harsh, the decisions were criticised.. Six people were convicted in S v Safatsa and they were all sentenced to death. However, after an outcry by several countries the death sentences were commuted to life imprisonment. The greatest problem was that when the Safatsa case and the Nzo case were decided the death sentence was still a competent sentence. It is only with the coming of S v Makwanyane[58] that the death penalty was adjudged to be unconstitutional. Projecting their minds to the time when the two judgements were made Burchell and Milton make an impressive observation. They argue that whilst general

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[56] N.Boister supra note 24 at 167
[57] loc cit
[58] S v Makwanyane 1995 (3)SA 391

principles had at other times been used and manipulated so as to shield or "protect the accused from exposure to the death penalty (e.g. killing under intense provocation) the common purpose doctrine increased the possibility of capital punishment being imposed on a wider range of persons despite the fact that their participation in the execution of the crime may be relatively small."[59] There is much truth in this statement because it also reveals the harshness of the common purpose doctrine when one considers that the death penalty ended up being imposed on each of the six accused persons who were found guilty, irrespective of the fact that the role played might have been minor. As Burchell and Milton rightly say, the existence of the death penalty had an overall detrimental effect on the unified application of the general principles of liability.[60] Also lesser charges could have been preferred without any prejudice or miscarriage of justice . This issue will be revisited later.

In S v Safatsa the deputy mayor of Lekoa was murdered at his home in a township related incident. He was stoned by a number of people and ultimately burnt to death.Eight members of the crowd were arrested and were charged with murder. Due to the nature of the attack it was impossible to prove the causal link between the actions of each of the accused and the ultimate consequence which was death. Hence the court used the active association rule. Legal scholars have attacked the decision in Safatsa from different angles. There has been considerable debate on whether the facts surrounding the participation of the Sharpeville Six were sufficient to constitute active association in the crime to satisfy the requirement of unlawful conduct which is necessary before the court can impute the acts of others to the rest of the parties to the common purpose. The writer does not have any problems with the court's assessment of the conduct of the accused persons apart from

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[59] Burchell and Milton ***Principles of Criminal Law*** supra note 6 at 347
[60] J.Burchell "Common purpose Liability" 1990 SACJ 345 at 351

accused number 3. This accused was found in possession of the pistol of the deceased which he had wrestled from him, but apart form this there was no other evidence to prove that he remained on the scene and took part in the assault, as required by the rules set out in S v Mgedezi. The court was of the view that the intention to kill had manifested itself at the time the deceased's house was set on fire.[61] There was no evidence that the accused was present on the scene at that time and he should have received the benefit of the doubt . Despite this the court found him guilty of murder and sentenced him to death. With due respect there was no proper application of the doctrine of common purpose especially were active association is concerned and the court misdirected itself in making inferences.[62]

V.W.Duba's criticism has not been directed at the conduct per se but on the inferences drawn by the court on the issue of intention.[63] He reasons that there is nothing wrong with the principles as set out in the case but that the problem lies with the application of the law to the facts, especially as regards intention. After the court found that the intention to kill started to exist in the mob at the time that the deceased's house was set on fire, the court went on to consider any party who was part of the mob and who in any way had interfered with the deceased's person or his property as possessing dolus eventualis and therefore guilty of murder. It is Duba's argument that the court was mistaken in finding that all the people in the mob that set the house alight had the intention to kill the deceased. Although some had that intention the generalisation that the court made has no legal basis.[64]

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[61] S v Safatsa supra note 5 at 893B

[62] E.Cameron "Inferential Reasoning and Execution in the case of the Shapeville Six" 1988(2)SACJ 243 at 246

[63] V.W.Duba "What was wrong with the Sharpeville Six Decision" 1990 (2) SACJ 180-186

[64] V.W.Duba op cit at 182

This argument seems to have some merit in it. This is because where dolus eventualis is the form of intention in issue the court has to carefully scrutinise the mental state of each accused person before drawing adverse inferences from circumstantial evidence. If the Safatsa case had come after the case of S v Goosen[65] maybe various interesting points could have been raised by the defence. In the Safatsa case the mens rea which the court was considering was dolus eventualis, in this light one could thus have raised the defence that although he had foresight of death ensuing he did not contemplate death as resulting from assault and the burning of the person of the deceased. Incidentally this would raise the issue that the accused's foresight of the manner in which death was to occur differed from the manner in which death finally eventuated. Definitely this would have been a case for the court to grapple with. This is just a matter of interest which comes to mind in view of the fact that there is now the Goosen which has left an impact on the whole issue of dolus eventualis.

The other concern which led to dissatisfaction with the Safatsa case was that the accused could have been convicted of other offences like conspiracy, incitement or public violence. Why the state preferred murder charges which carried a heavier sentence (death penalty) and went on to invoke the common purpose doctrine raises concern. On the other hand, despite the fact that charges of murder had been levelled, the court could nonetheless have mero motu convicted the accused of lesser charges as it had the power to do so. All these concerns lead the writer to believe that there indeed were political undertones in the way in which the common purpose doctrine was used during apartheid days, hence the criticism that the doctrine was used as a political tool.

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[65] supra note 23

prosecution and conviction for treason but also for murder in terms of the common purpose principle, if the killing is perpetrated by one of its members in furtherance of the objectives of the organisation."[68] This was a wrong finding, no wonder Mr Justice Steyn disagreed. The judgement in this case runs contrary to the principles set out in the Mgedezi case. The Nzo case was one in which there was no prior agreement, either express or implied, to commit the murder. This means that the only other ground on which the application of the common purpose doctrine could be based was active association.

The was no clear proof of active association, except membership of a vast organisation. The appellants were not present at the scene when the deceased was killed. There was nothing to indicate that the first and the second appellants intended to make common cause with Joe the perpetrator of the murder. Furthermore, there was no evidence that they performed an overt act which manifested that they shared a common purpose with the perpetrator. In this regard Burchell correctly comments that the fact that the appellants were members of the ANC and subscribed to ANC policies was clearly not sufficient "to link the appellants to the specific murder committed by the perpetrator in that case."[69] Burchell raises an interesting point - the issue of the violation of fundamental principles of justice. He maintains that convicting where there is no clear proof of an intention to make common cause with the actual perpetrator constitutes a serious infringement of the principles of justice. There indeed is truth in this assertion. This is because justice demands that where there is no sufficient evidence the accused should be given the benefit of the doubt, and failure to do so where appropriate is an infringement of the fundamental rules of justice. In any case, as Burchell suggests, if the offenders had been punished for alternative offences like treason,

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[68] Paraphrased by J.Burchell in "S v Nzo Common purpose liability"SACJ (1990)3 at 348

[69] J Burchell and Milton ***Principles of Criminal Law*** supra note 6 at 346.

their sentence would still have achieved the desired purpose of punishment which inter alia consists of censure and deterrence.[70]

There is confusion on the issue of when mens rea should be assessed. Whilst in the case of S v Nkwenja [71] the Appellate Division ruled that mens rea should be assessed at the time the common purpose was formulated, the case of S v Motaung and Others[72] is to the effect that the mens rea has to be assessed at the time the offence is committed. No doubt the later view, which also mirrors the views that were expressed by the dissenting judges in the Nkwenja case, is the correct view. It is a fundamental rule of criminal liability that the unlawful conduct and the fault element must exist at the same time. If the ruling in the Nkwenja case is adopted this would amount not only to unnecessarily changing the general rules of liability, but most importantly, it means that subsequent changes in the mental state before the commission or the accomplishment of the crime are not taken into account. Taking such a stance will amount to applying a versari type of liability.[73] There is thus a need for the Appellate Division to come out in the open and decide which one of the two conflicting judgements should be followed. As the law stands both judgements have the force of law as neither of them has been overruled. This state of the law causes great concern as this can lead to discrepancies in judgements as it will depend on which case the judge will decide to choose. It is pleasing however, to note that there is a tendency by the courts to assess mens rea as at the time that the offence was committed and the court did this in the cases of S v Singo and S v Mitchell and Another.[74]

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70 op cit at 346-347
71 1985(2)SA 560 (A)
72 as cited in note 13
73 Burchell and Milton ***Principles of Criminal Law*** supra note 6
74 S v Singo supra note 39; Sv Mitchell and Another supra note 31

Despite all the criticisms raised one needs to take note that the South African legal system has been able to get rid of some of the confusion surrounding application of the common purpose doctrine. As Snyman[75] correctly puts it; the Safatsa case has effectively made it clear that the doctrine of common purpose can be based on express or implied agreement, or the concept of active association by one person with another's unlawful conduct. This ended the whole debate as to whether the doctrine was based on the theory of mandate or active association. Whilst the debate on the historical basis of the doctrine of common purpose has been resolved in South Africa, the acceptance of the decision in Safatsa by the Zimbabwean courts can also be interpreted to mean that, the matter has been clarified in Zimbabwe as well.[76]

Tribute should also be paid to the decision in S v Mgedezi because this decision clearly formulated the principles upon which liability will be based, in cases where active association is the basis for alleging common purpose. Courts may fail to employ the rules properly (as what happened in the Nzo case) but that is a problem which hopefully can always be addressed on appeal. The important thing is that there is clarity in the rules. This writer was impressed by the manner in which the factors set out in the Mgedezi case were employed by the court in the case of S v Khumalo and Another,[77] later known as the Upington 25. Only the judgement of the court of appeal will be briefly looked at.

In the Khumalo case a crowd gathered in front of deceased's house and threw stones. The deceased panicked, and, fearing for his life fled, but some members of the crowd chased him and caught him.The deceased was killed by these people but there was no sufficient evidence to show

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75 C.R.Snyman ***Criminal Law*** supra note 22 at 251
76 S v Mubayiwa & Another 1992 (2)ZLR 362(S) at 380F-H
77 1991(4)310 (A)

that the people who killed him were all members of the initial crowd that had gathered at the deceased's house.The trial court had sentenced the 25 accused to death.The appeal court correctly found that members of the original crowd that had gathered at the deceased's home were not guilty of murder as the court could not infer mens rea merely by reason of the fact that they were in the crowd. Appellant number 18 was a member of the original crowd and had clearly possessed the intention to kill the deceased (as evidenced by her conduct),[78] but the court held that she had not actively associated herself with the actions of the persons who had finally killed deceased, therefore she was acquitted of murder. Whether this was a pacifist judgement in response to the outcry about the trial court's judgement or not , the point is that there seems to have been a proper application of the rules set out in the Mgedezi case.

The Goosen has definitely placed the South African law on dolus eventualis on a new footing. It will also have an impact on the cases involving common purpose where the intention is premised on dolus eventualis..

Burchell alleges that lately there has been an inclination by the Appellate Division to limit the scope of the common purpose doctrine rather than to widen it.[79] He cites the Mgedezi case as a reflection of this. This may be correct, but then how does one explain the Appellate Division's failure to apply the rules set out in the later case of S v Nzo?

Taking it up from there one can also say that the Goosen case goes a long way in limiting the scope of liability in common purpose cases. This is achieved by the very fact that the courts are not just looking at foresight of death , but it go further to consider whether the accused foresaw death as

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[78] She had uttered threatening words to the deceased before the attack of the house and during the attack exhorted others to kill and burn deceased and after the murder had raised her clenched fists and uttered words of satisfaction with the death.

[79] J.Burchell "S v Nzo Common purpose liability" supra note 58 at 351

happening in the same manner in which it finally happens. On this point South Africa stands distinct from Zimbabwe, England and New South Wales. This is impressive as it reflects how South African courts are finely developing their rules on liability. While this may be the practical effect of the decision in Goosen, Snyman contends that the court came up with an incorrect judgement.[80] His view is that a mistake on the chain of causation should not constitute a defence in consequence crimes, as such mistake is immaterial. This, he argues, is due to the fact that, the requisite intention in consequential crimes does not include knowledge of the precise time and way in which the result will be brought about: what is required the accused foresaw that his actions would bring about the proscribed state of affairs.[81] The writer will not go into the arguments pertaining to dolus eventualis as they are outside the scope of this paper. However, Snyman raises another argument which incidentally, has a bearing on the common purpose doctrine; the manner of the application of the principles set in the Goosen case.[82] The argument by Snyman is worth considering as the writer is also concerned with the manner in which the Goosen case was applied in S v Mitchell.[83]

Perhaps the difficult in applying the Goosen case arises out of the interpretation of the principle set by the court ; that mens rea will be lacking where the actual causal chain of events differed materially from the causal chain envisaged by the accused.[84] The court did not specify the criteria to be used to distinguish between material and immaterial differences in the manner in which death eventuates.[85] Since the Goosen case does not give sufficient specific guidelines on what is considered "marked difference", it remains an issue of the value judgement of the trial court.

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[80] C.R Snyman ***Criminal Law*** supra note 22 at 179

[81] loc cit.

[82] ibid

[83] supra note 31

[84] C.R.Snyman Criminal Law supra note 22 at 179.(Please note that the judgment is in Afrikaans, there is no English translation on hand hence the extraction from Snyman).

[85] ibid

Snyman is of the view that from the sources refereed to by the court, one can conclude that, the possible test used to determine if the actual causal chain of events differed materially from those envisaged by the perpetrator: "**is whether the actual events fell outside the bounds of what according to human experience can be expected to flow from the type of act that X committed.**" Snyman correctly notes that this would amount to the same test employed in the first place to determine whether, there is a causal connection between the conduct of the accused and the resultant death[86]. Snyman submits that, in so far as the same test is used to decide on culpability and causation, the stance adopted in the Goosen case is therefore wrong.

The manner in which the Goosen case was interpreted in the Mitchell case shows how fatal the failure by the court in S v Goosen to give guidelines on the interpretation of "material differences" can be. In the Mitchell case the appellants had agreed to throw stones at pedestrians from the back of a landrover. The first appellant threw a stone and as a result of the injuries the targeted pedestrian died. The trial court found the perpetrator and his partner guilty of murder on the basis of common purpose. The second appellant's conviction was set aside on appeal. In dealing with the appeal the Appellate Division purported to employ the principles set in the Goosen case. In upholding the appeal, Nestadt JA held that Appellant had thrown a paving brick which had fatal consequences, this act fell outside the scope of the common purpose due to the *marked difference between the size of the brick and the size of the collected stones and also due to the fact that the consequences that flow from the throwing of a brick as compared to those that would result from the throwing of stones.*[87] This reflects the judge´s value judgement, as there are no guidelines set in the Goosen case as to what has to be looked at in deciding whether the causal chain of events leading to death occurred in a manner which is materially different from that envisaged by the offender.

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[86] ibid at 179-180

[87] S v Mitchell supra note 31 at 22G-H.Note my emphasis.

With due respect, the writer believes that the line of argument or reasoning adopted by the court was wrong, as there would be no marked difference between the consequences brought about by a brick and by a stone. That a stone can equally have fatal consequences is apparent from the Safatsa case and indeed the Khumalo case. The other issue is whether it was necessary in the first place to employ the case of Goosen in dealing with the appeal. The writer sincerely believes that the theory of active association could have been employed to determine whether the facts supported a conviction of murder on the basis of the common purpose.The writer has no problem with the court's finding on the issue of mens rea.

Now that the political situation has changed for South Africa and also that the death sentence has been ruled to be unconstitutional, the question is whether the doctrine of common purpose can still regain its status and retain a seat within the legal arena of rules dealing liability.

Questions such as these arise:

(a) can common purpose be used with all fairness ? and,

(b)what is the future of common purpose ?

Several views have been expressed on this aspect. Duba is of the view that, properly applied, there is no danger in the common purpose principle as long as it is proved that each individual agreed that the crime in question be committed, or was reckless as to whether the foreseeable possibility occurred or not.[88] Duba expresses the fear that if the doctrine is done away with this will create problems where people acting in concert agree to commit offences but some effect the agreement while others provide the means of executing the common purpose. Boister, like Duba, believes that common purpose still has a place in the new South Africa. In his argument he relies on the fact that the Goosen case when applied removes and gets rid of some of the fears which were raised in the

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[88] V.W.Duba supra note 63 at 185

1980s when common purpose was regarded as a legal bludgeon.[89] The writer has a problem with this argument, because the Goosen case does not specifically relate to common purpose.

Burchell takes this issue further. He starts from the premise that the doctrine of common purpose has become entrenched in South African law to be removed.[90] He proposes that it be retained but with some changes effected. He suggests that emphasis be shifted from co-perpetrator liability, which is based on the principle of imputation (which is the central notion of the doctrine of common purpose), to accomplice liability. This would enable the court to treat a person who plays a minor role, as an accomplice rather than a co-perpetrator. In this approach the court will still have to choose whether to convict on the basis of attempt to commit the offence or conspiracy. He argues that such an approach will remove the fiction of imputation.[91] This he points out would work out well were the perpetrator can be identified that is, where it is clear that A fired the fatal shot.[92] Adopting this line will not be novel. In New South Wales general principles of liability which cover principals and accessories are used to determine liability as regards the offence agreed to by the parties, while common purpose will only relate to incidental crime.[93] This can be explained in simple terms as follows: A, B and C agree to a common purpose to commit house breaking and theft, whilst in the process the house owner intercepts them and B (a boxer) heavily punches the house owner and he dies; murder will be the incidental crime, and the doctrine of common purpose will be invoked. However, in dealing with the charge of house breaking and theft the court will employ the general principles of liability, which distinguish between accessories and principal offenders. Burchell goes on to suggest that in cases where there are different parties and the actual

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89 Neil Boister supra note 24 at 172
90 Burchell:"S .v Nzo Common Purpose Liability" supra note 58 at 352
91 loc cit at 353
92 My elaboration.
93 D.Brown et al ***Materials and Commentaries on Criminal Law and Process in New South Wales*** at 1377

perpetrator cannot be established (or all the parties took part in the attack), an agreement to commit an offence might render them liable for conspiracy, incitement or public violence. Burchell's proposal, if it were to be implemented, would go a long way to mitigating the harsh implications of using the doctrine in murder cases. Chances are that the courts may resist such a suggestion and argue that safeguards already exist, as shown by the formulated rules in the Mgedezi case and also the Goosen case.

All the foregoing arguments highlight the concerns raised by retaining the common purpose doctrine, however, all the writers considered above are reluctant to recommend that the common purpose doctrine be done away with. This writer, strongly believes that the operation of the common purpose doctrine in murder cases is very harsh. First, the fact that despite playing a minor role, the court can still find you guilty as a perpetrator raises great concerns. Secondly, the implications of being convicted of murder are harsh, enormous and far reaching. A heavy penal sanction such as life imprisonment can be imposed, which means a long period of incarceration. Further, with a conviction for murder, one cannot hold public office or be a director of a company. In this light common purpose when applied to murder becomes undesirable. At the same time, if it were to be done away with, what happens to the cases where various people commit an offence (a mob attack)and it is impossible to prove a causal link between the conduct of each accused person and the resulting offence?

Generally speaking the South African law on common purpose is clear and, despite the bad light cast on the doctrine during apartheid days, it seems that the principle has survived and is in fact still being used by the courts in the new South Africa. The absence of the death penalty coupled with a spirit to use the doctrine for legitimate purposes may perhaps guarantee the continued use of the doctrine. Although clear rules on the aspect of dissociation are still to be formulated, the South

African courts have managed to make fair rulings where the defence of withdrawal from common purpose is raised by looking for guidance from the Zimbabwean cases.

ZIMBABWE

The doctrine of common purpose is part of Zimbabwean law. Unfortunately it is not clear when exactly the Zimbabwean courts (formerly Rhodesian) started applying the doctrine. There is a strong possibility that the adoption of the doctrine into South African law led to the adoption of the principle by the Zimbabwean courts.[94] This view is based upon the knowledge that the Zimbabwean common law is based upon the Roman-Dutch law which is also South Africa's common law.This line of thought is strongly supported by the fact that the Rhodesian courts had to apply the law in force in the Colony of the Cape of Good Hope on the 10 of June, 1891 as modified by subsequent legislation enacted in Rhodesia.[95] From 1931 upto 1955 South African courts[96] were the intermediate courts of Appeal and it was only in 1964 that Rhodesia had its own intermediate court of Appeal. The final court of Appeal was the Privy Council. More interesting is that the Zimbabwean law on common purpose reflects a strong influence of South African law. On the other hand, English law has greatly influenced the Zimbabwean law on withdrawal from common purpose. However, despite this massive borrowing of concepts from the aforementioned jurisdictions, Zimbabwe has been able to take a stance on the law on the doctrine of common purpose. It is important to note that the writer will rely on cases in the enquiry on Zimbabwean law.[97]

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[94] Personal view.

[95] Section 19 of the Proclamation of the High Commissioner for South Africa of the 10th of June 1891,and s49(2)Southern Rhodesia Order in Council 1898

[96] Cape Supreme Court(1931-1955); the Appellate Division of the Supreme court of South Africa (1955-1964)
See W.J.Millar Rhodesian Accomplice Law Thesis for Master of Law Degree at UCT 1969 at 11

[97] There are no Zimbabwean law books apart from a Guide to Zimbabwean Law written by G.Feltoe in 1989 which is now outdated, and a Thesis by W.Millar written in 1969 cited supra.

The Zimbabwean definition of common purpose is the same as the South African one. Feltoe gives a very simplified definition which is that:

If A and B associate with C in a joint unlawful enterprise, A and B will be liable for the crimes committed by C which fall within the common design.[98]

This definition seems to be no different from the definition given by Burchell and Milton which is that:

Where two or more people agree to commit or actively associate in a joint unlawful enterprise each will be responsible for specific criminal conduct committed by one of their number which falls within the common design.[99]

The application of the doctrine by the courts is such that it is in line with the later definition.

Just like in South Africa, there has not been consensus on the legal historic basis of the doctrine of common purpose. Although there have not been any submissions by Zimbabwean legal scholars on the issue, in dealing with cases involving the application of the common purpose doctrine, some courts have proceeded on the basis that , the doctrine is based on the mandate theory, whilst others have referred to association.[100] In the recent case of S v Mubaiwa and Another, [101] McNally JA acknowledged the decision in S v Safatsa,[102] referred to it as one of the landmark decisions on common purpose in Southern Africa[103] and then went on to deal with common purpose on the premise that it is based on active association. As this was a Supreme Court decision, the High Court and the Magistrates are bound to follow this decision and this may ultimately mean, an acknowledgement that common purpose can only arise out of agreement

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98 G.Feltoe ***A Guide to Zimababwean Criminal Law*** Legal Resources Foundation; Harare 1989 Zimbabwe at 42

99 Burchell and Milton ***Principles of Criminal Law*** (1st edit)Juta & Co 1991

100 G.Feltoe supra note 98 at 42-43

101 1992 (2) ZLR 362 (SC)

102 1988(1)SA 868

103 S v Mubaiwa supra note 101 at370F

either express or implied from conduct, but where there is no such agreement then a party can also be held to be a party to a common purpose design through active association.[104]

Rationale

In the absence of anything to the contrary to indicate otherwise, one can conclude that, the reasons for the adoption of the common purpose doctrine were the same as those for South Africa. This means the doctrine is meant to circumvent the problems of establishing the causal link between each participants act and the resultant offence (murder). The doctrine is also used as a means to curb crime, discouraging people to come together to commit offences. This can be extracted from the statement by Lewis JP who, although he was dealing with dissociation, remarked that:

" It seems to me that the policy of the law must be to encourage people to refrain from crime by having a change of heart whether through fear or for some other motive, and to eschew the crimes which they have conspired to commit even at the last stage before the actual commission of the offence."[105]

Creation of Common Purpose

The position in Zimbabwe is the same as in South Africa, that, a common purpose can arise out of agreement. The agreement can either be express or implied from the conduct. This is confirmed by the statement of Lewis AJA in R v Njenje[106] where he referred to Gardner and Lansdown on the fact that proof whether by evidence of words or of conduct, of agreement to participate in the criminal design, added to proof of participation, and directly or by necessary implication of

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[104] Despite the statement by Feltoe that somecourts were in 1989 stil using the mandate theory the major decisions on common purpose seem to have used the active association theory, although it was not described as such.
[105] R v Chinyerere 1980 (2) SA 576 at 578-579
[106] R v Njenje 1966 (1) (SR.AD)369 at 372

contemplation of consequences, irrespective of the particular means by which they are attained, provide the proper test in the law of common purpose.[107] Although the statement touches on intention it is only the part relating to agreement which is sought to be highlighted.

On the issue of association , Millar correctly points out that, proof of an agreement between persons is not essential for common purpose to arise, as the existence of a common purpose may be inferred indirectly from the acts of the persons concerned.[108] In Zimbabwe the term and notion of ***active association*** is a new phenomenon, as the courts would just refer to ***association*** when deciding whether there was implied agreement where there is no express agreement. The application of the requisite elements for common purpose based on active association set out in the Mgedezi case, in the Zimbabwean case of S v Mubaiwa might usher in a new era wherein the courts will have to consider and refer to ***active association*** where parties acted together to commit an offence. This to put it in Snyman's words would happen where there is no prior conspiracy and the common purpose arises spontaneously.[109] The whole concept of active association entails much more than looking at the accused´s conduct, but also at the surrounding circumstances.

The issue of when exactly a common purpose comes into existence has never been a subject of discussion by legal scholars in Zimbabwe.[110] What is clear though is that an accomplice cannot become liable for a criminal act by ratification.[111] In this regard common purpose liability can only arise before or during the commission of the offence, but cannot arise after the completion of the substantive offence.[112]

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[107] Gardner and Lansdown ***South African Criminal Law and Procedure*** Vol 1 6th Edit

[108] Millar supra note 96 at 74

[109] C.R.Snyman ***Criminal Law*** (3rd.ed)Butterworths,Durban 1995

[110] This is the writer´s personal view as nothing to that effect was ever picked up in the course of the research.

[111] S v Chimbamba 1977(4)SA 803(RA) at 807 See also G.Feltoe at 43

[112] W.Millar supra note 96 at 74

Issues of Imputation and Culpability

A. The Actus Reus

The current position as regards the imputation of conduct of the perpetrator to the other parties in the common purpose is exactly the same as in South Africa, in England and in New South Wales. In the Mubaiwa case, the South African cases of S v Safatsa and S v Mgedezi[113] were not just used as persuasive authority, but actually the Supreme Court went on to adopt and directly apply the principles set in those cases, especially the Mgedezi case. McNally CJ summarised the rules of imputation which arise out of these cases as that:

" The actus reus of the accused, on which criminal responsibility for murder is founded consists not necessarily in an act which is causally linked with the death of the deceased,but solely in an act by which he associates himself with the common purpose."[114]

The act by which the accused associates with the common purpose, can either be, through agreement or active association. The position is that, agreement to the common purpose, and in its absence, active association in the common purpose makes the act of the main perpetrator the act of all. In cases where there was no agreement the court has to really satisfy itself that certain requisites are met before it can hold that the accused was a member to the common purpose. The issue of active association was dealt with in the Mubaiwa case.The facts of this case were as follows:

The two appellants who incidentally were brothers went to farm with the intention of stealing money from a white farmer. The two knew that the farmer kept firearms. Posing as the members of the Central Intelligence Organisation they pretended to be on a mission to search for unlicensed

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[113] S v Mgedezi & Others 1989(1)A 687 (A)and S v Safatsa & Ors supra note 102

[114] S v Mubaiwa supra note 101 at 370F-H

firearms, and to look for spies. They induced the farmer to hand over one of his guns, a pistol which was loaded. In the meanwhile some farmworkers had become suspicious of the two and had run to a neighbour Mr V for assistance. The neighbour drove to the farm in the company of two others.On hearing an approaching car the first appellant who was inside the house came out with the pistol concealed behind a clipboard.The second appellant remained in the house and assured the farmer that his pistol was to be given back. On being physically confronted by Mr V the first appellant, had shot Mr V at point-blank range, and shot at the other two but he missed. The trial court found both appellants guilty of murder.

On appeal the court adopted and directly applied the five requirements set out in the Mgedezi case, to the facts at hand.[115] On the issue of conduct the court found that there was no prior agreement other than to commit theft by false pretence and possibly common assault.[116] In the absence of an agreement the court had to decide whether the second appellant had associated himself with the shooting. Applying the elements listed in the Mgedezi, the court found that; the second appellant was present, he was aware of the shooting only in the sense that he witnessed it, there was nothing to indicate that he intended to make common cause with his brother in the shooting, and, he lacked the requisite mens rea. The adoption and assimilation of the Mgedezi case has therefore placed the Zimbabwean law on the same footing as the South African law.

It is settled law in Zimbabwe as well as in South Africa, New South Wales and England that, it is only conduct which falls within the scope of the common purpose which can be attributed to the other participants in the unlawful venture. In R v Nemashakwe and Others,[117] seven freedom

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[115] op cit at 371C-F

[116] The court took cognisance of the fact that the two had gone to the farm unarmed and the fact that they found a loaded gun was a coincidence.

[117] 1967 (3) (RAD)520

fighters (referred to in the case as terrorists), the appellants, were charged and convicted of murder and of contravening Section 36 of the Law and Order (Maintenance) Act Chapter 39.The later charge concerned possession of offensive weapons; however it is the murder charge that is relevant to this discussion.The murder charge arose out of the following facts:

The seven men were members of the armed wing of the Zimbabwe African National Union (ZANU) a political party which was fighting against the then government of Mr Ian Smith. They had crossed from Zambia with an intention to fight and oust the Smith government. Tired and hungry, the group had stopped an African truck driver and asked for a lift to another point. The driver had refused to assist and as he drove off first appellant had shot him and a colleague had shot the tyres of the truck to flatten them. The trial court had convicted the first appellant and all the other six appellants of murder on the basis of common purpose. On appeal the court had to decide whether the six appellants (second up to appellant number seven) were ***socio-criminis***[118] in the commission of the murder. MacDonald JA correctly stated that it was for the Crown to establish a common purpose to commit this crime. The common purpose was derived from the literature found in the group´s possession, which literature outlined the objectives of the armed wing. On the issue of killing, the court found that the objective was stated as the killing of whites or Europeans living in Rhodesia, that there was nothing to indicate that there was a common purpose to kill innocent Africans, and that if the driver was a European then the murder would have been part of the common purpose.[119] MacDonald JA held that, "the proposition that the members of a terrorist gang of this kind should be held liable for a murder committed by a member even if it was not committed in pursuance of the common purpose,...cannot be supported in principle."[120]

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[118] This term is no longer used by the Zimbabwean courts. G.Feltoe makes it clear that in fact this refers to an accomplice.See G. Feltoe supra note 98

[119] R v Nemashakwe supra note 118 at523C-E

[120] loc cit at 523F

The court went on to hold that the Crown had failed to discharge the onus upon it to prove that the murder of the deceased was committed in pursuance of the common purpose. The court´s finding was a correct one and it reflects proper application of the rules of liability on common purpose. This case stands in great contrast to the South African decision of S v Nzo 1990 (3) SA 1 (AD). In Nemashakwe, the politics of the day pertaining to the war between the Rhodesian government and ZANU did not cloud the court´s judgement.

Similarly in R v Njenje & Others [121], several appellants who had taken part in a venture to set certain persons' huts on fire had been convicted inter alia of, assault and intimidation contrary to a section of the Law and Maintenance (Order) Act. The appeal court set aside these convictions on the basis that the common purpose arising from the instructions given to the participants was to burn the huts and the State had failed to prove that there was a common purpose to assault and to intimidate.[122]

The Rhodesian courts and ultimately the Zimbabwean courts have been able to distinguish properly where and when conduct fell within common purpose.

B.<u>The Fault Element</u>

There is clarity in Zimbabwean law on common purpose that mens rea can either be in the form of actual intention, dolus eventualis or negligence. This is the same in England except that in England the term ***dolus eventualis*** is not used. In Zimbabwe like elsewhere it is only conduct which is imputed to the other participants in the joint unlawful venture, mens rea is assessed on an individual basis.[123] Actual intention does not present any problem as the court will simply decide on whether

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121 supra note 107
122 R v Njenje supra note 106 at 373 and 374B
123 S v Mubaiwa supra note 101 at 370

the accused intended to bring about the intended consequence for example, death. Some explanation is required in respect of dolus eventualis. From the readings done the writer is of the opinion that, the term dolus eventualis is not frequently used by the Zimbabwean courts although the courts appreciate the intention which the South African courts refer to as dolus eventualis.

In R v Nemashakwe & Others,[124] MacDonald JA reformulated the then test of intention by adapting the language of the South African test laid down in S v Malinga & Ors[125] to accord with that in Poteredzayi v R;[126] commenting that the South African test was better couched.

The learned judge held that :

"Now the liability of a socius criminis is not vicarious but is based upon his mens rea. The test is whether he foresaw the possibility that his socius-criminis might commit the act in question in the prosecution of the common purpose.

In considering the issue of intention to kill, the test is whether the socius foresaw the possibility that the act in question in the prosecution of the common purpose involved some risk to life and was reckless as to whether or not the risk might be fulfilled in death."[127]

This was a proper description of the test for intention, employed in murder cases involving common purpose. More recently in the Mubaiwa case, the Supreme court wholly adopted the Mgedezi case, and the mental element test was held to be that the accused must have the requisite mens rea in respect of the killing of the deceased, he must have intended the deceased to be killed or he must have foreseen the possibility of the death and perpetrated his own act of assault with recklessness. Thus by adopting the test in the Mgedezi case the court ended up with a wider definition as compared to the one that had been formulated in the Nemashakwe case. The Mgedezi

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124 at 522H-523A
125 S v Malinga & Others 1963(1)SA 692(AD) at 694
126 Poteredzayi 1959(19 R&N 31 at 34
127 R v Nemashakwe supra note 118 at 523A-B

test also includes both dolus directus and dolus eventualis unlike the test formulated in Nemashakwe.

In applying the test on mens rea of the Nemashakwe case, the court rightly found that the state had failed to prove that the other members of the gang foresaw that the first appellant might intentionally kill an African lorry driver if he proved to be unco-operative when stopped by the gang.[128] The court further held that to prove that some members of the group had foreseen the possibility of violence of one form or another would be insufficient. The murder convictions of appellants 2 to 7 were set aside. This was with the concurrence of all the judges of appeal.

Similarly the application of the test in the case of Mubayiwa was perfect. The court found that the second appellant only had mens rea in respect of theft; it could not be held that he had foreseen that, the first appellant would take possession of a firearm, find it loaded and use it to kill someone on the farm.[129] The court rightly noted that the position would have been different if the two appellants had gone on the unlawful venture with the knowledge that the farmer had a loaded gun. It was the court´s view that there was nothing to indicate that the second appellant intended to make common cause with his brother in the firing of the gun.

In the circumstance the court found that the second appellant lacked the requisite mens rea.

On the whole, one can safely conclude that the Zimbabwean courts seem not to have any problems with applying the test to determine mens rea in common purpose cases. The law on that aspect is also clear. This is unlike England where various issues have arisen as to the standard test to be employed in determining the intention of the other parties to the joint unlawful enterprise.[130]

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[128] loc cit at 524C and 523G-H

[129] S v Mubaiwa and Another supra note 101 at 371C

[130] CMV Clarkson & Keating ***Criminal Law:Text and Materials*** 2nd edit. Sweet & Maxwell,London 190 at 515

DISSOCIATION

In defining dissociation Gubbay CJ held in S v Beahan that, the terms "withdrawal" and "dissociation" which are often used in this context of the law, refer to the voluntary action by a conspirator which is legally effective to terminate his relationship to the conspiracy.[131] This is an important statement as it, in a way, embodies the requirements of dissociation.[132] First, the statement makes it clear that, the withdrawal has to be ***voluntary*** and secondly, it provides that the withdrawal has to be ***legally effective*** . It is through probing what makes a withdrawal legally effective that the requirements of dissociation are born. In all the jurisdictions under discussion, withdrawal from a common purpose involve much more than a change of heart.

The Zimbabwean law on dissociation has been strongly influenced by English law. Case law shows that the Rhodesian courts and the Zimbabwean courts have shown a consistency in the application of English law when dealing with issues of dissociation from common purpose.

In R v Chinyerere, S v Ndebu and in the landmark case of S v Beahan, the judges either directly referred to, and or quoted English legal writers like Smith and Hogan, Glanville Williams, and English cases and went on to apply the principles therein.[133] Where a party has effectively withdrawn from the common purpose, he is not liable for the subsequent acts by the group,so no imputation of the perpetrators´acts will be made to him. Gubbay CJ remarked that, the rationale for allowing the defence of dissociation is to encourage the participant to abandon the common purpose prior to the achievement of the object or commission of the crime, and by so doing weaken the group.[134] This reason has also been advanced in English law.

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131 S v Beahan 1991(2)ZLR 98(SC)at 118B
132 The writer´s personal observation.
133 In R v Chinyerere at 50D-E; in S v Ndebu at 135F-J; S v Beahan at 121
134 S v Chinyerere supra note 106 at 579G

The participant must voluntarily withdraw from the common purpose. Where one is arrested and the arrest ends his participation in the common purpose, this does not constitute voluntary withdrawal. Thus in the Beahan case it was held, if the appellant had not been arrested, he might well have been present to play his part. The Zimbabwean law also requires that the person withdrawing must have a clear and ambiguous intention to withdraw. The intention can either be express or it can be inferred from the conduct of the participant.

What exactly would constitute effective withdrawal?

In S v Beahan the court referred to English law which is to the effect that, what is required of a participant who relies on the defence of effective withdrawal will depend upon his degree of participation. Reference was also made to Feltoe's statement(which, in the writer's opinion, no doubt shows great influence of English law) that:

"Where the conspirator has played a prominent role in devising a plan which is likely to ensure the successful implementation of the criminal venture, he should be obliged to go further than simply physically withdraw from the group; he should be obliged to do something wholly to deprive his prior complicity of its effectiveness or to negate the consequences flowing from his previous participation. What this means is that he must actively try to dissuade his co-conspirators from acting on the plan and if it is clear that they are not prepared to drop the plan to report to the police that this crime is about to be committed...so that the police can try to stop the crime from occurring."[135]

The judge went on to state that he associated himself with the approach that the actual role of the conspirator determines the kind of withdrawal necessary to effectively terminate liability for the commission of the substantive crime.[136] He then went on to formulate the test in a more detailed manner, but this detailed formulation shall be looked at later. Although the Beahan case is the one

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135 G.Feltoe 1990 Legal Forum Vol 2 No 3 at 16

136 S v Beahan supra note 131 at 121D

which rubber stamped the English approach and came up with a solid formulation of the test for effective withdrawal, the cases decided before it seemingly had applied the test.

In S v Chinyerere,[137] the appellant was a party to a common purpose to commit house breaking and theft from a shop. When the shop was broken into, he was standing guard; he however panicked and ran away. He did not assist with the removal of the goods. His flight was regarded as constituting effective withdrawal due regard being made to the role he played in the unlawful joint venture. Similarly, in R v Njenje[138] one of the appellants who was party to a common purpose to burn complainant's huts withdrew before the burning of the huts and went to sleep. The court accepted this action as constituting effective withdrawal, and Lewis JA remarked that if the appellant had been the instigator or the procurer his running away would not have served as an excuse.[139] In S v Ndebu,[140] the second appellant who was party to a common purpose to commit house breaking and theft ran away just before his co-accused shot dead the owner of the house they had broken into. The running away was held not sufficient to constitute effective withdrawal. The fact that these cases were decided before the Beahan case shows that the Rhodesian and later Zimbabwean courts have always approached the question of dissociation from the angle that, the role played by the party determines what is expected of him in order to terminate liability for acts committed by the rest of the parties to the common purpose, after the withdrawing party has stopped participating.

By way of clarifying the test and giving content to it Gubbay CJ in the Beahan case went on to state that:

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137 supra note 106
138 1966(1)SA 369(RAD)
139 loc cit at 378G-H
140 1986(2)SA 133(ZS)

" Where a person has merely conspired with others and has not commenced an overt act towards the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose.Where, however, there has been participation in a more substantial manner, something further than a communication to the conspirators of an intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effects of this contribution is required."[141]

Although the courts have always proceeded on a premise that the role of the accused determines that which is expected of him; in the writer´s opinion the Beahan case is the first case in Zimbabwe in which the court set out how exactly the role played in the unlawful common purpose would be construed in deciding what conduct constitutes effective withdrawal.

The question what is timely and unequivocal notice needs to be considered. Timely notice is in the opinion of the writer, simply, notice which is given on time. This leads to the issue of when exactly the withdrawal should take place. In S v Chinyerere,[142] Lewis JP held that, a conspirator can withdraw from the enterprise even at the last moment before the commission of the common purpose, and when he does this, he should be acquitted on the main charge...

This can, in the writer´s opinion be regarded as a general comment. This is because in S v Ndebu, the second appellant had run out of the house the parties had broken into, and on reaching the gate he heard the fatal shot; the court held that, as the appellant had subjectively foreseen the possibility of the killing and was reckless as to whether or not it would occur in

the circumstances, his ***flight was not dissociation, anymore than hiding under a bed would have been.***[143] His last minute abandonment of the unlawful mission only worked to save him from the

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141 S v Beahan supra note 131 at 121D-f
142 supra note 106 at 579G-F
143 S v Ndebu supra note 140 at 137E

death sentence. With due respect Lewis JP´s stance in the Chinyerere case, that even a last minute withdrawal will warrant acquittal is wrong, and the position in the Ndebu case is the correct one. The attempts by the second appellant came late, even though it was before the fatal shot was fired.The stance taken by the court in the Ndebu case accords with the requirement set in the Beahan case that there should be timeous notice of the intention to withdraw.

The South African position discussed earlier on, is to the effect that, withdrawal from a common purpose can be effected before the fatal wound is inflicted.[144] One wonders what stance the South African courts would adopt faced with a case which has the same facts as the Ndebu one.

The acts - what has to be done by the withdrawing party.

It has been made clear that the Zimbabwean position is that what has to be done will depend on the extent and degree of an accused´s participation in the common purpose, that is the circumstances of the case. The writer has already given examples of how the courts employed this test before the decision in Beahan´s case. It seems that in all the cases discussed the participants can not be said to have played any prominent roles. It is the Beahan case which demonstrates a high degree of participation by a conspirator and hence clearly demonstrates what is required in such an instance. As stated earlier, the court expects something more than mere communication of the desire to withdraw.

The facts of the Beahan case were as follows:

The appellant a former mercenary soldier had been hired by certain people in Germany to conduct a rescue mission of certain people who were in a Zimbabwean prison. These people who were South Africans, had been properly tried and convicted for murder and other sabotage related charges.

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144 S v Singo 1993(2)SA 765

Appellant was instrumental in recruiting and training people who were to take part in the rescue mission. Appellant and a colleague had attempted to enter into Zimbabwe illegally and they were arrested by Immigration Officers and the police but, surprisingly they escaped and swam to Botswana. The appellant phoned his superiors in Germany to inform them that something had gone wrong. The appellant and his colleague were later arrested by the Botswana Defence Force and detained. Meanwhile, the other participants went ahead as planned but the rescue mission was thwarted by the Zimbabwean security forces. However there were casualties, a security guard was shot and a stolen helicopter was extensively damaged. The appellant and his colleague were later handed over to the Zimbabwean authorities once it was known that the Zimbabwean police were looking for them.

The appellant was tried and convicted of the offences committed by the rest of the parties on the basis of common purpose, and was sentenced to a life term. He appealed.

On appeal the appellant relied on dissociation; he submitted that his dissociation was evidenced by his absence from the scene of the offence, and also by the fact that he had phoned his superiors in Germany that the "boat had sunk".

The Supreme Court held that the High Court had not misdirected itself when it held that there was a common purpose and that the appellant must have appreciated that explosives which his companions had might be used in the rescue mission. The court then had to decide whether the appellant had effectively withdrawn from the common purpose. This is when the court formulated the test referred to earlier on in this paper. In applying the law to the facts the court held that, mere absence from the scene of the crime, or flight from the scene, even if it is voluntary action may not always, serve to dissociate a co-conspirator from being held liable for the ensuing criminal activity.[145] The court went on to hold that where absence is due to arrest, or flight from arrest, the

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[145] S v Beahan supra note 131 at 121

conspirator will still remain liable for the acts of the other which fall within the scope of the common objective since the arrest does not reverse the assistance given.[146]

The court took note of the fact that Beahan had played a prominent role, recruiting and training the parties to the common purpose, and in co-ordinating the whole enterprise; the role played exceeded mere agreement, he was in fact the leader. Gubbay CJ pointed out that due to all this activity , it was incumbent upon the appellant to take reasonable measures to nullify or frustrate the consequences of his contribution.[147] Positive action was expected of him, for example warning the Zimbabwean Police or Botswana authorities or even contacting the other perpetrators in order to try and persuade them not to go ahead, would have sufficed. In the absence of this action, the appellant could not be said to have effectively withdrawn from the common purpose and was therefore liable for the acts committed by his colleagues. In the court´s view, the telephone call was just a way of communicating the state of affairs to his superiors and not an unequivocal communication of Beahan´s intention to withdraw.

Despite the clear stance in the Beahan case, the question to what extent is a person is expected to frustrate a plan can still be discussed. In S v Chinyerere, the court expressly rejected the argument that it is a pre-requisite for the person withdrawing to frustrate the plan.[148] In S v Ndebu, MacNally JA did not take a clear stance on the issue, he just remarked that, had the second appellant disarmed or dissuaded his companion, or protected the householder in some way, he might perhaps have purged his constructive intention.The court therefore found that what he did was not sufficient.[149]

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146 loc cit at 122
147 op cit
148 S v Chinyerere supra note 106 at 379G-H
149 S v Ndebu supra note 140 at 137E

From the Beahan case, one can still say the court did not make it a pre-requisite that one must frustrate the plans. In the writer´s view the position is thus that, the circumstances of the case will determine whether one is expected to frustrate the plan or try and dissuade others from continuing. This comes out clearly in the South African case of S v Nomakhlala[150] where, the court in looking at the surrounding circumstances decided that it would have been unwise for the appellant to try and dissuade the others not to kill a 73 year old that the appellant had been asked to carry in his car. From the Beahan case one can conclude by inference that under Zimbabwean law whether one is expected to frustrate or dissuade others from continuing with the common purpose will depend upon the circumstances of each case, and that the role played will be of importance in arriving at a decision. This makes sense in that if a party to a common purpose plays a minor role his position may be such that he cannot be in a position to derail the whole plan.[151]

COMMENTS

In the writer´s opinion there is evidence that, unlike in South Africa, the application of the doctrine in Zimbabwe has never been criticised as having political undertones. In the case of S v Nemashakwe[152] despite that the court was dealing with a case involving elements fighting against the then government, the Supreme Court was able to apply the law without favour or bias. This is highly commendable. This case stands in contrast to the South African case of S v Nzo referred to earlier on where the court unreasonably extended the ambit of the common purpose of the ANC armed wing.

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150 S v Nomkhlala 1990(1)SACR 300A
151 thi is the writer´s opinion developed through reading the cases.
152 S v Nemashakwe supra note 118

By referring to the South African cases of S v Safatsa, and S v Mgedezi and proceeding to apply the principles set out therein, the courts have managed to place the Zimbabwean law on the same footing as the South Africa law. In this regard Zimbabwe has benefited from the clarity, which characterises South African law on common purpose. Credit goes to the Supreme Court for taking a bold stance in adopting all the requirements on active association set out in the Mgedezi case, when it presided over the Mubaiwa case. This is because there seemed to be no clear trend followed by the court in circumstances where there was no agreement, either implied or express and common purpose was based on active association.

The writer could not find any Zimbabwean case in which the Goosen case was referred to and relied on. It will perhaps be better for the Zimbabwean courts not to adopt and use the Goosen case. This view emanates from the fact that as Snyman correctly says, the exact manner in which the contemplated consequence (death) occurs or is brought about should be immaterial because the intention required in result crimes does not include knowledge of the exact manner in which the contemplated result will occur and it suffices that the accused foresaw that his actions might cause the proscribed state of affairs.[153] If therefore the Goosen case is used in cases involving common purpose this will result in a number of people being acquitted not because they did not foresee the possibility of death resulting during the execution of the unlawful common purpose, but because the change in the causal chain results in the possibility eventuating in a manner they had not contemplated. Snyman argues that to hold that there should not only be foresight of the possibility but also foresight of the manner in which the possibility results amount to using the same test twice.This, as Snyman argues would be a misconception of how intention is construed in result

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[153] C.R Snyman ***Criminal Law*** supra note at 179

crimes. In this regard, it is hoped that the Zimbabwean courts will not adopt and apply the Goosen case in common purpose cases.

Systematic reliance on English law has also paid dividends.There is no confusion in the Zimbabwean law on dissociation as was seen from the chain of cases which arose before the landmark case of Beahan[154]. As Hales remarked, the Beahan case rubber stamped the court's approval of the existing law by expressly adopting the English law requirements.[155] He goes on to submit that by holding that the extent and degree of accused's participation will determine what constitutes withdrawal, the Zimbabwean courts have adopted a flexible approach which gives room to a court to decide what type of conduct is necessary to effect withdrawal depending on the circumstances of the case as revealed by the facts at hand.[156] This, he says, is an excellent stance to adopt as it would be impracticable for any court to prescribe the conduct required for, and provide for each and every eventuality that may arise in future. As the law stands, each case will be judged according to its own merits.[157]

Thus by borrowing from both South Africa and England, Zimbabwe has managed to attain clarity in its laws pertaining to common purpose and dissociation. Perhaps one can conclude that Zimbabwe has a hybrid law on accomplice liability, which has arisen because of the influence of two completely different legal jurisdictions, South Africa and England, and from this it has managed to end up with the best of laws on common purpose and dissociation.

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154 Personal view.

155 H.L Hales "Effective Dissociaotion from a Common Purpose-A Zimbabwean View 1992 SACJ 187-193 at 193

156 op cit.

157 op cit

ENGLAND

In England a common purpose to commit an offence is usually referred to as a "joint unlawful enterprise" and sometimes as a "common design" although on rare occasions reference is also made to common purpose.[158] The principle has been defined as follows:

"Where two persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise, that that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise (and this is the crux of the matter) but that if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act."[159]

This may simply be explained to mean that parties can agree to commit murder, and in such instances, both of them are liable irrespective of who delivered the fatal blow or; the parties might be out to commit house-breaking and in the process someone gets killed, both parties will still be liable.Thus in R v Hyde, Sussex, Collins[160] (hereinafter referred to as 'the Hyde case') Lord Lane CJ explained that broadly speaking there are two main types of joint enterprise cases where death results to the victim. The first being where the primary aim of the participants is to do some kind of injury to the victim, and the second type being where the primary object is not to cause physical injury to any victim but, for example to commit burglary. He went on to explain that the victim is killed as a possibly unwelcome incident of the burglary and that this type of joint enterprise poses more complicated questions than the one were the common purpose is simply to cause physical harm, although the principle in each case is the same.

Whilst the doctrine can be applied in other areas of the law, it is in homicide cases that the doctrine has attracted judicial consideration.[161]

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158 The writer's observation from reading texts and cases on English law.
159 R v Anderson and Morris 1966(2)QB 110 at 118
160 R v Hyde and Ors 1992 QB 134 at
161 K.J.M.Smith ***A Modern Treatise on the Law of Criminal Complicity*** Clarendon Press, Oxford 1991 at 210

It must however be noted that the definition given in Anderson and Morris has been modified over the years as shall be demonstrated later, due to the realisation that acts which were contemplated by the other parties to the offence can also be included within the common purpose.

RATIONALE

Case law shows that the doctrine of joint unlawful enterprise is used to avoid the problems that the state encounters in trying to establish the causal link between the conduct of the perpetrators and the resultant offence. This is apparent in R v Hyde where the three appellants had kicked and punched one P outside a pub and P had died from an injury caused by a kick to the head. The trial court had proceeded to convict despite the fact that it could not be proved who exactly had inflicted the fatal kick. The appeal court upheld the conviction. Similarly in R v Roberts,[162] R and G had proceeded to the house of an old man intending to rob him. In the process there was a struggle and the old man was killed by blows which were inflicted to his face and one serious injury to the head. It was not clear from the injuries whether a spade or an axe had been used. The two accused blamed each other. The court nonetheless convicted the accused and the appeal court upheld the conviction. Also in Chan Wing-Siu v The Queen, Sir Cooke referred with approval to the direction that had been given to the jury by the trial judge to the effect that it was not necessary for the state to prove which one of the accused had inflicted the fatal wound on the deceased; where mens rea was proved it did not matter whether the accused had inflicted the wound himself or his companion had done so.[163]

That the function of the doctrine is to remove the problems of proving the causal link between the accused's actions and the death is confirmed by Smith when he says "the doctrine's function, *of*

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[162] Roberts 1993(1)AER 583(Court of Appeal Crim.Div)
[163] Chan Wing-Siu [1985]1 AC 168 at 175

providing an apparently straight-forward and convenient means for incriminating partners in crime when the settling of the respective roles performed by each was inaccessible to usual techniques of proof, was later infiltrated and complicated by workings and evolution of the felony murder rule."[164]

The doctrine by mere fact that it seeks to achieve conviction of all the parties to the crime in question has been used to control crime.[165] Thus the rationale behind the employment of the common purpose doctrine in England is the same as in South Africa and Zimbabwe.

Smith makes a statement which raises concern: he alleges that "...whatever perceived practical need may have motivated the doctrine's creation, its nature, status, and relationship to general complicity concepts and requirements have been and to fair degree remain hazy."[166] This is confirmed by Clarkson and Keating who allege that there is increasing doubt as to whether the doctrine is part of aiding and abetting liability or is a wider form of liability in its own right.[167] The authors go on to note that in Chan Wing-Siu it was thought to be a wider principle than the ordinary secondary liability, and in the latest Law Commission paper it was considered separately.[168] In the writer's opinion the confusion arises out of the fact that England has well developed laws on accessories. Section 8 of the Accessories and Abettors Act of 1861 in fact provides that:

"whosoever shall aid, abet, counsel or procure the commission of any indictable offence ...shall be liable to be tried, and indicted and punished as a principal offender."

Clearly, there is an overlap between what is provided in the Act, and how the doctrine of joint unlawful purpose operates, the two will produce the same results.

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[164] K.J.M Smith supra note 161 at 14 (my emphasis)
[165] See Skeet 176 ER 854 at 857
[166] K.J.M.Smith supra note 161 at 209
[167] C.M.V. Clarkson and H.M.Keating ***Criminal Law Text and Materials*** 3rd edit Sweet & Maxwell,London, 1994 at 517
[168] op cit

Historical legal basis

It is not clear what theory underlies the doctrine of joint unlawful enterprise. Like in South Africa (until the Safatsa case) England has faced a problem of determining on what exactly the doctrine of common purpose is based. Smith submits that one theory has based complicity on agency. In this light the courts have often referred to perpetrators as 'being authorised or commanded' to carry out or execute the accessory's purpose, or accessories having 'consented to' or 'ratified' criminal behaviour.[169] He correctly goes on to say that this cannot be totally correct as there can be liability for accomplices without consensus. Smith argues that "a rationale appropriate for civil responsibility is far from a fitting basis for incriminating a party where a range of quite different policy consideration hold sway."[170]

The other theory has been that, the doctrine is based on participation--associating with or involvement in the crime. Here participation may be taken as a strong manifestation of the accused's criminal proclivities to warrant punishment.[171] It must be noted that in England there seem to be no notion of active participation as enunciated in the South African cases of Safatsa and Mgedezi.[172] This can be inferred from the fact that Smith actually criticises these two South African cases as having made it uncertain what common purpose is and what active association is. Whilst under English law the court can imply from conduct that there was agreement between parties to commit an offence, there is no evidence that the court would find on common purpose on the grounds of ***active association*** as understood by the South African courts.

The joint unlawful enterprise arises out of agreement which can either be express or tacit.[173]

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169 K.J.M.Smith supra note 161 at 6
170 op cit
171 ibid
172 J.K.M.Smith supra note 161 at 62(see footnote 3 on that page)
173 loc cit at 218

Clarkson and Keating submit that one is only a member of the group if he is acting in accordance with some joint plan or joint common enterprise. It is not clear if it can be based on participation.[174] In explaining the theories on the derivative nature of accomplice liability, Smith refers to a theory which views participation as sufficient and powerful evidence of an accessory allying or associating himself with the principal's criminal venture.[175] However as explained in the foregoing paragraph this association is only acknowledged when the court deals with mens rea to find out what the participant would have foreseen with regard to the actions of the principal which ensues during the joint enterprise.

There is no evidence that the courts in England have had to grapple with questions such as - when exactly does a common purpose begin or arise; when should mens rea be assessed; what is the liability of someone who joins the common purpose at a later stage; which questions generated debate in South Africa and were addressed inter alia in S v Khoza, S v Nkwenja[176] and in S v Motaung.

IMPUTATION

Actus Reus

It is only those actions which fall within the scope of the common purpose design, those carried out in pursuance of the common purpose, which can be attributed to the other members to the common purpose.[177] Conduct of one of the participants can be imputed irrespective of the fact that

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174 Clarkson and Keating supra note 167 at 517

175 loc cit at 6

176 S v Khoza 1982(3)SA 1019(A), S v Nkwenja 1985(2)SA 560 (A), S v Motaung 1990 (4)SA 485(A)

177 K.J.M.Smith supra note 161 at 218

the other party was not present at the scene. This is clear from a statement by Lord Lane CJ made in R v Slack when he said:

"A must be proved to have intended to kill or do serious bodily harm at the time he killed. *B may not be present at the killing, he may be a distance away, for example waiting in a get-away car, he may be in another part of the home, he may not know that A has killed,* he may have hoped, and probably did hope that A would not kill or do serious injury...."[178]

The problem of imputing the acts of the perpetrator to the rest of the parties to the joint unlawful enterprise arise where the other party alleges that the perpetrator either went beyond what was agreed to or acted outside the common purpose. Thus, if the actions of one of the parties completely departs from `the concerted action of the common design the others are no longer responsible.'[179] In Davies v DPP[180], a gang of boys went to Clapham Common to engage in a fist fight with another group of boys. Unknown to L, E carried a knife and he stabbed one boy inflicting a fatal wound. L was convicted of murder and he appealed. The appeal court quashed the conviction and held that L was guilty of common assault, and he could not be held to be an accomplice to murder. The court went on to hold that if one of the boys had produced a gun and shot the other, the other boys would not be liable as the action would be beyond the scope of the joint unlawful enterprise.[181] As Clarkson and Keating put it, producing a gun in such circumstances would be an act of a stranger and liability can not attach for the unagreed acts of strangers.[182] Smith and Hogan also comment on the finding of the court and rightly say that, if death had resulted from a blow of the fist then L would have been guilty of manslaughter.

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178 R v Slack 1989(3)W.L.R 513(Court of App.Crim.Div) at (my emphasis)
179 Clarkson and Keating supra note 167 at 517
180 Davies v DPP 1954 AC 378
181 loc cit at 401
182 Clarkson and Keating supra note 167 at 517

Similarly the issue of which acts can be imputed to the other parties to the common purpose was dealt with in R v Anderson and Morris.[183] In this case one W had been molesting A's wife; and M and A went to look for W. On confronting W, A and W had engaged in a fight. A took out a knife and stabbed W; W died. A and M were charged with murder. M had just witnessed the fight and had not joined in, and during the trial he was adamant that he was not aware that A had a knife. M was convicted of manslaughter and he appealed. Speaking on behalf of all the five judges of the court, Lord Parker CJ held that:

"if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unathorised act...(and) it is for the jury in every case to decide whether what was done was part of a joint enterprise or went beyond it and what was in fact an act unathorised by that joint enterprise."[184]

It is apparent from the cases cited that in considering the acts of the perpetrator the emphasis was on whether what he did was part of what was agreed upon; the English courts later went on to include acts which the other party might have contemplated, when deciding whether the acts of the perpetrator could be imputed to the other members to the common purpose.Smith submits that the current position is that, common purpose not only cover what was expressly or tacitly agreed on, but now encompasses what was contemplated or foreseen by the other parties.[185]

The writer intends to deal with the issue of contemplation when the issue of mens rea is discussed. As of now suffice to say, it has now been established in English law that an accomplice can also be convicted of an incidental offence even if he has not tacitly or expressly agreed to it provided that

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183 Anderson and Morris supra note 159
184 loc cit at 118
185 K.J.M.Smith supra note 161 at 218-219

he contemplated that the perpetrator might commit it but still participates in the enterprise.[186] Thus the imputation of conduct is not restricted to acts agreed to but extends to those contemplated. This is slightly different from the position assumed by the South African and Zimbabwean courts where; the acts imputed are those falling within the common purpose as agreed, where there is no agreement then the atus reus would arise from the participation of the secondary party in the common design, that is, active association as set out in the Safatsa case. The issue of contemplation or foresight is in the writer´s opinion restricted to the mental element as separate from the actus reus.

Mens rea (The mental element)

In England mens rea can either be specific (actual) intent or what is commonly referred to as "contemplation". This is the mental element constituted by foresight.[187] There was confusion for quite some time on the relationship between authorisation (mandate) and contemplation although now it is clear that foresight in the absence of actual intent forms the basis for culpability.[188] This problem arose in the process of trying to determine the basis of liability where one of the parties alleged that the actions of the other exceeded what was agreed on in the common purpose. In the writer´s opinion, issues pertaining to the actus reus or conduct ended up linked with a test for mens rea.

In Lovesey and Peterson; and in Anderson and Morris in deciding on liability the court´s decision was not made on the basis of mens rea but on whether what was done went beyond what was agreed to in the joint enterprise, hence the actions were construed as unauthorised. There was more reliance on mandate than on mens rea. Clarkson and Keating raise the question that the courts

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[186] Card, Cross and Jones: ***Criminal Law*** 12th edit.Butterworths, London 1982 at 548

[187] Clarkson and Keating note 167 at 518

[188] Card Cross and Jones supra note 186 at 548;Smith supra note 161 at 221

of England have had to grapple with, namely, whether the secondary party must have mens rea with regard to the principal offence or whether knowledge of what the principal intends to do will suffice.[189] Reference is made to the case of Reid[190] in which the defendant and two colleagues were party to a joint unlawful enterprise of possessing weapons for the purpose of going to threaten and frighten certain persons. Instead of just frightening the victims, one of the men went on to shoot the victim. The question which the aforesaid authors pose is whether liability would emanate from the fact that the defendant was a party to the unlawful enterprise (in which case he will be guilty of murder) or from his own individual mens rea (in which case he will be guilty of constructive manslaughter) or the defendant would be held not to have had the same mens rea as the principal and hence acquitted on the main charge and only held liable for the offence he committed in his own right?[191] The authors argue that at one time this could be answered clearly but variable case law has led to uncertainty.The situation used to be that liability would depend on the accessory's own mens rea. In the Reid case, the appellant could not be convicted of murder as he did not possess the same mens rea as his associates. The court found that he possessed intention for constructive manslaughter. However in R v Dunbar[192] the court reached a different decision premised on the fact that the accessory must possess the same mens rea as the principal. In this case appellant, a woman, knew that the co-defendants were planning to burgle her former boyfriend´s place and that in the course of the burglary some harm could be done to the lover. In the process of the burglary the victim got killed and A and B were charged with, and convicted of murder. The trial court had convicted A of murder and B of manslaughter. B´s conviction was quashed on

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[189] Clarkson and Keating Text and Materials 2nd edit Sweet & Maxwell 1990 at 519 (Please note that both the 2nd and 3rd editions were used, the second edition raised some interesting questions which the authors did not repeat in the 3rd edit. hence the writer found the need to refer to both of them)

[190] Reid (1975)62 Cr.App.R 109

[191] loc cit at 515

[192] Dunbar 1988 Crim.L.R 693

appeal, and the court held that she could only be guilty of incitement and conspiracy which at that moment could not be substituted for manslaughter. The court went on to hold that if the appellant was only a party to an agreement to only inflict harm short of grievous bodily harm then she could not be guilty of either murder or manslaughter. In this case the court referred to both authorisation and contemplation but ultimately the decision lay on the principle of authorisation.

In R v Smith[193] the appellants had kicked the victim and his friend whom they suspected of being supporters of a rival football club. The victim and his friend were attacked twice and during the second attack the two were kicked as they lay on the ground. The two were charged with grievous bodily harm and were all convicted. In directing the jury the trial judge had said:

"if two people agree to do some harm but it was not part of the agreement to do really serious bodily harm and one person attacks the victim intending and causing really serious bodily harm the second person is guilty of causing grievous bodily harm with intent even though he did not intend that his partner should cause the victim really serious bodily harm, if he could and did foresee that in the course of the agreed attack there was a real risk that his partner might attack one of the victims with the intention of causing serious bodily harm."[194]

This was a correct restatement of the law especially with regard to the mens rea.

The appellant´s conviction was quashed on appeal it being held that the jury should have been directed that it could only convict if it was convinced that the appellant had the necessary intent to cause grievous bodily harm. The appeal court also held that the foresight which the trial judge had referred to, was not of itself to be regarded as intention, although it could be properly regarded as evidence supporting the existence of the intent necessary to establish the offence.[195] Smith and Hogan submit that the Appeal Court thought erroneously that where a joint unlawful enterprise is

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[193] Smith 1988 Crim.LR 616

[194] loc cit at A rough translation of the direction given made by the judge of the Appeal court.

[195] op cit at 617

in issue , " an alleged secondary party must now be proved to have had an intention to cause serious bodily harm"[196] as in specific intent. Clarkson and Keating comment that going by the Smith and Dunbar cases the defendant in Reid would not have been convicted of murder.[197] In the commentary to the case it is noted that the court had proceeded under the assumption that it is necessary to prove the same mens rea for the secondary party as for the principal and this is not so as a general rule.[198] It is also stated that the courts cannot follow the Smith decision and can best ignore it.[199]

The other ground on which courts have based mens rea is that the secondary party must be aware of the risk of the consequence occurring, that is, the aspect of foresight. The case of Chan Wing-Siu shedded light on the requirement of foresight, and cleared up most of the confusion surrounding the determination of mens rea of the secondary party, as well as confusion about whether mens rea should be determined by looking at whether the acts were authorised or within the scope of the common design.[200]

In the Chan Wing-Siu case three men, each armed with a knife agreed to go to a flat and commit a robbery. In the process of executing the common purpose K the owner of the place was stabbed to death and his wife was wounded when her face was slashed with a knife. The three defendants were charged with murder and grievous bodily harm. The judge had directed the jury that any one of the three could be convicted of murder if when he took part in the enterprise he had contemplated that one of the accomplices might use a knife with the intention to inflict serious injury. All of them were convicted on both accounts and they appealed. The Privy Council upheld the decision of the trial

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196 Smith and Hogan ***Criminal Law*** 7th edit.Butterworths, London 1992
197 Clarkson and Keating 2nd edit.supra note 189 at 517
198 R v Smith supra at 193 at 617
199 ibid
200 K.J.M.Smith supra note 161 at 220

court. In doing so the court made comments which to date have formed the cornerstone of the determination of the mental element. In holding that a party can be held liable for the acts of another in a joint enterprise, Sir Robin Cooke held that, a party can be criminally liable for the acts by the primary offender of a type which the former foresees but does not intend. He went on to say "..that there is such a principal is not in doubt. It turns on contemplation or putting the same idea in other words, authorisation, which may be express but is more usually implied.It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."[201]

In explaining how the mens rea arises Sir Robin stated that:

"Where a man lends himself to a criminal enterprise knowing that potentially dangerous weapons are to be carried and in the event that there are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic."

The judge went on to correctly state that where there is no contemplation by an accused that serious bodily harm would be inflicted intentionally then he cannot be guilty of murder.[202]

The court correctly made a finding that the test for mens rea is subjective and the court has to consider "what the accused in fact contemplated; and this is inferred from his conduct and all evidence that throws light on what the accused foresaw, at the material time, including, what he says in his evidence or statement."[203] The question that has to be directed to the jury would therefore be:

Did the particular accused contemplate that in carrying out the common unlawful purpose one of his partners might use a knife or a loaded gun with the intention of causing really serious bodily harm?

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201 Chan Wing-Siu supra note 163 at 175 G-H
202 loc cit at 177E
203 lco cit 777H

The court made it clear that the state has the onus to prove beyond reasonable doubt that the accused contemplated the possibility; where there is a reasonable possibility that accused did not contemplate the risk then he is not guilty of murder or wounding with intent to cause serious bodily harm.[204] Where however the jury feels that an accused´s intention was less than that of inflicting serious bodily harm, then this foresight would not be sufficient for a murder conviction but for manslaughter,[205] for example where one thinks that the knives are to be used to frighten the victims.This was held not to be case in Chan Wing-Siu, as T had not alleged that ground .The appeal was dismissed.

The principle in Chan Wing-Siu is seen at work in R v Slack[206] where X and appellant had a common purpose to break into a flat intending to rob the occupant. Whilst the parties were in the flat X murdered the occupant in the absence of the appellant. The trial judge in directing the jury said that the jury could convict appellant of murder if they made a finding that the appellant had contemplated and foreseen that X would kill or cause grievous bodily harm to the occupant as part of the joint unlawful enterprise[207] . This was a correct restatement of the law. Appellant´s appeal was dismissed, but the court´s reasoning was in a way different from that one of the trial court although the same conclusion was arrived at. The court held that, for a person to be guilty he must have lent himself to a criminal enterprise involving the infliction of serious harm or death or to have had an express or tacit understanding with the other party that such harm or death should, if necessary, be inflicted[208] . The judgement of the appeal court did not fully appreciate the trial court´s reasoning on foreseeability, which reasoning was good and the appeal court was

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204 Chan Wing-Siu supra note 163 at 178
205 This is clear in R v Roberts (1993)96 Cr.App Rev
206 1989 WLR 513
207 loc. cit. at 516
208 R v Slack 1989 QB 775 at 781

misdirected as it emphasised agreement instead of foresight[209]. The court´s failure to take note of the foreseeability element shall be dealt with more extensively when the writer comes to criticisms.

As mentioned earlier, in the Chan Wing-Siu case the court made it clear that where A foresees harm being inflicted but the foreseen harm is less than serious bodily harm then he should be convicted of manslaughter instead of murder. This is because the liability of A should be limited where B goes beyond anything that A foresees[210]. This is the stance taken by the court in R v Roberts[211] where the trial judge directed the jury that if B foresees only that A may inflict a minor injury, A will be guilty of murder and B of manslaughter, it being argued that B would not be liable for murder because A had gone beyond the limits of anything agreed to or foreseen by B, as to what might be done. This distinction seems to be peculiar to England. This is because under South African and Zimbabwean laws there is no concept of an act being within the scope of the common purpose but going beyond the limits set in the agreement or the foreseen consequences.

In R v Wakely[212] there was an attempt to employ the principle set out in Chang Wing-Siu but the court had problems as the appeal court paid "insufficient attention... ...to the distinction between on the one hand tacit agreement by B that A should use violence despite B´s refusal to authorise or agree to it´s use[213]. In fact in R v Wakely the appeal court had criticised the trial judge on his employment of the foreseeability test holding that

"the suggestion that a mere foresight of the real or definite possibility of violence being used is sufficient to constitute the mental element of murder is prima facie academically speaking at least, not sufficient[214]."

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209 K.J.M. Smith supra note 161 at 221
210 By inference
211 (1993) 96 Cr App R 291
212 1990 Crim L R 119
213 R v Hyde, Sussex, Collins 1990 (3) WLR at 1119
214 R v Wakely supra note 212 at 120 to 121

It was in R v Hyde and Others that the appeal court admitted its misdirection in applying the principle of foresight laid down in Chang Wing-Siu´s case. In the Hyde case the three appellants were all charged with murder after they had jointly attacked a person outside a pub by kicking him repeatedly. It was impossible to determine which one of the three had struck the fatal blow but the intention of the three was to inflict serious bodily injury. In their defence the defendants had argued that as the jury could not decide with certainty which person´s actions had caused death, therefore none of them could be convicted of murder. The trial judge´s direction was that if the jury made a finding that each of them foresaw the risk of grievous bodily harm being done, they should convict. The defendants were all convicted and they appealed.

In deciding the appeal the Appeal court had to reconsider it´s interpretation of the principle set out in Chan Wing-Siu and also consider criticisms by Professor J.C. Smith on how the court had misdirected itself on the issue of mens rea[215] . In putting the correct test in other words, the court held that "if B realizes (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture[216] ." This case was followed in R v Hui Chi-Ming[217] where the court in dealing with mens rea and matters involving joint unlawful enterprise, referred to Sir Robin´s statement in Chan Wing-Siu and went on to hold that:

"the accessory in order to be guilty must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight still have participated in the enterprise...[218] " In the writer´s opinion this is better expressed than in the Hyde case.

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215 R v Hyde supra note 213 at 1119
216 op.cit.
217 R v Hui Chi-Ming 1992 (1) A.C. 34
218 loc. cit. at 58

Clarkson and Keating[219] raise the question that if the issue is one of carrying on the enterprise with foresight what *degree of foresight is required.* This is very important as the distinction between a negligible risk and a real risk will have a bearing on liability. Sir Robin Cooke stated in Chan Wing-Siu that various suggestions describing the foreseen possible incident include, a substantial risk, a real risk, a risk that something might well happen, and he pointed out that any of these can be utilized[220]. He made it clear that where the risks are dismissed by the accused as negligible when contemplated, then the accused can neither be convicted of murder or (manslaughter) intentionally causing grievous bodily harm[221]. This is the position in South Africa and Zimbabwe as well because with dolus eventualis, the accused must not only foresee the possibility of the event occurring, but he must also reconcile himself to the possibility, meaning if he foresees the possibility happening but dismisses it or believes that the result will not ensue then he will not be convicted of murder as he lacks dolus eventualis.[222]

From case law and submissions by the writers duly referred to, one can safely say that, in cases involving a joint unlawful enterprise to commit a crime and in the process a murder is committed, then mens rea can either be in the form of actual intent or foresight of a real risk of death occurring or grievous bodily harm being inflicted. In cases where one party foresaw an injury short of serious bodily harm occurring and in fact death ensues then that party can only be liable for manslaughter.[223]

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219 supra note 167 at 520

220 R v Chan Wing-Siu supra note 163 at 179. Please note that in R v Roberts the court approved of the term real risk.

221 op. cit.

222 C.R. Snyman ***Criminal Law*** 3rd.ed. Butterworths, Durban 1995 at 170-171

223 Roberts case followed and not as in Dunbar

Withdrawal

In England like elsewhere, if a party to a joint unlawful enterprise withdraws from the joint unlawful enterprise then he is not liable for subsequent acts performed by the other parties, provided his withdrawal is effective. In R v Becerra and Cooper[224] the court cited and quoted from the British Columbian case of Whitehouse where it was stated that "the unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it, nor [are they] liable to its full and final consequences." Smith and Hogan, although referring to aiding, abetting and counselling submit that: "an effective withdrawal will not however affect any liability he (a secondary party) may have already incurred for incitement, conspiracy, or if the withdrawal took place after the secondary party had done more than a mere preparatory act, attempt to commit the crime."[225] Withdrawal must be voluntary and it is submitted that arrest leading to absence from further participation does not constitute withdrawal.[226] This is the position in Zimbabwe and South Africa.

The leading case on withdrawal or dissociation in England is R v Becerra and Cooper, in this case nearly all the requirements for dissociation are stated. The facts of this case are briefly that: Becerra, Cooper and another person broke into a house intending to steal. Becerra had a knife which incidentally had been used before and he gave it to Cooper. The knife was to be used if they were to be interrupted. When inside the house, L, a tenant, heard a noise from his upstairs room and came to investigate. At that moment Becerra shouted: "There´s a bloke coming. Let´s go!" And he

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224 R v Becerra and Cooper 1975 62 Cr App R 212
225 Smith and Hogan supra note 196 at 153
226 loc. cit. at 155

jumped out of a window and ran away. Cooper stabbed L on his way out and L died from the stab wound. Becerra and Cooper were both convicted of murder and Becerra appealed arguing that he had withdrawn from the common design and was therefore no longer liable for subsequent acts by Cooper.

In deciding on the question the court went on to refer to the case of Whitehouse (alias Savage)[227] and adopted the decision of the court of appeal of British Columbia. The court adopted this decision as a correct restatement of the law on withdrawal[228] . The writer will extract the principles from the cited passage. The court was of the opinion that a mere change of heart and absence from the scene of the offence will not suffice to constitute dissociation in the absence of exceptional circumstances.[229] In the writer's opinion the reference to "in the absence of exceptional circumstances" implies that where the circumstances are unique, exceptional, change of heart and absence from the scene may constitute effective dissociation. In the South African case of S v Nomakhlala and the Zimbabwean case of S v Chinyerere running away was construed as effective dissociation.[230]

Lord Sloan JA, the judge in the Whitehouse case had said that he was not going to attempt to define closely what has to be done in criminal matters involving participation in a common purpose to break the chain of causation and responsibility.He had gone on to say:

"*that too must depend upon the circumstances of each case, but it seems to me that one essential element ought to be established in a case of this kind.Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crimes to those who wish to continue in it.What is timely communication must must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal and otherwise, that*

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227 (1941) 1 WWR 112

228 R v Becerra supra note 224 at 218 specifically para. 115 to 116 of the Whitehouse decision

229 op. dit.

230 S v Chinyerere 1980(2)SA 576; S v Nomakhlala 1990(1)SACR 300(AD)

will serve unequivocal notice upon the other party.....to the common unlawful cause that if he proceeds he does so without the further aid and assistance of those who withdraw.

This passage is clear and self-explanatory, and it sets out the law as it stands in England. Most interesting is the flexibility which characterises the requirements for effective dissociation. First, Lord Sloan JA stated that what must be done ***will depend on the facts of the case*** and went on to emphasise that where ***practicable*** reasonable timely communication has to be made and that timely communication will depend on the facts of the each case.[231] This gives the court room to weigh and consider factors and make fair decisions, as what may be reasonable and practicable in one case may not be in another case. The Zimbabwean cases of S v Chinyerere and S v Beahan[232] in which English law was applied are a good example.

Smith submits that by qualifying its (the court) reference to unequivocal notice with "where practicable and reasonable" the case of Becerra implicitly recognise the existence of other ways an accessory might be entitled to the defence, for example, by warning law enforcement authorities, or the victims to be.[233]

In applying the law to the facts the court considered that the evidence adduced at trial was to the effect that neither Cooper nor the other companion had heard Becerra say, "..Come lets go" when he jumped out of the window. The court held that, since the knife had been used previously and there was contemplation of its use during the unlawful enterprise to avoid interruption, in order to withdraw Becerra had to "countermand ...in some manner vastly different and vastly more effective than merely say `Come on, lets go´ and go out through the window."[234]

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231 personal observation
232 S v Chinyerere supra note 230; S v Beahan 1991(3)ZLR 98
233 K.J.M.Smith supra note 161 at 256-257
234 Becerra supra note 224 at 219

The court finally held that what Becerra did was insufficient to constitute withdrawal, hence he was legally responsible for Cooper`s actions committed after he had gone out of the window.It is important to note that the appeal court refused to make a ruling on whether what the judge in the trial court had said was right or wrong when he stated that, it was incumbent upon Beccerra to have physically intervened to stop Cooper or come between Cooper and the victim. The appeal was dismissed.

The case of Becerra was recently followed in R v Rook.[235] The appellant was party to a common purpose to commit murder. The appellant disappeared when the others called to pick him up on the way to commit the murder. The appellant never communicated his intention to withdraw to other members of the group. On appeal Lloyd L.J held that "His absence on the day could not possible amount to `unequivocal communication´ of his withdrawal.. He had made it clear to himself that he did not want to be there on the day but he did not make it clear to others."[236] In the writer´s view this was a good judgement. Thus the law on dissociation in England is as set out in the Becerra case.

COMMENTS AND CRITICISMS

Commenting on the law of dissociation Smith notes that, in considering "..the range of effective withdrawal measures, the most demanding would require an accessory to have attempted to prevent the offence; the least demanding might require an attempt to communicate notice of withdrawal to the principal."[237] He goes on to say that between these two extremes other action which may be taken include attempts by accessories to neutralise prior conduct by, for example, recovering materials or by retracting encouragement or warning the police or the potential

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235 R v Rook (1993)97 Cr. App.327
236 ibid at 333-334
237 K.J.M.Smith supra note 161 at 255

victims.[238] This in the writer´s opinion is a correct assessment of how the defence works. This is due to the fact that, ultimately what constitute effective withdrawal will depend on the facts of each case. Smith was also able to pick up that, "implicit in the defence of withdrawal appears to be a proportionality or relational condition, the greater the accessory's involvement in a criminal venture the more substantial the effort needed" to extricate himself from being held liable for the subsequent acts of the other parties to the joint unlawful enterprise.[239] This is a correct statement of the law in that in the Beahan case (in which English law was applied) it was held that the actual role of the conspirator determines the kind of withdrawal necessary to effectively terminate liability for the commission of the substantive offence.[240]

Clarkson and Keating are of the view that the ultimate effect of the authorities at hand is to render withdrawal practically impossible once the crime is underway.[241] For this comment they refer to a comment by the court in Rook´s case where, in its deliberations, the court considered a scenario where there is a conspiracy to dynamite a building and the fuse has been set; in that court´s opinion, if someone wants to withdraw at that moment he should do his best to step on the fuse. The writer disagrees with Clarkson and Keating´s submission because whilst it is difficult to withdraw at the last minute, to say it is practically impossible would be putting it too strongly, all the more when each case depends on its facts. To put it in Smith and Hogan´s words, it does not follow that it is never possible to effectively withdraw by countermand where aid given by D continues to be effective.[242] The authors go on to say that it is easier to withdraw during the preparatory stage than when the crime is being committed.[243]

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238 op cit
239 loc cit at 257
240 S v Beahan 1991(2)ZLR 98 at 121
241 Clarkson and Keating supra note 167 at 537
242 Smith and Hogan note 196 at 155
243 ibid

There seems to be a tendency by the English courts to seriously consider the defence of withdrawal when raised or where there is evidence of its existence.Smith and Hogan refer to the cases of Grundy, and Whitefield in which the appeal court ruled that the issue of withdrawal should have been put to the jury.[244] In the Whitefield case the appellant and a colleague had planned to break in a house with a colleague.The appellant later decided against it and he unequivocally informed E that he no longer wanted to be a party to the plan. It is in light of this fact that the appeal court remarked that the jury should have been called upon to decide whether there was effective withdrawal.

It is most disturbing to note that the factor characterising most English cases on common purpose is the `confusion about the relationship between authorisation and contemplation.'[245] However as Smith says, there is now a move to rely on foresight.[246] Even in the celebrated decision of Chan Wing-Siu where Sir Robin Cooke, expressing the view of the Privy Council, established that intention could be based on contemplation in the form of foresight, the court nearly fell into the trap of failing to recognise that in the absence of specific intent, intention can rest on foresight and not on authorisation. Smith remarks that "mystifying as it is for `contemplation´ to have been equated with `authorisation´ the repeated emphasis and the use of the foresight formula throughout the judgement neutralises Sir Robins confused slide into the language of consensus."[247]

Despite the fact that it had been made clear in the Chan Wing - Siu case that mens rea had to be tested subjectively by considering what the accused contemplated, the appeal court had gone on in R v Slack and R v Wakely to consider foresight as insufficient to constitute mens rea. However the

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244 Grundy (1977)Crim L.R 543; Whitefield (1984)79 Cr App Rep 36
245 Clarkson and Keating supra note 167 at 518
246 K.J.M.Smith supra note 161 at 210
247 loc cit at 221

acknowledgement by the Appeal court in the Hyde case that it had misdirected itself in those two cases coupled with the clear stance adopted in the Hui Chi-Ming case, where the court relied on the cases of Chan Wing-Siu; and the Hyde case, have cleared most of the confusion surrounding the issue of foresight. In view of this, Smith remarks that:

"The underlying philosophy of modern English decisions -whether common purpose or not- is culpability through risk taking.Consensual or authorisational theories of liability are not really compatible with this philosophy.The language of `mandate´ is inappropriate, liability in common purpose turns on general mens rea complicity principles."[248]

The words of Card clearly sums up the position in England on the issue of mens rea in common purpose cases as follows; it is now well established that an accomplice can also be convicted of an incidental offence even if he has not tacitly or expressly agreed to it, provided that it is proved he contemplated as a real possibility that the perpetrator would commit it but still participates in the enterprise.[249]

Clarkson and Keating argue that it is unjustifiable that a secondary party can be convicted of murder on the basis of recklessness, a lesser mens rea, when the principal offender can only be convicted of murder if he actually intended to cause death or grievous bodily harm.[250] The authors go on to argue that the accessory should only be convicted, if he actually intended to cause death or grievous bodily harm and that this intention can be inferred from the circumstances; for example where death is foreseen as extremely likely or virtually certain, then he can be appropriately convicted of murder.[251] Where however the accessory foresees death as a real risk and continues with the enterprise he is reckless, thus would have a lesser mens rea so they argue, and hence

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248 J.K.M.Smith supra note 161 at 221
249 Card,Cross and Jones supra note 187 at 548
250 Clarkson and Keating supra note 167 at 520
251 loc cit at 521

should be convicted of manslaughter.[252] If South African concepts of dolus eventualis were to be applied, there is nothing wrong with an accessory who foresees death as a real possibility being convicted of the same offence as the perpetrator. However, there is a great difference between the South African notions of dolus eventualis and the English notions of recklessness. In this light the concerns raised by Clarkson and Keating are plausible where English law is concerned. However, the complexities characterising the English mens rea notions for murder and manslaughter are not incorporated in this paper.

There is a very strong possibility that the common purpose doctrine is overshadowed by the laws pertaining to aiding, abetting, counselling and procuring provided for in Section 8 of the Accessories and Abettors Act of 1861. This is because it is common in reading cases on common purpose to come across notions of aiding, abetting and procuring. Also English writers, like Clarkson and Keating, speak in terms of secondary parties or accessories which terminology is very much linked to the provisions of the aforementioned Section 8.

It is also discouraging to note that although South Africa adopted the doctrine of common purpose from England, the English courts were as late as in the 1980s still battling with the issue of whether liability for incidental crime occurring during the commission of the crime for which the common purpose was entered into should be based on agreement or foresight. South Africa can be said to be ahead of England in so far as refining the doctrine of common purpose is concerned. It is however appreciated that the case of Chan Wing-Siu and subsequent cases later cleared the confusion. Fortunately the English law on dissociation is very clear. This definitely explains why the Zimbabwean courts had no problems in adopting the English law on this aspect.

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[252] op cit

NEW SOUTH WALES

In dealing with the law of common purpose in New South Wales the format will be slightly different from that adopted for the other jurisdictions. This is because there are many similarities between the law on common purpose in New South Wales and that in England. This is because at one time the final court of appeal for cases from New South Wales was the Privy Council. Hence, attention will be given to new aspects characterising the law in New South Wales; otherwise, it will be just relating once again what English law is like on common purpose. This section will thus be dealt with in a summarised fashion.

A common purpose arises when parties agree either expressly or impliedly to commit an offence. This is the position in England, South Africa and Zimbabwe. However, with New South Wales the thrust of the doctrine differs in degree from that in Zimbabwe and South Africa. This is apparent from how the doctrine has been conceived by the courts.

In describing the doctrine of common purpose Jordan CJ held in the case of R v Surridge[253] that:

"*If two people combine to effect a common criminal purpose, each is liable for any act done by the other in order to effect the purpose which was common to both of them, but not for anything done by the other which was not incidental to the carrying out of the common purpose.*"

In New South Wales focus is thus placed on the scope of the common purpose, in other words, the doctrine is used mostly to deal with incidental crime.[254] Brown states that in New South Wales liability for the crime which parties agree or get together or combine to commit will be determined according to the general rules of complicity covering principals and accessories, whilst liability for

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253 R v Surridge (1942) 42 S.R (NSW) 278 at 282

254 D.Brown, D.Neal;D Farrier and D.Weisbrot Materials and Commentaries on Criminal Law and Process of New South Wales The Federation Press 1990 at 1372.

an incidental crime would be determined using the common purpose doctrine.[255] This is confirmed by Gillies when he says that, where parties agree to commit an offence, their liability would be determined in accordance with ordinary liability rules.[256] He goes on to say, " in practise the doctrine of common purpose has generally been employed to resolve issues of liability in a relatively specialised fact situation ...where A and B jointly agree to commit crime X(the foundational crime- for example..house breaking) in the course of which B commits a further crime (the incidental crime...assault)."[257] Gillies submits that there will not be any problems in finding A liable either as a principal or as an accessory depending on his role in the commission of the foundational crime, and it is in relation to the incidental crime that the issue of liability raises questions.[258] This explanation shows that New South Wales unlike the other three jurisdictions discussed, specifically use the doctrine of common purpose for the special cases where there is incidental crime.

The rationale behind the use of the common purpose doctrine in New South Wales has been aptly described by Brown as that the law recognises that there are situations were several people get together to commit a particular crime, where that crime is actually committed, it may be impossible for the jury to determine with certainty which of the participants actually "did the deed".[259] One can also through inference from the manner in which the doctrine is currently used, say that the rationale was to deal with liability issues where incidental crime arises when the parties are pursuing the commission of the foundational crime.

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255 loc cit at 1377
256 P.Gillies ***Criminal Law*** (The Law Book Co Ltd) 1985 at 139
257 op cit
258 ibid
259 D.Brown supra note 254 at 176.

ISSUES OF IMPUTATION AND CULPABILITY

As stated earlier, the liability for the foundational crime is dealt with using the general principles of liability. In this light it is only the incidental crime which will be looked at. Only acts falling within the scope of the unlawful enterprise will be imputed, that is, to put it in Gillies´s words; acts committed in order to consummate the commission of the foundational crime or in order to effect some related purpose, for example warding off resistance or to escape a threatened arrest.[260]

In deciding whether an act lies within the common purpose a subjective test is employed.[261] This is also the case in the other three jurisdictions already discussed. The question the jury has to consider is whether the offence charged is a probable consequence of the execution of the common purpose to which the accused person is a party.[262] The jury has to look at the evidence available then conclude whether the parties ever contemplated that the incidental offence might be committed.

Thus a party to a common purpose to commit an offence can become criminally liable for the acts of the perpetrator if such acts are a consequence that flow from the execution of the common purpose. In explaining why the perpetrators conduct is imputed to the other party, Brown states that:

"Such an act is one which falls within the parties own purpose and design precisely because it is within their contemplation and is foreseen as a ***possible incident*** of the execution of their planned enterprise."[263] This leads to the issue of mens rea.

The mens rea can either be in the form of specific intent or in the form of foresight. Where foresight is in issue, the party to the common purpose need not contemplate the occurrence of the

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260 P.Gillies supra note 256 at 139
261 loc cit at 140; see also Brown supra note 254 at 1374
262 Brown supra note 254 at 1374
263 op cit

commission of the incidental offence as a probability, but rather as a ***possibility***. This is also clear in the foregoing statement by Brown, where he says the accused must foresee the offence as a possible incident. This was made clear by the court in the case of Johns[264] where the New South Wales Criminal Court of Appeal in describing how liability is determined for criminal acts in relation to common purpose stated that a party bears"...a criminal liability for an act which was within the contemplation of himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention- an act ***contemplated as a possible incident*** of the originally planned venture." In the Johns case, the defendant and two others had agreed that the two would rob one M and the defendant was to drive the two to a place close to where the robbery was to take place. The robbery was to be carried in defendant´s absence. The defendant duly drove the two to the scene of the robbery; however, one of the two was armed with a loaded gun which factor defendant was aware of. One of the two shot M and M died. The three were charged with murder and all of them were convicted. The defendant appealed.

The Appeal Court held that the fact that Johns had driven the two accomplices to the scene of the robbery knowing that one of them was carrying a gun, which he expected to be loaded, and knowing that the person with the gun was quick - tempered and was not going to tolerate any resistance, was held to be enough evidence from which it could be inferred or concluded that the offence was within the parties contemplation. The appeal was dismissed. In the writer´s opinion, the Johns case clearly demonstrates how the subjective test is employed to determine whether the accused foresaw the possibility of the incidental offence occurring. Brown summarises the principle from the Johns case as that: where a person agrees to a criminal enterprise knowing that there was a possibility that, for example a murder would occur, then he is guilty of murder.[265]

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264 Johns (1978)1 N.S.W.R.282 at 290
265 D.Brown supra note 254 at 1378

The issue of the extent to which a participant to a common purpose should be held liable for contemplated acts has not evaded the courts attention in New South Wales. Put differently the question is, how is liability worked out where one of the participants alleges that the perpetrator's acts went beyond what was agreed to, or what was contemplated. The English case of R v Anderson and Morris[266] is leading authority in New South Wales, although some courts whilst professing allegiance to the Anderson case have come up with slightly different judgements.[267] The facts of the case were referred to earlier.

In upholding the appeal by Morris, Lord Parker CJ said:

"It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect, is something which would revolt the conscience of the people today."[268]

The court went further to given example that, if X and Y agree to assault Z with fists, and then Y unexpectedly produces a knife, stabs and kills Z, then X is only guilty of common assault and is not an accessory to murder as Y's actions were unexpected and uncontemplated. There is evidence that the Anderson case and the Johns case are the reference cases for issues pertaining to mens rea.The case of Johns was cited with approval in the Mills[269] case. It is also interesting to note that the case of the Johns was also referred to and approved by the Privy Council in Chan Wing-Siu,[270] which case has become authority in England on the issue of the mental element in common purpose related offences especially where foresight of the incidental crime is concerned.

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266 R v Anderson and Morris 1966 (2) QB 110
267 Varley v R (1976)12 A.L.R.347
268 Anderson supra note 266 at 120
269 (1986)61 ALJR 59
270 Chan Wing-Siu v The Queen 1985 A.C 168 at 176.

Gillies observes that there is in New South Wales a new line of thinking which is being adopted by the courts. To demonstrate this he refers to the case of R v Varley.[271] In this case the appellant and two other parties J and K had agreed that they were to assault one L with fists. The assault was perpetrated, whilst the appellant stood and watched. In the process, K had unexpectedly produced a baton, and inflicted a fatal blow on L. Although the court accepted that Anderson's case was still authority, it went on to hold that the appellant could not be covered by the principle laid down in that case. The court went on to find that although the appellant had not foreseen the use of the baton, it could not be said it was an unexpected incident; in fact it was a likely means of carrying out the plan, due regard being made to the fact that the assault was to be carried out on someone of a big physique who was also a judo expert.[272] Thus in this case there is an acknowledgement of the Anderson decision yet the court felt that the principle set therein was not appropriate in this case. In the writer's opinion this was a misdirection. The court went too far in drawing inferences, surely the fact that the deceased was a judo expert does not mean that a party to a common purpose has to contemplate the use of a baton, where it is produced unexpectedly, and where only the use of fists was agreed to. Due regard being made to the fact that the court has to employ a ***subjective test***, such a finding is with due respect wrong.

In the case of Markby v R,[273] the court held that where there is a common purpose to rob, and the parties carry a loaded gun in order to frighten the victim, and in the process on of them develops intention to shoot the victim, the other parties are guilty of manslaughter. Gillies however criticises this case as being inconclusive and of having relied on or referred to conflicting case law whilst

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271 Varley supra note 267
272 loc cit at 353
273 (1978)21 A.L.R 448

failing to develop a clear reasoning trend.[274] Whilst this might be the case, the writer has no problem with the decision of the court. This is because, here, unlike in Anderson, each participant is aware of the potentially dangerous weapon; it is not as if the gun is produced unexpectedly. This opinion derives from what was said in Chan Wing-Siu, a leading English case, where the court remarked that if the accessory knew that lethal weapons were to be carried, then it would be improper to consider any risk of the incidental offence occurring as negligible (as opposed to real risk).

There is no evidence that the position laid down in the Anderson case has been dropped by the courts in New South Wales; therefore where a party alleges that the force used was beyond that contemplated, or that what happened was not contemplated, then the Anderson case will provide the test.

WITHDRAWAL

The legal position here is exactly as in England. Like in other jurisdictions a person who effectively withdraws from the common purpose will not be liable for the acts of the party who continues with the unlawful enterprise. As Brown put; it how a person breaks the chain of causation and responsibility will depend on the facts of each case.[275] The law on dissociation in New South Wales is as set out in R v Becerra and Cooper.[276] The two elements of liability namely conduct and mens rea have to be satisfied. The withdrawing party must intend to dissociate himself from the common purpose, a mere change of heart will not suffice.The court in considering the defence of withdrawal will look at whether there was timeous communication of the intention to abandon the common purpose from those wishing to withdraw from the common design to those who still remain party

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274 P.Gillies supra note 255 at 144
275 D.Brown supra note 254 at 1366
276 R v Becerra & Cooper (1976) 62Cr App R 212

thereto. The communication should however serve unequivocal notice to the party who continues with the joint unlawful enterprise that if he does so proceed, he does so without further aid and assistance from the party who is withdrawing. The mode of the communication is not material, it can thus be verbal or otherwise as long as it clearly sends the message of the withdrawing party´s intention to withdraw. Brown just cites the foregoing requirements which are laid out in Becerra as fully constituting the law on withdrawal in New South Wales.[277]

COMMENTS

The doctrine of common purpose raises quite some interest, when one considers how it has been utilised in New South Wales; specifically, the fact that it has to a large extent been restricted to incidental crime. This is in the writer´s view understandable in that, in foundational crime there is usually agreement whether implied or express of what offence has to be committed. The issue becomes different in incidental crime where the issues of foresight have to be addressed. The matters become so abstract; however, the fact that a subjective test is employed to determine what the other party might have contemplated go a long way in assisting the court to make a proper decision. Gillies is of the opinion that, in cases where incidental offences are involved, the doctrine "represents a convenient and graphic way for a trial judge to focus attention upon the essential issues of liability..in directing the jury.[278] "

It seems that the courts in New South Wales seem not to have been trapped in a maze of confusion over the issues of mandate and foresight as was the problem in England. The issue of foresight as a form of mens rea is clear and the courts seem to have no problems at all in interpreting and explaining foresight. This is clear from the cases cited in this section and the relevant paragraphs

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277 D.Brown supra note 254 at 1366
278 P.Gillies supra note 256 at 140

which the writer quoted. Similarly the law on dissociation is very clear and since New South Wales adopted the English position, it therefore means that, the law on dissociation in that jurisdiction, in Zimbabwe and ultimately in South Africa is the same. The withdrawing party must intend to withdraw from the common purpose and his conduct must not only reflect that intention but he must also serve unequivocal notice to the other parties that he is no longer party to the unlawful enterprise.

Despite the fact that there seem to have been a failure to properly apply the test provided in the Anderson case, in the Varley case, this does not mean that the law is not clear when deciding whether the attack made or the force used went beyond that contemplated or agreed to by the parties. In fact there is no case which has displaced the Anderson case in New South Wales. New South Wales fortunately seems to have escaped some of the problems that the other three jurisdictions encountered in developing the laws on common purpose.

CONCLUSION

The examination of the application of the doctrine of common purpose has not only revealed that the prosecution in all the four jurisdictions discussed prefer to use it, when faced with offences involving a number of participants, but also reveals that the courts are also comfortable with such a doctrine as there was not a single case in which the court showed reservations on the use of the doctrine. Whilst there are numerous similarities between all the jurisdictions discussed, on the manner in which the doctrine has been applied and the rationale for the employment of the doctrine, there are also important differences and the same were constantly highlighted within the body of this work.

All the four jurisdictions are agreed on the fact that, where an accomplice seeks to withdraw from a common purpose, a mere change of heart will not suffice; he must possess a clear intention to withdraw, he must serve an unequivocal notice to the other participants that he wishes to dissociate himself from the common purpose, his conduct should also reflect this intention, but at the end of the day, the conduct sufficient to dissociate an accomplice from a common purpose will depend on the facts and circumstances of each case. Some of the notable differences can be summarised as follows: South African law has not only based common purpose on express or implied agreement, but has gone on to establish that were there is no such agreement the actus reus can be grounded on active association. For England the case law has been characterised by confusion on the issue of whether liability for an incidental crime is grounded upon mandate, or on contemplation by the secondary party of a real risk of the incident occurring. As stated earlier, the issue has been clarified by recent case law. Zimbabwe seems to have managed to address the issues arising out of common purpose by adopting South African and English law on establish common purpose and dissociation respectively. New South Wales on the other hand, has restricted the application of common

purpose doctrine to incidental crime, whilst foundational crime is dealt with by using the ordinary rules of complicity.

The mentioned different approaches by different jurisdictions show that the jurisdictions try to adapt the operation of the doctrine to suit their needs. It is however necessary to briefly consider if the doctrine is really necessary. Smith submits that "Not only is there no magic in the doctrine of common purpose, it is an historical relic whose continued use and employment is an easily avoidable nuisance in an area of criminal law of considerable inherent complexity."[279] It could be that Smith is right. This is apparent when one considers that Gillies states that the doctrine does not make a substantive addition to, or replace the general principles of liability.[280] If this is true, is it not possible to ground liability on general complicity rules? This in the writer´s view is possible, because liability would, apart from the mens rea, be based on participation in the offence. This participation would constitute evidence of the other parties associating themselves with the perpetrator.[281] There would still be no need for the prosecution to prove the causal link, and the extent of liability would be determined according to the degree of participation. The mental element would still be determined in the normal way. In this light one can therefore argue that the doctrine can be done away with as suggested by Smith. The South African legal scholars[282] are reluctant to have the doctrine done away with, as stated earlier on; some want it to remain with some changes, whilst others believe that if applied correctly, there is nothing wrong with the doctrine.

The other issue which should be food for thought is the point raised by Brown[283] on the issue of the mental element. His concern is that, "in setting the ambit of the doctrine of common purpose at

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279 K.J.M.Smith supra note 167 at 232
280 P.Gillies supra note 256 at 140
281 Idea developed from a reading of Clarkson and Keating supra note 167 at 511
282 The scholar´s views were considered in the Chapter on South Africa.
283 D.Brown supra note 254 at 8

actions contemplated as possible deviations from the agreed crime, have the courts laid down a rule that is too wide?" He argues that this stance is capable of having draconian effects, as for example people at the edge of a crowd which stones a victim to death can also be liable for murder.[284] In the writer´s opinion this is another reason why the doctrine of common purpose should be relinguished as it has the tendency to cast the net too wide. The fact that a person can be convicted for murder even if he played a minor role shows the harshness that characterises the application of the common purpose doctrine.

The other reason which can be advanced for the abandonment of the common purpose doctrine is that referred to earlier on, that of the far reaching effects flowing from the conviction for murder where someone played a minor role but is convicted of the main charge simply because he was part of the group which participated in the common purpose or he foresaw the possibility of the perpetrator being killed. The secondary party has much to lose in his social life; not only is there a possibility of a long term of incarceration, and in other circumstances, a death sentence (as in Zimbabwe) but, also the convicted party cannot assume public office or become a Company director. It is submitted that the doctrine of common purpose can be done away with without any adverse effects to the prosecution of matters where several parties acted together to achieve a particular end.

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[284] ibid

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