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TOPIC:

**A CRITICAL EVALUATION OF THE DOCTRINE OF
COMMON PURPOSE IN SOUTH AFRICAN LAW**

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ABSTRACT

Although South African law adopted the doctrine of common purpose from 19th century English law, the scope of the doctrine has been considerably extended. Whereas English law required presence at the time of the crime, in pursuance of a conspiracy to commit the crime in concert, South African law has dispensed with the need for all these requirements to be met. Thus, where there is a prior conspiracy, South African law does not require presence at the time of the crime, or an actual contribution towards its execution. Where there is presence at the time of the crime, it is unnecessary to prove a prior conspiracy, or an actual contribution towards the execution of the crime. All that is required is unilateral conduct showing solidarity with the conduct of the actual perpetrator. South African law has also dispensed with the need to establish the scope of a common purpose as a matter of objective fact. It is only necessary to prove association in a criminal enterprise of some kind, coupled with the necessary mens rea for the crime.

This means that liability for a serious crime like murder can arise from a relatively trivial act of association, which in no way contributed to the death of the deceased, or encouraged or facilitated the commission of the crime. This is an unacceptable departure from the principles of normative criminal justice, which require liability and punishment to be commensurate with personal culpability.

Although the normative basis for the doctrine was originally thought to lie in the principles of mandate, mandate cannot offer a tenable justification for the doctrine in its present extended form. It is argued that there is in fact no normative basis for the doctrine in this form. The only justifications that remain are instrumental in nature. The lack of a normative basis for the doctrine is inimical to a rational, systematic and principled approach to the law, whilst disregard for the principles of culpability, fair labelling and proportionality in punishment is unacceptable in a constitutional dispensation concerned with protecting fundamental human rights. At the same time, instrumental justifications for the doctrine are unconvincing. It is accordingly submitted that the South African law of complicity is in need of reform to render it constitutionally compliant.

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CHAPTER 1

INTRODUCTION

1. BACKGROUND

South African criminal law, like that of other Western legal systems, is founded on the principle of personal responsibility – the idea that each individual is responsible for his own wrongdoing,¹ and can therefore be held to account for it and punished accordingly.² This idea originated in Canon law, as a corollary of the Judaeo-Christian doctrine of free will and its philosophical equivalent, the theory of self-determinism, which holds that human beings are able to govern their conduct according to their will. The medieval theologian-philosopher, St Thomas Aquinas (1225-1274), was an arch-proponent of these ideas, which he developed in his leading works, *The Treatise on Human Nature: Summa Theologica* and *Summa Contra Gentiles*.³ An important implication of the principle of personal responsibility is the idea that, since each individual is responsible for his own wrongdoing, he is not as a general rule responsible for the wrongdoing of others.⁴ As Unterhalter explains:

[The principle of personal responsibility] is a necessary entailment of the criminal law's profound commitment to the separateness of persons. Blame attaches to individuals in virtue of their own actions because each person is sovereign over his actions and thus responsible for them. The law is rightly reluctant to hold one person responsible for the actions of another, for ordinarily another's actions fall outside the domain over which the individual is sovereign. Thus the language of collective guilt does not figure in the moral vocabulary of criminal law.⁵

¹ Unless the context indicates otherwise, 'his' also denotes 'her' and 'he' also denotes 'she'.

² J Burchell *Principles of Criminal Law* 3ed (2005) 49-50 and further authorities cited therein.

³ T Aquinas *The Treatise on Human Nature: Summa Theologica, Pars I* reprinted ed (2002); *Summa Contra Gentiles* reprinted ed (1975). See also Kemp G et al *Criminal Law in South Africa* (2012) 14-15.

⁴ Thus, for example, a parent is not responsible in law for the crimes of his child and an employer is not as a rule responsible for the crimes of his employee, although there are instances where the legislature has imposed such liability, either expressly or by necessary implication. One example is section 24(1) of the Drugs and Drug Trafficking Act 140 of 1992.

⁵ D Unterhalter 'The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?' (1988) 105 *SALJ* 671, 674.

This principle was contrary to early Germanic law, which viewed criminal responsibility as a matter that concerned not only the offender and the victim, but also their extended families on both sides. The adoption of the principle of personal responsibility therefore represented an important milestone in the development of Western criminal jurisprudence and it remains an important cornerstone of modern South African criminal law.

At the same time, however, South African criminal law recognises a significant exception to the principle of personal responsibility, in the form of the doctrine of common purpose:⁶ Where two or more participants associate together with a common purpose to commit a crime, each becomes liable for any crimes committed by his fellow participant(s) that fall within the scope of that common purpose. It is not necessary for the state to prove that each participant contributed towards the commission of the crime in a physical or even psychological sense. As a matter of law, the conduct of each participant is imputed to all the others. The participants are then regarded as co-perpetrators and are accordingly liable for the crime itself, rather than for the separate and lesser offence of being accomplices to that crime. This represents a significant departure from the principle of personal responsibility.

Although the doctrine of common purpose originated in and was adopted from English law, English law nevertheless based the liability of secondary participants on their proximity to the commission of the crime, in both a physical and a legal sense;⁷ for example ‘aiding and abetting’ the actual perpetrator, or procuring the commission of the crime, or providing advice or encouragement towards the commission of the crime before the event (counselling). English law therefore required a connection (although not necessarily a causal one) between the conduct of a secondary participant and the commission of the crime, which is no longer required in South African law.

⁶ The term ‘doctrine’ has fallen out of favour in recent years, most modern authorities preferring to downplay its significance by speaking of the common purpose ‘rule’, or even by referring to common purpose as though it were simply a matter of fact (see, for example, *R v Chenjere* 1960 (1) SA 473 (FC) 476D: ‘[T]he courts are not acting on a doctrine’; *S v Maxaba* 1981 (1) SA 1148 (A) 1149H: ‘[T]here is nothing magical about the doctrine of common purpose’. See further P Parker ‘South Africa and the Common Purpose Rule in Crowd Murders’ (1996) 40 *J of African Law* 78, 86-7). As will be shown, however, common purpose is a basis for imputing liability where none would otherwise exist. As such, it constitutes a legal fiction and it is submitted that the term ‘doctrine’ is not only accurate but appropriate.

⁷ *S v Nzo* 1990 (1) SA 1 (A) 16I (per Steyn JA, minority judgment).

In South African law, the unlawful conduct of a participant whose liability is founded on common purpose consists of his act of associating with the actual perpetrator, with a shared intention to commit the crime in question.⁸ It is not necessary to show that his conduct contributed towards the commission of the crime in a physical or even psychological sense. Consequently, liability for a serious crime like murder can arise from a relatively trivial act of association, which in no way contributed to the death of the deceased, or encouraged or facilitated the commission of the crime. This is regarded by some critics as an unacceptable departure from the principles of culpability, fair labelling and proportionality in punishment and, hence, as an unwarranted lowering of the threshold for liability.

Although the Constitutional Court considered and rejected a number of constitutional objections to the doctrine of common purpose in *S v Thebus*,⁹ it did not consider the implications of the principles of culpability, fair labelling and proportionality in punishment. Furthermore, much of its reasoning on the issues that it did consider is questionable and the validity of its conclusions regarding the constitutionality of the doctrine are consequently open to doubt. Accordingly, there still remains considerable scope for enquiry regarding the constitutionality of the doctrine in its current form.

The pressing need for such an enquiry was highlighted recently by the public response to the National Prosecuting Authority's (NPA's) short-lived decision to institute murder charges against 270 Lonmin mineworkers, thirty-four of whose colleagues had been shot and killed by the police during the course of an illegal strike at Lonmin's Marikana mine, in August 2012. Although the NPA had adequate legal grounds for its decision, in terms of current South African law,¹⁰ it was greeted with outrage and disbelief by the

⁸ Burchell EM & Hunt PMA *South African Criminal Law and Procedure, Volume 1, General Principles of Criminal Law* (1970) 364: 'Association in a common illegal purpose constitutes the participation - the *actus reus*. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all.' This passage was cited with approval by Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) 899E-F.

⁹ *S v Thebus* 2003 (6) SA 505 (CC).

¹⁰ See, for example, the defence of the NPA's decision by Grant (James Grant 'Marikana: Common purpose not outdated or defunct' *Mail & Guardian* 31 August 2012 (available at <http://mg.co.za/article/2012-08-31-marikana-common-purpose-not-outdated-or-defunct>, accessed on 26 November 2013).

general public, members of the intelligentsia and even the international community.¹¹ Although this public furore eventually resulted in the withdrawal of the charges, it clearly illustrates the extent to which the doctrine of common purpose has fallen out of step with common conceptions of crime and criminality.

2. OBJECTIVES OF DISSERTATION

The overall aim of this dissertation is to analyse and evaluate the doctrine of common purpose in South African law, in relation to its compatibility with the principles of personal responsibility, culpability, fair labelling and proportionality in punishment, which are commonly accepted principles of normative criminal justice in liberal societies and which are reflected in the principles and values enshrined in the South African Constitution.¹²

It begins by identifying the classical models of complicity and describing and classifying the approaches adopted in Roman-Dutch, English and early South African law. It documents the adoption of the doctrine of common purpose into South African law and critically analyses its development and the extension of its scope by the South African courts, up to to the present day, in four principal areas; namely, the nature and effect of the doctrine; the methods of forming a common purpose; the relevance of the time of its formation; and the determination of the scope of a common purpose, including liability for collateral crimes. Accomplice liability, as a further (and possible alternative) form of complicity, is also examined and critically analysed.¹³

Thereafter, the possible normative and instrumental justifications for the existence and retention of the doctrine of common purpose are discussed and evaluated. It is argued that, whilst there may have been clear and defensible normative justifications for the doctrine in its original form, there is no normative justification for the considerably

¹¹ See, for example, L Bridges 'The case against joint enterprise' (2013) 54(4) *Race & Class* 33, 33-34 and further sources cited therein. See also the range of responses to Grant's article on that webpage (note 10 above).

¹² The Constitution of the Republic of South Africa 1996 ('the 1996 Constitution').

¹³ Liability as an accessory after the fact is not concerned with complicity in the crime itself and will therefore not be addressed in any detail.

extended form of the doctrine, as it currently exists in South African law. It is also argued that the instrumental justifications that have been advanced for the doctrine have been exaggerated and lack empirical foundation.

The constitutionality of the doctrine of common purpose is then addressed in depth. This is done in two stages: First, the Constitutional Court's judgment and rulings on the constitutional issues raised in *S v Thebus* are analysed and criticised.¹⁴ It is argued that, contrary to the Constitutional Court's findings, the doctrine of common purpose does in fact represent a violation of the constitutionally protected right to freedom and security of the person, as well as the right to be presumed innocent.¹⁵ Thereafter, the question of whether the doctrine of common purpose violates the constitutionally protected right to dignity (which was not adequately ventilated in *S v Thebus*) is examined afresh.¹⁶ In so doing, the content of the right to dignity, the principles of culpability, fair labelling and proportionality in punishment, and the interconnection between the right to dignity and these principles are examined and elucidated, to justify the conclusion that the doctrine of common purpose, in its present form, does in fact violate the right to dignity.

Lastly, after summarising the conclusions to be drawn from the above, practical proposals are submitted for the reform of the doctrine, so as to render the South African law of complicity constitutionally compliant.

3. RESEARCH METHODOLOGY

The research methodology adopted throughout the dissertation is analytical and library-based. It has involved the location and analysis of texts, commentaries, cases and other written materials documenting the origins and development of the South African law of complicity and, in particular, 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 other jurisdictions for purposes of comparison as and when appropriate.

¹⁴ *S v Thebus* (note 9 above).

¹⁵ These rights are protected by s12(1)(a) and s35(3)(h), respectively, of the 1996 Constitution.

¹⁶ The right to dignity is protected by s10 of the 1996 Constitution.

CHAPTER 2

AN OVERVIEW OF THE LAW OF COMPLICITY IN ROMAN-DUTCH, ENGLISH AND SOUTH AFRICAN LAW

1. INTRODUCTION

This chapter will focus on the origins of the doctrine of common purpose in English law and its adoption into South African law. It will begin by discussing briefly the classical models for dealing with participation in crime, the approaches adopted in Roman-Dutch and English law, respectively, and then consider how these different approaches influenced the development of South African law.

2. THE CLASSICAL MODELS OF COMPLICITY

Criminal law scholarship traditionally distinguishes between two classical models for dealing with questions of complicity; namely, the *monistic* model and the *dualistic/pluralistic* model.¹ In a criminal justice system based on a monistic model, ‘each individual contributing to an offence is liable as a perpetrator and is responsible as such – regardless of the significance of the contribution’.² The significance of the contribution may be relevant to the question of sentence, but not to the question of liability. In a system based on a dualistic/pluralistic model, a distinction is drawn between at least two types of participant; namely, ‘main offenders or perpetrators or authors on the one hand; mere accomplices, instigators, aiders and abettors on the other hand’.³

Although it is thought that the dualistic/pluralistic model is closer to social reality, where distinctions are commonly drawn between primary and secondary offenders,⁴ the

¹ J Vogel ‘How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models’ (2002) *Cahiers de défense sociale* 151, 152. As the title of his article indicates, Vogel argues that there are in fact more than two possible models, however it is unnecessary for present purposes to canvass his proposals for an alternative scheme of classification.

² *Ibid.*

³ *Ibid.*

⁴ Vogel (note 1 above) 153.

challenge facing legal systems that adopt this model is to decide what legal criteria should be employed for distinguishing between primary and secondary participants.⁵ Questions of this nature do not arise with the monistic model, which has the virtue of simplicity,⁶ but a legal system that adopts this model undoubtedly faces its own challenges, such as how to reconcile the equal liability of all participants, regardless of contribution, with the principles of fairness and justice (including the principles of culpability and fair labelling) and where to draw the outer limits of liability. Of course, a particular legal system need not necessarily opt for a single approach. It might adopt a hybrid approach, in which both monistic and dualistic features are combined. An example of such an approach may be found in 19th century English law.

In the discussion that follows, it will be shown how, in South African law, the dualistic features of the English law approach were superimposed onto the monistic Roman-Dutch law approach. It will also be shown, however, that despite the initial adoption of these dualistic features, South African law has generally preferred a monistic approach. Consequently, where dualistic features have been adopted, they have been short-lived and, where retained, there has been a tendency to minimise their role and influence.

3. COMPLICITY IN ROMAN-DUTCH LAW

Roman-Dutch law tended to approach the question of crimes committed in concert by applying the concept of mandate (or, perhaps more properly, quasi-mandate),⁷ the legal effect of which is summed up in the maxim ‘qui facit per alium facit per se’ (literally translated as ‘he who acts through another, acts through himself’).⁸ On this basis, both the mandator and the mandatary would be equally liable for a crime executed by the

⁵ Ibid.

⁶ Simplicity could be a definite advantage in those jurisdictions where trial is by a jury of laypersons, who might have difficulty understanding complex, technical distinctions between different categories of participant.

⁷ Rabie explains that mandate implies a lawful juristic act, commissioned for a lawful purpose. Where the act was unlawful or immoral, or commissioned for an unlawful or immoral purpose, the law of mandate has no application – MA Rabie ‘The Doctrine of Common Purpose in Criminal Law’ (1971) 88 *SALJ* 227, 237, citing A Mattheus *De Criminibus* 1.3.26.7. For this reason, it is probably more accurate to speak of ‘quasi-mandate’ in such cases.

⁸ Author’s translation. This maxim forms the foundation of the law of agency.

mandatary.⁹ The result was that, with the exception of accessories after the fact,¹⁰ Roman-Dutch law did not distinguish between different categories of criminal participant. All participants in a crime were regarded as co-principals and all were equally liable for the crime itself.¹¹ The Roman-Dutch law model of complicity was therefore monistic in nature.

Rabie points out that, at the same time, the Roman-Dutch authorities also recognised a principle closely resembling the doctrine of common purpose in cases of prior conspiracy to commit murder, although possibly not in other types of case.¹² He mentions, however, that although not clearly stated, the majority of the Roman-Dutch authorities did not appear to consider that this principle dispensed with the need to prove causation, in the sense that it was still necessary to show that the death was *a result* of the conspiracy.¹³

Although the principles outlined above formed part of South African criminal law and still apply today (at least in theory), they are of relatively little significance, since, as will be shown, they were soon eclipsed by the adoption of the English law doctrine of common purpose and the development and extension of the principles involved in that doctrine.

⁹ A Domanski 'Criminal liability based on mandate and order in the *De Criminibus* of Matthaëus' (1997) 10 *SACJ* 287 at 289-90 and further authorities cited therein.

¹⁰ In *R v Peerkhan and Lalloo* 1908 TS 798, 802-3, Wessels J mentions that, according to Matthaëus *De Criminibus* 1.2, even an accessory after the fact was regarded as a socius criminis, however Burchell & Hunt point out that, elsewhere, Matthaëus himself and various other Roman-Dutch authors did draw a distinction between a socius criminis and an accessory after the fact, at least for purposes of punishment (EM Burchell and PMA Hunt *South African Criminal Law and Procedure, Volume 1, General Principles of Criminal Law* (1970) 368 and further authorities cited therein).

¹¹ It should perhaps be noted that Professor JC De Wet, co-author of one the leading Afrikaans textbooks on criminal law, disagrees with this view. In his view, Roman-Dutch law did recognise and distinguish between different forms of participation, at least for purposes of sentence (see JC de Wet & HL Swanepoel *Strafreg* 3ed (1975) 171-178 and further authorities cited therein).

¹² Rabie (note 7 above) 235-6.

¹³ *Ibid.*

4. COMPLICITY IN ENGLISH LAW

English law had a hybrid approach towards complicity. Until the mid-19th century, English law had a complex and sophisticated set of rules and distinctions for crimes committed in concert. In the first instance, a distinction was drawn between different types of crime; in particular, between felonies and misdemeanours.¹⁴ Complicity in the case of misdemeanours was monistic in nature, with no distinction drawn between primary and secondary parties. In the case of felonies, however, a dualistic approach was adopted, with a distinction being drawn between primary participants (principals) and secondary participants (accessories).¹⁵ These distinctions will be discussed below.

4.1 Principals

A principal was a person who was present at the time of the commission of a felony and who participated in its commission. Principals were further subdivided into *principals in the first degree* and *principals in the second degree*. A principal in the first degree was the person who actually executed the crime, whether acting alone or in concert with others.¹⁶ It also included a person who did not commit the crime himself, but who orchestrated its commission through an innocent agent.¹⁷ A principal in the second degree was a person other than a principal in the first degree, who was present at the time of the commission of the crime,¹⁸ and who aided and abetted (assisted, incited

¹⁴ At common law, a felony was a crime 'which occasioned ... the forfeiture of lands and goods'. They were usually also capital crimes. Felonies were therefore generally the more serious common law crimes (excluding the various forms of treason, which were in a category of their own), such as murder, rape and robbery, together with other felonies created by statute. All crimes other than treasons and felonies were misdemeanours, and attracted a lesser punishment. English law eventually abolished the distinction between felonies and misdemeanours by means of s1 of the Criminal Justice Act 1967. South African law has never distinguished between treasons, felonies and misdemeanours (Burchell & Hunt, note 10 above, 83 and further authorities cited therein).

¹⁵ These distinctions did not apply in the case of misdemeanours. In the case of a misdemeanour, a person who played the role of an accessory before the fact was simply regarded as a co-principal, whilst no liability attached to a person who played the role of accessory after the fact (G Williams *Criminal Law The General Part* 2ed (1961) 346; JC Smith & B Hogan *Criminal Law* (1965) 68). Early editions of these texts have been consulted in order to ascertain, as nearly as possible, the state of the English law of complicity prior to recent developments.

¹⁶ There could be more than one principal in the first degree. For example, where A and B both attacked C, who died from the combined effect of their blows, both A and B would be principals in the first degree to murder (Smith & Hogan (note 15 above) 69).

¹⁷ Williams (note 15 above) 349.

¹⁸ The concept of 'presence' was given a fairly broad interpretation. It did not necessarily mean presence at the actual place where the crime was being committed, but would also include a person who was

and/or encouraged) the commission of the crime; or who was present in pursuance of a prior conspiracy to commit the crime, in which case proof of aiding and abetting was not required.¹⁹

The abettor's liability as a co-principal was based on *imputed conduct*; the fiction that, by aiding and abetting the actual perpetrator, he identified himself with the latter's crime to the extent that it was regarded by law as his own. As explained by Sir Matthew Hale, writing in 1736:

[A]ll, that are present, aiding and assisting, are equally principal with him, that gave the stroke whereof the party died ... *for tho one gave the stroke, yet in interpretation of law it is the stroke of every person, that was present, aiding and assisting, and tho they are called principals in the second degree, yet they are principals* (emphasis added).²⁰

This fiction can be traced back to the 14th and 15th centuries. Abettors were originally regarded as a third class of accessory – *accessories at the fact* – and enjoyed the same privileges as other accessories.²¹ At some time after the reign of Edward III (1327 – 1377), however, a legal fiction emerged that a person who was present and who aided and abetted the commission of a murder, was himself regarded as having killed, as much as if he himself had given the deadly blow. Although this fiction was not immediately accepted as settled law, it had come to be regarded as such by the time of Mary I (1553 – 1558).²² The original rationale for the fiction is not entirely clear. The

stationed some distance away, but near enough to be of assistance, for example by giving warning, or helping the perpetrators escape after the event. Equally, the concept of presence 'at the time' of the crime was given a fairly broad meaning. It was not necessary for an abettor to have been present throughout the commission of the crime, as long as he was present during part of its commission, or even so soon afterwards that his contribution could be regarded as part of the same train of events. Thus an abettor would include a person who, by arrangement, arrived at the scene of a housebreaking only after entry had been effected, but in time to help carry away the stolen goods (Williams, note 15 above, 354-6, 409; Smith & Hogan, note 15 above, 70; and further authorities cited therein).

¹⁹ Williams (note 15 above) 353; Smith and Hogan (note 15 above) 70; and see also below on common purpose in English law. Mere voluntary presence at the scene of a crime, in the absence of a prior conspiracy, and without actively aiding and abetting the commission of the crime, was not sufficient for liability (*ibid*).

²⁰ Sir M Hale *The History of the Pleas of the Crown* 1 (1736) 437. Writing in 1762, Foster explained the principle in similar terms: 'For in combinations of this kind the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument, by which the others strike.' (M Foster and M Dodson *Crown Law* 3ed (1792) 351).

²¹ Foster & Dodson (note 20 above) 347-348. For a brief account of these privileges, see 4.2 below.

²² *Ibid*.

English judge, Sir Michael Foster, who provides the most extensive account of its adoption, was of the view that it was adopted purely in order to deny abettors the privileges available to accessories, notably that of being (effectively) immune from trial and punishment until such time as the actual perpetrator had been brought to justice:

At the time when [Bracton and Fleta] wrote, and indeed for a long time afterwards, the law was taken to be, that persons present aiding and abetting were to be considered in the rank of accessories, not liable to answer till the principal was convicted or outlawed: but the mischiefs of this rule were very great and many. The persons who were then esteemed the only principals might die before conviction: their accomplices might dispatch them, in order to procure their own indemnity; and it is no improbable supposition, that persons whose hands have been once dipped in blood should do so. The principals might be persons wholly unknown, or they might not be distinguishable from the rest of the party in-the-confusion, which, usually attends the perpetration of enormous offences, where numbers are concerned. In all these cases, and others which might be mentioned, by too strict an adherence to this rule the hands of justice would be forever tied up with regard to the accomplices: and whenever the principals could lie concealed or flee, the course of justice against the accomplices was very much retarded.

If I may be allowed to make a conjecture, I would say, that to obviate these mischiefs, *and with that view alone*, the judges by degrees came into the rule of law, as it now stands, *That all present and abetting are principals ...* What strengthens my conjecture is, that it appears by the cases cited in the margin, wherein the point came under consideration, that the persons who gave the mortal wounds, for they are all cases of murder, were fled from justice; and that none beside the persons present and abetting were amenable: and probably in the other cases the fact might be so, though the reporters are silent as to that circumstance; and I the rather think so, because I do not at present recollect any case, wherein, as the law then stood, the distinction between principals and accessories could be any way material, unless it were to determine, whether the prisoner should take his trial immediately, or must wait for the conviction of another person, who possibly might not then be amenable to justice' (emphasis in the original).²³

In light of Foster's explanation, it appears more than likely that, initially at least, the fiction rested on nothing more than expediency. Later, however, during the Victorian

²³ Foster & Dodson (note 20 above) 347-348.

era, when it might have been considered necessary to find some more legitimate (and thus normative) basis for the fiction, it was thought to rest on principles of agency (authorisation).²⁴

4.2 Accessories

An accessory was a person who played a supportive role in the commission of a felony, but who was not present at the time of its commission. Accessories, in turn, were divided into accessories *before* and *after the fact*. An accessory before the fact was a person who counselled or procured the commission of the crime (in other words, an instigator), or who conspired towards its commission, or who knowingly gave assistance to the principal(s) before the crime, but who was not present when it was committed.²⁵ An accessory after the fact was a person who was not present when the crime was committed and did not contribute towards the commission of the crime itself, but who assisted a principal felon, or another accessory to a felony, to evade justice after the event.²⁶

It will be noted from the above that English law attached considerable importance to the question of presence at the time of the crime (proximity to the commission of the crime in both physical and temporal terms).²⁷ The role of prior conspiracy in determining the extent of liability was accorded less importance. Thus a conspirator would be a co-principal only if he was also present at the time of the crime. A conspirator who was elsewhere when the crime was committed would merely be an accessory before the fact.²⁸

²⁴ See, for example, the judgments of Vaughan Williams J in the 1850 cases of *R v John Wiley* 169 ER 408, where he refers to the parties to a common purpose as being ‘agents for each other’; and *R v Skelton and Bating* 175 ER 488, where he refers to the question of whether one party to a common purpose desired that purpose to be carried out ‘through the agency’ of the other. English law continued to adhere to the notion of authorisation as the basis for joint enterprise liability until recently, when it was abandoned in *R v Powell; R v English* [1997] 4 All ER 545; a case where the accused’s liability was based on mere foresight of the commission of the collateral crime, even though it was clearly unauthorised (AP Simester & GR Sullivan *Criminal Law Theory and Doctrine* 2ed (revised 2004) 222 and further authorities cited therein).

²⁵ Williams (note 15 above) 362; Smith & Hogan (note 15 above) 72.

²⁶ Williams (note 15 above) 409; Smith & Hogan (note 15 above) 85.

²⁷ On the meaning of presence at the time of the crime, however, see note 18 above.

²⁸ Williams (note 15 above) 408.

The distinction between principals and accessories in felonies was originally important from a procedural perspective. Although principals in the second degree and accessories before the fact to a felony were both liable to the same punishment as a principal in the first degree,²⁹ a principal could not claim benefit of clergy in the case of certain felonies like murder, robbery, rape and burglary, this benefit having been ousted by statute during the reigns of Henry VIII and Elizabeth I,³⁰ but left available to accessories.³¹ More importantly, the liability of an accessory was inherently derivative in nature and was thus dependent upon the liability of the principal. Accordingly, at common law, an accessory to a felony could not be convicted before the principal had been convicted.³² If the principal could not be apprehended and convicted, or escaped liability due to a technicality, the accessory would also escape liability.³³

These undoubtedly inconvenient distinctions lost much of their significance, however, as a result of various legislative amendments over the years, culminating in the Accessories and Abettors Act 1861,³⁴ which allowed for an accessory before the fact to any crime to be indicted, tried, convicted and sentenced as a principal.³⁵ The distinction between the first three categories and the last (that of accessories after the fact) remained. An accessory after the fact was liable to a lesser punishment than a principal and consequently could not be indicted, tried and convicted as a principal, but had to be

²⁹ This did not mean that they would necessarily receive the same punishment. A party who merely played a peripheral or incidental role in the commission of the crime would generally receive a lighter sentence than the principal actor, whilst a person who masterminded the crime, even if only an accessory before the fact, might well receive a heavier sentence than the person who actually executed the crime (Williams, note 15 above, 404). During the years when the Homicide Act 1957 was in force, the death penalty could only be imposed on the party who himself had killed or used force against the deceased (S5 Homicide Act 1957).

³⁰ J Baker (ed) *The Oxford History of the Laws of England: 1483 – 1558 Vol VI* (2003) 535 – 539.

³¹ Foster (note 20 above) 356-357. As Foster explains, benefit of clergy generally meant the difference between life and death for the offender (ibid).

³² P Parker 'South Africa and the Common Purpose Rule in Crowd Murders' (1996) 40 *J of African Law* 78, 81; Williams (note 15 above) 362. See also Foster & Dodson (note 23 above and accompanying text).

³³ See note 23 above and accompanying text. Parker states that there were also defences available to an accessory that were not available to a principal, most notably that of duress (presumably in a case of murder), however neither Williams nor Smith and Hogan refer to any such defences. On the contrary, Williams states categorically that duress is 'no defence to a charge of murder', although he argues that it should be a defence to a reluctant secondary participant who does not substantially contribute to the crime (Parker, note 32 above, 81; Williams, note 15 above, 378).

³⁴ Smith & Hogan (note 15 above) 78.

³⁵ Section 8 of the Accessories and Abettors Act 1861: 'Whosoever shall aid, abet, counsel or procure the commission of any indictable offence whether the same be an offence at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender.'

indicted, tried and convicted as an accessory after the fact.³⁶ Thus, although English law retained the dualistic distinction between primary and secondary participants, it came to be a distinction with very little difference.

4.3 The doctrine of common purpose

In determining the liability of principals in the second degree, English law could rely on the doctrine of common purpose. An early account of common purpose is provided by Foster, writing in the latter part of the 18th century:

Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him; some to commit the fact, others to watch at proper distances and stations to prevent surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law, present at it;³⁷ for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise.³⁸

It is evident from the above passage that, in its early form and as explained by Foster, common purpose had two implications: Firstly, involvement in a common purpose established ‘presence at the time of the crime’, in a constructive sense;³⁹ and, secondly, it stood as proof of mutual assistance and encouragement (aiding and abetting).⁴⁰ In other words, evidence of involvement in a common purpose helped to establish that the accused was a party to the crime, rather than an innocent bystander; and, furthermore, that he was a co-principal, rather than an accessory before or after the fact. Common purpose was not, however, ‘a doctrinally separate basis of liability’ at the time when

³⁶ Williams (note 15 above) 414. As a general rule, the maximum sentence was two years’ imprisonment, although an accessory after the fact to murder could be sentenced to life imprisonment (Smith and Hogan (note 15 above) 86 and further authorities cited therein).

³⁷ In the next paragraph, Foster goes on to refer to this as ‘constructive presence’ (Foster, note 20 above, 350).

³⁸ Foster (note 20 above) 350.

³⁹ See note 37 above.

⁴⁰ R Toulson ‘Sir Michael Foster, Professor Williams and complicity in murder’ in DJ Baker & J Horder (eds) *The Sanctity of Life and the Criminal Law, The Legacy of Glanville Williams* (2013) 230, 230.

Foster was writing.⁴¹ Nevertheless, it had clearly acquired this status by the early part of the 19th century. Thus, for instance, in the 1838 case of *Macklin, Murphy, & Others*, the court held:

[I]t 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 all.⁴²

The doctrine of common purpose was subsequently applied as a basis for liability in a number of other murder cases, such as *R v Downing and Powys*, *R v Harrington* and *R v Price and Others*.⁴³ It was not limited to murder cases however,⁴⁴ but was applied to other crimes as well, such as poaching,⁴⁵ burglary⁴⁶ and possession of housebreaking implements.⁴⁷ It was also applied to manslaughter in the case of *R v Swindall and Osborne*.⁴⁸

The legal effect of the doctrine is well illustrated in *R v Price and Others*.⁴⁹ This case concerned six men on trial for the murder of a man whom they had allegedly attacked and who had been stabbed and killed by one of them. The court (per Byles J) instructed the jury that if the identity of the actual perpetrator could be established, he would be liable for murder, whilst the other five accused would also be guilty of murder if they had participated in the attack on the deceased with a common purpose to kill him, or failing that, with a common purpose to stab him, 'because then the hand that used the knife was the hand of all of them'.⁵⁰ Even if they lacked such a common purpose, the other five accused would still be guilty of murder if they had been present when the

⁴¹ Toulson (note 40 above) 230.

⁴² *Macklin, Murphy, & Others' Case* (1838) 168 All ER 1136.

⁴³ *R v Downing & Powys* (1844) 175 ER 158 at 159; *R v Harrington* (1851) 5 Cox CC 23; *R v Price & Others* (1858) 8 Cox CC 96.

⁴⁴ Rabie (note 7 above) 228.

⁴⁵ *R v Passey, Meadows and Others* (1836) 173 ER 124.

⁴⁶ *Cornwall's Case* (1730) 83 ER 914.

⁴⁷ *R v Thompson* (1869) 11 Cox CC 36. See also Rabie (note 7 above) 228 and further authorities cited therein.

⁴⁸ *R v Swindall & Osborne* (1846) 2 Car. & K. 230. The two accused in this case were cart drivers who challenged each other to a race, in the course of which one of them ran over and killed an elderly pedestrian. It could not be established which accused had done this, but the court held that, since they were both driving furiously and encouraging each other in the race, it was irrelevant which of them had actually struck the deceased; they were both equally liable for his death.

⁴⁹ *R v Price* (note 43 above).

⁵⁰ *R v Price* (note 43 above) 97.

deceased was killed and had shown their approval by assisting in the crime (aiding and abetting). If none of these things could be proved against them, they could not be found guilty. The only person who would be guilty would be the actual perpetrator and, if his identity could not be established, all six would have to be acquitted.⁵¹

It can be seen, therefore, that by the early years of the 19th century the doctrine of common purpose was being used to extend the ambit of liability as a principal in the second degree: No longer was presence in pursuit of a common purpose merely *evidence* of aiding and abetting (as described by Foster in the passage cited above); by the time of *R v Price* it had become a *substitute* for aiding and abetting – that is, an alternative basis of liability, which made it unnecessary for the prosecution to prove conduct amounting to actual aiding and abetting.⁵² It is worth noting, however, that the doctrine was nevertheless limited to persons who, by conspiracy, had actually embarked together on the commission of a crime and who were present at the time of its commission, albeit in an extended or ‘constructive’ sense. A person who merely conspired towards the commission of the crime before the event, but who was not present at the time and played no part in its commission, was not a principal in the second degree, but remained an accessory before the fact. As mentioned previously, though, this once-important distinction lost its significance after 1861, with the enactment of the Accessories and Abettors Act of that year.

4.4 Modern English law

In modern English law, a secondary party may be liable for a crime committed by another on the basis of his own conduct (aiding, abetting, counselling, or procuring),⁵³ or through membership of a ‘joint criminal enterprise’ (the current term for common

⁵¹ Ibid.

⁵² Thus, for example, Williams says: ‘A person is guilty of aiding and abetting if he is either (a) a conspirator who is present at the time of the crime, whether or not he in fact assists, or (b) anyone who knowingly assists or encourages at the time of the crime, whether a conspirator or not and whether present or not.’ (Williams, note 15 above, 353).

⁵³ These forms of participation are still dealt with in terms of s8 of the Accessories and Abettors Act 1861, in terms of which aiders, abettors, counsellors and procurers may be indicted, tried and punished as principal offenders. They are, however still regarded as secondary parties (accomplices), in that their actus reus and mens rea differ from that of the principal offender (Simester & Sullivan, note 24 above, 196).

purpose) that led to the commission of the crime.⁵⁴ As regards the first method, ‘aiding’ denotes actual assistance, in some practical form. This means that the assistance must in fact have been given. A mere attempt, or willingness to assist will not suffice (although an unfulfilled *promise* of assistance could amount to abetting),⁵⁵ but the assistance need not have been substantial or necessary, nor it is necessary for the principal to have been aware of it.⁵⁶ ‘Abetting’ requires actual encouragement, whilst ‘counselling’ requires urging, or the provision of advice. In both cases, the encouragement, urging, or advice must have been effectively communicated to the principal. Mere presence at the commission of a crime, which does not constitute encouragement, is insufficient for abetting, as are words and gestures of encouragement that cannot be shown to have come to the principal’s notice.⁵⁷ The same applies, *mutatis mutandis*, to counselling.⁵⁸ It is not necessary, however, for the encouragement, urging, or advice to have had any effect on the principal’s decision to commit the crime.⁵⁹ In the case of ‘procuring’, the secondary party must deliberately have caused the principal to commit the crime.⁶⁰ Proof of a causal nexus between the conduct of the secondary party and the commission of the crime by the principal is therefore required. Although a causal nexus is not required in the case of aiding, abetting and counselling, the secondary party’s conduct must nevertheless amount to *participation* in the crime. There must therefore be a connection of some sort between the secondary party’s conduct and the commission of the crime.⁶¹ There is no imputation of conduct.⁶²

The second form of secondary party liability, joint enterprise liability, is based on imputed conduct. This form of liability is reserved primarily for *collateral* crimes,

⁵⁴ Simester & Sullivan (note 24 above) 195.

⁵⁵ Simester & Sullivan (note 24 above) 199 and further authorities cited therein.

⁵⁶ *Ibid.*

⁵⁷ Simester & Sullivan (note 24 above) 201-202 and further authorities cited therein.

⁵⁸ Simester & Sullivan (note 24 above) 202 and further authorities cited therein.

⁵⁹ *Ibid.*

⁶⁰ JC Smith and B Hogan *Criminal Law* 6ed (1988) 135. See also Simester & Sullivan (note 24 above) 199- 203. And see the further discussion in this regard in chapter 3, section 2.3.2.1.

⁶¹ Simester & Sullivan (note 24 above) 203.

⁶² It is not clear why English law abandoned the principle of imputation in the case of aiding and abetting. It may be speculated, however, that it happened because the fiction was no longer required once s8 of the Accessories and Abettors Act 1861 permitted secondary parties to be indicted, tried and punished as principals, despite their status as accessories.

committed in pursuance of a *prior conspiracy*, in which the various participants *act in concert*.⁶³ It requires proof of the following:

1. Two or more parties (X and Y), by express or tacit agreement, embark together on the commission of a particular crime (crime A);
2. X foresees the possibility that, in the course of their joint enterprise to commit crime A, Y (with the necessary mens rea) might commit a collateral crime (crime B);⁶⁴
3. Y does commit crime B;
4. Crime B occurs as an incident of their joint enterprise to commit crime A and does not occur in a manner that is fundamentally different from the manner foreseen by X.⁶⁵

On satisfaction of these requirements, X will be liable for crime B. His liability for crime A will however still depend on his own conduct (aiding and abetting, as discussed above).⁶⁶ This form of liability is therefore a refined version of the original doctrine of common purpose,⁶⁷ as it existed in English law during the mid-19th century.

5. COMPLICITY IN OTHER COMMON LAW JURISDICTIONS

Although an extensive comparative analysis is beyond the scope of this dissertation, it may be useful, before proceeding to South African law, to mention briefly how the law relating to complicity has developed in some of the other common law jurisdictions based on, or influenced by English law.

⁶³ Simester & Sullivan (note 24 above) 219-220.

⁶⁴ The possibility needs to have been foreseen as a 'real' one. Foresight of a possibility so slight that the accused dismissed it as altogether negligible will not suffice (*R v Powell*; *R v English* [1997] 4 All ER 545; *R v Rahman* [2008] UKHL 45).

⁶⁵ Simester & Sullivan (note 24 above) 220. The case of *R v Powell*; *R v English* [1997] 4 All ER 545 (HL) is a case in point.

⁶⁶ *Ibid.*

⁶⁷ The most significant refinement is the substitution of subjective foresight for the 'probable consequences' test used in the original version.

Both Canadian and Australian law approach secondary participation in terms very similar to those of English common law. The Canadian Criminal Code provides for the liability of secondary parties based on aiding, abetting, counselling and procuring, in much the same way as modern English law (there are slight differences in the requirements for liability, but they are not important for present purposes and need not be canvassed here).⁶⁸ Australian law distinguishes between principals in the second degree (aiders and abettors present at the fact) and accessories before the fact (aiders, abettors, counsellors and procurers not present at the fact), but the distinction is of no great significance.⁶⁹ Both jurisdictions also recognise liability for collateral crimes committed in the course of a joint criminal enterprise, in much the same way as English law. In each jurisdiction, as in English law, there must be both prior conspiracy (consensus) and concerted action by the participants.⁷⁰

The fault element for liability is the same in Australian law as in English law (subjective foresight of a real possibility),⁷¹ but Canadian law differs. Unlike English law, the Canadian Criminal Code does not require subjective foresight of the commission of the collateral crime. Negligence will suffice,⁷² although the Canadian Supreme Court has ruled that subjective foresight will nevertheless be required in the case of certain crimes for which a subjective fault requirement is a ‘fundamental principle of justice’, as contemplated in section 7 of the Canadian Charter of Rights and Freedoms.⁷³ It has been held that murder and attempted murder are such crimes, in view of the high social stigma and severe penalties they carry.⁷⁴ Conversely, in Canada it is insufficient if the

⁶⁸ Sections 21(1) and 22 of the Canadian Criminal Code 1892 as amended. See also B Ziff ‘The Rule Against Multiple Fictions’ (1976-1987) 25 *Alberta LR* 160, 171-172 for a succinct explanation of the Canadian law of complicity.

⁶⁹ A Hemming ‘In Search of a Model Code Provision for Complicity and Common Purpose in Australia’ (2011) 30 *Univ of Tasmania LR* 53, 55.

⁷⁰ Hemming (note 69 above) 55; Canadian Criminal Code (note 68 above) s21(2): ‘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.’

⁷¹ See note 64 above.

⁷² Section 21(2) of the Canadian Criminal Code (note 70 above).

⁷³ Section 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982: ‘Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.’

⁷⁴ *R v Vaillancourt* [1987] 2 SCR 636 (unconstitutionality of the felony-murder rule); *R v Martineau* [1990] 2 SCR 633 (subjective foresight of death required for murder); *R v Logan* [1990] 2 SCR 731 (subjective foresight of death required for attempted murder).

parties knew, or ought reasonably to have known that the collateral crime was a *possible* consequence of carrying out the common purpose. It must have been foreseen, or be reasonably foreseeable as a *probable* consequence.⁷⁵

Scottish common law does employ a doctrine very similar to the South African doctrine of common purpose, in the form of ‘art and part’ liability. Apart from accessorial liability through aiding, abetting, counselling and procuring, a person will also be liable ‘art and part’ for an offence committed by another, if (1) he conspired beforehand to commit the offence and took some part in its preparation or commission; or if (2) in the absence of prior conspiracy, he knowingly participated in its commission. Art and part liability furthermore extends to collateral crimes committed by the other participant(s) in the course of committing the principal crime, if the commission of the collateral crime was a reasonably foreseeable consequence of the commission of the principal offence.⁷⁶

6. COMPLICITY IN SOUTH AFRICAN LAW

As previously shown, the English law distinctions between principals in the first and second degrees and between principals and accessories before the fact had no counterparts in the Roman-Dutch law upon which South African law was founded.⁷⁷ Thus, in 1908, in *R v Peerkhan and Lalloo*,⁷⁸ the Transvaal Supreme Court held (per Innes CJ):

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 committed it. The English law calls such an one a principal in the second degree; and there is much curious learning as to when a man is a principal in the second, and when in the first degree. Our law knows no such distinction between principals in the first and second degrees or between principals in the second degree

⁷⁵ Canadian Criminal Code (note 68 above) s21(2).

⁷⁶ E Clive et al *A Draft Criminal Code for Scotland with Commentary* (2003) (published under the auspices of the Scottish Law Commission) 47-50.

⁷⁷ In any event, as previously explained, by the beginning of the 20th century these distinctions had almost entirely lost their significance in English law too, save only for the separate and distinct liability of the accessory after the fact.

⁷⁸ *R v Peerkhan & Lalloo* 1908 TS 798.

and accessories. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis* – an accomplice or partner in the 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 perpetrator of the deed.⁷⁹

Consequently, for many years South African law recognised and distinguished between only two categories of participant – *principals* (or perpetrators, as they were later known) and *accessories after the fact*.⁸⁰ Any secondary participant other than an accessory after the fact was simply a ‘socius criminis’ and was regarded as a co-principal/co-perpetrator. Pursuant to the decision of the Appellate Division of the Supreme Court (‘AD’) in the 1980 case of *S v Williams*,⁸¹ however, South African law has distinguished between secondary participants according to whether they are co-

⁷⁹ *R v Peerkhan & Lalloo* (note 78 above) 802 (the latter portion of this passage was subsequently cited with approval by the AD in *R v Ngcobo* 1928 AD 373, 376). In his concurring judgment, Wessels J explained the position in Roman-Dutch law in more detail (802-3): ‘Our law differs considerably from the English law in that respect. Our law is void of any technicality. It says that a person who assists at a crime is himself guilty of the crime... Everybody who, in the opinion of the judge, does something to further the purpose of a criminal is a person who assists or helps at the crime. Even the person who keeps a lookout to see that the police do not interrupt the perpetrator of a crime is punishable according to our law. The whole subject will be found in Matthaeus, *de Criminibus* Chap 1, sec 2. He says that there can be no doubt that a person who lends any aid whatsoever to a criminal is himself a criminal. Then he goes on to say not only that lending aid consists in being actively helpful to the criminal, as, for instance, where a person holds down the man who is being murdered, but that anybody who lends assistance indirectly towards the commission of the crime is also to be regarded as assisting at the crime, as, for example, where a person sells poison, knowing that the poison will be used for a criminal purpose, or who gives another a weapon with which to commit a crime. Then he goes even further than that, and declares that a person who has not even moved his hand towards committing the crime can still be guilty of being an assistant, as, for instance, a man who stands by for the purpose of terrifying the victim, as in the case of rape or some similar crime. He also includes persons who, for the purpose of acting as watchmen, stand by to see that the criminal escapes. Further, he tells us that what are called accessories after the fact are considered, according to our law, as guilty of assisting at the crime. So that the Roman-Dutch law is entirely void of technicality, simply leaving to the judge ... the question of whether the accused assisted at the crime or was intentionally helpful to the criminal to enable him to effect his purpose, or not. If he was he is guilty of a crime, and if he is guilty of a crime he can be punished.’ De Wet is critical of this exposition of the Roman-Dutch law, principally because he considers that Matthaeus himself misunderstood the true legal position. In his view, the law is better explained by Voet, whom he interprets as requiring a causal connection between the conduct of the secondary participant and the commission of the crime by the actual perpetrator (De Wet, note 11 above, 174-177, 180-181).

⁸⁰ Despite Wessels J’s observation that Roman Dutch law, as cited by Matthaeus, did not distinguish between a socius criminis and an accessory after the fact (see the extract cited in note 79 above), Matthaeus evidently did draw such a distinction elsewhere, as did other Roman-Dutch authorities like Damhouder, Van der Linden, Moorman and Voet, at least for purposes of sentence (Burchell & Hunt, note 10 above, 368 and further authorities cited therein). In any event, the separate liability of the accessory after the fact was established early on by the AD’s decision in *S v Mlooi* 1925 AD 131, 135, where it held that an accessory after the fact is not a socius criminis and cannot be found guilty of the principal crime, but is liable for the separate crime of being an accessory after the fact to that crime.

⁸¹ *S v Williams* 1980 (1) SA 60 (A).

perpetrators or accomplices.⁸² Accordingly, South African law currently recognises and distinguishes between three categories of participant, namely *perpetrators*, *accomplices* and *accessories after the fact*. Accessories after the fact are not regarded as parties to the crime and do not require detailed discussion for present purposes.⁸³ The discussion that follows will therefore concentrate on the legal position of perpetrators and accomplices.

There are three ways in which a person may become a perpetrator (or co-perpetrator) in South African law: Firstly, if he personally satisfies all three elements of criminal liability (*actus reus*, criminal capacity and *mens rea*); secondly, if he does not commit the *actus reus* himself, but orchestrates its commission by some unwitting or otherwise innocent agent; and, thirdly, if he does not commit the *actus reus* himself, but forms a common purpose to commit the crime together with a person who executes the *actus reus* in pursuance of that common purpose.⁸⁴ It is unnecessary for present purposes to discuss the first two types of perpetrator in detail, but liability based on common purpose will be discussed further.

Both Rabie and Parker have provided informative accounts of the adoption and development of the doctrine of common purpose in South African law.⁸⁵ For the sake of completeness, however, and to set the scene for the critical analysis of the doctrine that follows in later chapters, it would be appropriate to provide a brief account here.

As explained above, Roman-Dutch law generally regarded the liability of secondary participants as arising from quasi-mandate. It would seem from the Transvaal Supreme Court's use of the term '*socius criminis*' (literally translated as 'partner in crime') in *R v Peerkhan and Lalloo*,⁸⁶ that it regarded the fictitious mandate as arising, not from authorisation, such as would occur in the case of principal and agent, but rather from operation of law, the analogy being the implied mandate that is deemed to come into

⁸² The distinction will be discussed more fully in ch4.

⁸³ See note 80 above.

⁸⁴ J Burchell *Principles of Criminal Law* 3 ed (2005) 572. It will be noted that aiding and abetting is no longer a basis for liability in its own right. This is because, as will be shown further on in this chapter, the ambit of common purpose liability has been so widely extended in South African law that conduct that would amount to aiding and abetting is now regarded as evidence of accession to a common purpose.

⁸⁵ Rabie (note 7 above) 227; Parker (note 32 above) 78.

⁸⁶ *R v Peerkhan & Lalloo* (note 78 above) 802.

existence between partners ('socii') in a business venture. The existence of such a partnership was to be inferred, the court suggests, from the assistance afforded by the one to the other in the commission of the crime. The notion of fictional partnership and consequent implied reciprocal mandate was not very far removed from the English law concept of imputed conduct based on common purpose,⁸⁷ as expressed in cases such as *Macklin, Murphy and Others* and *R v Price*,⁸⁸ however, and one might speculate that this fiction could well have resulted in our law developing in much the same direction as it did, even if the doctrine of common purpose had not been imported into South African law.

Such speculation is idle, however, since the doctrine of common purpose was imported into South African law, either directly from English law, or (as is commonly thought) via the influence of the Native Territories' Penal Code of 1886,⁸⁹ section 78 of which provided as follows:

If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.⁹⁰

⁸⁷ See, for example, Solomon JA's dictum in *McKenzie v Van der Merwe* 1917 AD 41, 51-2, where he states: 'I am not at all satisfied that the rule laid down by *Stephen* and other text writers ... differs very much in principle from that quoted from *Van der Linden* (2, 1, 7): "If, therefore, the parties to a conspiracy have met together in conjunction for the commission of a certain act, and have been prepared with mutual aid and co-operation, or have been used as spies or as sentinels against danger, they are all equally punishable, though the act itself, e.g., a murder has only been committed by one of them."'

⁸⁸ *Macklin, Murphy, & Others' Case* (note 42 above); *R v Price* (note 43 above).

⁸⁹ Native Territories' Penal Code 24 of 1886 (Cape), also commonly known as the Transkeian Penal Code. This code was an almost verbatim replica of an earlier attempt by the prominent English judge, Sir James Stephen, to codify the English criminal law. Although the code was legally enforceable only in the area of the (former) Transkei, it was often consulted by South African courts as a convenient reference work on English criminal law generally. Further on the role of the Code in introducing the doctrine of common purpose into South African law, see DS Koyana *The Influence of The Transkei Penal Code on South African Criminal Law* (1992) 20-44 (published doctoral thesis); See also CR Snyman *Criminal Law* 5 ed 80.

⁹⁰ Section 78 Native Territories' Penal Code, Act 24 of 1886 (Cape). The provisions of s78 were amplified by s5(e) of the Code, which provided: 'When a criminal act is done by several persons in the furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act, with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.' Rabie (note 7 above 229 fn 17) points out that s5 of the

The doctrine of common purpose, as encapsulated in section 78 of the Native Territories' Penal Code, was subsequently applied in the area of the (former) Transkei, in the 1920 case of *R v Taylor*.⁹¹ The doctrine did not remain confined to the Transkei, however. In 1917, it was used as the basis of a delictual claim in the Orange Free State Provincial Division of the Supreme Court, in the case of *McKenzie v Van der Merwe*.⁹² McKenzie, a farmer, claimed compensation for stock stolen and fences damaged in 1914 by a group of Boer rebels, whose commanding officer had been the defendant, Van der Merwe. McKenzie's argument was that, because Van der Merwe had shared a common purpose with his rebel troops to engage in an illegal rebellion, each of them was liable for the delicts of the others, committed in furtherance of that objective. The trial court, by a majority of two to one, declined to award damages on this basis and McKenzie appealed to the AD. The AD however similarly declined to uphold McKenzie's claim, holding that there was no basis for such a claim, either in Roman-Dutch law, or in English law. In delivering the majority judgement, Solomon JA held as follows:

The contention is that everyone who takes part in a rebellion must be taken to constitute every other rebel as his agent to do all that is reasonably necessary in order to carry out their common purpose... No direct authority in our law has been produced for a doctrine which produces such startling results, and it was virtually admitted that it could only be based on the ground of agency. That no such agency is expressly constituted by a rebel when he enters into a rebellion is undoubted, and I fail to see how it can be inferred from the mere fact of his joining such a movement.⁹³

Despite the AD's reluctance to award damages on the basis of common purpose in *McKenzie*, the doctrine was invoked again a few years later, with more success, in the

Code is the section that dealt with definitions and that nowhere is s5(e) explicitly linked to the provisions of section 78, however two were evidently meant to be read in conjunction.

⁹¹ *R v Taylor* 1920 EDL 318. This case concerned a number of students of the Lovedale Missionary Institution, who had been charged with public violence, malicious injury to property, arson and assault with intent to do grievous bodily harm, arising out of their participation in student riots at the institution. Hutton J held (323): '... [I]t must of course be borne in mind that it is not necessary for the Crown to prove that each one of the accused had committed some overt act constituting the offence. For in the circumstances of the present case the Crown is entitled to rely on the doctrine of common purpose, the common law definition of which has never been more clearly stated than in Sec. 78 of Act 24 of 1886 (the Transkeian Penal Code)'.

⁹² *McKenzie v Van der Merwe* (note 87 above).

⁹³ *McKenzie v Van der Merwe* (note 87 above) 51-2.

criminal case of *R v Garnsworthy*.⁹⁴ The accused, a group of striking mineworkers, had launched an armed attack on mine officials and others defending the Brakpan Mine, with the aim of bringing mining operations to a halt. One Lowden, a member of the defending force, had been killed in this attack and others had been killed in subsequent acts of violence, committed after the defending force had surrendered. Although there was no evidence that any of the accused had killed any of the deceased, all were convicted of Lowden's murder on the basis of common purpose, but were acquitted of the subsequent murders on the grounds that these had fallen outside the scope of the common purpose to stop operations at the mine, that purpose having already been achieved when these additional murders were committed. In delivering the court's judgment, Dove-Wilson JP held:

Now the law upon this matter is quite clear.⁹⁵ 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 furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object. 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.⁹⁶

After *R v Garnsworthy*, the doctrine of common purpose was applied and developed by the courts, particularly the AD, in a number of cases. Until 1945, it appears to have been used interchangeably with Roman-Dutch law. Thus, for example, in *R v Ngcobo* in

⁹⁴ *R v Garnsworthy* 1923 WLD 17.

⁹⁵ This was undoubtedly an overstatement. As Rabie points out, there was no direct authority for the proposition in South African law (Rabie, note 7 above, 230, note 22).

⁹⁶ *R v Garnsworthy* (note 94 above) 19. Although the court did not cite any authority in support of its judgment, it is evident from the authorities relied upon by counsel in argument that all parties were ad idem that the basis on which liability was in dispute was the doctrine of common purpose (the Crown relied on *McKenzie v Van der Merwe* (note 87 above) whilst counsel for the defence cited the English cases of *R v Edmeads* (1828) 3 C & P 390, 172 ER 469 and *R v Pridmore* (8 CAR 198), both of which dealt with common purpose). It would also be noted that the court's description of the scope of common purpose liability bears a strong resemblance to that contained in section 78 of the Native Territories Penal Code of 1886 and was in all likelihood derived therefrom.

1928, the AD applied Roman-Dutch law, citing *R v Peerkhan and Lalloo*.⁹⁷ In *R v Mbande* in 1933, the AD upheld the third accused's conviction for murder on the basis that he was a party to a common purpose to commit murder and had also 'aided and abetted' the commission of the murder by the second accused. In 1942, in *R v Matsitwane*, the AD again applied Roman-Dutch law, citing both *R v Peerkhan and Lalloo* and *R v Ngcobo*.⁹⁸

From 1945 onwards, however, the courts attempted to reconcile the English law and Roman-Dutch law approaches, by stating that the doctrine of common purpose was founded on the same principle of implied mandate that was also recognised in Roman-Dutch law, if not as a matter of historical fact, then as the only acceptable legal rationale, as held earlier by Innes CJ in *McKenzie v Van der Merwe*:

Now [the common purpose] rule has not been deduced from general principles, but rests upon certain old decisions. The terms in which it is expressed and the limitations to which it is subject would seem to indicate that the principle which underlies it is that of agency. However that may be, its place in our law must be that of an application of the doctrine of implied mandate. There is none other upon which it can be grounded; and its operation in our practice must be confined within the limits of the doctrine.⁹⁹

This idea was echoed by Tindall JA in his dissenting judgment in *R v Duma*, where he held, 'If it is proved that the intention of persons acting in concert is to do an illegal act, then there is a common purpose and *each is the agent of the other* in the performance of that act' (emphasis added).¹⁰⁰ After *R v Duma*, there were numerous cases in which the courts took the view that the joint liability of parties to a common purpose rested on implied mandate.¹⁰¹ This view was in fact endorsed by no less a luminary than Professor Exton Burchell, writing in 1957,¹⁰² although he was later to retract it, with the

⁹⁷ *R v Ngcobo* 1928 AD 372, 376.

⁹⁸ *R v Matsitwane* 1942 AD 213, 219.

⁹⁹ *McKenzie v Van der Merwe* (note 92 above) 46 (minority judgment).

¹⁰⁰ *R v Duma* 1945 AD 410, 415.

¹⁰¹ *R v Mkhize* 1946 AD 197, 205-6; *R v Shezi* 1948 (2) SA 119 (AD) 128; *R v Mgxwiti* 1954 (10 SA 370 (A) 382; *R v Bergstedt* 1955 (4) SA 186 (AD) 188; *R v Motaung* 1961 (2) SA 209 (AD) 210-11; *S v Nkomo* 1966 (1) SA 831 (AD) 833-4.

¹⁰² EM Burchell 'Mandate to Kill by Witchcraft' (1957) 74 *SALJ* 382 (a discussion of the decision in *Twelve v R* 1957 R & N 265 (FSC)).

observation: '[T]here is no magic about the "doctrine" of common purpose, and ... there is in fact no need for a special doctrine or rule in cases of this kind.'¹⁰³

The notion that the imputation was based on implied mandate was maintained well into the 1960s,¹⁰⁴ although it began to attract increasing criticism as the years passed. One unassailable criticism was that it is not possible for criminal liability to arise *ex mandato*, because a mandate to commit an unlawful act is itself unlawful and hence invalid.¹⁰⁵ At best, therefore, one might speak of a situation *analogous* to mandate, or 'quasi-mandate'. Other critics were concerned with the fact that, if the analogy was carried through to its logical conclusion, there would be nothing to prevent conduct from being imputed retrospectively, by implied ratification;¹⁰⁶ an approach that did in fact apply in South African law, despite criticism, for some years.¹⁰⁷

Apart from such technical objections, however, there were also criticisms aimed at logical inconsistencies in the application of the analogy, such as the fact that, in civil law, a mandator's liability is limited by the scope of the mandate, which includes any express instructions as to how the mandate should be executed. In criminal law, however, whilst A and B may agree to commit a particular crime, and A may (for instance) expressly instruct B that no violence is to be used for the purpose, A will nevertheless be liable for B's acts of violence if A foresaw the possibility that B might

¹⁰³ Burchell & Hunt (note 10 above) 363. It should be noted, however, that in making this comment, Burchell & Hunt were considering the question of whether the doctrine of common purpose dispensed with the need to prove *mens rea* (which it does not). In that sense, therefore, it differs from (civil) liability based on agency or employment, which is entirely vicarious in nature. They were not, therefore, considering the legal basis on which one participant's *conduct* is imputed to the other.

¹⁰⁴ See, for example, *R v Duma* 1945 AD 410, 415; *R v Mkhize* 1946 AD 197, 205-6; *R v Shezi* 1948 (2) SA 119 (AD) 128; *R v Mgxwiti* 1954 (10 SA 370 (A) 382; *R v Bergstedt* 1955 (4) SA 186 (AD) 188; *R v Motaung* 1961 (2) SA 209 (AD) 210-11; *S v Nkomo* 1966 (1) SA 831 (AD) 833-4. See also EM Burchell 'Mandate to Kill by Witchcraft' (1957) 74 *SALJ* 382 (a discussion of the decision in *Twelve v R* 1957 R & N 265 (FSC)).

¹⁰⁵ MA Rabie 'The Doctrine of Common Purpose in Criminal Law' (1971) 88 *SALJ* 227, 237. De Wet however explains that, even though the analogy with private law was recognised during the Middle Ages, it was not carried through to its logical conclusion, in that the mandator was not held liable 'ex mandato', but 'propter mandatum'; that is, not because the mandatory's act was imputed to him, as in private law, but because, through his mandate, he had set into motion a *causal sequence of events* (De Wet & Swanepoel, note 11 above, 173).

¹⁰⁶ See, for example, De Wet (note 11 above) 185; Rabie (note 105 above) 237.

¹⁰⁷ See further ch3, s4 below.

commit such acts, despite his instructions to the contrary.¹⁰⁸ Nor does it matter whether the violence used by B was necessary for, or incidental to the commission of the agreed crime, as long as it was foreseen by A.¹⁰⁹ A's liability is therefore not limited by the scope of the mandate, but only by the scope of his own foresight, which is disanalogous.¹¹⁰ Furthermore, in civil law the mandator is necessarily the dominant party in the relationship, in that the mandatary, in executing the mandate, is required to submit to the mandator's control and to act entirely in the mandator's interests, subordinating his own interests insofar as necessary.¹¹¹ Where A is the instigator and driving force behind the planning and execution of a crime, whilst B merely falls in with A's plans, it seems inapposite to speak of B as having impliedly mandated A to act on his (B's) behalf. Yet the doctrine of common purpose imputes A's conduct to B as readily as it imputes B's conduct to A. Once again, this is disanalogous. As explained above, however, it seems likely that the original analogy in South African law was drawn, not from the law of agency, but from the law of partnership, where each partner ('socius') in a business venture is deemed to have granted every other partner an implied mandate to transact business for the account of all. In so doing, the common law does not distinguish between 'senior' and 'junior' partners – all partners are deemed to be of equal standing, with equal authority to bind the others.

Whatever the merits of the above criticisms, however, it is abundantly clear that the mandate analogy is untenable in those cases where the participant in question accedes to the common purpose by active association (joining-in) and thus unilaterally.¹¹² Mandate is necessarily based on consensus. By extending the doctrine of common purpose to such cases, therefore, the courts unavoidably placed themselves in a position where they could no longer appeal to the mandate rationale as a general justification for the fiction. It is unsurprising, therefore, that despite Botha JA's observation in *S v Safatsa* that the

¹⁰⁸ English law originally took a different approach. In English law, liability for collateral crimes was determined principally by reference to the agreement between the parties (see below ch3, s5). This approach changed recently, however, with the case of *R v Powell; R v English* (note 24 above).

¹⁰⁹ The English law of joint criminal enterprise differs, in that the collateral crime must have been 'an incident' of the joint enterprise (Simester & Sullivan, note 24 above, 222).

¹¹⁰ See, for example, NA Matsukis 'The nature and scope of common purpose' (1988) 2 *SACJ* 226, 232; D Sisilana 'What's wrong with common purpose' (1999) 12 *SACJ* 287, 289-290.

¹¹¹ Dressler (note 106 above) 110.

¹¹² Matsukis (note 110 above) 232; R Whiting 'Joining In' (1986) 103 *SALJ* 38, 39-40; A Paizes 'Common purpose by active association: Some questions and some difficult choices' (1995) 112 *SALJ* 561, 569. Methods of forming a common purpose are discussed in the next chapter (ch3, s3).

‘much maligned notion of implied mandate’ is ‘not without merit’,¹¹³ he declined to express a definite view on the matter, or that the courts in subsequent years have not seen fit to endorse this notion. On the contrary, after *Safatsa* there was general silence on the rationale for the fiction, until the Constitutional Court was obliged to address the question in *S v Thebus*.¹¹⁴

In *S v Thebus*, in upholding the constitutionality of the active association form of common- purpose liability, the Constitutional Court identified two rationales for the doctrine. It held that its principal object is to ‘criminalise collective criminal conduct and thus to satisfy the social “need to control crime committed in the course of joint enterprises”’.¹¹⁵ In support of this object, it added that ‘[t]he phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge’.¹¹⁶ To the foregoing, it added a secondary rationale, namely that ‘in consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result’.¹¹⁷ It held that the introduction of a causal requirement for liability, as contended for by the appellants, would render the object of the doctrine ‘nugatory and ineffectual’ and ‘make prosecution of collaborative criminal enterprise intractable and ineffectual’.¹¹⁸ It would be evident, therefore, that the Constitutional Court did not attempt to rely upon the mandate analogy, or, for that matter, on any other normative basis as a justification for the fiction. It based its justification fairly and squarely upon instrumental rationales; principally, the need for crime control, with the need to circumvent evidentiary difficulties as a secondary consideration.¹¹⁹

The chapter that follows will consist of a more detailed discussion of the development of the doctrine of common purpose pursuant to its adoption in South African law.

¹¹³ *S v Safatsa* 1988 (1) SA 868 (A) 900I.

¹¹⁴ *S v Thebus* 2003 (6) SA 505 (CC).

¹¹⁵ *S v Thebus* (note 114 above) para 34.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* See also the court’s comment, later on in the judgment (para 40) that ‘group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals’.

¹¹⁸ *Ibid.*

¹¹⁹ *S v Thebus* (note 114 above) paras 34 and 40, cited previously. This case is discussed in detail in ch6.

CHAPTER 3

THE DEVELOPMENT OF THE DOCTRINE OF COMMON PURPOSE IN SOUTH AFRICAN LAW

1. INTRODUCTION

In the previous chapter, it was explained how the 19th century English law doctrine of common purpose was adopted into South African law. This chapter will focus on the development of the doctrine by the South African courts pursuant to its adoption. In so doing, the subject will be addressed under four headings, namely: (1) the nature and effect of the doctrine; (2) methods of forming a common purpose; (3) the time of formation; and (4) determining the ‘scope’ of a common purpose. Withdrawal from a common purpose (sometimes referred to as ‘repentance’), although an important topic in its own right, is not directly relevant for present purposes and will not be discussed in detail.

2. THE NATURE AND EFFECT OF THE DOCTRINE

The doctrine of common purpose in South African law may be expressed as follows:

Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their “common purpose” to commit the crime.¹

The legal effect of the doctrine is that secondary participants who are party to such a common purpose are regarded as co-perpetrators (co-principals), not as accessories, and are therefore liable for the crime itself. Inasmuch as it is a fundamental principle of South African criminal law that liability must be based on unlawful conduct of some kind, the actus reus of such a secondary participant is regarded as his act of associating

¹ *S v Thebus* 2003 (6) SA 505 (CC) para [18], citing J Burchell & J Milton *Principles of Criminal Law* 2ed (1997) 393.

with the actual perpetrator, with a common purpose to commit the crime.² As a matter of law, the criminal conduct of each participant is then imputed to all the others.³ In short, therefore, the doctrine of common purpose dispenses with the need for the state to prove all the normal requirements of the *actus reus* in respect of each and every participant, or to prove actual aiding and abetting.⁴

Thus, where the crime was committed in pursuance of a prior conspiracy, it is not necessary to show that each conspirator played an active role in the execution of the conspiracy, or that he was even present at the time of the crime (as was required in English law). Nor, in the absence of a conspiracy, is it necessary to prove that each participant contributed towards, or facilitated the commission of the crime, in a physical or even psychological sense (aiding and abetting). It follows that, where the crime is one that normally requires proof of causation, as with murder, it is not necessary to prove that each participant played a contributory role in causing the prohibited consequence, or even to establish the identity of the actual perpetrator(s). As long as the state can prove, by inferential reasoning, that the consequence must have been caused by one or other of the participants, and that the others shared a common purpose with him (or them) to cause it, all will be liable for the resulting crime.⁵ The law on this last point was not always clear. Writing in 1970, Burchell and Hunt cited numerous cases as authority for their assertion that:

It is not necessary to show either that each party did a specific act towards the attainment of the joint objective or that there was a causal link between the conduct of each party and the unlawful consequence as long as it resulted from conduct of the actual perpetrator within the common design'.⁶

² Burchell EM & Hunt PMA *South African Criminal Law and Procedure, Volume 1, General Principles of Criminal Law* (1970) 364: 'Association in a common illegal purpose constitutes the participation - the *actus reus*. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all.' This passage was cited with approval by Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) 899E-F.

³ *Ibid*; see also *S v Safatsa* (note 2 above) 898A.

⁴ It does not however dispense with the need to prove the other elements of criminal liability, namely criminal capacity and *mens rea*, as was highlighted by the AD in *S v Malinga* 1963 (1) SA 692 (A) 694F: '[T]he liability of a *socius criminis* is not vicarious but is based upon his own *mens rea*'. The subject of *mens rea* in common purpose cases will be discussed further on.

⁵ *S v Madlala* 1969 (2) SA 637 (A) at 640F-H.

⁶ Burchell & Hunt (note 2 above) 362 and further authorities cited therein, most notably that of *R v Mgxwiti* 1954 (1) SA 370 (A).

At the same time, there were some eminent authorities who took the opposing view, most notably Professor JC de Wet,⁷ who considered that there needed to be a causal relationship between the conduct of the participant in question and the commission of the crime, even if only in a psychological sense.⁸ There were also other commentators who thought that the law did not require proof of causation in any form, but regarded this as a highly objectionable departure from the normal principles of liability.⁹ Further uncertainty was added in 1969 by the AD's decision in *S v Thomo*, where it held (per Wessels JA) that, according to 'accepted principle and authority':

[O]n a charge of murder it must be established that, intending the death of his victim, the accused, irrespective of the fact whether he is charged as principal or *socius*, was guilty of unlawful conduct which caused or causally contributed to the death of the deceased.¹⁰

Certain commentators understood this to mean that proof of a causal relationship was indeed required in order to establish the liability of a secondary participant for murder,¹¹ an interpretation which seemed to be confirmed by the AD's subsequent decisions in *S v Williams* and *S v Maxaba*.¹²

It has been explained that, in *Williams*, the AD sought to re-introduce a distinction between principals (co-perpetrators) and secondary participants. The facts of the case were that Williams and his three co-accused had been travelling together on a train. There was no evidence that they had started out with a common purpose to commit any

⁷ JC De Wet & HL Swanepoel *Die Suid-Afrikaanse Strafbreg* 2ed (1960) 169-70. See also SA Strauss 'Oorsaaklikheid en daderskap: moord sonder veroorsaking?' (1960) 23 *THRHR* 95, 101-2.

⁸ Although the notion of 'psychological causation' was harshly criticised by Botha JA in *S v Safatsa* (note 2 above, 901C-D) as 'stretching the concept of causation ... to such unrealistic limits as to border on absurdity', it corresponded to a large extent with the English law concept of abetting (incitement or encouragement). An abettor was not only one who gave practical assistance towards the commission of the crime, but would also include a person who offered moral support or encouragement, even of a verbal nature (G Williams *Criminal Law The General Part* 2ed (1961) 359). De Wet & Swanepoel's approach was subsequently followed by the Rhodesian Supreme Court in *R v Masuka* 1965 (2) SA 40 (SR) 42F-H, 43G-H.

⁹ See, for example, MA Rabie 'The Doctrine of Common Purpose in Criminal Law' (1971) 88 *SALJ* 227 236-9.

¹⁰ *S v Thomo* 1969 (1) SA 385 (A) 399H.

¹¹ See, for example, JH Hugo 'Common purpose and causation' (1969) 86 *SALJ* 391; see also CR Snyman *Criminal Law* (1984) 215-6, where he states that, in cases involving common purpose, liability for murder is simply determined according to general principles. And see also Parker's comments on these developments (Parker, P Parker 'South Africa and the Common Purpose Rule in Crowd Murders' (1996) 40(1) *J of African Law* 78, 91).

¹² *S v Williams* 1980 (1) SA 60 (A); *S v Maxaba* 1981 (1) SA 1148 (A).

crime, but during the course of their journey the first three accused attacked and killed another passenger. Williams stabbed the deceased with a knife, then the second accused grabbed him round the neck and pulled him along the coach. Whilst the deceased was being held by the second accused, the third accused approached and stabbed the deceased with a broken-off bottleneck. The fourth accused did not participate at all. The trial court convicted Williams and the third accused of murder as co-perpetrators and convicted the second and fourth accused of being accomplices to the murder. On appeal by the second and fourth accused, the AD (per Joubert JA) distinguished between co-perpetrators and accomplices,¹³ in the following terms:

An accomplice's liability is accessory in nature so that there can be no question of an accomplice without a perpetrator or co-perpetrator who commits the crime. A perpetrator complies with all the requirements of the definition of the relevant crime. Where co-perpetrators commit the crime in concert, each co-perpetrator complies with the requirements of the definition of the relevant crime. On the other hand, an accomplice is not a perpetrator or co-perpetrator, since he lacks the *actus reus* of the perpetrator. An accomplice associates himself wittingly with the commission of the crime ... in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the commission of the crime ... [A]ccording to general principles there must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator (emphasis added).¹⁴

The AD then confirmed that the second accused had been correctly convicted of being an accomplice to murder, but acquitted the fourth accused, because he had merely been a passive bystander.

It would be evident from the above extract that, apart from trying to revive the English law dualistic distinction between primary and secondary participants, Joubert JA was also seeking to introduce an additional requirement for liability as a secondary participant, namely that there needed to be a causal connection between the conduct of

¹³ Joubert JA, delivering the judgment in Afrikaans, used the term 'medepligtige' to distinguish between such a secondary participant and a co-principal ('mededadiger'). In accordance with Corbett JA's judgment in *S v Khoza* 1982 (3) SA 1019 (A) 1031C-F, the terms 'accomplice' and 'co-perpetrator' have since been adopted for use in English.

¹⁴ *S v Williams* (note 12 above) 63A-C (trans JM Burchell *Cases and Materials on Criminal Law* 3ed (2007) 528).

such a participant and the commission of the crime by the actual perpetrator. This was contrary to the preponderance of authority, which, as previously explained, regarded proof of such a causal connection as unnecessary in cases where the parties had acted in pursuit of a common purpose.¹⁵ Joubert JA offered no direct explanation for this sudden departure from precedent, other than to say that there was often confusion between ‘medepligtigheid en mededaderskap’,¹⁶ but it is evident from the authorities cited in his judgment that the court’s thinking had been heavily influenced by commentators such as De Wet and Swanepoel, Strauss, Hugo and Rabie,¹⁷ who had advocated the need for such a causal relationship to be proved.¹⁸

S v Williams was not an isolated case. The following year, in *S v Maxaba*, the AD (per Viljoen JA) interpreted its earlier decision in *Williams* as meaning that the state must indeed prove a causal connection, both in order to establish liability for murder as a co-perpetrator and in order to establish liability as an accomplice to murder.¹⁹ These two decisions were not permitted to stand as authority for very long. In *S v Khoza*, the AD, in a rather startling example of judicial obfuscation, held (per Botha AJA) that it did not ‘accept’ that Joubert JA had meant to alter the law on common purpose:

Generally, I should make it clear that I do not accept that it was intended in *Williams’* case to supplant, qualify, or detract from, the substance of the practice of the Courts in relation to common purpose in previous cases decided over a period of many years.²⁰

¹⁵ Burchell & Hunt (note 2 above) 362 and further authorities cited therein. It would also be evident from the discussion of the English law approach to complicity in the previous chapter that a causal relationship is not an invariable requirement of English law either.

¹⁶ Loosely translated as ‘liability as an accomplice and liability as a co-perpetrator’.

¹⁷ *S v Williams* (note 12 above) 63H.

¹⁸ De Wet & Swanepoel (note 7 above); Strauss (note 7 above); Hugo (note 11 above); Rabie (note 9 above).

¹⁹ *S v Maxaba* (note 12 above) 1155F-G; 1156H-1157A.

²⁰ *S v Khoza* 1982 (3) SA 1019 (A) 1054C-D. The difficulty with this dictum is that it simply does not accord with the record. It is impossible to place any construction on Joubert JA’s words in the extract from *Williams* cited above (note 14 and accompanying text), other than that he did indeed mean to alter the law by introducing a dualistic approach to liability, as does his treatment of the second accused in that case. It is evident from the facts that the second accused spontaneously associated himself with the first accused’s murderous attack on the deceased, which, according to established authority by that time (see s3.2 below), made him party to a common purpose with the first accused to murder the deceased and, hence, liable for murder himself, as a co-perpetrator (the requirements for spontaneous association will be discussed under the next heading). In order for him to be liable as an accomplice, rather than as a co-perpetrator, the law on common purpose would first have needed to be altered. Whiting argues that the second accused was in fact a principal in the *first* degree, because he satisfied the requirements for causation, but this would only be correct if the second accused’s contribution had been a sine qua non of

Botha AJA's dictum in *Khoza* proved insufficient to dispel uncertainty on the question of causation, however. Six years later, he was required to address the issue yet again in his judgment in *S v Safatsa* – the notorious case of the so-called 'Sharpsville Six'.²¹ This time he left no scope for uncertainty. The case arose from the mob-killing of the Deputy Mayor of Lekhoa outside his house in Sharpsville. Eight members of the mob were identified and tried for the murder. Two (the fifth and six accused) were acquitted by the trial court, because, although they were part of the mob when it 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. The trial court found, however, that each of the remaining six had intended the death of the deceased and that they had all actively associated themselves with the conduct of the mob, which was directed at causing his death. They were accordingly convicted of murder and sentenced to death. They appealed against their convictions and sentences on the grounds, inter alia, that the state had not proved a causal connection between their conduct and the death of the deceased. In support of this argument, they relied in particular on the authority of *S v Thomo* and *S v Maxaba*.

On appeal, the AD (per Botha JA, as he had by then become) reviewed the evidence and confirmed that the trial court had been correct in finding that each of the accused had (1) shared a common purpose to kill the deceased with the mob as a whole; (2) by their conduct, actively associated themselves with the achievement of that common purpose; and (3) had the necessary intention to commit murder.²² On the question of causation, Botha JA put an end to further argument on the subject by making it abundantly clear that proof of a causal connection is not required in cases involving common purpose.²³ After reviewing the authorities on the subject, he held that Wessels JA's dictum in *Thomo* had been obiter and was thus not a binding precedent.²⁴ He repeated his earlier assertion that Joubert JA's ruling in *Williams* had not been intended to alter the established law on the doctrine of common purpose and had, in any event, not had that

the deceased's death, which does not appear from the reported facts (R Whiting 'Principals and accessories in crime' (1980) 97 *SALJ* 191, 201-2); 'Joining in' (1986) 103 *SALJ* 38, 51).

²¹ *S v Safatsa* (note 2 above) .

²² *S v Safatsa* (note 2 above) 901H-J.

²³ *S v Safatsa* (note 2 above) 898J - 900A.

²⁴ *S v Safatsa* (note 2 above) 896E-F.

effect.²⁵ Lastly, after criticising Viljoen JA's interpretation of *Williams* in *Maxaba*, Botha JA went on to hold that the former's ruling on causation in that case could also be safely ignored in the treatment of cases involving common purpose.²⁶ Although Botha JA's ruling on causation has been extensively criticised over the ensuing years, amongst other aspects of the *Safatsa* judgment,²⁷ it recently received the endorsement of the Constitutional Court in *S v Thebus*,²⁸ and it must now be regarded as a correct reflection of South African law, even if the rule itself remains susceptible to criticism.

Before moving on to the next heading, it needs to be mentioned that there are certain crimes to which the doctrine of common purpose does not apply. South African law has adopted the English law position that certain crimes are framed in terms that render them incapable of commission by anyone other than the actual perpetrator.²⁹ Common law crimes falling into this category are rape,³⁰ bigamy and perjury.³¹ By the same token, a statutory offence may be framed in such terms that it can only be committed by a certain class or category of persons, such as the holder of a personal permit or licence, or a person of a certain status, such as a prisoner, or an unrehabilitated insolvent.³² In such cases, the only person who can be convicted of the offence itself is the individual who personally satisfies all the requirements of the actus reus. A person who conspires

²⁵ *S v Safatsa* (note 2 above) 898D-I: 'In my view the Court in *Williams*' case did not intend to supplant, qualify, or detract from the substance of the practice of the Courts in relation to common purpose. I expressed this view in *Khoza's* case *supra* at 1054C. It has turned out to be correct, having regard to the manner in which cases of common purpose have continued to be dealt with in the decisions of this Court subsequent to *Williams*' case, as mentioned above... For practical purposes, in applying the law relating to cases of common purpose, the judgment in *Williams*' case can safely be left out of consideration altogether.

²⁶ *S v Safatsa* (note 2 above) 900A.

²⁷ See, for example, D Unterhalter 'The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another' (1988) 105 *SALJ* 671; A Rabie 'Kousaliteit en "common purpose" by moord' (1988) 2 *SACJ* 229; VVW Duba 'What was wrong with the Sharpeville Six decision?' (1990) 2 *SACJ* 180; P Parker 'South Africa and the Common Purpose Rule in Crowd Murders (1996) 40(1) *J of African Law* 78; L Sisilana 'What's wrong with common purpose?' (1999) 12 *SACJ* 278.

²⁸ *S v Thebus* (note 67 above) paras [33]-[40].

²⁹ Snyman refers to these as 'autographic' crimes (CR Snyman *Criminal Law* 5ed (2008) 269). See also *S v Kimberley* 2002 (2) SACR 38 (E) 42H-43E; *S v Saffier* 2003 (2) SACR 141 (SE). On English law, see *Williams* (note 8 above) 386 and JC Smith & B Hogan *Criminal Law* (1965) 81.

³⁰ The common-law crime of rape has been repealed in South Africa by the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It is not clear to what extent, if any, the rule mentioned applies to the statutory crime of rape, created by section 3 of the Act, which replaces the common law version of the crime.

³¹ Rape could only be committed by sexual intercourse per vaginam by a male over 14 years of age, who was not the complainant's husband. Bigamy could only be committed by one who was married. Perjury could be committed only by one who had taken the oath (*Williams*, note 8 above, 386).

³² *S v Kimberley* (note 29 above) 42H-43E.

with, or intentionally causes or assists the former to commit the crime cannot be convicted as a co-perpetrator, but is not altogether immune from liability. Pursuant to *S v Williams*,³³ such an individual may be held liable as an accomplice.³⁴

3. METHODS OF FORMING A COMMON PURPOSE

It has been explained that, in cases where liability is based on common purpose, the actus reus of a co-perpetrator is regarded as his act of associating with the actual perpetrator, with a common purpose to commit the crime in question. It follows that it is important to have clarity on what will be regarded as sufficient to constitute such an act of association.

It would be evident from the authorities cited above that, according to English law, a common purpose could only arise from prior conspiracy – in this case, an agreement between the relevant parties to commit the crime in concert.³⁵ Indeed, Glanville Williams seldom uses the term common purpose, but speaks merely of conspiracy, treating the two concepts as synonymous.³⁶ As previously explained, too, in 19th century English law, liability as a principal in the second degree (which we now call a co-perpetrator) could arise in one of two ways, namely (1) by aiding and abetting the actual perpetrator(s); or (2) by conspiring beforehand to commit the crime in concert with the actual perpetrator(s). Simply put, therefore, such liability could arise either from prior conspiracy (common purpose), or from individual conduct (aiding and abetting). In either case, however, presence at the time of the crime was required, albeit in an extended or constructive sense.³⁷

³³ *S v Williams* (note 12 above).

³⁴ *S v Kimberley* (note 29 above) 42H-43E.

³⁵ See the description given by Foster in section 4.1 of the previous chapter (M Foster & M Dodson *Crown Law* 3ed (1792) 351. See also Solomon JA's description in *McKenzie v Van der Merwe* 1917 AD 41 53: 'It seems clear, not only from the language used, but also from the illustrations given by the author, that what [Stephen] was dealing with was the case of a number of persons *banded together and proceeding to carry out some common object*' (emphasis added). And see the dissenting judgment of Steyn JA in *S v Nzo* 1990 (3) SA 1 (A) 14G. An agreement to act in concert is still essential for joint criminal enterprise liability in modern English law (AP Simester & GR Sullivan *Criminal Law Theory and Doctrine* 2ed (revised 2004) 219-220).

³⁶ Williams (note 8 above) 346-415.

³⁷ See ch2, s4.1.

Although South African law adopted the doctrine of common purpose from 19th century English law, however, it soon began to develop its own set of rules:

3.1 Conspiracy

Whereas English law required presence at the time of the crime, in pursuance of a prior conspiracy *to commit the crime in concert*, South African courts developed the view that, where the accused had entered into a prior conspiracy to commit the crime, presence at the time of the crime was not an invariable requirement, nor, consequently, was it always necessary for the accused to have played some role in the execution of the crime.³⁸ In *R v Njenje*, the Southern Rhodesian Appellate Division (per Lewis AJA) drew a distinction between different types of conspirator.³⁹ It held that a conspirator who incited, commanded, or procured his co-conspirators to commit the crime would be liable as a co-principal even if he was not present and played no part in its commission,⁴⁰ whilst other types of conspirator would be liable as co-principals only if they had participated in (aided and abetted) the actual commission of the crime.⁴¹ The effect of this dictum was therefore to eliminate the distinction (if any remained) between accessories before the fact and principals in the second degree.⁴² In *S v Yelani*, the AD relied upon the first part of Lewis AJA's dictum to hold the appellant liable for murder despite his absence from and lack of active participation in the commission of the crime.⁴³ It can be seen, therefore, that South African law came to attach greater weight to the existence of a conspiracy than English law.

³⁸ Burchell & Hunt (note 2 above) 364, citing *R v Bergstedt* 1955 (4) SA 186 (A) and *S v Nkombani* 1963 (4) SA 877 (A). See also *R v Kgolane* 1960 PH H110.

³⁹ *R v Njenje* 1966 (1) SA 368 (SRA) 376H, citing Fischer JP's dictum in *R v Dhlamini* 1941 OPD 154, 157 that 'a conspirator may be the person incited and not the person inciting'.

⁴⁰ In English law, such an individual would have been an accessory before the fact (Williams, note 8 above, 408).

⁴¹ *R v Njenje* (note 39 above) 377B-C and further authorities referred to therein.

⁴² It did not, however, extend liability as a co-principal beyond those who, in English law, would have been regarded as accessories before the fact (that is, inciters, counsellors, or procurers).

⁴³ *S v Yelani* 1989 (2) SA 43 (A) 46F-G. In this case, the accused had instigated or authorised the crime, so the legal position of other types of conspirator was not germane to the issues in dispute and the AD did not mention it, thus leaving it open to debate whether the South African courts would adopt the distinction drawn by Lewis AJA in *Njenje*. Thus far, the only South African case to have drawn this distinction is *S v Tungata* 2004 (1) SACR 558 (TkD) 566C-E, however the first appellant in this case (who was ultimately acquitted) had clearly procured the commission of the crime, having paid the second appellant to murder her husband, so the court's observations regarding other types of conspirator must presumably be regarded as obiter.

A year after *Yelani*, however, the AD went considerably further and extended the scope of liability arising from a conspiracy to extreme (and highly questionable) lengths, in *S v Nzo*.⁴⁴ Nzo and his co-appellant had been members of a cell of ANC activists, based in Port Elizabeth, at the time when this organisation was banned. They were charged with treason, as well as the murder of a fellow cell-member's wife, who had threatened to expose her husband's illicit activities, which included operating a safe house for fellow activists. Nzo, who was the leader of the group, had overheard the threat and reported it to one 'Joe', another member of the cell, who warned the deceased, in Nzo's hearing, that he would shoot her if she persisted in her disloyalty. About a month later, Joe murdered the deceased and fled the country, evading justice. Nzo played no part in the commission of the murder and was, in fact, in custody when it took place, having been arrested on unrelated charges and having disclosed his unlawful activities to the police.

The second appellant had even less involvement with the murder. There was no direct evidence that he had been aware of the deceased's threat to inform, or of Joe's counter-threat, but he had been a leading member of the cell, whose responsibilities had included finding safe accommodation for the activists after their arrival in the country. The trial court therefore found that, because of the position he occupied, he must have been privy to this information. The trial court found, further, that a common purpose had existed between the members of the cell to commit acts of sabotage in the Port Elizabeth area and that they must have foreseen the possibility that fatalities might be caused in the process. It also referred to certain ANC pamphlets urging the killing of informants, the contents of which must have been known to the appellants. It held further that both appellants must have been aware of the possibility that the deceased would be killed in retaliation for informing, or in order to prevent her from doing so. It held, therefore, that Nzo, the second appellant and Joe had all shared an unlawful common purpose and that the murder of persons in the position of the deceased fell within its scope. Both appellants were accordingly convicted of treason and murder, but appealed to the AD against their murder convictions (they did not appeal against their convictions for treason).

⁴⁴ *S v Nzo* 1990 (3) SA 1 (A).

On appeal, counsel for the appellants argued that mere membership of an unlawful organisation and a broad, general agreement to commit unspecified acts of sabotage was not sufficient to render the appellants liable for every foreseen crime committed by every one of their fellow members; liability needed to be based on association with the particular crime in question. In support of their argument, they cited *McKenzie v Van der Merwe*,⁴⁵ where the AD had declined to hold that each member of the rebel troops was liable for the delicts of other members committed in pursuance of the rebellion.⁴⁶

Although their argument won the support of the minority of the court (Steyn JA), it failed to persuade the majority. Hefer JA, who delivered the majority judgment, made no reference to the AD's decision of the previous year in *Yelani*,⁴⁷ or to the distinction between different types of conspirator, drawn earlier by Lewis AJA in *Njenje*.⁴⁸ He simply relied on the portion of the AD's dictum in *S v Madlala*, which dealt, in a very general manner, with liability for collateral crimes committed in the course of carrying out a common purpose.⁴⁹ He held that all the available evidence pointed to the fact that Joe and the two appellants had functioned as a cohesive unit, in which each played an

⁴⁵ *McKenzie v Van der Merwe* 1917 AD 41. This case was discussed in ch2, s6.

⁴⁶ 'I am not prepared to hold that every member of a commando is, by the mere fact of such membership, liable for the acts of every other member "within the scope of the objects of the rebellion"' (per Innes CJ, in *McKenzie v Van der Merwe* (note 45 above) 47 (minority judgment); and see also Solomon J: '[T]here is no suggestion in the judgments in favour of any such rule as is now contended for. And certainly if we were to adopt it, it would be productive of very startling results, for as pointed out by the Chief Justice of the Orange Free State in his judgment "it would make a rebel in this Province liable for the acts of another rebel in the district of Prieska in the Cape Province with whom he had no further connection than that both of them were ultimately under the head command of General De Wet". Moreover it would mean that every private in the rebel ranks would be civilly liable for everything done by the orders of the commander-in-chief in furtherance of the rebellion. No direct authority in our law has been produced for a doctrine which produces such startling results, and it was virtually admitted that it could only be based on the ground of agency. That no such agency is expressly constituted by a rebel when he enters into rebellion is undoubted, and I fail to see how it can be inferred from the mere fact of his joining such a movement' (majority judgment, 52).

⁴⁷ *S v Yelani* (note 43 above).

⁴⁸ *S v Njenje* (note 39 above).

⁴⁹ *S v Madlala* (note 5 above) 640G-H: 'It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, ... an accused may be convicted of murder if the killing was unlawful and there is proof - (a) that he individually killed the deceased, with the required *dolus* ...; or (b) that he was a party to a common purpose to murder, and one or both of them did the deed; or (c) that he was a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred'. This case was no authority at all for the proposition that a common purpose could be constituted by a broad, general agreement to commit as-yet unspecified crimes.

allotted role;⁵⁰ their common design was to ‘wage a localised campaign of terror and destruction’ and the murder of the deceased (which must have been foreseen as possible by both appellants) was committed ‘in the furtherance of this design and for the preservation of the unit and the protection of each of its members’.⁵¹ He concluded that ‘[t]his being the narrow ambit within which their liability falls to be decided, it is clear that they cannot derive material assistance from *McKenzie v Van der Merwe*’.⁵² Lastly, he held that there was no logical distinction between a common design relating to a particular offence and one relating to a series of offences.⁵³ He found, however, that Nzo had dissociated from the common purpose at the time when he disclosed his unlawful activities to the police and that he was consequently not liable for the murder, which had been committed after this date. Nzo’s conviction for murder was therefore set aside, but that of the second appellant was upheld.

Nzo’s case illustrates the inherent difficulties created by dispensing with the need to establish presence at the time of the crime (even in an extended or constructive sense), coupled with concerted conduct. These requirements had placed practical, finite limits on the scope of the doctrine, which in turn limited liability for collateral crimes committed in pursuance of a common purpose.⁵⁴ These requirements had meant (as Steyn JA observed in his minority judgment) that the doctrine was based on the principle of a participant’s *proximity* to the commission of the crime, in both factual and legal terms.⁵⁵ They also meant that a generalised campaign of criminal conduct, even if

⁵⁰ These observations suggest that Hefer JA may have been attempting to assign some form of command responsibility to the appellants (*respondeat superior*), by virtue of their role as leading members of the cell; however it seems unlikely, from the facts recorded in the judgment, that the cell was organised with the type of clearly defined command structure that one would find in, say, a military unit (see further note 53 below).

⁵¹ *S v Nzo* (note 44 above) 7I.

⁵² *S v Nzo* (note 44 above) 8A.

⁵³ *S v Nzo* (note 44 above) 8G. The reasoning behind this dictum may well be correct, but the difficulty with its application in the present case was that the appellants had not conspired to commit a series of specific acts of sabotage. The various acts that were committed were evidently identified and planned as time progressed; membership of the Port Elizabeth cell was continually changing and different members of the cell were involved in planning and executing different acts of sabotage at different times. In many cases, it seems, they broke into smaller groups for such purposes and committed these acts on their own initiative, so that, even though the appellants were evidently leading members of the cell, and were probably aware of the activities of their fellows, it is doubtful whether they exercised any level of control or influence over these activities. Their role seems to have been that of facilitators, rather than instigators.

⁵⁴ Liability for collateral crimes arising out of a common purpose is discussed in s5 below.

⁵⁵ ‘Die leerstuk van gemeenskaplike doel is, na my oordeel, in die geval van ’n nie-dader gegrond op die beginsel van ‘nabyheid’ (feitlik and regtens) van so ’n nie-dader aan die pleging van die betrokke misdaad.’ (*S v Nzo*, note 44 above, 16I, per Steyn JA).

it amounted to treason, could not be regarded as sufficient to constitute a common purpose.⁵⁶ Dispensing with these requirements removed the practical constraints on the scope of the doctrine and opened up almost infinite possibilities for liability, particularly as regards collateral crimes.⁵⁷

Burchell criticised the AD's judgment in *Nzo* for extending the scope of the doctrine at a time when the general trend, as evidenced by cases like *S v Mgedezi*, *S v Goosen* and *S v Motaung*,⁵⁸ was to restrict its scope.⁵⁹ In *S v Mzwempi*,⁶⁰ and clearly mindful of Burchell's criticisms of *Nzo*,⁶¹ Alkema J observed that the AD's judgment in *Nzo* had only been followed on the question of dissociation and not on the question of the scope of common purpose liability.⁶² He held further that the AD's ruling in this latter regard had been overruled by the Constitutional Court's decision in *S v Thebus*,⁶³ in light of the latter's approval of the requirements for active association, as set out in *S v Safatsa* and *S v Mgedezi*, and which included the necessity for presence at the time of the crime.⁶⁴ Alkema J's reasoning in *Mzwempi* is however based on a fundamental misconception, in that he incorrectly identified the form of common purpose relied on by the AD in *Nzo* as having arisen from active association (discussed below), whereas it is abundantly clear that the AD considered that it was dealing with a case of common purpose arising

⁵⁶ As previously explained, the doctrine of common was originally devised to deal with participation in felonies (ch2, s4.1). It was probably never intended to apply to a crime like (high) treason, which is so widely defined that any overt act committed with the necessary hostile intent amounts to treason itself (J Burchell *Principles of Criminal Law* 3ed (2005) 928). English law drew no distinctions between different participants in the case of treason. All were regarded as principals (Williams, note 8 above, 346).

⁵⁷ Burchell commented: 'In light of the decision of the majority of the Appellate Division in *S v Nzo*, continued membership of an organization which adheres to the policy that violence is permissible in order to achieve certain political ends, will not only expose its members to prosecution and conviction for treason but also for murder, in terms of the common purpose principle, if a killing is perpetrated by one of its members in furtherance of the objectives of the organization.' (J Burchell 'Joint enterprise and common purpose: perspectives in English and South African criminal law' (1997) 10 *SACJ* 120, 133).

⁵⁸ *S v Mgedezi* 1989 (1) SA 687 (A) (discussed in s3.2 below); *S v Goosen* 1989 (4) SA 1013 (A); *S v Motaung* 1990 (4) SA 485 (A) (discussed in s4 below).

⁵⁹ J Burchell 'S v Nzo 1990 (3 SA 1 (A) common purpose liability' (1990) 3 *SACJ* 345, 351.

⁶⁰ *S v Mzwempi* 2011(2) SACR 237 (E).

⁶¹ *S v Mzwempi* (note 60 above) para 113.

⁶² *S v Mzwempi* (note 60 above) para 96. It is correct that there are no reported cases which cite *Nzo* as authority in this latter regard, but see *S v Boekhoud* 2011 (2) SACR 124 (SCA) (especially at para 23), which indicates that there are still cases where the state relies on a generalised, ongoing conspiracy as a basis for common purpose liability. Possibly one of the reasons why it has not been necessary to rely on *Nzo* is that the majority of ongoing conspiracies now fall within the ambit of the Prevention of Organised Crime Act 121 of 1998 and are dealt with in terms of its provisions, although there still seems to be scope for the common purpose doctrine in relation to liability for collateral crimes, as illustrated in *Boekhoud*.

⁶³ *S v Thebus* (note 1 above).

⁶⁴ *S v Safatsa* (note 2 above); *S v Mgedezi* (note 58 above). These requirements are discussed under the next sub-heading.

from prior conspiracy.⁶⁵ The AD's decisions in *Safatsa* and *Mgedezi* had no bearing on cases of common purpose formed by prior conspiracy and the Constitutional Court's judgment in *Thebus* did not touch upon such cases either.⁶⁶ Thus, although it would have been a welcome development if *Nzo* had indeed been overruled, it must regrettably be concluded that Alkema J's finding is incorrect and that *Nzo* still remains binding authority,⁶⁷ even if liable to criticism. Unfortunately, however, there are bound to be instances where Alkema J's ruling will be taken at face value and it can be anticipated, therefore, that this is likely to lead to confusion in the law, which will require clarification at some time in the future.

3.2 Spontaneous association

Although the South African courts attached greater weight to the existence of a prior conspiracy than had been the case in English law, they simultaneously developed the view that prior conspiracy, whilst important in itself, was not an essential prerequisite for the establishment of a common purpose. English law considered that it was not necessary to provide direct evidence of the existence of a prior conspiracy, or of its nature and scope. These were matters that could be inferred from the facts of the case.⁶⁸ South African law adopted the same approach in the early case of *R v Itumeling*.⁶⁹ In his dissenting judgment in *R v Duma*, however, Tindall JA went even further, holding: 'If it is proved that the intention of persons acting in concert is to do an illegal act, *then there is a common purpose...*' (emphasis added).⁷⁰

⁶⁵ E Du Toit (ed) *Commentary on the Criminal Procedure Act* RS 50 2013 ch22 40. Alkema J does not appear to be alone in this thinking, however – see, for example, the state's contentions regarding active association in *S v Boekhoud* (note 62 above) para 47.

⁶⁶ The Constitutional Court's judgment in *Thebus* will be discussed fully in ch6.

⁶⁷ This is also Du Toit's view (Du Toit et al, note 65 above, 40). For a detailed analysis and critique of Alkema J's judgment in *S v Nzo*, see SV Hoor 'Common Purpose' (2011) *Annual Survey of South African Law* 349-353.

⁶⁸ Williams (note 8 above) 396, footnote 1; and, on conspiracy in general, 663.

⁶⁹ *R v Itumeling* 1932 OPD 10, 12.

⁷⁰ *R v Duma* 1945 AD 410, 415. This view was endorsed by Murray AJA, delivering the majority judgment in *R v Mthembu* 1950(1) SA 670 (A) 691: 'It may be taken that no necessity exists for proof by express words showing an agreement to act in future in concert. Such agreement may equally be inferred from conduct, not only before and practically contemporaneous with the act constituting the criminal offence, but also from conduct subsequent to such attack which affords proof of the mental attitude of the participants at the time of the commission of the offence.'

R v Duma was a case of mob violence. A crowd of about thirty people, armed with sticks, had chased the deceased and, when he was caught, he was not only beaten, but also stabbed. He died as a result of the stab wound. Duma and his co-accused were seen carrying sticks and moving away from the place where the deceased had died. Although the trial court convicted them of murder, the AD overturned their convictions on appeal, the majority of the court holding that there was insufficient evidence to show that the appellants had actually participated in the attack on the deceased. Tindall JA dissented. He found that there was sufficient evidence to conclude that the appellants had joined in the chase, knowing that the deceased was likely to be beaten to death if caught. He held that, if this had in fact happened, they would have been liable for murder. Because the deceased had died of a stab wound, however, he held that the appellants would be guilty of murder only if they had also foreseen this particular method of killing. Since there was no evidence to show that this had been the case, they were not guilty of murder, but, because they had associated themselves with the attack on the deceased with sticks, they were guilty of the lesser crime of assault.⁷¹

Parker points out that, apart from endorsing the evidential rule that permitted the existence of a common purpose to be inferred from the facts of a particular case, Tindall JA's dissenting judgment in *Duma* introduced two novel propositions into the substantive law: Firstly, he introduced the idea that a common purpose could arise spontaneously, without any degree of prior consultation or planning (in other words, through tacit agreement); and, secondly and more importantly, he introduced the idea that a common purpose could also arise where one person joined in spontaneously with a crime that was already in the process of being committed by others, and thus without any agreement at all.⁷²

These ideas rapidly gained currency. A year later, in *R v Mkhize*, Greenberg JA repeated Tindall JA's view that a common purpose could arise in the absence of prior conspiracy, 'on an impulse without any prior consultation or arrangement'⁷³ and, in 1950, in his

⁷¹ *R v Duma* (note 70 above) 417-418.

⁷² Parker (note 4 above) 85-6.

⁷³ *R v Mkhize* 1946 AD 197, 206: 'A mandate can be implied even if there is no previous conspiracy between the persons concerned; in my opinion it is sufficient if they act in concert with the intention of doing an illegal act, even though this co-operation has commenced on an impulse without any prior consultation or arrangement.'

dissenting judgment in *R v Mthembu*, Schreiner JA endorsed the view that a common purpose could arise by spontaneous association.⁷⁴ In 1954, both of these propositions were accorded unanimous acceptance by the AD; firstly in the case of *R v Du Randt*,⁷⁵ where it was found that the common purpose to commit murder had arisen spontaneously whilst the accused were trying to avoid arrest and, secondly, in *R v Mgxwiti*,⁷⁶ which was a case of spontaneous association (joining in), without any form of prior agreement.

The idea that a common purpose could be formed by spontaneous association and, hence, by unilateral action was a radical development. English law had held that liability as a principal in the second degree could arise out of prior conspiracy (common purpose),⁷⁷ or out of aiding and abetting (individual conduct). In the latter event, the accused was required to have done something of a practical nature to facilitate or encourage the commission of the crime, even if the crime could, and probably would, have been committed without his involvement.⁷⁸ As explained under the previous heading, proof of a practical contribution to the commission of the crime is unnecessary in South African law, in cases where the state is able to rely on common purpose. Thus, by being able to extend the doctrine of common purpose to *non*-conspirators, the state was spared the need to prove conduct on the part of the individual accused that amounted to aiding and abetting. It was sufficient to show that there was conduct from which it could be inferred that the accused had ‘made common cause’ or ‘associated

⁷⁴ *R v Mthembu* 1950 (1) SA 670 (A) 677-8: ‘A person may be liable for a crime actually perpetrated by another without having agreed with him or given him a mandate to commit the crime; as a rule assistance and agreement go together but there may be cases where the assister is liable for the act of the perpetrator without any agreement with the latter at all, even such an agreement as may have arisen on the spur of the moment and may be inferred from the fact of more or less simultaneous assault upon the victim. If, for instance, A is pursuing C manifestly intending to assault him dangerously or kill him and B joins in the pursuit without A's knowledge but wishing to associate himself with and to aid in achieving A's manifest object, B is also liable if A, in consequence of their pursuit, succeeds in killing C. The notion of 'mandate' would obviously have to be given an extended meaning if cases where the 'mandatory' is unaware of the 'mandator's' very existence must be brought under it.’

⁷⁵ *R v Du Randt* 1954 (1) SA 313 (A).

⁷⁶ *R v Mgxwiti* 1954 (1) SA 370 (A).

⁷⁷ Williams points out that ‘[t]his rule may result in the conviction as party of one who does not materially contribute to the commission of the crime. But nearly always a conspirator who is present will be contributing something, even if it is no more than the encouragement of his presence’ (Williams, note 8 above, 353 note 3).

⁷⁸ Williams (note 8 above) 359.

himself' with the conduct of those committing the crime.⁷⁹ As will be shown further on, this lowered the threshold of proof for liability.

This development was of particular significance to cases involving mob violence, as is illustrated by the case of *R v Mgxwiti*.⁸⁰ In this case, a large crowd of people had stopped a car and had attacked and killed its occupant, a woman. The deceased was first assaulted, then the car was set alight and burned with the deceased inside. Although the cause of death was officially given as extensive burns, it could not be established what injuries the deceased had already received when the car was set alight and, in particular, whether she had died in the fire or from one of these prior injuries. Mgxwiti had been seen walking towards the car with a knife at the time when the initial assault was taking place and he was also seen, shortly afterwards, stabbing (or stabbing at) the deceased through the open window or door of the car. Greenberg JA, delivering the majority judgment on behalf of the AD, found that there was sufficient evidence to conclude that Mgxwiti had 'made common cause' with the mob at very latest at the time when he walked towards the car with his knife,⁸¹ thus making him a party to the common purpose to murder the deceased before she received her fatal injuries. He was consequently found liable for murder.⁸²

Mgxwiti's case illustrates how the idea that common purpose may arise from spontaneous association was used to extend the scope of liability. Mgxwiti's act of stabbing (or stabbing at) the deceased would no doubt have afforded adequate proof of aiding and abetting, but, in that case, it would not have been possible for the court to find beyond reasonable doubt that such aiding and abetting had taken place before the deceased received her fatal injuries. Merely walking towards the car with a knife would *not* in itself have constituted adequate proof of aiding and abetting, but, by being able to construe this conduct as evidence of accession to a common purpose to commit murder, the court was able to find that Mgxwiti had become a party to the crime at an earlier

⁷⁹ *R v Mgxwiti* (note 76 above); *R v Dladla* 1962 (1) SA 307 (A); *S v Motaung* 1961 (2) SA 209 (A); *S v Maree* 1964 (4) SA 545 (O).

⁸⁰ *R v Mgxwiti* (note 76 above).

⁸¹ For a criticism of this conclusion, however, see note 95 below.

⁸² *R v Mgxwiti* (note 76 above) 379A. Schreiner JA dissented. He found that there was a reasonable possibility that the deceased had already received the fatal injury at the time when Mgxwiti joined in, but he held that, in that case, Mgxwiti had 'ratified' the injuries that the deceased had already received and that this was sufficient to find him guilty of murder in any event.

stage in the sequence of events, at a time when the deceased had not yet received her fatal injuries.

Mgxwiti's case also highlights some of the difficulties presented by the idea that a common purpose may arise through spontaneous association; in particular, the difficulty of determining what will constitute sufficient proof of such association. In line with English law,⁸³ the courts have repeatedly held that mere presence at the scene of a crime and failing to prevent it, or even performing an act that appears to coincide with the acts of the perpetrators is not sufficient to constitute proof of accession to a common purpose,⁸⁴ but they did little in early years to lay down any practical guidelines as to what was sufficient. It was only in 1986 that Professor Whiting suggested that there were three basic requirements that ought to be satisfied:

Firstly, the party to whom the act is to be attributed must be present on the scene at the time of its commission. Secondly, he must intend to associate himself with the commission of the act by the other party or to make common cause with the other party in its commission. And, thirdly, he must give expression to this intention by some overt conduct, such as joining a crowd obviously intent on the commission of the act in question and showing solidarity with whomever it is who actually commits it.⁸⁵

Although the AD did not deal directly with the question in *S v Safatsa*,⁸⁶ preferring to concentrate instead on the question of causation, it is evident from Botha JA's treatment of the facts and his endorsement of the trial court's findings that he implicitly recognised three requirements for spontaneous association; namely that (1) the accused in question must have 'manifested an active association' with the conduct of the

⁸³ See, for example, *R v Atkinson* (1869) 11 Cox CC 330; *R v Coney* (1882) 8 QBD 534. Presence at the scene of a crime could, however constitute prima facie proof of aiding and abetting (*R v Coney* (1882) 8 QBD 534). See further Smith & Hogan (note 29 above) 70-71 and further authorities cited therein.

⁸⁴ *R v Mbande* 1933 AD 382, 392-3; *R v Kgolane* 1960 (1) PH H110; *S v Macala* 1962 (3) 270 (A) 254C; *S v Mbambo* 1965 (2) SA 845 (A) 854D.

⁸⁵ R Whiting 'Joining In' (1986) *SALJ* 234, 235. Although Whiting admitted that these requirements had never actually been spelt out by the courts, he was of the view that they could be inferred from such decisions as *R v Mgxwiti* (note 76 above) and *R v Dladla* (note 79 above).

⁸⁶ *S v Safatsa* (note 2 above). This was the first major case involving spontaneous association after Whiting's article appeared.

perpetrators; (2) he must have shared a common purpose with the latter; and (3) he must have had the requisite form of mens rea for the crime.⁸⁷

A year after *Safatsa*, however, Botha JA expressly endorsed Whiting's suggested approach when he delivered the AD's judgment in *S v Mgedezi*,⁸⁸ although, perhaps mindful of his earlier judgment in *Safatsa*, he expanded the list of requirements to five, namely:

1. The accused in question must have been present at the scene of the crime;
2. He must have been aware that the crime was being, or was about to be committed;
3. He must have intended to make common cause with those committing the crime;
4. He must have manifested his sharing of such a common purpose by performing some act of association with the conduct of the others;
5. He must have had the requisite mens rea for the crime.⁸⁹

Botha JA's ruling in *Mgedezi* has since been accepted as the definitive authority on the requirements for spontaneous association and received the approval of the Constitutional Court in *S v Thebus*.⁹⁰

It should be noted that the fourth requirement laid down by Botha JA is crucial. Mere presence at the scene of a crime is not a sufficient basis for liability, so little can be made of the fact of such presence, even when the accused went to the scene in the knowledge that the crime would be committed.⁹¹ At the same time, it is impossible to divine a person's unspoken intentions, other than by observing his conduct within the context of the surrounding facts, and drawing appropriate inferences. The accused's conduct in such cases will therefore generally be the decisive factor in determining his intentions and, consequently, his liability.⁹² Whiting had spoken of 'some overt conduct' which showed 'solidarity' with the actual perpetrators of the crime. In *Mgedezi*, Botha JA also spoke of manifesting the sharing of the common purpose

⁸⁷ Ibid, 893G-H, 901H-J.

⁸⁸ *S v Mgedezi* 1989 (1) SA 687 (A).

⁸⁹ *S v Mgedezi* (note 88 above) 705I-706B.

⁹⁰ *S v Thebus* (note 1 above) para 47.

⁹¹ *S v Jama* 1989 (3) SA 427 (A) 436H-J.

⁹² NA Matsukis 'The nature and scope of common purpose' (1988) 2 *SACJ* 226, 233.

through some ‘act of association’, however this term appears to have been discarded in recent years, in favour of the rather more vague and less satisfactory term ‘active association’, originally used in *Safatsa*.⁹³

Exactly what will constitute a sufficient ‘act of association’ or ‘active association’ has never been explicitly defined by the courts. In *S v Thebus*, the Constitutional Court held that this was a matter to be determined according to the facts of each case.⁹⁴ It is however apparent from the leading cases on the subject that it ought to consist of positive conduct of some kind (an act, as opposed to an omission), from which the accused’s accession to the common purpose can be properly inferred.⁹⁵ So saying, it is equally clear that the act in question need not actually assist, or facilitate, or encourage the commission of the crime in any way, as long as it shows ‘solidarity’ (as Whiting puts it) with the perpetrators of the crime.⁹⁶ It could therefore be something relatively trivial, such as uttering verbal encouragement, even though the accused’s words may well have gone unheard or unheeded by the perpetrators,⁹⁷ and it does not appear to be necessary to show that the perpetrators invited or welcomed the accused’s participation, or, for that matter, that they were even aware of it. An entirely unilateral act is sufficient.

In summary, therefore, in modern South African law, a common purpose can arise in two possible ways, namely:

⁹³ See, for example, *S v Singo* 1993 (2) SA 765 (A); 722D-E; *S v Thebus* (note 1 above) paras 44 – 47; *S v Mzwempi* 2011 (2) SACR 237 (E). See also the terminology used by Burchell (note 56 above, 594) and Snyman (note 29 above, 267).

⁹⁴ *S v Thebus*, note 1 above, para [45]: ‘The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend on the factual context of each case’.

⁹⁵ Matsukis speaks of ‘some kind of overt conduct’ and ‘objectively ascertainable active association’ (Matsukis, note 92 above, 233). ‘Overt’ means outwardly visible, and hence positive conduct (an omission cannot be ‘observed’). See also *S v Jama* (note 91 above) 436I-J: ‘It is only by positive proof of the acts of each individual appellant, either at the meeting or at the house, that the third and fourth requirements could be established’. It might be mentioned that, in light of the subsequent dicta in *Mgedezi*, *Jama* and *Thebus* (note 94 above) it is very likely that Mgqwiti’s act of merely walking towards the deceased’s car with a knife in his hand would not today be considered sufficient to constitute an act of association (*S v Mgqwiti*, note 76 above).

⁹⁶ See the discussion on proof of causation under the previous heading.

⁹⁷ See, for example, the conduct of the 4th accused in *S v Safatsa* (note 2 above) 892C-F.

1. By prior conspiracy, in which case all that is necessary is that there be consensus between the parties that the crime should be committed, procured, or assisted by one or more of the conspirators. This form of association therefore implies bi- or multilateral conduct. In such cases, presence at the time of the crime is not a prerequisite for liability, nor is active involvement with the execution of the crime. There need not be prior consultation or planning; consensus can arise more-or-less spontaneously, through tacit agreement.⁹⁸ The ‘act of association’ is the act of entering into the conspiracy.
2. By spontaneous association, or ‘joining-in’ (in other words, unilateral conduct), in which case each of the five requirements set out in *Mgedezi*, including presence at the time of the crime, must be satisfied.⁹⁹ The act of association must consist of some form of objectively ascertainable and hence positive conduct on the part of the individual accused, showing solidarity with the conduct of the perpetrators and evidencing his intention to make common cause with them.

4. THE TIME OF FORMATION OF THE COMMON PURPOSE

As previously explained, English law regarded common purpose as coterminous with conspiracy. Clearly, therefore, the common purpose needed to be entered into at some time before the commission of the crime and the parties would only be liable for each other’s acts committed whilst the common purpose still endured.¹⁰⁰ Once it had been achieved,¹⁰¹ or if it was abandoned,¹⁰² no further liability arose. Thus, for example, a

⁹⁸ Even though consensus may be reached tacitly, it is nevertheless submitted that actual consensus is required; mere acquiescence is not sufficient. Consequently, it is submitted, the Supreme Court of Appeal’s decision in *S v Musingadi* 2005 (1) SACR 395 para [34], in which it accepted that an expanded common purpose can arise through mere acquiescence and failure to withdraw, is not in accordance with established law and is thus subject to criticism.

⁹⁹ *S v Mgedezi* (note 88 above) 705I-706B.

¹⁰⁰ This did not necessarily mean that the common purpose would only endure until the completion of the crime itself; it might also extend to the use of force to elude arrest after the crime (Williams, note 8 above, 400). Furthermore, a person who agreed in advance to receive stolen goods immediately after a planned theft became a party to the theft itself, rather than a receiver of stolen goods (Williams, note 8 above, 409) Liability for collateral crimes committed in pursuit of a common purpose will be addressed under the next heading.

¹⁰¹ *R v Edmeads* (1828) 3 C & P 390, 172 ER 469; *R v Pridmore* (8 CAR 198).

¹⁰² Smith & Hogan (note 29 above) 82-3.

person who merely assisted a felon to profit from his felony after the event would ordinarily attract no liability.¹⁰³

The idea that a common purpose could also arise through spontaneous association however presented the courts with a new challenge, as was illustrated in the case of *S v Mgxwiti*.¹⁰⁴ It raised the question of whether a person would be liable for murder, if he joined in with a murderous attack after the fatal blow had already been delivered, but before the victim died. This question was especially problematic in cases of mob violence, where the deceased might have been subjected to numerous injuries, inflicted at different times by different assailants. It has been explained how, in *Mgxwiti's* case, the majority of the court were able to avoid this difficulty by finding that Mgxwiti had acceded to the common purpose to kill before the deceased had received her fatal injury or injuries.¹⁰⁵ Schreiner JA was however unable to agree with this finding. In his dissenting judgment, he held that there was a reasonable possibility that the deceased had already received the fatal injury before Mgxwiti joined in, but went on to hold that, in that case, Mgxwiti had 'ratified' the injuries that the deceased had already received and that he was consequently liable for her murder on that basis:

[W]hoever joins in a murderous assault upon a person must be taken to have ratified the infliction of any injuries which have already been inflicted, whether or not in the result these turn out to be fatal either individually or taken together.¹⁰⁶

The proposition that liability could arise retrospectively, through ratification, was subsequently endorsed by the majority of the Rhodesian Federal Court in *R v Chenjere*,¹⁰⁷ and Schreiner JA's dictum was adopted and applied by the Natal Provincial

¹⁰³ Williams (note 8 above) 411.

¹⁰⁴ *R v Mgxwiti* (note 76 above).

¹⁰⁵ *R v Mgxwiti* (note 76 above).

¹⁰⁶ *R v Mgxwiti* (note 76 above) 383A. The possibility that liability might be based on subsequent ratification had already been mooted by Schreiner JA in his dissenting judgment in *R v Mthembu* (note 74 above) 677, although he had declined to express an opinion on the point in that case: 'I find it unnecessary, however, to express any opinion as to whether the guilt of the appellant might not also have been properly rested upon his having joined in what he could see was a murderous assault, which, although the fatal wound had already been administered when he intervened, was still being maintained by the second accused against the first accused to the extent that he was still holding him.'

¹⁰⁷ *R v Chenjere* 1960 (1) SA 473 (FC) 476E-477A (per Tredgold CJ), 481E-H (per Briggs FJ). The decision was not, however, followed by Young J in *R v Masuka* 1965 (2) SA 40 (SR), who decided that he was not bound by the Federal Court's judgment.

Division of the Supreme Court in *R v Mneke*.¹⁰⁸ It was only in 1969, however, that the validity of what, for sake of brevity, will be referred to as the ‘ratification rule’ was considered by the AD in *S v Thomo*.¹⁰⁹ Wessels JA, who delivered the unanimous decision of the court in that case, rejected the ratification rule, with the following words:

The only real practical advantage offered by this limited recognition of the principle of ratification would, in my opinion, appear to be the lessening of the burden of proof in a murder charge where circumstances render proof of causality a difficult matter. It must be borne in mind that an accused will not escape the consequences of his proved unlawful conduct in assaulting a mortally injured person, because he may, depending upon the nature of his own conduct and state of mind, still be guilty of attempted murder, assault with intent to murder or to do grievous bodily harm or common assault ... Even if it were open to this Court to give its approval to the rule of law referred to in *Mgxwiti's* case, I am satisfied that no good reason exists why it should do so.¹¹⁰

Despite the AD’s unanimous decision in *Thomo*, the question continued to exercise the minds of courts and commentators alike for some years.¹¹¹ In 1982, the AD revisited the question in *S v Khoza*.¹¹² In that case, the majority of the court (Holmes AJA, Joubert JA and Hoexter AJA) found that the accused had lacked intention to kill and altered his conviction to one of assault. Corbett JA and Botha AJA dissented. Corbett JA found that the accused had intention to kill in the form of *dolus eventualis*, but held that, because he had joined in the attack only after the fatal blow had been delivered and had done nothing himself to hasten death, he was merely guilty of attempted murder. In so doing, like Wessels JA before him, Corbett JA rejected the ratification rule, holding that:

Whatever role common purpose may serve in the law relating to participation in crime ... it is clear that in order to impute the act of a perpetrator to another person on the ground of

¹⁰⁸ *R v Mneke* 1961 (2) SA 240 (N) 243H-244A.

¹⁰⁹ *S v Thomo* (note 10 above). This case was discussed previously, on the subject of causation.

¹¹⁰ *S v Thomo* (note 10 above) 399H-400D.

¹¹¹ For commentary, see for example EM Burchell ‘Murder: Accused Joining in After Fatal Injury Inflicted’ (1960) 77 *SALJ* 140 and ‘Murder or Attempted Murder: Accused Joining in After Fatal Injury Inflicted’ (1965) 82 *SALJ* 280; Rabie (note 9 above) 334; R Whiting ‘Joining in’ (1986) 103 *SALJ* 234; MC Maré ‘The liability of the “joiner-in” for murder’ (1990) 3 *SACJ* 24.

¹¹² *S v Khoza* (note 20 above).

common purpose it is, in general, necessary that the latter should have acceded to the common purpose before the act in question was committed.¹¹³

Botha AJA also found that the accused had intention to kill and held that he had been correctly convicted of murder. In coming to this conclusion, he endorsed the ratification rule, describing it as ‘pragmatic’ and ‘soundly based on considerations of policy and practical exigency in the administration of criminal justice’.¹¹⁴ He approved of the reasoning of Tredgold CJ and Briggs FJ in *Chenjere*,¹¹⁵ and added his own reasons, namely that, since it was unnecessary to prove causation on the part of a secondary party, it could be of no logical significance whether that party acceded to the common purpose before or after the causal act.¹¹⁶

Botha AJA’s approach was subsequently followed in *S v Dlamini*, by Thirion J, who endorsed the need for a pragmatic approach in such cases.¹¹⁷ It was only in 1990 that the AD finally resolved the uncertainty as to which approach was to be preferred. In *S v Motaung*,¹¹⁸ the nine accused had all been convicted of murder on the basis of the ratification rule, but on appeal, the AD, in a unanimous decision delivered by Hoexter JA, rejected the rule and overturned their convictions, holding that the choice of approach had to be determined with reference to legal principle, and that the principle of retrospective criminal liability was alien to South African criminal law.¹¹⁹ Thus, it held, where a person accedes to a common purpose to commit murder only after the deceased

¹¹³ *S v Khoza* (note 20 above) 1036F-G.

¹¹⁴ *S v Khoza* (note 20 above) 1049H.

¹¹⁵ *R v Chenjere* (note 107 above, loc cit).

¹¹⁶ *S v Khoza* (note 20 above) 1049H: [I]n cases of the kind under discussion the *actus reus* of the accused, on which his criminal responsibility for the murder is founded, consists, not in an act which is causally linked with the death of the deceased, but solely in an act by which he associates himself with the common purpose to kill... On this view of the law it follows, in my judgment, that there is no necessity to distinguish between participation in a common purpose to kill which commences before the deceased has received a fatal wound and such participation which commences after the deceased has been mortally wounded, but while he is still alive; nor, indeed, is any useful purpose to be served by such a distinction. The distinction is deprived of any real significance, in my opinion, as soon as it is recognised that a causal connection between the acts of the accused and the death of the deceased is not an indispensable requirement for a conviction of murder... In fact and in law the crime of murder is not complete until the victim dies; up to that moment there is no reason, I consider, why an active association with the object of the main perpetrator(s) should not attract criminal responsibility for the result which follows thereafter... Of course, it must be postulated that the deceased was still alive at the time of the accused's participation, because no civilised legal system will hold a man guilty of murder on the ground of having taken part in an assault on a corpse.

¹¹⁷ *S v Dlamini* 1984 (3) SA 360 (N) 367B-D.

¹¹⁸ *S v Motaung* 1990 (4) SA 485 (A).

¹¹⁹ *S v Motaung* (note 118 above) 521B-C.

has been fatally injured, and does nothing himself to expedite death, he cannot be guilty of murder. At most, he will be guilty of attempted murder.¹²⁰

Pursuant to *Motaung*, it is now settled law that, in order for a person to be liable for another's unlawful conduct on the basis of common purpose, and regardless of the method of association, the former must have been party to the common purpose at the time when that unlawful conduct was committed. In the case of a materially-defined crime like murder, this will be the time when the causal act or omission occurs, not the time when the consequence materialises, even though the crime is not complete until such consequence does materialise.

5. DETERMINING THE SCOPE OF A COMMON PURPOSE

A fundamental principle of the doctrine of common purpose is that the criminal conduct of one party to a common purpose may be imputed to the other parties only if that conduct falls within the 'scope of the common purpose', or within the 'scope of the mandate',¹²¹ or within the 'common design',¹²² as it is also sometimes described (the terms are often used interchangeably). They will therefore not be liable for crimes committed by their fellow participants that fall outside the scope of the common purpose. Clearly, this means that the parties will be liable for whatever crime or crimes they actually meant to commit together, but questions often arise concerning their liability for collateral crimes committed by one or more of their number in the process of achieving their actual aim and object.

According to Glanville Williams, English law regarded the question as one of degree.¹²³ He cites the following passage from Foster's *Crown Law*:

Much has been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another hath gone beyond the terms of such

¹²⁰ *S v Motaung* (note 118 above) 520A-B.

¹²¹ *R v Shezi* 1948 (2) SA 119 (AD) 128, Greenberg JA held that 'the liability of parties to a common purpose depends on whether the result produced by the perpetrator of the act falls within the mandate'.

¹²² See, for example, Burchell (note 56 above) 574.

¹²³ Williams (note 8 above) 396.

instigation, or hath in the execution varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt ... but if the principal in substance complieth with the temptation, varying only in circumstances of time and place, or in the manner of execution, in those cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal.¹²⁴

In the case of liability for the use of violence as an adjunct to the principal crime, the answer depended primarily on what had been agreed beforehand by the participants. The nature of such agreement could however be inferred from the facts and circumstances of the case.¹²⁵ Thus, where one party knew that the other was carrying a weapon, this would be strong evidence (although not conclusive proof) of a common intent to use violence. Equally, an agreement to threaten violence would generally be construed as evidence of a common intent to use violence, ‘for the one so easily leads to the other’.¹²⁶ It therefore appears that, in English law, the scope of a common purpose was regarded as a matter of objective fact, although it could be inferred from the facts and circumstances of the case.

In addition, however, English law insisted that a secondary party had to have mens rea in order for liability to arise,¹²⁷ although the form of mens rea was wider than that required for a principal in the first degree, in that it merely required that the secondary party should have involved himself *knowingly* in the commission of the crime; in other words, with full knowledge of, or wilful blindness towards all the material facts and circumstances constituting the crime.¹²⁸ At the same time, English common law employed a number of rules that either dispensed with, or facilitated proof of mens rea.

¹²⁴ Foster (note 35 above) 369, cited by Williams (note 8 above) 396-7. An early case in point, reported by Foster, was *The Three Soldiers' Case* (1697) Foster 353. Three soldiers had gone to steal fruit from an orchard. Two climbed a pear tree, whilst the third kept watch at the gate, with his sword drawn. When the owner's son tried to intervene, the third soldier stabbed and killed him with the sword. Holt CJ held that the third soldier alone was guilty of murder, but that his verdict would have been different if all had set out with a common intention to oppose interference with lethal force (Smith & Hogan, note 29 above, 76).

¹²⁵ Williams (note 8 above) 397.

¹²⁶ Williams (note 8 above) 397-8.

¹²⁷ Thus, even if the crime was one of strict liability, the secondary party would not be guilty in the absence of mens rea (Williams, note 8 above, 395).

¹²⁸ Williams (note 8 above) 394-5 ; Smith & Hogan (note 29 above) 84.

One such rule was that a person was presumed to foresee and intend the natural consequences of his acts (sometimes the terms ‘probable’ and ‘reasonable’ consequences were preferred).¹²⁹ A second rule, commonly known as the felony-murder rule, was that a person would be liable for murder if he caused the death of another in the course of committing a felony, even if he had no mens rea in respect of such death. It was only necessary to prove the mens rea for the felony.¹³⁰ A third rule was the doctrine of transferred malice, which held that, where a person set out to commit a crime against a particular person or object, but accidentally or mistakenly targeted some unintended person or object, he would nevertheless be liable for the crime, if the harm that followed was of the same legal kind as he had intended. His malice (intention to commit the crime in question) was regarded as having been ‘transferred’ to the person or object that was the actual victim or target of the actus reus.¹³¹ These rules, which applied equally to secondary participants,¹³² extended the scope of liability for crimes committed in concert.

The same rules were imported into South African law and applied for some years; the first,¹³³ until it was overruled in a line of decisions beginning with *R v Valachia* in 1945;¹³⁴ the second, in its better-known guise of the ‘versari in re illicita’ doctrine, until the 1960s, when it was abolished by the AD’s rulings in *S v Van der Mescht* and *S v*

¹²⁹ Williams (note 8 above) 89-99; Smith & Hogan (note 29 above) 47-8, 216. Burchell & Hunt (note 2 above) 146. This rule was abolished in English law by s8 of the Criminal Justice Act 1967.

¹³⁰ Smith & Hogan (note 29 above) 194-5, 216-223. This rule, which was also known as the ‘doctrine of constructive malice’ and the ‘doctrine of constructive murder’, was described by Sir James Stephen as ‘cruel and monstrous’ (JF Stephen *Digest of Criminal Law* (1878) 57). It was abolished in England and Wales by the Homicide Act 1957, although it still survives in a number of jurisdictions whose criminal law was based on English law. Smith & Hogan (217-8) explain that the rule applied originally to deaths caused in the commission of any crime, but, by the time of Foster’s *Crown Law*, it had been limited to deaths caused in the commission of a felony. It was then supplemented by a further rule, known as the ‘doctrine of constructive manslaughter’, which held a person liable for manslaughter if he caused another person’s death in the course of committing some crime other than a felony. These rules, which were originally derived from Canon law, are analogous to the now-defunct versari in re illicita rule of South African law (Burchell & Hunt, note 2 above, 111-3).

¹³¹ Williams (note 8 above) 126-8; Smith & Hogan (note 29 above) 41-3. The South African equivalent of this doctrine was known as the ‘aberratio ictus’ rule.

¹³² Williams (note 8 above) 350, 401-3; Smith & Hogan (note 29 above) 75-8.

¹³³ See, for example, *R v Ngcobo* 1921 AD 93.

¹³⁴ *R v Valachia* 1945 AD 826 at 831.

Bernardus,¹³⁵ and the third until its eradication in 1981, after a long line of conflicting decisions, culminating in the AD's ruling in *S v Mavhungu*.¹³⁶

The most important rule for present purposes was the first one, namely that a person was held to have foreseen and intended the natural and probable consequences of his conduct. This meant that both the perpetrator and a secondary party would be liable, not only for such criminal conduct as had been expressly or tacitly agreed upon, but also for any consequence that they knew or ought to have known would be a likely or probable result of their agreed conduct, including the commission of collateral crimes.¹³⁷ This rule was incorporated into Sir James Stephen's draft criminal code of 1879,¹³⁸ upon which the Native Territories' Penal Code was later modelled.¹³⁹ Thus, in *R v Garnsworthy*, Dove-Wilson JP stated the relevant rule as follows:

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 furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object. 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.¹⁴⁰

With the South African trend towards the subjectivisation of mens rea during the 1950s and 1960s, however, the approach to determining the scope of a common purpose was also subjectivised,¹⁴¹ to the point where the enquiry for scope became conflated with the

¹³⁵ *S v Van Der Mescht* 1962 (1) SA 521 (A); *S v Bernardus* 1965 (3) SA 287 (A). For a common purpose case in which this rule was applied, see *R v Mkhize* (note 73 above).

¹³⁶ *S v Mavhungu* 1981 (1) SA 56 (A) 67G-H.

¹³⁷ Williams (note 8 above) 402, footnote 1.

¹³⁸ Ibid.

¹³⁹ Native Territories Penal Code 24 of 1886 (Cape)..

¹⁴⁰ *R v Garnsworthy* 1923 WLD 17, 19. In that case, however, as previously explained, the court found the accused were not guilty of the deaths of the additional victims (other than Lowden), because they fell outside the scope of the common purpose and were not a 'natural consequence' of the operations of the commando.

¹⁴¹ See, for example, *S v Nsele* 1955 (2) SA 145 (A).

enquiry for mens rea. Thus, writing in 1970, Burchell and Hunt explained the law as follows:

[I]n the judgments where the liability of parties to a common purpose was based on mandate, language identical to that used to determine the existence of *mens rea* was employed to define the limits of the mandate. Indeed, *mens rea* and the scope of the mandate between the parties are synonymous in that if the associate in question had *mens rea* in respect of the crime actually committed by the principal offender, that crime fell within the mandate, and vice versa.¹⁴²

Accordingly, in modern day South African law, the scope of a common purpose is ascertained *ex post facto*, by simply enquiring whether the party concerned had the necessary form of mens rea for the crime in question. If so, that crime is then considered to have fallen within the scope of the common purpose. Since each party's liability is determined according to his own mens rea, this means that different parties to the same common purpose may be liable for different crimes, depending on what they knew and foresaw as possible in the circumstances, or, in the case of culpable homicide, what they ought reasonably to have foreseen.¹⁴³ Thus, for example, where A, B and C share a common purpose to assault X and X dies as a result of the assault, A will be guilty of murder if he subjectively foresaw the possibility of causing X's death; B will be guilty of culpable homicide if he did not subjectively foresee that possibility, but a reasonable person in the same circumstances would have done so; and C will be guilty of assault if he had neither subjective foresight nor negligence in respect of X's death, but merely foresaw the possibility of injury.

The question however arises as to the point in time when such mens rea is required: Is it at the time of association, or at the time of the commission of the actus reus, or, in the case of a prior conspiracy, is it at the time when the parties actually embarked on the commission of the agreed crime? Clearly, the actual perpetrator (if his identity can be

¹⁴² Burchell & Hunt (note 2 above) 363-4.

¹⁴³ Because a common purpose means a purpose which is shared consciously by all the parties, for some time it was unclear whether a person could be guilty of culpable homicide on the basis of common purpose. English law accepted that it was possible, as shown in the early case of *R v Swindall & Osborne* (1846) 2 Car & K 230, however doubt was expressed in this regard in *R v Shikuri* 1939 AD 225, 231. After a number of conflicting decisions, the AD finally answered the question in the affirmative, in *S v Nkwenja* 1985 (2) SA 560 (A) 568G-569D.

established) must have had the necessary mens rea at the time of the actus reus, in accordance with the established rule requiring contemporaneity of fault and conduct. It is also clear that a party who accedes to a common purpose by spontaneous association must have had the necessary mens rea at the time of his act of association.¹⁴⁴ The position in respect of parties to a conspiracy is far from clear, however. The courts have not thus far addressed the issue directly. Burchell points out that, in *S v Nkwenja*,¹⁴⁵ the majority of the court chose to assess the parties' mens rea for culpable homicide at the time when they formed the common purpose to rob, whilst the minority chose to assess it at the time of the unlawful conduct (in this case, the fatal assault).¹⁴⁶ In neither of the judgments was the issue specifically addressed, however, so the case is of doubtful value as authority on the point.

Burchell's own view is that the minority approach is preferable, because it allows for a subsequent change in the mental state of a participant, which would enable him, failing repentance and withdrawal, to be held liable for a collateral crime which was not contemplated at the time when he acceded to the common purpose, or embarked on the commission of the principal crime.¹⁴⁷ As he explains:

The intention of a participant in a common purpose to rob, for instance, may initially not include the intention to kill or even the subjective foresight that death may result from the robbery. However, at some stage before the victim of the robbery is killed, the participant may, in fact, realise or foresee that one of the group may use violence which might result in the death of the deceased. If the intention of the participant in question is to be judged at some later stage before the victim of the robbery dies, then account can be taken of the change in the participant's mental state. If the participant, despite his knowledge or foresight of the possibility that death might result, *nevertheless associates himself with the common purpose*, then his failure to withdraw from the criminal venture may be seen as unlawful and liability for murder could ensue (emphasis added).¹⁴⁸

¹⁴⁴ *S v Mgedezi* (note 88 above) 707I-706B; *S v Khumalo* 1991 (4) SA 310 (A).

¹⁴⁵ *S v Nkwenja* (note 143 above).

¹⁴⁶ Burchell (note 56 above) 590-1.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.* Burchell's view is supported by Boister, who observes that, in *S v Mitchell* 1992 (1) SACR 17 (A), the AD assessed the mens rea of the second accused at the time of the unlawful conduct (the throwing of the brick) and not at the time when the common purpose to throw stones came into being (N Boister 'Common purpose: association and mandate' (1992) 2 SACJ 167, 169). With respect, however, it is not at all clear that the court did assess the second accused's mens rea for murder at the time of the

What Burchell is effectively saying, however, is that the scope of a common purpose may be extended as the commission of the crime progresses. There is nothing remarkable in this. Where parties to a common purpose to commit one crime later agree, either expressly or tacitly, to commit a collateral crime, all parties to such later agreement will be guilty of the collateral crime. Equally, if one party starts committing a collateral crime without such an agreement having been reached, and another party joins in with him in the commission of that crime, the latter will also be guilty of the collateral crime. All that has happened, in either case, is that a new and extended common purpose has been formed, either by fresh conspiracy (the first example), or by spontaneous association (the second example). There does however need to be a fresh act of association in some form,¹⁴⁹ as Burchell appears to recognise (see the italicised words in the passage above) and it would appear that each participant's mens rea is then judged at the time of that act.¹⁵⁰ This, in any event, is in accordance with the normal rule requiring contemporaneity of fault and conduct.¹⁵¹ It seems, therefore, that despite Burchell's preference for the minority approach in *Nkwenja*, it is probably the majority approach that is the correct one, although greater clarity on the issue would certainly be desirable.

6. CONCLUDING REMARKS

This concludes the discussion of the development of the doctrine of common purpose in South African law. It has been shown that, whereas English law required presence at the time of the crime in pursuance of a conspiracy to commit the crime in concert, South African law has dispensed with the need for all these requirements to be met in any given case. Thus, where there is a prior conspiracy, South African law has dispensed with the need for either presence at the scene of the crime, or an actual contribution

unlawful conduct. If the relevant passage (23D-F) is read in its entirety (and not merely the extract supplied by Boister), it is evident that the court was merely assessing the second accused's *credibility* when he claimed that *at no time* did he foresee that the brick would be thrown. It is also evident that the court subsequently (22J-23A) assessed his mens rea for culpable homicide at the time of the formation of the common purpose.

¹⁴⁹ See s3 above on what constitutes an act of association.

¹⁵⁰ This approach is also in accordance with the contemporaneity rule.

¹⁵¹ If the actus reus of a secondary participant consists of his act of association with the actual perpetrator (see note 2 above and accompanying text), then it is at the time of that act that his mens rea should properly be judged.

towards its execution. Where there is presence at the scene of the crime, South African law has dispensed with the need for either prior conspiracy, or an actual contribution towards the execution of the crime; all that is required is unilateral conduct showing solidarity with the conduct of the perpetrators. And lastly, South African law has dispensed with the need to establish the scope of a common purpose as a matter of objective fact. All that is required is association in a criminal enterprise of some kind, coupled with the necessary mens rea for the crime in question. It would be evident, therefore, that South African law has greatly extended the scope of the doctrine, to the point where it now covers a wide range of conduct that, in English law, would have been regarded as accessorial in nature, or may well have attracted no liability at all. This raises the question of what, if any, scope remains for accessorial liability. The following chapter will therefore deal with the position of accomplices in South African law.

CHAPTER 4

ACCOMPLICE LIABILITY IN SOUTH AFRICAN LAW

1. INTRODUCTION

Although South African law adopted and has largely adhered to the Roman-Dutch monistic approach towards complicity, it has been explained how, in *S v Williams*,¹ the AD (per Joubert JA) attempted to introduce a dualistic approach, by reviving the English law distinction between principals in the first degree and secondary participants.² It has also been explained that it sought to introduce an additional requirement for liability as a secondary participant (termed an ‘accomplice’), namely that there needed to be a causal connection between the conduct of the accomplice and the commission of the crime by the actual perpetrator. This latter decision represented a significant departure from established precedent on common purpose liability and, although it was endorsed in *S v Maxaba*,³ both decisions were subsequently reversed in *S v Khoza* and *S v Safatsa*.⁴

In reversing Joubert JA’s ruling on causation in cases of common purpose, however, the AD did not simultaneously reverse his decision on the need to distinguish between perpetrators and accomplices. That decision was allowed to stand, although it must now be read in conjunction with, and subject to, the AD’s rulings in *Khoza* and *Safatsa*. In order to determine exactly what is required for accomplice liability in South African law, therefore, it is necessary to piece the relevant requirements together from these conflicting judgments.

2. THE NATURE OF ACCOMPLICE LIABILITY

According to Joubert’s judgment in *S v Williams*, an accomplice is someone *other than a perpetrator or co-perpetrator*, who:

¹ *S v Williams* 1980 (1) SA 60 (A).

² As explained in chapter 2, such a distinction was not drawn in Roman-Dutch law, so it is difficult to reconcile this decision with the objects of the Purification movement, which were to eradicate the influence of English law and return to ‘pure’ Roman-Dutch law principles.

³ *S v Maxaba* 1981 (1) SA 1148 (A).

⁴ *S v Khoza* 1982 (3) SA 1019 (A); *S v Safatsa* 1988 (1) SA 868 (A). See the discussion in s2 ch 3, above.

[A]ssociates himself wittingly with the commission of the crime ... in that he knowingly affords the perpetrator or co-perpetrator the opportunity, the means or the information which furthers the commission of the crime... The assistance consciously rendered by the accomplice in the commission of the crime can consist of an act or an omission... [T]here must be a causal connection between the accomplice's assistance and the commission of the crime by the perpetrator.⁵

Further on, on the subject of accomplice liability for murder, Joubert JA held:

The state of mind of an accomplice to murder consists in the intention to assist the perpetrator or co-perpetrators in killing the victim... His own act comprises his assistance in or furthering the commission of the murder. He is then liable as an accomplice to murder on the basis of his own act, whether it is a positive act or an omission, to further the commission of the murder, and his own fault, viz the intent that the victim must be killed, coupled with the act (*actus reus*) of the perpetrator or co-perpetrator to kill the victim unlawfully.

This much of Joubert JA's judgment remains unaffected by the decisions in *Khoza* and *Safatsa*. The only effect of these latter decisions, although an important and far-reaching one, is that the term 'perpetrator' is not limited to principals in the first degree, as Joubert JA evidently intended, but also includes principals in the second degree; that is, persons who are liable for the crime on the basis of common purpose. Such persons are still regarded as co-perpetrators and thus, by definition, cannot also be accomplices. In order to determine whether a particular participant is an accomplice, therefore, it is necessary in the first instance to eliminate the possibility that he may be a co-perpetrator. Only if he is not, may one then proceed to enquire whether he meets the remaining requirements for liability as an accomplice.⁶

It is evident from *Williams* that an accomplice's liability is based, not on the principle of imputation, but on his own actus reus, coupled with the necessary mens rea.⁷ Each will therefore be discussed in turn:

⁵ *S v Williams* (note 1 above) 63A-C (trans JM Burchell *Cases and Materials on Criminal Law* 3ed (2007) 528).

⁶ R Whiting 'Principals and accessories in crime' (1980) 97 *SALJ* 199, 201.

⁷ J Burchell *Principles of Criminal Law* 3 ed (2005) 600.

3. THE ACTUS REUS OF AN ACCOMPLICE

The actus reus of an accomplice consists in unlawfully furthering or assisting the commission of a crime by someone else; for example by affording the perpetrator ‘the opportunity, the means or the information which furthers the commission of the crime’.⁸ This assistance may consist of a positive act, or an unlawful omission – a failure to act positively to prevent the commission of the crime, in breach of a duty to do so.⁹ Since the accomplice’s liability is based on his own conduct, it does not appear to matter whether the perpetrator was aware of the assistance he received, or the identity of the person from whom he received it.¹⁰ There must however be ‘a causal connection between the accomplice’s assistance and the commission of the crime by the perpetrator’.¹¹

3.1. *The need for a causal connection*

The need to prove a causal connection between the accomplice’s assistance and the commission of the crime by the perpetrator has given rise to considerable debate. Some commentators, like De Wet, Whiting and Snyman, have interpreted this requirement strictly, to mean that the accomplice’s assistance must have been a sine qua non of the commission of the crime and, in the case of murder, to mean that the accomplice’s conduct must have been a contributory cause of the death of the deceased.¹² As they point out, however, this then leads to the anomalous situation where a person can never be an accomplice to murder, because the conduct required for such liability would then also be sufficient, in most cases, to render him liable as a perpetrator in his own right (a principal in the first degree).¹³ Other commentators, like Joubert,¹⁴ interpret the requirement more broadly, to mean that there must merely be a causal connection between the conduct of the accomplice and the ‘commission of the crime generally’ and, furthermore, that the envisaged causal connection does not require proof of

⁸ Burchell (ibid); CR Snyman *Criminal Law* 5ed (2008) 274-6.

⁹ *S v Williams* (note 1 above) 63A-C. See also *R v Shikuri* 1939 AD 225; *S v Mahlangu* 1995 (2) SACR 425 (T) 443-6; *S v A* 1993 (1) SACR 600 (A) 606H.

¹⁰ Burchell (note 1 above) 603.

¹¹ *S v Williams* (note 1 above) 63A-C.

¹² JC De Wet & HL Swanepoel *Strafreg* 3ed (1975) 169-70, 187 footnote 86, 201; Whiting (note 6 above) 200-201; Snyman (note 8 above) 274-6.

¹³ Ibid. See also Corbett JA’s inconclusive discussion on this point in *S v Khoza* (note 4 above) 1033G-1035A.

¹⁴ A St Q Skeen in WA Joubert (ed) *The Law of South Africa* Vol 6 2ed (replacement volume 2010, updated by SV Hoor) 149.

causation in the same exacting sense as is required to establish liability for a materially defined crime like murder (namely, the usual enquiries for factual and legal causation).¹⁵ Botha AJA, in his dissenting judgment in *Khoza*, provided a third interpretation. He stated that the required causal connection was not between the conduct of the accomplice and the crime itself, or its result, but between the conduct of the accomplice and the *conduct of the perpetrator*.¹⁶ He declined, however, to express an opinion as to how substantial that causal connection needed to be. Burchell expresses no opinion on the question of where the causal connection must lie, but does suggest that it is only necessary to prove factual causation; thus allowing for a person to be convicted as an accomplice to murder where his conduct was the factual, but not the legal cause of death.¹⁷

Roman-Dutch law did not distinguish between principals and accessories and is thus of no assistance in resolving the issue. English law did draw such a distinction, but is of less assistance than might be hoped. Williams, after reviewing a number of the older cases, concludes that ‘it is enough that the accused has facilitated the crime, even though it would probably have been committed without his assistance’.¹⁸ As KJM Smith points out, however, the English case law on the subject is ‘patchy’ and contradictory and there has been little attempt by the courts to develop a coherent approach or set of principles.¹⁹ In 1975, the meaning of the term ‘procure’, as used in the phrase, ‘aid, abet, counsel or procure’,²⁰ was the subject of judicial review and the Court of Appeal held that the words were to be given their ordinary meanings.²¹ Pursuant to this decision, Smith and Hogan offered the opinion that ‘procuring’ probably implies ‘causation but not consensus’; ‘abetting’ and ‘counselling’

¹⁵ Ibid.

¹⁶ *S v Khoza* (note 4 above) 1054G-H: ‘Those authors who have read this statement to mean that a causal connection is required between the conduct of the accomplice and the death of the deceased have, I consider, misunderstood the judgment. If that were the requirement for liability as an accomplice, there would be no meaningful distinction between the *actus reus* of a perpetrator and the *actus reus* of an accomplice, and the very foundation of the distinction drawn between the two in the *Williams* judgment would disappear, with the result that the reasoning in the judgment would be self destructive. It is clear, therefore, that, in formulating the requirement of a causal connection in the way it did, as quoted above, the Court in *Williams*’ case could not have been postulating a causal connection between the conduct of the accomplice and the death of the deceased. What was stated to be required was a causal connection between the conduct of the accomplice and *the commission of the offence* by the perpetrator(s) ... which connotes no more than a causal connection between the conduct of the accomplice and the conduct of the perpetrator or co-perpetrators.’

¹⁷ Burchell (note 1 above) 602-3.

¹⁸ G Williams *Criminal Law The General Part* 2ed (1961) 353.

¹⁹ KJM Smith ‘Complicity and Causation’ (1986) *Criminal LR* 663, 663-4 and authorities cited therein.

²⁰ As it appears in section 8 of the Accessories and Abettors Act 1861.

²¹ Attorney-General’s Reference (no 1 of 1975) [1975] QB 773.

probably imply ‘consensus but not causation’; and ‘aiding’ probably implies ‘actual assistance but neither consensus nor causation’.²² Smith and Hogan’s interpretation does appear to reflect the approach adopted in English law in more recent years. According to Simester and Sullivan, there needs to be a proven *connection* between the secondary party’s act and the commission of the offence by the principal, but this is not necessarily a *causal* connection.²³ They explain the connection and the reasoning behind it in the following terms:

Secondary liability is derived from S’s *involvement* in the principal offence, and not merely her attempt to become involved. It follows that S’s conduct must somehow be connected to the commission of the offence by P... [I]n the case of aiding this requirement is manifested by the need to demonstrate that assistance of some sort *was in fact* provided to P; similarly, in the case of procuring, it is reflected in the need to show a causal link between S’s conduct and perpetration of the offence. The same is true for abetting and counselling. Although causation need not be shown [for abetting and counselling], it must be established by the prosecution that the principal *received* encouragement, urging, or advice, before S’s conduct may count as participation falling within section 8 [of the Accessories and Abettors Act 1861].

This point is fundamental to the nature of secondary participation. Derivative liability is *not* a form of inchoate liability. Liability is not based on S’s act of encouragement (for example) *per se*, as it is in inchoate offences such as incitement. Rather, it is derived from S’s *participation* in the offence perpetrated by P. If P is not aware of the encouragement, urging, or advice, S necessarily fails to participate in the commission of the offence. In such a case, S cannot be a party to its commission (emphasis in the original).²⁴

Thus, despite Joubert JA’s confident pronouncement on the need for the existence of a causal relationship, it does not appear that such a relationship was an invariable requirement of English law. Although it is impossible to express a definite opinion on the question, therefore, it is submitted that the preferable approach is that provided by Botha AJA in his dissenting judgment in *Khoza*, namely that the causal relationship should lie between the conduct of the accomplice and the conduct of the perpetrator; and, furthermore, that such a relationship does not require proof of either factual or legal causation, in the strict sense, but merely proof that, as described by Williams, the accomplice’s conduct *facilitated* the

²² JC Smith & B Hogan *Criminal Law* 6ed (1988) 135.

²³ AP Simester & GR Sullivan *Criminal Law Theory and Doctrine* 2ed (revised 2004) 199-203.

²⁴ Simester & Sullivan (note 23 above) 203.

commission of the crime in some way,²⁵ even if the perpetrator could and probably would have committed it anyway. In this way, it is submitted, effect can be given to the concept of accomplice liability without encountering the difficulties raised by De Wet, Whiting and Snyman. Furthermore, this approach would appear to coincide most closely with the position in English law, from which the concept of accessorial liability was derived.

3.2. Becoming an accomplice without becoming a co-perpetrator

It would be evident that, because the scope of common purpose liability has been so widely extended in South African law, it is virtually impossible for a person to further or assist knowingly in the commission of another's crime without rendering himself a co-perpetrator. Where the assistance, whether in the form of an act or an omission, is rendered by agreement, however informal, this would be a case of common purpose arising from conspiracy. Where the assistance is rendered unilaterally, without prior agreement, positive conduct that amounts to such assistance will inevitably be regarded as a sufficient show of solidarity to constitute an act of spontaneous association in a common purpose. Essentially, then, there are only two clear possibilities that remain:

1. Where the assistance is rendered unilaterally, without prior agreement, and takes the form of an unlawful omission (a failure to take steps that may have prevented the commission of the crime, or foiled its successful completion), the person who renders such assistance cannot become a co-perpetrator, since spontaneous association requires *positive* conduct. In that case, he may then be an accomplice.²⁶

²⁵ That is to say, made it easier, or more convenient, or even more morally acceptable for the perpetrator to commit the crime. See also Snyman's definition of the term 'furthers' (Snyman, note 8 above, 273).

²⁶ English law took the view that aiding and abetting could take the form of an unlawful omission, thus rendering the abettor liable as a principal in the second degree (Williams, note 18 above, 360-1; JC Smith & B Hogan, *Criminal Law* (1965) above, 71). In *R v Shikuri* 1939 AD 225, the AD had held an employer liable as an accomplice to his employee's failure to stop after an accident involving the vehicle in which the employer was being driven by the employee. In later years, possibly because of the emphasis placed on common purpose, the South African courts appear to have lost sight of this form of complicity. In *Williams*, Joubert JA cited, as an example of accomplice liability, the conduct of a night watchman who deliberately fails to raise the alarm during a burglary (*S v Williams*, note 1 above, 63A-C) and, in *S v Mahlangu* 1995 (2) SACR 425 (T), the Transvaal Supreme Court ruled obiter (434G) that an employee who failed to warn his employer of an impending robbery would be liable as an accomplice to the robbery.

2. Where the crime in question is an autographic crime,²⁷ a person who assists in its commission cannot be a co-perpetrator, but may instead be an accomplice.²⁸

Apart from the above two possibilities, which have in fact been endorsed by the courts,²⁹ one may speculate upon a further possibility, although the position is less clear; namely, where the assistance, whatever form it took, was not accompanied by sufficient mens rea to render the provider liable for the crime itself, but only sufficient to render him liable as an accomplice. In order to consider this last possibility further, the mens rea for accomplice liability needs to be addressed. This will be done further on. In order to complete the discussion of the actus reus for accomplice liability, there is one further point requiring brief discussion.

3.3. The derivative liability of accomplices

Because an accomplice's liability is accessory in nature, it derives from and is thus necessarily dependent on the liability of the actual perpetrator. This does not mean that the perpetrator must first be tried and convicted, as was once required in English law, but a crime must indeed have been committed, and committed by someone other than the alleged accomplice. Even so, the exact degree of dependence is unclear. Two possible approaches have been identified in this regard.³⁰ One, the 'strict accessoriness' approach, requires that the perpetrator must have satisfied all the normal elements of liability for the crime in question. Thus, where the perpetrator is able to rely on a defence that excludes criminal capacity or mens rea, a person who assisted him to commit an unlawful act would not be liable to conviction as an accomplice.³¹ This approach has been criticised on the grounds that it is capable of producing inequitable results. Whiting argues that it would mean that a person who

²⁷ Autographic crimes are discussed in ch3, s2.

²⁸ *R v Uys* 1911 CPD 213; *R v Jackelson* 1920 AD 486; *R v M* (1950) 4 SA 101 (T); *S v Kellner* 1963 (2) SA 435 (A); *S v Kimberley* 2002 (2) SACR 38 (E).

²⁹ See the authorities cited in footnotes 26 and 28 above.

³⁰ Burchell (note 1 above) 604. See also Whiting (note 12 above) 203 and MA Rabie 'Die Aksessoriteits-beginsel in die Deelnemingsleer' (1970) 33 *THRHR* 244, 247. Rabie in fact argues that there are four possible approaches, but the two additional ones he mentions ('minimal' accessoriness and 'hyper' accessoriness) lie so far at the extreme ends of the spectrum that they are unlikely to be given serious consideration by the courts and need not be addressed here.

³¹ See, for example, *R v Rasool* 1924 AD 44, in which the accused flouted the immigration laws by bringing his three-year-old son, a prohibited immigrant, into the country, but escaped liability because the child, lacking criminal capacity, was not himself capable of committing a contravention of the relevant Act

orchestrated the rape of a woman by a mentally ill person would then attract no liability.³² To circumvent this problem, the alternative or ‘limited accessoriness’ approach requires only that the perpetrator must have committed the actus reus of the relevant crime. In that case, it would be open to the alleged accessory to rely on a defence like justification, which would exclude this element of liability on the part of the principal offender, but not on a defence aimed at excluding the subjective elements of liability (criminal capacity or mens rea).³³ Burchell appears to favour the limited accessoriness approach,³⁴ although the preponderance of South African case authority tends to favour the strict approach,³⁵ as do the majority of the English cases.³⁶

4. THE MENS REA OF AN ACCOMPLICE

Turning now to the mens rea element of accomplice liability, it is clear that the required form of mens rea is dolus, that is to say, the intention to assist the perpetrator to commit the crime in question.³⁷ Dolus may take any of the accepted forms, including dolus eventualis, but mere negligence will not suffice, as this would cast the net of liability too widely.³⁸ It is also clear, pursuant to the recent decision of the Western Cape High Court in *S v Masilingi*, that the accomplice must have known what type of crime it was that the perpetrator would commit (or

³² Ibid. Whiting is of course referring to the (former) common law crime of rape (a discussion of the position in light of the provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, is unnecessary for present purposes). It should be noted that this type of problem only arises in the case of autographic crimes. Ordinarily, the orchestration of a crime through an innocent would make one a perpetrator (see the three categories of perpetrator described in s6 of Ch 2 above).

³³ With respect, however, this approach is equally capable of producing inequitable results. For example, a person who orchestrated the rape of a woman by a somnambulist would then escape liability on the basis that the accused’s conduct was involuntary, which is surely no less inequitable a result than the example supplied by Whiting. Furthermore, it would mean that a person who coerced the principal actor into committing the crime would also escape liability, because the latter would be able to rely on the defence of compulsion (see for example the English case of *R v Bourne*, note 36 below).

³⁴ Burchell (note 7 above) 604.

³⁵ See, for example, *In re the State v Verkouteren* 1894 SAR 192; *R v Rasool* (note 32 above); *Stewart v R* 1934 NPD 340; *R v Sejosengoe* 1935 EDL 474; *S v Gordon* 1962 (4) SA 727 (N). See also *R v Van Rooy* 1920 CPD 675, 676.

³⁶ Williams (note 18 above) 386-390, Smith & Hogan (note 26 above) 78-9 and further authorities cited therein. A notable exception to the trend was the 1952 case of *R v Bourne* 36 CAR 125 (CCA), in which a husband who forced his wife to commit an unnatural sexual offence with an animal was found guilty of aiding and abetting her to do so, notwithstanding the fact that she was not guilty of the offence herself, due to coercion. Williams however speculates that the revolting nature of the accused’s conduct drove the court to stretch the law in the interests of justice (Williams, note 18 above, 388-9).

³⁷ *S v Williams* (note 1 above) 63A-C.

³⁸ Burchell (note 7 above) 604.

at least have foreseen that type of crime as one of a range of possibilities).³⁹ Thus, in order to be an accomplice to robbery with aggravating circumstances, the accomplice must have been aware that the robbery would (or might possibly) be committed under those particular circumstances.

What is not clear, however, is the degree of particularity with which the accused is required to have known or foreseen the identity of the victim or target of the crime to be committed by the perpetrator. Suppose, for example, that A lends B a firearm, believing that B intends to use it to rob a certain grocery store, but B uses it instead to rob a bank. Is A an accomplice to the resulting bank robbery? According to English law, where one person supplies another with the means to commit a crime like robbery, murder, or burglary, the former becomes an accessory to the latter's crime, even though he may not know the identity, or even the class or category of persons whom the latter intends to rob or murder, or the address of the premises that the latter intends to burgle. It is enough if the former knew, or foresaw the possibility that he was assisting the latter to commit one or more of a range of possible crimes, which included the *type* of crime that was ultimately committed.⁴⁰ To answer the question posed above, therefore, in English law A would indeed be an accomplice to the bank robbery, because it was a crime of the same type as he had foreseen (robbery). He would not, however, be an accomplice to the bank robbery, if he had lent the firearm to B in the genuine, but mistaken belief that B intended to use it for purposes of game poaching, being a crime of an entirely different type. Although this question has not yet been decided by the South African courts, it is possible that they would follow suit. If so, this would mean that there is a third way in which a person might meet the requirements for accomplice liability without becoming a co-perpetrator (and thus disqualifying himself); namely, if he supplied the means for the commission of a crime without sufficient knowledge of its intended victim or target to be said to have had 'concrete' intention in that regard. In that case, he would not satisfy the mens rea requirements for liability as a co-perpetrator,⁴¹ but he could conceivably satisfy the requirements for accomplice liability, as long as the type of crime committed fell within the range of crimes that he had contemplated.

³⁹ *S v Masingili* 2013 (2) SACR 67 (WCC).

⁴⁰ *R v Bullock* [1955] 1 ER 15; *Pope v Minton* [1954] Crim LR 711; *R v Bainbridge* [1959] 3 WLR 656 (CCA); *Maxwell v DPP for Northern Ireland* [1978] 3 ER 1140. See also A Ashworth *Principles of Criminal Law* (1991) 379-380.

⁴¹ As explained above, South African law has rejected the English law doctrine of transferred intention; see *S v Mavhungu* 1981 (1) SA 56 (A).

5. CONCLUDING REMARKS

It would be evident from the preceding discussion that the South African approach towards participation in crime has remained primarily monistic in nature, in accordance with the approach in Roman-Dutch law. Although certain dualistic elements were initially adopted from English law and were revived by the AD's decision in *S v Williams*,⁴² they have thus far proved of relatively little significance. Thus, although it is correct that South African law now recognises accessorial liability, in the form of accomplices, it has been shown that this form of liability spans such a narrow range of conduct as to be almost negligible. It would also be evident that the law on the subject of accomplice liability is in a most unsatisfactory state. Despite the fact that more than thirty years have elapsed since the *Williams* judgment, there remain a number of crucial areas where the law is in need of clarification and development.

⁴² *S v Williams* (note 1 above).

CHAPTER 5

JUSTIFICATIONS FOR THE DOCTRINE OF COMMON PURPOSE

1. INTRODUCTION

It has been explained that the doctrine of common purpose rests upon a fiction, derived from English law, whereby the conduct of the principal actor is imputed to secondary participants. The secondary participant's own actus reus is merely his act of associating with the principal actor, with a common purpose to commit the crime in question.¹ This fiction allows both parties to be regarded as co-perpetrators, with equal liability for the crime. It has also been explained that the original rationale for this fiction (which developed during the late Middle Ages and thus predated the doctrine of common purpose) was probably based on little more than expediency – the need for a mechanism to convert accessories at the fact into co-principals, in order to deprive them of the privileges then available to accessories; most notably that of being effectively immune from justice until the principal actor had been tried and convicted.

During the 19th century, however, when it might have been considered necessary to find some normative basis for the fiction, in order to legitimise the emerging doctrine of common purpose, it was thought to rest on principles of agency, or authorisation.² This appears to have been the view adopted by the American courts in early years,³ and the

¹ EM Burchell & PMA Hunt *South African Criminal Law and Procedure, Volume 1, General Principles of Criminal Law* (1970) 364: 'Association in a common illegal purpose constitutes the participation - the actus reus. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all.' This passage was cited with approval by Botha JA in *S v Safatsa* 1988 (1) SA 868 (A) 899E-F; 898A.

² See, for example, the judgments of Vaughan Williams J in the 1850 cases of *R v John Wiley* 169 ER 408, where he refers to the parties to a common purpose as being 'agents for each other'; and *R v Skelton and Batting* 175 ER 488, where he refers to the question of whether one party to a common purpose desired that purpose to be carried out 'through the agency' of the other. English law continued to adhere to the notion of authorisation as the basis for joint enterprise liability until recently, when it was abandoned in *R v Powell; R v English* [1997] 4 All ER 545; a case where the accused's liability was based on mere foresight of the commission of the collateral crime, even though it was clearly unauthorised (AP Simester & GR Sullivan *Criminal Law Theory and Doctrine* 2ed (reprinted 2004) 222 and further authorities cited therein).

³ Shellow et al point out that 'agency concepts and agency jargon' were a 'routine feature of conspiracy opinions' for many years before the so-called 'Pinkerton doctrine' was adopted into federal law in *Pinkerton v United States* 328 U.S. 640 (1946) (JM Shellow, WH Theis & SW Brenner 'Pinkerton v United States and Vicarious Criminal Liability' (1984-1985) 36 *Mercer LR* 1079, 1083-1087 and further authorities cited therein).

South African courts took the same view, although, presumably in order to reconcile the English and Roman-Dutch law approaches,⁴ the latter generally preferred to speak of ‘implied mandate’. Thus, for example, Innes CJ, in his minority judgment in *McKenzie v Van der Merwe*, explained the rationale for the fiction in the following terms:

Now the rule has not been deduced from general principles, but rests upon certain old decisions. The terms in which it is expressed and the limitations to which it is subject would seem to indicate that the principle which underlies it is that of agency. However that may be, its place in our law must be that of an application of the doctrine of implied mandate. *There is none other upon which it can be grounded*; and its operation in our practice must be confined within the limits of the doctrine (emphasis added).⁵

As previously explained, however, although the implied mandate analogy was maintained well into the 1960s, it attracted increasing criticism as time passed.⁶ It became evident that the analogy could not account satisfactorily for all applications of the doctrine and, in particular, that it could not explain or justify the extension of the scope of the doctrine to include the ‘active association’ form of common purpose, where liability is based on unilateral conduct, rather than consensus. Thus, although Botha JA observed in *S v Safatsa* that the ‘much maligned notion of implied mandate’ is ‘not without merit’,⁷ he (perhaps wisely) declined to express a definite view on the matter and, for many years, the courts remained silent on the question of what the underlying rationale for the doctrine was, until the Constitutional Court was obliged to address this question in *S v Thebus*.⁸ In doing so, however, the court did not attempt to advance any normative basis for the doctrine, but held that it was justifiable on purely instrumental (utilitarian) grounds; principally, the need for crime control, with the need to circumvent difficulties of proof as a secondary rationale:

The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social ‘need to control crime committed in the course of joint enterprises’. The phenomenon of serious crimes committed by collective individuals, acting

⁴ See further ch 2, s5.

⁵ *McKenzie v Van der Merwe* 1917 AD 41, 46.

⁶ These criticisms are outlined in ch2, s6.

⁷ *S v Safatsa* 1988 (1) SA 868 (A) 900I.

⁸ *S v Thebus* 2003 (6) SA 505 (CC).

in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for 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.⁹

The lack of any normative basis for the doctrine is highly problematic, however. It flies in the face of decades of legal development and refinement, in which our courts have generally striven to approach the criminal law on a rational, systematic and principled basis.¹⁰ It means that the doctrine of common purpose is an aberration, since it then represents the *sole* remaining instance of what might be termed ‘unprincipled’ criminal liability in our common law. There are also serious constitutional implications to divorcing criminal liability from personal responsibility and, hence, from the principle of culpability.¹¹ The question therefore arises as to whether the doctrine of common purpose can be justified on normative grounds, or whether any such justification(s) must, of necessity, be purely instrumental. These questions will be examined in this chapter.

2. NORMATIVE JUSTIFICATIONS

2.1 *Mandate revisited*

In considering whether a normative justification can be found for the doctrine of common purpose, it is necessary, in the first instance, to revisit the ‘much maligned’ concept of implied mandate.¹² Although it must be accepted that criminal liability

⁹ *S v Thebus* (note 8 above) para 34.

¹⁰ As exemplified in cases like *R v Valachia* 1945 AD 826 (abolition of ‘natural and probable consequences’ rule); *S v Bernardus* 1965 (3) SA 287 (A) (abolition of *versari in re illicita* doctrine); *S v Mavhungu* 1981 (1) SA 56 (A) (abolition of doctrine of transferred intent); *S v Chretien* 1981 (1) SA 1097 (A) (abolition of specific intent rule); *S v Motaung* 1990 (4) SA 485 (A) (abolition of subsequent ratification rule).

¹¹ These implications will be addressed in chapter 7.

¹² The criticisms levelled against the analogy are discussed in ch2, s6.

cannot be based on mandate per se,¹³ Dressler nevertheless observes that ‘the concept of agency explains a great deal about why we feel justified in punishing an accomplice as if she were the perpetrator’.¹⁴ The question that arises is why this should be so. After examining the commentary that exists on the subject, it becomes evident that there are three different ways of viewing the mandate analogy, each of which offers a distinctive normative basis on which the imputation of the principal actor’s conduct to a secondary party could conceivably be justified. These approaches may be briefly stated as *authorisation*, *power of control* and *contributory causation*.

2.1.1 *Mandate as authorisation*

The most common and literal approach to the mandate analogy is to regard the secondary party as having expressly or tacitly authorised the perpetrator’s criminal act. The notion of indirect perpetration, as expressed in the classic maxim ‘qui facit per alium facit per se’, is well entrenched in our law and is unassailable as a principle of normative justice. Thus, where the secondary party (S) was in fact the instigator of the crime committed by the perpetrator (P), a clear and defensible normative basis exists for imputing P’s conduct to S. In such cases, P is merely the instrument through which S exercises his autonomous will and there can be no objection in principle to holding S liable as a co-perpetrator on this basis.¹⁵ As Unterhalter puts it:

This follows from the criminal law’s commitment to the idea that he who proposes should suffer the same criminal liability as he who disposes because of the moral equivalence of their blameworthiness.¹⁶

Difficulties with the ‘mandate as authorisation’ approach arise, however, when one attempts to extend the analogy beyond cases of actual (express or tacit) authorisation, to cases where the mandate is implied; for example, where P and S set out to commit the crime together, or where P merely enlists S’s help to commit a crime of his own, or

¹³ A mandate for an unlawful purpose is itself unlawful and hence of no legal force or effect.

¹⁴ J Dressler ‘Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem’ (1985) 37 *Hastings LJ* 91, 111.

¹⁵ In fact, S is not really a secondary participant at all, but would more accurately be described as a remote principal.

¹⁶ D Unterhalter ‘The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?’ (1988) 105 *SALJ* 671, 673.

where P, in executing his mandate from S, commits a collateral crime that was expressly forbidden by S.¹⁷ To say that, in such cases, S has *authorised* P's criminal conduct stretches the concept of authorisation into the realms of fictitious or constructive mandate, a concept which, it is submitted, has no place in criminal law.¹⁸ One is then also faced with the need to explain and justify not just one, but two legal fictions.¹⁹ As Ziff puts it, however, 'one legal fiction + another legal fiction = science fiction'.²⁰ In such cases, the analogy becomes so attenuated that it no longer offers a defensible normative foundation for the imputation.²¹ There are, however, two further ways of approaching the mandate analogy.

2.1.2 *Mandate as power of control*

A second way of approaching the mandate analogy is by viewing the secondary participant in terms of the power of control that he exercises over the principal actor's conduct. In civil law, the doctrine of vicarious liability is explained and justified in part by the employer/principal's right to direct and control his servant/agent's actions.²² Although this doctrine does not form part of our criminal law, the concept of control (hegemony) nevertheless enjoys significant support as a basis for criminal liability in Continental legal systems,²³ notably that of Germany. In German law, a perpetrator is one who exercises 'Tatherrschaft' over the criminal act,²⁴ even if he does not commit it himself. Thus S will be the perpetrator of a crime executed by P if the criminal act is the

¹⁷ See also Dressler's observations on these points (Dressler, note 14 above, 110-111).

¹⁸ As Unterhalter explains: '[P]rivate law is concerned with the reliance placed by third parties upon the appearances created by the principal. In criminal law third-party reliance is irrelevant. What matters is not the objective appearance of consent but a person's subjective consent to be bound by the acts of another.' (Unterhalter, note 16 above, 674).

¹⁹ That is, in order to explain and justify the fiction that P's crime is S's crime, one must first explain and justify the fiction that S authorised P to commit the crime, when he did not actually do so.

²⁰ B Ziff 'The Rule Against Multiple Fictions' (1987) 25 *Alberta LR* 160, 160. Ziff's point is that it is fundamentally unjust to found criminal liability upon a compounding of fictions.

²¹ The concept of mandate implied from general authority is a civil law construct, which has no place in criminal law (see FB Sayre 'Criminal Responsibility For Acts of Another' (1929-1930) 43 *Harvard LR* 689, 692, 701, citing *R v Huggins* 2 Strange 885: 'It is a point not to be disputed but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases; they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this distinction; that to affect the superior by the act of the deputy, there must be the command of the superior, which is not found in this case).

²² J Fleming Jr 'Vicarious Liability' (1954) 28 *Tulane LR* 161, 165-166.

²³ Dressler (note 14 above) 124.

²⁴ MD Dubber 'Criminalising Complicity: A Comparative Analysis' (2007) 5 *J of Int Criminal Justice* 977, 982-983. 'Tatherrschaft' is literally translated as 'dominion' (ibid, 982).

result of S's 'event-directing will' and if S 'dominates the commission of the act in terms of the significance of his objective contribution'.²⁵ This 'objective contribution' could take the form of planning and masterminding the crime, or playing a significant part in its execution. Once again, this is merely another example of indirect perpetration (*qui facit per alium facit per se*) and, as such, it offers a clear and defensible normative basis for imputing P's criminal act to S. It would not, however, justify the imputation of principal liability to minor and insignificant participants, who exercised no control over the way in which the crime was executed and were in no position to have done so. It is doubtful, therefore, whether the 'mandate as control' analogy would extend the scope of liability any further than the 'mandate as authorisation' analogy.

2.1.3 *Mandate as contributory cause*

A third way of approaching the mandate analogy is in terms of causation; that is to say, by regarding S, through his mandate, as having (indirectly) caused the commission of the crime by P. This approach corresponds with the medieval approach to crimes committed by mandate in Western Europe,²⁶ in that (according to De Wet) the mandator was not held liable *ex mandato*, but *propter mandatum*; that is to say, not because P's act was imputed to S, as in civil law, but because, through his mandate, S had set into motion a causal sequence of events, for which he could ultimately be held responsible.²⁷ Causation, too, would offer a clear and defensible normative basis for the imputation of P's conduct to S; possibly the most defensible basis of all, in view of the importance universally accorded to causation as a determinant of criminal liability:

The common law is wedded to the concept of personal, rather than vicarious, responsibility for crimes. Professor Sayre has described the notion that criminal liability is 'intensely

²⁵ Dubber (note 24 above) 983 and further authorities cited therein.

²⁶ JC De Wet and HL Swanepoel *Strafreg* 3ed (1985) 173 and further authorities cited therein. De Wet believed that Roman-Dutch law also required proof of a causal connection between S's conduct and the commission of the crime by P, however the only authority he offered for this proposition was Voet 17.1.6 and 47.10.3 (De Wet, *op cit*, 175). De Wet discounted the contributions of the other Roman-Dutch authorities on the subject as confused or flawed. It should be borne in mind, however, that much of his criticism of these authors is coloured by his own rather eccentric views on causation, according to which anyone who contributed factually towards causing a particular consequence, no matter how minor or indirect the contribution, would be its author. He did not recognise the need for an enquiry into legal causation.

²⁷ *Ibid.* The reason why the mandator could not be held liable *ex mandato* is explained in note 13 above.

personal’ as ‘deep rooted’. Our demand that responsibility be personal is the result of the ‘inarticulate, subconscious sense of justice of the man on the street’. Personal responsibility is the ‘only sure foundation of law’. Causation, then, is the instrument we employ to ensure that responsibility is personal. It links the actor to the harm. It helps us to understand who should be punished by answering how the harm occurred. Causation is, as Professor Jerome Hall writes, ‘an ultimate notion, deeply characteristic of human thought and expressed even among the most primitive people, in their effort to understand the “way of things”’.²⁸

It was no doubt for such reasons that De Wet and other adherents of the Purification movement argued so vigorously for causation to be made a prerequisite for secondary participant liability.²⁹ The reason for their lack of success is not hard to find, however. There is a difference between saying that S contributed causally to the crime committed by P and saying that S contributed causally to P’s commission of the crime. The former statement denotes a direct causal nexus between S’s conduct and the crime itself, so that S becomes a co-perpetrator in his own right; whereas the second statement denotes indirect causation – S causes P to act and P in turn commits the crime. The latter is clearly what De Wet had in mind when he spoke of ‘psychological’ causation,³⁰ a notion that was dismissed by Botha JA in *S v Safatsa* as ‘stretching the concept of causation ... to such unrealistic limits as to border on absurdity’.³¹

The extremely narrow view of causation taken by the AD in *Safatsa* was almost certainly influenced, to some degree at least, by Hart and Honoré’s well known and highly influential treatise on the subject, in which they argued that, because human beings have independent volition, it can never be correct to speak of one person as having *caused* another’s voluntary act and that, consequently, it is not permissible to attribute responsibility for one person’s voluntary act to another on the principle of causation; an intervening human act, if voluntary, must invariably rank as a *novus actus interveniens*.³² According to this reasoning, if causation became a requirement for secondary participant liability, an important category of participants would then escape liability, namely those persons who instigated the crime, without playing a direct role its

²⁸ Dressler (note 14 above) 103.

²⁹ See the discussion on this point in ch3, s2 above.

³⁰ De Wet & Swanepoel (note 26 above) 169-70.

³¹ *S v Safatsa* 1988 (1) SA 868 (A) 901C-D.

³² HLA Hart & AM Honoré *Causation in the Law* (1959) 69.

execution. It is understandable that the AD would not have been prepared to countenance such an outcome.³³ More contentiously, it must also be assumed that it was not prepared to countenance the exoneration of minor and non-contributory participants either.³⁴

Kadish, however, whilst he agrees with Hart and Honoré's view that it is not possible for one person to cause the voluntary act of another in the strict, scientific sense, observes that it is certainly possible for one person to *influence* another's voluntary act and that, where such influence is exerted deliberately, responsibility for the ensuing act may be attributed to the former on the basis of that influence:

Holding a secondary party liable for influencing the principal's decision to act is plainly compatible with the premise that the latter's acts are determined by his own choice. Recognizing that a person is influenced by what other people say and do... does not imply that volitional actions are caused, in the physical sense, the way natural events are determined by antecedent conditions... As Hart and Honoré have pointed out, the characteristic form of influencing another is the giving of reasons for an action. This differs from causal influence in that the influence operates not as a determining condition, but as a consideration that renders a particular course of action more desirable to the primary actor. If one persuades or encourages another to commit a criminal act by appealing to some consideration that moves him, by giving him emotional support and approval, by offering a rationalization for the action, or by similar means, one has not caused the principal to act in the physical sense of cause. These influences did not make the principal act, for he was free to act as he chose. Nonetheless, since the secondary party intentionally initiated the influence in order to induce the principal to act, he may be held liable. This is a commonplace ground

³³ In fact, they need not have done so. By the time of *Safatsa*, the courts had abandoned the view that intervening human conduct, if voluntary, must invariably rank as a *novus actus interveniens*: 'To have this effect, it would need to be a completely independent act, in the sense that it should be one which is totally unconnected and has no relationship to the act of the perpetrator; and this would not be the case where this act or behaviour is indeed the primary cause of the act, although the act in itself is innocent.... Where the act of the other person, as in these instances, is a calculated part of the chain of causation which the perpetrator started, an eventuality which the perpetrator foresees as a possibility and which he desires to employ to obtain his object, ... it would be contrary to accepted principles of law and to all sense of justice to allow him to take shelter behind the act as a *novus actus interveniens*' (Steyn CJ in *Ex Parte Minister van Justisie: In Re S v Grotjohn* 1970 (2) SA 355 (A) 346A-D (trans JM Burchell *Cases and Materials on Criminal Law* 3ed (2007))).

³⁴ The fourth accused, Theresa Ramashamola, was a case directly in point.

for blaming a person in ordinary experience and is reflected in the legal doctrine of complicity.³⁵

To *influence* however means to *affect*. Where S influences P to act in a particular manner, S's conduct *affects* the course and eventual outcome of events; and, in that case, it is submitted that it is unduly pedantic to insist that S's conduct was not a *contributory cause* of those events, merely because P had the freedom to act differently had he chosen to do so.³⁶ This, in any event, is the current English law approach towards the concept of procuring,³⁷ and it corresponds with the current approach in our law towards causation generally.³⁸ It is submitted, therefore, that the 'mandate as contributory cause' analogy would also offer a clear and defensible normative basis for the imputation of the principal actor's conduct to secondary participants. As with the other analogies, however, it would not justify the imputation of such conduct to minor and insignificant participants, whose conduct had no influence whatsoever on the commission of the crime by the principal actor.

In summary, therefore, it can be seen that the mandate analogy offers three clear and readily-defensible normative bases on which the imputation of a principal actor's conduct to a secondary party could conceivably be justified. It can also be seen, however, that there are limits to how far this analogy can be extended, without involving further fictions and entering into the realms of 'science fiction'.³⁹ Whichever analogy one adopts (and they are not mutually exclusive), the concept of mandate offers no normative basis for imputing a principal actor's conduct to minor and insignificant secondary participants. It is self-evident that, to be regarded as a co-principal in terms of the analogy, the remote/secondary participant must play a role that corresponds closely with the common conception of what a principal is, according to civil law. Before

³⁵ SH Kadish 'Complicity, Cause and Blame: A Study in the Interpretation of Doctrine' (1985) 73 *California LR* 323, 343-344.

³⁶ See also Dressler's comments on this point (Dressler, note 14 above, 126-128; J Dressler 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence' (2008) 5 *Ohio State J of Crim L* 427, 439 and further authorities cited therein).

³⁷ The requirements for procuring are briefly described in ch 2, s4.4.

³⁸ See, for example, *Ex Parte Minister van Justisie: In Re S v Grotjohn* (note 33 above) and see also *S v Lungile* 1999 (2) SACR 597 (SCA) para 30: 'In our law, a *novus actus interveniens* is an event which is, in the context of the act that was committed, abnormal, and completely independent of the acts of the accused.'

³⁹ See note 20 above and accompanying text.

leaving the subject of mandate, however, it is necessary to address a further justification advanced by Snyman, namely the concept of mandate as *forfeited identity*.

2.1.4 *Mandate as forfeited identity*

Snyman argues that the true justification for the doctrine of common purpose lies in the concept of ‘forfeited identity’. He explains:

It is not unjust to impute X’s act ... to Z. By engaging in conduct in which he co-operates with X’s criminal act, Z forfeits his right to claim that the law should not impute to him another’s unlawful act. He signifies through his conduct that the other person’s (ie Z’s) act is also his.⁴⁰

The theory of forfeited identity was developed and advanced by Dressler, as an alternative to the idea that the imputation of the principal actor’s conduct to secondary parties was based on authorisation or agency.⁴¹ For various reasons, Dressler considered the analogy with the civil law concept of agency unsatisfactory,⁴² and argued that a more realistic and honest explanation for the imputation was that, due to his participation in the crime, the secondary participant was simply regarded as having forfeited his personal identity; his right, in other words, to be treated as an individual:

Despite these technical distinctions, the concept of agency explains a great deal about why we feel justified in punishing an accomplice as if she were the perpetrator. Perhaps, however, our feelings may be described better in terms of ‘forfeited personal identity’. Ordinarily a person is held criminally responsible for his own actions. However, when an accomplice chooses to become a part of the criminal activity of another, she says in essence, ‘your acts are my acts’, and forfeits her personal identity. We euphemistically may impute the actions

⁴⁰ CR Snyman *Criminal Law* 5ed (2008) 266 (see also note 22 on that page and 270 note 51).

⁴¹ J Dressler (note 14 above) 110-111.

⁴² Ibid: ‘Civil rules of agency, however, cannot explain precisely the doctrines of criminal law accountability. Civil agency requires a party to consent to being subjected to the control of another, whereas criminal liability does not. A criminal accomplice is responsible for the acts of another even if under civil theory the latter would be classified as an independent contractor who is not under the accessory’s direct control or supervision. Moreover, civil, but not criminal, liability can be predicated not only on expressed or implied authority, but also on apparent authority or subsequent ratification. And although hostile motives of an agent to his principal presumably will not preclude vicarious civil liability so long as the agent’s conduct was authorized, such antagonism may well preclude criminal law imputation.’

of the perpetrator to the accomplice by ‘agency’ doctrine; in reality, we demand that she who chooses to aid in a crime forfeits her right to be treated as an individual. Thus, moral distinctions between parties are rendered irrelevant. We pretend the accomplice is no more than an incorporeal shadow.⁴³

It should be noted, however, that Dressler regarded forfeited identity as an *explanatory* theory and not as a defensible normative basis for imputing a principal actor’s conduct to secondary parties. On the contrary, he made it clear that he considered the notion of forfeited identity objectionable. His chief objection was that forfeiture of personal identity cannot be reconciled with the principle of culpability:

Forfeiture permits society to ignore the potentially numerous levels of personal culpability and personal involvement of wrongdoers. Yet, it is precisely because the criminal justice system stigmatizes the guilty and metes out punishment for wrongdoing that the common law usually rejects forfeiture, and instead evaluates legal guilt and apports punishment based on the degree of personal responsibility. Punishment is rendered proportionally to culpability because this approach is considered deontologically correct.⁴⁴

Snyman’s adoption and advancement of forfeited identity theory as a normative basis for the imputation of a principal actor’s conduct to secondary participants is therefore problematic. The principal difficulty lies in explaining precisely why mere co-operation in another’s crime should, in and of itself, be regarded as sufficient to justify a forfeiture of such magnitude. Three feasible normative justifications for imputation have been offered above, however it has also been shown that these justifications are of limited application. None of them is capable of justifying imputation based on co-operation alone. Furthermore, applying civil law concepts like forfeiture and waiver in the context of criminal law is treading on very dangerous ground, especially when dealing with questions of personal identity, which must inevitably impact upon constitutionally protected rights.⁴⁵ It may be concluded, therefore, that the ‘mandate as forfeited identity’ approach does not offer a defensible normative basis for imputing a principal actor’s conduct to secondary participants. On the contrary, it offers a very good reason

⁴³ Dressler (note 14 above) 111.

⁴⁴ Dressler (note 14 above) 116.

⁴⁵ The relationship between personal responsibility, culpability and the constitutional right to dignity will be addressed in chapter 7.

for regarding any such imputation as objectionable in the absence of some other convincing and defensible justification.

2.2 Change of normative position

An alternative normative basis for the imputation of the principal actor's conduct to secondary participants is advanced by Simester and Sullivan, in the form of 'change of normative position'.⁴⁶ This theory, originally devised by Gardner,⁴⁷ and elaborated by Ashworth and others,⁴⁸ has been advanced to justify what Ashworth describes as 'moderate' constructivism in the criminal law, in relation to liability for unforeseen and unintended consequences. It may be distinguished from 'unlawful act' theory,⁴⁹ which allows for more extreme forms of constructive liability. According to 'unlawful act' theory, an offender crosses a significant moral and criminal threshold at the moment when he knowingly commits an unlawful act of *any kind*. Because he has chosen to place himself on the 'wrong side' of the law, liability may be imputed to him for any consequence that results from that act, however unintended and unforeseen. This theory is recognisable as the basis of the now-defunct *versari in re illicita* doctrine of South African law and the English law doctrines of constructive malice (the felony-murder rule) and transferred malice.⁵⁰ Unlawful act theory has been discredited as a sufficient basis for the attribution of liability in modern times,⁵¹ not merely because of its

⁴⁶ Simester & Sullivan (note 2 above) 226.

⁴⁷ J Gardner 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge LJ* 502, 509. Gardner used the theory to explain the constructive liability of offenders for unintended consequences in terms of section 47 of the Offences Against the Person Act 1861, as follows: 'By committing an assault one changes one's own normative position, so that certain adverse consequences and circumstances which would not have counted against one but for one's original assault now count against one automatically, and add to one's crime' (*ibid*).

⁴⁸ A Ashworth 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) 11 *New Criminal LR* 232; and see also the further authorities referred to by Ashworth at 241.

⁴⁹ According to Ashworth, this theory was originated by Sir Edward Coke in the 17th century (Ashworth, note 48 above, 233-234), but its origins are probably older. Burchell & Hunt believe that the theory originated in medieval Canon law (EM Burchell & PM Hunt, *South African Criminal Law and Procedure*, vol 1, *General Principles of Criminal Law*, 111).

⁵⁰ These doctrines were discussed briefly in ch 3, s4.

⁵¹ In accordance with the trend towards the subjectivisation of fault and (culpability generally) in South African law, the *versari in re illicita* doctrine was abolished by the AD's decisions in *S v Van Der Mescht* 1962 (1) SA 521 (A) and *S v Bernardus* 1965 (3) SA 287 (A), whilst the felony-murder rule was abolished in England and Wales by the Homicide Act 1957. English law however still retains a number of instances in which liability may arise in the absence of specific intent (what, in South Africa, we would refer to as 'concrete' intention), whilst variations of the doctrine of constructive malice still survive in a number of American states, in the Pinkerton doctrine of American federal law and in the Canadian version of joint criminal enterprise.

draconian implications, but also because it is inimical to the principle of culpability, which is based on respect for individual autonomy and is, in turn, integrally associated with the concept of subjective guilt (*mens rea*).⁵²

‘Change of normative position’ theory represents an attempt to reintroduce unlawful act theory in a more refined and considerably more restricted form. In terms of change of normative position theory, the significant moral and criminal threshold is crossed when the individual intentionally wrongs another person by directing conduct against a particular type of interest; for example, by assaulting that person.⁵³ The commission of such an act, together with the required subjective *mens rea*, then ‘constitutes a change of position of such normative significance’ that it can justify the imposition of liability for more serious consequences than those subjectively foreseen, as long as the resulting liability falls within the same general group or ‘family’ of offences.⁵⁴ According to Ashworth, there appear to be three main elements to the proposition: Firstly, the ‘trigger’ for liability must be intentional conduct amounting to a change of normative position in relation to the consequences of that conduct; secondly, the intentional conduct must lie in the commission of a crime belonging to the same ‘family’ as that for which liability is sought to be imposed; and, thirdly, there must be a measure of proportionality (or ‘no great distance’) between the intended crime and that for which liability is sought to be imposed.⁵⁵

Whilst it would be evident that ‘change of normative position’ theory was developed as a justification for departure from the normal principles of *mens rea* and correspondence,⁵⁶ its relevance for present purposes arises from its adoption by Simester and Sullivan as a justification for the modern English law doctrine of joint criminal enterprise:

By entering into an agreement or joint enterprise, S changes her normative position. She becomes, through her own deliberate choice, a participant in a group action to commit a crime. Moreover, her new status has moral significance: she associates herself with the

⁵² The connection between individual autonomy, culpability and *mens rea* will be discussed in chapter 7.

⁵³ Ashworth (note 48 above) 233.

⁵⁴ Ashworth (note 48 above) 241.

⁵⁵ Ashworth (note 48 above) 255.

⁵⁶ Ashworth (note 48 above) 241 and further authorities cited therein.

conduct of the group in a way that the mere aider and abettor, who remains an independent character throughout the episode, does not.⁵⁷

Whilst Simester and Sullivan's explanation might appear plausible, however, it cannot withstand close scrutiny. In the first instance, the application of 'change of normative position' theory to the doctrine of joint criminal enterprise bears no relation to the purpose for which the theory was originally devised, namely to provide a justification for moderate (and thus limited) constructivism in relation to unforeseen and unintended consequences. This is borne out by the fact that the imputation of one party's criminal conduct to another cannot fulfil the three essential requirements outlined by Ashworth,⁵⁸ the second and third of which are necessary in order to limit the attribution of liability and support the theory's claim to be a justification for *moderate* constructivism. In fact, in the terms in which the theory is described and applied by Simester and Sullivan, there is nothing to distinguish it from the old 'unlawful act' theory (*versari in re illicita* doctrine), which is no longer regarded as a legitimate basis for the attribution of liability, and would certainly not be considered acceptable in modern South African law. Furthermore, other than alluding to the law's hostility towards criminal groups,⁵⁹ Simester and Sullivan fail to offer any reason as to why entering into a criminal conspiracy should be considered an act of such great moral and criminal significance as to justify the treatment of conspirators in a manner that differs so radically from other criminal offenders, who are judged on the basis of their own conduct. Consequently, it is submitted, 'change of normative position' theory is too vague and broad to provide a clear and defensible normative basis for imputing a principal actor's conduct to secondary parties. If this theory is to shed any light on the subject, it needs to be developed so as to explain more precisely what it is about conspiracy that changes a conspirator's normative position.

⁵⁷ Simester & Sullivan (note 46 above) 66-67. They go on to explain that the law has a particular aversion to collective criminal activity: 'The law has a particular hostility to criminal groups ... [T]he rationale is partly one of dangerousness: "experience has shown that joint criminal enterprises 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 of 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 set itself against the law and order of society at large. Individuals offending alone do not do this. Thus concerted wrongdoing imports additional and special reasons why the law must intervene' (ibid, 67).

⁵⁸ See note 55 above and accompanying text.

⁵⁹ See the passage cited in note 57 above.

2.3 *Substantial participation*

The final normative basis that requires discussion is Dressler's 'substantial participation' standard for the imputation of conduct.⁶⁰ In 1985, Dressler proposed that the conduct of a principal actor should be imputed to a secondary participant only if it could be shown that S's conduct was a factual cause (*sine qua non*) of the ensuing criminal harm. Other, 'non-causal' accomplices should not be regarded as co-principals, but should instead be guilty of a lesser offence. Factual causation would, of course, offer an unassailable normative basis for holding a secondary party liable as a co-principal, however, as previously discussed, South African courts have consistently refused to adopt factual causation as a prerequisite for such liability.⁶¹ In 2008, however, Dressler modified his original proposals, to suggest what he regarded as a pragmatic alternative solution, namely that P's conduct could be imputed to S if the latter was a 'substantial participant' in the crime:

'Substantial participant' concededly is an imprecise term, but certainly no more so that the doctrine of proximate causation, which invites the fact-finder to draw justice-based lines of responsibility. Ultimately, the issue here is whether the accomplice's role in the planning or commission of the offense is sufficiently great that it is just to hold her accountable for – to derive liability for – the offense committed by the principal.⁶²

Whilst 'substantial participation' does not offer as clear and defensible a normative basis for imputing conduct as authorisation, power of control, or contributory causation, it could well be regarded as a convenient *proxy* for causation, which would obviate the need for a causation enquiry, with all the difficulties that such an enquiry would encounter in a case of joint wrongdoing.⁶³ It is self-evident, though, that 'insubstantial' participants could not be held liable as co-principals on this basis. They would still need to be found guilty of a lesser offence, as Dressler originally proposed.

⁶⁰ Dressler (note 36 above) 448.

⁶¹ *S v Safatsa* (note 1 above); *S v Thebus* (note 8 above).

⁶² Dressler (note 36 above) 448.

⁶³ For an example of these difficulties, see Snyman's explanation of the necessity for the doctrine of common purpose (Snyman, note 40 above, 263-264).

2.4 Observations

It has been shown that there are indeed defensible normative justifications for imputing a principal actor's conduct to secondary participants in terms of the doctrine of common purpose. Apart from direct causation, which has been rejected as a prerequisite for such liability, authorisation, power of control and indirect causation would each offer a defensible normative justification for imputation, as would substantial participation. It has also been shown, however, that these normative justifications do not cover the entire scope of common purpose liability as it exists in our present law. In particular, there is no normative justification of any sort for treating minor and insignificant secondary participants as co-principals. It must therefore be concluded that the only possible reasons for doing so are instrumental in nature. Instrumental justifications for the doctrine of common purpose will therefore be discussed below.

3. INSTRUMENTAL JUSTIFICATIONS

It has been explained that, in *S v Thebus*, the Constitutional Court did not attempt to advance any normative basis for the doctrine of common purpose, but held that it was justifiable on instrumental (utilitarian) grounds alone; principally, the need for crime control, with the need to circumvent difficulties of proof as a secondary rationale.⁶⁴ It has also been explained that instrumental rationales are inherently problematic when they are used as the sole basis for criminal liability. They are inimical to a rational, systematic and principled approach to criminal law and there are also adverse constitutional implications to basing criminal liability on social exigency (public policy), rather than on personal culpability.⁶⁵ Public policy has been famously compared to an 'unruly horse' that may take its rider where he has no wish to go.⁶⁶ This is not to say that public policy considerations can never afford a valid basis for imposing

⁶⁴ See note 9 above and accompanying text.

⁶⁵ These implications will be addressed in chapter 7.

⁶⁶ 'I, for one, protest . . . against arguing too strongly upon public policy; it is a very unruly horse, and when you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued upon at all but when other points fail.' (per Burrough J in *Richardson v Mellish* (1824) 2 Bing 252).

criminal liability, but justifications based on public policy need to be approached with circumspection and not simply accepted at face value.

Thus, for example, examining the influence of instrumental arguments on human rights adjudication in the context of criminal law, Schwikkard offers the following observations in an article published shortly after the Constitutional Court's judgment in *Thebus*:

The criminal law is where the interface between state power and the individual is at its most direct. It is where the values of a democratic society based on dignity, equality and freedom are most frequently tested. If we accept that upholding constitutional rights might have a minimal impact on the conviction rate, then we must have clear and compelling reasons in specific instances for undermining the normative value of rights. The more easily we find the infringement of a right acceptable, the weaker becomes the normative value of that right. In the area of criminal justice, the justification for limiting rights is inevitably instrumental: the infringement is necessary to meet the pressing social need of combating crime. In order for these instrumental arguments to be clear and compelling they need to be supported by evidence so that their rationality can be tested. The weighting and evaluation of these arguments and the evidence on which they are based need to be placed in the public domain.⁶⁷

From the foregoing, it can be concluded that one of the serious difficulties with the Constitutional Court's justification of the doctrine of common purpose in *Thebus* is that no evidence of any kind was placed before the court to demonstrate that the doctrine does have any particular utility.⁶⁸ The court's conclusions regarding the necessity for retaining the doctrine were essentially based on assumption and, as will be demonstrated in the next chapter, its underlying assumptions were in fact flawed. Here it is perhaps necessary to emphasise that the issue is not whether there is utility in criminalising and punishing those who participate in the crimes of other persons. On the contrary, it is to be accepted that there are both valid normative and instrumental reasons for doing so. The issue is whether holding secondary participants, especially minor and insignificant secondary participants, liable as *co-principals* achieves the

⁶⁷ P-J Schwikkard 'Instrumental Arguments in Criminal Law: A Mirage of Tensions' (2004) 121 *SALJ* 289, 294.

⁶⁸ Schwikkard (note 67 above) 302.

objective of crime control in any way that could not be achieved equally well (or perhaps even better) by holding them liable as accomplices, or finding them guilty of some other lesser offence.⁶⁹ No facts or reasons were advanced in *Thebus* to support any such conclusion and, in fact, the court declined to confront this particular question at all.⁷⁰

One of the main difficulties with evaluating instrumental justifications for the doctrine of common purpose is that there does not appear to have been any empirical research conducted into the question of whether it makes any difference, from the perspective of deterrence, incapacitation and/or crime prevention, whether secondary participants are regarded as principals or as accessories.⁷¹ What little research is relevant to the subject suggests that there may well be utility in a more nuanced approach to the imposition of liability and punishment; that is to say, in distinguishing between participants on the basis of their actual role in and contribution to the crime. Thus, for example, Robinson and Darley observe that recent research in the social sciences has demonstrated that people hold widely-shared intuitive beliefs about the relative gravity of different offences and offence scenarios, and that these intuitions are both ‘nuanced and consistent’ and demonstrate a high degree of consensus, even in cross-cultural studies:⁷²

The studies confirm that subjects consistently differentiate between situations and that they share intuitions about how these variations affect the blameworthiness of the offender. This was seen in a number of ways. First, punishment was uniformly imposed by subjects for serious wrongdoing. Second, incremental changes in facts produce predictably significant changes in punishment. Finally, subjects demonstrate a high degree of accord about the relative amount of punishment that is deserved for different offenses.⁷³

⁶⁹ Dressler (note 14 above) 111.

⁷⁰ See the analysis of the judgment in ch6.

⁷¹ See also Dressler’s observations on this point in the American context (Dressler, note 14 above, 111-114).

⁷² PH Robinson & JM Darley ‘Intuitions of Justice: Implications for Criminal Law and Justice Policy’ (2007) 81 *Southern California LR* 1, 9-10.

⁷³ Robinson & Darley (note 72 above) 9. These observations appear to be equally relevant in the South African context, as is evident from Schönteich’s research on public perceptions of sentencing in South Africa (M Schönteich ‘Sentencing in South Africa: Public perception and judicial process’ (no pagination) ISS Paper 43, Institute for Security Studies, November 1999 available online at: <http://dspace.cigilibrary.org/jspui/bitstream/123456789/31552/1/paper43.pdf?1>, accessed on 5 November 2013).

Such research suggests, therefore, that there is a natural tendency to draw finely nuanced distinctions between offences and offenders, based on differences in culpability.

Robinson and Darley point out further that such research has also shown that people will generally obey the law, even in the absence of a strong likelihood of arrest, conviction and punishment, under two sets of conditions: Firstly, when ‘they regard the law as representing the principles that moral people adhere to’, because ‘they are socialized in such a fashion as to want to live up to those moral rules’;⁷⁴ and, secondly, when ‘the law specifies morally proper conduct’, because they then ‘naturally believe that the community believes in the “righteousness of the law” and so people fear the disapproval of their social groups if they violate the law.’⁷⁵ This in turn, indicates that the fear of social sanctions is a far more efficient and effective deterrent than the fear of legal sanctions.⁷⁶ Robinson and Darley conclude that, taken together, these two sets of findings make out a strong case for the utility of a criminal justice system that harnesses normative social influences, by providing for ‘a distribution of liability and punishment in concordance with the citizens’ shared intuitions of justice’:⁷⁷

The ability of the criminal justice system to harness the power of stigmatization, to avoid subversion and vigilantism, to gain compliance in borderline cases, and to have a role in shaping societal norms is directly related to its ability to gain moral credibility from those to whom it applies. The moral credibility of the law is enhanced when the distribution of punishment it prescribes accords with the community's own shared intuitions of justice. When the law is perceived as “doing justice”, assigning liability in proportion to the moral blameworthiness of the punished offender, it becomes more effective at controlling crime. In contrast, when criminal liability deviates from intuitions of justice, particularly when such deviations are dramatic, the loss of moral credibility undermines the ability of the criminal law to effectively perform a crime control function.⁷⁸

⁷⁴ In this case, obedience to the law is explained as ‘behaviour produced by internalised moral standards and rules’ (Robinson & Darley, note 72 above, 19 and further authorities cited therein).

⁷⁵ In this case, obedience to the law is explained as ‘compliance produced by normative social influence’ (Robinson & Darley, *ibid*).

⁷⁶ Robinson & Darley (note 72 above) 20-21.

⁷⁷ Robinson & Darley (note 72 above) 18.

⁷⁸ Robinson & Darley (note 72 above) 31.

Robinson and Darley's research therefore indicates that there is considerable social utility in what has become known as the 'principle of fair labelling'; the principle that requires that the stigma (the 'label') attaching to an offender in consequence of his crime should be a fair and accurate reflection of his culpability and that 'widely felt distinctions between different kinds of offences and degrees of wrongdoing are respected and signalled by the law'.⁷⁹ Vogel has observed that a dualistic/pluralistic model of complicity is 'closer to social reality where primary and secondary responsibility are distinguished'.⁸⁰ This in turn suggests that there could very well be greater utility in drawing a distinction between major and minor criminal participants for purposes of conviction and sentence, than in treating all participants on the same footing, regardless of personal contribution. Although it is impossible to draw any firm conclusions on the subject without further and more specific research, it would therefore appear that, contrary to the Constitutional Court's assumptions in *Thebus*, instrumental arguments in favour of the doctrine of common purpose are inconclusive at best and, at worst, may turn out to be positively ill-founded.

4. FEINDSTRAFRECHT

Although the Constitutional Court's ruling on the necessity for the doctrine of common purpose as an instrument of crime control can be criticised for lack of supporting evidence, it needs to be acknowledged that the court was not alone in its reasoning. Crime control rationales, in particular the need to deal effectively with the challenges presented by new forms and/or increasing levels of collective criminal activity, associated with gangsterism, organised crime, mob violence and terrorism, have also been advanced in other jurisdictions that employ a version of the common purpose doctrine.⁸¹ Thus, for example, Simester and Sullivan explain the rationale for joint enterprise liability as follows:

⁷⁹ A Ashworth *Principles of Criminal Law* 6ed (2009) 78. The principle of fair labelling will be addressed in more detail in chapter 7.

⁸⁰ J Vogel 'How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models' (2002) *Cahiers de défense sociale* 151, 153 and further authorities cited therein.

⁸¹ L Bridges 'The case against joint enterprise' (2013) 54(4) *Race & Class* 33, 34; and see also HCU Sieber 'Blurring the Categories of Criminal Law and the Law of War' 41 (report presented at the 15th International Congress of Social Defense on 'Criminal Law between War and Peace', Toledo, 22 Sept.

The law has a particular hostility to criminal groups ... [T]he rationale is partly one of dangerousness: “experience has shown that joint criminal enterprises 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 of 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 set itself against the law and order of society at large.⁸² Individuals offending alone do not do this. Thus concerted wrongdoing imports additional and special reasons why the law must intervene.⁸³

Sieber argues persuasively that the doctrine of joint criminal enterprise is one of a number of wider crime-control measures, both within and outside the substantive criminal law, to which modern states appear to be resorting with increasing frequency, and which may be grouped together under the descriptive heading of ‘feindstrafrecht’ or ‘enemy criminal law’.⁸⁴ The controversial theory of feindstrafrecht was developed by the German legal scholar, Günter Jakobs, to explain (and later justify) a range of German legislative measures, in which considerations of culpability were subordinated to instrumental considerations. Jakobs argued that such measures were not aimed at the ordinary ‘occasional’ offender, who, despite his offence, still subscribes to society’s norms and values, but at the type of offender (such as those involved in organised crime, sexual predators, drug dealers and terrorists) whose persistent anti-social conduct demonstrates an outright rejection of society and its norms and values. His theory is that such individuals are, to all intents and purposes, enemies in society’s midst and, because of this, the state is not obliged to treat them according to the normal principles of (domestic) criminal justice (‘bürgerstrafrecht’), but, for the sake of security, is justified in adopting the type of draconian measures that would normally be reserved for enemy aliens in times of war (‘feindstrafrecht’). Typical measures for such purposes would include (1) pre-emptive criminalisation; (2) disproportionately severe punishment; and

2007) available online at <http://www.defensesociale.org/warandpiece/Blurring.pdf>, accessed on 8 October 2013.

⁸² Compare this observation with Jakobs’s theory of feindstrafrecht, outlined below.

⁸³ Simester & Sullivan (note 46 above) 226, citing Lord Mustill’s judgment in *R v Powell; R v English* (note 2 above) 551.

⁸⁴ Sieber (note 81 above) 36 and further authorities cited therein.

(3) the suppression of rights of due process.⁸⁵ What was particularly controversial about Jakob's theory is that he not only regarded such measures as a legitimate response to such forms of law-breaking, but he also argued for the recognition of feindstrafrecht as a separate branch of criminal law, with its own set of norms grounded on the right to security.⁸⁶

Despite the controversy with which the theory of feindstrafrecht was received,⁸⁷ Sieber observes that, in recent years, many states are in fact adopting increasingly draconian measures, of the sort that have been identified as typifying feindstrafrecht, in order to add impetus to their various 'wars' on terror, drug-trafficking, organised crime, economic crime and so forth.⁸⁸ He goes on to point out that, within the scope of substantive criminal law, legal systems all over the world have responded, either legislatively or judicially, to the special risks posed by 'complex offender constellations', such as organised criminal networks and terrorist groups and cells, by creating 'special legal instruments that facilitate the attribution of criminal liability'.⁸⁹ He identifies the doctrine of joint criminal enterprise as one such instrument, along with other forms of constructive liability, such as vicarious and strict liability.⁹⁰ The justifications offered by Simester and Sullivan for the doctrine of joint criminal enterprise, as reflected in the passage cited above,⁹¹ suggest that Sieber was not overstating the position. Simester and Sullivan speak of the 'threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address' and of a group constituted by a joint criminal enterprise as being a 'form of society that has set itself against the law and order of society at large', which 'individuals offending alone do not do'.⁹² This is recognisably the language of feindstrafrecht theory.

⁸⁵ L Zedner 'Security, the State and the Citizen: The Changing Architecture of Crime Control' (2010) 13 *New Criminal LR* 379, 392.

⁸⁶ For further elucidation of this theory, see Zedner (note 85 above) 391-394; C Gómez-Jara Diez 'Enemy Combatants Versus Enemy Criminal Law' (2008) 11 *New Criminal LR* 529, 531; 391-393; D Ohana 'Trust, Distrust and Reassurance: Diversion and Preventative Orders in the Shadow of the German *Feindstrafrecht* Controversy' (2010) 73 *Modern LR* 721, 723-727.

⁸⁷ See, for example, Ohana (note 86 above) 727-730; Gómez-Jara Diez (note 86 above) 533, note 6 and further authorities cited therein.

⁸⁸ Sieber, note 81 above, 39-40. For examples of measures adopted in the United Kingdom in recent years, see Ohana (note 86 above) 741 and Zedner (note 85 above) 394-.

⁸⁹ Sieber, note 81 above, 41.

⁹⁰ *Ibid.*

⁹¹ Note 83 above and accompanying text.

⁹² *Ibid.*

The notion of the doctrine of common purpose as a draconian measure, designed to deal with a perceived national ‘crisis’ of criminal activity, places it in an entirely different light from that in which it is traditionally viewed. Viewed in this new light, the doctrine is not to be evaluated according to accepted normative theory, but according to a different set of norms altogether; namely, those of *feindstrafrecht*. This idea is both revelatory and, at the same time, deeply disturbing. As Zedner observes, ‘[t]he recognition that many areas of criminal law share the traits of enemy criminal law and treat their objects not as citizens but as presumptive enemies is a striking insight’.⁹³ Certainly, viewing the doctrine of common purpose through the lens of *feindstrafrecht* theory offers a plausible explanation (perhaps the most plausible thus far) as to why a doctrine of this nature appears – and is tolerated – in the legal systems of so many societies otherwise wedded to liberal precepts, but to explain is not necessarily to justify. In the South African context, an attempt to justify an aberrant and draconian doctrine on the basis of security requirements should surely trigger alarm. South Africa’s own experience with special internal security measures is too recent and painful to allow any but those with the shortest of memories to look upon such an attempt with equanimity.⁹⁴ Thus, although *feindstrafrecht* theory offers an interesting perspective on the doctrine of common purpose, it is unlikely to be taken seriously as a defensible justification for the doctrine, although it might perhaps explain some of the subconscious thinking behind the desire for its retention.

⁹³ Zedner (note 85 above) 391.

⁹⁴ See, for example, the following succinct account by Chaskalson CJ: ‘In 1960, the Unlawful Organizations Act was passed to empower the government to declare organizations other than the so-called “communist organizations” to be unlawful, and to extend the criminal sanctions of the Suppression of Communism Act to such groups. The African National Congress and other anti-apartheid organizations, which until then had been at the *forefront* of nonviolent opposition to apartheid, were banned, and it became an offence to belong to such organizations or to further their objects. Political rhetoric set the scene for this and for the draconian security legislation that followed. The white voters were warned that the state was facing a total onslaught. They were told that the legislation was not directed against law abiding citizens and would not affect them. The targets were communists and terrorists. Detention without trial was introduced, the police were empowered to hold detainees incommunicado, and to deny them access to their lawyers or own medical advisors. Initially detention was for 90 days, then for 180 days, and then indefinitely. Courts were stripped of their jurisdiction to make habeas corpus orders in respect of detainees. The isolation of the detainees and the ousting of the jurisdiction of the courts led to torture and other abuses. Censorship was introduced, newspapers aimed at the black community were banned, and in the 1980s a state of emergency was declared which allowed the security forces vast discretionary powers’ (A Chaskalson CJ ‘Dignity as a Constitutional Value: A South African Perspective’ (2010-2011) 26 *American Univ Int LR* 1377, 1379).

5. CONCLUDING REMARKS

In previous chapters it was shown how the doctrine of common purpose has been developed by the South African courts. It has been shown that, whereas English law required presence at the time of the crime in pursuance of a conspiracy to commit the crime in concert, South African law dispenses with the need for all these requirements to be met in any given case. Thus, where there is a prior conspiracy, it is unnecessary to prove presence at the scene of the crime, or an actual contribution towards the execution of the crime. Where there is presence at the scene of the crime, it is unnecessary to prove prior conspiracy, or an actual contribution towards the execution of the crime. It is only necessary to prove unilateral conduct showing solidarity with the conduct of the perpetrators. And lastly, South African law dispenses with the need to establish the scope of a common purpose as a matter of objective fact. All that is required is association in a criminal enterprise of some kind, coupled with the necessary mens rea for the crime in question. It has been shown, therefore, that South African law has greatly extended the scope of the doctrine, to the point where it now covers a wide range of minor and insignificant conduct, which would originally have been regarded as accessorial in nature, or may well have attracted no liability at all.

In this chapter, it has been shown that there are normative justifications for a limited application of the doctrine of common purpose. Such justifications may arise from the normative implications of authorisation, power of control and contributory causation, all three of which represent different ways of viewing the mandate analogy. It has also been shown that substantial participation would offer a convenient and defensible proxy for contributory causation. These grounds cannot, however, justify the entire scope of the doctrine as it is currently applied in our law. In particular, they are not capable of justifying the imputation of a principal actor's conduct to minor and insignificant secondary participants. There is no normative justification for extending the doctrine of common purpose to such participants. Whether it is possible to justify such an extension on instrumental grounds is also open to doubt. Thus far, no empirical evidence has been advanced to indicate that holding minor and insignificant participants liable as co-principals has any crime-control benefits that could not be achieved equally well by holding them liable as lesser participants. On the contrary, what little empirical evidence

there is suggests that the interests of crime-control are best served by ‘fair labelling’. This in turn implies that it would be more beneficial to reflect public perceptions of differences in culpability by distinguishing between minor and major participants.

Because of the far-reaching implications of the Constitutional Court’s decision in *S v Thebus*, the case requires discussion in more depth. The following chapter will therefore consist of a detailed analysis and critique of the portions of the judgment that deal with the doctrine of common purpose. The portions dealing with the right to silence, although important in their own right, are not relevant for present purposes and will not be addressed.

CHAPTER 6

THE CONSTITUTIONAL COURT'S JUDGMENT IN *S v THEBUS*

1. INTRODUCTION

In previous chapters, it has been explained how the South African courts developed the doctrine of common purpose and, in so doing, expanded its scope to the point where the doctrine now covers a wide variety of minor and insignificant participatory conduct, which, in English law, from which the doctrine was derived, would have been regarded as accessorial in nature, or might well have attracted no liability at all. In particular, the South African law no longer requires a common purpose to have been constituted by prior conspiracy, but bases liability on active association; that is to say, mere unilateral conduct showing solidarity with that of the principal actor.¹

This form of participation came under the spotlight in the late 1980s, in the highly politicised case of *S v Safatsa*, in which the AD confirmed that, in such cases, it is not necessary for the state to prove a causal connection between such a participant's conduct and the commission of the crime, or, for that matter, to prove that such a participant's conduct had any effect, whether practical or psychological, on the commission of the crime at all.² It was this ruling that permitted the fourth accused, a young woman of eighteen, to be convicted of murder and condemned to death, when her only contribution had been to shout 'laat ons hom doodmaak' ('let us kill him') and to slap another woman who remonstrated with the crowd.³ Whilst the case itself provoked a public outcry, it is well documented that, of all the Sharpeville Six, it was the AD's treatment of this young woman which most clearly highlighted the draconian implications of the doctrine and brought the South African criminal justice system into international disrepute.⁴

¹ This form of liability is unknown in English law, or in the legal systems of other common law countries like Canada and Australia. The only common law country that appears to recognise this form of liability is Scotland (see ch2, s5).

² *S v Safatsa* 1988 (1) SA 868. The case is more fully discussed above, in ch3, s2.

³ *S v Safatsa* 1988 (1) SA 868, 892C-F.

⁴ See, for example, P Parker 'South Africa and the Common Purpose Rule in Crowd Murders' (1996) 40 *J of African Law* 78, 98-99: 'For the judgment against the Six had shocked the world. Lord Scarman examined the evidence against one of the accused for Granada television and said that had he been trying

Given the level of attention and criticism generated by the *Safatsa* judgment, as well as the political milieu in which the case was decided, it was almost inevitable that the AD's ruling would be challenged in the new constitutional dispensation which emerged during the 1990s. In 2003, therefore, the constitutionality of the active association form of common purpose was challenged in *S v Thebus*,⁵ but, perhaps surprisingly (and even disappointingly) for those who had followed the criticisms of the *Safatsa* judgment, the doctrine was found to pass constitutional muster.

2. THE FACTS OF THE CASE

S v Thebus was a case of common purpose by active association.⁶ On 14 November 1998, a group of Ocean View residents planned and staged a vigilante offensive against certain reputed drug dealers operating in the area. In the course of this offensive, an exchange of gunfire took place between one of the reputed dealers and a group of vigilantes, which led to the death of a child and the injury of two other children. The two appellants, who were part of the vigilante group, were charged with one count of murder and two counts of attempted murder, by virtue of their participation in the shooting incident. Although they raised alibi defences at their ensuing trial in the Cape High Court, the court rejected their alibis as recent fabrications. It found that that they had been present at the scene of the shooting, were aware of the shooting when it occurred, had made common cause with the group involved in the shooting, including the gunman, and had acted in association with the latter, the first appellant by standing

the case, he would have withdrawn it from the jury and directed an acquittal, and would have quashed the conviction had it come to the appeal court. Calls for clemency were made by the Pope, the Archbishop of Canterbury, Cardinal Hume, Lord Elwyn-Jones, the UN Security Council, the Organisation of African Unity, the Commonwealth, the European Community, the governments of the United States, Britain, France, West Germany, Canada, Australia, Japan, the Soviet Union, New Zealand, Israel, Iran, Finland, Norway, Sweden, Greece, Italy, Luxembourg, Belgium, Botswana. Mrs Thatcher invited the sister of one of the Six to Downing Street. The case did severe damage to the reputation of South Africa's judiciary. An editorial in *The [London] Times* described the Six as "victims of a disgraceful piece of legal chicanery", and concluded that "such a judicial system hardly deserves the name. It is little more than a charade designed to deter and intimidate – terror tailored to the purposes of the State". See also E Cameron 'When judges fail justice' *Advocate* December 2004 issue 37, 38; J Mihálik 'Expedient legal fiction and death sentences in Bophuthatswana' (1991) 24 *Comparative & Int LJ of SA* 105, 111-112.

⁵ *S v Thebus* (2003) 6 SA 505 (CC).

⁶ This, at any rate, was the way in which the trial court chose to approach the case. The facts indicate, however, that the appellants' liability could equally well have been based on the prior conspiracy form of common purpose.

guard and the second appellant by collecting the spent cartridge cases.⁷ In accordance with the requirements for common purpose by active association, as set out in *S v Mgedezi*,⁸ the court found them guilty as charged and their convictions were upheld by the Supreme Court of Appeal (SCA) on appeal.⁹

The appellants then appealed to the Constitutional Court, challenging the constitutionality of the doctrine of common purpose.¹⁰ They did not attempt to argue that the doctrine of common purpose was unconstitutional in its entirety, but claimed that, in cases of common purpose by active association, it violated their constitutionally-protected rights of dignity, freedom and security of the person, as well as their right to a fair trial, including the right to be presumed innocent.¹¹ They contended that, in light of these violations, and as enjoined by section 39(2) of the 1996 Constitution,¹² the SCA ought to have developed the common law beyond existing precedent, so as to give effect to their constitutionally protected rights; in particular, by developing, applying and elucidating the requirements that:

1. There must have been a causal connection between their actions and the crime(s) for which they were convicted;
2. They must have actively associated themselves with the unlawful conduct of those who actually committed the crime(s); and
3. They must also have had the subjective foresight that others in the group would commit the crime(s).¹³

⁷ *S v Thebus* (note 5 above) para 10.

⁸ *S v Mgedezi* 1989 (1) SA 678 (A) 702.

⁹ The SCA's judgment deals entirely with the trial court's evaluation of the factual evidence and the appropriateness of the sentences that it imposed. It did not deal with the law relating to common purpose at all and, for that reason, it is unnecessary to discuss the judgement in detail.

¹⁰ They also claimed that the adverse inferences drawn by the trial court from their failure to disclose their alibis when first questioned by the police violated their right to silence, however this aspect of the case is not relevant for present purposes and need not be discussed.

¹¹ These rights are protected by sections 10, 12(1)(a) and 35(3)(h), respectively, of the Constitution of the Republic of South Africa 1996 (the 1996 Constitution).

¹² Section 39(2) provides that, '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

¹³ *S v Thebus* (note 5 above) para 23.

3. THE ISSUES IN DISPUTE

The essence of the appellants' complaints regarding the constitutionality of the doctrine of common purpose, as derived from the Constitutional Court's judgment,¹⁴ was as follows:

1. The doctrine of common purpose undermines the fundamental dignity of each person convicted of the same crime with others, because it de-individualises them and de-humanises them by treating them 'in a general manner as nameless, faceless parts of a group'.¹⁵ In support of this argument, it was contended that a crime like murder carries a greater stigma than lesser offences such as public violence, conspiracy, incitement, attempt, or liability as an accomplice, which are competent verdicts or available alternatives to a charge of murder.¹⁶
2. The doctrine of common purpose violates the right not to be deprived of freedom arbitrarily,¹⁷ because, by dispensing with the requirement of a causal connection between the accused's actions and the crime of which he may be convicted, it 'countenances the most tenuous link' between the individual's conduct and his resulting liability.¹⁸ In the course of this argument, the appellants criticised the concept of liability based on active association, arguing that the requirements for active association had been cast too widely and/or misapplied, whilst, at the same time, there were less invasive forms of liability available, which did not require conviction as a co-perpetrator.¹⁹

¹⁴ It must be mentioned, at the outset, that it is no easy task to reconstruct the appellant's arguments from the judgment. The court's account of these arguments is so brief and fragmented that it is impossible to tell, with any degree of certainty, exactly how the arguments on each issue were structured and presented, or what authority was offered in support of each argument. The account that follows in the text therefore represents the author's own attempt to introduce some degree of structure and coherence, although some of the arguments (especially the first) sound far-fetched and even nonsensical in the retelling.

¹⁵ *S v Thebus* (note 5 above) para 35.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *S v Thebus* (note 1 above) paras 33, 35.

¹⁹ *S v Thebus* (note 1 above) para 44.

3. The doctrine of common purpose violates the presumption of innocence, because it lowers the threshold of proof for a crime and absolves the state from having to prove all its elements beyond a reasonable doubt.²⁰

The appellants argued, finally, that the primary rationale for the doctrine of common purpose, which they cited as 'convenience of proof in favour of the prosecution', was insufficient to justify the above violations.²¹

4. THE JUDGMENT

The Constitutional Court (per Moseneke J) commenced its judgment by outlining the essential import of the doctrine of common purpose, namely that it bases liability upon imputed conduct.²² It went on to distinguish between the two methods by which a common purpose may be formed, namely prior agreement (conspiracy) and active association.²³ The court further observed that other common law jurisdictions, like England, Canada, Australia, Scotland and the USA, also apply principles similar to the doctrine of common purpose, without a causal nexus being a prerequisite for liability,²⁴ although it acknowledged that there is no equivalent of the doctrine in German or French law.²⁵ After explaining the approach that a court must follow when dealing with a constitutional challenge to a rule of the common law,²⁶ the court responded to the appellants' arguments by identifying two rationales for the doctrine of common purpose, namely the need for crime control and the need to circumvent evidentiary difficulties (the instrumental rationales described in the previous chapter).

²⁰ *S v Thebus* (note 1 above) para 35.

²¹ *Ibid.*

²² *S v Thebus* (note 1 above) para 18.

²³ *S v Thebus* (note 1 above) paras 19 – 21.

²⁴ *S v Thebus* (note 1 above) para 22. Although (as previously discussed in ch2, ss4.5 and 4.6) it is correct that a causal nexus is not an invariable requirement for liability in these jurisdictions, what the court omitted to mention is that none of these jurisdictions, save for Scotland, regard 'active association' as sufficient for liability either. In all the others, joint enterprise liability is based on prior conspiracy (consensus). See also J Burchell *Principles of Criminal Law* 3ed (2005) 582-583.

²⁵ *S v Thebus* (note 1 above) para 22, note 30. The significance of the absence of an equivalent doctrine in German law will be discussed further in the next chapter.

²⁶ *S v Thebus* (note 1 above) para 32. The procedure is, briefly, that the court must first decide whether the rule does limit a constitutionally protected right. If not, that is the end of the matter. If there is such a limitation, the court must then decide whether it is reasonable and justifiable, having regard for the various considerations enumerated in section 36(1) of the Constitution. If so, the rule stands. If not, the court must adapt or develop it in order to harmonise it with the norms of the Constitution.

In response to the argument that the doctrine of common purpose violates the right to dignity, the court held that it was fallacious to argue that the prosecution and conviction of a person dehumanises him.²⁷ In further response to this argument, as well as to the argument that the doctrine of common purpose amounted to an arbitrary deprivation of freedom, the court held that ‘the entire scheme of [sections] 35 and 12(1) of the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals, provided it occurs within the context of a procedurally and substantively fair trial *and a permissible level of criminal culpability*’ (emphasis supplied).²⁸ The court thus confirmed its earlier ruling in *De Lange v Smuts NO* that section 12(1)(a) of the Constitution opens the substantive criminal law to constitutional review,²⁹ in that:

The standard [of criminal culpability] must be constitutionally permissible. It may not unjustifiably invade rights or principles of the Constitution. Put differently, the norm may only ‘impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint’. However, once the culpability norm passes constitutional muster, an appropriate deprivation of freedom is permissible.³⁰

Further on, the court amplified this dictum as follows:

[T]he criminal norm may not deprive a person of his or her freedom arbitrarily or without just cause. The ‘just cause’ points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason ... The meaning of ‘just cause must be grounded upon and (be) consonant with the values expressed in [section] 1 of the Constitution and gathered from the provisions of the Constitution’.³¹

The court went on to hold, however, that the definitional elements for a common law crime are ‘unique to that crime’ and that, whilst common minimum requirements are unlawful conduct, criminal capacity and fault, a causal nexus is not a requirement of

²⁷ *S v Thebus* (note 1 above) para 36.

²⁸ *Ibid.*

²⁹ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paras 22 - 23.

³⁰ *S v Thebus* (note 1 above) para 36, citing O’Regan J’s dictum in *S v Coetzee* 1997 (1) SACR 379 (CC) para 178.

³¹ *S v Thebus* (note 1 above) para 39, citing Langa DP’s dictum in *S v Boesak* 2001 (1) SACR 1 (CC) para 37.

every crime.³² The court reasoned that, because of this, the mere exclusion of causation as a prerequisite for liability is not 'fatal to the criminal norm'.³³ Despite its earlier dicta to the effect that the standard of criminal culpability must be sufficient to justify the deprivation of freedom, in accordance with the core values and provisions of the 1996 Constitution, it held further that:

There are no pre-ordained characteristics of criminal conduct, outcome or condition. *Conduct constitutes a crime because the law declares it so...* Ordinarily, making conduct criminal is intended to protect a societal or public interest by criminal sanction. It follows that criminal norms vary from society to society and within a society from time to time, relative to community convictions of what is harmful and worthy of punishment in the context of its social, economic, ethical religious and political influences (emphasis added).³⁴

The court then ruled that the doctrine of common purpose does not amount to an arbitrary deprivation of freedom, because it is 'rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise'.³⁵ It held that it serves a 'vital purpose', since, without it, persons other than the actual perpetrators of a crime and their accomplices would escape all liability, despite their unlawful and intentional participation in the crime, which would not accord with 'the considerable societal distaste for crimes by common design'.³⁶ It went on to hold that:

Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime. In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person.³⁷

³² *S v Thebus* (note 1 above) para 37.

³³ *Ibid.*

³⁴ *S v Thebus* (note 1 above) para 38.

³⁵ *S v Thebus* (note 1 above) para 40.

³⁶ *Ibid.*

³⁷ *Ibid.*

The court concluded that '[t]here is no objection to this norm of culpability even though it bypasses the requirements of causation'.³⁸ The appellants' argument in this regard was thus found to be without merit.

The court then turned to the argument that, by dispensing with proof of a causal nexus between an accused's conduct and the criminal result, the doctrine of common purpose lowers the threshold of proof, thereby violating the presumption of innocence.³⁹ It pointed out that the doctrine of common purpose does not amount to a reversal of the normal onus of proof, or to a presumption of guilt, in that the state is still required to prove all the elements necessary to establish liability in terms of the criminal norm established by the doctrine, which (it reiterated) had been found to pass constitutional scrutiny.⁴⁰ It concluded that a proper application of the doctrine could not result in the conviction of an accused despite reasonable doubt as to his guilt and that, consequently, the doctrine does not violate the presumption of innocence.⁴¹

Lastly, the court dismissed the objections, raised by certain commentators,⁴² that the requirements for active association, as set out in *S v Mgedezi* and subsequent cases,⁴³ had been cast too widely and/or misapplied, whilst there were less invasive forms of liability available, which did not require the accused's conviction as a co-principal.⁴⁴ As regards the first of these objections, it held that criticisms of the doctrine on the grounds that it had been misapplied did not render liability based on active association

³⁸ *Ibid.*

³⁹ *S v Thebus* (note 1 above) para 42. At this point, the CC reiterated O'Regan J's dictum in *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC) para 15: '[T]he presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution... It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends s25(3)(c).'

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *S v Thebus* (note 1 above) para 44. Here the court cited the criticisms offered by the authors Burchell & Milton (J Burchell & J Milton *Principles of Criminal Law* 2ed (1997) 393).

⁴³ *S v Mgedezi* (note 8 above); *S v Petersen* 1989 (3) SA 420 (A); *S v Yelani* 1989 (2) SA 43 (A); *S v Jama* 1989 (3) SA 427 (A); *Magmoed v Janse van Rensburg* 1993 (1) SA 777 (A); *S v Motaung* 1990 (4) SA 485 (A); *S v Khumalo* 1991 (4) SA 310 (A); *S v Singo* 1993 (2) SA 765 (A).

⁴⁴ With respect, the availability of less invasive forms of liability should not have been dealt with at this juncture, but as an integral part of the appellant's second argument, dealing with the requirement of 'just cause' (see note 35 above). As mentioned previously (see note 14 above), it is impossible to tell from the CC's judgment how the appellants' arguments were structured, so it is not known whether the fault in this case lies with the court, or in the way in which the appellants' arguments were structured and presented in the first instance.

unconstitutional, but merely highlighted the need for trial courts to ensure that the established requirements were properly applied.⁴⁵ It did not elucidate the requirements for active association, commenting merely that the 'factual context of each case' would determine whether these requirements had been met.⁴⁶ As regards the objection that there were less invasive forms of liability available, which did not require the conviction of a participant as a co-principal, the court held that this was a proportionality argument, which it would only have been required to consider if the appellant's complaints had passed the threshold enquiry. Since they had not done so, however, the court was not obliged to consider the point.⁴⁷ After (quite correctly) declining to sit in judgment on the SCA's findings of fact in the matter, the court concluded that the doctrine of common purpose, in cases of murder by active association, was not unconstitutional in its existing form and consequently did not require development or reformulation in terms of section 39(2) of the 1996 Constitution. The appeal on this ground was consequently dismissed.⁴⁸

5. COMMENTARY ON THE JUDGMENT

Considering its significance (and in dramatic contrast with the AD's judgment in *Safatsa*), the Constitutional Court's judgment on the constitutionality of the doctrine of common purpose provoked surprisingly little comment and even less criticism. For the most part, this aspect of the judgment was simply noted.⁴⁹ Snyman welcomed the judgment, even though he criticised certain aspects of the court's reasoning.⁵⁰ Even Cameron JA (as he then was), who had earlier objected so vociferously to the AD's ruling on causation in *Safatsa*,⁵¹ thought that the Constitutional Court had applied a 'carefully balanced standard of constitutional fairness' in upholding the doctrine.⁵² One

⁴⁵ *S v Thebus* (note 1 above) para 45.

⁴⁶ *Ibid.*

⁴⁷ *S v Thebus* (note 1 above) para 48.

⁴⁸ The entire court concurred with Moseneke J's judgment on this ground of appeal.

⁴⁹ See, for example, M Reddi 'The Doctrine of Common Purpose Receives the Stamp of Approval' (2005) 122 *SALJ* 59.

⁵⁰ CR Snyman *Criminal Law* 5ed (2008) 270.

⁵¹ E Cameron 'Inferential reasoning and extenuation in the case of the Sharpeville Six' (1988) 2 *SACJ* 243. See also his own and Mihálik's account of his involvement in the media furor (Cameron, note 4 above, 38; Mihálik, note 4 above, 106 note 14).

⁵² Cameron (note 4 above) 37.

of the judgment's few critics was Schwikkard, who expressed concern at the Constitutional Court's willingness to allow the content of the right to freedom to be eroded by instrumental arguments, without engaging in more rigorous analysis of the content of that right and without addressing the question of what the minimum standard of criminal culpability ought to be, in order to avoid depriving a person of his freedom arbitrarily or without just cause.⁵³ The only commentator to engage in extensive criticism of the judgment was Burchell, who incorporates a critique of its salient features into his overall critique of the doctrine of common purpose in his current textbook.⁵⁴ Although Burchell has identified most of the major flaws in the judgment, it is necessary, for the sake of completeness, to consider the Constitutional Court's response to the issues raised by the appellants in some depth.

5.1 Ruling on the 'violation of dignity' issue

The argument that the doctrine of common purpose undermines the fundamental dignity of each participant, because it 'de-individualises and de-humanises them', by treating them 'in a general manner as nameless, faceless parts of a group',⁵⁵ is so far-fetched that it is difficult to believe that it was actually advanced in these terms. Since *S v Mgedezi*,⁵⁶ there has been no doubt that, in order to prove the active association form of common purpose, the state must prove individual conduct on the part of each accused, amounting to such association. Furthermore, in cases involving multiple offenders, the court must satisfy itself of the guilt of each individual accused and each accused is entitled to a separate verdict on each count with which he is charged. There is nothing in South African law that permits multiple accused charged with the same crime to be treated 'in a general manner as nameless, faceless parts of a group'. If this was indeed what the appellants argued, then the Constitutional Court can hardly be faulted for dismissing it out of hand, but the fact that the appellants apparently contended, in support of this argument, that a crime like murder carries a greater stigma than a lesser offence like public violence, conspiracy, incitement, attempt, or accomplice liability,⁵⁷ seems to

⁵³ P-J Schwikkard 'Instrumental Arguments in Criminal Law: A Mirage of Tensions' (2004) 121 *SALJ* 289, 301-303.

⁵⁴ Burchell (note 24 above) 580-588.

⁵⁵ *S v Thebus* (note 1 above) para 35.

⁵⁶ *S v Mgedezi* (note 8 above).

⁵⁷ *Ibid.*

suggest that they may in fact have been attempting to invoke the principles of culpability and/or fair labelling, both of which are integrally connected with the right to dignity.⁵⁸ If so, their argument was evidently misunderstood by the court. This, however, is mere conjecture and no purpose will be served by pursuing the point here. Objections to the doctrine of common purpose based on the principles of culpability and fair labelling will however be examined in the next chapter.

5.2 Ruling on the 'arbitrary deprivation of freedom' issue

Of far greater concern is the court's treatment of the issue of whether the doctrine of common purpose violates of the right to freedom and security of the person. This issue must be viewed in light of section 12(1)(a) of the 1996 Constitution, which provides that '[e]veryone has the right to freedom and security of the person which includes the right ... not to be deprived of freedom arbitrarily or without just cause'.⁵⁹ The threshold analysis for an alleged violation of this right involves two separate determinations, namely (1) whether the deprivation in question was/is 'arbitrary'; and, if not, (2) whether it was/is for 'just cause'.⁶⁰ As regards the first stage of the enquiry, a deprivation of freedom will not be arbitrary if there is 'a rational connection between the deprivation and some objectively determinable purpose'.⁶¹ Provided that there is such a purpose, and the deprivation is *causally linked* to that purpose, the deprivation

⁵⁸ It may not have been entirely coincidental that, in the year before *Thebus*, the constitutionality of the Israeli version of joint criminal enterprise (section 34A of the General Part of the Israeli Penal Law) had been challenged (albeit unsuccessfully) in the Supreme Court of Israel, in *Silgado v State of Israel* 56(5) PD 529 [2002], on the grounds that it violated the right to human dignity, which (as in South Africa) is explicitly protected in the Israeli Constitution (Israeli Basic Law: Human Dignity and Liberty 1992, art 1A, 2, 4). Firstly, it was argued that human dignity requires that criminal liability be imposed in accordance with the actor's culpability, whereas section 34A(a)(1) permits the attribution of liability for collateral crimes requiring subjective fault to secondary parties on the basis of negligence. Secondly, it was argued that it was a violation of human dignity for the stigma of murder (the 'mark of Cain') to be attached to a person in the absence of subjective fault. The majority of the court (President Barak and Justice Levy) accepted that section 34A does restrict both dignity and liberty, but the challenge failed, because the court found that the limitation was justifiable under Israel's general limitations clause (art 8). For further discussion of the judgment, see M Gur-Arye and T Weigend 'Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives' (2011) 44 *Israel LR* 63, 75 and 86-88.

⁵⁹ It is s12(1)(a), therefore, that requires the substantive criminal law to be constitutionally compliant. Rights of due process are protected by s12(1)(b), together with s35 of the Constitution.

⁶⁰ *De Lange v Smuts NO* 1998 (3) SA 785 (CC) para 23 (per Ackermann J (majority judgment)).

⁶¹ *Ibid.*

will not be arbitrary.⁶² This part of the enquiry therefore sets a very low standard for constitutional compliance,⁶³ however it must then be followed by the second (and clearly more important) stage of the enquiry, which requires the court to determine whether the 'purpose, reason or "cause" for the deprivation' is a 'just' one.⁶⁴

Despite the Constitutional Court's acknowledgement that 'just cause must be grounded upon and (be) consonant with the values expressed in [section] 1 of the Constitution and gathered from the provisions of the Constitution',⁶⁵ it is evident from the judgment that it paid scant attention to this part of the enquiry. In order to justify this criticism, it is necessary, in the first instance, to compare the court's approach in *Thebus* with its earlier approach in *De Lange v Smuts NO*.⁶⁶ This latter case, which concerned the constitutional validity of committal and detention in terms of section 66(3) of the Insolvency Act,⁶⁷ was the first in which the provisions of section 12(1)(a) came before the Constitutional Court for consideration.⁶⁸ Dealing with the question of what would constitute 'just cause' for a deprivation of freedom, Ackermann J (who delivered the majority judgment) held that:

It is not possible to attempt, in advance, a comprehensive definition of what would constitute a 'just cause' for the deprivation of freedom in all imaginable circumstances. The law in this regard must be developed incrementally and on a case by case basis. Suffice it to say that the concept of 'just cause' must be grounded upon and consonant with the values expressed in section 1 of the 1996 Constitution and gathered from the provisions of the Constitution as a whole.⁶⁹

⁶² IM Rautenbach 'The limitation of rights in terms of provisions of the bill of rights other than the general limitation clause: a few examples' (2001) *J of SA Law* 617, 631. The 'rational connection' test for purposes of s12(1)(a) is therefore not the same test as that for purposes of section 9 of the Constitution (the right to equality) as laid down in *Prinsloo v Van der Linde* 1977 (6) BCLR 708 (CC) para 25.

⁶³ Rautenbach (note 62 above) 631.

⁶⁴ *De Lange v Smuts NO* (note 60 above) para 23.

⁶⁵ *S v Thebus* (note 1 above) para 39, citing Langa DP in *S v Boesak* (note 31 above) para 38.

⁶⁶ *De Lange v Smuts NO* (note 60 above), especially Ackermann J's majority judgment at paras 30-41.

⁶⁷ Insolvency Act 24 of 1936.

⁶⁸ The court's earlier decisions on the right to freedom in *Ferreira v Levin* 1996 1 BCLR 1 (CC), *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) and *S v Coetzee* 1997 (4) BCLR 437 (CC) dealt with s11(1) of the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) and were not, therefore, necessarily applicable in interpreting s12(1) of the 1996 Constitution, which is framed in substantially different terms. *De Lange v Smuts NO* is consequently regarded as the leading case on the interpretation and application of s12(1)(a) of the 1996 Constitution.

⁶⁹ *De Lange v Smuts NO* (note 60 above) para 30.

Despite Ackermann J's unwillingness to define or elaborate on the meaning of 'just cause', is evident from what follows in his judgment that, in reaching the conclusion that the requirement of 'just cause' was satisfied in the case of the committal and detention of section 66(3) examinees, he considered a number of factors, namely:

1. The purpose of and necessity for committal and detention in terms of section 66(3),⁷⁰ which he ultimately described as 'compelling and indispensable';⁷¹
2. The fact that similar provision for detention exists in other comparable jurisdictions and has not been found objectionable;⁷²
3. The fact that no effective but less severe measure exists by which an examinee may be compelled to furnish the required information;⁷³
4. The fact that the means of release are within a detained examinee's own hands and that procedural safeguards exist to protect persons wrongfully committed or detained;⁷⁴
5. The fact that the committal mechanism is 'very closely tailored to its intended purpose and goes no further than is absolutely necessary to achieve its objective'.⁷⁵

It is noteworthy that, amongst the factors deemed worthy of consideration, were the nature and extent of the limitation, the importance of its purpose, the relationship between the limitation and its purpose, and whether that purpose could be achieved by less restrictive means.⁷⁶ These are factors that a court is required to consider in performing a limitations enquiry in terms of section 36(1) of the 1996 Constitution (the

⁷⁰ *De Lange v Smuts NO* (note 60 above) paras 31-38. Although it is unnecessary for present purposes to recount all the reasons considered by Ackermann J in his judgment, it is noteworthy that they were furnished in specific and detailed terms, occupying a full eight paragraphs of the judgment.

⁷¹ *De Lange v Smuts NO* (note 60 above) para 40.

⁷² *De Lange v Smuts NO* (note 60 above) para 39.

⁷³ *De Lange v Smuts NO* (note 60 above) para 40.

⁷⁴ *De Lange v Smuts NO* (note 60 above) paras 40 and 41.

⁷⁵ *De Lange v Smuts NO* (note 60 above) para 41.

⁷⁶ Rautenbach (note 62 above) 632.

general limitation clause).⁷⁷ In essence, therefore, in determining whether the requirement of 'just cause' was satisfied in *De Lange*, Ackermann J chose to perform a proportionality enquiry, very similar to (although less stringent than) that which a court is required to perform for purposes of section 36(1).⁷⁸

If Ackermann J's majority judgment in *De Lange* is to be regarded as having set the standard for a 'just cause' enquiry, however, it is evident that Moseneke J's approach in *Thebus* failed to measure up to that standard. The latter's entire treatment of the threshold enquiry for a violation of section 12(1)(a) appears in a single paragraph, the first part of which (the court's treatment of the 'arbitrariness' part of the enquiry) reads as follows:

Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise.⁷⁹

The remainder of the paragraph then reads:

[The doctrine] serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime. In practice, joint criminal

⁷⁷ Ibid. Section 36(1) of the 1996 Constitution provides: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

⁷⁸ Rautenbach (note 62 above) 632.

⁷⁹ Brief though this statement is, the court's finding is presumably adequate, given the low standard set for constitutional compliance in this particular regard (see note 63 above and accompanying text).

conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus there is no objection to this norm of culpability even though it bypasses the requirement of causation.⁸⁰

On first reading, this second passage seems a mere continuation of the first passage cited above (that is, a further elucidation of the court's ruling on the 'arbitrariness' enquiry). Presumably, however, it must be understood as dealing with the second part of the threshold enquiry, namely the requirement of 'just cause'. This assumption is based on the fact that the 'just cause' requirement is not dealt with anywhere else in the judgment, however it is addressed in such cursory terms that it is difficult to say that the court really applied its mind to this part of the enquiry at all. Even accepting that the court's remarks in the passage cited above must be read in conjunction with its earlier remarks concerning the rationales for the doctrine and the existence of similar doctrines in other comparable jurisdictions,⁸¹ it would be evident that its analysis was inadequate in comparison with the considerably more detailed and multi-faceted analysis performed in *De Lange*.⁸² It will be observed that, in *Thebus*, the court focussed exclusively upon the purpose of the limitation and the importance of that purpose from a public interest perspective. It did not, however, consider whether that purpose was a 'just' one. It did not consider the relationship between the limitation and its purpose; that is to say, whether the doctrine of common purpose is an appropriate and fitting means for achieving that purpose, or whether it goes further than strictly necessary. Nor did it consider whether the same objective could be achieved equally well by less invasive measures (a point evidently argued by the appellants at some stage during the proceedings).⁸³ Despite the precedent set by the majority judgment in *De Lange*, the court took the view that such 'proportionality arguments' were relevant only to a section 36(1) enquiry and, since it was not performing such an enquiry, it was not obliged to consider them.⁸⁴ No criticism of the majority approach in *De Lange* was offered,

⁸⁰ *S v Thebus* (note 1 above) para 40.

⁸¹ In which, as previously observed, the court omitted to mention that none of the jurisdictions named by the court, save for Scotland, have any equivalent of the 'active association' form of common purpose liability (see note 24 above).

⁸² *De Lange v Smuts NO* (note 60 above) paras 31-39, discussed above.

⁸³ *S v Thebus* (note 1 above) para 48.

⁸⁴ *Ibid.*

however, nor any other explanation for the departure from precedent.⁸⁵ All of this detracts from the quality of the judgment.⁸⁶

Most importantly of all, however, as Schwikkard has pointed out, the Constitutional Court did not consider what the minimum standard of criminal culpability ought to be, in order to constitute just cause for depriving a person of his freedom.⁸⁷ On the contrary, despite its reference to a 'constitutionally permissible standard' of criminal culpability,⁸⁸ the court was able to avoid the (admittedly unenviable) task of deciding what this standard was, by adopting a simple, positivist approach to criminalisation: 'There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so'.⁸⁹ This statement however confuses legality with justness. Whilst the principle of legality is undoubtedly an indispensable principle for upholding the Rule of Law, legality alone cannot be a sufficient precondition for criminal liability;⁹⁰ at least not in a constitutional dispensation intended to uphold and protect individual human rights against the so-called 'tyranny of the majority'.⁹¹ If that were so, Parliament could criminalise any conduct it chose and, as long as the resulting provision had some 'objectively ascertainable purpose' and was not in direct conflict with some constitutionally protected right *other* than the right to freedom, the Constitutional Court would be powerless to intervene, regardless of how unjust that provision might be. It is impossible to believe that this is what the framers of the Constitution had in mind.⁹²

⁸⁵ This raises serious concerns about the protection of the right to freedom and security of the person, however a full discussion of these concerns is beyond the scope of this dissertation.

⁸⁶ See also Rautenbach's critique of the judgment on this point (I Rautenbach 'Regspraak: Constitutional Court and Supreme Court of Appeal Decisions on the Bill of Rights' (2004) *J of SA Law* 386, 393).

⁸⁷ Schwikkard (note 53 above) 301-303.

⁸⁸ *S v Thebus* (note 1 above) para 36.

⁸⁹ *S v Thebus* (note 1 above) para 38.

⁹⁰ Further on this point see A Rycroft 'In the Public Interest' (1989) 106 *SALJ* 172, 183.

⁹¹ See Schwikkard's comparison of the positivist approach of the South African courts under the previous constitutional dispensation, with their approach under the present dispensation (Schwikkard, note 53 above, 289-291). See also CP Erlinder 'Mens Rea, Due Process and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law' (1981) 9 *American J of Criminal Law* 163, 163-164.

⁹² As Henry Hart asked, rhetorically: 'What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?' HM Hart (Jr) 'The Aims of the Criminal Law' (1958) 23 *Law & Contemporary Problems* 401, 431.

What is of particular concern in this regard is that, although the Constitutional Court must have been well aware of the criticisms levelled over the years at the doctrine of common purpose (especially in its active association form), it did not take any account of the historical reasons for much of that criticism; in particular, the harshness and injustice wrought by the AD's judgment in the notorious *Safatsa* case. It has been accepted that, in interpreting the Constitution and determining constitutional issues, it is not only permissible, but indeed necessary for the Constitutional Court to take cognisance of historical events that have a bearing on the issues under consideration.⁹³ Given the notoriety of the common purpose doctrine, one would have expected the court in *Thebus* to have taken account of these historical events, at least to the extent of providing some reassurance that the type of treatment meted out by the *Safatsa* bench to the fourth accused would no longer be possible under the present constitutional dispensation.⁹⁴ Despite the court's passing reference to the 'evocative history' of the doctrine,⁹⁵ however, it did not do this.⁹⁶ It did not refer directly to the *Safatsa* judgment at all,⁹⁷ and offered no criticism of the AD's treatment of the case, whether on the facts, or on the law, or on the question of sentence.⁹⁸ If its reminder to the courts to 'exercise the utmost circumspection in evaluating the evidence against each accused person',⁹⁹ was intended as an oblique criticism of the AD's findings of fact in *Safatsa*, then, with the utmost respect, it fails to reassure. Whatever criticisms might be levelled at the AD's

⁹³ See, for example, the dictum of Mahomed J in *S v Makwanyane* 1995 (3) SA 391 (CC) para 266: 'What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and their context; the interplay between the different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; *factual and historical considerations bearing on the problem*; the significance and meaning of the language used in the relevant provisions; the content and the sweep of the ethos expressed in the structure of the Constitution; the balance to be struck between different and sometimes potentially conflicting considerations reflected in its text; and by a judicious interpretation and assessment of all these factors to determine what the *Constitution* permits and what it prohibits' (emphasis supplied. See also, generally, P de Vos 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SA J on Human Rights* 1).

⁹⁴ One might, of course, argue that the abolition of the death penalty is itself sufficient reassurance, but, with respect, this begs the question.

⁹⁵ *S v Thebus* (note 1 above) para 50.

⁹⁶ See also Burchell's criticism on this point (note 24 above) 580.

⁹⁷ The only reference to the case is in a footnote to para 18 of the judgment (*S v Thebus*, note 1 above, note 18).

⁹⁸ In fact, the court appears to have focussed instead on *S v Mgedezi* (note 8 above) as the leading authority on the subject. However, whilst *Mgedezi* may rightly be regarded as the leading authority on the requirements for active association, it is no authority at all on the subject of causation, that question having been settled the previous year by the AD's ruling in *Safatsa*.

⁹⁹ *S v Thebus* (note 1 above) para 45.

interpretation of the evidence in relation to the other five accused,¹⁰⁰ there can be no doubt that, according to the proven facts, the fourth accused in *Safatsa* satisfied the requirements for active association, not only as the law then stood, but also as it was later formulated in *S v Mgedezi*,¹⁰¹ as it has since been confirmed and reiterated in cases like *S v Jama*,¹⁰² and as it still stands today. Thus, if the fourth accused were tried today, she would still stand to be convicted of murder and would still qualify for the maximum punishment permissible by law. In the circumstances, one can only conclude, along with Burchell, that '[t]he lessons of the past ... appear to have been forgotten in a crime-control fervour'.¹⁰³

Even if it is incorrect to fault the Constitutional Court's treatment of the 'just cause' enquiry on account of the factors that it omitted to consider, however, it can certainly be faulted on account of the factors that it did consider. As Burchell has noted,¹⁰⁴ its reasoning concerning the importance of the doctrine and the necessity for its retention was based on a serious factual inaccuracy. The inaccuracy lies in the statement that, without the doctrine of common purpose, 'all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime'.¹⁰⁵ Whilst technically correct, this statement can only be described as disingenuous. It creates the impression that large numbers of criminal participants would then go 'scot-free', which is simply incorrect.

As explained in the fourth chapter, the extremely narrow scope of accomplice liability in current South African law is directly attributable to the extremely broad scope of common purpose liability. The doctrine of common purpose converts the vast majority of persons who intentionally further or assist in the commission of a crime into co-perpetrators.¹⁰⁶ This means that they cannot also be accomplices.¹⁰⁷ If they were no

¹⁰⁰ See, for example, Cameron (note 51 above); Cameron (note 52 above); see also Burchell (note 24 above) 575-576.

¹⁰¹ *S v Mgedezi* (note 8 above).

¹⁰² *S v Jama* 1989 (3) SA 427 (A).

¹⁰³ *Ibid.*

¹⁰⁴ Burchell (note 24 above) 582-583.

¹⁰⁵ *S v Thebus* (note 1 above) para 40.

¹⁰⁶ For the rare exceptions, see chapter 3, section 2.3.2.

longer regarded as co-perpetrators, however, they would then qualify to be regarded as accomplices and could be held liable accordingly; not for the crime itself, but for the separate and distinct offence of being an accomplice to that crime,¹⁰⁸ a verdict that would then allow for a wide range of sentencing options, whilst ensuring that the sentencing court could not lose sight of the accused's status as a secondary participant.¹⁰⁹ Only if such a person's conduct did *not* amount to 'furthering or assisting the commission of the crime', or if he lacked the necessary intention to do so, would he then escape liability as an accomplice. Even so, this does not mean that he would automatically be beyond the reach of the law. Depending on what form his participation took, he could still be held liable for conspiracy or incitement to commit the crime in question, or for attempted incitement, or even perhaps for an attempt to commit the crime itself. In cases of mob violence, he could be held liable for the separate offence of public violence.¹¹⁰ As discussed in the previous chapter, there is no empirical evidence to indicate that the interests of deterrence, incapacitation and/or crime prevention are served any better by treating secondary participants as co-perpetrators, than by holding them liable as accomplices, or convicting them of some other, lesser offence. Nor, for that matter, is there any evidence to suggest that it would be any more difficult or taxing for the state to prove a participant guilty of one of the lesser offences named above. As for the small number of individuals that might conceivably remain after these possibilities had been exhausted, it can hardly be regarded as a significant threat to law and order for a person who has neither committed, or attempted to commit a crime himself, nor furthered, assisted, incited, or conspired towards its commission by someone else, to escape conviction and punishment.

It would be evident, therefore, that the Constitutional Court greatly exaggerated the crime-control benefits of the doctrine of common purpose; a fact that it was able to avoid confronting through its refusal to consider the appellants' counter-argument that there are other, less invasive means available for punishing individuals who unlawfully and intentionally participate in the commission of crimes by common design. It seems,

¹⁰⁷ An accomplice must be someone *other than a co-perpetrator*, who intentionally furthers or assists the commission of a crime. On the further requirements for accomplice liability, see further chapter 3, section 2.3.2.

¹⁰⁸ Burchell (note 24 above) 582, 586.

¹⁰⁹ Burchell (note 24 above) 583.

¹¹⁰ Burchell (note 24 above) 586.

therefore, that the real consideration behind the Constitutional Court's support for the doctrine was simply that, as claimed by the appellants, the doctrine favours the convenience of the prosecution. It is highly unlikely, however, that prosecutorial convenience alone could ever constitute a just cause for deprivation of freedom.

5.3 Ruling on the 'violation of presumption of innocence' issue

Of equal concern is the Constitutional Court's ruling that the doctrine of common purpose does not pass the threshold test for a violation of the presumption of innocence, because it does not involve a reversal of the onus of proof, or a presumption of guilt, which relieves the prosecution of any part of the burden of proof. With respect, this is pure sophistry. Whilst it is correct that the doctrine of common purpose does not amount to a reversal of the onus of proof, or to a presumption of guilt per se, it is patently incorrect to say that it does not relieve the prosecution of part of the burden of proof. It does *exactly* this, by relieving it of the need to prove that an accused personally committed the actus reus of the crime with which he is charged.¹¹¹ This is the very essence of the doctrine. In many cases, it also relieves the prosecution from proving what part a particular accused did play in the commission of the crime, or indeed that he played any active part at all. The court's ruling on this issue is all the more startling, because it expressly acknowledged the role of the doctrine in easing the prosecution's burden of proof earlier in its judgment, when it offered, as one of the rationales for the doctrine, the difficulty of proving the causal contribution of each individual participant in the case of consequence crimes.¹¹² Simple logic should have dictated that the court could not have it both ways.

Schwikkard appears to defend the Constitutional Court's ruling, by observing that its response 'accords with the clear distinction, drawn by O'Regan J in *S v Coetzee* and *Bernstein v Bester NNO*, between issues directed at establishing the legitimacy of a form of criminal liability and issues of due process'.¹¹³ Even if it is to be accepted,

¹¹¹ See also Burchell's criticism of the court's ruling on this point (Burchell, note 24 above, 584).

¹¹² *S v Thebus* (note 1 above) para 34; and see also the court's observation (para 40) that '[i]n practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person'.

¹¹³ Schwikkard (note 53 above) 300-301.

however, that in South African constitutional jurisprudence the presumption of innocence is concerned solely with issues of due process and not with the legitimacy of the substantive criminal law,¹¹⁴ it is incorrect and misleading to portray the doctrine of common purpose as simply another *form* of criminal liability.¹¹⁵ A person is not found guilty of a 'common purpose' to commit a particular crime, in the same way as he might be found guilty of incitement, conspiracy, or an attempt to commit that crime. He is found guilty of the crime itself, without the prosecution having to prove that he committed it. The doctrine is therefore 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.

It is submitted that the correct approach to the issue is to be found in the judgment of Cameron J (as he then was) in *S v Meaker*.¹¹⁶ In this case, the Witwatersrand Local Division of the High Court was required to determine whether the presumption of innocence was violated by section 130(1) of the former Road Traffic Act,¹¹⁷ which created a (rebuttable) presumption, for purposes of any prosecution under the Act, that at any material time a vehicle is driven by its registered owner. The state argued that there was no such violation, since section 130(1) did not create a presumption of guilt in the same way as the types of provision that had previously been struck down by the Constitutional Court,¹¹⁸ since the state was required to prove the commission of an offence, independently of the presumption, before the presumption took effect.¹¹⁹

¹¹⁴ Canadian constitutional jurisprudence takes a broader view of the presumption of innocence, regarding it as integrally connected with the protection of life, liberty and security of the person (Schwikkard, note 53 above, 300, footnote 89 and further authorities cited therein). By taking a narrower view of the presumption of innocence, therefore, South African constitutional jurisprudence has evidently chosen to follow a different path. Whether or not this is the correct path is open to debate, however the subject is beyond the scope of this dissertation, and will not be addressed here.

¹¹⁵ This might be true if parties to a common purpose were regarded as accomplices, rather than co-perpetrators, and were liable for a different crime, but the doctrine of common purpose holds each party liable for the crime itself.

¹¹⁶ *S v Meaker* 1998 (2) SACR 73 (W). It should be noted that Cameron J was not yet a member of the Constitutional Court when *Thebus* was decided.

¹¹⁷ Road Traffic Act 29 of 1989.

¹¹⁸ The state was alluding to cases such as *S v Zuma and Others* 1995 (2) SA 642 (CC); *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC); *S v Julies* 1996 (4) SA 313 (CC); *S v Coetzee* 1997 (1) SACR 379 (CC); *Scagell v Attorney-General of the Western Cape* 1996 (2) SACR 579 (CC).

¹¹⁹ *S v Meaker* (note 116 above) 83I-J.

Cameron J rejected this argument, holding that the state had drawn 'a distinction without a difference':¹²⁰

The effect of the presumption is to lock the accused into the crime by associating him or her, through a fact presumed from ownership, with the commission of the offence. It does so by holding him or her liable for it in the absence of probable contrary proof.¹²¹

It would be evident that, with one or two minor amendments, Cameron J could equally well have been describing the doctrine of common purpose. The only real difference is that, with the doctrine of common purpose, there is no evidence or argument that a secondary party can advance in order to avoid having the principal actor's conduct imputed to him. The imputation is irrebuttable.¹²² In conclusion, therefore, it is submitted that the doctrine of common purpose does indeed represent a violation of the presumption of innocence, sufficient at least to pass the threshold enquiry stage, and that the Constitutional Court should have held accordingly.

6. CONCLUDING REMARKS

It may be concluded from the above discussion that the Constitutional Court's decision in *S v Thebus* is unsatisfactory in a number of material respects. Although the court cannot be faulted for its response to the appellant's first argument, concerning the violation of the right to dignity, its responses to the second and third arguments contain serious flaws. Its treatment of the threshold enquiry for a violation of the right to freedom was faulty, both in terms of the court's wholly inadequate approach to the 'just cause' stage of the enquiry and in terms of the factual inaccuracies evident in its reasoning on the necessity for the retention of the doctrine. Its treatment of the threshold enquiry for a violation of the presumption of innocence was equally based on fallacious reasoning. The result was that neither of these challenges to the constitutionality of the doctrine passed the threshold enquiry stage, when, by rights, they should have done so.

¹²⁰ *S v Meaker* (note 116 above) 84A-B.

¹²¹ *Ibid.* Cameron J accordingly concluding that section 130(1) did indeed violate the right to be presumed innocent, although he went on to find that the limitation of the right was reasonable and justifiable limitation, after performing an enquiry in terms of section 36(1) of the Constitution.

¹²² Burchell, note 24 above, 584.

The result of this, in turn, was that pertinent issues relating to the constitutionality of the doctrine of common purpose were never properly ventilated, or subjected to the critical scrutiny that a section 36(1) enquiry would have necessitated.

Accordingly, whilst it must be accepted that, for all practical purposes, the judgment makes it very difficult to launch any further constitutional challenge against the doctrine of common purpose, it can hardly be regarded as a satisfactory answer to concerns regarding the doctrine's constitutionality. There can be little doubt, however, that the court's response might well have been different had the appellants succeeded in making out a better case for their first argument. Had they been able to show that the doctrine of common purpose does indeed violate the right to dignity (or, for that matter, some other constitutionally protected right), then the court would have been constrained to pay closer attention to the question of whether the doctrine represents a constitutionally permissible norm of liability, by performing a proper enquiry in terms of section 36(1) of the 1996 Constitution. The court would then have been obliged to take account of the alternative forms of liability available for use in cases of joint wrongdoing.

This in turn raises the question of whether there are grounds, other than those raised in *Thebus*, upon which the constitutionality of the doctrine may be challenged. In the following chapter, it will be argued that the doctrine of common purpose does indeed violate the right to dignity; not for the reasons advanced by the appellants, but because it represents an infringement of the principles of culpability, proportionality in punishment and fair labelling; all three of which, it will be shown, are inextricably connected with the right to dignity. It will also be argued that, by infringing the principle of proportionality in punishment, the doctrine violates the right not to be subjected to cruel, inhuman or degrading punishment, protected by section 12(1)(e) of the 1996 Constitution.

CHAPTER 7

COMMON PURPOSE AND THE RIGHT TO DIGNITY

1. INTRODUCTION

In *S v Thebus*, the appellants argued that the doctrine of common purpose violates the fundamental dignity of each person convicted of the same crime with others, because it de-individualises and de-humanises them by treating them ‘in a general manner as nameless, faceless parts of a group’.¹ This argument held no sway with the Constitutional Court; perhaps unsurprisingly, since the argument sounds nonsensical, at least when couched in the terms in which it is reported in the judgment. As explained in the previous chapter, there is nothing in South African law that permits multiple accused charged with the same crime to be treated ‘in a general manner as nameless, faceless parts of a group’.² Nevertheless, there is merit in the argument that the doctrine of common purpose, as it is currently applied in South African law, violates the dignity of the individual accused; not for the reasons argued in *Thebus*, but because it violates the principle of culpability, together with a number of related principles, all of which are integrally associated with the right to dignity in the sphere of criminal justice. This proposition will be discussed and amplified in this chapter.

2. THE RIGHT TO DIGNITY

Dignity (‘dignitas’) denotes a person’s sense of personal pride and self-worth.³ Along with reputation (‘fama’), body (‘corpus’) and physical freedom (‘libertas’), it makes up the bundle of physical and psychological interests that are recognised by law as the constituents of human personality. Whilst all four constituents confer justiciable rights upon the individual, dignity is accorded special importance in South African law, by

¹ *S v Thebus* 2003 (6) SA 505 (CC) para 35.

² See Ch 6 s4.1.

³ M Loubser & R Midgley (eds) *The Law of Delict in South Africa* (2010) 313; See also A De Chickera ‘Through the Lens of Dignity: An Essay on Equality and Liberty’ (2009) 4 *The Equal Rights Review* 35, 40: ‘dignity is a concept best understood by appealing to subjective notions of how one should be treated and one’s life valued, and applying them to society at large. Such an approach is “empathical”, demands consistency and affirms the inherent, unquantifiable value of humanity.’

virtue of the provisions of the 1996 Constitution.⁴ In South Africa, human dignity is not only a constitutionally protected right,⁵ but one of the founding values upon which the entire 1996 Constitution is based.⁶

Whilst the prominence accorded to dignity in the 1996 Constitution may be attributed primarily to reaction against the inhumanity and indignity to which so many were subjected during the years of apartheid,⁷ dignity is nevertheless a value implicit in, and fundamental to, any conception of society based on liberal precepts and respect for human rights.⁸ Thus, for example, its importance is acknowledged in the very first article of the Universal Declaration of Human Rights,⁹ as well as in various other instruments of international human rights.¹⁰ Since the Second World War and, more recently, the fall of the Iron Curtain, there has been an increasing tendency to refer to human dignity in national constitutions, either as a founding principle or value, or as a justiciable right, or frequently both.¹¹ An early example may be found in the German Constitution,¹² which, like our own, was formulated in the wake of a political regime that involved gross violations of human rights, without regard for human dignity. Article 1(1) of the German Constitution now stipulates, as a precursor to the schedule of rights, that ‘the dignity of man shall be inviolable’ and the German courts, in the sixty-odd years since its adoption, have developed a substantial body of jurisprudence on the

⁴ The Constitution of the Republic of South Africa, 1996 (‘the 1996 Constitution’).

⁵ Section 10 the Constitution of provides that: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

⁶ Section 1 of the Constitution provides: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms. (b) Non-racialism and non-sexism. (c) Supremacy of the constitution and the rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.’

⁷ See the Constitutional Court’s dictum in *S v Makwanyane* 1995 (3) SA 391 (CC) para 329: ‘Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.’ See also S Hoctor ‘Dignity, Criminal Law and the Bill of Rights’ (2004) 121 *SALJ* 304, 304.

⁸ *Ibid.* See also A Chaskalson ‘Human Dignity as a Foundational Value of Our Constitutional Order’ (2002) 16 *SA J on Human Rights* 193, 197-8.

⁹ Universal Declaration of Human Rights, adopted 10 December 1948, UN Doc A/810 (1948).

¹⁰ Hoctor (note 7 above) 304 and further authorities cited therein; Chaskalson (note 8 above) 197-198.

¹¹ D Schultziner & GE Carmi ‘“Dignitizing” Constitutions Worldwide: On the Proliferation of Human Dignity in National Constitutions’ (2013), available online at http://works.bepress.com/guy_carmi/6, accessed on 1 November 2013.

¹² Grundgesetz Für Die Bundesrepublik Deutschland 1949 (commonly referred to as ‘The Basic Law’).

right to dignity,¹³ which has included the review of criminal legislation by the German Federal Constitutional Court.¹⁴

Respect for human dignity demands the recognition of the intrinsic (and thus inalienable) value and moral worth of each individual person. As such, the concept of human dignity is inextricably associated with the blend of individualist, libertarian and egalitarian values that have come to typify modern liberal democratic ideology. The liberal concept of dignity is essentially Kantian and individualistic in nature: It demands that each individual be regarded as an end in himself, rather than merely a means for achieving the ends of others,¹⁵ a view evidently shared by the South African Constitutional Court, as is evident from the dictum of Ackermann J in *S v Dodo*:

Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as a means to an end.¹⁶

It also demands respect for each individual as ‘fully human’; that is to say, as capable of rational thought and choice, of making moral judgments and, hence, as capable of evaluating, choosing and directing his own behaviour.¹⁷ Because of this, the individual has the innate right to choose his own ends and pursue them in his own ways, as free as possible from external constraint and interference.¹⁸ The liberal concept of dignity is therefore also fundamentally libertarian, in that it requires respect for the autonomy of the individual and the protection of his personal liberty.¹⁹ And it is egalitarian, in that it assumes that, since all individuals have dignity in the same measure, they are of equal worth and are thus entitled to equal concern and respect from society and its institutions.²⁰ In as much as the ideals of libertarianism and egalitarianism are generally

¹³ Chaskalson (note 8 above) 198.

¹⁴ M Gur-Arye and T Weigend ‘Constitutional Review of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives’ (2011) 44 *Israel LR* 63, 67-71.

¹⁵ Hoctor (note 7 above) 305; De Chikera (note 3 above) 39.

¹⁶ *S v Dodo* 2001 (3) SA 382 (CC) para 38; see also Hoctor (note 7 above) 305.

¹⁷ This is commonly referred to as the doctrine of free will, or theory of self-determinism. An early proponent of this doctrine was the medieval theologian-philosopher, St Thomas Aquinas (1225 – 1274).

¹⁸ BJ Winick ‘On Autonomy: Legal and Psychological Perspectives’ (1992) 37 *Villanova LR* 1705, 1714-1715.

¹⁹ *Ibid*; Hoctor (note 7 above) 309 note 40 and further authorities cited therein.

²⁰ Hoctor (note 7 above) 312; De Chikera (note 3 above) 42.

regarded as inherently contradictory,²¹ dignity may be regarded as the crucial mediating factor.²² No society can be expected to guarantee its members absolute liberty, or equality in all things. However, a society founded on liberal values, with human dignity as its central value, is nevertheless required to guarantee its members liberty and equality in such matters and in such degree as may be necessary for and commensurate with their right to dignity.²³

3. THE RIGHT TO DIGNITY AND THE SUBSTANTIVE CRIMINAL LAW

The notion of liberty mediated by dignity has important implications for criminal justice. In the sphere of criminal law, the liberal conception of the individual as an autonomous moral agent finds expression in the notion that, with free will, comes personal responsibility.²⁴ It is this principle which, according to Kantian thinking, entitles the state to condemn and punish the individual for choosing to break society's laws. Holding an offender responsible for how he has chosen to act, and punishing him accordingly, is not cruel, inhuman, or degrading. On the contrary, it is an affirmation of the individual's autonomy and, hence, his inherent dignity,²⁵ whereas (for example) regarding criminal behaviour as an illness, something for which the offender is not responsible and for which he requires therapy rather than punishment,²⁶ reduces him to something less than fully human and, as such, constitutes an affront to his dignity.²⁷

²¹ Chaskalson (note 8 above) 201 and further authorities cited therein; De Chikera (note 3 above) 35.

²² Chaskalson (note 8 above) 201-202; De Chikera (note 3 above) 41; PG Carozzo 'Human Dignity in Constitutional Adjudication' in T Ginsburg & R Dixon (eds) *Research Handbook in Comparative Constitutional Law* (2011) 459, 466, available online at <http://ssrn.com/abstract=1799436>, accessed 1 November 2013.

²³ Chaskalson (note 8 above) 202-204; De Chickera (ibid): 'It becomes clear, therefore, that the "type" of liberty and equality we speak of is important. Equality and liberty can be deemed commensurable under a dignity analysis, only to the extent that they are based on dignity, and are facets of it. Equality and liberty so conceived are not absolute rights, but then, no version of either can ever be. They become valuable notions only to the extent that they promote and protect the inherent dignity of humanity. Likewise, any limitation on either becomes justifiable only to the extent that dignity is protected.'

²⁴ De Chikera (note 3 above) 41.

²⁵ Hoctor (note 7 above) 308.

²⁶ Such an approach was advocated during the 1960s by Lady Barbara Wootton, who argued for the abolition of the entire system of criminal justice based on concepts of crime and punishment, in favour of a therapeutic, preventative approach to anti-social behaviour (K Huigens 'Dignity and Desert in Punishment Theory' (2003-2004) 27 *Harvard J of L and Public Policy* 33, 35).

²⁷ Huigens (note 26 above) 35.

It follows, however, that an individual may only be subjected to punishment for criminal conduct that was in fact a product of his own free will; conduct, in other words, for which he is personally responsible and thus blameworthy.²⁸ This precept is commonly referred to as the *principle of culpability*,²⁹ a principle that is recognised to a greater or lesser degree in all modern liberal systems of criminal justice. Thus, for example, individuals are not normally punished for their involuntary acts and omissions, nor if they genuinely lack the capacity for rational choice and self-control, as in the case of young children and the mentally ill. By the same token, individuals are not normally punished for the wrongdoing of other individuals, because such conduct falls outside the domain over which the individual is able to exercise his autonomy.³⁰ The *principle of personal responsibility* can thus be regarded as a corollary of the principle of culpability.³¹

The principle of culpability however has further implications for criminal justice. The concept of culpability is closely allied with the concept of fault (*mens rea*), as expressed in the classic maxim ‘*actus non facit reum nisi mens sit rea*’; the notion that, in order for a person to be considered guilty, his unlawful conduct must have been accompanied by a culpable mental attitude towards that conduct. A person who engages in criminal conduct without the necessary *mens rea* can hardly be regarded as blameworthy and deserving of punishment.³² The importance of fault as a fundamental prerequisite of liability in Western criminal jurisprudence has been highlighted by the Constitutional Court (per O’Regan J) in the following terms:

[T]he requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment; it

²⁸ Hoctor (note 7 above) 309; and see generally M Kremnitzer & T Hörnle ‘Human Dignity and the Principle of Culpability’ (2011) 44 *Israel LR* 115.

²⁹ The term ‘culpability’ is frequently used in modern criminal law scholarship to denote the subjective elements of criminal liability (criminal capacity and fault), in distinction to the element of unlawful conduct. In the present context, however, the term is used to denote the offender’s overall guilt, comprising all the necessary elements of liability, together with his moral blameworthiness (see, for example, Kremnitzer & Hörnle’s description, note 28 above, 115).

³⁰ D Unterhalter ‘The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Another?’ (1988) 105 *SALJ* 671, 674; Kremnitzer & Hörnle (note 28 above) 129.

³¹ Kremnitzer & Hörnle (note 28 above) 128-131.

³² Hoctor (note 7 above) 309: ‘Where guilt is absent there is no moral basis for criminal liability, because it is then divorced from the right to respect. See also S Kadish ‘The Decline of Innocence’ (1968) 26(2) *Cambridge LJ* 273, 274.

lies at its heart. The State's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment.³³

The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the State may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule.³⁴

It would be evident, therefore, that the generally accepted paradigm of criminal liability, comprising a voluntary actus reus, accompanied by criminal capacity and mens rea, did not emerge by mere chance and it is not coincidental that these three elements are common requirements amongst modern Western systems of criminal law, as Moseneke J seems to suggest in *S v Thebus*.³⁵ On the contrary, they are reflective of a particular ideology concerning the nature of human existence and the proper relationship between the individual and the society in which he lives; an ideology to which South Africa has subscribed by virtue of its constitutional dispensation. It is submitted, therefore, that instead of the positivist approach that it chose to adopt in *S v Thebus*,³⁶ this paradigm of criminal liability ought to have received the recognition of the Constitutional Court as establishing the 'constitutionally permissible norm',³⁷ such that any extension of liability beyond this paradigm, whether in relation to fault, conduct, or any other element of liability, would be regarded as prima facie violations of the rights to dignity and freedom and would require justification in terms of the general limitations clause (section 36(1)).

³³ *S v Coetzee* 1997 (3) SA 527 (CC) para 162.

³⁴ *S v Coetzee* (note 33 above) para 176. The importance of the principle of culpability was however recognised in South African criminal law long before the present constitutional dispensation. The trend towards the subjectivisation of mens rea from the 1940s onwards, which led inter alia to the systematic eradication of the various doctrines and presumptions inherited from English law (see ch3, s4), was as much a response to the recognition of the importance of the principle of culpability (and a generally 'principled' approach to criminal law) as a desire for legal purism.

³⁵ *S v Thebus* (note 1 above) para 37.

³⁶ *S v Thebus* (note 1 above) para 38: 'There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so'. See the previous chapter for a criticism of this approach (Ch6, s4.2).

³⁷ *S v Thebus* (note 1 above) para 36.

The principle of culpability is not relevant only to the substantive elements of criminal liability, however. It is also closely allied to the principle of proportionality in punishment; the notion that each individual offender should be punished according to his own deserts; that is, according to the gravity of his offence and his own moral blameworthiness.³⁸ Punishing a person solely (or primarily) to act as a deterrent to others, or for preventative purposes, or in order to achieve some other socially desirable goal, treats him as a mere means to an end, rather than an end in himself, and is an affront to his dignity.³⁹ The Constitutional Court (per Ackermann J) has explicitly recognised the relationship between dignity, culpability and proportionality in punishment:

The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue... To attempt to justify any period of penal incarceration ... without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ..., the offender is being used essentially as a means to another end and the offender's dignity assailed.⁴⁰

To summarise, therefore, a 'dignified' approach to criminal justice requires that individuals be punished for their crimes, each according to his own culpability. Punishment cannot be divorced from culpability. If an individual is not culpable, no guilt attaches to him and punishment becomes merely a violation of the individual's liberty and his dignity. This implies that punishment must be essentially desert-based and desert-based punishment is necessarily proportional. Whilst deterrence, prevention and incapacitation may (at least arguably) be permissible ancillary goals of

³⁸ Kremnitzer and Hörnle (note 28 above) 115.

³⁹ Hoctor (note 7 above) 308. See also D van Zyl Smit & A Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 4 *Modern LR* 541, 546. This does not mean that deterrence might not be a legitimate *ancillary* aim of punishment; the objection is to deterrence as its sole or primary aim (Z Hoskins 'Deterrent Punishment and Respect for Persons' (2011) 8 *Ohio State J of Criminal L* 369, 376).

⁴⁰ *S v Dodo* (note 16 above) paras 37-38.

punishment,⁴¹ the punishment of the individual purely (or primarily) for instrumental purposes is objectionable, because, by treating him as no more than a means to the ends of society, it constitutes an affront to his inherent dignity and a prima facie violation of his right to liberty.

Although the above precepts are generally recognised in the criminal justice systems of all modern liberal societies, however, the extent to which they confer justiciable rights on the individual varies considerably, according to the degree of prominence accorded to the right to dignity in the particular constitutional dispensation concerned. For example, the Constitution of the United States of America (USA) and the Canadian Charter of Rights and Freedoms⁴² contain no explicit references to human dignity. Thus, in the USA, the dignity of criminal suspects and defendants is not protected directly, but is afforded protection under the rights of due process and fair trial,⁴³ whilst disproportionate punishment is reviewable under the right not to be subjected to ‘cruel and unusual’ punishment.⁴⁴ The scope for constitutional review of the substantive criminal law is however generally limited to questions of compliance with the criteria of legality,⁴⁵ although exceptions have been made in the case of laws involving the death penalty,⁴⁶ and those that can be brought under the ambit of violations of the right to privacy.⁴⁷ Although the Canadian Supreme Court takes a wider view of its powers of constitutional review of the substantive criminal law than courts in the USA, Canada approaches such challenges primarily from the perspective of the right to liberty.⁴⁸ Although the Canadian Supreme Court has implicitly recognised the principle of culpability in a number of decisions dealing with the requirement of mens rea,⁴⁹ no

⁴¹ Hoskins (note 39 above) 376.

⁴² Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (the Charter).

⁴³ Amendments 5 and 14 of the USA Constitution.

⁴⁴ Amendment 8 of the USA Constitution.

⁴⁵ M Gur-Arye ‘Human Dignity of “Offenders”: A Limitation on Substantive Criminal Law’ (2012) 6 *Criminal Law & Philosophy* 187, 188 and further authorities cited therein.

⁴⁶ For a discussion of such cases, see for example D Suleiman ‘The Capital Punishment Exception: A Case for Constitutionalizing the Substantive Criminal Law’ (2004) 104 *Columbia LR* 426.

⁴⁷ *Lawrence v Texas* 539 US 558 (2003) (decriminalisation of same-sex sodomy).

⁴⁸ The right to liberty is protected by s7 of the Charter, which provides that ‘[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’.

⁴⁹ *R v Vaillancourt* [1987] 2 SCR 636 (unconstitutionality of the felony-murder rule); *R v Martineau* [1990] 2 SCR 633 (subjective foresight of death required for murder); *R v Logan* [1990] 2 SCR 731 (subjective foresight of death required for attempted murder).

special importance is attached to the right to dignity per se and, indeed, the Canadian Supreme Court has held that respect for human dignity is not a ‘principle of fundamental justice’, for purposes of section 7 of the Charter.⁵⁰

By contrast, because of the primacy afforded to the right to dignity in the German Constitution,⁵¹ German criminal law adheres strictly to the principle of culpability. For this reason, criminal sanctions are divided into two forms, namely punishments and preventative measures. Punishments must conform strictly to the principles of culpability and proportionality, whilst preventative measures are unrelated to culpability and are based instead on dangerousness.⁵² Any criminal law infringing human dignity is unconstitutional, however, regardless of the importance of its social purpose.⁵³

In South Africa, the right to dignity, along with the right to life, is regarded as a value ‘of the highest order’ under the Constitution.⁵⁴ Although dignity does not carry quite the same primacy as in it does in German constitutional jurisprudence (where the right to dignity is considered inviolable), the prominence accorded to the right to dignity is reflected in various examples of constitutional litigation, including the review of the substantive criminal law. Thus, for example, in its decision to decriminalise same-sex sodomy, the Constitutional Court attached greater weight to the violation of the right to dignity arising from the stigmatisation of the conduct concerned than it did to the violation of other constitutionally protected rights such as equality and privacy, which were also implicated in the matter.⁵⁵ Similarly, its recent striking-down of certain sections of the current Sexual Offences Act,⁵⁶ which criminalised consensual sexual acts between adolescents, was based in the first instance on the violation by these provisions of the right to dignity, although the Constitutional Court also recognised that the

⁵⁰ *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519 (Can); see also K Roach ‘The Primacy of Liberty and Proportionality, Not Human Dignity, When Subjecting Criminal Law to Constitutional Control’ (2011) 44 *Israel LR* 91.

⁵¹ Note 12 above and accompanying text.

⁵² MD Dubber ‘Theories of Crime and Punishment in German Criminal Law’ *American J of Comparative Law* (2005) 53 679, 698-699.

⁵³ Gur-Arye & Weigend (note 14 above) 84.

⁵⁴ *S v Makwanyane* 1995 (3) SA 391, para 111; see also para 144: ‘The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in the Bill of Rights’.

⁵⁵ *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28.

⁵⁶ Sections 15 and 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; see *The Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC).

relevant provisions violated such children's right to privacy and was not conducive to their best interests. It is therefore important to be mindful of these differences in emphasis when seeking to compare South African rulings on the constitutionality of the substantive criminal law with those of other jurisdictions.

4. DIGNITY AND THE DOCTRINE OF COMMON PURPOSE

Given the interconnection between the right to dignity and the principles of culpability and proportionality in punishment, as discussed above, the doctrine of common purpose gives rise to a number of concerns:

4.1 Common purpose offends against the principle of culpability

Because the principal actor's conduct is imputed to the secondary party, the doctrine of common purpose holds the latter liable for criminal conduct which he did not personally commit; conduct which, as Unterhalter puts it, 'falls outside the domain over which the individual is able to exercise his autonomy'.⁵⁷ This is a deviation from the principle of personal responsibility, which is a corollary of the principle of culpability. At its most basic level, therefore, the doctrine represents a prima facie violation of the principle of culpability. Such a deviation could be justified, however, if it could be shown that the doctrine of common purpose nevertheless respects the principle of culpability by some other means. This could be achieved if some defensible normative basis existed for the imputation of the principal actor's conduct to the secondary party, sufficient to warrant the conclusion that the latter's wrongdoing is commensurate in culpability with that of the former. As previously discussed, authorisation, power of control and/or contributory causation would all offer such a normative basis,⁵⁸ whilst substantial participation would offer a defensible proxy.⁵⁹ None of these are necessary requirements for common purpose liability in South African law, however. On the contrary, it has been shown that there is no normative justification for the manner in which our courts have extended the scope of the doctrine to include minor and insignificant secondary participants. It is self-

⁵⁷ D Unterhalter (note 30 above) 674

⁵⁸ See ch5, s2.1.

⁵⁹ See ch5, s2.3.

evident, therefore, that in such cases the doctrine of common purpose violates the principle of culpability and, thereby, the offender's right to dignity.

Whilst this might not be considered a serious obstacle to the constitutionality of the doctrine in jurisdictions where less prominence is accorded to the right to dignity, it is submitted that it cannot be so easily disregarded in South Africa, given the prominence assigned to the value of human dignity in the Constitution. It is not insignificant, therefore, that German law, which regards the right to dignity as inviolable and which consequently places great importance on the principle of culpability,⁶⁰ contains no rules of imputation equivalent to the South African doctrine of common purpose. Instead, a distinction is drawn between perpetrators (direct and indirect, lone and multiple) and secondary parties, with liability attaching to each type of participant according to his own role in the crime.⁶¹ Although the Constitutional Court was evidently aware of the difference between German and South African law on this point when it delivered its judgment in *Thebus*,⁶² it may not have fully appreciated the implications of this difference.

4.2 Common purpose offends against the principle of proportionality in punishment

By holding a secondary party liable for the principal actor's crime, irrespective of the secondary party's own culpability, the necessary connection between culpability and punishment is disregarded. The secondary party is not only convicted of a crime that he did not personally commit; he is then sentenced as though he had committed that crime, regardless of his actual role in its conception and commission. Where his role in the planning and execution of the crime was minor and peripheral in nature, or where he is held liable for a corollary crime in which he did not participate at all and which he may have foreseen as no more than a possibility, this may translate into disproportionately harsh punishment. Although it is generally accepted that it is incumbent on a court, when passing sentence, to take account of any factors that bear upon the accused's

⁶⁰ Dubber (note 52 above) 699.

⁶¹ MD Dubber 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *J of Int Criminal Justice* 977, 979. See also ch5, s2.1.2 on the concept of 'Tatherrschaft'.

⁶² *S v Thebus* (note 1 above) para 22 and footnote 30.

moral blameworthiness, including his actual role in the commission of the crime,⁶³ as well as the nature of his mens rea,⁶⁴ the unfortunate reality is that courts seldom draw a sufficient distinction between participants on this basis. There is all too often a tendency to punish a secondary participant, whose contribution to the crime was minimal and who may not have foreseen its commission as anything more than a possibility,⁶⁵ as severely as though he were the actual perpetrator,⁶⁶ or only marginally less severely.⁶⁷

Although the worst effects of this tendency have been ameliorated in more recent years, with the abolition of the death penalty,⁶⁸ the minimum sentencing legislation currently in force hampers the sentencing discretion of a court which might otherwise be inclined to impose a less severe sentence on account of the minor role played by a secondary participant. Thus, for example, the Criminal Law Amendment Act 1997 requires the imposition of a minimum sentence of life imprisonment for murder and rape, when committed in the execution or furtherance of a common purpose or conspiracy, unless there are ‘substantial and compelling’ reasons why such sentence should not be imposed.⁶⁹ Although such statutorily prescribed minimum sentences are now described as ‘discretionary’ rather than ‘mandatory’,⁷⁰ they nevertheless represent a significant incursion upon judicial sentencing discretion. The fact that the legislature has made specific provision for the sentencing of offenders whose liability arises out of common purpose makes it difficult for a court to find that minimal participation alone constitutes a substantial and compelling reason for departing from the statutorily prescribed

⁶³ *S v Sauls* 1981 (3) SA 172 A; *S v Smith* 1984 (1) SA 583 (A). See also JR Lund ‘Extenuating circumstances, mob violence and common purpose’ (1988) 2 *SACJ* 260, 265-266.

⁶⁴ In crimes of intention, *dolus directus* will generally attract more severe punishment than *dolus eventualis*, whilst in crimes of negligence, gross negligence will generally attract more severe punishment than minor negligence.

⁶⁵ For many years, foresight of even the remotest possibility was considered sufficient to establish *dolus eventualis* and, hence, liability for collateral crimes (*S v De Bruyn & Another* 1968 (4) SA 489 (A) (minority judgment of Holmes J); *S v Shaik* 1983 (4) SA 57 (A); *S v Ngubane* 1985 (3) SA 677 (A)), whereas English law requires foresight of a real possibility (*R v Powell*; *R v English* [1997] 4 All ER 545; *R v Rahman* [2008] UKHL 45). With the SCA’s recent decisions in *S v Humphreys* 2013 (2) SACR 1 (SCA) and *S v Makgatho* (unreported) (732/12) [2013] ZASCA 34, 28 March 2013, however, it appears that South Africa is eventually following suit.

⁶⁶ *S v Safatsa* 1988 (1) SA 868 is a notorious case in point. For criticisms of the sentences imposed in this case, see Lund (note 63 above); E Cameron ‘Inferential reasoning and extenuation in the case of the Sharpeville Six’ (1988) 2 *SACJ* 243. For further examples, see Lund (*ibid*) 265 and further authorities cited therein.

⁶⁷ J Burchell *Principles of Criminal Law* 3ed (2005) 575 note 19.

⁶⁸ *S v Makwanyane* (note 7 above).

⁶⁹ Section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 107 of 1997.

⁷⁰ Pursuant to the Criminal Law (Sentencing) Amendment Act 38 of 2007.

sentences.⁷¹ The usual reasoning in such cases is that the legislature must have been mindful of the variety of forms that secondary participation might take and would have taken such considerations into account when enacting the legislation.⁷²

It is this unduly punitive feature of the doctrine that has probably attracted more criticism than any other. Dressler, for example, describes the corresponding principle in American law as ‘a disgrace’.⁷³ The reason is that, in such cases, it cannot be said that the individual is being punished according to his own deserts; instead, he is being punished primarily in order to serve the goals of society (deterrence, incapacitation and/or crime-prevention). This, for reasons that have been discussed, is an affront to his dignity. Disproportionately harsh punishment is also a violation of the constitutionally protected right not to be subjected to cruel, inhuman, or degrading punishment.⁷⁴

4.3 Common purpose offends against the principle of fair labelling

Even in cases where the sentence itself is not disproportionately harsh, however, it is submitted that the doctrine of common purpose nevertheless violates the offender’s right to dignity, because it offends against the principle of fair labelling,⁷⁵ the principle which requires that the *stigma* attaching to an offender in consequence of his conviction should be a fair and accurate reflection of his guilt. Although the principles of culpability and proportionality in punishment are well known and widely recognised principles of criminal justice, the principle of fair labelling is rather less widely recognised and some further elucidation is therefore necessary.

The concept of ‘fair labelling’ was initially derived from ‘labelling theory’, a theory developed in the early 1960s by Becker and other criminologists to explain how the stigmatisation of offenders as deviant individuals (‘outsiders’) marginalises them and

⁷¹ See, for example, *S v Vuma* 2003 (1) SACR 597 (W).

⁷² *Ibid*, 605D.

⁷³ J Dressler ‘Reforming Complicity Law: Trivial Assistance as a Lesser Offence’ (2008) 5 *Ohio State J of Criminal L* 427, 428.

⁷⁴ *S v Dodo* (note 16 above) paras 37-38 (see note 40 above and accompanying text). The right ‘not to be treated or punished in a cruel, inhuman or degrading way’ is protected by s12(1)(e) of the Constitution.

⁷⁵ Burchell (note 67 above) 586.

predisposes them to re-offend.⁷⁶ In 1981, in an essay on the subject of transferred intention, Professor Andrew Ashworth,⁷⁷ who was both a criminologist and a scholar of criminal law, adopted the term ‘labelling’ (stigmatisation) from labelling theory and, bridging the traditional divide between criminology and normative legal theory,⁷⁸ coined the term ‘representative labelling’,⁷⁹ which he described as ‘the belief that the label applied to an offence ought fairly to represent the offender’s wrongdoing’.⁸⁰ Further on in the same essay, he explains:

[O]nce the label is entered on the person’s criminal record the passage of time will dim recollections of the precise nature of the offence and may result in the label being taken at face value. Both out of fairness to the individual and in order to ensure accuracy in our legal system, therefore, the legal designation of an offence should fairly represent the offender’s criminality.⁸¹

Professor Glanville Williams, responding to Ashworth’s essay, amplified the latter’s brief exposition of the principle with the words:

I understand this to mean not merely that the name of the abstract offence but the particulars stated in the conviction should convey the degree of the offender’s moral guilt, or at least should not be positively misleading as to that guilt’.⁸²

⁷⁶ See, for example, HS Becker *Outsiders: Studies in the Sociology of Deviance* (1966) (revised 1973) 178-181)

⁷⁷ Recently-retired Vinerian Professor of English Law in the Law Faculty of Oxford University.

⁷⁸ N Lacey ‘Principles, Policies, and Politics of Criminal Law’ in L Zedner & JV Roberts (eds) *Principles and Values in the Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 28-29.

⁷⁹ A Ashworth ‘The Elasticity of Mens Rea’ in CFH Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (1981) 45, 53. According to Lacey, Ashworth’s point was that ‘normative principles of criminal law connect not only with a fundamental concern with the criminal law’s legitimacy, but also that a baseline of legitimacy is key to criminal law’s efficacy as a system co-ordinating evaluation of behaviour and contributing to reasonably peaceable social relations’ (Lacey, note 78 above, 29).

⁸⁰ Ashworth (note 79 above) 53.

⁸¹ Ashworth (note 79 above) 56. In the current edition of his textbook, Ashworth offers the following expanded definition: ‘[The principle’s] concern is to see that widely felt distinctions between different kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking’ (A Ashworth *Principles of Criminal Law* 6ed (2009) 78).

⁸² G Williams ‘Convictions and Fair Labelling’ (1983) 42 *Cambridge LJ* 85. He went on to remark that the principle of fair labelling is immune from challenge as a principle of criminal justice (ibid, 85-96): ‘The principle of fair labelling has not been explicitly adopted in the law or by our courts, but all the same it is immune from challenge as a principle of justice. No-one could argue that unfair labelling is acceptable (apart, of course, from cases where it has to be accepted for practical reasons).’

Professor Williams in turn proposed the term ‘fair’ labelling, which he thought was a more accurate description than Ashworth’s original term,⁸³ and it is Williams’s term that has since been generally adopted. Although Chalmers and Leverick claim that the principle of fair labelling has since become ‘common currency in criminal law scholarship’,⁸⁴ this may be a mild exaggeration. Literature on the subject is hardly abundant or extensive, but it is fair to say that the principle has been accorded increasing recognition, although largely within the United Kingdom of Great Britain (UK).⁸⁵ Thus, for example, a number of modern authorities on English law, like Simester and Sullivan,⁸⁶ Herring,⁸⁷ Clarkson⁸⁸ and, of course, Ashworth himself,⁸⁹ now include at least a brief discussion of the subject in the introductory chapters of their standard works. One area of legal scholarship in which the principle of fair labelling has indeed become common currency is the relatively young, but rapidly-developing field of international criminal law. Robinson goes so far as to identify the principle of fair labelling as one of three fundamental principles of criminal law, recognised by international criminal law, which distinguish a liberal system of criminal justice from an authoritarian system.⁹⁰ The principle of fair labelling has also received some degree of formal recognition in Canadian law, by virtue of a series of judgments, beginning with *R v Vaillancourt*, in which the Supreme Court has held that, in view of the ‘special stigma’ attaching to certain crimes, such as murder, attempted murder, war crimes and

⁸³ Williams (note 82 above) 85. Williams was concerned that the term ‘representative’ might be misleading, since it is also used in other legally relevant senses, as for example in the term ‘representative government’.

⁸⁴ J Chalmers & F Leverick ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217, 217.

⁸⁵ It would not be correct, however, to think that recognition of the principle of fair labelling has been entirely confined to the UK. It has also received some degree of recognition in Canadian and Australian legal circles; see, for example, B Ziff ‘The Rule Against Multiple Fictions’ (1986) 25(2) *Alberta LR* 160 and D Stuart ‘The Dangers of Quick Fix Legislation in the Criminal Law’ in RJ Daniels, P Macklem and K Roach (eds) *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (2001). See also A Hemming ‘Reasserting the Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests’ 2011 (13) *Univ of Notre Dame Australia LR* 69.

⁸⁶ AP Simester & CR Sullivan *Criminal Law Theory and Doctrine* 2ed (revised) (2004) 44-45.

⁸⁷ J Herring *Criminal Law: Texts, Cases and Materials* 5ed (2012) 1-15.

⁸⁸ CMV Clarkson *Understanding Criminal Law* 4ed (2005) 9-12.

⁸⁹ Ashworth (note 81 above) 78-80.

⁹⁰ D Robinson ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden Journal of International Law* 925, 926; and see also D Robinson ‘The Two Liberalisms of International Criminal Law’ in C Stahn & L van den Herik (eds) *Future Perspectives on International Criminal Justice* (2010) 115, 119-120. The other two principles that he identifies are the principle of personal culpability and the principle of legality (*ibid*).

crimes against humanity, as well as the severity of punishment in such cases, subjective mens rea is a Constitutional requirement for liability.⁹¹

Simester and Sullivan explain that the principle of fair labelling is a necessary adjunct to the need for justice not only to be done, but to be seen to be done.⁹² They go on to explain:

The criminal law speaks to society as well as wrongdoers when it convicts them, and it should communicate its judgment with precision, by accurately naming the crime of which they are convicted.⁹³

Like Ashworth, Simester and Sullivan take the view that the designations attached to offences (their ‘labels’) should reflect public perceptions of differences in wrongdoing and that, where these distinctions are blurred, the law’s communicative function is impaired. Further in this regard, they explain that the distinction between crimes is not merely a matter of distinguishing between different outcomes of criminal conduct (the nature and/or amount of harm done), but also reflects socially significant differences in the conduct leading to those outcomes (the mode of offending).⁹⁴ The law must make it clear, they argue, ‘exactly what *sort* of criminal each offender is’ (emphasis added) and communicate this to the offender, so that he knows exactly how he has transgressed and the reason for his punishment.⁹⁵ In this way, the punishment will be meaningful to him and not just arbitrary harsh treatment. This information must also be communicated to the public, so that it knows the nature of the offender’s transgression.⁹⁶ In essence, therefore, the principle of fair labelling requires the definition of an offender’s guilt in

⁹¹ *R v Vaillancourt* and other cases referred to in note 49 above; and see also *R v Finta* [1994] 1 SCR 701 (subjective mens rea required for war crimes and crimes against humanity). It should be noted that Canadian law does not always require subjective mens rea for crimes that would normally require this form of fault in South African law.

⁹² Simester & Sullivan (note 86 above) 44.

⁹³ *Ibid.*

⁹⁴ Thus, for example, they argue that it would be wrong to conflate the crimes of vandalism and negligent damage to property, because although their outcome (loss of property) may be the same, vandalism involves a degree of contempt for society that is not present in negligent damage to property (*ibid.*). Herring makes the same point in slightly different terms: ‘In defining the offence, it is necessary to distinguish between the losses suffered by the victim and the wrongs done to the victim’. He argues that it is therefore appropriate for the law to distinguish between crimes such as criminal damage to property and theft, and between negligent injury and assault (Herring, note 87 above, 14-15).

⁹⁵ Simester & Sullivan (note 86 above) 45.

⁹⁶ *Ibid.*

such a way that his particular *type* of wrongdoing, its relative *gravity* and the extent of his *legal and moral blameworthiness* are accurately expressed and conveyed, thereby enabling his personal culpability to be accurately assessed and readily distinguished from that of other offenders.

It would be evident, therefore, that the principle of fair labelling derives from the recognition of the importance of the criminal law's condemnatory or denunciatory function, which in turn has important implications for an offender's rights of personality. A criminal conviction has two immediate implications for an offender: Firstly, the court's verdict is a formal, public statement of condemnation (denunciation)⁹⁷ and, as such, it constitutes a direct affront to the offender's dignity (an *injuria*).⁹⁸ Secondly, it determines the stigma that will attach to the offender in the eyes of the public; that is to say, the extent to which his reputation (*fama*) stands to suffer in consequence of his conviction,⁹⁹ which in turn constitutes a further infringement of his legally protected rights of personality. Whatever justifications may exist for permitting these infringements (and it is commonly accepted that they are indeed justified),¹⁰⁰ it is clear that such justifications can hold good only insofar as the court's verdict is a true and fair reflection of the offender's culpability. A misrepresentation of an offender's guilt cannot constitute a justifiable infringement of his rights of personality.

Furthermore, whilst some might regard the stigmatisation of criminal offenders as no more than an unfortunate, but unavoidable 'by-product' of conviction and punishment, the more common view is that such stigmatisation is an essential function of the

⁹⁷ V Tadros 'Fair Labelling and Social Solidarity' in L Zedner & JV Roberts (eds) *Principles and Values in the Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 67, 72.

⁹⁸ O Lagodny 'Human dignity and its impact on German substantive criminal law and criminal procedure' (1999) 33 *Israel LR* 575, 578: 'The guilty-verdict encroaches upon a basic right which is constituted by human dignity: The right of human personality... This right is mainly based on aspects of human dignity. The guilty verdict severely encroaches upon this right, because the verdict means that the person has acted in contradiction to the highest values of society and because – in addition – this verdict is made publicly. Therefore, human dignity is at stake, because this verdict is meant to stigmatize and to dishonour the violator'.

⁹⁹ B Mitchell 'Multiple Wrongdoing and Offence Structure: A Plea for Consistency and Fair Labelling' (2001) 63 *Modern LR* 393, 412; Tadros (note 97 above) 618; Simester & Sullivan (note 86 above) 30; Chalmers & Leverick (note 84 above) 227-228.

¹⁰⁰ Lagodny explains that '[t]he inner legitimation of the criminal-law-verdict is the misuse of responsibility, the latter being one of the core aspects of human personality.' (Lagodny, note 98 above, 578). For a general discussion of the various justifications that may be advanced for an infringement of personality rights, see Loubser & Midgley (note 3 above) 346-356.

criminal justice system and a central element of punishment.¹⁰¹ If this is accepted as correct, it follows logically that the principle of proportionality should apply, not only to the sentence formally imposed by the court, but also to the stigma that the offender must bear in consequence of his conviction and sentence.¹⁰² Since unfair labelling implies unfair stigmatisation,¹⁰³ it can be argued that it also amounts to disproportionately harsh punishment. Unfair labelling also has serious implications for future punishment. An offender's criminal record will have a direct impact on his sentence in the event that he re-offends. In such cases, the offender's criminal record is likely to be 'taken at face value', as Ashworth puts it.¹⁰⁴ The offender therefore has a direct and concrete interest in having the nature and gravity of his offences fairly and accurately reflected in his criminal record. If his culpability is overstated, it is likely to result in undeservedly harsh (and thus disproportionate) punishment being imposed in the future.¹⁰⁵

The doctrine of common purpose stigmatises a secondary party as having committed a crime that he did not in fact commit and in which his role may have been merely minor and peripheral. A secondary party may thus be branded a 'murderer', a 'robber', an 'arsonist', etc, when he has neither committed such a crime, nor been instrumental in its commission in any meaningful sense. This overstatement of the offender's guilt amounts to unfair stigmatisation.¹⁰⁶ Although this is true of any crime, it is of particular concern in the case of murder, being arguably the most serious crime in our law, in view of the fact that South African law, unlike some other legal systems, does not distinguish between different degrees of murder. For the reasons explained above, it is submitted that this unfair stigmatisation amounts to an unjustifiable infringement of the offender's right to dignity and reputation and, furthermore, because of the foregoing, amounts to

¹⁰¹ This approach is most commonly espoused by adherents of the communicative (expressive/declaratory/condemnatory) theory of punishment, which has gained currency in recent years, along with a revival in retributivism (A Duff & D Garland *A Reader on Punishment* (1994) 13-16 and further authorities cited therein; A von Hirsch 'Proportionate Sentences: A Desert Perspective' in M Tonry (ed) *Why Punish? How Much?* (2011) 207, 208-210; and see also Tadros (note 97 above); J Feinberg *Doing and Deserving* (1970) 95-118 (reprinted as 'The Expressive Function of Punishment' in A Duff & D Garland (eds) *A Reader on Punishment* (1994) 71); A von Hirsch *Censure and Sanctions* (1993) 6-19 (reprinted as 'Censure and Proportionality' in Duff & Garland (op cit) 115).

¹⁰² Von Hirsch seems to imply this when he discusses the role of censure as integral to punishment (Von Hirsch 'Proportionate Sentences: A Desert Perspective' (note 101 above) 208-211.

¹⁰³ Chalmers & Leverick (note 84 above) 226.

¹⁰⁴ Note 81 above and accompanying text.

¹⁰⁵ Chalmers & Leverick (note 84 above) 231-232.

¹⁰⁶ Burchell (note 67 above) 586.

disproportionately harsh punishment. It is possible that these were the points that the appellants were attempting to make in their first argument in *S v Thebus*.¹⁰⁷ If so, it is unfortunate that they were not made more effectively, or taken more seriously by the Constitutional Court.

5. CONCLUDING REMARKS

In the previous chapter, it was shown that the arguments advanced by the appellants in *Thebus*, to the effect that the doctrine of common purpose, in its present form, infringes the right to freedom and security of the person and the right to be presumed innocent, should have received more serious consideration by the Constitutional Court than they were accorded, at least to the point of subjecting such infringements to scrutiny in terms of the general limitations clause (section 36(1)). In this chapter it has been shown that the doctrine of common purpose also infringes the principles of culpability, proportionality in punishment and fair labelling, thereby violating the right to dignity, with which these principles are intimately associated. In so doing, it also violates the right not to be subjected to cruel, inhuman or degrading punishment. Although this is not necessarily so in all cases where the doctrine applies, it is indeed the case when the doctrine is applied to minor and insignificant secondary participants, where there is neither any normative justification for the application of the doctrine, nor any demonstrable instrumental justification.

It is therefore submitted that, despite the Constitutional Court's ruling to the contrary in *Thebus*, the doctrine of common purpose does not in fact pass constitutional muster in such cases, and that our law of complicity is consequently in need of reform, to bring it into line with Constitutional norms and values. Conclusions and recommendations in this regard will be discussed in the final chapter.

¹⁰⁷ *S v Thebus* (note 1 above) para 35.

CHAPTER 8

CONCLUSIONS AND RECOMMENDATIONS

1. SUMMARY OF FINDINGS AND CONCLUSIONS

1.1 The scope and ambit of the doctrine of common purpose

It has been shown that, whereas the Roman-Dutch law approach towards complicity was monistic in nature, the English law approach was largely dualistic, with a distinction being drawn between primary and secondary participants (principals and accessories) in the case of felonies. During the early part of the 19th century, English law developed the doctrine of common purpose in order to extend the scope of liability of principals in the second degree (abettors), which was in turn based on the older principle of imputed conduct. Whilst liability as a principal in the second degree originally required proof of aiding and abetting, the doctrine of common purpose held that a secondary participant would be liable as a principal in the second degree if he was present at the time of the crime, in pursuance of a prior conspiracy to commit the crime in concert with the actual perpetrator or perpetrators. It was then unnecessary to prove conduct on the part of the secondary participant amounting to actual aiding and abetting.

It has also been shown that, whilst the South African approach towards complicity was originally based on Roman-Dutch law, the English law approach was adopted and superimposed onto the Roman-Dutch law approach during the early years of the 20th century. It may be speculated that this was done primarily because the doctrine of common purpose (and the principle of imputed conduct on which it was based) provided a legal basis for holding secondary participants liable as co-principals, in accordance with the monistic approach preferred in Roman-Dutch law. In so doing, however, the South African courts extended the scope of the doctrine considerably, so as to bring accessories before the fact and, eventually, all co-conspirators within its ambit. Thus, whereas English law required presence at the time of the crime, in pursuance of a conspiracy to commit the crime in concert, South African law dispensed with the need for all these requirements to be met in any given case. Accordingly, where

there is a prior conspiracy, South African law does not require presence at the time of the crime, or an actual contribution towards its execution. Because of this, it appears that, in South African law, a common purpose need not take the form of a conspiracy to commit a particular crime or crimes; it may also take the form of an ‘ongoing’ conspiracy to commit a series of crimes, the particulars of which need not have been determined by the conspirators at the time of their act of association.¹

In addition to these developments, however, and even more controversially, the South African courts also extended the scope of the doctrine so as to dispense with the need for prior conspiracy in all instances. Thus, where there is presence at the time of the crime, it is unnecessary to prove the existence of a prior conspiracy, or an actual contribution towards the execution of the crime (aiding and/or abetting); all that is required is unilateral conduct showing solidarity with the conduct of the actual perpetrator, coupled with the necessary intention to commit the crime in concert with the latter.² And, lastly, South African law dispensed with the need to establish the scope of a common purpose as a matter of objective fact. It is only necessary to prove association in a criminal enterprise of some kind, coupled with the necessary mens rea for the crime in question, which is generally established by ex post facto enquiry. Thus one party to a common purpose will be liable for a collateral crime committed by another if the commission of that crime was foreseen as a possibility by the former, regardless of what the parties may have agreed upon in advance and regardless of whether the collateral crime was necessary for, or incidental to the achievement of the common purpose.

It can be concluded, therefore, that since its adoption into South African law, the scope of the doctrine of common purpose has been extended well beyond its original scope in English law, or indeed its scope in other common-law jurisdictions which also apply a version of the doctrine, with the sole exception of Scottish law. Consequently, whilst South African law does allow for accessorial liability, in the form of accomplices, the scope of the doctrine of common purpose is now so wide that it leaves very little scope for accessorial liability. In the vast majority of cases, a person who furthers or assists in

¹ *S v Nzo* 1990 (3) SA 1 (A).

² *S v Mgedezi* 1989 (1) SA 687 (A).

the commission of another's crime will be a co-perpetrator, rather than an accomplice, by virtue of the doctrine of common purpose. As a result, the South African approach towards complicity has remained largely monistic in nature, with very little scope for the drawing of distinctions between participants on the basis of their actual role in the conception and commission of the crime and, hence, on the basis of their own culpability.

1.2 Justifications for the doctrine of common purpose

It has been shown that, although the medieval English principle of imputed conduct originally rested on little more than practical exigency (the need to convert accessories at the fact into co-principals, so as to render them amenable to justice without the need for the principal offender first to be tried and convicted) the doctrine of common purpose has generally been rationalised on the basis of the principles of agency. In South African law, it was originally considered to rest on the principle of implied mandate; or, more properly, quasi-mandate.

Despite criticisms of the mandate analogy, it has been shown that the concept of mandate nevertheless offers three clear and defensible normative grounds upon which the imputation of a principal actor's conduct to a secondary participant may be justified; namely, authorisation, power of control and indirect causation: Where a remote party instructs or authorises another person to perform a criminal act, or has the power to direct and control the latter's conduct, or influences the latter into committing a crime, then the latter is merely the instrument through which the remote party exercises his autonomous will. In such circumstances, it is entirely in accordance with the principles of normative justice to regard the remote party as a co-perpetrator of the crime and to impute the actual perpetrator's criminal conduct to him for such purpose.³ It has also been argued that, in cases where one party is a substantial participant in the planning or commission of another's crime, this too would offer a defensible proxy for causation, as a basis for holding the secondary participant liable as a co-perpetrator.

³ Qui facit per alium facit per se.

Authorisation, power of control, indirect causation and substantial participation are not, however, sufficient to justify the extremely broad scope of common purpose liability in modern South African law. In particular, they cannot justify the imputation of the principal actor's criminal conduct to a minor secondary participant, who exercised no authority, control, or influence over the commission of the crime and whose contribution thereto was of no significance or consequence. This is so, regardless of whether the secondary participant's act of association took the form of prior conspiracy, or spontaneous association. On the contrary, it has been shown that there is no normative justification of any kind for the extension of the doctrine of common purpose to cover such cases.

The lack of any normative basis for the doctrine in such cases is highly problematic, since it flies in the face of decades of legal development and refinement, in which our courts have generally striven to approach the criminal law on a rational, systematic and principled basis. It is also problematic, since it means that liability for a serious crime like murder can arise from a relatively trivial act of association, which in no way contributed to the death of the deceased, or encouraged or facilitated the commission of the crime. This is an unacceptable departure from the principles of normative criminal justice, which require liability and punishment to be commensurate with personal culpability. Disregard for the principle of culpability is inherently problematic in a constitutional dispensation that seeks to protect fundamental human rights and, in particular, to foster respect for the inherent dignity of each individual, including those who offend against the law.

Although the Constitutional Court attempted to justify the doctrine primarily on the basis of the pressing need for crime control,⁴ it was shown that crime control arguments in favour of the doctrine are far from convincing. There is no empirical evidence to show that the interests of crime control are better served by a monistic approach to complicity than by a dualistic approach. On the contrary, what evidence there is on the subject suggests that there may well be greater utility in a dualistic approach, because an approach based on differences in personal contribution to the commission of the crime coincides more closely with public perceptions of differences in moral blame-

⁴ *S v Thebus* 2003 (6) SA 505 (CC).

worthiness, and because assigning liability in proportion to perceived moral blameworthiness ('fair labelling') helps to harness the normative social influences of the community, which have proven to be a more effective crime deterrent than the fear of detection and punishment per se. In short, therefore, it can be concluded that there is no real justification for the doctrine in its present extensive form, other than that it favours the convenience of the prosecution. Prosecutorial convenience alone cannot however be regarded as a sufficient justification for the draconian treatment of offenders in a constitutional dispensation that is concerned with the protection of fundamental human rights.

1.3 The constitutionality of the doctrine

Although the Constitutional Court found the doctrine of common purpose to be constitutionally compliant in *S v Thebus*,⁵ it has been shown that the Constitutional Court's ruling is open to criticism in a number of respects and it has been argued that the doctrine of common purpose, in its present extended form, does in fact violate an offender's constitutionally protected rights. Firstly and most importantly, the doctrine infringes the offender's right to dignity,⁶ because:

1.3.1 It allows for the imposition of liability without regard for the principle of personal culpability; the essential principle whereby the dignity of offenders is protected and the moral and social legitimacy of the criminal justice system is maintained. Although this is not the case in those instances where there is a clear and defensible normative basis for the imputation of the primary actor's conduct to the secondary party (as discussed above), it is the case where such conduct is imputed to minor and insignificant secondary parties, whose culpability cannot be regarded as commensurate in any sense with that of the principal actor and other major participants.

1.3.2 By allowing for the imposition of liability without regard for personal culpability, it also allows for the imposition of punishment without regard for

⁵ *S v Thebus* (note 4 above).

⁶ The right to dignity is protected by s10 of the Constitution of the Republic of South Africa 1996 (the 1996 Constitution).

personal desert. It has been explained that, in a constitutional dispensation that seeks to protect human dignity and personal freedom, punishment should essentially be desert-based. Where an offender's sentence is not based on personal desert, but is imposed primarily for reasons of social utility (such as crime control), it infringes the offender's right to dignity; and, where such sentence is substantially more severe than the offender deserves, it also amounts to disproportionately harsh punishment. It has furthermore been shown that, in our constitutional jurisprudence, disproportionately harsh punishment is necessarily cruel, inhuman and degrading, and thus a violation of the right to freedom and security of the person.⁷

1.3.3 Even in those cases where the offender's sentence is not substantially more severe than he deserves, however, it has been shown that the doctrine of common purpose nevertheless infringes the principle of fair labelling,⁸ because it stigmatises the offender as having committed a crime that he did not in fact commit and in which his role may have been minor and negligible. Over-representing an offender's culpability amounts to unfair stigmatisation, which in turn constitutes an unjustifiable insult to his dignity, as well as an unjustifiable injury to his reputation. It has been argued that these unjustifiable injuries represent disproportionately harsh punishment in themselves and, hence, a violation of the offender's right to freedom and security of the person. Furthermore, insofar as the public record overstates the offender's culpability, it compromises his right to a fair and proportionate punishment in the event that he re-offends, which is a further, prospective violation of his right to freedom and security of the person.

Secondly, because the doctrine of common purpose infringes the offender's right to dignity and may furthermore subject him to disproportionately harsh punishment, as described above, it is submitted that it also infringes his constitutionally protected right

⁷ The right 'not to be treated or punished in a cruel, inhuman or degrading way' is protected by s12(1)(e) of the 1996 Constitution, which is concerned with the protection of the right to freedom and security of the person.

⁸ The principle of fair labelling requires that the *stigma* attaching to an offender in consequence of his conviction should be a fair and accurate reflection of his guilt.

not to be deprived of his freedom without just cause.⁹ Although it is conceded that the doctrine does not represent an ‘arbitrary’ deprivation of freedom, since it is causally linked to the objectively-determinable government purposes of crime control and prosecutorial convenience, it has been shown that these purposes alone are not sufficient to constitute ‘just cause’ for such a deprivation. It has been held that the concept of ‘just cause must be grounded upon and consonant with the values expressed in [section] 1 of the Constitution and gathered from the provisions of the Constitution’;¹⁰ yet it has been shown that, in the case of minor and insignificant secondary participants, where there is no normative basis for the application of the doctrine, the doctrine is not consonant with the values expressed in section 1 of the Constitution, nor is it consistent with those provisions of the Constitution that are concerned with the protection of the right to dignity and the right to not to be subjected to cruel, inhuman or degrading punishment.¹¹ At the same time, no evidence has been advanced to support the Constitutional Court’s suggestion that, without the doctrine, significant numbers of criminal participants would be beyond the reach of the law;¹² nor (as previously mentioned) has any evidence been advanced to show that the interests of crime control are better advanced by holding secondary participants liable as co-principals than by treating them as accomplices. It can therefore be concluded that, in those cases where there is no normative foundation for the application of the doctrine, it cannot represent a constitutionally permissible norm of liability, sufficient to constitute just cause for depriving an individual of his freedom.

Lastly, it is submitted that the doctrine of common purpose infringes the presumption of innocence,¹³ because, to paraphrase the words of Cameron J in *S v Meaker*,¹⁴ the effect of the doctrine is to ‘lock the accused into the crime’ by associating him, through a fact

⁹ The right ‘not to be deprived of freedom arbitrarily or without just cause’ is protected by s12(1)(a) of the 1996 Constitution.

¹⁰ *S v Boesak* 2001 (1) SACR 1 (CC) para 37 (per Lange DP, cited with approval in *S v Thebus*, note 4 above, para 39).

¹¹ Sections

¹² They could instead be held liable as accomplices to the crime, or convicted of incitement or conspiracy to commit the crime, or, in appropriate cases, of an attempt to commit that crime, or of attempted incitement, or public violence.

¹³ The right to be presumed innocent is protected by s35(3)(h) of the 1996 Constitution. Section 35 deals with the incidents of the right to a fair trial.

¹⁴ *S v Meaker* 1998 (2) SACR 73 (W).

presumed from his association with the principal actor, with the commission of the offence.¹⁵

Although none of the rights protected by the 1996 Constitution may be regarded as absolute and inviolable, it is submitted that the abovementioned infringements are neither reasonable nor justifiable in an open and democratic society, based on human dignity, equality and freedom, when all relevant factors are taken into account, including (1) the nature of the rights infringed (the right to dignity and freedom and the right to be presumed innocent, bearing in mind, in particular, the high value accorded to the right to dignity); (2) the relatively low value to be accorded to the true purpose of the doctrine (prosecutorial convenience); (3) the draconian nature and extent of the limitation posed by the doctrine, which holds minor and insignificant secondary participants liable as though they had committed the crime themselves; (4) the fact that the doctrine goes further than is reasonably necessary to ensure that those who intentionally participate in the commission of crimes by other persons are criminalised and punished; and (5) the fact that there are equally practical, normatively defensible and less draconian measures available to achieve this purpose.¹⁶

It can be concluded, therefore, that the doctrine of common purpose, in its present form, represents an unreasonable and unjustifiable limitation of the rights referred to above; namely, the right to dignity, the right to freedom and security of the person, and the right to be presumed innocent, and that the South African law of complicity is consequently in need of reform in order to render it constitutionally compliant.

¹⁵ Cf the dictum of Cameron J in *S v Meaker* (note 14 above) 84A-B.

¹⁶ Section 36(1) of the 1996 Constitution provides: 'The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

2. RECOMMENDATIONS FOR REFORM

There are various ways in which the reform of the South African law of complicity could be approached. The radical approach would be to eradicate the doctrine of common purpose entirely and to judge all secondary participants on the basis of their liability as accomplices.¹⁷ This would doubtless be regarded as the only satisfactory solution by those critics who, like Rabie,¹⁸ object to the principle of imputation per se, and would prefer to see liability based on a causal nexus between the conduct of the secondary party and the commission of the crime. At the same time, there are other critics, like the appellants in *S v Thebus*, who do not object to the doctrine of common purpose in general, but only to the active association form of common purpose.¹⁹ It has been shown, however, that the broadening of the scope of common purpose liability arising from prior conspiracy, so as to include the type of ‘ongoing’ common purpose envisaged *S v Nzo*,²⁰ is equally capable, in its own way, of producing unjust and constitutionally questionable results as the active association form of common purpose. It is therefore submitted that the preferable approach to reform would be one that is guided, as far as possible, by existing normative principles; in particular, the principles of culpability and fair labelling. Proposals for the reform of the South African law of complicity are accordingly submitted with these considerations in mind.

2.1 Categories of participant

It is submitted that there is no need for the creation of additional or alternative forms of participation. The existing three categories of participant (perpetrators/co-perpetrators, accomplices and accessories after the fact) are sufficient and should be retained. The scope of liability as a co-perpetrator, arising from association in a common purpose, should however be considerably narrowed, thus allowing considerably wider scope for accomplice liability, as more fully described below.

¹⁷ This appears to be what Burchell is advocating in his critique of the doctrine of common purpose (J Burchell *Principles of Criminal Law* 3ed (2005) 583.

¹⁸ M Rabie ‘The Doctrine of Common Purpose in Criminal Law’ (1971) 88 *SALJ* 227, 237.

¹⁹ *S v Thebus* (note 4 above).

²⁰ *S v Nzo* (note 1 above) introduced the concept of an ‘ongoing’ common purpose.

2.2 Co-perpetrator liability

It is submitted that liability as a co-perpetrator (co-principal) on the basis of the doctrine of common purpose should be reserved for those cases where the secondary participant's role in the commission of the crime is sufficient to render him an 'indirect' perpetrator, in accordance with the maxim *qui facit per alium facit per se*. In order to achieve this, liability should be based on more than mere association with the actual perpetrator, regardless of whether such association arose spontaneously, or from prior conspiracy. Association should remain a *minimum* requirement for liability as a co-perpetrator and the existing criteria for association should be retained for this purpose,²¹ but it should no longer be a *sufficient* requirement. Liability should instead be based on association *plus* a substantial contribution to the conception, planning or execution of the crime.²² It is accordingly recommended that the following secondary/remote participants (only) should be regarded as co-perpetrators in terms of the doctrine of common purpose:

1. A conspirator who also *instigates* (procures or otherwise authorises) the commission of the crime by the actual perpetrator;²³
2. A conspirator who also plays a substantial role in the *conception and/or planning* of the crime;²⁴
3. A party to a common purpose, whether formed by conspiracy or active association, who also plays a substantial role in the *execution* of the crime.

²¹ That is to say, the requirements for conspiracy and the requirements for spontaneous association, as set out in *S v Mgedezi* (note 2 above), depending on the facts of the case.

²² The proposals that follow in this regard are substantially in accordance with Dressler's proposals, discussed in ch5, s2.3 (see further J Dressler 'Reforming Complicity Law: Trivial Assistance as a Lesser Offence' (2008) 5 Ohio State J of Crim L 427, 448).

²³ In this case, 'authorised' should mean *actual* authorisation, whether express or tacit (by conduct). There should be no scope for fictional or constructive (implied) authorisation.

²⁴ The term 'substantial role' is intended to denote the equivalent of Dressler's concept of 'substantial participation', as discussed in ch5 s2.3 (Dressler, note 22 above, 448). Whilst it may be thought that substantial participation is too flexible a criterion for criminal liability and that it would not be able to satisfy the need for reasonable certainty of outcome (the *ius certum*), it is submitted that it is no more flexible than the present test for legal causation, or the distinction between an attempt and an act of mere preparation, both of which require a court to make a value judgment, which in turn is ultimately guided by considerations of public policy, fairness and reasonableness.

Conspirators, as envisaged in the first and second scenarios, would not need to be present at the time of the crime in order for liability to arise.²⁵ In the third scenario, presence at the time of the crime would of course be necessary, in order for there to be substantial participation in the execution of the crime.²⁶ In all three scenarios, it is submitted, there are clear and defensible normative grounds for regarding the secondary participant as a perpetrator, albeit of an indirect kind, rather than as an accessory. It is further submitted that, in these circumstances (and despite the arguments of those critics who object to the principle of imputation per se), there can be no legitimate objection to imputing the principal actor's conduct to the remote or secondary party, or to invoking the doctrine of common purpose in order to do so.

2.3 Accomplice liability

It follows that a secondary participant who does not meet the requirements for common purpose liability, as described in one or other of the three scenarios outlined above, would at most be regarded as an accomplice. Whilst there is no need to reform the present law of accomplice liability, there is certainly a need (as mentioned at the conclusion of the fourth chapter) for this area of law to be developed and refined. In particular, in order for accomplice liability to fulfil the expanded role envisaged for it, it will be vitally important to clarify the nature of the causal relationship that is required to exist between the conduct of an accomplice and the commission of the crime by the actual perpetrator, and to do so in such a way that the scope of accomplice liability is not unduly narrowed. It is therefore proposed that it should be regarded as sufficient if the accomplice's conduct merely facilitates the commission of the crime in some way (that is to say, makes it easier, more expeditious, or more convenient for the actual perpetrator to commit the crime), even if the crime could and probably would have been committed without the accomplice's contribution. This would mean that a conspirator who neither instigates the crime, nor plays a substantial role in its planning and/or

²⁵ That is to say, the distinction drawn by Lewis AJA in *S v Njenje* 1966 (1) SA 368 (SRA)) 377B-C should be revived.

²⁶ Where the crime was executed by prior conspiracy, then such presence could take the form of constructive presence, so that it would include an active participant who is physically stationed at a remote location, but who is nevertheless in contact with the perpetrators and/or is playing a pre-assigned role in the execution of the crime. The concept of constructive presence is sufficiently well documented in English law that there should be no difficulties of interpretation.

execution, would be regarded as an accomplice only if his conduct amounted in some way to furthering or assisting in the commission of the crime. Merely showing ‘solidarity’ with the perpetrator, by expressing agreement with, or approval of the commission of the crime, would not suffice for accomplice liability.

2.4 Other forms of liability

There will therefore be a relatively small number of individuals who are currently being held liable as co-perpetrators, by virtue of the doctrine of common purpose, who will meet neither the reformulated requirements for common purpose liability, nor qualify to be regarded as accomplices. This, it is submitted, is entirely in accordance with the principles of culpability and fair labelling. Thus, a person who conspires to commit a crime, but who is not an instigator and plays no part at all in its planning or execution (for example, the individual described above, who merely expresses agreement with, or approval of the commission of the crime) would no longer be regarded as a party to the crime. Such a person would however be liable instead for the inchoate crime of conspiracy to commit the crime in question. By the same token, a person who is present at the scene of a crime and who joins in with its commission, but whose role in the commission of the crime is insignificant and inconsequential (like that of the fourth accused in *S v Safatsa*),²⁷ would no longer be regarded as a participant either. Depending on what form his conduct took, however, such an individual might be liable for an attempt to commit the crime, or for incitement to commit it, or for attempted incitement, or, in an appropriate case, for the crime of public violence.²⁸

2.5 Liability for collateral crimes

As far as possible, liability for collateral crimes should be attributed in accordance with the general principles and distinctions outlined above. For this purpose, it is proposed that a distinction be drawn between the different types of co-perpetrator, according to their method of association:

²⁷ *S v Safatsa* 1988 (1) SA 868 (A).

²⁸ These recommendations are largely in accordance with Burchell’s views on the subject (Burchell, note 17 above, 585).

2.5.1 A co-perpetrator (as defined above) who acceded to a common purpose by prior conspiracy would also be a co-perpetrator in respect of any collateral crimes committed in pursuance of the common purpose, provided that he had the necessary mens rea for their commission. This is much as the law stands at present, however it is recommended that the enquiry for this purpose should be developed, so that, as in the modern English law of joint criminal enterprise,²⁹ it would fall into two parts: Firstly, the court should determine whether, as a matter of objective fact, the collateral crime was one committed *in pursuance of the common purpose*, rather than an independent crime. The proposed test for this purpose would be whether the collateral crime was reasonably necessary for, or incidental to the successful achievement of the common purpose (including escape and the avoidance of detection). If not, it would not constitute conduct falling within the scope of the common purpose and only the actual perpetrator would be liable. Once the court had determined that the collateral crime fell within the scope of the common purpose, the second part of the enquiry would be whether the participant in question had the necessary mens rea for its commission. This would be determined, as it is at present, by *ex post facto* enquiry.³⁰

2.5.2 A co-perpetrator who acceded to the common purpose by substantial participation (ie, a non-conspirator) should not be liable as a co-perpetrator for a collateral crime committed by his fellow participants, unless it can be shown that he also entered into a common purpose to commit the collateral crime, by one or other of the methods envisaged in section 2.2 above. A participant who intentionally furthered or assisted in the commission of a collateral crime, without qualifying to be regarded as a co-perpetrator of that crime, would be an accomplice.

²⁹ See ch2 s4.4 above.

³⁰ In light of the SCA's recent ruling in *S v Makgatho* 2013 (2) SACR 13 para 9, it seems that foresight of a remote possibility will no longer suffice to meet the requirements for *dolus eventualis*. This development will resolve many of the concerns regarding the attribution of liability for collateral crimes, so further reform in this particular regard is unnecessary.

2.6 Practical and evidential considerations

Suggestions for the reform of the doctrine of common purpose commonly generate two types of practical concern. The first relates to the difficulties of proving an individual participant's causal contribution to the commission of the crime, in cases where there are multiple wrongdoers, all acting more or less simultaneously.³¹ This concern, it is submitted, has been adequately addressed in the proposals outlined above, by allowing for liability to be based on considerations other than causation, such as substantial participation in the conception, planning or execution of the crime.

A second concern relates to the difficulty of proving the respective contributions of individual participants, when this information may be known only to the participants themselves, who cannot be compelled to divulge it, or trusted to do so truthfully. In order to address this problem, there is no reason why, without going so far as to create constitutionally offensive presumptions of liability, or reversals of the onus of proof, rules of evidence could not be developed to assist the court and the prosecution. Thus, for example, where there is proof that a conspirator was present at the time of the crime, the 'natural inference' would be that he was a substantial participant in either the conception and planning of the crime, or its execution, or both.³² Such an inference would then place an *evidential burden* on the party in question (not an onus), which would require him to disturb the inference by adducing credible evidence as to his actual role in and contribution to the crime, sufficient at least to create a reasonable doubt as to whether or not he was a substantial participant. This type of evidential rule is fairly commonplace in South African criminal law and is unlikely to be thought constitutionally objectionable.

3. CONCLUDING REMARKS

It is submitted that, whilst it has been shown that there are a number of serious concerns regarding the constitutionality of the doctrine of common purpose in the extended form

³¹ This concern was, for example, expressed in *S v Thebus* (note 4 above) para 34.

³² This, in essence, was the original English law concept of common purpose, as described in ch2, s3.4 above.

in which it is currently applied in South African law, it would be a relatively simple matter to reform the existing law of complicity so that these concerns could be eliminated, without creating intractable problems of proof, overly burdening the prosecution and state resources, or making the prosecution of joint wrongdoers ineffectual.

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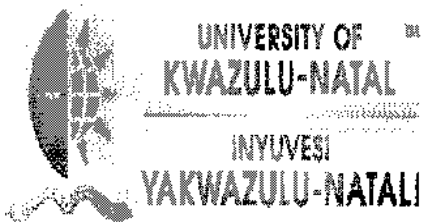
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11 March 2014

Mrs S Walker (734731480)
School of Law
Pietermaritzburg Campus

Dear Mrs Walker,

Protocol Reference Number: HSS/0141/014EX
Project Title: A critical analysis of the Doctrine of Common Purpose in South African law

Full Approval – No Risk

In response to your application dated March 2014, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenuka Singh (Chair)

cc.Supervisor: Professor S Hoctor
cc.Academic Leader Research: Mrs Shannon Bosch
cc.School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

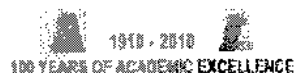
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