

THE DOCTRINE OF COMMON PURPOSE: A BRIEF HISTORICAL PERSPECTIVE;
THE COMMON PURPOSE DOCTRINE DEFINED AND A FOCUS ON WITHDRAWAL
FROM THE COMMON PURPOSE

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CONTENTS

CHAPTER 1 : INTRODUCTION

1.1 Background	4
1.2 Purpose and objectives of the dissertation	6
1.3 Research Methodology	6

CHAPTER 2: A BRIEF HISTORICAL BACKGROUND AND THE DEFINITION OF COMMON PURPOSE DOCTRINE

2.1 Introduction	8
2.2 The Transkeian Penal Code	8
2.3 The early application of the doctrine through the cases	8
2.4. Definition of the common purpose	11
2.5 The <i>Safasta</i> decision	14
2.6 The <i>Mgedezi</i> decision	16
2.7 Conclusions	19

CHAPTER 3: THE CONSTITUTIONALITY OF THE DOCTRINE OF COMMON PURPOSE.

3.1 Introduction	20
3.2 Facts of the <i>Thebus</i> case	21
3.3 Criticism of the <i>Thebus</i> case	24
3.4 Justification for the doctrine of common purpose	25
3.5 Conclusion	26

CHAPTER 4: DISSOCIATION FROM THE COMMON PURPOSE

4.1 Introduction	27
4.2 What constitutes withdrawal from common purpose	27
4.2.1 The intention to withdraw	28
4.2.2. A positive act	33
4.2.3 Voluntariness to withdraw	34
4.2.4 Stage of withdrawal	36
4.2.5 Type of act required	36
4.2.6 Role of the accused	37
4.3. Conclusion	43

CHAPTER 5: FOREIGN JURISDICTIONS 44

5.1 Introduction	44
5.2 The English position	44
5.3 Circumstances where foreign courts consider withdrawal	48
5.3.1 Venda decisions	48
5.3.2 Zimbabwean decisions	50
5.4. Conclusion	56

CHAPTER 6: CONCLUDING REMARKS 57**BIBLIOGRAPHY** 59

CHAPTER 1 : INTRODUCTION

1.1 Background

The South African criminal legal system is based on personal liability, where an individual can be held responsible for his or her own conduct. Essentially individuals are in the general sense responsible for their own conduct and in the event of wrongful conduct they may be held liable. Where two or more persons are acting together, in joint enterprise, they become liable for the crimes committed by their fellow perpetrators. In the South African legal system, the criminal law attributes blameworthiness to participants ‘who have been implicit or explicit by agreement to commit an unlawful act’.¹ In other words even where the consequential act was carried out by only one of the members, the doctrine of common purpose dispenses with the need for the state to prove causation in respect of the remaining members of a joint enterprise. It facilitates conviction of multiple accused.

To a degree this is a valuable tool to control criminal activities and it serves the interests of law and order and justice well. Similarly, foreign jurisdictions have other forms of this doctrine, like joint enterprise law in the United Kingdom, Canada, Scotland and Australia to name a few. Criminal enterprises too have evolved, from the small scale band of robbers holding up the local bank to more organized crimes spanning many countries and sometimes involving different nationalities: drug cartels, human trafficking syndicates and cross-border poaching are just a few that come to mind. Previously, South Africa faced comparatively fewer cases of the aforementioned crimes with the main focus of the police being the protection of the apartheid state although of course, common purpose was extensively used in relation to crimes relating to political violence in the apartheid era.

Since democracy and the opening up of South Africa’s borders, coupled with the relaxing of imports into the Republic, law enforcement has experienced an increase in crime especially in

¹ U Kistner , ‘*Common Purpose’: The Crowd and the Public*, *Law Critique* (2015) 26, accessed on 10 July 2015 at <http://link.springer.com/article/10.1007%2F510978-014-9146-4>

the area of contraband entering the country.² '(T)he phenomenon of serious crimes committed by collective individuals acting in concert remains a significant societal scourge'.³ In their desperate attempt to control this growing plague the State needs to use the best of modern technology to ensure successful arrests and prosecutions and to this end we see the use of DNA evidence, cellphone records and satellite mapping to name a few. But all of this technology makes for little assistance in a trial if causation element cannot be proved. It is to this end that the common purpose doctrine is most helpful as it completely negates the need to prove causation for each individual accused who is part of the common purpose. Today in most cases involving multiple accused persons, it is the application of this doctrine that secures a more successful rate of convictions on the main (and often more serious) counts.

Despite being a helpful tool in securing successful prosecutions of syndicate and mobs engaged in illegal activities, the application of the common purpose doctrine has been rather contentious in our law. The decision of the court in the *S v Safatsa*⁴ case caused an international outcry against the then apartheid state and its judiciary. This decision was seen in the context of the political milieu of the time. Here the court extended the definition of the doctrine to include active association.

The *S v Thebus*⁵ decision in 2003 saw the common purpose doctrine, in the active association form, pass constitutional muster. As of late the doctrine has again attracted negative criticism when the National Prosecuting Authority (NPA) decided to prosecute the surviving Marikana miners.⁶ The 270 miners that survived the deaths of their colleagues, who were shot by the police were charged with murder of the very same colleagues. The outcry was such that the charges were eventually withdrawn.

² Snyman CR '*Criminal Law*' 5ed (2008) 22;23;26

³ *S v Thebus* 2003 (6) SA 505 (CC) para 34

⁴ *S v Safatsa* 1988 (1) SA 860

⁵ Note 3 above

⁶ Masombuka S 'NPA buckles under Marikana pressure' in Legalbrief as accessed at <http://legalbrief.co.za/diary/legalbrief-today/story/npa-backs-off-marikana-murder-charges/print/> on 3 August 2016.

There are many opposing views with regard to the doctrine of common purpose. An important facet of the arguments against the doctrine of common purpose must be the constitutional challenge to the right to be presumed innocent until proven guilty.

When examining the doctrine of common purpose it is essential that we examine the concept of common purpose: its background, definitions, constitutionality and how a co-accused could dissociate from the common purpose. We examine how the requirements for withdrawal evolved over a period of time. The requirements for liability, according to some academics, have been refined over the years by our courts.⁷ We also consider how some foreign jurisdictions apply the doctrine or its equivalent, focusing especially on withdrawal from this doctrine.

1.2 PURPOSE AND OBJECTIVES OF DISSERTATION

This paper entails an analysis of the doctrine of common purpose and further, an analysis of factors that give rise to what is known as dissociation from such common purpose. The focus of this paper is directed towards analyzing the doctrine of common purpose in South African law in respect of the prior agreement form and active association form and to focus on withdrawal and what it entails. It begins with a brief historical perspective and describes initially the circumstances under which the doctrine, had it been developed to some extent, definitions of the doctrine and how one can withdraw from the doctrine such as to negate liability. The constitutionality of the doctrine is briefly addressed and in order to support this exercise the Constitutional court's judgment in *S v Thebus* is discussed and criticised briefly.⁸ Finally it examines how a foreign jurisdiction decides on what constitutes withdrawal.

1.3 RESEARCH METHODOLOGY

⁷ Mare' MC 'The doctrine of common purpose' as access at uir.unisa.ac.za/bitstream/handle/Joubert_JJ_0869818380_Section4.pdf accessed on 12 May 2015

⁸ Note 3 above

The method of research employed in this research paper is largely analytical and library-based. It focuses on cases, journals, foreign law where applicable and any other written material related to the doctrine of common purpose. Although a full comparative analysis of the law of complicity in other comparable jurisdictions has not been undertaken, reference is made to the jurisdictions for purposes of comparison and to confirm the South African approach.

The primary objectives of my research work into dissociation from the common purpose entails the following structure:

- 1.3.1 to review case law and how courts dealt with the doctrine of common purpose
- 1.3.2 to analyse cases and extract the principles at play in application of this doctrine
- 1.3.3 to consider how South African and a foreign court dealt with dissociation from the common purpose.

CHAPTER 2: A BRIEF HISTORICAL BACKGROUND OF THE DOCTRINE OF COMMON PURPOSE AND THE DOCTRINE DEFINED

2.1 Introduction

We trace back the early legislation and case law reflecting application of what is now termed the ‘common purpose’ doctrine. A brief historical background is considered. We then look at the various definitions of common purpose.

2.2 The Transkeian Penal Code

The doctrine of common purpose has traces back to the Transkei Penal Code’s section 78, which is a version of the Native Territories Penal Code of 1886 section 78 which provides:

‘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 anyone 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.’⁹

The essence of this provision is that it is assumed that a person will know the reasonable and probable consequence of his actions.

2.3. The early application of the doctrine in South Africa cases

In Roman–Dutch law, any person who counselled or gave assistance to another became punishable ‘*al den principal*’.¹⁰ In *R v Peerkhan & Lalloo*¹¹ the court had, through the judgment of Innes J, interpreted what participation would mean in terms of the common law. Innes T held that,

‘It (our law) calls a person who aids, abets, counsels or assists in a crime a *socius criminis* – an accomplice or partner in crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much punishment, as if he had been the actual

⁹ Section 78 Native Territories Penal Code Act 24 of 1886

¹⁰ Literally translates to ‘as its principals’

¹¹ 1908 TS 798

perpetrator of the deed. Now it is clear that in our criminal courts men are convicted for being *socii criminis* without being specially charged in the indictment as such.¹²

Essentially the Transvaal Supreme Court held that in the case of common law offences, ‘any person who knowingly aids and assists in the perpetration of a crime is punishable as if he himself physically committed the act.’¹³

The decision in the *Peerkhan* case was applied in a subsequent case by the Appellate Division in *R v Ngcobo* when the court held that

‘Our court differs considerably from the English law in that respect. Our law is void of any technicality. It says that a person who assists in the commission of a crime is himself guilty of crime.’¹⁴

In the opinion of the Court, any person who does something to further the purpose of another or a criminal is a person who assists or helps at the crime.¹⁵ The judge simply needs to ascertain whether or not the accused assisted at the crime or for that matter intentionally helped the criminal to execute the crime.

The Appellate Division analysed the difference between perpetrators and accomplices in the *S v Williams*¹⁶ case.

One of the first reported cases in South Africa where the doctrine of common purpose was applied is that of *R v Garnsworthy*,¹⁷ where Dove-Wilson JP held:

‘Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others of the combination, in the

¹² Note 11 above, 15-116

¹³ Note 11 above, 23

¹⁴ 1928 AD 376

¹⁵ Note 14 above, 376

¹⁶ 1980 (1) SA 60 (A) 63

¹⁷ 1923 WLD 17

furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavoring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being liable; but if what is done is just what anybody engaging in this illegal combination would naturally, or ought naturally to know would be the obvious and probable result of what they were doing, then all are responsible.’¹⁸

The doctrine was given an objective formulation by the court as opposed to a subjective formulation, which will require personal foresight of a possibility to occur.

The principle in effect embodies the well know dictum in criminal law, ‘*qui facit per alium facit per se*’.¹⁹ And this is a fundamental maxim of the law of agency. It was nevertheless applied in a civil case, *McKenzie v Van der Merwe*,²⁰ in which case the plaintiff was an orange farmer who wished to recover his stock and recover damages to his farm by the defendant, another farmer. The defendant was at that time in rebellion against the King and the Government of the Union. The majority found that notwithstanding his rebellion, it did not mean that he was now responsible for all other acts of rebellion, committed by other rebels, save of course if he had authorized or instigated such acts. Judge Maasdorp however, in a dissenting judgment stated,

‘they are all liable for such acts of any of their associates as fell within the scope of the objects of the rebellion.’²¹

In *R v Geere and Others*,²² Judge Schreiner accepted the doctrine of common purpose as being applicable in South African law. He contended that the word ‘purpose’ in the expression ‘common purpose’ should not be applied to mean that the death of the deceased

¹⁸ Note 17 above, 19

¹⁹ Literally it translates as: a person who acts through another does the act himself.

²⁰ 1919 AD 41

²¹ Note 20 above

²² 1952 (2) SA 319 A

must have been the result aimed at.

In another case, a few years later, *S v Nsele*,²³ the appellant and his companion had gone to steal money from a store-owner but the companion, who had a gun, shot the owner. The issue was whether the appellant was also guilty of murder. The appeal failed and the conviction of murder of the appellant was confirmed in terms of the doctrine of common purpose.

2.4. Definition of the common purpose doctrine

The essence of the doctrine of common purpose is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.²⁴

The doctrine itself is not confined to any particular crime but may apply generally. The doctrine finds application though in one of the most serious of crimes, murder. In considering the doctrine in the context of murder, it is accepted that one of the elements for the crime of murder is intention. Essentially in the context of common purpose it would be sufficient for this requirement to be met so that all the participants had the common intention to assist one another in the commission of the crime of murder.

It may be argued that it is unjust to impute one person's act to the others. However in the circumstances, having regard to the intention of all the participants, it would not be unjust to impute one person's act to the others.

What is important to remember is that the act itself is imputed and not the other participants and not the culpability of the one who actually carried out the act. The other participant's liability is actually based upon his own culpability or intention. It is however not necessary for any form of pre-planned conspiracy. It would be sufficient for common purpose to arise spontaneously. The evidence may well lead to every indication that the conduct of all the participants actually led to the demise of a victim, for example in the case of murder. This

²³ 1955 (2) SA 145 (A)

²⁴ C R Snyman '*Criminal Law*' 6ed 2014 262,263

doctrine is essentially defined as follows:

‘The main principles relating to this important doctrine may be summarized as follows:

- a) If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.
- b) In a charge of having committed a crime which involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.
- c) Conduct by a member of the group of persons having a common purpose which differs from the conduct envisaged in the said common purpose may not be imputed to another member of the group unless the latter knew that such other conduct would be committed, or foresaw the possibility that it might be committed and reconciled himself to that possibility.
- d) A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person or persons.
- e) A finding that a person acted together with one or more other persons in a common purpose may be based upon the first – mentioned person’s active association in the execution of the particular criminal act of the other participant(s). However, in a charge of murder this rule applies only if the active association took place while the deceased was still alive and before a mortal wound or mortal wounds had been inflicted by the person or persons with whose conduct such first-mentioned person associated himself.
- f) If, on a charge of culpable homicide the evidence reveals that a number of persons acted with a common purpose to assault or commit robbery and that the conduct of one or more of them resulted in the death of the victim, the causing of the victim’s death is imputed to the other members of the group as well, but negligence in respect of the causing of the death is not imputed.
- g) The imputation referred to above in statement 1 does not operate in respect of charges of having committed a crime which can be committed only through the instrumentality of a person’s own body or part thereof, or which is generally of such a nature that it cannot be committed through the instrumentality of another.’²⁵

In consequence crimes, the prosecution need only prove that all participants agreed to

²⁵ Note 24 above

commit the crime or actively associated themselves with the crime in question which is committed by one of the participants, the latter who acted with the required *mens rea*. If the state can prove that the latter participant actually caused the end result, then his actions are imputed to the other participants in the group. It is immaterial which particular participant caused the ultimate result.²⁶

Snyman, on the other hand opines that

‘[T]he crucial requirement is that the persons must all have had the intention to murder and to assist one another in committing the murder. Once that is proved, the act of X, who actually shot and killed Y, is imputed to Z, who was a party to the common purpose and actively associated himself with its execution, even though a causal relationship between his (Z’s) act and Y’s death cannot readily be proved. X’s act is then regarded as also that of Z.’²⁷

What this in effect means is that Z gave up his right to object to the imputation the moment he started to engage in conduct such that he co-operated with X’s criminal act. ‘He signifies through his conduct that the other person’s (i.e., Z’s) act is also his.’²⁸

As only the act is imputed and not the culpability, each actor’s liability is based on his own culpability. In cases of prior agreement, the basis of the doctrine is that each participant in a joint enterprise gave the other participant an implied mandate to commit the unlawful act. Hence the liability of the party who did not physically perform the act in question was pivotal to whether such act fell within the mandate given.

2.5 The *Safatsa* decision: Scope of common purpose increased.

In *Safatsa*, six participants in a mob were charged with and later convicted of the murder of the deceased. The court found that each of the accused shared a common purpose to kill the deceased with a mob as a whole. Each were intent upon killing the deceased and in fact

²⁶ J Burchell ‘*Principles of Criminal Law*’ 5ed (2016) 477

²⁷ CR Snyman ‘*Criminal Law*’ 5 ed 2008 266

²⁸ Note 27 above, 266

succeeded in doing so. As pointed out by the court, all eight accused by their conduct actively associated themselves with the achievement of the common purpose and each of them had the requisite *mens rea* for murder. The question that is faced by the courts in cases of this kind, in relation to murder is the following: is it competent for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct caused or contributed causally to the death of the deceased?

The court found that the accused shared a common purpose to kill the deceased with the mob as a whole.²⁹ It was held in this case that there need not be a causal connection between the acts of every party to the common purpose and the death of the deceased need not be proved in order to sustain a conviction of each of the participants.

‘The trial court found that the mob intended to kill the deceased, and that the intention to kill had manifested itself at the time when his house was set alight.’³⁰

The mob (excluding accused five and six), had the intention to kill the deceased and they had actively associated themselves with the mob in the killing of the deceased. The trial court found that the intention for the crime of murder was present for all these accused. In the judgment of Botha JA it was

‘a clear recognition of the principle 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. The reference to ‘voorafbepanning’ is not significant, for it is well established that a common purpose need not be derived from an antecedent agreement, but 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.’³¹

The administration of the criminal justice system in South Africa was in the spot-light in the *Safatsa*³² case. This particular judgment was at the height of the Apartheid state, when the

²⁹ Note 4 above, 894

³⁰ Note 4 above, 893

³¹ Note 4 above, 898

³² Note 4 above

government was using all legal and other means possible to maintain law and order. The uprisings of ordinary civilians was a threat to the State lest it spread to widespread civil unrest and perhaps even civil war.

Botha JA went on to state that

‘[T]here can be no doubt, in my judgment, that the individual acts of each of the six accused convicted of murder manifested an active association with acts of the mob which caused the death of the deceased. These accused shared a common purpose with the crowd to kill the deceased and each of them had the requisite *dolus* in respect of his death. Consequently the acts of the mob which caused the deceased’s death must be imputed to each of the accused.’³³

Botha JA further found that the exact manner in which the deceased was murdered was not really relevant to the overall realization of the common purpose. The appeal court confirmed the decision of the trial court and common purpose by active association was now sanctioned into law.

Two accused, number 5 and 6 were acquitted by the trial court. The court held that although they were part of the mob that stoned the deceased’s house, there was no evidence that they were still present when the mob set the deceased’s house on fire and that they had been party to a common purpose to murder the deceased. They had in fact, dissociated from the common purpose or at least, no active association was proved against them.

It was clear from the *Safatsa* case that the court put an end to deliberations on the issue of causation. It was held that proof of a causal connection is not required in cases involving common purpose.

Following hot on the heels of *Safatsa* was the case of *Mgedezi*³⁴ also an Appellate Division case which also dealt with the common purpose in the absence of a prior agreement. While Snyman refers to *Safatsa*, Burchell ponders the position in *Mgedezi*. In this particular case, the court distinguished between the requirements for liability where there is a prior agreement

³³ Note 4 above, 901

³⁴ 1989 (1) SA 687 (A)

either, either explicit or implicit, or the situation where no such mandate exists. The court, in *Mgedezi*, set out certain requirements, prior to imputation being inferred, thus confirming the *Safatsa* decision.

2.6. The *Mgedezi* Decision

In this case there was unrest in a mine compound where mineworkers considered their team leaders as informers. On the fatal night, bands of mineworkers raided the compound while singing songs of death of these leaders. Violence erupted and a room used by the team leaders set alight while the door was torn down and the windows were broken. The attack resulted in the deaths of 4 team leaders while 2 managed to escape.

The appeal court found that absenting a planned attack and absent a causal link between the killing or injuring of the victims, a accused could still be held liable on the basis of the *Safatsa* case if the following perquisites were met:

‘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 victims. Thirdly, he must have intended to make common course 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, 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.’³⁵

The principles enunciated by Burchell et al, occupies an integral part of decisions relating to common purpose. In fact in some instances it was argued that the common purpose ‘casts the net of criminal liability too widely’.³⁶ For example, in *S v Mitchell and Another*,³⁷ where the

³⁵ Note 4 above, 688

³⁶ Boister N ‘*Common purpose: association and mandate*’, SACJ 1992 2 SAS 167

³⁷ 1992 (1) SACR 17 (A)

doctrine of common purpose was applied in uncommon circumstances. Here, the appellants and two others collected stones and sat at the back of the van, throwing stones at pedestrians. One of them threw a brick and it struck the deceased on the head who later died. The main principle was whether the trial court had correctly applied the doctrine of common purpose. The trial court had convicted both X (who threw the fatal brick) and Y (who was throwing stones) of murder. The conviction of Y called for an examination of the principles of the doctrine of common purpose. Nestadt J A upheld the appeal and reasoned as follows:

‘Nestadt found that the original agreement, the form of common purpose specified in *Mgedezi* as the mandate situation, did not extend to the throwing of the brick and thus the conscious decision to participate in the throwing of the stones could not be the basis for imputing X’s action to those party to the original agreement. Something more was required of Y. As there was no agreement to throwing paving stones the issue was whether Y actively associated with X’s actions.’³⁸

In terms of Nestadt J A’s reasoning, Y did not foresee the use of the brick and the fatal consequences thereof. Thus he was not liable as minus the intention to kill, X’s act could not be imputed to him. Boister correctly points out that he ‘assessed Y’s fault at the moment of the murder and not at the time when the alleged common purpose came into being....The actual perpetrator’s actions which serve as a substitute for the actions of the party to the common purpose are only imputable if the latter has the requisite fault when the perpetrator acts.’³⁹

Burchell opines that the case of *Mzwempi*⁴⁰ is both a ‘prior agreement’ agreement (to commit crime A i.e. assault, arson and public violence) and alleged active association in crime B (murder).⁴¹ He is in agreement with Alkema J.

It has been noted in *Mgedezi* that in order for the association to be considered in the context of common purpose, an accused must be fully aware that together with the minds of the others, they are all directed at the same common intent, for example the killing of the

³⁸ Note 36 above, 168

³⁹ Note 36 above, 169

⁴⁰ 2011 (2) SACR 237 (ECM) 19

⁴¹ Note 26 above, 479

deceased.⁴² In other words where we have a situation where a person simply entertains the actions of others, whilst remaining independent of such actions of the others, it cannot be said that he actually associated himself with such a common purpose.

Whilst there may be some clarification with regard to the view in the *S v Mgedezi*⁴³ the degree to which an accused must associate himself in order to attract liability lacks sufficient guidance. Such a situation arises when for example the accused may argue during the time of executing the common purpose that he dissociated himself from such an act.

It is arguable that whether an accused has associated himself with the intended common purpose is a question of fact. Essentially there has to be a very careful examination of the role played by the accused. That is, to ascertain whether from this conduct, any inference can be drawn that the minds of all of the accused or the perpetrators were actually directed towards achieving their common goal, for example the death of their victim.

If one has regard to the legal causation, it cannot be said that there exists such causation under such circumstances. Essentially in terms of the legal causation it must be determined which particular result, which was actually caused by the perpetrator's wrongful, culpable act, should he in fact be liable for. To put simply: Should the perpetrator be held liable for the harm caused wrongfully and intentionally by another?

Basically the requirements are that for common purpose to prevail there must be both the physical and mental element present. The accused under the doctrine of common purpose must be consciously aware in his association and that his conduct must together with the other co-perpetrators be intentionally directed at obtaining the same common result. In the absence of such elements, there can be no common purpose association.

Take for example where an accused had hoped that the other perpetrators would succeed in their objectives of housebreaking, with intent to commit theft, but of course does not himself actually do anything together with the others. Surely he cannot be a part of the common purpose. Further, where an accused who may have decided to engage in a criminal act

⁴² Note 26 above, 479

⁴³ Note 34 above

himself, for reasons not related to that of the common purpose, he cannot be held to be associated with such a common purpose.

The crucial point is actually the time when the accused associated himself in the common purpose or ceases to associate himself, as this is what would be taken into consideration to determine liability of that accused.

Where there is some form of association to a common purpose to kill, which association was after the deceased was fatally injured and there was nothing further done by the accused thereafter that hastened the death of the deceased, then in such circumstances, the accused may be held at most for attempted murder and not for murder itself .

2.7 Conclusion

The application of the common purpose doctrine has the effect of treating all whom it encompasses as drones. The doctrine of common purpose too forces all persons within its scope to be liable and not being very selective of the actual act that an individual in fact did. This begs the question is this doctrine actually constitutional in light of its far-reaching implications for participants in a joint enterprise?

CHAPTER 3 :THE CONSTITUTIONALITY OF THE DOCTRINE OF COMMON PURPOSE

3.1 Introduction

In the previous chapters the development of the doctrine of common purpose through the years and various case laws evolved in the process. The South African courts no longer requires a common purpose to be preceded by a prior conspiracy but essentially bases liability on active association. In other words, all that is required is to show that there was some form of solidarity with the principal.⁴⁴

The proof of a causal element in the commission of a crime is integral in criminal law. However it would appear that the doctrine of common purpose rule dispenses with the requirement of causal element in consequences of crime in certain circumstances.⁴⁵ It is in fact in contradiction of the fundamental principle in law that the prosecution must prove the elements of liability beyond reasonable doubt. Accordingly, such a rule in respect of the doctrine of common purpose deviates from the presumption of innocence, or so in a constitutional state such as South Africa.

One of the other critical issues raised is that the application of this doctrine in effect prejudices a group of people in the circumstances in that they are not treated equally.⁴⁶ That is, in relation to those accused persons who are charged with consequence crimes but are not engaged in common purpose. It is further contended that the common purpose rule is not reasonable and justifiable as there are less intrusive means of punishment for such crimes as where there is joint liability. There could in other words be alternative convictions in the form of public violence, conspiracy, incitement, attempt or accomplice liability.⁴⁷ On the other

⁴⁴ A form of liability that is unknown in English law or other common law countries like Canada and Australia, the exception being Scotland.

⁴⁵ Note 26 above, 486

⁴⁶ Section 35(3)(h) of the 1996 Constitution(the right to be presumed innocent, to remain silent, and not to testify during the proceedings).

⁴⁷ Note 26 above, 487

hand, in the case of the requirements for a mandate or where prior agreement is concerned, there may be more justification for all of the accused involved in the crime under the common person doctrine, to convicted. It is not the same as that for active association with the other participants with the *mens rea* element but without any prior agreement to commit such a crime or crimes.

3.2 Facts of the *Thebus* case

In November 1998, a mob of angry people were protesting against the presence of drug dealers in their area. They damaged property of a reputed dealer, Grant Cronje. The latter fired at the mob, the members of whom, returned fire to him. It is in this cross fire that a little girl, Crystal Abrahams, was fatally struck and two others were injured. The two appellants were arrested and convicted of her murder. The trial court relied on the doctrine of common purpose. Applying the definition in *Mgedezi*⁴⁸ the trial court convicted the first appellant, finding that all the requirements were satisfied.

The appellants approached the Supreme Court of Appeal where their case was dismissed and then the Constitutional Court on the basis that the development and application of the common purpose was not in line with the Constitution. [They also had raised an issue of the disclosing of an *alibi* defence the discussion of which is irrelevant to this topic].

The main issues in the *Thebus* case was that of fundamental dignity of those convicted. It essentially de-individualises them and de-humanises them by treating them in a ‘general manner as nameless, faceless parts of a group.’⁴⁹ Secondly, the doctrine of common purpose violates the right to freedom arbitrarily. The reason is that the court dispensed with the requirement of causal connection between the accused’s actions and the crime that was committed. It is what was called a ‘countenances the most tenuous link’ between the individuals conduct and the resulting liability.

In the main, the appellants criticized the doctrine of common purpose on lack of causation between the death of the deceased and attempted murder of the complainants. It was

⁴⁸ Note 34 above

⁴⁹ Note 3 above, 342

conceded by the appellants at argument stage that in a joint enterprise, the action of the accused need not contribute to the criminal result in the case in that but for it the result would not have ensued. Instead, the appellants argued that their action must be shown to facilitate the resulting death or injuries at some level. Such facilitation would occur if the act of the accused is a contributing element to the outcome. To this end the appellants asked that the court develop the common law to cater for this requirement. Their argument was not a direct challenge to the principles as formulated in *S v Mgedezi*.⁵⁰

In terms of the *S v Thebus*⁵¹ case, the finding was that doctrine of common purpose here in its active association form, is compatible with the Constitution.⁵² This case dealt with essentially common purpose by active association. The appellants did not argue that the doctrine of common purpose was totally unconstitutional, but rather that in invoking the principles of common purpose by active association, it was a violation of their dignity, freedom and security of person, as well as their right to a fair trial and to be presumed innocent.⁵³ In particular the Constitutional Court examined the constitutional rights to dignity and freedom. The purpose according to the constitutional court is rationally linked to a rational aim. That is, to combat criminal activities where a number of people are involved. The situation would be unacceptable where for example only one person is found guilty in a crime whilst the others who intentionally contributed to the crime would not be found guilty.

In passing judgment, the Constitutional Court began by outlining the essential import of the doctrine of common purpose that is, imputing conduct. In dealing with the issue the court had to take cognisance of the challenge to a rule of common law. That is, the court had to decide whether the rule limits a constitutionally protected right. If indeed that is not the case, it brings the matter to an end. However if indeed there is a limitation, then the court must decide the matter in terms of the limitation clause of the Constitution, section 36. If the limitation is reasonable and justifiable then the matter rests. However, if not, then the court

⁵⁰ Note 34 above

⁵¹ Note 3 above

⁵² Note 3 above, 533

⁵³ Rights as contained in the Constitution sec 10,12(1)(a) and 35(3)(h) respectively.

must develop the rule in order that it conforms with the provisions of the Constitution.

The application of the doctrine was found not to in effect be an arbitrary deprivation of freedom but rather rationally connected to the control of joint criminal enterprise.⁵⁴ It was found to essential in holding perpetrators of crimes and their accomplices responsible for commissions of their crimes. Crimes committed by groups are seen as more serious than offences committed by single accused. Notwithstanding that crimes committed by a single accused could well have devastating effects, the court reasoned that criminal enterprises involving many actors has the propensity to cause greater harm to South African community by virtue of there being many more actors. The state of our society was considered as well as the desperate need for crime control measure especially in the area of multiple accused persons. The court acknowledged the difficulty of proving causal links in crimes involving many accused as compared with that involving a single accused.⁵⁵ It went on to find the doctrine most helpful in the successful prosecution of multiple accused persons.

Whether in cases of prior agreement or those involving active association, it stands to reason that a court is faced with no simple task of easily applying the common purpose doctrine. The court has to consider the actions in totality, of each accused person and how this influenced the outcome, if at all, which results in the crime(s) he is facing. How the court interprets these factors of the accused conduct in determining the guilt or innocence of the accused and the applicability or not of the doctrine of common purpose will depend on the facts of each particular case.

The doctrine of common purpose appears to be trampling on the rights of a category of people in common purpose in that they are given an unequal treatment. That is to say it goes against the provisions of section 9 of 'the right not to be discriminated against, unfairly.'⁵⁶

In *Thebus*⁵⁷, the court relied on the English law of joint enterprise to impute liability. However such a rule differs from the South African perspective of common purpose.

⁵⁴ Note 3 above, 532

⁵⁵ Note 3 above, 529

⁵⁶ S9 of The Constitution of the Republic of South Africa, 1996

⁵⁷ Note 3 above, 103

According to the English law, the participants are not regarded as co-perpetrators to impute liability but instead the participants in joint enterprise are referred to at most accomplices as in aiders or abettors. It may well be more appropriate to have regards to a participants in common purpose, especially where they played a minor role in so far as the crime was concerned, as accomplices rather than co-perpetrators. What this gives rise to is a situation where there is a shift from the imputed co-perpetrator liability in the context of the common purpose doctrine to one of the actual accomplice liability.

What the Constitutional court affirmed in the *Thebus* case that there is no need for causation, be it factual or any other form, to convict all the participants involved in the common purpose mission. A reason given by the Constitutional Court is that it is difficult to prove causation on all the participants involved in terms of the common purpose, particularly when it involves murder, robbery, malicious damage to property and arson because: ‘Such a causal prerequisite for criminal liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.’⁵⁸

3.3 Criticisms of the *Thebus* decision

The Constitutional Court had a good opportunity to conduct a more in-depth examination of how the rights in question were affected. Further it was argued that the court failed to address the question of what the minimum standard of criminal culpability ought to be, in order to avoid depriving an individual of his freedom arbitrarily or without any just cause.

In terms of the *Thebus* decision, there are other ways in which a participant could still be liable for his actions. He could be liable for the crimes of conspiracy or incitement to commit the crime in question, or for attempted incitement. In a case of mob violence, for example, he may be held liable for the separate offence of public violence.

Perhaps the punishment for offences of conspiracy, public violence and incitement could be increased such that they mirror the courts strong condemnation for the actions done by

⁵⁸ Note 3 above, 508

accused persons as opposed to finding them guilty on murder in terms of the active association form of the doctrine of common purpose. Burchell opines that a shift from co-perpetrator liability to actual accomplice liability would give

‘...appropriate weight to the degree of a participant’s participation in a common purpose in determining both verdict and sentence. It is arguable that the English concept of joint enterprise liability, based on finding that participants in a common purpose are accomplices, not co-perpetrators, is the correct approach and this approach ought to have been followed by the Constitutional Court in South Africa.’⁵⁹

The Constitutional Court lost this opportunity to replace imputed co-perpetrator liability with a form of direct accomplice liability. Perhaps the active association form, at least, should have been declared unconstitutional with imputation failing constitutional muster. This could have at least brought some relief to those affected by such far-reaching consequences that imputation brings.

It would therefore appear that the Constitutional Court greatly exaggerated the crime-control benefits of the doctrine of common purpose. One of the arguments is that the constitutional court could have avoided confronting the appellant’s counter argument that there are less invasive means available for punishing individuals who unlawfully and intentionally participate in the commission of crimes by common purpose or design. After all, legislation can always be enacted to cover more serious offences like the recent look at getting certain crimes to be classified as hate crimes.⁶⁰ Legislation can be created or adapted to accommodate society’s needs.

It would appear that the decision makes it such that the doctrines have become a mechanism for circumventing the normal requirements of proof and, as such, its role in the criminal law cannot be separated logically from issues of due process.

3.4 Justification for the doctrine of common purpose

⁵⁹ Note 26 above , 487, 488

⁶⁰ Government Gazette No 40367, 24 October 2016. General Notices: Prevention & Combating of Hate Crimes & Hate Speech Bill-call for comment.

The Constitutional Court's ruling on the necessity for the doctrine of common purpose as an instrument of crime control can be criticised for the lack of supporting evidence. However, cognisance must be taken of the fact that other relevant factors were also considered, such as crime statistics, the increasing levels of collective criminal activity associated with gangsterism. It should be noted that the Prevention of Organized Crime Act, has already been promulgated to deal with the criminalization of gangs.⁶¹

According to Lord Steyn in *Regina v Powell*,

'[T]he law has a particular hostility to criminal groups. The rationale is partly one of dangerousness: 'experience has shown that joint criminal enterprises are only too readily escalate into the commission of greater offences. Criminal associations are dangerous. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address. Moreover, the danger is not just an immediate physical nature. A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has itself against the law and order of society at large.'⁶²

In arriving at a decision though, courts are not without any consideration of the proportionality test. In *S v Makwanyane* the court held that, 'Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading.'⁶³

In the doctrine of common purpose the proportionality test is one that must be taken cognizance of the 'foundational offence'.⁶⁴ In other words, should the foundational offence be in any sense proportionate to the incidental offence?

3.5 Conclusion

The finding by the Constitutional Court that the doctrine of common purpose, in its active association form, did in fact pass constitutional muster meant for far-reaching implications

⁶¹ Prevention of Organized Crime Act 121 of 1998

⁶² *R v Powell* (1997) 3 W.C.R. 959-14-G-H

⁶³ 1995 3 SA 391 (CC)

⁶⁴ Hayes R & Feld FL, 'Is the test for extended common purpose over-extended?'

for accused. Accused would, when engaged in a joint criminal enterprise, be all too easily prey to the common purpose should the requirements in *Mgedezi* be met [in cases of active association]. Since the attacking of the constitutionality of the doctrine is no longer open, the other option of escaping the reach of the doctrine, once already a part of the joint enterprise in question, is the option for a party to withdraw from the common purpose.

CHAPTER 4: DISSOCIATION FROM THE COMMON PURPOSE.

4.1 Introduction

Association with the common purpose either in terms of prior agreement or active association could mean an actor is guilty on application of this principle. Dissociation or withdrawal from the common purpose could, depending on the particular conduct, negative liability. Dissociation is the converse of association. It is, however, not just any kind of withdrawal that has the effect of negating liability. The courts have to date, not created particular rules in respect of the circumstances in which withdrawal from will actually end an accused liability under the doctrine of the common purpose. There are, however, some basic principles⁶⁵ the courts usually follow to determine to what extent the conduct of the person constitutes withdrawal.

4.2. What constitutes withdrawal from the common purpose?

Snyman has usefully summarised the relevant factors which the courts take into account in determining whether withdrawal from the common purpose has been successful as follows:

‘(i) the accused must have a clear and unambiguous intention to withdraw; (ii) the accused must perform some positive act of withdrawal; (iii) the withdrawal must be voluntary; (iv) the withdrawal must take place before the course of events have reached the stage when it is no longer possible to desist from or frustrate the commission of the crime; (v) the type of act required for an effective withdrawal is dependent on the circumstances of the case; and (vi) the role played by the accused is

⁶⁵ D Landman, ‘*Accomplices and withdrawal*’ (1991)LQC 575, also referred to in *S v Musingadi* 2005(1)SACR 395 (SCA)

determinative of the type of conduct required to demonstrate withdrawal.’⁶⁶

The *actus reus*: there may be instances where there is a withdrawal that would negate the *actus reus*. In other words, where the conduct itself is a constituent element of the crime rather than the mental state of such an accused, it may well exculpate the accused. Where however the withdrawal does not disaffirm the *actus reus*, the accomplice may still raise a defence under particular circumstances, that is, it must be voluntary; there must have been reasonable steps to prevent the crime. An effective countermand will act as a strong defence as opposed to a mere form of encouragement. Lastly, the withdrawal must be properly communicated so that the countermand is clearly understood. Essentially the withdrawal itself must be capable of being effective.

4.2.1 The intention to withdraw

The accused must have the clear and unambiguous intention to withdraw from such joint purpose.⁶⁷

In *S v Singo*⁶⁸ the appellant played an active role as part of a crowd that assaulted the deceased, initially. The crowd threw stones at the deceased. The appellant was himself then hurt in the ensuing attack and then decided to return home to rest. At the time he was not present and asleep, the crowd once again attacked the victim. They subsequently killed her. The trial Court accepted the appellant’s evidence as being true (at least as a reasonable possibility) but still convicted him of murder and reasoned as follows: The test in the *Singo* case is factual- did he cease having the intent to kill that is, had the accused stopped having the intention to kill? Applied this to the facts in this case-the accused initially had the intention to kill the deceased hence the hurling of two stones at him. The trial court convicted the accused of murder as the court reasoned that there had not been a change in his intention even though he had left the scene, thereby not withdrawing from the common purpose.

The appeal court, on the question of withdrawal found that the accused had dissociated

⁶⁶ CS Snyman, ‘*Criminal Law*’ 6ed (2014) 263-264

⁶⁷ Note 66 above

⁶⁸ 1993 (1) SACR 226 (A)

himself from the common purpose to kill. He left the place where the initial assault occurred, which constituted a positive conduct. He further abandoned the intention to kill the deceased. It was held at appeal that:

‘The accused starts with the problem that, ex hypothesis, he was an active participant in the common purpose, and a court may well be skeptical 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 actual stage when the deceased received his or her mortal wounds the accused was still party to the common purpose of those assaulting the deceased, the accused is entitled to the benefit of the doubt.’⁶⁹

The court then considered that in these cases liability required in essence entails that the accused must have had the intent, in common with the other participants, to commit the substantive crime charged, and secondly that there had to have been an active association by the accused with the group in the attainment of the common design. The court held that the appellant had withdrawn from the common purpose prior to the infliction of the mortal injuries on the deceased and that had negated his liability. Both these requirements need to be fulfilled in order for the common purpose doctrine to be of application. Should one requirement not be met, then he would not be acting as part of the common purpose. However, practically speaking, it remains hard to conceive of situations where an accused would be able to escape from liability on the ground that he had ceased his active association with the offence while his intent to be part of that group remains. In the event that the accused not only desisted from actively participating, but also abandoned his intention to commit the offence, he could, theoretically speaking, not be liable for any acts committed by the group after his intention changed.

Then the accused got injured, decided to leave the scene and go home. At this stage, it is obvious that he ends his active participation in the attack. The reason for stopping the attack does not seem important. What is important is that he stopped participating in the act and leaves the scene. EM Grosskopf JA was of the view that there could be ‘nothing more which he could have been expected to do to demonstrate a change of intention.’⁷⁰ He went on to find that he had

⁶⁹ Note 68 above, 233

⁷⁰ Note 68 above, 234

withdrawn from the common purpose before the fatal infliction occurred. Thus the conviction of murder was set aside and he was instead convicted of attempted murder.

The court, in arriving at the decision drew a distinction between dissociation from a common purpose based on active association and dissociation from a common purpose based on prior agreement. The court further held that in order for common purpose to prevail based on active association, which is at work here, common intention and active association in order to achieve a common purpose are required. In the absence of any one of these elements, it would be sufficient for dissociation. Thus the appeal court set aside the murder conviction and substituted it with attempted murder.

Paizes⁷¹ in his critique of the appeal decision, provides other reasons for accepting that the intent to kill had ceased. While the appeal court found that the accused ceased to have the intent to kill when he left the scene. Paizes suggests that since as this happened before the mortal wound was inflicted, he simply 'lacked the requisite mens rea for murder, since he did not intend the act that caused her death would bring about that result.'⁷² This would have negated the need, he proposes, to consider the common purpose argument.

Paizes on the issue of intent of the accused suggests that the question should have been '...whether he intended the victim to be killed by the act of the immediate party which is attributed to him and for which he is, for the purposes of the criminal law, responsible.'⁷³ The real question being 'was the appellant responsible for the act of the immediate party that caused that victim's death –the act, that is, of throwing the stone that actually killed her?'⁷⁴ He opines that if the answer is in the affirmative, then the appeal should have failed. He cites the lack of leaving for moral reasons and the fact that he must have foreseen the death of the deceased by one of the mob as reasons for the appeal failing.

⁷¹ Paizes A 'Common Purpose By Active Association: Some Questions and Difficult Choices' (1995) 112 SALJ 561

⁷² Note 71 above, 563

⁷³ Note 71 above, 563

⁷⁴ Note 71 above, 563

On the issue of the actual hurling of the stones by the accused, Paizes opines that ‘non-liability could only be due to either (a) an insufficient degree of association with the act to warrant the invoking of the doctrine of common purpose in the first place or (b) a dissociation by reason of certain conduct which, in the circumstances was sufficient to have the effect of releasing him from a responsibility which would otherwise have existed for that act.’⁷⁵

He criticized courts for considering ‘association and dissociation as separate issues’ with its ‘own conditions and rules’.⁷⁶ The question, Paizes advances is, on all the evidence before the court, ‘is it appropriate to hold the remote party accountable for the conduct of the immediate party?’⁷⁷ The answer, for Paizes turns on the extent to which the accused associated and the extent to which he intended to associate with such mob conduct. It is easier in cases of prior agreement where agreement between the accused and the remote party is more easily distinguishable as compared with the present case of active association, where what is actually agreed on is not so easily distinguishable. In the latter case, Paizes suggests that all that is needed is, in respect of the remote party, to consider the extent to which he has partook in the common purpose and to ‘reverse or, at least, take all reasonable steps to reverse-the steps that one took initially in associating with the conduct of the others.’⁷⁸

The appeal court found that the accused had in fact withdrawn from the conduct of the mob. Paizes is also at odds with this finding correctly pointing out that it was his actions that got him to be a part of the common purpose and then asking what was it that he had done to get himself out of the scope of this doctrine? The accused himself was frank in that he had not had a change of heart, but rather of health, he was certainly not remorseful and he did not try to dissuade the others of the group to stop the attack. He did not stop on his own accord (that is his conscience as opposed to his injury) from throwing stones nor did he merely just observe the incident. The latter-mentioned conduct too, reasons Paizes, would have been enough to make him liable for the death of the deceased.

⁷⁵ Note 71 above, 564

⁷⁶ Note 71 above, 564

⁷⁷ Note 71 above, 564

⁷⁸ Note 71 above, 565

Applying the requirements of *Mgedezi*⁷⁹ is problematic for the following reasons:

- (a) The accused was not at the scene when the mortal wounds were inflicted;
- (b) It is still unclear if his intention continued up until the infliction of the mortal wound and
- (c) There was no act of association at the time the mortal wound was inflicted.

Paizes thus rightly questions the actual application of the doctrine of common purpose in the above circumstances.

Comparing the active association form of the common purpose to that of prior agreement, Paizes points out that dissociation in cases of prior agreement must be at a stage where ‘he is still able to exercise some control over its commission and in a manner that is clear and unequivocal.’⁸⁰ After that stage the argument of the remote party not being in the presence of the immediate party is not enough to resist the application of the doctrine. In cases of prior association the ‘constitutive act of agreeing to perform an act is so strong and so clear an endorsement of its commission that it operates with something approaching presumptive effect as regards its duration’.⁸¹ In cases of withdrawal in such instances, Paizes avers that it would have to appear from evidence that some effort on the part of the remote party was made to revoke or attempt to revoke the mandate absenting which, it would not be unfair for the court to assume that the association continued.

In contrast, position of application of the doctrine in terms of active association is not the same. Here the remote party in the words of Paizes,

‘...does nothing to communicate to the immediate party that there is some compact between them to do the acts in question: otherwise one would say there is an implied agreement or mandate to do them. ..the extent to which he associates is not neatly wrapped up in the form of an agreement...His association takes the form of doing something as opposed to asserting something and it tends, as a result, to be more ambiguous, less clearly defined and less clearly expressive of an intention to associate himself with another’s conduct than the grant of mandate.’⁸²

⁷⁹ Note 34 above

⁸⁰ Note 71 above, 566

⁸¹ Note 71 above, 566

⁸² Note 71 above, 567

While both these forms attract responsibility for the actions of a third party, there will be cases where one is in doubt whether, in cases of active association, the remote party had the intention to so associate. In cases involving a lapse of time, Paizes opines of looking elsewhere for ‘assurance of the remote party’s intention to associate himself with the kind of acts actually endured.’⁸³ The context of the entire event must be considered. The removal, according to Paizes, of the accused from the scene in *Singo*, deprived him of the opportunity ‘to follow the progression of events and, possibly, to change his mind.’⁸⁴

4.2.2 A positive act performed by the accused

The actual act of disengagement from the common purpose must be sufficient enough to constitute withdrawal. In more complex cases effective withdrawal may mean advising authorities of the common enterprise or actually objectively stopping the enterprise from continuing. If a perpetrator has been assisting the group with some means to facilitate the crime in question, then he must take likewise steps to cancel out the help he has given.

Just by merely being passive is simply not enough to be considered a withdrawal. The reasoning behind is that the accused person, by his previous association, connected his fate with that of the others to the joint enterprise.

The Appellate Division in the *S v Nomakhlala*⁸⁵ case took a view in that in this case, the appellant did not simply run away or flee from the scene of the incident. He in fact refused to submit to the act of actually stabbing the victim to death. He subsequently withdrew from the place where the incident had occurred. He was also not part of the ‘gang’ as the other accused were. Under the circumstances it would have been difficult for him to try and convince the others in the “gang” to refrain from going ahead with their plans so that he may have protected the deceased. Furthermore, the appellant in the *Nomakhlala*⁸⁶ case, did not at first participate in committing the crime with the ‘full appreciation’ that it would result in the

⁸³ Note 71 above, 568

⁸⁴ Note 71 above, 568

⁸⁵ 1990(1)SACR 300(A)

⁸⁶ Note 85 above, 304

death of the victim.

We accordingly derive two relevant factors following the *Nomakhlala*⁸⁷ case, with regards to effective dissociation from common purpose. Firstly; there is positive dissociating conduct which entails, for example, running away from the crime scene and refusing to carry out any instructions. Secondly, whether or not the accused appreciated that the consequences might actually occur.

4.2.3 Voluntariness to withdraw

Just merely being passive is simply not enough to be considered a withdrawal. The reasoning behind is that the accused person, by his previous association, connected his fate with that of the others to the joint enterprise. The withdrawal must also be done voluntarily or of his own accord. If he decides to withdraw after the conspiracy has been discovered by authorities, then in those circumstances his withdrawal is late and goes not negate liability.

In *Malinga*⁸⁸ the accused, on his own accord, told authorities of a conspiracy. The court found that he had, in effect, dissociated from the common purpose.

In *S v Nzo and another*⁸⁹ members of a cell belonging to a terrorist organization, where a woman was killed after she threatened to expose the cell in which they were kept. There was no evidence to show actual association with the murder of the woman by the accused members.

The crime according to the court was committed with the intention of preventing the deceased from divulging any information to the police as it would have compromised the execution of the task they set out to achieve. The first appellant in this case, when confronted by the police regarding his identity document, revealed all the secrets of his colleagues' plans

⁸⁷ Note 85 above, 304

⁸⁸ 1963 (1) SA 692 (A)

⁸⁹ 1990 (3) SA 1 (A)

and activities. The second appellant together with the others were subsequently arrested, with the exception of one who managed to evade justice by escaping to Lesotho.

The court took into consideration the fact that the first appellant confessed his deeds to the police. The question is whether he wanted no further part in the mission with his other confederates. In fact the court was given evidence of his behaviour the following day where the first appellant insisted that the second appellant surrender the explosives. The court held that his conduct amounted to no more than an act of abjuration, that is the solemn repudiation, abandonment or repudiation upon oath. So does this recanting help him to escape liability by way of dissociation? The court held that whilst it was by no means of any help at that stage, it was however relevant and important to determine his state of mind at that time when he made certain disclosures to the police.

The court subsequently held that the appellant in the circumstances and view of his conduct dissociated himself from the common purpose prior to the murder being committed. Accordingly he absolved himself from liability of the common purpose to commit murder.

The court took into consideration that the accused, on his own accord, told the police of his political connection with the ANC. He effectively disassociated himself with the common purpose to have the deceased murdered. The relevant factor in this instant was the voluntariness of the withdrawal from the common purpose. His conduct on the following day of the event in particular his insistence to the other participants to give up their weaponry indicated his position to the court. It was held that his conduct was indicative of his rejection of the common plan when he made his disclosure to other police.

Nzo however, must be distinguished from *Malinga*⁹⁰ in that in the former case, the accused spoke up because he had to due to the situation he found himself in that he was arrested by authorities in a road block on the basis of having a false identity document. *Nzo* is contentious as he was never a party to an agreement to murder the deceased, nor did he actively associate himself with the commission of the death of the deceased. He was, in fact, not present at the scene where the murder occurred, thus not satisfying the requirements in *Mgedezi*. It must also be noted that the accused laboured under the impression that authorities

⁹⁰ Note 88 above

had uncovered the scheme and then ‘voluntarily’ made statements to the police. Perhaps his withdrawal was not so voluntary and his defence should not succeed on this ground.

Nzo was a case concerning ANC operatives, who were sought out by the authorities at the time. This political context can perhaps explain the difficulties at play for the court to make sound judgment on one hand and to maintain law and order on the other.

4.2.4 The stage of withdrawal

A significant factor to be considered by the court is just how far the crime has already progressed, in deciding if the dissociation is a timely withdrawal. What will amount to a successful withdrawal is if this withdrawal commences before reaching of the so-called ‘commencement of the execution’ stage – that is, the point where the achievement of the crime cannot be frustrated. In determining whether this stage has been reached, the court will have to consider the particular crime with all relevant circumstances.

In *S vs Lungile*,⁹¹ the appellant belonged to a gang who were busy in the commission of a crime when they were disturbed by a policeman. He then ran away. As it was shown that he was party to prior agreement had already participated to such a substantial part, more was needed to be done by the accused to effect a successful defence of withdrawal for example by telling his co-conspirators and stopping or frustrating the effect of the plan to commit the joint enterprise. Here the court had found that his departure was a neutral factor and that it had done nothing to create the reasonable possibility of having withdrawn from the common purpose and its subsequent execution.

4.2.5 The type of act required

Essentially the particular conduct needed for successful negation of liability depends upon a number of circumstances. A set term of requirements applicable in all cases is not possible. If

⁹¹ 1999 (2) SACR 597 (SCA)

it is possible for him to converse with his co-conspirator and inform them of his withdrawal and then attempts to talk them out of continuing with the plan then his defence of disassociation succeeding is improved. However, for the defence to succeed he need not necessarily succeed in his attempt to dissuade them; neither is it necessary for him actually to frustrate their plan – a mere attempt on his part to do so may be sufficient to qualify as an effective withdrawal.⁹² On the other hand, although an attempt to frustrate the commission of the crime is strong evidence of an effective withdrawal, it is not in all circumstances an indispensable precondition for the withdrawal to succeed as a defence. What amounts to dissociation from the common purpose in one case may not amount to dissociation from the common purpose in another, based on the circumstances surrounding that particular case.⁹³

4.2.6 The role of the accused

What role a person played in the entire crime also plays an integral part in determining whether or not such crime can be imputed to such a person, being one of the accused. A larger more active role equated with a more pronounced act of withdrawal.

In *S v Musingadi and Others*⁹⁴ liability in respect of common purpose and in particular dissociation from common purpose were at issue. In this case the appellants were departing from the scene, leaving the deceased to die. The court illustrated that not every act of apparent disengagement will in effect mean effective dissociation. The circumstances are all important in the consideration. The court stated in the *Musingadi*:⁹⁵

‘Much will depend on the circumstances: On the manner and degree of the accused’s participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of

⁹² CR Snyman 5th Ed 271

⁹³ Note 92 above, 271

⁹⁴ 2005(1) SACR 395 (SCA)

⁹⁵ Note 94 above

circumstances is not exhaustive.’⁹⁶

In this case, the court took into consideration the participation of the accused and accordingly arrived at the following conclusion:

‘(T)he greater the accused’s participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.’⁹⁷

In *S v Wana & others*⁹⁸ the high court examined the circumstances that might warrant the conclusion that a party to a common purpose by mandate or agreement (as opposed to active association) had done enough to dissociate himself from the common purpose and escape liability. Although this is a high court decision it does warrant some mention especially in light of the way the court dealt with dissociation.

The facts in *Wana*⁹⁹ was that seven accused were charged with 17 offences among others: robbery with aggravating circumstances, murder and attempted murder. An armoured vehicle was carrying liquid platinum. The driver and passenger were shot at and drums of the platinum were removed from the vehicle. Police tried to intervene and both sides exchanged fire. Six persons died and 3 were injured. Of the deceased persons one was a member of the public and 1 bystander was injured. Accused 4 raised a defence of withdrawal from the common purpose claiming that he had dissociated from the robbery itself and that the dissociated commenced at the planning stage. He went on to inform accused 5 of him wanting to withdraw and his continued meeting was explain as not wanting to alert other of this. He did take some steps to tell a policeman known to him of the plans for the robbery without having given enough details as to where exactly it would take place and how the mission was to play out. Without these details, the policeman could not intervene and the

⁹⁶ Note 94 above, headnote

⁹⁷ Note 94 above, 396

⁹⁸ 2015(1)SACR 374 (ECP)

⁹⁹ Note 98 above

planned robbery panned out.

In the *Wana*¹⁰⁰ decision, however, the court held that it was necessary to consider the status and effect of the *Beahan*¹⁰¹ dictum which is a foreign (Zimbabwean) case. That case involved a conspiratorial criminal enterprise which had already advanced to a substantial degree by the time of the alleged dissociation. He considered that the dictum that the more the accused's participation, and the greater the implementation of the common enterprise, the greater the accused would need to do in order to negate dissociation. He hastened to add that this would not place an onus on an accused. It pointed out rather a need to create the performance of some positive act of withdrawal to illustrate an unequivocal intention to dissociate from the common purpose.

As to what conduct was necessary, the court held that this was dependent on a number of considerations, and might, depending on circumstances, include an attempt to dissuade co-conspirators from proceeding with the plan or taking steps to thwart or prevent the performance of the enterprise, such as reporting timeously to the police or providing the police with the means to prevent the commission of the offence.

The dictum commended itself to Goosen J as 'sound in principle and . . . consistent with our law.'¹⁰² In his view a co-conspirator who had, by his conduct and actions, played a central role in the initiation of the enterprise and also proceeded to facilitate its execution had, if he wished to establish effective dissociation from the enterprise, actively to set out to undo the conspiracy, or if that was not possible, to thwart its execution. What would suffice would depend, of course, on the facts of each case.

In *Wana*¹⁰³ the accused played a pivotal part in the plan to commit the robbery. He was the main man in setting up buyers for the platinum that was to be stolen; he had done so

¹⁰⁰ Note 98 above

¹⁰¹ 1992 (1) SACR 307 (ZS) (Note that this is a Zimbabwean case)

¹⁰² Note 98 above, para 204

¹⁰³ Note 98 above,

previously; he brought other persons into the planning process; he was, for a period, in custody but returned immediately afterwards to the central role he had previously played.

His own account of what he did to withdraw included: telling a co-conspirator of his wish to withdraw; going ahead with meetings with another ostensible co-conspirator (who, it turned out, was a police trap) only so as to not alert the others of his decision to withdraw; and informing a policeman in vague terms – but only on the evening before the robbery, and only by giving him the name of a general area.

The policeman was not given any details as to what was to take place or where, specifically, it would take place. According to Goosen J, what was clear from this was that ‘no effective steps could then be taken to frustrate the carrying out of the prior agreement neither to commit an offence nor to dissuade the co-conspirators from continuing with that criminal enterprise.’¹⁰⁴ There was, moreover, evidence to suggest that the accused continued to play his role in the robbery on the day of the incident, which was to monitor the movement of the security vehicle carrying the platinum from the airport to the spot where the robbery was to take place, and to furnish his co-conspirators with the information to that effect.

In conclusion, the accused’s conduct did ‘not, in the circumstances of this case, establish that he manifested an unequivocal intention to dissociate himself from the commission of the offences or that his positive act was sufficient to establish dissociation from the commission of the crimes which he had conspired to commit with his co-conspirators.’¹⁰⁵

It had been stressed that in *S v Nduli*¹⁰⁶ the more advanced his participation in the crime was, the more significant and evident his action would have to be to establish dissociation. It was, according to the court, a matter of fact and degree.

In *Nduli*¹⁰⁷ the Appellate Division found it necessary to decide whether the dictum in *Beahan*¹⁰⁸ constituted a rule of law in South Africa or was merely at best a ‘rule of thumb’?

¹⁰⁴ Note 98 above, para 209

¹⁰⁵ Note 98 above, para 211

¹⁰⁶ 1993(2) SACR 501 (A)

So too, in *S v Lungile & Another*¹⁰⁹, where it was held whatever view one took of the matter, there was no withdrawal from the common design, since the reason for the accused fleeing from the scene was, in all likelihood, because of fear of arrest or to escape with the spoils of the criminal endeavours.¹¹⁰

The court gave regards to the fact that the flight of the accused from the crime scene when the police arrived may create a reasonable doubt as to whether the accused was part of the common purpose mission. Essentially, the accused being part of a gang committing a robbery ran away as soon as the police arrived on the scene. The court took into consideration that such running away from the scene may create some doubt about his association. In this case however, there was a prior agreement to commit the robbery. The accused had in fact participated in the crime until the police arrived.

The court then held that in the case here there is an issue regarding common purpose, it is imperative to give attention to the extent of the accused's participation in the crime itself. That is to say, where the accused may have participated in the activity to some 'substantial degree'. In other words there must be more than a mere leaving of the scene by the accused in order to establish a legally effective dissociation from the common purpose. There should at least be some form of notification to the other participants and further a nullification or frustration of the furtherance of the common purpose. Considering the crime itself and its *sequelae* there does not exist a reasonable possibility that the accused had in fact withdrawn from the common purpose.

The contention on behalf of the first appellant in the *Nduli*¹¹¹ case was that he had dissociated himself from the conspiracy to rob the filling station. He therefore had to be acquitted by the

¹⁰⁷ Note 106 above

¹⁰⁸ Note 101 above

¹⁰⁹ Note 91 above

¹¹⁰ 1999(2)SACR 597 (SCA); 'where it is proved that the accused was party to a prior agreement to commit the robbery, and that he in fact participated in it until the advent of the policeman, the fact that he left the scene before the shooting started does not create such a doubt.'

¹¹¹ Note 106 above

trial Court. The three features that showed he had distanced himself from the crimes committed are: his averment in his extra- curial statement to a magistrate that he had told appellants 2 and 3 when they got out of the car that ‘this job you give me is too heavy for me’; that he had borrowed R2.00 for bus fare; and that he had in fact departed by bus.

In considering the test to ascertain whether the appellant had in fact dissociated himself from the crimes, the court held that the statement made to the magistrate was not confirmed in evidence, the first appellant chose not to testify, neither was he cross – examined on the issue. Further such a statement was made only two years after the incident. He the first appellant never mentioned it again nor did he plead in the trial court. His explanations were considered to be equivocal”, including the borrowing of the R2.00 for bus fare. It was held on appeal that his conduct was not consistent with dissociation and accordingly his appeal was dismissed.

In *S v Van Wyk*¹¹², there was a salutary reminder that whilst there may exist an inference of common purpose on the basis of what was said during or after the event, there must be caution as to inferring such an association with some group activity from the mere presence of the person who is sought after for being liable for the actions of the other perpetrators.

The court held that:

‘(E)ven if the appellant had realized that the deceased was about to be killed when he returned into the thicket with the rest of the group, that does not justify an inference that he was in agreement with, or approved of, the crime which was about to be perpetrated, nor that he thereby manifested his association with the group’s criminal purpose. The fact that he did not participate in the murderous assault on the deceased illustrates this.’ 113

The court found no evidence of association as the appellant had not participated in the murderous assault on the deceased. The fact that he had asked where the heart was located was sufficient to establish his intention to be part of the common purpose with the others or the performance by him associating him with the other perpetrators.

¹¹² 2013 JDR 0667 (SCA)

¹¹³ Note 112 above, 18

In so far as dissociation is concerned, the courts require more than a mere withdrawal or cessation by the co-conspirator. The two basic requirements of the court essentially are that of intent by the accused and of course followed by his active participation. In the absence of either element, there can be no liability. On the contrary where the element of intent is still contained, despite terminating the active association would still render such a person liable. In other words, there must be both withdrawal of intent and the active participation for the argument of non – liability to succeed.

4.3 Conclusion

There are a number of indicators of dissociation. The court will consider what the accused has actually done thus far, what he did to claim withdrawal, the actual act of withdrawal and its surrounding circumstances and how this reflects his intention. This will be influential on the type of conduct which the law requires him to have performed in order to succeed with a defence of dissociation. Somebody whose role is relatively small (such as a person who has done nothing more than merely agree to assist in the commission of the crime) may more easily escape conviction by withdrawing from the common purpose than someone who has played a prominent part in the devising of the plan or conspiracy which then unfolded. Whereas the former may possibly escape liability by simply abandoning the group, a court would probably require the latter to actively attempt to dissuade his companions from proceeding with the plan or to warn the police timeously of the planned commission of the crime so as to enable the police to prevent the crime from being committed. It is improbable that a court will uphold a defence by the co-accused of dissociation if he had previously conspired with other members of the gang to commit the crime and then merely walked away. It is also easier for a co-accused in common purpose in terms of active association to withdraw as compared with a co-perpetrator in terms of common purpose by prior agreement as more is required in the latter case, of an accused.

CHAPTER 5: DOCTRINE OF COMMON PURPOSE- FOREIGN JURISDICTIONS

5.1 Introduction

The doctrine is not only found in South African law. While some other jurisdictions have some form of the doctrine it is important to consider their versions of it and where our doctrine features comparatively.

Other common law jurisdictions like Australia and Canada have essentially followed the English approach on the subject of joint criminal enterprises. Both these courts require that there must be a prior agreement followed by some actions by all participants to a joint enterprise. In Australian law, there is a distinction between aiding and abetting at the scene as opposed those who aided and abetted before commencement of the crime. Hence there are distinctions between participants in the second degree.

In Canada, Section 21(2) of the Canadian Criminal Code states:

‘Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.’¹¹⁴

5.2. The English Position

The origin of this doctrine is found in English case law. The earliest trace of this doctrine goes back to the case of *Macklin, Murphy and others*¹¹⁵ where Judge Alderson B stated:

‘It is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by

¹¹⁴ Section 21(2) of the Canadian Criminal Code

¹¹⁵ (1839) 2 Lewin 225 ER 1136

all.’116

Later in the case of *R v Swindall & Osborne*¹¹⁷ where two cart drivers participated in a race. A pedestrian was killed and it was unknown which driver had driven the cart that caused the mortal injuries. Since both equally encouraged the other in the race, it was held to be immaterial which driver was responsible for the death and they were held jointly liable.

The English stance on negating actions to a conspiracy was quoted in the Zimbabwean decision *Beahan*¹¹⁸ by Judge Gubbay. He learned Judge referred to Glanville Williams in this regard:

‘The need not even be express withdrawal of advice and consent, if the inciter (conspirator) has made his change of heart clear by conduct, as by quitting the gang.....

The above rule applies only when the defendant has done no more than encourage or otherwise incite the commission of the crime, as by agreeing to take part in it. If he had acted positively to assist the crime, he must it seems, do his best to prevent its commission, by warning the victim or by other means, short of going to the police.’¹¹⁹ (Emphasis supplied.)

The court went on to quote the writers Smith and Hogan as follows:

‘The position might be different where D has supplied E with the means of committing the crime. Arguably, D must neutralize, or at least take all reasonable steps to neutralize, the aid he has given. If E ignores D’s countermand and uses the thing or information with which D has supplied him to commit the crime, he has in fact been aided by D in doing so. Aid may be less easily neutralized than advice.’¹²⁰ (Emphasis supplied)

¹¹⁶ Note 115 above

¹¹⁷ *R v Swindall and Osborne* (1846) 2 Car. & K.230

¹¹⁸ Note 101 above

¹¹⁹ Note 101 above, 322

¹²⁰ Note 101 above, 322

In *R v Powell*¹²¹, the appeal was against the liability of a participant in a joint enterprise when the other participant was in fact guilty of the crime and the purpose was not the crime in question. The facts of the matter was that three accused went to the deceased's house to buy cannabis. One of the group then shot at the deceased when he opened the door, resulting in his death. They were all charged with murder. One of the accused, P, claimed that he was only there to purchase the drug and that he was not aware of the gun carried by D. The appeal court dismissed their appeal. A further appeal was also rejected. Their liabilities were relating to the accessory principle. Lord Steyn in his judgment stated that

‘...if the law required proof of the specific intention on the part of the secondary party, the utility of the accessory principle would be greatly undermined. It is just that a secondary party who foresees that the primary offender might kill with intent sufficient for murder, and assists and encourages the primary offender in the criminal enterprise on this basis, should be guilty of murder. He ought to be criminally liable for harm which he foreseen and which in fact resulted in the crime he assisted and encouraged.’¹²²

He went on to lament the difficulties of proving the intention of such a perpetrator. He continues the

‘criminal justice system exists to control crime. A prime feature of this system must be to deal justly but efficiently with those that join others in criminal enterprises. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed. For these reasons I would reject the arguments advanced in favour of revision of the accessory principle’.¹²³

Lord Hutton in his judgment found that ‘it is sufficient for a conviction of murder if a secondary party, in the course of a joint enterprise appreciated that the primary participant

¹²¹ [1999]1AC 128

¹²² Note 121 above, 114 para E to G

¹²³ Note 121 above, para G to H

could cause the death with intent to kill or to cause grievous bodily harm.’¹²⁴ Thus the appeal was dismissed.

In *R v Rook*,¹²⁵ the court held that, as in the case of joint enterprise where both parties are present at the scene of the crime, it is not necessary for the prosecution to show that a secondary party who lends assistance or encouragement before the commission of the crime intended the victim to be killed, or to suffer serious injury, provided it was proved that he foresaw the event as a real or substantial risk and nonetheless lent his assistance.

Rook was convicted as one of a gang of three men who met and agreed the details of a contract killing of the wife of a fourth man on the next day. Rook did not turn up the next day and the killing was done by his two fellows. His defence was that he never intended the victim to be killed and believed that, if he failed to appear, the others would not go through with the plan. Lloyd LJ. described the evidence against him in this way:

‘So the position, on his own evidence, was that he took a leading part in the planning of the murder. He foresaw that the murder would, or at least might, take place. For a time he stalled the others. But he did nothing to stop them, and, apart from his absence on the Thursday, he did nothing to indicate to them that he had changed his mind.’¹²⁶

This did not amount to an unequivocal communication of his withdrawal from the scheme contemplated at the time he gave his assistance.

The learned authors contend that there could be another more appropriate manner of determining potential liability by way of accomplice liability. This form of liability accords with that of the English joint enterprise, to which Judge Moseneke relied upon in support of his decision in the *Thebus* case.¹²⁷ However the English version differs in that the participants in a joint enterprise are not considered as co-perpetrators by imputing blame to the liability of the actual perpetrator. Instead the participants in a joint enterprise under such circumstances

¹²⁴ Note 121 above, G

¹²⁵ (1997) Cr. App. R. 327, 9

¹²⁶ Note 125 above

¹²⁷ Note 3 above

are regarded as accomplices, at most.

It is contended that where the emphasis is placed on the liability being imputed co-perpetrator to that of actual accomplice liability, the courts may give more appropriate weight to the degree of that participant's role in the common purpose when determining verdict and sentence.

It was submitted that in accordance with the English law dictum of joint enterprise liability, where the participants are regarded as accomplices and not co-perpetrators, that is the correct approach.¹²⁸ Their rules consider the extent of the accused's participation more than the South African system. Even labelling is more fair with participants are terms accomplices as opposed to so-perpetrators.

5.3 Circumstances under which foreign courts considered withdrawal

There is no doubt that the doctrine of common purpose raises many questions and of course more often than not, poses much uncertainty. The question therefore is, how does one dissociate himself or herself from common purpose? Case laws abound as to how the courts deal with such situations. We take a look at some of the cases and establish to what extent a person thus escapes liability.

It may sometimes occur that a person will have a change of mind when faced with certain circumstances. He or she may decide to take flight from the situation due to a realisation of some sort of risk that made him change his mind from participating in the commission of some crime.

5.3.1 Venda decisions

Venda was theoretically an independent state and thus not officially part of South Africa until 27 April 1994, when it was re-absorbed into the Republic. Their judicial decisions have up until appeal stage been Venda decisions. It must be noted that appeals were to the South

¹²⁸ Note 26 above, 487

African Appellate Division. Hence these would, at that stage be South African decisions. I have included them here for ease of reference.

In the Venda decision of *S v Tshitwamulomoni*,¹²⁹ the appellant who was part of a gang, was hit from behind in the fracas and decided to go home. The court held that, ‘a man who actively associates in the execution of the common purpose and at the stage when becoming out of breath or becoming tired stops actively participating just for that reason, but not because he mentally wanted to dissociate himself from the actions of the other perpetrators whose actions are also regarded to be his.’¹³⁰ Subsequently he was convicted of murder in terms of the doctrine of common purpose. Similarities abound between this case and the trial court in *Singo*.¹³¹

In *S v Ramadzhan*¹³² a traditional healer was killed by a mob. According to the accused, in terms of a prior agreement, he went along with the mob to the kraal of the victim. He went with them with the intention to kill the traditional healer. He then ran after the victim when he fled from his kraal. As soon as the victim was struck down by a blow with an axe to his back, the accused then joined in and assaulted the deceased with a stick or wood. Medical evidence though showed that the blow with the axe was not in fact the fatal blow that led to his death. The attack on the deceased continued and when the co – accused began to chop the deceased on the head, the accused found it repulsive and left the scene of the crime. The court held that the fatal injury was committed only after the accused had left. However there was no evidence beyond reasonable doubt and as such it was taken that the accused had left shortly after the fatal injury.

One argument against this view is that it leads to speculation that the fatal injury may have followed immediately after the accused had left. In such a case, there exists the possibility that the deceased may well have been initially unconscious and the co accused may have realized this only later and then completed his job. It is also possible that the deceased may

¹²⁹ SK Parmanand, “Dissociation in common purpose” 5 Stellenbosch Law Review. 82 1994 -a view from Venda (unreported)2 November 1990(VSC)

¹³⁰ Note 129 above

¹³¹ Note 68 above

¹³² *S v Ramadzhan* (unreported) 13 May 1991 (Case No. CC27/90) (V)

have been alive for a while until finally succumbing to his fatal injuries. Such a fatal injury was not caused by the accused.

In conclusion, dissociation is to a large extent a question of degree. Relevant to the enquiry is whether or not there is a reasonable doubt with regards to the accused's *mens rea* in respect of the fatal assault. In the absence of a prior agreement, it is only where there is the actual presence at that material time when one can be said to have *mens rea* in respect of a murderous attack. Where therefor, a person physically leaves the scene before the material time of the victim's death, there is every indication of a subjective intention contrary to the common purpose. Under such circumstances, *dolus eventualis* is absent because *dolus* itself is absent.

5.3.2 Zimbabwean decisions

In *R v Chinerere*¹³³ the appellant, as part of a gang, was present when the door of the shop was broken. He however, got cold feet and decided to leave the scene. He did not enter the shop, nor did he join the others to physically remove any goods from the shop. The court considered such withdrawal of the appellant in the context of dissociation. The court held that,

‘A conspirator can withdraw from the enterprise even at the last moment and in the event of his withdrawal he is entitled to his acquittal on the main charge and is liable to be convicted only on the offence of conspiring to commit the crime in question.’¹³⁴

Essentially the last-moment withdrawal amounted to dissociation from the common purpose. It is sufficient according to the court if the person attempts to frustrate the plan and it is not expected that such plan is actually frustrated. It would be sufficient if he simply makes an attempt to frustrate the plan. The court went on further to say that,

¹³³ 1980 (2) SA 576 (RA)

¹³⁴ Note 133 above, 579

‘...since there are two offences involved [housebreaking with intent to steal and theft] there does not seem to be any reason in principle why a person who has aided and abetted in the initial stage of housebreaking with intent to steal and theft should not dissociate himself from the ultimate offence, that is the theft of goods from premises broken into, before the theft has been perpetrated, and thus escape conviction of that offence as a principal offender.’¹³⁵

The running away of the appellant at the last moment after the break in was effected, was sufficient dissociation from the theft. A criticism against this judgment is that the court overlooked the fact that the appellant was actively associated with the others and therefore linked his fate and guilt with them. As soon as he became scared and decided not to participate, he should have made attempts to convince his companions to change their minds. Simply running away does not in itself tantamount to dissociation.

Any assistance that fell away due to his running away does not in itself affect his liability in the common purpose based on active association, together with the ultimate commission of the crime. Therefore, active association in a common design results in the act of the principal offender becoming the ‘act of all.’

It is submitted that the following factors to be considered for dissociation from a common purpose in Zimbabwean law:

- (a) Intention: There must be the intention to dissociate from the common purpose. Such intention can be implied or express and of course it must be clear and unambiguous.
- (b) Communication: The person’s fate and guilty is linked to the other. Therefore, the communication must be conveyed to the other in one way or another, having regards to the fact that it is sometimes impossible, given the surroundings and the circumstances.
- (c) Statement: There must be effective words used and such statements must be made voluntarily. The sole intention must be to dissociate from the unlawful common purpose.
- (d) Positive Act: Once communication has been effected, there must be a positive act on the person who decided to dissociate from such an unlawful common purpose. Every attempt

¹³⁵ Note 133 above, 580

must be made to frustrate the common purpose from prevailing or taking place. Regards should be given to the circumstances under which the person is placed to dissociate from the common purpose.

In the case of conspiracy or common purpose, for example, Gubbay CJ ventured the following dictum:

‘I respectfully associate myself with what I perceive to be a shared approach, namely, that 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 substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the 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. To the extent, therefore, that the principle enunciated in *R v Chinyerere*¹³⁶ is at variance, I would with all deference, depart from it.’¹³⁷

In *S v Ndebu*¹³⁸ case, both appellants set out to commit housebreaking. It was common cause that the first appellant had a gun. The second appellant knew that a possibility existed that the gun could be used and that someone could be fatally shot. As they reached the house a lady saw them and screamed out to another person. That person then approached the first appellant who then shot at him, thereby killing him. The second appellant contended that he fled as soon as he heard the lady scream and that he was outside the house when the mortal shot was fired. The court considered the last-minute withdrawal by a participant from a common purpose immediately prior to mortal shot being fired at the deceased, did not assist the accused in avoiding a charge of housebreaking but rather operated as a mitigating factor

¹³⁶ L Hales, *Effective dissociation from a common purpose – a Zimbabwean view*, SACR 1992 2 SAS 1980 (2) SA 576 RAD

¹³⁷ Note 91 above, 324

¹³⁸ 1986(2)SA133(ZS)

during sentence. At the stage that the second appellant withdrew from the joint criminal enterprise, it became impossible to frustrate the commission of the crime.

The mere flight of the appellant, according to the court, was not dissociation, any more than someone who is hiding under a bed. The second appellant very well knew and appreciated the risk that should there be someone in the house at that time confronting the intruders; there was a possibility that the firearm might be used in order to subdue them or to facilitate an escape.

If he had, for example, influenced his companions to withdraw from their conduct or tried to protect the occupants of the house at that time, it would certainly have been different. His actions might have under such circumstances amounted to dissociation. He however simply made a last-minute withdrawal which was in any event not communicated to his companion who was at that time armed. It was also possible that his companion who was armed was not even aware of his absence from the house at that time. As such his actions at that time was seen by the court as being in the interest of both of them and therefore fell within the scope of their common design.

The court held that words used must be effective in order to constitute dissociation from the common purpose. There must in other words be effective communication to the others and the communication itself must contain effective words. Such words must have the effect of changing the minds of the others and further influence them to stop continuing with their actions.

Ultimately the court held that the withdrawal at the very last minute from the common purpose, just prior the fatal shot was fired, did not serve to release him from liability with the common purpose mission. That is, where he was part of the gang to do house breaking and the fact that he ran away from the crime scene. At most it helped in so far as mitigating circumstances on the issue of sentencing. The significant factor to consider is “how far the crime has already progressed” in determining the dissociation from the common purpose. In other words the “timeous withdrawal” factor would be given due consideration by the court.

It seems that in the six years since *Chinerere*, the Zimbabwean Courts had become more

critical of the stage of withdrawal of the participants acting in common purpose.

The Zimbabwean case of *Beahan*¹³⁹

The facts of the case were: the appellant was contacted by a person in May 1988 from Germany advising him of an opportunity and requesting him to go to Frankfurt, Germany. An amount of R8000 was paid into his bank account. The appellant then took flew up to Frankfurt and met with a certain Allan. The latter told the appellant of a plan to break out of prison certain prisoners at Chikurubi Prison in Harare. The appellant displayed a keen interest in the matter by advising on the number of persons needed to conduct the mission, he suggested two persons to be included in this enterprise and he even introduced the said Allen to one Jeff, while still in Frankfurt.

On his return to South Africa, the appellant contacted a certain Cormack to join the project. He still kept in contact with Allen and Jeff and he mentioned Namibia as a preparation area.

In June of 1988 the appellant engage in training and preparation at a certain farm 300 km away from the capital in Namibia. Included in this training was Maguire and Cormack, the men he had suggested to Allen in Frankfurt. The appellant had details of the enterprise, knowing it involved the use of military weapons and explosives. He also knew that an aircraft will be used especially at the end stage of the project and during escape.

A few days later the appellant met Jeff at Swaziland discussed plans and then went to Botswana where they found a certain Toyota available for their disposal. He was in the company of Maguire and a day later, they then drove to the Kazungula. When the customs officials wanted to search the truck at the border, the appellant and Maguire then deserted the truck and ran to the Zambezi River. They stole a boat and eventually swam to Botswana. It was then that Maguire telephonically contacted Allen, telling him that 'the boat had sunk'. The appellant wholly associated himself with the latter act of Maguire's.

The rest of the group continued with the mission and it was eventually halted by the

¹³⁹ Note 101 above

Zimbabwean authorities after a security guard was fired upon at an airstrip and a helicopter badly damaged.

The appellant claimed that he had withdrawn from the mission and was thus not responsible for the mission after his withdrawal. The trial court rejected this claim and found that in the particular circumstances of this matter, and in considering the level of participation of the appellant more was required of the appellant to negate his contributions.¹⁴⁰ The court took into account two relevant features relied upon by the appellant to signify his timely and effective withdrawal. One was the fact that he was absent from Zimbabwe when the mission to free the prisoners was carried out and the second being the notification that the enterprise had actually failed. The test in other words for dissociation to succeed was not fulfilled. In considering the claims made by the appellant, it was held that his absence from Zimbabwe was of no significance and did not in any way help to diffuse the fact that he did not aid and encourage the mission in any way. And secondly, the telephone call was not an act to dissociate from the mission planned.

On appeal Gubbay CJ considered it the shared approach of earlier cases and commentators that it is the actual role of the perpetrator which should decide the withdrawal required to in fact negate his liability for the commission of the substantive crime. He then continued:

‘Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the 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.’¹⁴¹

The appellant’s absence from Zimbabwe was seen as being of no importance as it did not assist to dissociate him from the mission in this particular case. The appeal court found that it did not negate any assistance and support that he had given to the mission. The court as such

¹⁴⁰ Note 101 above, 324

¹⁴¹ Note 101 above, 324b-c

found him responsible for the actions of his fellow co-conspirators as so far as they were within the ambit of the common objective.

The court considered the role of the appellant as being significant in the entire missions and as such, something more was required like notifying Zimbabwean or Botswana authorities of the mission or at least to persuade the rest of the perpetrators in Zimbabwe to abort the mission. The phone call to Allen was merely to advise him of the situation. The appeal court thus confirmed the trial court's position on withdrawal.

The court in *Wana*¹⁴² quoted the decision of *Beahan*¹⁴³ and followed the principles in the dictum above.

In *Chinyerere* the withdrawal happened before the crime was committed while in *Ndebu*, it was at a stage it had no bearing on the outcome of the joint criminal enterprise. It seems that the years between since *Chinyerere* and *Beahan*, the courts have gradually become more critical of the accused's participation in a conspiracy to commit a crime. As the participation of an conspirator increased or was pivotal to the target, so too was the nature of the act of withdrawal, from merely leaving the scene, in *Chinyerere*, to, at the stage of *Behan*, needing to make a more substantial dissociative acts than simply communicating the intention to dissociate, in order to negate common purpose liability. Mere running away does not always amount to a successful defence of withdrawal. Here again, as with South African courts,¹⁴⁴ where the accused played a vital or important role in the criminal enterprise, more is required in order for him to negate liability. By implication, then, a lesser participant, one who was playing a smaller role will have to do less to withdraw from a joint criminal enterprise.

5.4. Conclusion

Many similarities abound between the South African position of common purpose and some jurisdictions. The English position seems more equitable in its treatment of accused under its

¹⁴² Note 100 above, 203

¹⁴³ Note 103 above

¹⁴⁴ See the discussion in *Singo* above.

version of the doctrine. They have apt labelling and more consideration of proportionality of the actual act in the overall application of their joint enterprise law. By contrast, the South African position is that a relatively minor player is treated the same as the mastermind behind a joint criminal enterprise.

CHAPTER 6 : CONCLUDING REMARKS

It is a known fact that the trajectory of the law sometimes go off tangent, missing its target. Applying this simple principle to the law and more particularly the doctrine of common purpose, it may make some legal sense to a certain extent. Consider the common purpose doctrine - Courts have used this legal principle as a club with which to bash all participants and perhaps in the process missing a few targets. In the process, there appears to be a dilution of the constitutional principle of 'beyond reasonable doubt'. That is not only is the right to be presumed innocent is obscured, but is also in the process contaminated by the arbitrary application of the law.

There is without a doubt, in situations where courts are faced with common purpose versus dissociation, it becomes a rather vexed question. So what do we do when courts find themselves in a complicated terrain of giving an account with exactitude, however improbable it might be?

Intuitively, there must be some justifiability, the explanation's hypothesis must be a good explanation that is testable and has a good predictive power. Essentially, courts resort to a form of abduction, otherwise known as argument to the best explanation. It goes beyond the immediate evidence.

So whilst guarding against categorical arguments in a way that emphasis form, rather than specific content, courts are often faced with a situation of what is called 'symbolism'. That is to say, in other words there appears to be a stereotypical conclusion that in 'mass violence' we must regard all as being part of the crime, rather than to ensure that courts are able to sift out the real culprits. And that remains a colossal task facing our courts in the current violent

society, South Africa.

In the process common purpose becomes justified as a ‘necessary evil’¹⁴⁵ for crime control where joint criminal activities take place. Those that undergo punishment do so due to the conduct of the others over which those being punished have no control. Such a violation of the right to be presumed innocent most certainly in the application of the doctrine of common purpose remains inescapable.

Hence dispensing with the causation requirement meant for easier prosecution of participants in joint criminal enterprises and improved crime control. But this is too high a price to pay for crime control. The passing of constitutional muster of the doctrine in *Thebus*¹⁴⁶ was a lost opportunity by South Africa’s highest court to bring some parity into our law for those who fall within its far-reaching scope. The English law rule of aiders and abettors as opposed to considering them co-perpetrators, was a more sophisticated solution and which should have been incorporated into our law in *Thebus*.¹⁴⁷ But alas, this was a lost opportunity by the Constitutional Court of giving accused their just desserts. Now the treating co-perpetrators engaged in a joint enterprise with the same hive mentality makes for loss of faith in our legal system where fair-play is not on the menu.

BIBLIOGRAPHY

Cases

¹⁴⁵ J Grant, ‘Common Purpose: *Thebus*, *Marikana* and unnecessary evil’, 2014 SAJHR (1), p14

¹⁴⁶ Note 3 above

¹⁴⁷ Note 3 above

1. South African Law Reports

- 1.1 *R v Dladla and Others* 1962 (1) SA 307 (A)
- 1.2 *R v Garnsworthy* 1923 WLD 17
- 1.3 *R v Peerkhan & Lalloo* 1908 TS 7978 802
- 1.9 *R v Mgxwiti* 1954 (1) SA 370 (A)
- 1.10 *S v Jama* 1989 (3) SA 427 (A)
- 1.15 *S v Khoza* 1982 (3) SA 1019 (A)
- 1.16 *S v Lungile* 1999 (2) SACR 597 (SCA)
- 1.17 *S v Madlala* 1969 (2) SA 637 (A),
- 1.18 *S v Malinga and Others* 1963 (1) SA 692 (A)
- 1.19 *S v Mgedezi* 1989 (1) SA 687 (A)
- 1.20 *S v Musingadi and Others* 2005 (1) SACR 395 (SCA)
- 1.20 *S v Mzwempi* 2011 (2) SACR 237 (ECM)
- 1.21 *S v Nduli & Others* 1993 (2) SACR 501 (A)
- 1.22 *S v Nkwenja en n Ander* 1985 (2) SA 560 (A)
- 1.23 *S v Nomakhlala and Another* 2005 (1) SACR 300 (A)
- 1.24 *S v Nzo and Another* 1990 (3) SA 1 (A)
- 1.25 *S v Safatsa* 1988 (1) SA 868 (A)
- 1.26 *S v Singo* 1993 (1) SACR 226 (A)
- 1.27 *S v Thebus and Another* 2003 (6) SA 505 (CC)
- 1.28 *S v Thomo and Others* 1969 (1) SA 385 (A)
- 1.29 *S v Wana* 2015(1)SACR 374 (ECP)

2. Foreign Law reports

- 2.1 Attorney General's Reference (No. 3 of 2004) (2005) EWCA Crim 1882
- 2.2 *Ex Parte Becerra and Cooper* 1976 Cr App Rep 212 (CA)
- 2.3 *R v Chinyerere* 1980 (2) SA 576 (RA)
- 2.4 *R v Lovesey and Peterson* (1969) 53 Cr.App. R. 461 (CA)
- 2.5 *R v Powell* (Anthony) and English [1999] 1 AC 1
- 2.6 *R v Rook* (1997) Cr. App. R. 327

- 2.7. *R v Swindall and Osborne* (1846) 2 Car. & K.230
- 2.8 *S v Beahan* 1992 (1) SACR 307 307 (ZS)
- 2.9 *S v Mitchell and another* (1992) SACR 17(A) SA 576 (RAD)
- 2.10 *S v Ndebu* 1986 (2) SA 113 (ZSC)
- 2.11 *S v Ramadzhan* (unreported) 13 May 1991 (Case No.CC27/90) (V)
- 2.12 *S v Tshitwamulomoni* (unreported) 2 November 1990(VSC)

3. Books

- 3.1 Burchell JM *SA Criminal Law & Procedure*, Vol 1: General Principles 4 edition, Juta, Cape Town 2011
- 3.2 Burchell J, *Principles of Criminal Law*, Fourth Edition, Juta, Cape Town, 2013
- 3.3 Burchell J, *Principles of Criminal Law*, Fifth Edition, 2016, Juta, Cape Town
- 3.4 Snyman CR, *Criminal Law*, 6ed,(2014),Lexis Nexis Durban
- 3.5 Wilson W *Criminal Law Theory and Doctrine*,(2010) Pearson, London

4. Articles

- 4.1 Baker DJ, '*Liability for Encouraging One's Own Murder, Victims and Other Exempt Parties*' (2012) 23(3) King's Law Journal 257
- 4.2 Khuluse D, '*Dissociation from Common Purpose – a survey*', (1992) SACJ 2 SAS. 173
- 4.3 De Vos P, '*Marikana murder charge withdrawal: the first glimmer of sanity*', 12 September 2012, University of Cape Town as accessed on <http://constitutionallyspeaking.co.za/marikana-murder-charge-withdrawal-the-first-glimmer-of-sanity>

- 4.4 Parmanand S K, '*Dissociation from a Common Purpose*' 1994, Stellenbosch Law Review, 181
- 4.5 David Lanham, '*Accomplices and Withdrawal*' (1981) 97 LQR 575
- 4.6 Paizes A, *Common purpose by association: some questions and some difficult Choices*, 1995(Part 4) SALJ Vol 112(Part 4) 561
- 4.7 Boister N, '*Common Purpose: association and mandate*',(1992),SACJ (2) SAS 167
- 4.8 Maree MC, '*The doctrine of common purpose*', Professor of Law, UNISA, as accessed at http://www.unisa.ac.za/bitstream/handle/.../Joubert__JJ__0869819380__Section4.pdf on 11 May 2016
- 4.9 Kistner U, *Common Purpose: The Crowd and the Public*, Law Critique (2015) 26, Department of Philosophy, University of Pretoria, 2008.
- 4.10 Legal brief (31 August 2012) <http://legalbrief.co.za/diary/legalbrief-today/story/npa-backs-off-marikana-murder-charges/print/> on 3 August 2016.
- 4.11 Hales L, '*Effective dissociation from a common purpose – a Zimbabwean view*', SACR 1992 2 SAS 1980 (2) SA 576 RAD
- 4.12 Grant J, *Common Purpose: Thebus, Marikana and unnecessary evil*, 2014 SAJR (1) as accessed pm 11 May 2016 at [http://ipproducts.jutalaw.co.za/nxt/gateway.dll/jelj/sajhr/2/25/26/28/29?f=templates\\$fn=](http://ipproducts.jutalaw.co.za/nxt/gateway.dll/jelj/sajhr/2/25/26/28/29?f=templates$fn=)
- 4.13. Dr Robert Hayes, F L Feld, *Is the test for extended common purpose over-extended?* As accessed on the 14th of May 2016 at <http://www.austlii.edu.au/au/journals/UNELawJI/2009/2.pdf>
- 4.14 Landman D, '*Accomplices and withdrawal*'(1991) LQC 575

5. Thesis and Internet

5.1 Digby Sqhelo Koyana, *The Influence of the Native Territories Penal Code on South African Criminal law*, submitted for Doctor of Laws, UNISA, October 1988.

6. Acts

6.1 The Constitution of South Africa, 1996

6.2 Native Territories Penal Code Act 24 of 1886

6.3 Prevention of Organized Crime Act 121 of 1998