THE DEVELOPMENT OF THE DOCTRINE OF COMMON PURPOSE SUBSEQUENT TO THE JUDGMENT IN S v SAFATSA 1988 1 SA 868 (A)

(WITH SPECIFIC REFERENCE TO THE GENERAL PRINCIPLES OF CRIMINAL LIABILITY)

by

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SECTION I: INTRODUCTION

> Si in rixa percussus homo perierit, ictus unius cuiusque in hoc collectorum contemplari oportet.[1]

The doctrine of common purpose, which hails from English law, was introduced into South African law via the **Native Territories Penal Code**.[2] The first South African criminal case[3] in which this doctrine was applied outside the field of application of the abovementioned act, was R v Garnsworthy[4], where it was formulated as follows:

> 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 of 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.[5]

According to Visser and Vorster,[6] this doctrine was probably imported into our law due to difficulties experienced in

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1. D XLVIII.8.17: 'If a man dies after having been struck in the course of a quarrel, the blows of every one who took part in this should be investigated' - own translation.

2. Section 78 of the **Native Territories Penal Code Act** 24 of 1886 (C) provided: 'If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.' (Quoted in Rabie "The doctrine of common purpose" (1971) **SALJ** 229.) See also R v Taylor 1920 EDL 318 323.

3. It was also applied in the earlier civil case of McKenzie v Van der Merwe 1917 AD 41.

4. 1923 WLD 17.

5. 19.

6. Visser and Vorster **General Principles of Criminal Law** 691.

proving which individual out of more than one possible participant actually caused the death of a deceased.[7]

Since this early application, the doctrine of common purpose has been relied on extensively by the courts.[8] Although the doctrine has largely found application in cases of murder, it has also been applied in cases of treason,[9] public violence,[10] assault,[11] rape[12], housebreaking[13] robbery[14] theft[15], arson,[16] incitement,[17] conspiracy[18] and culpable homicide.[19] In this dissertation the emphasis will be on the relation between the doctrine of common purpose and the crime of murder as a materially defined crime - a so-called "consequence crime". (Due to the close relation between murder and culpable homicide, certain aspects of the latter offence will also be examined.) The statements made regarding the crime of murder could of course **mutatis mutandis** be applied to other common law and statutory crimes as well.

Visser and Vorster explain that the doctrine of common purpose has been adapted in order to bring it into line with the present-day subjective approach in determining

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7. See also Duba "What was wrong with the Sharpeville Six decision?" (1990) **SACJ** 185.

8. See eg Rabie **op cit** 230.

9. S v Banda 1990 3 SA 466 (BGD).

10. S v Mashotonga 1962 2 SA 321 (SR) - in fact, common purpose is one of the elements of the crime of public violence.

11. R v Bayat 1947 4 SA 128 (N); S v Maree 1964 4 SA 545 (O).

12. Thebe v S 1961 2 PH H247 (A).

13. R v Grobler 1918 EDL 124.

14. S v Nkombani 1963 4 SA 877 (A).

15. S v Mongalo 1978 1 SA 414 (O).

16. R v Mapolisa 1965 3 SA 578 (PC).

17. R v Segale 1960 1 SA 721 (A).

18. R v Njenje 1966 1 SA 369 (SRA).

19. See Section V **infra**.

intention.[20] In terms of the more recent application of "common purpose" it can be formulated as follows:

> 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.[21]

According to Rabie, the practical effect of this would be the following in the case of murder: where a number of persons have a common purpose to commit a crime and they assist one another in the commission of that crime, all are guilty of murder if someone is killed in the process and if all had intent, usually in the from of dolus eventualis, in regard to the victim's death, without the question being posed whether the conduct of each is causally connected with the victim's death.[22]

The question of a causal relationship (as far as the so-called materially defined crimes are concerned) had long been a vexed issue, and prior to 1988 two distinct views could be distinguished. On the one hand there were cases in which the courts emphasized that the doctrine of common purpose could not be used to render an accused who did not causally contribute to the death of the deceased, liable for murder.[23] In other cases the courts indicated (albeit by implication) that a causal **nexus** was not required where the doctrine of common purpose was relied upon.[24]

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20. Visser and Vorster **loc cit**; Rabie **Deelnemingsleer in die Strafreg** 243-244.

21. Burchell and Milton **Principles of Criminal Law** 334-335. See also Burchell and Hunt **Criminal Law** 430; De Wet and Swanepoel **Strafreg** 192; Joubert (ed) **LAWSA** 113 par 117; Visser and Vorster **loc cit**; Snyman **Strafreg** 281; Whiting "Joining in" (1986) **SALJ** 38.

22. Rabie **loc cit**.

23. S v Thomo 1969 1 SA 385 (A) 399-400H; S v Williams 1980 1 SA 60 (A); S v Maxaba 1981 1 SA 1148 (A) 1155.

24. See eg R v Mgxwiti 1954 1 SA 370 (A); R v Dladla 1962 1 SA 307 (A); S v Malinga 1963 1 SA 692 (A); S v Madlala 1969 2 SA 637 (A); S v Khoza 1982 3 SA 1019 (A); S v Daniels 1983 3 SA 275 (A); S v Nkwenja 1985 2 SA 560 (A).

This uncertainty was finally settled by the Appellate judgment in S v Safatsa and Others[25], where it was expressly held (per Botha JA) that a causal connection between the acts of each partner to the common purpose and the death of the deceased is not required. Although this decision largely ended the debate surrounding the issue of causation, it left a lot of questions unanswered. The purpose of this dissertation is to examine certain aspects of the development of the doctrine of common purpose as set out in Safatsa and subsequent decisions,[26] in order to ascertain to what extent these questions have been answered (if at all).

The specific issues that will be addressed are the following: common purpose and the element of causation, the basis of common purpose liability, the relation between common purpose and **mens rea**, the applicability of common purpose in negligence crimes (with specific reference to culpable homicide) and the question of dissociation from common purpose. It will also be necessary to examine the way in which evidence has been evaluated as a subsidiary issue in order to ascertain whether any changes have taken place in this sphere. In order to place certain developments in the correct context, it will on occasion be necessary to refer to decisions preceding Safatsa as well.

It can safely be said that the Safatsa decision was not equally well received in all quarters.[27] Due to the effect **inter alia** of the mandatory death penalty,[28] a lot of what appeared to be politically motivated criticism was levelled at the decision. It is not the purpose of this dissertation to explore this:

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25. 1988 1 SA 868 (A). Incorrectly quoted in the South African Law Reports, it should read Sefatsa - see Diar **The Sharpeville Six** 5; Cameron "Inferential reasoning and extenuation in the case of the Sharpeville Six" (1988) **SACJ** 243n2.

26. Please see **Annexure A** for the dates of judgments in Safatsa and subsequent decisions. This is included to facilitate reference.

27. See eg Burchell and Milton **op cit** 337; Davis "Capital punishment and the politics of the doctrine of common purpose" **in** Hansson & Van Zyl Smit (eds) **Towards Justice?** 143-145; Duba **op cit** 180; Cameron **op cit** 243-260; Lund "Extenuating circumstances, mob violence and common purpose" 1988 **SACJ** 260-268.

28. The position regarding the mandatory death penalty has subsequently been amended by the **Criminal Law Amendment Act** 107 of 1990.

> I ignore the misguided comments of hysterical politicians masquerading as lawyers, following upon the judgment delivered in the case reported as S v Safatsa and Others 1988 1 868 (A).

Although this **dictum** of Botha JA in the subsequent case of S v Mgedezi[29] is worded rather strongly, it is important to stress at the outset that this dissertation will deal with the implications of Safatsa for the purposes of the general principles of criminal liability only.[30]

It has of course long been a subject of spirited academic debate whether the doctrine of common purpose should form part of South African criminal law at all. On the one hand there is a group which advocates the retention of this doctrine;[31] on the other there is the school of thought which maintains that this doctrine has no right of existence, because of its disregard of the general principles of liability (specifically the element of causation), and that it could with equal success be replaced by "accomplice liability".[32] This of course also involves the well-known debate whether it is legally possible to be an accomplice to murder.[33] (It is quite interesting to note that common purpose liability has been regarded throughout

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29. **S v Mgedezi** 1989 1 SA 687 (A) 702I.

30. Inasmuch Section II contains certain references to "policy considerations", this must be seen within the narrow confines of the issues under discussion in this specific section.

31. See Duba **op cit** 185; De Jager "Opset by groepsgeweld" (1992) **TSAR** 315; Matzukis "The nature and scope of common purpose" (1988) **SACJ** 233. The arguments in favour of the doctrine will be referred to in greater detail in Section II **infra**.

32. See Rabie **op cit** 236-237; Rabie "Kousaliteit en common purpose by moord" (1988) **SACJ** 242; Burchell and Milton **op cit** 348; Van Oosten "Deelneming aan gevolgsmisdade" (1979) **De Jure** 55-57; Ellis "Kante van die medepligtigheidsmisdaad" (1983) **De Jure** 356-372; Oosthuizen "Kousaliteit en common purpose in die strafreg" (1985) **TSAR** 105; Strauss "Oorsaaklikheidsverband en daderskap" (1960) **THRHR** 108. I consider this view to be preferable.

33. See eg Whiting **op cit** 54; Rabie "Medepligtigheid en ontbrekende kousaliteit by moord" (1988) **SACJ** 35-51; Maré "The liability of the joiner-in for murder" (1990) **SACJ** 26-34; Snyman **op cit** 291-293.

to found perpetrator liability.)[34] Unfortunately, the scope of this dissertation does not allow a discussion of this aspect; for present purposes, it will be accepted that the doctrine of common purpose - whether wisely or not - is still to be regarded as an integral part of South African criminal law.

There are some other interesting aspects of common purpose liability which unfortunately could not be addressed here either: the position of the so-called "joiner-in"[35] (i.e. where participation in a common purpose to kill commences after the deceased has been fatally wounded but while he is still alive)[36]; the applicability of the doctrine of common purpose in cases of "strict liability";[37] the role of "deindividuation" in common purpose cases and the possibility that deindividuation might serve to eliminate imputability (and thus criminal liability) instead of just serving as mitigation - the way in which it has featured up to now.[38]

On a technical level it might be mentioned that the term "common purpose"[39] will be preferred throughout. Although different terms, eg "common intent"[40], "gemeenskaplike

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34. Whiting loc cit; Rabie "Kousaliteit en common purpose" (1988) SACJ 239; Burchell and Milton op cit 347.

35. See on this subject: Whiting op cit 38-54; Maré op cit 24-38; Snyman op cit 285-287; S v Motaung 1990 4 SA 485 (A); S v Dladla 1991 1 SASV 465 (A).

36. The situation that has been dealt with throughout here is one where participation in the common purpose commences before the deceased has received the fatal wound. See also in this regard S v Motaung 1990 4 SA 485 (A) 509B-D; Burchell and Milton op cit 340.

37. This aspect has received no attention in the literature or case law yet.

38. See Davis op cit 146-148; Foster "Expert testimony on collective violence" in Hansson and Van Zyl Smit (eds) op cit 154-172; S v Thabetha 1988 4 SA 272 (T) 280D-281F; S v Motaung 1990 4 SA 485 (A) 526I; S v Matshili 1991 3 SA 264 (A) 270J-274A; S v Khumalo 1991 4 SA 310 (A) 360I-362B.

39. The Afrikaans equivalent being "gemeenskaplike oogmerk".

40. See Rabie "The doctrine of common purpose" (1971) SALJ; he suggests that under certain circumstances this might actually be more apt - 238.

opset"[41] or "gemeenskaplike doel"[42] have been used in literature and certain judgments, it is felt that "common purpose" denotes the implications of the doctrine with the most precision, and that it also serves to distinguish between "purpose" and "intent" (in the sense of dolus) as one of the elements of criminal liability.

It is perhaps a little optimistic to presume that this enquiry will contribute towards "curing a position in our criminal law which has for many years suffered from an overdose of sophistic reasoning and severely twisted principles".[43] An attempt will however be made to indicate that although the doctrine of common purpose has been subject to some degree of development since Safatsa, it is still a minefield of vagueness and uncertainty.

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41. S v Van der Merwe 1991 SACR 150 (T) 155I; De Beer "Strafbare manslag" (1988) Die Landdros 76.

42. S v Nzo 1990 3 SA 1 (A) 12D.

43. Hugo "Common Purpose and causation" (1969) SACJ 391.

SECTION II: THE ELEMENT OF CAUSATION

1. INTRODUCTION:

> Moord is die wederregtelike en opsetlike **veroorsaking** van die dood van 'n ander mens.[44]

In this section the approach to the element of causation as it appears from the judgment in S v Safatsa[45] and subsequent decisions will first be examined. In the second place, possible reasons for this approach will be evaluated with reference to Safatsa and later judgments, as well as the opinions of certain writers.

2. GENERAL APPROACH TO CAUSATION:

2.1 S v SAFATSA 1988 1 868 (A):

In this case the Appellate Division was called on to decide "once and for all" on the question of causation in cases where a common purpose was alleged.[46] Botha JA phrased the question in the following terms:

> Thus the question that must be faced squarely is this: in cases of the kind commonly referred to in our practice as cases of "common purpose", in relation to murder, is it competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct individually caused or contributed causally to the death of the deceased?[47]

After a close scrutiny of the relevant decisions, Botha JA comes to the conclusion that, in spite of the uncertainty created by a number of cases,[48] the correct legal position - although never stated unequivocally - is that in cases of common purpose, the act of one participant in causing the death of the deceased, is imputed as a matter of law, to the other participants, provided that the necessary **mens rea** is present.[49]

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44. Snyman op cit 435. Emphasis supplied.

45. 1988 1 SA 868 (A).

46. 874D.

47. 894G-H.

48. Eg S v Thomo 1969 1 SA 385 (A); S v Williams 1980 1 SA 60 (A); S v Maxaba 1981 1 SA 1148 (A). See also Section I supra.

49. See 896D-E and 898A.

> That being the existing state of the law relating to common purpose, it would constitute a drastic departure from a firmly established practice to hold now that a party to a common purpose cannot be convicted of murder unless a causal connection is proved between his conduct and the death of the deceased.[50]

Botha JA does address the argument that causation is a fundamental element in the definition of the crime of murder which cannot be ignored, (and that the concept of active association with the act of killing by another is too vague to serve as a touchstone for liability): he states that in many cases where acceptable - and required - results are achieved by means of imputing the act of killing by one person to another by virtue of a common purpose, the adherence to the requirement of a causal connection between the conduct of the latter person and the death of the deceased would necessitate stretching the concept of causation, **inter alia** by resorting to the device of "psychological causation", to such limits as to border on absurdity.[51] In the process there would be a greater measure of vagueness and uncertainty than in regard to the application of the test of active association with the common purpose. The latter test simply involves an assessment of the facts of the particular case, and the factual issues to be resolved should not prove to be more difficult to resolve than many other issues encountered in any criminal case.[52]

He explains that in cases of common purpose the act of one participant in causing the death of the deceased is **imputed**, as a matter of law, to the other participants.[53]

The principle of imputation, which according to Rabie[54] and Burchell,[55] lies at the heart of common purpose liability, can be explained as follows:

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50. 900H. Emphasis supplied.

51. 901B-D.

52. 901D-E.

53. 898A-B.

54. Rabie op cit 235.

55. Burchell 1990 "S v Nzo 1990 3 SA 1 (A)" (1990) SACJ 348.

> Die handeling van die een of meer wat inderdaad die dood veroorsaak het, word beskou as die handeling van al die deelgenote. Dit is gevolglik nie belangrik om uit te maak of daar tussen elke beskuldigde en die slagoffer se dood 'n kousale verband bestaan nie.[56]

In spite of any criticism which might previously have been levelled against the principle of imputation,[57] the judgment in Safatsa is quite unequivocal. The doctrine of common purpose (and along with it, the principle of imputation) has now been granted express approval, in spite of the fact that it presents a significant departure from the general principles of criminal liability. (It is however important to point out that Safatsa did not herald any new developments in the law relating to common purpose; it merely served to clarify the state of the law as it had existed previously and to end any uncertainty which had prevailed up to this point.[58])

2.2 SUBSEQUENT DECISIONS:

In S v Mgedezi[59], one of the most important features of the State case was that no state witness saw any of the accused actually inflicting any injury upon any of the four deceased which caused or contributed causally to the death of any of the deceased, nor was any of the accused seen physically to assault the person referred to in Count 5 (attempted murder).[60] Botha JA comments as follows:

> The absence of evidence that any of the accused committed any act which was directly and physically linked to the causing of the death of any of the deceased or to the assault upon None means that liability for the deaths or the assault can attach to the accused only if the State proved that the accused acted in common purpose with those whose acts caused the deaths of the deceased or who took part in the assault upon None.[61]

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56. Rabie "Kousaliteit en common purpose by moord" (1988) SACJ 237. See also Rabie "The doctrine of common purpose" (1971) SALJ 235.

57. See eg Rabie op cit 236-237.

58. Matzukis op cit 227; Rabie "Kousaliteit en common purpose" (1988) SACJ 237-238.

59. 1989 1 SA 687 (A).

60. 698F-G.

61. 698G-H.

The Court then proceeds to set out the five requirements which have to be met in order to come to the conclusion that the accused did in fact act in common purpose with those whose acts caused the deaths of the deceased.[62] In principle, the same approach regarding causation is followed as in Safatsa.

In S v Memani[63], Goldin JA agrees with the conclusion reached in Safatsa that under our common law it is not required to establish causation as a 'fundamental element in the definition of the crime of murder'.[64]

The same approval is found in S v Motaung[65], where it is stated expressly that any uncertainty in regard to the issue of causation has been dispelled by Safatsa;[66] in S v Khumalo[67] it is said that in cases of "gesamentlike optrede" the requirement that the accused must have committed the fatal **actus reus** is not always adhered to.[68] Another decision where Safatsa is referred to with obvious approval is S v Van der Merwe[69].

Friedman J makes the following statement in S v Banda[70]:

> Safatsa's case unfortunately may have conveyed the impression on a mere cursory reading that in cases of murder, a causal connection between the acts of each participant in causing the death of the deceased need not be proved.[71]

This statement is somewhat strange, especially in the light of the fact that Friedman J does align himself with the "amplification of the law relating to common purpose", as

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62. 705I-706B. See also Section III **infra**.

63. 1990 2 SACR 4 (TkA).

64. 7B-C.

65. 1990 4 SA 486 (A).

66. 509D.

67. 1991 4 SA 310 (A).

68. 341G.

69. 1991 SACR 150 (T) 156C.

70. 1990 3 SA 466 (BGD).

71. 499B-C.

set out in Safatsa and Mgedezi.[72] (He also states that he need not for the purpose of this case concern himself with the controversy surrounding the issue of causation.)[73]

3. POSSIBLE MOTIVATIONS FOR THIS APPROACH:

3.1 S v SAFATSA 1988 1 SA 868 (A):

The trial court in Safatsa dealt with the liability of the six accused by way of reference to "mededaders" and "medepligtiges", i.e. so-called "accomplice liability".[74] Botha JA however, prefers to make use of the doctrine of common purpose:

> It is more usual, and in my view, with respect, **more appropriate** to deal with the liability of these accused for murder on the basis of what is called in our practice 'common purpose', and it is on that basis that I proceed to discuss the matter.[75]

He does not advance specific reasons for this point of view, but it is once again reiterated in his discussion of Burchell and Hunt's statement that "there is no magic about the doctrine of common purpose"[76]:

> I should add that I myself see no 'magic' in the practice of the Courts - but I do see a lot of common sense and expedience in it.[77]

It should already at this stage of the enquiry be quite clear that Botha JA is of the opinion that the application of this doctrine (to be preferred to "accomplice liability") goes some way towards serving certain practical demands. This is confirmed by his remark that the English origin of the doctrine of common purpose is no reason for rejecting it, "if it satisfies the exigencies of the administration of our own criminal law"[78].

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72. 500D.

73. 501C-D.

74. See Safatsa 1988 1 SA 868 (A) 893I-J.

75. 894C. Emphasis supplied.

76. See Burchell and Hunt Criminal Law 430.

77. 899H.

78. 900J-901A.

3.2 SUBSEQUENT DECISIONS:

In the judgment in Petersen's case, Botha JA once again made it quite clear that he considered accomplice liability and common purpose liability to be equally acceptable, with the latter being more practicable:

> Of 'n mens nou die saak benader uit die oogpunt van medepligtigheid, of soos in die praktyk gebruiklik is, uit die oogpunt van gesamentlike optrede met 'n gesamentlike oogmerk wat meebring dat die dader se handeling aan die appellant toegereken moet word...[79]

In Banda, Friedman J refers to the Safatsa case with apparent approval:

> This setting out of the legal position is not only correct in principle, but is **pragmatic**...[80]

He is also in favour of the doctrine **per se**:

> Although this doctrine has been criticised... I nevertheless believe that the doctrine of common purpose is a **useful and practical** method of determining liability or innocence where more than one person is involved in a joint unlawful activity pursuant to their common design and objective...[81]

3.3 OPINIONS OF WRITERS:

The question of course arises what these "exigencies of the administration of our criminal law", referred to by Botha JA, would be. Snyman provides at least a partial answer:

> Indien 'n mens derhalwe die aanspreeklikheid van 'n individuele lid van die groep bepaal aan die hand van die gewone beginsels van oorsaaklikheid, is daar 'n wesenlike gevaar dat al twintig lede van die groep aanspreeklikheid vir moord mag vryspring weens die afwesigheid van bewys van 'n oorsaaklike verband tussen elke lid se handeling en Y se dood.[82]

Duba advances the following explanation:

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79. 423H-I.

80. 499J. Emphasis supplied.

81. 501D-E.

82. Snyman **Strafreg** 280.

> Common purpose liability was devised by the courts to deal with situations which made it difficult for the court to convict on the ordinary essentials of criminal liability due to the lack of one or more elements.[83]

(He is however in favour of retaining the principle of common purpose, because of the difficulty of dealing with situations where a group of persons expressly agree to rob and kill and part of the group executes the agreement while part of the group provides the means of execution.[84])

The practical demands of the situation were described succinctly in Khumalo:

> Dit was, kortom, die optrede van barbare. Weersinwekkend. Geen beskaafde, geordende gemeenskap kan soiets gedoog nie. Dit is optrede wat volstrek gestraf en swaar gestraf moet word.[85]

It is quite interesting to note the description of the background to the Khumalo case as set out by De Jager[86] (it is clear from his article that De Jager approves of the way in which these demands were addressed)[87]:

> Vir 'n geruime tyd al word die Suid-Afrikaanse gemeenskap deur groepsgeweld geteister. Ook die onderhawige feitestel bied 'n sprekende voorbeeld van sinnelose wraakgeweld. Smeulende ontevredenheid het op die weersinwekkendste, lafhartigste en mees primitiewe wyse tot uitbarsting gekom. 'n Enkele weerlose simbool van staatsgesag is agtervolg, met klippe bestook, gesteek en uiteindelik deur 'n bloeddorstige skare aan die brand gesteek.[88]

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83. Duba op cit 185.

84. Ibid. This is, with respect, a classic example of accomplice liability!

85. 360F-G.

86. See Hansson and Fine "Expert testimony on community attitudes to sentencing: the case of the Upington 26" in Hansson and Van Zyl Smit op cit 175-176 for another view.

87. See De Jager op cit 313-314.

88. De Jager op cit 313.

For Burchell and Milton, there is a very direct answer to the question of why the general principles of liability must "make way" for common purpose liability:

> The reason for the common-purpose rule (which involves a departure from the general principle that, in consequence crimes, the prosecution must establish a causal link between the conduct of the accused and the unlawful consequence) is clearly one of crime control.[89]

According to the learned writers, the practical difficulty of proof confronting the prosecution in establishing a specific causal link between the conduct of each participant in a common purpose and the ultimate unlawful consequence caused by another participant in the same common purpose has played a prominent part in entrenching the principle of imputation. The existence of (mandatory) capital punishment for certain offences has also had an overall detrimental effect on the uniform application of general principles of liability. On the one hand, the manipulation of general principles has been directed at protecting an accused from the exposure to the death penalty (for instance the "partial excuse" rule in cases of provocation). On the other hand, the common purpose principle, which permits a court to regard participants in a common purpose as co-perpetrators even though they do not satisfy the definitional elements of the crime, has 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.[90]

They argue (correctly, it is submitted) that the accused in Safatsa would have been liable to conviction for conspiracy, incitement or public violence, and that the punishment for these offences could well be severe enough to have both the desired deterrent effect and give vent to society's feeling that such conduct should be condemned.[91] (This is apart from the fact that they are of the opinion that accomplice liability would provide a far more attractive alternative.)

4. CONCLUSION:

In conclusion, it can be said that the view expressed in Safatsa concerning the element of causation has now become firmly entrenched, as illustrated by subsequent decisions. As Du Plessis remarks (in connection with the extention of

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89. Burchell and Milton op cit 338-339.

90. Burchell and Milton op cit 347.

91. Burchell and Milton op cit 347-348.

the doctrine of common purpose to culpable homicide in S v Kwadi[92]):

> Dit sal nie help om die beswaar te opper dat die kousaliteitsvereiste daardeur negeer word nie, aangesien Safatsa (19881 SA 86 (A) en sien ook Mgedezi 1989 1 SA 687 (A)) alle debatvoering ten opsigte van die uitskakeling van die kousaliteitsvereiste akademies gemaak het.[93]

(It is perhaps important to note that the element of causation is not be necessarily absent in all cases of common purpose: Rabie points out that where the common purpose arose from a prior agreement, a causal relationship may be seen because of the agreement which led to the victim's death.[94])

It appears from the cases cited that the disregard of general principles of criminal liability (more specifically the element of causation) brought about by the application of the doctrine of common purpose is based on the fact that this doctrine is more pragmatic and simply more "user friendly" (for the prosecution, that is) in situations where it might be awkward to prove a causal connection between the conduct of a certain participant and the fatal result.[95] The application of this doctrine for these purposes has understandably made for some extremely unpopular judgments.[96]

When looking for instance at the case of S v Nzo[97] against the socio-political background prevailing at the time (more specifically the position of the ANC), one cannot help but wonder to what extent "the exigencies of criminal law" played a role in the eventual findings of the majority,[98]

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92. 1989 3 SA 524 (NC). See also Section V infra.

93. Du Plessis "Gemeenskaplike oogmerk by strafbare manslag?" (1990) TSAR 147.

94. Rabie "The doctrine of common purpose" (1971) SALJ 238; also Maré "Gemeenskaplike oogmerk by strafbare manslag" (1986) SACC 64.

95. See also Rabie "Kousaliteit en common purpose" (1988) SACJ 238; Oosthuizen "Kousaliteit en common purpose in die strafreg" (1985) TSAR 103-104.

96. See eg Burchell "S v Nzo 1990 3 SA 1 (A)" (1990) SACJ 345.

97. 1990 3 SA 1 (A).

98. See Section III infra.

(especially in the light of the remark by Steyn JA, who delivered the minority judgment in Nzo, that the majority judgment constituted an attempt to apply this doctrine to a factual situation "waarop dit nie toepasbaar is nie en waarvoor dit nie bedoel is nie"[99]).

In the final analysis, the use of the doctrine of common purpose (with the concomitant disregard of the requirement of causation) cannot be justified.[100] It seems to be common cause that the State is often confronted in practice with great difficulties in trying to prove a causal **nexus** between the individual actions of a participant and the eventual result.[101] A difficulty in evidence should however be no justification for disregarding a substantial element of a crime.[102]

> Should fundamental principles of justice to the individual, which include proof of the causal element in consequence crimes, be made to bend to accommodate evidential difficulties?[103]

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99. 17D.

100. See also De Wet and Swanepoel **op cit** 193.

101. See Joubert (ed) **op cit** 125 par 128; Rabie **op cit** 238.

102. Strauss **op cit** 109; Rabie "The doctrine of common purpose" (1971) **SALJ** 238-239; Joubert (ed) **loc cit**.

103. Burchell and Milton **op cit** 339.

SECTION III: THE BASIS OF COMMON PURPOSE LIABILITY

1. INTRODUCTION:

Although it now seems to be established that a causal link need not be proved when common purpose is alleged, the judgment in Safatsa unfortunately did not solve all the problems relating to common purpose liability. As Matzukis points out, it is unfortunate that the case did not occasion an enquiry into the nature of common purpose and the manner in which it is constituted.[104]

In a number of earlier decisions, the concept of **mandate** has featured as a possible basis of common purpose liability.[105] In most cases, an actual mandate could not be proved,[106] and accordingly the mandate was deemed to be an "implied" one (that is, a mandate which is derived from the circumstances)[107]. The liability of participants who did not inflict the fatal blow would then depend on the question of whether the unlawful criminal result fell within the mandate.[108] This concept has been criticized most vehemently, in particular by De Wet and Swanepoel:

> Ons howe het egter met hulle doctrine of common purpose die aanspreeklikheid van iemand wat 'n party is tot 'n afspraak om 'n wandaad te verrig as 'n soort kontraktuele aanspreeklikheid gaan beskou waardeur die een persoon dan belas word met kriminele aanspreeklikheid vir die dade van 'n ander.[109]

The learned writers point out (correctly, it is submitted) that the reason why such a mandate would be unacceptable, apart from being a principle of the law of contract, is because it would be invalid - as being **contra bonos**

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104. Matzukis **op cit** 230.

105. See R v Duma 1945 AD 410 416-417; R v Mkize 1946 AD 197 205-206; R v Mtembu 1950 1 SA 670 (A) 684; R v Mgxwiti 1954 1 SA 370 (A) 382; R v Motaung 1961 2 SA 209 (A); S v Nhiri 1976 2 SA 789 (RA) 791.

106. Joubert **op cit** 124 par 127.

107. Rabie **op cit** 230.

108. Snyman **op cit** 281-282.

109. De Wet and Swanepoel **op cit** 192.

mores.[110] Another objection to the "mandate" basis is that the mandate is virtually always construed fictitiously.[111]

Burchell and Milton[112] submit that there are two possible criteria on which common purpose could be based: agreement - whether express or implied - or active association.[113] The important observation is made that active association is a far wider concept than agreement and may cover many situations other than agreement.[114]

Express agreement would involve "the articulated achievement of **consensus ad idem** between the parties that one or more of them should bring about the death of the deceased".[115] There are however, some cases of common purpose which cannot be explained in terms of agreement or **consensus** between the parties to it; such instances of common purpose without consensus typically involve murderous attacks by a crowd of people.[116] This would constitute cases of active association.

Matzukis concedes that active association is less easily defined than agreement.[117] It would entail three requirements, (as formulated by Whiting)[118], viz that the party to whom the act is to be attributed must firstly be present on the scene at the time of its commission. Secondly, he must intend to associate himself with the commission of the act by the other party or to make common cause with the other party in its commission. Thirdly, he must give expression to this intention by some overt conduct (such as joining a crowd obviously intent on the commission

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110. De Wet and Swanepoel op cit 193; see also Visser and Vorster op cit 698; Snyman loc cit; Matzukis op cit 232.

111. De Wet and Swanepoel op cit 197; Rabie op cit 237; Strauss op cit 100.

112. Burchell and Milton op cit 345.

113. See also Matzukis op cit 231; Joubert (ed) op cit 114 par 118-119.

114. Matzukis op cit 231-232. See also Snyman op cit 283.

115. Matzukis op cit 231.

116. Whiting op cit 38-39.

117. Matzukis loc cit.

118. Whiting op cit 39.

of the act in question and showing solidarity with whomever it is who actually commits it).[119]

It would appear that the concept of active association as a possible basis of common purpose liability is rather vague:

> ... it seems clear that some kind of overt conduct (objectively ascertainable active association) on the part of the accused is necessary, indicating a common cause with the other party who commits the murder.[120]

In this section an attempt will be made to ascertain on which basis common purpose liability has been placed in Safatsa and subsequent decisions, and in cases where active association has been relied on, to determine how the term "some kind of overt conduct" has been interpreted. This will also entail an examination of the way in which evidence is evaluated in order to arrive at a finding of common purpose liability.

2. S v SAFATSA 1988 1 868 (A):

As far as the facts were concerned, Botha JA was satisfied that the trial Court had made the correct findings regarding intention and active association:

> In the case of each of these accused, the conduct described above plainly proclaimed an active association with the purpose which the mob sought to and did achieve, viz the killing of the deceased. And from the conduct of each of these accused, assessed in the light of the surrounding circumstances, the inference is inescapable that the mens rea requisite for murder was present.[121]

It is sufficient that the individual participant actively associated himself with the common purpose.[122] There is no need for an antecedent agreement: a common purpose can arise on the spur of the moment, and can be inferred from the facts surrounding the active association with the "furtherance of the common design".[123]

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119. See also the five requirements set out in S v Mgedezi 1989 1 SA 687 (A) infra.

120. Matzukis op cit 232-233. Emphasis supplied.

121. 893G-I.

122. 901H.

123. 898B.

Botha JA makes the following statement concerning the question of "implied mandate":

> ... the much maligned notion of implied mandate seems to me not to be without merit, now that it is well recognized that the liability of an individual accused rests on his own mens rea alone.[124]

It is important to note here that although Botha JA prefers active association as a basis for common purpose liability, he does not actually reject the concept of implied mandate either.

3. S v MGEDEZI 1989 1 SA 687 (A):

One of the concerns of the post-Safatsa furor, was whether the participation of each individual accused in the murder of the deputy-mayor constituted sufficient "active association" in the crime to satisfy the element of unlawful conduct.[125] The fact that there seems to be no clear delineation of the term "active association" appears to have complicated this problem. In Mgedezi, the Appellate division "elucidated and expounded"[126] the requirements for liability in terms of the doctrine of common purpose.

Botha JA is of the opinion that the trial Court had erred in dealing with the evidence by not giving proper consideration to the evidence of each accused. It had erred in precluding itself from its duty to consider the evidence of each accused separately and individually, to weigh up that evidence against the particular evidence of the individual state witness(es) who implicated that accused, and upon that basis then to assess the question whether that accused's evidence could reasonably possibly be true.[127]

> A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions en masse.[128]

In evaluating the finding of the trial court, Botha JA explains that the trial court should have considered, in relation to each individual accused whose evidence could

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124. 900H-J.

125. Burchell and Milton op cit 347.

126. Visser and Vorster op cit 700.

127. 703E-F.

128. 703B.

properly be rejected as false, the facts found proved by the state evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose.[129]

In the absence of proof of a **prior agreement**,[130] an accused who was not shown to have contributed causally to the killing or wounding, can be held liable for those events, on the basis of the decision in Safatsa, only if certain prerequisites are satisfied:

> In the first place he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common purpose with those who were actually perpetrating the assault. Fourthly, he must 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 the others. Fifthly, he must have had the requisite **mens rea**; so, in respect of the killing of the deceased he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.[131]

Botha JA also elaborates on the concept of "common purpose" itself, by saying that the indispensable notion of an **acting in concert** is inherent in the concept of imputing to an accused the act of another on the basis of common purpose. From the point of view of the accused, the common purpose must be one which he shares consciously with the other person. A "common purpose" which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former.[132]

Another important point that is raised is that a mere spectator amongst a crowd present at the scene of the violence cannot be held liable; something more than mere presence is required.[133]

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129. 703I-J

130. 705F-G.

131. 705J-706B.

132. 712B-D.

133. 702H-I.

Above and beyond the fact that the Mgedezi judgment provides a measure of clarification of some of the aspects of common purpose that Safatsa did not elaborate on,[134] the value of the judgment lies specifically in the fact that there is a clear distinction between situations where there is no proof of a prior agreement (in which case the five requirements would have to be met before liability based on common purpose could follow) and situations where there is in fact a prior agreement.[135]

4. THE DEVELOPMENT IN SUBSEQUENT DECISIONS:

In the light of the debate between "agreement" and active association, the decision in S v Yelani[136] is of some interest. Following close in the wake of Mgedezi, the Court held in casu that if a person, who is the chairman of a meeting, with the necessary intent to kill, passes or authorizes what amounts to a sentence of death on another, with the subjective expectation that the sentence will be carried out, and the sentence is in fact carried out, he is liable for the death of the victim at the hands of those who perform the actual killing pursuant to a common intent, irrespective of whether or not he was present at the time of the actual killing.[137] One notes with interest that the Court refers to R v Nienje and Others[138] as authority.[139] Although the Court had been referred to Safatsa on the issue of common purpose by counsel for both the state and appellant,[140] the Court did not comment on the issue of Safatsa and active association. (This would have been the ideal opportunity to comment on the relationship between active association and prior agreement.) Important to note: judgment was delivered by Smalberger JA; Botha JA and Nicholas AJ concurred.

S v Petersen[141] offers an example of a situation where the Appellate Division refused to acknowledge that there was an acting in concert ("gesamentlike optrede") and accordingly

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134. See Parmanand "S v Mgedezi 1989 1 SA 687 (A)" 1989 Obiter 229.

135. See Burchell and Milton op cit 335.

136. 1989 2 SA 43 (A).

137. 46F-H.

138. 1966 1 SA 369 (SRA).

139. 46G.

140. See 44A-B.

141. 1989 3 SA 420 (A).

the appellant could not be held liable for murder. While acknowledging that where two persons participate in a robbery, and the one fatally injures the victim in the course of the assault, and the other subsequently acts in a manner which indicates that he associates himself with what has taken place, this subsequent conduct can be used to base an inference that he foresaw the possibility that the victim could be killed, and was reckless in regard thereto. Whether such inference is justified, will depend on the circumstances of each case. **In casu** such an inference could not be drawn, since there was no acting in concert by the appellant and the person inflicting the fatal wound beforehand, and no co-operation afterwards.[142]

In S v Jama[143] the Appellate Division did in fact rely extensively on the principles set out in Safatsa and Mgedezi.[144] Referring to the five requirements laid down in the latter case, Vivier JA remarks that all of these requirements have to be proved beyond a reasonable doubt in the case of each accused.[145] The third and fourth requirements, especially, could only be established by positive proof of the acts of each individual accused.[146] It is therefore necessary to consider the reliability of the evidence against each individual appellant in order to determine his liability.[147] (To adopt a global view of the totality of the defence cases in order to reject the evidence of an individual accused is not permissible.)[148] **Botha** JA and Hefer JA concurred.

A further illustration of the approach of the Appellate Division can be found in S v Nomokhlala[149]. The Court came to the conclusion that there was a reasonable doubt as to whether the second appellant had in fact, by taking the deceased by the hand, actively associated himself with the aggressors who had formed the common intention to kill the deceased.

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142. 425E-G.

143. 1989 3 SA 427 (A).

144. See 436D.

145. 436G.

146. 436I.

147. 436J.

148. 439D.

149. 1990 1 SACR 300 (A).

> In my judgment it cannot be held, without pushing the bounds of common purpose too far, that the State has proved beyond reasonable doubt that the second appellant became a party to the common purpose to kill the deceased.[150]

In the judgment in S v Memani[151], the Transkei Appellate Division (per Goldin JA) referred to Safatsa with approval:

> I respectfully agree with the conclusion by Botha JA that under our common law it is not required to establish causation as a 'fundamental element in the definition of the crime of murder'. **Active association with the acts of the person or persons which caused the death of the deceased can also justify a finding of his own mens rea and his guilt.**[152]

The meaning of the emphasized passage **supra** is, with respect, not entirely clear. Does this imply that active association in itself is sufficient to base an inference of **mens rea**? (If so, this would run counter to the established position that **mens rea** has to be determined independently.)[153]

The Bophuhatswana General Division (**per** Friedman J) has also confirmed in S v Banda[154] that it deems the position as formulated in Safatsa and qualified by Mgedezi, to be the correct one.

> This setting out of the legal position is not only correct in principle, but is pragmatic, and establishes the proper **nexus** in imputing the act of one accused to that of another in cases of murder on the basis of common purpose...[155]

Friedman J warns however, that in the absence of prior agreement or conspiracy, the doctrine of common purpose may not be used as a method to subsume the guilt of all the accused with nothing more. It cannot function as a "dragnet operation" to draw in all the accused: association by way of participation, and the **mens rea** of all the accused involved,

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150. 304H.

151. 1990 2 SACR 4 (TkA).

152. 7B-C. Emphasis supplied.

153. See Section IV **infra**.

154. 1990 3 466 (BGD).

155. 499J-500A.

are essential prerequisites.[156] Even if the State does prove a common purpose between the accused, then nevertheless it is the Court's duty to evaluate the evidence against each accused separately and to ascertain whether the principle of common purpose can be applied to each and every accused[157] - the Court must perform this duty as a matter of abundant caution to "ensure that justice is done in the case of each accused."[158]

S v Barnes[159] is another example of a situation where the appellant in question had not committed any assault on the deceased himself. Although the trial Court had found him guilty of culpable homicide on the basis that he had associated himself with the fatal assault on the deceased,[160] Booysen J held that there were certain difficulties in finding him guilty of having associated himself with the fatal assault; for instance, it was impossible to find how this association had manifested itself. (Mere presence, even with unexpressed approval, could not constitute association in this sense).[161]

> I lay stress upon the requirement that he must 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 the others, a requirement clearly not proved in this case.[162]

S v Nzo[163] afforded the Appellate Division an opportunity to comment on the situation where there was neither a prior agreement to commit murder, nor a common purpose relating specifically to the murder of the deceased. (It is undisputed that the appellants did share a broad common goal to commit certain acts of sabotage as members of the ANC.) The trial court held that there was no evidence of a common purpose to kill the deceased, but that there was a common purpose on the part of the "terrorists" to commit acts of sabotage, in the execution of which design the possibility

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156. 501E-F.

157. 500I; 502C-D.

158. 502D.

159. 1990 2 SACR 485 (N).

160. 489F.

161. 491A-B; 492H-I.

162. 492D-E.

163. 1990 3 SA 1 (A).

of certain "categories of fatality"[164] must have been foreseen. Hefer JA accepts this premise, and proceeds to find that in the view of clear evidence that the appellants continued to participate in the execution of the common design [the acts of sabotage], despite their foresight of the possibility of the murder, they fall squarely under paragraph (c) of the dictum in S v Madlala[165] - to the effect that the parties to a common purpose are liable for every foreseen offence committed by any of them in the execution of the design if they persist, reckless as to its possible occurrence.[166]

Hefer JA rejects the argument that the appellants' participation in the common design is insufficient and that evidence of their association with the murder as such is required to render them liable: he is of the opinion that this submission entails a disavowal of the principles stated in Madlala.[167] According to him there is no logical distinction between a common design relating to a particular offence and one relating to a series of offences, and therefore the argument that "some other crime" referred to in paragraph (c) of the Madlala dictum should only be taken to refer to a particular crime does not convince.[168]

The startling effect of the majority decision in Nzo (per Hefer JA with which Nestadt JA concurred) is that in the absence of any prior agreement to commit a specific offence, and in the absence of a common purpose to commit a specific offence and with no evidence of active association with the commission of the act, an accused can be convicted of this specific offence merely on the basis that he shared a broad common goal with the perpetrator (which goal could possibly have been enhanced by the commission of this act) and under circumstances where the accused foresaw that the offence might possibly be committed.[169]

It is possibly significant that the majority judgment does not refer to Safatsa or subsequent authority, but relies -

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164. 4G-H.

165. 1969 2 SA 637 (A).

166. 7B-D.

167. 8E.

168. 8F-H.

169. See the summary of Steyn JA in the minority judgment: 12G-H.

as far as this section of the judgment is concerned - squarely on Madlala.[170]

In a "strong and compelling dissenting judgment",[171] Steyn JA however held that neither of the appellants were guilty of murder since a broad, overarching common purpose to commit sabotage in the Port Elizabeth area is not sufficient to lead to conviction of the appellants for the murder of the deceased. He refers to the decision in McKenzie v Van der Merwe[172] and explains (correctly, it is submitted) that although this was a civil matter, the principles enunciated therein are also applicable in criminal law[173] - especially in this matter where the facts are analogous to such a large degree[174].

According to him, the salient feature of the McKenzie case and subsequent decisions is that common purpose liability should be limited to the commission of a specific offence, or to the case where another unplanned but foreseeable crime was committed in the course of the commission of the particular planned offence.[175] The dicta of the Appellate Division in Madlala, Safatsa and Mgedezi dealt with specific offences committed by numerous persons, and the exposition of the doctrine of common purpose in these cases applied only to such situations.[176] The extension of the doctrine to a more general basis was not intended.[177]

He is of the opinion that the doctrine of common purpose is founded (in the case of a non-perpetrator) on the principle of proximity (factual and in law) of the non-perpetrator to the commission of the offence in question.[178] In the light of this conclusion he cannot reconcile himself with the majority view:

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170. See specifically 7C-8H.

171. Burchell and Milton op cit 337.

172. 1917 AD 41.

173. 14A.

174. 16E.

175. 15F-G.

176. 15H.

177. 15I.

178. 16I.

> Die leerstuk van gemeenskaplike doel is volgens my oordeel nie reeds deur ons regspraak verbreed om 'n geval soos die onderhawige te dek nie, en daar bestaan geen regverdiging om dit in hierdie geval te doen nie... Daar was in die onderhawige geval verkeerdelik gepoog om daardie leerstuk toe te pas op 'n feite-kompleks waarop dit nie toepasbaar is nie en waarvoor dit nie bedoel is nie.[179]

S v Van der Merwe[180] dealt with the liability of a policeman for culpable homicide committed by a fellow policeman. The Court distinguishes between the facts **in casu** and the other judgments where it had been held that the doctrine of common purpose can be applicable in cases of culpable homicide,[181] on the basis that in all the other cases the act with which the accused had associated himself was also the act leading to the death of the accused. They were cases of assault where the accused had been a perpetrator, but his exact share and whether his act caused the death of the deceased, could not be ascertained. In this case however, the appellant was no party to the act leading to the death - he was in fact unaware of this - and could not be held liable.[182]

> Die kousale verband, selfs in die oordraagtelike sin waarin dit toegepas word, ontbreek dus hier geheel en al... Met die handeling wat die dood veroorsaak het, het die appellant niks te doen gehad nie.[183]

To hold the second appellant liable in this case would amount to an application of the much maligned **versari in re illicita** doctrine, which must be avoided at all costs.[184]

S v Khumalo[185] provided another example of a group killing situation. The Court refers to the judgments in Safatsa and Mgedezi with approval, and stresses the importance of the

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179. 17B-E.

180. 1991 SACR 150 (T).

181. See Section V **infra**.

182. 156J-157A.

183. 157A-C.

184. 158B. It is interesting to note the difference in approach between Van der Merwe and Nzo, especially when bearing in mind that according to precedent Nzo would be binding on Van der Merwe.

185. 1991 4 SA 310 (A).

concept of active association with the act of the person(s) causing the death of the deceased.[186]

It is quite interesting to note exactly what the Court deems to be "sufficient" active association. The participation of Accused number twenty in the events had consisted of his throwing stones at the house of the deceased and after the murder of the deceased, singing "Hey hey die hond is dood."[187] In addition to this he also mentioned to someone afterwards that they killed a policeman by stoning him, hitting him and then burning him. In reply to the argument that Accused number twenty's association with the attack on the deceased possibly did not include active participation in the murder, the Court replied as follows:

> Wat hy self presies gedoen het, is nie bewys nie, maar sodanige bewys is nie nodig vir skuldigbevinding nie.[188]

The only evidence of his participation in the actual killing itself, is his own report to the witness; this constitutes an unprecedented elaboration of the existing **dicta** that the State has to prove at least active association in the form of a positive act.[189] (There is direct evidence that he participated in the stoning of the house and the singing afterwards, but as the Court concedes,[190] this in itself would be insufficient to justify a conviction of murder.)

In S v Mitchell[191] the question arose whether the second appellant could be held liable for the act of the first appellant on the basis of the common purpose that the group had formed. It was held that the mere presence of the second appellant at the scene of the crime was insufficient to establish association by him with first appellant's actions.[192] Therefore he could not be held liable for murder.

The Court also held that the throwing of a brick (which was considerably larger than the stones which the rest of the

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186. 351B-F.

187. 357G.

188. 359B.

189. Cf the requirements set out in Mgedezi **supra**; see also Jama 1989 3 SA 427 (A) 436I.

190. 357H.

191. 1992 1 SACR 17 (A).

192. 22I.

group had picked up) involved means and consequences different from those contemplated by the parties to the agreement to throw stones[193]. Because of the different means employed by the first appellant, his actions "fell outside the scope of the common purpose",[194] and the second appellant could therefore not be held liable for assault either, since the throwing of a brick at the deceased can not be imputed to second appellant.

In the recent case of S v Singo[195], a very clear line was drawn between prior agreement and active association:

> Our case is similar to those which have been considered in a number of recent decisions of this Court, where a common purpose arose otherwise than by prior agreement, and was manifested simply by conduct... It is clear that in such cases liability requires, in essence, that the accused must have the intent, in common with the other participants, to commit the substantive crime charged (in this case, murder) and that there must be an active association by him with the conduct of the others for the attainment of the common purpose.[196]

(Unfortunately, the issues in dispute here did not warrant an extensive analysis of what active association would entail, since this matter actually dealt with dissociation from common purpose.[197])

5. CONCLUSION:

Bearing in mind the fact that one would expect the legal position regarding agreement and active association as potential bases of common purpose liability to be quite clear after Safatsa and Mgedezi, the practical application of these concepts reflect a different situation.

When regard is had, for instance, to the application of the doctrine of common purpose in Nzo and Khumalo[198] and the content that was given in these cases to the concept "some

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193. 22B.

194. 23E-F.

195. 1993 1 SACR 226 (A).

196. 233A-B.

197. See also Section VI infra.

198. See specifically the position of Accused number twenty set out supra.

kind of overt act", the conclusion seems inescapable that the Courts have not found a uniform approach to the basis of common purpose liability.

Although the distinction between common purpose arising from a prior agreement and common purpose based on active association is recognized in principle in most cases,[199] it is important to note that the vast majority of cases decided after Safatsa dealt with factual situations where active association, and not a prior agreement, was relevant.[200] Therefore it has not really been necessary for the Courts to demonstrate the effect of this distinction in practice. (S v Yelani[201] would constitute one exception.)

The effect of the decision in Mitchell is as yet unclear, but the reference to the actions of second appellant as "falling outside the scope of the common purpose" is strongly reminiscent of the mandate concept, and in the light of Botha JA's statement in Safatsa that this concept is not without merit, it would seem that the idea of mandate as a basis for common purpose liability still has to be reckoned with.

In conclusion it can be said that although active association (in situations where there is no prior agreement) is recognized by the Courts in principle, every case is decided on its own merits and in each instance, a potentially different interpretation of what would constitute active association is possible. As Parmanand remarks:

> ... on the thorny issue of common purpose and allied perfidious concepts such as **inter alia** active association, the last word has yet to be spoken.[202]

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199. Cf eg Singo supra.

200. See eg Petersen, Jama, Memani, Banda, Barnes, Motaung and Khumalo supra.

201. Supra.

202. Parmanand op cit 231.

SECTION IV: COMMON PURPOSE AND MENS REA

1. INTRODUCTION:

Even before the Safatsa judgment, it was trite law that the liability of an participant in a common purpose to commit an unlawful act depends on his own **mens rea**. This was stated expressly by the Appellate Division in S v Malinga[203]. The **mens rea** of one participant is never imputed to another.[204]

It is not necessary that intention in the form of **dolus directus** be present; **dolus eventualis** is sufficient (i.e. if the accused foresees the possibility that the acts of the participants with whom he associates himself may result in the death of the deceased and he reconciles himself to this possibility).[205]

Burchell and Milton point out that as far as the element of mens rea is concerned, the liability of any individual participant in a common purpose is assessed in the same way as an individual who is not a party to a common purpose.[206] However, two concerns regarding **mens rea** have emerged since Safatsa: when is the correct moment for assessing the **mens rea** of a participant in a common purpose, and is it necessary for a participant in a common purpose to foresee **the exact manner** in which the prohibited result (death of the deceased) ensues[207]? The latter issue has increasingly become contentious since S v Goosen[208], where it was held that a mistake as to the causal chain - i.e. the manner in which death is caused - can now under certain circumstances be material.[209]

The judgment in Safatsa and subsequent decisions will be examined, in the first place to ascertain what the general approach to the element of **mens rea** is. In the second place

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203. 1963 1 SA 692 (A) 694F.

204. Visser and Vorster op cit 691; Joubert (ed) op cit 119 par 124.

205. Snyman op cit 284.

206. Burchell and Milton op cit 341-342.

207. Burchell and Milton op cit 342 list a further concern: whether a participant to a common purpose can be found guilty of culpable homicide. This is dealt with **infra** - see Section V.

208. 1989 4 SA 1013 (A).

209. This judgment is specifically relevant in cases where **dolus eventualis** is alleged.

the two issues set out supra will be addressed, the latter with specific reference to the judgment in Goosen.

2. GENERAL ASPECTS:

Botha JA makes it quite clear in S v Safatsa[210] that the act of one participant, in causing the death of the deceased, can only be imputed to the other participants if the necessary mens rea is present.[211] He finds in casu that each of the accused had the requisite dolus in respect of the death of the deceased.[212]

In S v Mgedezi[213], the presence of mens rea was reiterated as being one of the five requirements that have to be met:[214]

> ... so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.[215]

In S v Petersen[216], Botha JA considered the most important question to be whether the State had proven beyond reasonable doubt that the appellant had the requisite mens rea in the form of dolus (albeit dolus eventualis).[217] The Court eventually held that the conviction of murder could not in casu be sustained, in the light of its finding that the accused did not have the serious injury or death of the deceased in mind.[218]

The two appellants in S v Munonjo[219] had been convicted by the court a quo on the basis that when they broke into the

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210. 1988 1 SA 868 (A).

211. 896D-E; 900I.

212. 901H-J.

213. 1989 1 SA 687 (A).

214. See Section III supra.

215. 706B-C.

216. 1989 3 420 (A).

217. 423H-I.

218. 424G-H.

219. 1990 1 SACR 369 (A).

house, they already had a common purpose to commit murder (in the sense of paragraph (c) of S v Madlala[220], i.e. **dolus eventualis**). Nestadt JA disagreed, because he felt that although their common purpose included the possible assault of the occupants of the house, the decisive question was whether they had foreseen the possibility of the deaths. The answer to this, according to him, was in the negative: what actually happened was an extraordinary "twist of fate" which had not been foreseen by the appellants. Their purpose had only been theft and escape.

In S v Khumalo[221] the principle that an accused must have the necessary **mens rea**, is emphasized once again:

> In gevalle van gesamentlike optrede soos die onderhawige word daar onder bepaalde omstandighede afgesien van die vereiste dat die beskuldigde self die doodveroorsakende **actus reus** gepleeg het... Die vereiste van **mens rea** is egter absoluut en nie onderhewig aan uitsonderings nie. Geen persoon kan aan moord skuldig bevind word as hy nie die opset (in een van sy verskyningsvorms) gehad het om die oorledene te dood nie.[222]

The Court also explains that the intention of each **individual** accused has to be proven. When an attempt is made to infer this intention from the mental state ("geestesgesteldheid") of a group of people, such an inference is only justified where the court has no doubt that al the members of the group share this "eensgesinde opset", and that the accused was a member of the group in the sense that he shared this intention.[223]

3. WHEN MUST MENS REA BE ASSESSED?

In S v Nkwenja[224], the majority[225] was of the opinion that the critical moment for assessing **mens rea** of a participant in a common purpose was when the common purpose was formulated. The minority[226] held that the critical moment

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220. 1969 2 SA 637 (A) 640H. See also Section II **supra**.

221. 1991 4 SA 310 (A).

222. 341G-H.

223. 343J-344A.

224. 1985 2 SA 560 (A).

225. Per Jansen JA, Joubert JA and Grosskopf AJA.

226. Per Rabie CJ and Miller JA.

for judging the **mens rea** of the participant in a common purpose was at the time when the unlawful conduct of the actual perpetrator was committed.

Burchell and Milton prefer the latter view.[227] They base this on the following argument: the intention of a participant in a common purpose to rob may initially not include the intention to kill or even the subjective foresight that death may result from the robbery. However, at some stage before the victim of the robbery is killed, the participant may in fact realize or foresee that one of the group may use violence which might result in the death if the deceased. If his intention is to be judged at the time the common purpose is entered into, he will lack the intention required for murder. If the intention is judged at some later stage before the victim of the robbery dies, then account can be taken of the change in the participant's mental state.

The learned writers state (correctly, it is submitted)[228] that the majority judgment in Nkwenja, by not taking account of a subsequent change in the mental state of a participant in a common purpose before the completion of the crime, would involve a **versari**-type of liability. (It would also not allow for the principle of dissociation from a common purpose, which has become firmly entrenched in subsequent decisions.)[229]

In S v Nzo, Hefer JA states expressly that in a case where liability is sought to be imputed to the accused as an alleged party to a common purpose, it is necessary for the State to prove his association with the common purpose **at the time of the offence**. (Therefore he should be acquitted if it appears from the evidence that he dissociated himself before the commission of the offence.)[230] It is submitted that this **dictum** is to be welcomed.[231]

Burchell and Milton are of the opinion that the Appellate Division should, in Munonjo's case,[232] rather have examined the mental state of the accused at the time when the

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227. Burchell and Milton **op cit** 342-343.

228. See also De Wet and Swanepoel **op cit** 193-194; Boister "Common purpose: association and mandate" (1992) SACJ 169.

229. See Section VI **infra**.

230. 11H-I.

231. See also Visser and Vorster **op cit** 712.

232. **Supra**.

deceased were shot instead of at the time the accused embarked on their housebreaking venture.[233] (It is interesting to note that Nzo is binding on Munonjo in terms of the law of precedent.)[234]

In Majosi[235], the following interesting statement is made:

> The enquiry is directed to the state of mind of appellant No 2 at the time he embarked on the venture.... although his act of association, for the purpose of his common purpose to rob, must exist at the time of the offence.....[236]

Nienaber JA refers to Nzo as authority for the latter part of the above statement. What is especially noteworthy, is that in evaluating the evidence, he comes to the conclusion that appellant No 2 must subjectively have foreseen, **when he participated in the robbery**, that someone may be killed in the course thereof.[237] It would therefore appear that the Court, in spite of the statement above, nevertheless evaluated the **mens rea** of the appellant at the time of the **execution** of the common purpose.

S v Mitchell provides another example of this approach: although not expressly, Nestadt JA assesses the presence of the requisite intention to kill at the time the appellant committed his unlawful act.[238]

Boister suggests that the answer to the problem of how to prove that this intention exists at the moment the deed is committed (when there is only evidence of its presence at the time of the formation of the common purpose) is the following: if the accused does not withdraw, then in the absence of evidence proving the lack of **dolus**, the inescapable inference is that the accused remained conscious of the possibility of death at the time the perpetrator acted.[239]

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233. 343n68.

234. See **Annexure A**.

235. 1991 2 SACR 532 (A).

236. 537D-E.

237. 538E.

238. See Mitchell 1992 1 SACR 17 (A) 22D-I. See also Boister op cit 169.

239. Boister **loc cit**. See also the discussion on dissociation from common purpose (Section VI) **infra**.

4. FORESEEABILITY OF THE MANNER IN WHICH THE RESULT ENSUES

Prior to Safatsa, the position, as set out in R v Shezi[240], was that the liability of participants in a common purpose depended on whether the result produced by the perpetrator of the act fell within the "mandate", and was not concerned with the means by which the result was produced.[241]

This is also the view held by Botha JA in Safatsa:

> On the particular facts of this case the precise manner in which and the precise means by which the deceased was to be killed were irrelevant to the achievement of the common purpose.[242]

In S v Munonjo[243] the Court also referred to the Shezi principle, but held that on the facts it was not applicable.[244] (The apparent approval which Shezi still enjoys here is actually surprising, since Shezi can be deemed to have been overruled by S v Goosen.[245])

The ratio in Goosen can be summarized as follows:

> My slotsom is dus dat opset ontbreek indien die dader se voorstelling van die kousale verloop wesenlik van die daadwerklike verloop afwyk. Anders gestel, moet opset by 'n gevolgsmisdaad daarop gerig wees om die gevolg teweeg te bring op wesenlik dieselfde wyse as waarop dit inderdaad veroorsaak is.[246]

Steyn explains that the implication of this is that **dolus eventualis** should now be construed as the foresight of the possibility of a consequence occurring in **substantially the same manner** as that in which it actually occurred, together with a reconciliation with that consequence.[247]

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240. 1948 2 SA 119 (A) 128.

30. See also Burchell and Hunt **Criminal Law** 435; Snyman **op cit** 281.

242. 902A.

243. 1990 1 SACR 369 (A).

244. 364B-C.

245. 1989 4 SA 1013 (A).

246. 1026H-I.

247. Steyn "S v Goosen 1989 4 SA 1013 (A)" (1990) **SACJ** 107.

The first judgment in which the effect of Goosen on common purpose liability was visibly demonstrated, was S v Mitchell[248]. Nestadt JA points out that the Goosen dictum constituted an exception to the Shezi principle, and that in casu the Shezi principle does not apply.[249] Because of the different means employed by the first appellant, his actions fell outside the scope of the common purpose, and his throwing of a brick at the deceased cannot be imputed to second appellant.[250]

Boister explains that prior to Goosen, the law would not have differentiated between assault with a brick and assault with a stone. The assault that the second appellant was potentially liable for was not the assault with the stones he had subscribed to, but the assault with the brick which he had not subscribed to. Therefore he could not be held liable.[251]

This is a clear demonstration of the view held by Burchell:[252] he is of the opinion that the new approach initiated by Van Heerden JA in Goosen will prove most valuable as a way of limiting liability in common purpose cases.[253] Where the State relies on common purpose to avoid the necessity of proving a causal link between the accused's actions and the death of the deceased, the absence of dolus will become an important defence for the accused.[254]

5. CONCLUSION:

When looking at the joint effect of cases like Safatsa, Mgedezi, Petersen, Munonjo, and Khumalo, it is very clear that mens rea is an essential prerequisite for common purpose liability. It is also clear that the mens rea of each participant must be considered individually.

In spite of the majority judgment in Nkwenja, the position regarding the moment when common purpose is to be assessed,

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248. 1992 1 SACR 17 (A).

249. 23E-F.

250. 23F.

251. Boister op cit 171.

252. Burchell "Mistake or ignorance as to the causal sequence" (1990) SALJ 173; "S v Nzo 1990 1 SA 1 (A)" (1990) SACJ 352.

253. Burchell "Mistake or ignorance as to the causal sequence" (1990) SALJ 173.

254. Boister loc cit.

seems to have changed, as illustrated by Nzo, Majosi and Mitchell. It is submitted that this change was necessitated inter alia by the increasing emphasis on the possibility of dissociation from a common purpose: if it is accepted that common purpose has to be assessed at the moment of "the hatching of the plot" and that any subsequent change of heart is irrelevant, no room is left for a possible finding of dissociation.

It is quite disconcerting to note that in spite of the fact that Goosen dates from 1989, its effect was only felt in Mitchell. (A stringent application of the Goosen rule in some of the later decisions, eg Nzo, would in my opinion have brought about a markedly different result; it could hardly be said - on the basis of the evidence available - that the accused in Nzo had foreseen the exact manner in which the deceased was eventually killed.) If, for the sake of argument, Goosen had preceded Safatsa, it is conceivable that the accused in Safatsa might have been acquitted on this ground. (It is interesting to note that it was actually argued on behalf of the appellants in Safatsa that the final act of setting the deceased alight fell outside the purview of any common purpose to which the appellants were parties and that they could therefore not be held responsible for the deceased's death. This argument was however rejected.)[255]

Although the last word certainly has not been spoken about the Goosen principle itself, mainly because of the uncertainty of what would constitute a "wesenlike afwyking",[256] it is submitted that its application in common purpose cases would indeed have the welcome effect of limiting liability, as suggested by Burchell.[257]

> Whether a particular link in the causal chain is so "markedly different" that it produces an unforeseen result is a question of fact into which policy will inevitably intrude; but once it is established there can be no dolus in respect of the result.[258]

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255. 901J-902A.

256. See Boister loc cit; Steyn op cit 107.

257. Supra.

258. Boister loc cit.

SECTION V: COMMON PURPOSE AND CULPA

1. INTRODUCTION:

One of the angels perching precariously on the academic pinhead of common purpose has been the vexed question whether it is possible to be convicted of a so-called "negligence crime" on the basis of this doctrine,[259] the problem being that it seems inconceivable to have a common purpose to be negligent[260] or to "intend to be negligent"[261]. In 1971, Rabie voiced this concern as follows:

> Common purpose as regards the victim's death in cases of culpable homicide is conceptually excluded because the **design** of the participants cannot be aimed at the commission of a crime of **negligence** by them: design indicates intention and intention and negligence are mutually exclusive concepts.[262]

Although this issue was not addressed directly in Safatsa, it has cropped up in a number of subsequent decisions. An attempt will be made to ascertain if any development has taken place and to what extent this development might have been coloured by Safatsa. This will be done with reference to the relevant cases as well as the opinions of certain writers.

2. S v SAFATSA 1988 1 SA 868 (A):

The most significant pre-Safatsa Appellate Division judgment dealing with the relation between culpable homicide and common purpose was S v Nkwenja[263], where Jansen JA makes the following remark:

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259. See eg Burchell and Milton op cit 344.

260. Visser and Vorster op cit 714.

261. Snyman op cit 285.

262. Rabie op cit 244-245.

263. 1985 2 SA 560 (A). See also S v Coetzee 1974 3 SA 571 (T); S v Penton 1979 2 PH H 157 (A); S v Andrews JJ 1980 1 PH H 25 (A) contra.

> Die appellant het saamgewerk met die verwesenliking van die gesamentlike oogmerk. Op grond van die voorgaande blyk dit dat beide gehandel het met **culpa** ten opsigte van die dood wat ingetree het... In die onderhawige geval is dit onseker watter appellant die dodelike geweld toegepas het en sou dit moeilik wees om aan die een of die ander van die appellante 'n handeling toe te skryf wat **conditio sine qua non** van die dood was. Maar in ons praktyk word in gevalle soos die onderhawige, waar daar voorafbeplanning was en dan deelneming aan verwesenliking van die gesamentlike oogmerk, nie altyd streng aan die vereiste van kousaliteit (**sine qua non**) gekleef ten einde die een deelnemer strafregtelik aanspreeklik te stel vir 'n gevolg van die handeling van 'n ander deelnemer nie. Sonder om die juiste grondslag van hierdie aanspreeklikheid uit te stip wil dit my voorkom dat albei appellante wel aan strafbare manslag skuldig is...[264]

It must be pointed out **ab initio** that this **dictum** does not specifically deal with the issue in question. It is however, relevant because it is quoted in full in the Safatsa judgment,[265] with apparent approval.[266] Botha JA uses this **dictum** to strengthen his own argument relating to the requirement of causation as far as common purpose liability in general is concerned.[267]

3. DEVELOPMENT IN SUBSEQUENT DECISIONS:

S v Kwadi[268] was the first post-Safatsa instance where this question was squarely addressed. Steenkamp R refers to the earlier cases of R v Tsosane[269] and S v Coetzee[270], (where doubt was expressed whether the doctrine could be used to determine liability in cases of culpable homicide), as well

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264. 573B-D.

265. 897H-J.

266. 898A-B.

267. See Section II **supra**.

268. 1989 3 SA 524 (NC).

269. 1951 3 SA 405 (O).

270. 1970 3 SA 571 (T).

as the cases of S v Thenkwa[271] and S v Nkwenja (supra) and of course Safatsa. He comes to the following conclusion:

> Dit blyk derhalwe uit bogemelde gesag dat die leerstuk van gemeenskaplike oogmerk slegs aangewend kan word wat die kousaliteitselement betref, maar wat die skuldelement betref, moet daar steeds gekyk word na die optrede en kennis van elke individuele beskuldigde om vas te stel of hy in die spesifieke omstandighede behoort te besef het dat die oorledene as gevolg van die gesamentlike optrede kan sterf.[272]

He explains the effect of this proposition by saying that if a person participates in an unlawful assault, where he should have foreseen that the deceased could die as a result of the combined assault, he would be guilty of culpable homicide even if he did not specifically cause the death of the deceased and even if it is not possible to ascertain beyond reasonable doubt which of the participants had inflicted the fatal injury.[273]

Du Plessis[274] is of the opinion that the "extension" of the common purpose doctrine to culpable homicide as seen in Kwadi is justifiable; it is clear that there can in principle be no objection to this extension.[275] She argues that the common purpose relevant here is the purpose of the three accused to assault the deceased:

> Alhoewel dit nie uitdruklik so gestel word nie, word aanranding met die opset om renting te beseer ('n opsetsmisdaad) se skuldvereiste gebruik as die grondslag om strafbare manslag ('n nalatigheidsmisdaad) te bewys. Dit is miskien hierdie aspek wat verwarring kan skep.[276]

She then explains that the common purpose regarding the "other offence" is not being used to prove the element of **mens rea**, but merely to eliminate the necessity to prove a causal connection between the act of a specific participant and the prohibited result. The element of **mens rea** still has to be proven beyond reasonable doubt. Therefore this **dictum**

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271. 1970 3 SA 529 (A).

272. 527E-F.

273. 527F-G.

274. 147.

275. Ibid.

276. 146.

should allay any fears that the application of the doctrine in cases of culpable homicide would amount to a "gemeenskaplike bedoeling om nalatig te wees".[277]

In S v Barnes[278] the accused was also charged with culpable homicide. The issue here was whether the accused had associated himself with the fatal assault, and where the Court does refer to the authorities quoted above,[279] it is merely to confirm that the presence of the appellant on the scene of the assault is insufficient to constitute active association in the sense required in Safatsa.[280] It does not take the present enquiry any further.

S v Van der Merwe[281] presented another opportunity to consider the role of the doctrine of common purpose in cases of culpable homicide. The trial court had assumed that this doctrine is applicable in cases of culpable homicide.[282] Van Dijkhorst R refers to S v Coetzee[283], where the contrary had been held, and then expresses the opinion that reference by the trial court to Safatsa and Mgedezi is not conclusive, since these were instances where **dolus** was an element of the offence and intent was inferred from the "gemeenskaplike optrede" and from association with the intent of others. There was also participation in the fatal attack, although there was no causation.[284] As far as causation is concerned, he refers to Safatsa once again, and argues that, as illustrated by Nkwenja, the approach of the Appellate Division is not only limited to "opsetsmisdade".[285]

Although this approach would seem to be in conflict with the earlier Appellate Division **dictum** in Thenkwa, Van Dijkhorst J appears to accept it as the correct one. He then makes the following distinction between the cases referred to and the facts **in casu**:

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277. Ibid.

278. 1990 2 SACR 485 (N).

279. 491B-G.

280. See also Section III **supra**.

281. 1991 1 SACR 150 (T).

282. 155I.

283. 1974 3 SA 571 (T).

284. 155J-156A.

285. 156B-F.

> Hoe dit ook al sy, in al die sake was die tipe handeling waarmee die beskuldigde hom vereenselwig het die handeling wat direk tot die dood gelei het. Dit was aanrandingsake waar die beskuldigde 'n deelnemer was, waar sy presiese aandeel en of sy handeling die dood veroorsaak het, nie vasgestel kon word nie. **Die beskuldigde het egter in elke geval deelgeneem aan die lewensgevaarlike optrede wat tot die dood aanleiding gegee het.** Juis hierin lê die onderskeid met die onderhawige geval.[286]

He is of the opinion that **in casu** the appellant had nothing to do with the act which caused the death of the deceased.[287] He also experiences difficulties in finding that the appellant had the necessary **mens rea**: he explains that even if the reasonable man would foresee that a firearm would be used for this kind of extortion, he would not also foresee that it would be loaded and pointed at another person, and that the trigger would be pulled either intentionally or accidentally.[288] The appellant was accordingly acquitted.

De Vos criticizes the finding of Van Dijkhorst J. She is of the opinion that in the light of his finding that causation was completely absent, he should have applied the doctrine of common purpose and convicted the appellant on this basis.[289] (Our respectful submission is that a careful reading of the judgment reveals that this is in fact the approach that had been followed, but the fact that the conduct of the appellant did not constitute "active association" led to his subsequent acquittal.)

De Vos argues that in the first place the appellant was present on the scene; according to her the fact that he happened to be in another room, is of no importance. It is debatable whether under the circumstances this "presence" is sufficient to comply with the first requirement set out in Mgedezi,[290] viz that the accused has to be present "at the scene where the violence was being committed". She also argues that the fact that appellant was involved in a "tsho-

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286. 156I-157A. Emphasis supplied.

287. 157C.

288. 157H.

289. De Vos "Common purpose: 'n warboel?" (1992) **SACJ** 162.

290. 705I. See also Section III **supra**.

tsho" action constitutes active association;[291] however, as far as the appellant was concerned, the two activities (the act of extortion or "tsho-tsho" which he was committing and the conduct of his partner which led to the death of the deceased) were separate and distinct. Their initial intention was to commit "tsho-tsho", and any actions of the appellant were directed solely at this aim. It was not intended as active association with the (unintended) actions of his partner.

She also makes the statement that Van Dijkhorst J differed from the trial court regarding the question whether the doctrine of common purpose is also applicable in cases of culpable homicide.[292] As pointed out supra, this is not entirely true. Van Dijkhorst J does refer to Coetzee in saying that in this case the doctrine of common purpose had been found not to be applicable;[293] he however then distinguishes this case of "gesamentlike aanranding"[294] from the present one by saying that **in casu** the appellant had not participated in the actions which led to the death.[295] His reference to Coetzee is therefore at best **obiter**. If the rest of his exposition of the potential liability of the appellant is examined carefully, it is clear that he is in fact applying the principles of common purpose liability, albeit not explicitly.

Although delivered by the Bophuthatswana General Division, the judgment in S v Ramagaga[296] contains some remarks of potential interest for South African law. The salient feature of this judgment is that the applicability of common purpose in cases of culpable homicide was raised centrally as a point of law.[297]

Friedman J lists a number of cases where the doctrine of common purpose was applied to culpable homicide,[298] with specific reference to R v Geere[299]. He then explains that

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291. De Vos **op cit** 162-163.

292. De Vos **op cit** 163.

293. 155I.

294. **Ibid**.

295. 156J.

296. 1992 1 SACR 455 (B).

297. 463E.

298. 464B-C.

299. 1952 2 SA 319 (A).

the judgments of Coetzee and Penton created a certain degree of uncertainty,[300] which was laid to rest in Nkwenja, where the Appellate Division "decisively and finally determined that the principles of common purpose could be applied in cases of culpable homicide"[301].

He argues that the controversy concerning the true nature of **dolus** and **culpa** (which concerned itself with whether a conviction of culpable homicide can be entered where the evidence discloses that the accused killed intentionally) has been resolved by S v Ngubane[302]. This judgment was, incidentally, also delivered by Jansen JA (as was Nkwenja). It was held that proof of **dolus** does not necessarily exclude the existence of **culpa**.[303] This leads Friedman J to the following conclusion:

> This approach has been followed in subsequent cases and it can now be accepted as settled law in South Africa that common purpose can be applied in cases of culpable homicide.[304]

The problem of **culpa** and **dolus** being mutually exclusive is solved in this way:

> The apparent dichotomy is resolved by the postulate that a man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing. This would involve unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid the possibility of harm ensuing.[305]

4. OPINIONS OF WRITERS:

The writers appear to have widely diverging views on this matter. Snyman is still[306] sceptical about this concept; he (reluctantly) concedes that in the light of Nkwenja (read

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300. 464G.

301. 464H.

302. 1985 3 SA 677 (A).

303. 687E.

304. 465J.

305. 466A-B.

306. It is quite interesting to note that there is a marked difference between his two discussions of the subject in the second and third editions. See Snyman **Criminal Law** 2nd ed 262; **Strafreg** 3rd ed 285.

with Safatsa) the conclusion is unavoidable that South African law currently accepts that common purpose can be applied in culpable homicide cases. He explains that it appears from Safatsa that the fatal act of one person is imputed to other participants, not his intention. Every participant's intention must be determined individually. The same principle must apply to culpable homicide: if a number of people had a common purpose to commit a crime other than murder (eg assault), and the victim is killed in the execution of this purpose, the fatal act of one is imputed to the other. However, the culpa of every participant has to be determined individually.[307]

Visser and Vorster remark that in so far as the earlier decisions of Thenkwa, Coetzee and Penton are in conflict with Nkwenja, they must be regarded as overruled.[308] Kwadi is also referred to with approval.[309] They make the important observation that in the Nkwenja case the doctrine of common purpose was applied on a different basis than in Coetzee and Penton: in Nkwenja the Court applied the doctrine on the basis of a common purpose to commit a crime requiring intention and negligence in respect of the death,[310] whereas in the earlier two cases it was held that this doctrine could only be relevant to crimes of intention, because it is impossible to have a common purpose to be negligent.[311]

Burchell and Milton are similarly of the opinion that negligence can be sufficient to found the liability of a participant in a common purpose, and the following reason is advanced: by virtue of the doctrine of imputing the act of the perpetrator to the other participants in the common purpose, all of these participants become co-perpetrators and a co-perpetrator's liability can, in certain circumstances (notably cases of homicide) be based on negligence.[312]

This view echoes that of Burchell and Hunt[313]: according to them, the state of mind of a participant in a common purpose

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307. Snyman op cit 285.

308. Visser and Vorster op cit 715.

309. Ibid.

310. Visser and Vorster op cit 714-715.

311. See also Maré "Gemeenskaplike oogmerk by strafbare manslag" (1986) SACC 63.

312. Burchell and Milton op cit 344.

313. Burchell and Hunt op cit 434-435.

may consist in intention or negligence in the ordinary connotation of these two concepts. Thus, if one participant in a common purpose did not foresee the principal offender's killing as a possibility, but a reasonable man should have foreseen it, he may be liable for culpable homicide.

5. CONCLUSION:

It would appear that the basis on which the courts approach this question has undergone some change. In Coetzee and Penton the opinion was expressed that a conviction of culpable homicide could not be based on common purpose, due to the fact that it was regarded as anomalous to be "purposely negligent". A new trend was set in Nkwenja and was subsequently followed (via Safatsa) in Kwadi and Van der Merwe, which entailed that the issue was viewed from an entirely different angle: once there was a common purpose to commit an offence and the accused failed to foresee the death of the deceased resulting from the execution of this common purpose (under circumstances where the reasonable man would have foreseen it), he can be held liable for culpable homicide if he actively associated himself with the common purpose. This new approach obviously benefited a great deal from the approval that Nkwenja received in Safatsa.

It is submitted that the position as stated in Ramagaga can be accepted as the correct one. In principle there can be no objection to this application of the doctrine, bearing in mind the effect of Ngubane (as was done in Ramagaga) as well as subsequent developments concerning the doctrine of common purpose itself. If one accepts the basic premise that the doctrine of common purpose is viable in South African law, there can now be no doubt that an accused can also be convicted of culpable homicide on the basis of this doctrine.

SECTION VI: DISSOCIATION FROM COMMON PURPOSE

1. INTRODUCTION:

> The essence of common-purpose liability is based on association with the commission of the crime by the other participants. The converse of association is dissociation.[314]

Dissociation is of course quite an important aspect of common purpose liability, since it is essential to alert a participant as to what is required of him in order to escape criminal liability, should he experience a change of heart.[315] Khuluse explains that the issue of dissociation from a common purpose raises a number of questions:[316] Must the dissociation from the common purpose be express or may it be implied from conduct? Must the dissociation be communicated to other participants in the common design? (If so, how?) At what stage can a person dissociate from the common purpose?[317] Another question which also arises is what would constitute an "act of dissociation".

The question of dissociation has recently received quite a lot of attention.[318] This was largely inspired by the close succession of the judgments in S v Nomakhlala[319], S v Nzo[320] and S v Beahan[321]. It is quite interesting to note that until recently, the Zimbabwean law relating to dissociation was set out rather more clearly than its South African

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314. Burchell and Milton op cit 346.

315. See in this regard also R v Chinyerere 1980 2 SA 576 (RAD).

316. Khuluse "Dissociation from common purpose" (1992) SACJ 173.

317. This question is quite similar to the issue of voluntary abandonment from attempt: is there any stage (eg after the fatal blow has been struck) when it becomes impossible for the accused to dissociate himself from the common purpose?

318. See eg Khuluse op cit 173-179, Parmanand "Dissociation from common purpose: a view from Venda" (1992) SACJ 180-186; Hales "Effective dissociation from common purpose" (1992) SACJ 187-193.

319. 1989 1 SACR 300 (A).

320. 1990 3 SA 1 (A).

321. 1992 1 SACR 307 (ZS).

counterpart.[322] However, the South African Appellate Division has recently re-examined the position in S v Singo.[323]

In this section, the development of the "doctrine of dissociation" will be traced from the pre-Safatsa case of Ndebu[324], up until the latest case of Singo.[325] An attempt will be made to answer at least some of the questions set out above.

2. DEVELOPMENT THROUGH THE CASES:

2.1 S v NDEBU 1986 2 SA 113 (ZSC):

In Ndebu, McNally JA was of the opinion that mere physical withdrawal from the scene prior to the fatal act was insufficient to excuse the second appellant. His flight did not dissociate him from the danger he had helped to create: his last-minute withdrawal was not communicated to his armed companion (first appellant) and it is possible that first appellant was not even aware that the second appellant was no longer in the house. In this case, "successful" dissociation would have included the co-perpetrator's dissuasion (or attempt thereto) of the perpetrator from his fatal intention, or some form of protection (or attempt thereto) of the victim, coupled with his physical withdrawal from the scene prior to the fatal act. As Khuluse explains:

> The mere change of the appellant's mind was not enough because the mind that needed to be changed was not his alone but also the mind of his armed companion.[326]

The question whether an attempt to frustrate the criminal design is a prerequisite of effective dissociation, was left open S v Ndebu. However, McNally JA points out it may be necessary, in the light of different sets of circumstances, to analyze more fully what is meant by the phrase "dissociate himself from", and to look at the reliability of the English requirements that in certain cases something more positive is required of the one seeking to dissociate himself than "merely to run away".

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322. See also Hales op cit 188.

323. The degree to which this judgment can be said to have settled the matter is discussed infra.

324. 1986 2 SA 113 (ZS).

325. With the inclusion of relevant Zimbabwean cases.

326. Khuluse op cit 174.

In his eventual finding, McNally JA does in fact require more of the second appellant than merely running away: as set out above, it was felt that he should rather have taken steps to disarm or dissuade his companions or to protect the victim.[327] Although not stated unequivocally, it would appear that the approach of the Court is to require more of an accused under these circumstances than merely absenting himself from the scene of the crime - at least some attempt to frustrate the plan is needed.

2.2 S v NOMAKHLALA 1989 1 SACR 300 (A):

In S v Nomakhlala the first appellant's "dissociation" consisted of his refusal to comply with an instruction to stab the deceased and his subsequent withdrawal from the scene of the crime. Although it was submitted on behalf of the State that what the first appellant had done did not amount to a proper dissociation (it was suggested that he should at least have tried to dissuade his alleged companions or to protect the deceased in some way),[328] the Court held that under the specific circumstances it would not have been very prudent for the first appellant to have done this - he was not a 'comrade' like the rest of the group.

The Court was also referred to Ndebu,[329] but this case was distinguished on the basis that the "**socius criminis** in Ndebu's case initially participated in the commission of the crime with a full appreciation that death might ensue"[330]. **In casu** the first appellant did not do so. In any event the first appellant did not merely run away; he actually refused to comply with the instruction to stab the deceased when he realized what the assailants "had in mind for the deceased".[331] Thereafter he withdrew from the scene.

It can therefore be said[332] that Nomakhlala illustrates a willingness to accept dissociation as "the co-perpetrator's positive indication of his unwillingness to participate in

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327. 137E-F.

328. 303I-J.

329. 304B.

330. 304B-C.

331. 304C.

332. See eg Parmanand op cit 185.

the fatal act, coupled with his physical withdrawal from the scene prior to the killing of the victim".[333]

2.3 S v NZO 1990 3 SA 1 (A):

The question of dissociation featured again in the majority judgment in Nzo.[334] The Court held that the conduct of the first appellant after he had been detained was a "plain act of abjuration": why did he behave in this manner unless he wanted no further part in the mission?[335] It was also stressed again that in a case where liability is sought to be imputed to the accused as an alleged party to a common purpose, it is necessary for the State to prove his association with the common purpose at the time of the commission of the offence. Therefore he should be acquitted if it appears from the evidence that he dissociated himself before its commission.[336]

Parmanand summarizes the "Nzo interpretation" of dissociation as follows:

> ...the co-perpetrator's dissociation from a common purpose **by doing something positive**, prior to the killing.[337]

It cannot be said that Nzo provides any hard and fast rule regarding dissociation. This is clear from Parmanand's summary: "doing something positive" is a very wide concept. Unfortunately no further guidelines are to be found in the judgment itself.

2.4 S v BEAHAN 1992 1 SACR 307 (ZS):

At this stage of the enquiry it might be useful to have a brief look at the Zimbabwean position, and more specifically the decision in S v Beahan. Gubbay CJ examines both Zimbabwean and English law,[338] and comes to the conclusion

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333. See however discussion of Singo (infra) for a different view of Nomakhlala.

334. Although Steyn JA agreed in principle that the first appellant had dissociated himself from the general common purpose, the question never featured in the minority judgment due to the different approach followed regarding the scope of common purpose - see Nzo 1990 3 SA 1 (A) 17E.

335. 10J-11D.

336. 11H-I.

337. Parmanand op cit 185. Emphasis supplied.

338. 321J-324D.

that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the crime. He states the rule as follows:

> Where a person has merely conspired with others to commit a crime but 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 co-conspirators of the intention to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required.[339]

In arriving at this conclusion, Gubbay CJ relies inter alia on the English decision Ex parte Becerra and Cooper[340] as well as other several other decisions and the opinions of English and Zimbabwean authors. He also states that to the extent that the principle enunciated in Chinyerere[341] is at variance with his conclusion (viz that a reasonable effort to nullify or frustrate the effect of his contribution is required), he would depart from it.

It is reiterated that mere absence of physical presence or a physical change of place or flight from the scene, even in consequence of voluntary action,[342] may not (depending on the circumstances) serve to dissociate a co-conspirator.[343]

Hales explains that although Beahan does not constitute a 'turning-point' in the law relating to common purpose, its merit lies in the fact that it has provided some degree of clarity as to the principles applicable to this "complex doctrine".[344]

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339. 324B-D.

340. (1976) 62 Cr App R 212 (CA). (Quoted in Beahan 1992 1 SACR 307 (ZS) 322I.)

341. Supra.

342. As opposed to involuntary absence due to arrest or flight intended to evade detection.

343. 324E.

344. 193.

2.5 S v SINGO 1993 1 SACR 226 (A):

Until the recent decision in S v Singo, the cases of Nomakhlala and Nzo were the only definitive South African judgments on the issue of dissociation.[345] Parmanand argues (correctly, it is submitted) that unfortunately none of these decisions provided an absolute formula to determine the exact circumstances in which one can be said to have dissociated oneself from a common purpose.[346]

> Undoubtedly, more amplification on thus aspect will be provided in some future judgment...[347]

In Singo, Grosskopf JA does provide this amplification (to some extent). He states that there are several authorities on the topic of dissociation in our courts and those of Zimbabwe, but that most of them deal with common purpose arising from express agreement or conspiracy: R v Chinyerere, S v Ndebu, S v Nzo, S v Beahan. (S v Nomakhlala is distinguished - correctly, it is submitted - on the basis that this was not really a case of dissociation from common purpose, but that the first appellant had in fact never associated himself with a common purpose to kill the deceased.)[348]

Grosskopf JA states that the approach followed in Beahan's case and earlier authorities, are not of real assistance for the present purposes, where we are not dealing with the position of co-conspirators or with a person who incited or instigated others to commit an offence. The current case is similar to those which have been considered in a number of recent decisions, where a common purpose arose otherwise than by prior agreement, and was manifested simply by conduct: S v Safatsa, S v Mgedezi, S v Motaung, S v Khumalo. In these cases, liability required that the accused must have the intent, in common with the other participants, to commit the substantive crime charged and that there must be an active association by him with the conduct of the others for the attainment of the common purpose.[349]

If these two requirements are necessary for the creation of liability on the grounds of common purpose, it would follow, according to Grosskopf JA, that liability would only continue while both requirements remain satisfied (or: that

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345. Ndebu and Beahan being Zimbabwean decisions.

346. Parmanand op cit 180. See also Hales op cit 193.

347. Parmanand loc cit.

348. 232G.

349. 232J-233C.

liability would cease when either requirement is no longer satisfied).

He does however explain that from a practical point of view it is difficult to imagine situations in which a participant would be able to escape liability on the grounds that his active association had ceased while his intent to participate remained undiminished. One must postulate an initial active association to make him a participant in the common purpose in the first place. If he then desists actively participating whilst still retaining his intent to commit the 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 for conduct of the others committed after he had desisted. This would cover he case of the person who, tiring of the assault, lags behind or stands aside and allows others to take over; he would continue to be liable.[350]

However, where the participant not only desists from participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart. He no longer satisfies the requirements for liability on the grounds of common purpose.

Grosskopf JA's approach can be summarized as follows: although it can be said in principle that liability continues only while both requirements (intent and active association) remain satisfied - and therefore the cessation of either would also imply that the accused can no longer be held liable - it is difficult to imagine practical situations where a participant would be able to claim that his liability had ceased because he had ended his active association under circumstances where his intent still remained.

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350. 233D-F.

> The test for dissociation which I have stated above will often be difficult to apply, but ultimately it is a question of fact and evidence. The accused starts with the problem that, ex hypothesi, he was an active participant in the common purpose, and a court may well be sceptical of his avowal of abjuration. Nevertheless, here, as elsewhere, the onus is on the prosecution. If in a case of murder a court has a reasonable doubt whether at the critical stage when the deceased received his or her mortal wounds the accused was still a party to the common purpose of those assaulting the deceased, the accused is entitled to the benefit of the doubt.[351]

It is submitted that this approach is the correct one. It recognizes that there are differences between situations where common purpose liability arises from agreement, and where it is based on active association, and that these differences would require different approaches to dissociation. Unfortunately, it does not address the problem of what would constitute dissociation in cases where common purpose arose from a prior agreement; it is submitted that in these situations Beahan could provide useful guidelines.

3. CONCLUSION:

It is doubtful whether it can be said that Singo has done for dissociation "what Mgedezi did for Safatsa in relation to the requirements for liability on the basis of common purpose",[352] but at the very least the important distinction between common purpose based on a prior agreement and common purpose based on active association is now being recognized as far as dissociation is concerned.

With reference to the questions posed supra by Khuluse, it cannot be said that any of these concerns have been "settled" in a conclusive way. It is submitted that all these problems would have to be approached according to the distinction made in Singo; it is conceivable that the question of what would constitute an act of dissociation would differ according to whether the common purpose arose from a prior agreement or whether it is based on active association. Where common purpose is based on active association, an accused can be regarded to have dissociated himself if either his intention or his active association ceases. (It would appear that in practice both requirements would normally have to be absent.)

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351. 233G-H.

352. Parmanand loc cit.

Where a prior agreement is alleged, the participant's degree of participation would, according to Beahan, determine what is required for effective dissociation. Beahan requires more than a mere physical withdrawal from the scene or unwillingness to participate (as found in Nomakhlala): depending on the degree of participation, either a "timely and unequivocal notification to the co-conspirators of the decision to abandon the unlawful purpose" or "a reasonable effort to nullify or frustrate the effect of his contribution" is necessary. (This is more stringent than the approach followed in for instance Ndebu and Nzo.)

One question which unfortunately has not been addressed at all in the cases pertaining to dissociation, is the issue of when an accused can dissociate from a common purpose (or: whether there is any point beyond which dissociation is no longer possible).[353] It should be interesting to note how this aspect will be handled in future.

As far as any specific requirements regarding dissociation are concerned, a casuistic approach would have to be followed:

> ... it is with some difficulty that one may devise a fool-proof formula to determine when it is that an accused may juridically be regarded as having dissociated himself from a common purpose to kill. In the end each case would have to be decided on its own merits.[354]

Although this statement was made prior to the cases of Beahan and Singo, it is doubtful whether it is any less true today.

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353. It should be noted that the issues in dispute in these cases did not really call for any discussion on this point.

354. Parmanand op cit 186.

SECTION VII: CONCLUSION

> "Common purpose" het 'n ingewikkelde leerstuk geword wat wemel van subtiele onderskeidings, kwalifikasies en voorbehoude.[355]

It is submitted that this statement by Strauss, dating from 1960, still holds true today. The doctrine of common purpose as a potential basis of criminal liability rests on a number of nebulous concepts, which have been applied in such divergent ways that it is difficult to condense a linear gradient of development.[356] The following reasons are advanced why this doctrine is not acceptable:

1. In S v Safatsa, the Appellate Division unequivocally recognized the principle that a participant in a common purpose can be convicted of murder in the absence of proof that his conduct individually caused or contributed causally to the death of the deceased. Because the act of one participant in causing the death of the deceased is **imputed** to the participants, it is not important to ascertain whether a causal **nexus** exists between the death of the deceased and the conduct of each and every participant. This approach has been followed with approval in virtually all subsequent decisions.[357]

It has been submitted that the reason why the doctrine of common purpose is preferred by the courts, in spite of the disregard of the general principles of common purpose, is that it is pragmatic and satisfies certain demands of the administration of criminal justice, most notably the demand that participants in a common purpose should not be acquitted on a charge of murder merely because the State is unable to prove a causal link between their acts and the death of the deceased. This is demonstrated by the **dicta** in Safatsa, Petersen and Banda cited **supra**.[358] As indicated, this use of the doctrine of common purpose is unacceptable; evidentiary difficulties should not be allowed to impose on the sphere of the accepted principles of criminal liability.

2. An attempt has been made to trace the approach of the courts regarding the basis of common purpose liability as found in the relevant cases.[359] Although the majority of our

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355. Strauss **op cit** 108.

356. See especially points (2) and (5) set out **infra**.

357. In S v Yelani and S v Nzo, Safatsa is not expressly referred to - see Section III **supra**.

358. Section II.

359. See Section III **supra**.

writers (correctly, it is submitted) disapprove of the notion of mandate as a basis for common purpose liability, this concept has not been rejected; in fact, Botha JA's remark in Safatsa that the notion of mandate "is not without merit", has given it a new lease of life, as demonstrated in Mitchell.

One aspect which has received recognition is the distinction between common purpose based on prior agreement and common purpose arising from active association. In this regard, the judgment in Mgedezi has been of significance, especially in setting out the five requirements which have to be met in the absence of a prior agreement.

It is submitted that it would not be unfair to say that the treatment by the courts of what is considered to be "objectively ascertainable active association" does not demonstrate a uniform approach. (The disparity becomes especially obvious when examining the conclusions reached in Nzo and Khumalo.) In spite of everything that has been said regarding active association in Safatsa and subsequent decisions, the conclusion is inescapable that a casuistic approach is currently being followed in order to determine whether the conduct of an accused in a given situation constitutes active association.

3. As far as the requirement of **mens rea** is concerned, there can be no doubt that **mens rea** (to be considered individually in the case of each participant) is an essential prerequisite for common purpose liability. This is demonstrated by the cases referred to **supra**.[360] There has been a significant change in the position regarding the moment when **mens rea** is to be assessed; this change has been brought about by the combined effect of Nzo, Majosi and Mitchell. It now appears that common purpose is to be assessed at the time of the commission of the offence, and not at the time of the formation of the common purpose.

The **dictum** in Goosen regarding the foreseeability of the manner in which death ensues, has had some effect on common purpose liability, as demonstrated in Mitchell. It is submitted that the Goosen rule should have been applied in earlier decisions as well (eg Nzo) where it would have had the welcome effect of limiting liability.

In spite of the initial uncertainty regarding the question whether common purpose is applicable in the case of negligence crimes, it can now be accepted - after the judgments in Nkwenja, Safatsa, Kwadi, Van der Merwe and Ramagaga - that an accused can be convicted of a crime requiring **mens rea** in the form of **culpa** on the basis of common purpose. (This development is in accordance with

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360. See Section IV.

recent developments regarding **mens rea**,[361] and in principle, it cannot be faulted.)

4. The application of the concept "dissociation from common purpose" has been tainted by the same lack of uniformity referred to in the discussion of "active association" supra.[362] The position has to a certain extent been clarified by the judgment in Singo; however, this decision is only really of value where the common purpose arose from active association (and even then, the rules set out therein would be rather difficult to apply in practice, as the Court itself concedes).[363] In cases where a prior agreement is alleged, it is submitted that the Zimbabwean case of Beahan could provide useful guidelines. In the final analysis it could be said that no "fool-proof formula" to determine when it is that an accused may be regarded as having dissociated himself has been developed yet. This frustrates the very purpose of recognizing the idea of dissociation in the first place:

> The dominant policy of the law in allowing such a defence is to encourage the conspirator to abandon the conspiracy prior to the attainment of its specific object and, by encouraging his withdrawal, to weaken the group which he has entered.[364]

5. This emphasizes the problem that was also referred to earlier, when an attempt was made to define active association: due to the fact that there are no set rules governing the concepts constituting common purpose liability, virtually every case has to be decided "on its own merits". Apart from the lack of certainty which results from this, it is submitted that the "unstructured" nature of common purpose liability allows value judgments, based on policy considerations, to intrude when deciding what would constitute active association (or effective dissociation). Boister points out (with reference to Goosen) that whether a particular link in the causal chain is so 'markedly different' that it produces an unforeseen result, is "a question of fact into which policy will inevitably intrude".[365]

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361. Eg S v Ngubane - see Section V supra.

362. See Section VI supra.

363. See the discussion of Singo in Section VI supra.

364. Beahan 1992 1 SACR 307 (ZS) 322B.

365. Boister op cit 171. See also Section IV supra.

This statement, it is submitted, is equally applicable to the concepts relating to common purpose. As Burchell explains, the tendency since Safatsa has been to limit the scope of the common purpose principle rather than to widen it.[366] This was done inter alia by the limits imposed on "active association" in Mgedezi. The judgment in Goosen has also been employed in Mitchell to limit common purpose liability, as predicted by Burchell.[367] He points out that the application of the concept 'a marked correlation between the foreseen sequence of events and the actual sequence of events' involves to some extent "judicial evaluation aimed at limiting the scope of common purpose liability".[368] However, the converse of this is also possible: that the judicial evaluation of the concepts underlaying common purpose liability can result in an extension of the scope of liability. It is submitted with respect that this is reflected in the majority judgment in Nzo.[369]

In the light of the considerations set out supra, it is submitted in conclusion that the following statement by Burchell has to be concurred with:

> From a legal and an historical perspective the common-purpose rule is an anachronism and a return to standards of individual liability is both consistent with principle and politic at this time.[370]

However, for the moment common purpose liability is still a reality in South African law, and the principles which have evolved must be applied, "however painful"[371]. (It is of course an open question to which extent this doctrine is applied in the everyday, "normal course of business" administration of criminal justice in the courts.[372]) It

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366. Burchell "S v Nzo 1990 3 SA 1 (A)" (1990) SACJ 351-352.

367. Burchell "Mistake or ignorance as to the causal sequence" (1990) SALJ 173.

368. Ibid.

369. See also Burchell " S v Nzo 1990 3 SA 1 (A)" (1990) SACJ 352.

370. Burchell op cit 354.

371. See Du Plessis op cit 148.

372. This would in fact entail an interesting subject for future investigation. It is submitted - with caution - that the doctrine of common purpose does not feature too prominently in this context.

must also be noted that the initial dissatisfaction surrounding the application of the doctrine in Safatsa, would appear to have subsided considerably. (No opinion is ventured on the question whether this is possibly related to the changes experienced in the political sphere and a concomitant shift in emphasis regarding prosecution policies).

The hope can only be expressed - however unrealistically - that the Appellate Division will at some future stage see its way clear to recognize the need to do away with this doctrine and to "return to the standards of individual liability".

ANNEXURE A

CASE	DATE: JUDGMENT
S v Safatsa 1988 1 SA 868 (A)	1 December 1987
S v Kwadi 1989 3 SA 524 (NC)	8 April 1988
S v Mgedezi 1989 1 SA 687 (A)	30 September 1988
S v Yelani 1989 2 SA 43 (A)	24 November 1988
S v Petersen 1989 3 SA 420 (A)	29 November 1988
S v Nzo 1990 3 SA 1 (A)	8 March 1989
S v Jama 1989 3 SA 427 (A)	30 March 1989
S v Nomakhlala 1989 1 SACR 300 (A)	27 July 1989
S v Memani 1990 2 SACR 4 (TkA)	31 July 1989
S v Goosen 1989 4 SA 1013 (A)	5 September 1989
S v Banda 1990 3 SA 466 (BGD)	16-27 October 1989
S v Barnes 1990 2 SACR 485 (N)	24 November 1989
S v Munonjo 1990 1 SACR 360 (A)	12 March 1990
S v Motaung 1990 4 SA 485 (A)	17 August 1990
S v Van der Merwe 1991 SACR 150 (T)	26 September 1990
S v Khumalo 1991 4 SA 319 (A)	29 May 1991
S v Beahan 1992 1 SACR 307 (ZS)	14 September 1991
S v Majosi 1991 2 SACR 532 (A)	26 September 1991
S v Ramagaga 1992 1 SACR 455 (B)	31 October 1991
S v Mitchell 1992 1 SACR 17 (A)	6 November 1991
S v Singo 1993 1 SACR 226 (A)	27 November 1992

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1.9 De Jager FJ "Opset by groepsgeweld, gemeenskaplike opset, oorwegings by doodstraf" (1992) **TSAR** 313-317

1.10 De Vos WM "'Common purpose': 'n warboel?" (1992) **SACJ** 160-166

1.11 De Wet JC and Swanepoel HL **Die Suid-Afrikaanse Strafreg** 4ed (1985)

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1.14 Du Plessis I "Gemeenskaplike oogmerk (´common purpose´) by strafbare manslag?" (1990) **TSAR** 145-148

1.15 Ellis AG "Kante van die medepligtigheidsmisdaad" (1983) **De Jure** 356-372

1.16 Foster D "Expert testimony on collective violence" **in** Hansson D and Van Zyl Smit D (eds) **Towards Justice?** (1990) 154-172

1.17 Hales L "Effective dissociation from common purpose - a Zimbabwean view" (1992) **SACJ** 187-193

1.18 Hansson D and Fine D "Expert testimony on community attitudes to sentencing: the case of the Upington 26" **in** Hansson D and Van Zyl Smit D (eds) **Towards Justice?** 173-194

1.19 Hugo JH "Common purpose and causation" (1969) **SACJ** 391-396

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2.4 R v Dladla 1962 1 SA 307 (A)
2.5 R v Duma 1945 AD 410
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2.8 R v Grobler 1918 EDL 124
2.9 R v Mapolisa 1965 3 SA 578 (PC)
2.10 R v Mgxwiti 1954 1 SA 370 (A)
2.11 R v Mkize 1946 AD 197
2.12 R v Motaung 1961 2 SA 209 (A)
2.13 R v Mtembu 1950 1 SA 670 (A)
2.14 R v Njenje 1966 1 SA 369 (SRA)
2.15 R v Segale 1960 1 SA 721 (A)
2.16 R v Shezi 1948 2 SA 119 (A)
2.17 R v Taylor 1920 EDL 318
2.18 R v Tsosane 1951 3 SA 405 (O)
2.19 S v Andrews JJ 1980 1 PH H 25 (A).
2.20 S v Banda 1990 3 SA 466 (BGD)
2.21 S v Barnes 1990 2 SACR 485 (N)
2.22 S v Beahan 1992 1 SACR 307 (ZS)
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2.28 S v Khoza 1982 3 SA 1019 (A)
2.29 S v Khumalo 1991 4 SA 310 (A)
2.30 S v Kwadi 1989 3 SA 524 (NC)
2.31 S v Madlala 1969 2 SA 637 (A)
2.32 S v Majosi 1991 2 SACR 532 (A)

2.33 S v Malinga 1963 1 SA 692 (A)
2.34 S v Maree 1964 4 SA 545 (O)
2.35 S v Mashotonga 1962 2 SA 321 (SR)
2.36 S v Matshili 1991 3 SA 264 (A)
2.37 S v Maxaba 1981 1 SA 1148 (A)
2.38 S v Memani 1990 2 SACR 4 (TkA)
2.39 S v Mgedezi 1989 1 SA 687 (A)
2.40 S v Mitchell 1992 3 SACR 17 (A)
2.41 S v Mongalo 1978 1 SA 414 (O)
2.42 S v Motaung 1990 4 SA 485 (A)
2.43 S v Munonjo 1990 1 SACR 360 (A)
2.44 S v Ndebu 1986 2 SA 113 (ZSC)
2.45 S v Ngubane 1985 5 SA 677 (A)
2.46 S v Nhiri 1976 2 SA 789 (RA)
2.47 S v Nkombani 1963 4 SA 877 (A)
2.48 S v Nkwenja 1985 2 SA 560 (A)
2.49 S v Nomakhlala 1989 1 SACR 300 (A)
2.50 S v Nzo 1990 3 SA 1 (A)
2.51 S v Pentón 1979 2 PH H 157 (A)
2.52 S v Petersen 1989 3 SA 420 (A)
2.53 S v Ramagaga 1992 1 SACR 455 (B)
2.54 S v Safatsa 1988 1 SA 868 (A)
2.55 S v Singo 1993 1 SACR 226 (A)
2.56 S v Thabetha 1988 4 SA 272 (T)
2.57 S v Thenkwa 1970 3 SA 529 (A)
2.58 S v Thomo 1969 1 SA 385 (A)
2.59 S v Van der Merwe 1991 1 SASV 150 (T)
2.60 S v Williams 1980 1 SA 60 (A)
2.61 S v Yelani 1989 2 SA 43 (A)
2.62 Thebe v S 1961 2 PH H247 (A)

3. LEGISLATION:

3.1 Criminal Law Amendment Act 107 of 1990
