

**COMMON PURPOSE: THE LAST HOPE FOR THE SUCCESSFUL
PROSECUTION OF “MOB JUSTICE” MURDER CASES**

BY

BOITUMELO MADIRA MONYELA

(216074688)

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SUPERVISOR: MR KHULEKANI KHUMALO

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DECLARATION

I, Boitumelo Madira Monyela, hereby declare that the work contained herein is entirely my own, except where indicated in the text itself, and that this work has not been submitted in full or partial fulfilment of the academic requirements of any other degree or qualification at any other University.

I further declare that this dissertation reflects the law as at the date of signature hereof.

Signed and dated at _____ on the _____ day of _____ 2017

Boitumelo Monyela

ABSTRACT

Mob justice is prevalent in South Africa and the only way these “mob justice” cases can be successfully prosecuted is through the application of the common purpose doctrine. It should be noted that such an important doctrine is under siege, yet it actually has a crucial role to play in “mob justice” murder cases. Therefore, the purpose of this dissertation is to defend the importance of having the common purpose doctrine in the South African criminal justice system, particularly in the context of “mob justice” murder cases. I will defend its importance by responding to some of the scathing criticisms of the doctrine that were advanced *S v Thebus and Another* 2003 (2) SACR 319 (CC), followed by writers such as Burchell, Grant, Rabie and Boister.

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CHAPTER 1

INTRODUCTION

1.1. BACKGROUND: UNDERSTANDING MOB JUSTICE IN SOUTH AFRICA

Crime is prevalent in South Africa,¹ and the country's crime rate is amongst the highest in the globe.² Vigilantism and mob justice remains a significant societal scourge in South Africa and the world at large,³ and is causing rampant deaths of persons accused of committing crimes.

Mob justice in South Africa is known to be one of the ways of dealing with criminals in black townships.⁴ It is undeniably the most ferocious way in which a human being can be killed. This is usually done by stoning to death or severely assaulting the victim until they are unconscious. Others are killed by way of placing a tyre around their neck and setting them alight. This practice is commonly known as "necklacing".⁵

Such ruthlessness is contrary to the Constitution which highly upholds the right to human life.⁶ Only a few are fortunate enough to survive such brutal attacks. Every citizen in the Republic of South Africa needs to understand that there are laws that oversee every crime and therefore they should not resort to mob justice. Mob justice is not a solution but rather it affects the community in general, in a sense that the lives of the family of the victims are negatively affected especially in cases where the victim was a breadwinner.⁷

¹ D L Kgosimore 'Restorative justice as an alternative way of dealing with crime' (2005) 15 (2) *Acta Criminologica* 69.

² G Demombynes & B Ozler 'Journal of Development Economics' (2005) 76 (2) *Crime and Local inequality in South Africa* 265. See also A Kriegler & M Shaw *A Citizens Guide to Crime Trends in South Africa* (2016) 1.

³ *S v Thebus and Another* 2003 (2) SACR (CC) at para 34.

⁴ D Sign 'Resorting to community justice when State policing fails: South Africa' (2005) 18 (3) *Acta Criminologica* 48. See also J R Martin 'Vigilantism and Informal Social Control in South Africa' (2010) 23(3) *Acta Criminologica* 53.

⁵ S Kings 'Khutsong : This is what happens to criminals here' *Mail & Guardian online* at 1, available at <https://mq.co.za/article/2013-11-04-gangsters-silenced-in-khutsong>, accessed on 4 November 2013.

⁶ Section 11 of the Constitution of the Republic of South Africa, 1996.

⁷ E Baloyi 'The Christians Church's role in the escalating mob justice system in our black townships- an African pastoral view: original research' (2015) 71 *HTS: Theological studies* 2.

Everyone has the right to life and their right needs to be respected and protected⁸ irrespective of whatever crime they might have committed, either enormous (such as murder) or trivial (such as cell phone- snatching). The most unfortunate part in mob justice violence is that sometimes innocent people are killed or assaulted in these violent attacks.⁹ Others are killed for trivial offences such as snatching handbags or stealing a loaf of bread. Such incidents are better off reported to the police instead of taking the law into one's hands.¹⁰

Reports on Mob justice incidents

It was once reported in KwaMhlanga, in Mpumalanga that a family of a man who was beaten to death by a furious mob demanded answers from the police, whom they said were not acting quick enough to arrest those who were responsible for the crime.¹¹

It was again reported in Bushbuckridge, in Mpumalanga that a man who was accused of killing a 14year old girl was killed in a mob justice violence, after evidence was found linking him to the death of the 14year old. The community members dragged the man to the scene where the body of the girl was found and burned him to death.¹²

Another incident took place in the East Rand, where angry community members took the law into their own hands, after a group of men attempted to rob and rape a certain woman. The community caught nine of the men and burned them to death. The community members were quoted saying "in most cases these thugs did as they pleased, in certain

⁸ Note 5 above.

⁹ T Makhetha 'Wrongly accused man's mob justice ordeal' *IOL online* 17 October 2014 , <http://www.iol.co.za/news/crime-courts/wrongly-accused-mans-mob-justice-ordeal-1767526>, accessed on 20 October 2014.

¹⁰ Note 5 above.

¹¹ G Nicolaides & V Abreu 'Mob justice killing: Family want answers' *Eye Witness News* available at <http://mobi.iafrica.com/sa-news/2014/06/05/mob-justice-family-wants-answers/>, accessed on 5 June 2014.

¹² Y Silaule 'Murder suspect killed in mob justice attack' *News24* available at <http://www.news24.com/SouthAfrica/News/murder-suspect-killed-in-mob-justice-attack-20170605> , accessed 5 June 2017.

instances they raped woman in front of their husbands and children and if anybody intervened they were shot dead”.¹³

In Protea Glen, in Soweto it was reported that the community members had kept four men who were accused of being criminals in hostage and assaulted them. One of the accused dead at the scene and three of his accomplice were in hospital after being assaulted by an angry mob.¹⁴

The article entitled, “Free State community issues mob justice, burns two murder suspects” reported how two suspects were killed in retaliation for the role they were believed to have played in a murder that had taken place earlier that day. The initial victim in this case was robbed and killed on his way back home from a tavern. He died as a result of the wounds inflicted on him during the robbery. However, before he succumbed to the wounds the victim was able to identify the suspects that were involved in the robbery. The residents decided to pursue the alleged suspects, in which they initially caught up with two of the suspects and burned them to death. After killing them the residents went to the shacks where the suspects lived and burned them as well.¹⁵

1.2. THE ROLE OF THE COMMON PURPOSE DOCTRINE IN “MOB JUSTICE” MURDER CASES AND THE OBJECTIVE OF THE DISSERTATION.

In many cases involving a consequence crime¹⁶ committed by a group of people, such as murder, it is often difficult, if not impossible to determine which offender caused the death of the victim. If a victim is beaten to death by a mob, it is often impossible to determine which of the offenders delivered the fatal blow. In cases of this nature, if the component of causation cannot be proved beyond any reasonable doubt all the accused would be

¹³ W Pretorius ‘Community ‘Burns nine thugs to death’ on East Rand’ News24 available at www.news24.com/SouthAfrica/News/community-burns-nine-thugs-to-death-on-east-rand-20151211 , accessed 11 December 2015.

¹⁴ M Raborife ‘Robber killed during violent mob attack’ News24 available at www.news24.com/SouthAfrica/News/Robber-killed-during-violent-mob-attack-20150715 , accessed 15 July 2015.

¹⁵ ‘Free-State community issues mob justice, burns two murder suspects’ available at <http://www.sabreakingnews.co.za/2017/03/05/free-state-community-issues-mob-justice-burns-two-murder-suspects/> , accessed 5 March 2017.

¹⁶ G Kemp *Criminal law in South Africa* 2nd ed (2016) 74. A consequence crime is defined not in terms of what the accused did or failed to do, but rather in terms of the consequence that resulted from the accused conduct. Murder and culpable homicide are notable examples of consequence crimes.

acquitted. This is the injustice sought to be overcome through the introduction of the common purpose doctrine.¹⁷

This special doctrine was introduced to overcome difficulties relating to causation in consequence crimes committed by collective individuals¹⁸ and it deliberately waives the causation prerequisite in consequence crimes in order to “facilitate the conviction of murder of each separate member of the group”.¹⁹ This dissertation seeks to defend the importance of having the common purpose doctrine in the South African criminal justice system, particularly in the context of “mob justice” murder cases. I will defend its importance by responding to some of the scathing criticisms of the doctrine that were advanced in *Thebus*, followed by writers such as Burchell, Grant, Rabie and Boister.

The primary aim of the doctrine is to criminalize group misdemeanours and to satisfy the need to diminish crimes committed in the course of joint criminal ventures.²⁰ This dissertation further seeks to illustrate that despite the negative controversies the common purpose doctrine attracted in the past, it is nonetheless a useful instrument in the South African criminal courts.²¹

Reddi²² contends that in communities that are currently staggering from the negative impact caused by the widespread of serious crimes committed by collective individuals acting together, the common purpose doctrine is crucial to the eradication of the predominant threat posed by such criminals. It should be noted that such an important doctrine is under siege, yet it actually has a crucial role to play in mob justice murder cases.

¹⁷ *S v Mzwempi* 2011 (2) SACR 237 (ECM) at para 45.

¹⁸ C R Snyman *Criminal Law* 6th ed (2014) 257.

¹⁹ *S v Thebus* (note 3 above). See also Snyman (note 18 above, 257).

²⁰ *S v Thebus* (note 3 above).

²¹ The application of the common purpose doctrine has attracted severe criticisms since the decision in *S v Safatsa* 1988 (1) SA 868 (A) and the majority judgment on *S v Nzo* 1990 (3) SA 1 (A). However, the application of the doctrine was affirmed in *S v Thebus* supra note 3 at 50. For commentary and summary of the foregoing cases see also J Burchell *Principles of Criminal Law* 5th ed (2016) 487- 489.

²² M Reddi ‘The doctrine of common purpose receives the stamp of approval’ (2005) *South African Law Journal* 122 (1) 66.

It is further contended that the doctrine serves a greater good in deterring collective individuals acting together from taking the law into their hands and serves an essential role in cases of consequence crimes committed by collective individuals.²³ Therefore, without the common purpose doctrine, collective perpetrators of a crime would be beyond the reach of the criminal justice system irrespective of their unlawful and intentional participation in the commission of the crime.²⁴ This state of affair will without doubt be parallel to the societal detest of crimes committed by collective individuals acting in concert.²⁵

1.3. Research Methodology

The method of research used in this dissertation is largely analytical. It focuses on cases, journals, the Constitution and any other written material on the common purpose doctrine.

The primary aim of my dissertation is to defend the importance of the role of the common purpose doctrine, particularly in “mob justice” murder cases. The discussion will entail the following structure:

- 1.3.1. To elaborate further on how such an important doctrine is under siege, yet it actually has a crucial role to play in “mob justice” murder cases;
- 1.3.2. To analyse cases where the common purpose doctrine was applied, particularly the *Thebus* case because that is where the scathing criticism of the doctrine of common purpose were first laid down before the court; and
- 1.3.3. To defend the doctrine by responding to some of the scathing criticisms of the doctrine that were advanced in *Thebus*, followed by writers such as Burchell, Grant, Rabie and Boister.

²³ *S v Thebus* (note 3 above).

²⁴ Snyman (note 18 above,256). See also *S v Thebus* supra note 3 at 40.

²⁵ *S v Thebus* supra note 3 at 40.

Chapter 2

THE COMMON PURPOSE DOCTRINE

2.1. The development of the common purpose doctrine

2.1.1 English Law

The common purpose doctrine has its origin from English Law. The doctrine was defined and applied in the English law case of *Macklin, Murphy, & Others*.²⁶ The facts of the case were as follows: a crowd of prisoners assembled together and began rioting. The constables on duty intervened in order to disperse the crowd and apprehend the offenders. However, there was resistance from the mob and one of the constables was assaulted to death by the mob. A number of prisoners took part in the violence, some assaulting the constable with sticks and others by striking him with their fists.

The court turned to consider the question whether the facts of the case give rise to the commission of manslaughter i.e—whether or not the participants intended to kill the constable.²⁷ The court held that it was a principle of law that “if several persons act together in pursuance of a common intent, every act done in the furtherance of such intent by each of them is, in law, done by them all”.²⁸ The participants were initially found guilty of manslaughter.²⁹

It is clear from the foregoing that the common purpose doctrine is based on a principle of imputation.³⁰ According to the foregoing, actions are imputed to all the members in the joint unlawful enterprise who actively associate themselves with the actions of the other members in the joint unlawful enterprise. It is imperative to note that the principle of

²⁶ (1838) 2 Lewin CC 225, 168 ER 1136. For a summary and commentary of this case, see J Burchell ‘Joint enterprise and common purpose: Perspective in English and South African criminal law’ *South African Journal of Criminal Justice* 1997 (10) 126.

²⁷ Ibid 126.

²⁸ Ibid 126.

²⁹ Ibid 126.

³⁰ M A Rabie ‘Doctrine of common purpose in Criminal Law’ (1971) 88 *South African Law Journal* 235.

imputation is extended even to a party who plays a relatively minor role during the commission of the crime.³¹

The English law has always been concerned with intention (*mens rea*) rather than conduct (*actus reus*) of an accused in joint enterprise cases.³² In other words, the courts in determining criminal liability did not consider the element of *actus reus*, whether the accused actions physically brought about the death of the deceased, the main issue considered was whether the accused had the necessary intention (*mens rea*) at that moment to commit the crime in question.

The following are examples of the foregoing: In *R v Swindall Osborne*³³ the joint enterprise principle was formulated by Lord Chief Baron Pallock as follows :

“If each of the two persons be driving a cart at a dangerous and furious rate, and they be inciting each other to drive at a dangerous and furious rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter, and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time”.

In *Chan Wing-Siu v The Queen*³⁴ the court held that if X and Y agree to commit an offence (crime A) and in the course of the joint unlawful venture one of them X commits another offence (crime B) which they did not agree to commit. Y in this case will be found guilty as an accessory to crime B if he foresaw the possibility that his partner in crime X might act as he did.

In *R. v. Derek Bentley (deceased)*³⁵ the appellant (aged 19) together with his accomplice (aged 16) committed an offence of burglary attempt (crime A). During the execution of the offence, the appellant’s friend and accomplice (Christopher Craig) shot and murdered

³¹ Kemp (note 16 above, 263). See also the discussion on this point in *S v Safatsa* supra note 21 at 892c-d and *R v Mbande and others* 1933 AD 382.

³² Burchell (note 26 above, 128).

³³ 1846 2 CAR. & K.230.

³⁴ 1985 1 AC 168 (PC) at 175F-G. See also Burchell (note 26 above, 129).

³⁵ 1998 EWCA Crim 2516. For summary and commentary of the case see Dr Robert N Moles and B Sangha ‘Networked Knowledge-Law Report *R.v.Derek Bentley (Deceased)* [1998] EWCA Crim 2516’ Accessed 30 July 1998.

(crime B) a police constable. Bentley was convicted as a party to the murder in terms of the English law principle of joint enterprise.

*R v Rook*³⁶ the court held that in a case of a joint enterprise where both parties happen to be present at the scene of the crime, it is not necessary for the prosecution to prove beyond reasonable doubt that a secondary party who assisted or encouraged before the commission of crime possessed the necessary intention to kill the victim. Provided it was proved that he reasonably foresaw the event as a real or substantial risk but nonetheless doubted its occurrence.

2.1.2. South African law

The common purpose doctrine was introduced into South Africa through the Native Territories Penal Code,³⁷ which was the first legislation which incorporated the common purpose doctrine in South Africa. Section 78 of the Act provides that:

“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”.³⁸

From then, the South African courts like those in England interpreted the doctrine to apply to all members of a crowd who either agree or actively associate themselves with the criminal conduct committed by one member of the crowd. However, if they are not involved at all in the committing the crime, then they are not guilty of any crime.

³⁶ 1997 Cr. App. R .327.

³⁷ Native Territories Penal Code section 78 of Act 24 of 1886 (C), in which see Rabie (note 30 above, 229) and Hefer JA in *S v Nzo* supra note 21 at 14 E-F.

³⁸ Section 78 of Act 24 of 1886 at 2135.

*R v Garnsworthy*³⁹ was one of the early cases in which the common purpose doctrine was applied in the context of South Africa, where it was formulated as follows:

“where two or more combine in an undertaking or 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”.⁴⁰

The above formulation is said to have laid down the premise in which criminal liability based on common purpose may emerge. The South African common law of criminal liability recognizes four requirements for criminal liability namely, (i) an act (*actus reus*), (ii) which is unlawful (unlawfulness), (iii) causing the crime (causation), and (iv) committed with necessary intent or culpa (*mens rea*).⁴¹ From the foregoing a person may only be criminally liable for his or her own criminal conduct, there should be a causal connection between the accused’s conduct and the criminal outcome.⁴² However, since the South African law has adopted the common purpose doctrine, the causation requirement is excluded if the common purpose doctrine is applied.⁴³

When the doctrine is applied, an accused person may still be found guilty of an offence in the absence of proof of a causal link between his or her conduct and the criminal result provided the State proves that a common purpose existed amongst the accused person and the other members in the common purpose.⁴⁴ The South African law of common purpose regards the participants in the common purpose all as co-perpetrators by virtue of a principle of imputing the actions of the actual perpetrator to all the other participants

³⁹ 1923 WLD 17.

⁴⁰ Ibid 19.

⁴¹ C R Snyman *Criminal Law* 5th ed (2008) 29-33. See also *S v Mzwempi* supra note 17 at 44.

⁴² Kemp (note 16 above, 258).

⁴³ Burchell (note 21 above, 477).

⁴⁴ Kemp (note 16 above, 261). The following are examples of cases in which the Appellate Division held convictions of murder on the basis of the common purpose, where no causal connection was proved between the conduct of the accused and the death of the deceased, *R v Dlala and Others* 1962 (1) SA 307 (A), *S v Malinga* 1963 (1) SA 692 (A) and *S v Madlala* 1969 (2) SA 637 (A), *S v Mgxwiti* 1954 (1) SA 370 (A), *S v Khoza* 1982 (3) SA 1019 (A), *S v Daniels* 1983 (3) SA 275 (A), *S v Nkwenja* 1985 (2) SA 560 (A) and *R v Sikepe* 1946 AD 745.

acting together in the joint unlawful venture.⁴⁵ It is for this reason that the requirement for causation under common purpose is believed to be replaced by the principle of imputation in order to fill in the gap created by the concept.⁴⁶ It is essential to note that it is only conduct which is imputed and not intention under common purpose.⁴⁷ Therefore, to be convicted of murder, each individual accused should be proved to have had the intention in the form of (direct, indirect or *dolus eventualis*) to kill.⁴⁸

Currently as it stands the principle underlying common purpose is 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”.⁴⁹

Common purpose may arise in two forms, either by prior agreement or active association.⁵⁰ In the context of this dissertation prior agreement may arise in the following manner: where a crowd of angry community members assemble at a community hall and agree to riot to Y’s house who is believed to have raped and killed a student, and in the event Y is attacked by the mob with fists and others severely assault him until he dies from the fatal wounds inflicted on him. It is essential to note that where prior agreement

⁴⁵ Snyman (note 18 above, 258). See also *S v Malinga* supra note 44 at 695A-B, where the judge held that “as far as individual *mens rea* is concerned, the shot fired by accused no 4 was, in effect, also the shot of each of the appellants”.

⁴⁶ N P Makiwane *The Nature of Association and Dissociation for Common Purpose Liability* (published LLM Thesis, University of South Africa, 1999) 4.

⁴⁷ M C Mare ‘The doctrine of common purpose in South African law’ at 122 available at uir.unisa.ac.za/bitstream/handle/113-133, accessed 24 October 2016. In *S v Nkwenja* supra, the majority court held that “the critical moment to assess the *mens rea* of a participant in a common purpose is when the common purpose is formulated, and not when the unlawful act is committed”.

⁴⁸ Ibid 122.

⁴⁹ Burchell (note 21 above, 477). See also Rabie (note 30 above, 233). See also *S v Mitchell and Another* 1992 (1) SACR 17 (A) where Nestadft J A set aside Y’s conviction of murder on the basis that he did not foresee the manner in which the deceased died (X’s criminal conduct did not fall within the scope of their common design). The facts of the case were as follows: the appellants and two others were returning from a resort when they stopped at the café for food and cigarettes. Before they returned to their vehicle the two appellants and two others agreed to throw stones at pedestrians from the back of the vehicle. While they were collecting the stones X (appellant no1) also picked up a paving brick. After they resumed their journey, X stood up and throw the brick to a group of pedestrians which struck one of the pedestrians on his head and killed him. X was convicted of murder. Y (appellant no2) was found by the trial court to have been a party to a common purpose to kill and was also convicted of murder. Y appealed against his conviction and the Appellant Division found that the trial court had erred in its application of the common purpose. At the end of the trial Y’s conviction of murder was set aside. See also *S v Goosen* 1989 (4) SA 1013 (A).

⁵⁰ Burchell (note 21 above, 477).

is proved, the accused does not need to be present at the scene of the crime and neither is he required to have physically participated in the commission of the crime.⁵¹ However, the actions imputed to him must fall within the common design and he must be proved to have possessed the necessary *mens rea* (either direct or *dolus eventualis*).⁵²

Active association is a far wider concept than prior agreement.⁵³ In the absence of proof of prior agreement an accused person may be found guilty of the crime by virtue of active association.⁵⁴ It is imperative to note that the accused association with the other members in the common cause must take place *before* the commission of the crime and the accused must *still* be a party to the common cause at the time the crime is committed.⁵⁵

Mere presence at the scene of the crime does not automatically amount to criminal liability under the doctrine.⁵⁶ A fundamental distinction should be drawn between those that are merely standing and witnessing the mob ordeal and those participating in the commission of the crime. The prosecution has the duty to establish beyond reasonable doubt that each participant had the necessary criminal capacity and fault element at the time of the act of association.⁵⁷ Sisilana⁵⁸ argues that thoughts or wicked thoughts are not legally punishable as the law requires that the accused must have had the necessary intention and must have shown common purpose by performing some kind of overt conduct to show solidarity with the others. For instance, in a mob attack such an overt conduct would

⁵¹ Snyman (note 18 above, 260-261). See also *S v Motaung* 1961 (2) SA 209 (A) and *S v Mgxitwi* supra. In *S v Yelani* 1989 (2) SA 43 (A), accused no6 was held liable by the court *quo* although he was never present at the second meeting nor at the scene of the crime.

⁵² *S v Mzwempi* supra note 17 at paras 20 and 21.

⁵³ Snyman (note 18 above, 559).

⁵⁴ *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I-706C.

⁵⁵ Kemp (note 16 above, 263).

⁵⁶ *S v Mgedezi* supra note 54 at 702H-I and 703. See also N A Matzukis 'The Nature and scope of common purpose' 1988 *South African Journal of Criminal Justice* (2) 233. Matzukis gave an example of a mere presence at the scene using the following scenario: where a crowd with a clear intent of killing Y and X joins it, not because he desires to associate himself with the criminal conduct of the crowd, but because of curiosity avails himself to witness the impending murder. X would not be found guilty of murder because his overt conduct does not show solidarity with the acts of the crowd.

⁵⁷ Burchell (note 21 above, 477). See also D Unterhalter 'The Doctrine of Common Purpose: What Makes One Person Liable for the Acts of Others?' (1988) 105 *South African Law of Journal* 676, Unterhalter states that "a person may participate in a joint enterprise as a leading actor and yet not cause the death of the deceased".

⁵⁸ L Sisilana 'What's wrong with the common purpose' (1999) 12 *South African Journal of Criminal Justice* 302.

be shown by uttering words of encouragement to the other members of the mob to kill or burn the victim⁵⁹ or standing by ready to give assistance if required.⁶⁰

The case of *S v Safatsa*⁶¹ commonly known as the “Sharpeville Six case” remains for all the wrong reasons, the landmark case in which common purpose by active association was applied in the context of South Africa. The notable realities of the event were as follows, on the 3 of September 1984 a large crowd of about hundred people assaulted the deputy mayor of the town council of Lekoa, by throwing stones at him, dragging him to the street, pouring petrol and setting him alight. He died on the spot due to the wounds inflicted on him. Eight out of hundred people were charged with murder of the deputy mayor.⁶²

This is how the court applied the common purpose doctrine to determine liability of each of the eight accused at the trial court: Accused number 1, had grabbed the deceased, wrestled with him for possession of his pistol, and also throw the first stone which struck the deceased on his head.⁶³ Accused number 2, had stoned the deceased’s house and also throw a stone at the deceased which stuck him on his back. Accused number 3, had grabbed the deceased and wrestled with him for possession of his pistol in which he succeeded.⁶⁴

Accused number 4, had been part of the crowd which converged at the deceased’s house. She shouted repeated exhortations to the crowd to “kill the deceased because he had fired on them” this was after the deceased fired a shot which struck one of the members in the crowd and she had also slapped a woman in the face who remonstrated the crowd not to burn the deceased.⁶⁵

Accused number 5 & 6, had been part of the forefronts of the crowd which had converged at the deceased’s house and vandalised it, although they were not themselves seen to

⁵⁹ See *S v Safatsa* (note 21 above) for example, the conduct of the fourth accused who uttered words of encouragement to her fellow members to kill the victim.

⁶⁰ Kemp (note 16 above, 263).

⁶¹ Note 21 above.

⁶² *S v Safatsa* supra note 21 at 871B-F.

⁶³ *S v Safatsa* supra note 21 at 890D.

⁶⁴ *S v Safatsa* supra note 21 at 891C-D.

⁶⁵ *S v Safatsa* supra note 21 at 892C-D.

have thrown stones. Accused number 7, had made petrol bombs, set the deceased's house alight and pushed the deceased's car into the street, and setting it alight. Accused number 8, also made petrol bombs and handed them out with instructions. He commanded the mob to set the deceased's house on fire and assisted in pushing the car onto the street.⁶⁶

At the end of the trial, all accused were found guilty of murder except for accused number 5 and 6 who were said not to have had the necessary intention to kill at the time.⁶⁷ It is submitted from the above facts that, the six accused the "Sharpeville Six" were found guilty of murder on the basis of their "overt conduct". Whiting⁶⁸ in giving an example of such an overt conduct pointed out that "it would be to join a crowd with an obvious intention to act or show solidarity with the person who actually acts".

Furthermore, Botha JA in *S v Safatsa*⁶⁹ managed to answer the question whether it is possible for a participant in the common purpose to be found guilty of murder in the absence of proof that his conduct contributed causally to the death of the deceased? He concluded that a party to a common purpose can be convicted of murder in the absence of proof of a causal connection between his conduct and the deceased.⁷⁰ It is now trite law that the element of causation is not a prerequisite under the common purpose doctrine.⁷¹

Another landmark case on active association was the case of *S v Singo*⁷² the factual background of the case were as follows: the appellant formed part of the mob that attacked and killed an old woman in the belief that she had bewitched a certain young girl. After having stoned the woman, the appellant was himself injured, and according to his testimony at the trial court, he left the scene because he was worried about the injury

⁶⁶ *S v Safatsa* supra note 21 at 892G-J.

⁶⁷ *S v Safatsa* supra note 21 at 893F-G were Botha JA stated that "all these accused had actively associated themselves with the conduct of the mob which directed the killing of the deceased".

⁶⁸ R Whiting 'Joining-in' (1986) *South African Law Journal* 39.

⁶⁹ *S v Safatsa* (note 21 above).

⁷⁰ *S v Safatsa* supra note 21 at 900H.

⁷¹ Ibid 900H.

⁷² 1993 (2) SA 765 (A).

he sustained on his shoulder during the attack.⁷³ The trial court found that the appellant shared the common intent to kill the deceased with the other members in the common purpose and that he had actively associated himself with the mob in executing this intent. The trial court subsequently found the appellant guilty of murder. However, the appellant was granted leave to appeal against his conviction by the Supreme Court of Appeal in which he succeeded.⁷⁴

The application of the common purpose doctrine in its active association form has not been without controversy since its application in the “Sharpeville Six decision”.⁷⁵ However Botha JA, in *S v Mgedezi*⁷⁶ managed to limit the scope of active association by laying down the following prerequisites which should all be met before a person could be found criminally liable on the basis of active association in the absence of prior agreement. The requirements are as follows:

“(i) the accused must have been present at the scene of the violence, (ii) must have been aware of the assault on the deceased, (iii) must have had the intention to make common cause with those committing the assault, (iv) there must have been a manifestation by the accused of a sharing of a common purpose by himself performing an act of association with the conduct of the others and (v) he must have being in possession of the requisite *mens rea*”.⁷⁷

It is important to note that if in any event one of these prerequisites is not met, the accused will be acquitted.⁷⁸ Furthermore, although the scope of active association has been limited by Botha JA in *S v Mgedezi*⁷⁹ the facts in *S v Nzo*⁸⁰ illustrate an unreasonable extension

⁷³ *S v Singo* supra note 72 at 769F-G.

⁷⁴ *Ibid* 769F-G.

⁷⁵ J Burchell ‘Criminal Law: Strafreg *S v Nzo* 1990 (3) SA 1 (A) – Common-purpose liability’ *South African Journal of Criminal Justice* 1990 349. These controversies can be traced back to the case of *S v Thomo* 1969 (1) SA 385 (A), *S v Williams* 1980 (1) SA 60 (A) and *S v Maxaba* 1981 (1) SA 1148 (A).

⁷⁶ *S v Mgedezi* (note 54 above). The factual background of the case we’re as follows: the case arose from an unrest in the mine compound where tension had been flowing between the mineworkers and their team leaders who they regarded as informers. On the fatal night a group of mineworkers armed with weapons marauded the compound singing song of execution of their leaders. During the attack on a room shared by the team leaders, their beds were overturned, windows were broken, the door was torn down and the room was set alight. As a result of the attack, four of the team leaders died and the other two managed to escape. Further note that following *Mgedezi* the application of these requirements had influenced the decisions of various Appellate Divisions such as *S v Petersen* 1989 (3) SA 420 (A), *S v Yelani* supra, *S v Motaung* supra, *S v Khumalo* 1991 (4) SA 310 (A) and *S v Singo* supra.

⁷⁷ *S v Mgedezi* (note 54 above).

⁷⁸ *Ibid* 705I-706C. See also *S v Mzwempi* supra note 17 at paras 13-36 and also paras 119-128.

⁷⁹ *S v Mgedezi* (note 54 above).

⁸⁰ Note 21 above.

of the application of these prerequisites of active association. The salient facts of the case were as follows: The first appellant was a leader of a group of the African National Congress (ANC) in Port Elizabeth. The second appellant, was a member of the ANC who arranged for accommodation for ANC members for the storage of arms and explosives. Mrs T, the wife of another member of the ANC had threatened to report her husband of harbouring an ANC member. The threat was overheard by the first appellant who reported it to one Joe, also a member of the ANC. Joe warned Mrs T that he would kill her if she carried out her threat and three weeks later, on 8 May 1983 Joe murdered Mrs T. The first and second appellant's were subsequently charged with the murder of Mrs T, while Joe who initially committed the crime managed to escape to Lesotho and was never brought to justice.⁸¹

On appeal, counsel for the appellant did not challenge the trial court's finding that he foresaw the possibility of Mrs T's death. The essence of the appeal was whether the appellants had "associated themselves with and persisted in the furtherance of the common purpose".⁸²

Hefer JA, held that the first appellant's conviction should be set aside for murder based on the fact that, the appellant had effectively dissociated himself from the common purpose before the murder of Mrs T by voluntarily giving evidence to the police about his involvement in the ANC. The second appellant's conviction of murder was therefore confirmed by the Appellant Division.⁸³

It is paramount to note that the second appellant was convicted of murder despite any evidence placing him at the scene of the crime where Joe killed the deceased. Furthermore, there was no sufficient evidence on the part of the second appellant to make "common cause with those who were actually perpetrating the assault" and there was no manifestation of sharing of a common purpose with the perpetrator (Joe) of the murder

⁸¹ *S v Nzo* supra note 21 at 1E -2A.

⁸² *S v Nzo* supra note 21 at 6F.

⁸³ *S v Nzo* supra note 21 at 10F-G.

by performing “some act of association” with the conduct of the murderer. The extension of the doctrine in this case was too broad.⁸⁴

2.2. Accomplice and “joiner- in” liability

Accomplice liability is often confused with common purpose liability. Snyman⁸⁵ defines an accomplice as , a person who unlawfully and intentionally furthers a crime committed by somebody else (the perpetrator) by for example giving the latter advice or assisting them to commit the crime .

To determine if a person’s actions constitute accomplice liability the following prerequisites should be met:

- (i) *Accessory nature of liability* – an accomplice’s liability is of accessory or dependent nature. For an accused to be liable as an accomplice somebody else has to be liable as a perpetrator. The crime must have been committed by X before Y can be regarded as an accomplice.⁸⁶
- (ii) *Act of omission which furthers the crime* - in order to be liable as an accomplice, Y must commit an act which amounts to a furthering of the crime committed by X. Y may further or promote the commission of the crime by , for instance, facilitating, encouraging, giving advice, order the crime to be committed or assisting Y to dispose the body.⁸⁷
- (iii) *Unlawfulness* - The act of furthering must be unlawful and there must be no ground of justification for the act.⁸⁸
- (iv) *Intention* - to be liable as an accomplice Y must *intentionally* further the commission of the crime committed by X.⁸⁹

⁸⁴ *S v Nzo* supra note 21 at 12F.

⁸⁵ Snyman (note 18 above,266). See also Kemp (note 16 above, 273-277) and Burchell (note 21 above, 505-513) for the definition of accomplice liability.

⁸⁶ Snyman (note 18 above, 266). See also *S v Williams* supra note 75 at 63 and *S v Maxaba* supra.

⁸⁷ Snyman (note 18 above, 267). See also *S v Msomi* 2010 2 SACR 173 (KZP) and see also *S v Williams* supra note 75 at 63B-C.

⁸⁸ Snyman (note 18 above, 268).

⁸⁹ Snyman (note 18 above,269). See also *S v Tshwape and Another* 1964 4 SA 327 (C) 333.

Furthermore, Joubert JA in *S v Williams*⁹⁰ gave a clear distinction between a perpetrator and an accomplice in the following words:

“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 by the perpetrator or co-perpetrator 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 or co-perpetrator. He is ...liable as an accomplice to murder on the ground of his own act, either 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”.⁹¹

The question whether a person who subsequently makes common cause with others by joining-in an attack while it is *still* commencing will afford a sufficient basis for holding him liable in addition to the others for the murder of the victim, is one to contemplate when challenged with the question of a “joiner-in”.⁹²

In the context of this dissertation, a person will be regarded as a “joiner-in” in a mob violence if a joins a crowd of about fifty people who were acting with a common purpose and who have already wounded X. Thereafter, while X is still alive Y who had not

⁹⁰ Note 75 above.

⁹¹ Ibid 63A-F.

⁹² Whiting (note 68 above, 41). *R v Mtembu* 1950 (1) SA 670 (A) at 686-7, was the first case in which the question was considered by Murray AJA who was one of the majority judges, and Greenburg JA, dissenting, both rejected the idea that in this situation a person who joins in would be liable for murder. Followed by the case of *S v Mgxwiti* supra note 44 at 382D-E, where Schrenier JA was of the view that a joiner-in should be guilty of murder when he held that: “*But where an accused person has joined a murderous assault upon one who is then alive but who dies as a result of the assault, it seems to me that no good reason exists why the accused should be guilty of murder if at the time he joined in the assault the victim, though perhaps grievously hurt, was not yet mortally injured, but should not be guilty if the injuries already received at the time can properly be described as mortal or fatal*”. See also *R v Dlala* (note 44 above)

previously agreed with the other members to kill X, arrives at the scene and inflicts an injury to X, which however does not hasten his death. Thereafter X dies as a result of the wounds inflicted on him by the crowd. In this circumstances, Y will be equally liable with the others as a “joiner-in”.⁹³ However, the following requirements have to be considered in order to establish whether the “joining-in” in the mob violence amounts to murder or attempted murder:

(i) if the injuries inflicted by Y in fact hastened X’s death, there can be no doubt that there is a causal link between Y’s acts and X’s death and that Y is therefore guilty of murder. (ii) if Y’s assault on X takes place after X has already died from the injuries inflicted by the crowd or his partners in crime, it is similarly beyond reasonable doubt that Y cannot be convicted in respect of a corpse. (iii) if the evidence reveals a previous conspiracy between the crowd and Y to kill X, Y will be guilty of murder by virtue of the of the common purpose doctrine, since ‘the crowds act in fatally wounding X is then imputed to Y. The “joining-in” situation presupposes the absence of a common purpose between the crowd and Y.⁹⁴

Furthermore, it was in the case of *S v Motaung*⁹⁵ were the question whether a joiner-in is liable as an accomplice or as a perpetrator was settled. The court held that “a joiner-in after the fatal wound has been inflicted should be liable for attempted murder, while the person who joins the attack before the mortal wound has been inflicted should be convicted of murder”.⁹⁶

2.3 Dissociation from the common purpose

If a party to a common purpose changes his or her mind before the commission of the crime, such a dissociation from the common purpose warrants as a valid defence for escaping liability.⁹⁷ For example, if a crowd of people severely assault Y in the belief that

⁹³ Snyman (note 18 above,264).

⁹⁴ For full explanation of the characteristics of a “joining –in” see Snyman (note 18 above,265).

⁹⁵ Note 51 above.

⁹⁶ *S v Motaung* supra note 51 at 520F-G.

⁹⁷ Kemp (note 16 above,264).

he had raped a ten year old girl and during the assault X who along with other members of the mob attack Y with a fist. Thereafter, X disappears from the scene of the crime before the victim receives the fatal wounds. X's disappearance in this regard from the scene before the death of the victim, can in these circumstances be regarded as a form of "dissociation" from the common purpose, provided the necessary requirements are met.

Snyman⁹⁸ provides that it is however not just any kind of withdrawal from the common cause which has the effect of negating liability. He further recommends that the following requirements should be used to determine whether a particular individual's conduct constitute an effective dissociation:

- (i) in order for X to escape conviction on the ground of a withdrawal from the common purpose, X must have the clear and unambiguous *intention* to withdraw from such purpose.⁹⁹
- (ii) in order to succeed with a defence of withdrawal X, must perform some *positive act* of withdrawal.¹⁰⁰
- (iii) the withdrawal must be voluntary.¹⁰¹
- (iv) the withdrawal will amount to a defence only if it takes place *before* the course of event has reached what may be called 'commencement of the execution'.¹⁰²
- (v) The *type of act* required for an effective withdrawal depends upon a number of circumstances.¹⁰³
- (vi) The role played by X in devising the plan to commit the crime has a strong influence on the

⁹⁸ Snyman (note 18 above, 263-264). See for example the following cases, *S v Tshitwamulomoni* (unreported) 2 November 1990 (VSC), involved a mob killing of an old woman accused of being a witch. Singo, one of the accused, alleged that after he had thrown two stones at the deceased, of which one of the stones struck the deceased, he was in the event injured after he was struck hard on his shoulder with a stick and decided to leave the scene because he was worried about the injury he sustained on his shoulder during the attack. The court linked his position to 'a man who actively associates in the execution of the common cause and at the stage when becoming out of breath or becoming tired stops actively participating just for that reason, but not because he mentally wanted to dissociate himself from the actions of the other perpetrators whose actions are also regarded to be his' (at para 17). He was accordingly convicted of murder on the basis of common purpose. In *S v Ramadhana* (unreported) 13 May 1991 (Case No CC 27/90) (V), a traditional healer was killed by a mob. The accused in accordance with a prior agreement went along with the mob to the deceased's kraal. The accused confessed that when the deceased fled his kraal, he ran after him. In the event, when the deceased was struck by an axe on his back, the accused joined in the assault on the deceased by delivering two blows on his back with a piece of wood. The medical evidence indicated that the axe-blow was not the fatal blow which contributed to the death of the deceased. The attack on the deceased continued with the other members of the mob by striking the deceased with further blows on his head with an axe and panga. When the other members began chopping the deceased on his head, the accused found it repulsive and left the scene of the crime. The court held that the fatal injury was inflicted only after the accused had left the scene. However, despite the absence of evidence beyond any reasonable doubt the court concluded that the accused could only have turned away shortly before the fatal injury were inflicted.

⁹⁹ See for example *S v Singo* supra note 72 at 772H-I.

¹⁰⁰ See for example *S v Nomakhlala* 1990(1) SACR 300 (A) at 304A.

¹⁰¹ See for example *Nzo* supra note 21 at 10, *S v Musingadi* 2005 1 SACR 395 (SCA) 408I-J, *S v Lungile* 1999 2 SACR 597 (SCA) 603G-H and *S v Beahan* 1992 1 SACR 307 (ZS) 322A-B.

¹⁰² *S v Ndebu* 1986 2 SA 133 (ZS) at 137A-D.

¹⁰³ See *Beahan* supra note 101 at 322D, *R v Chinyere* 1980 (2) SA 576 (RAD) 579G-H and *Singo* supra note 72 at 772.

type of conduct which the law requires him to perform in order to succeed with a defence of withdrawal".¹⁰⁴

From the suggested requirements above, it is vital to note that when applying these requirements, what may constitute a viable withdrawal from the common purpose in one case, might not constitute a viable withdrawal in another case.¹⁰⁵

For instance, in *S v Ndebu*¹⁰⁶ the two appellants acting in concert went together at night with an intention of housebreaking. The first appellant had a gun and the second appellant was aware of it. Since they were to engage in a housebreaking, the second appellant knew that the gun would have to be utilized at some point and he did not care whether the fatal consequence would occur or not.

When they entered the house a certain woman saw them and screamed. The man of the house came and approached the first appellant who shot and killed him. The second appellant testified that he fled the scene as soon as he heard the woman scream and was outside the gate when he heard the gunshot. The main question arising from these facts was whether this last-minute withdrawal on the part of the second appellant amounted to an effective dissociation from the common purpose? The court concluded that his last minute flight from the scene did not amount to a dissociation.¹⁰⁷

The court based its judgment on the fact that the appellant knew and appreciated the risk that if someone in the house confronted them the firearm might be used to effect an escape. In other words, he subjectively foresaw the possibility of his **socius** (partner in crime) using the gun at some point during the housebreaking if they were to be confronted.¹⁰⁸ The court further held that had the second appellant disarmed or persuaded his companion or protected the household in some way, his dissociation would be upheld. For instance, if the second appellant showed a *positive act* by trying to stop

¹⁰⁴ See Musingadi supra note 101 at 409G-I, *S v Nomakhlala* supra note 100 at 304, *Singo* supra and *S v Nduli* 1993 2 SACR 501 (A) 504E-F.

¹⁰⁵ Snyman (note 18 above, 264).

¹⁰⁶ Note 102 above. For summary and commentary of the case see D R Khuluse 'Dissociation from common purpose' SACR (1992) 2 SAS 173-175.

¹⁰⁷ Ibid 173-175.

¹⁰⁸ *S v Ndebu* supra note 102 at 137D-H.

his companion or assist the householders to escape, such actions might have amounted to dissociation.¹⁰⁹

In *R v Chinyerere*¹¹⁰ contrary to the case of *Ndebu* supra the court in this case held that a last minute withdrawal from common purpose amounted to a dissociation. The appellant in this case was part of a gang and was present at the scene when the door of the shop was broken by his fellow gang members but he was frightened and decided to leave. He did not at any point enter the shop and participate in the physical removal of the goods. Lewis JP, held that “a conspirator can withdraw from the enterprise even at the last moment and in the event of his withdrawal he is entitled to his acquittal on the main charge and is liable to be convicted only of the offence of conspiring to commit the crime in question”.¹¹¹ In other words, the appellant in this case would be acquitted for theft, but will be liable for conspiracy.

From the two foregoing cases, it is evident that it is not any fleeing from the scene of the crime that amounts to a viable dissociation. In the case of *R v Chinyerere*¹¹² the last-minute dissociation from the scene was regarded as effective dissociation, while in *S v Ndebu*¹¹³ the last-minute dissociation from the scene was not regarded as effective dissociation.

In *S v Nzo*¹¹⁴ the dissociation of one of the appellant from the common purpose succeeded on the basis that he dissociated himself before the “*commencement of the execution*” of the crime and his act of dissociation was voluntary.¹¹⁵

Another case that dealt with a dissociation from a common purpose was *S v Singo*¹¹⁶ the appellate division in this case was faced with the question “whether the appellant’s

¹⁰⁹ Khuluse (note 106 above, 179).

¹¹⁰ Note 103 above. For summary and commentary on the case see Khuluse (note 106 above, 175 and 176).

¹¹¹ *R v Chinyerere* supra note 103 at 579F-G.

¹¹² *R v Chinyerere* (note 103 above).

¹¹³ *S v Ndebu* (note 102 above).

¹¹⁴ *S v Nzo* (note 21 above).

¹¹⁵ L Hales ‘Effective dissociation from a common purpose-a Zimbabwean view’ 1992 *SACJ* 188. Hales, stated that where the accused person has dissociated himself, he cannot be held responsible for offences committed after his withdrawal provided his disassociation was “effective”.

¹¹⁶ *S v Singo* (note 72 above).

discontinuance of participation in the assault on the deceased amounted to a dissociation from the common purpose to kill".¹¹⁷ The court (per Grosskopf JA) stated that :

"If these two requirements (active association and intention) are necessary for the creation of liability on the ground of common purpose, it would seem to follow that liability would only continue while both requirements remain satisfied or, conversely, that the liability would cease when either requirement is no longer. From practical a point of view, however, it is difficult to imagine situations in which a participant would be able to escape liability on the grounds that he had ceased his active association with the offence while his intent to participate remained undiminished. One must postulate an initial active association to make him a participant in the common purpose in the first place. If he then desists actively participating whilst still retaining his intent to commit the substantive offence in conjunction with others, the result will normally be that his initial actions would constitute sufficient active association with the attainment of the common purpose to render him liable even for the conduct of others committed after he had desisted. This would cover the case,...., of a person who, tiring of the assault, lags behind or stands aside and allows others to take over. Clearly he would continue to be liable. However, where the participant not only desists from actively participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart. He no longer satisfies the requirements of liability on the grounds of common purpose".¹¹⁸

At the end of the trial , the appellant was found to have effectively dissociated himself from the conduct of the crowd before the deceased received the fatal wounds.¹¹⁹ The conviction of murder was therefore set aside and replaced with a conviction for attempted murder.

In *S v Nomakhlala*¹²⁰ X and Y were convicted of the murder of Z. X was asked by his fellow group members to drive a car in which Z was upheld by his fellow group members, to a place described as a rugby field. X was instructed to stab Z with a knife, but he refused and immediately withdrew from the scene. The trial court subsequently found X and Y guilty of murder. Thereafter, X and Y appealed against their convictions of murder.

¹¹⁷ *S v Singo* supra note 72 at 770F-G.

¹¹⁸ *S v Singo* supra not 72 at 233 C-G.

¹¹⁹ *S v Singo* supra note 72 at 773D-E.

¹²⁰ *S v Nomakhlala* (note 100 above).

Grosskopf JA,¹²¹ in his judgment stated that, “X by refusing to stab the deceased clearly indicated that he wanted no part in the attack on the deceased”. Initially X appeal against his conviction was upheld.

CHAPTER 3

CASE ANALYSIS

3.1. *S v Thebus and Another 2003 (2) SACR 319 (CC)*

For the purpose of this dissertation, the *Thebus* case warrants a separate discussion because that is where the scathing criticism of the doctrine of common purpose were first laid down before the court.

3.1.1 *Facts*

The facts of the case were as follows: on 1 September 2000 the two appellants in this case were convicted in the High Court on one count of murder and two counts of attempted murder.¹²² On 14 November 1998 a crowd of protesting residents in Ocean View, Cape Town, assembled and approached the houses of several reputed drug dealers in the area, and allegedly caused damage to property. The protesters had driven through the area in a motorcade of about five to six vehicles. As the motorcade approached an intersection the drug dealer fired towards the group. In response some members of the crowd alighted from their vehicles and returned fire. As a result of the crossfire, a young girl (aged 7) was killed and two others were wounded.¹²³

The trial court found that both appellants had been part of the protesting group and were present at the scene of the shooting. Applying the common purpose doctrine, Mitchel AJ

¹²¹ *S v Nomakhlala* supra 100 at 304 C-D.

¹²² *S v Thebus* supra note 3 at para 1.

¹²³ Para 1 and 2.

found both appellants guilty of one count of murder and two counts of attempted murder. Both appellants were sentenced 8years imprisonment, suspended for a period of 5 years on certain condition. The appellants were also granted leave to appeal against their conviction and the State leave to appeal against their sentences.¹²⁴

In May 2002, the Supreme Court of Appeal (SCA) heard both appeals. The majority of the SCA dismissed the appeal against the convictions and upheld the appeal of the State against the sentences. The SCA ordered that each of the sentence imposed by the High Court be replaced by a sentence of 15years imprisonment. The appellants further made an application for special leave to appeal to the Constitutional Court against the judgment and order of the SCA. The appellants were thereafter, granted leave to appeal by the Constitutional Court on two constitutional issues.¹²⁵

3.1.2 *The issues*

The Constitutional Court was asked to decide two substantive constitutional issues. The first issue was whether, the Supreme Court of Appeal failed to develop the common law doctrine of common purpose in conformity with the Constitution, as required by section 39(2)¹²⁶ and thereby failed to give effect to the appellants rights to dignity,¹²⁷ freedom of the person¹²⁸ and a fair trial,¹²⁹ which includes the right to be presumed innocent.¹³⁰ The

¹²⁴ Para 6 and 7.

¹²⁵ Para 9.

¹²⁶ Section 39 (2) states that:

“When 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”.

¹²⁷ Section 10 guarantees that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

¹²⁸ Section 12(1)(a) states that:

“Everyone 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”.

¹²⁹ Section 35(3) states that “[e]very accused person has the right to fair trial”.

¹³⁰ Section 35(3)(h) guarantees that:

“[e]very accused person has a right to fair trial, which includes the right... to be presumed innocent, to remain silent, and not to testify during the proceedings”.

second issue is whether the negative inference drawn from the first appellant's failure to disclose his alibi defence before trial has infringed his right to silence.¹³¹ For the purpose of this dissertation only the first issue will be discussed.

3.1.3 Arguments

Doctrine of common purpose

The appellants' argued that the common purpose doctrine is unconstitutional in its entirety. The appellants further submitted that the High Court and the Supreme Court of Appeal erred in failing to develop, apply and elucidate the following requirements that:

"(a) there must be a causal connection between the actions of the appellants and the crime for which they were convicted;

(b) the appellants must have actively associated themselves with the unlawful conduct of those who actually committed the crime; and

(c) the appellants must have had the subjective foresight that others in the group would commit the crime".¹³²

Responding to the foregoing argument, the State argued that when the Court is faced with the task of developing the common law, the Court is obliged to promote the spirit, purport and objects of the Bills of Rights. The need to develop the common law may arise in at least two instance: first ,would be when a rule of common law is inconsistent with a constitutional provision and second, where though not inconsistent with a specific constitutional provision, the common law may fall short of its spirit, purport and objects.¹³³

The appellants further argued that the common purpose doctrine hinders the fundamental dignity of each convicted person of the same crime with others because it de-individualises him or her.¹³⁴ The appellants claimed further that common purpose doctrine violates their right not to be deprived of freedom arbitrary.¹³⁵ The court held that it was

¹³¹ para 17. See also section 35(1) (a) which states that "[e]veryone who is arrested for allegedly committing an offence has the right to remain silent".

¹³² Para 23.

¹³³ Para 25 and 28.

¹³⁴ Para 35.

¹³⁵ Ibid 35.

unable to agree that the doctrine encroaches the right to dignity and freedom as it is misleading to argue that the prosecution and conviction of an individual de-humanises him or her.¹³⁶

Causation

The appellants argued that the common purpose doctrine does not require a causal connection between their actions and the crimes of which they had been convicted. They urged the Constitutional Court to develop the common law by requiring that the action of the accused must be shown to facilitate the offence at some stage and such facilitation would occur when the act of the accused is a contributing element to the criminal outcome. This argument, the Constitutional Court concluded did not constitute a direct challenge to the principles set out in *S v Mgedezi*.¹³⁷

Active association

The appellants' argument against the common purpose doctrine was echoed by the two principal criticisms against the doctrine by certain authors. The first criticism was that in some cases the component of active association had been cast too widely or misapplied. The second criticism was that there are less invasive forms of criminal liability short of convicting a participant in the common design as a principal.¹³⁸ The State in response, argued that the foregoing criticisms did not render unconstitutional the liability requirement of active association but rather the requirement of active association requires that every trial court when applying the common purpose doctrine should evaluate the evidence against each accused person with caution.¹³⁹

Presumption of innocence

The appellants' argued further that their conviction under the common purpose doctrine deprived them the right to be presumed innocent as it exempts the State the burden of

¹³⁶ Para 36.

¹³⁷ Para 33.

¹³⁸ Para 44.

¹³⁹ Para 45.

proving individual causation in joint criminal enterprises.¹⁴⁰ In response, the State argued that the common purpose doctrine does not relate to a reverse onus or presumption which exempts the prosecution of any part of the burden.¹⁴¹

3.1.4 *Findings of the Constitutional Court*

On the issue regarding the *doctrine of common purpose* the court held that the common purpose doctrine did not amount to an arbitrary deprivation of freedom and stated that the doctrine was theoretically connected to the legitimate objective of limiting and controlling joint criminal ventures. “Group misdemeanour strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals”.¹⁴² The Court acknowledged that in practice, joint criminal conduct frequently poses difficulties of proof of individual causation, while such difficulties hardly emerge in cases of individual accused person. Consequently, the Court did not object this norm of culpability even though it waives the requirement of causation.¹⁴³

Responding to the issue regarding *causation* the court held that in terms of the South African law, a causal connection between the conduct of an accused and the criminal outcome is a prerequisite for criminal liability. The doctrine of common purpose, on the other hand, waives the causation requirement provided the accused actively associated with the actions of the perpetrators in the joint venture that caused the death and had the necessary intention in respect of the unlawful consequence, the accused would be guilty of the offence.¹⁴⁴ The primary objectives of the common purpose doctrine, is to criminalise group misdemeanour and to satisfy the need to diminish crime committed in the course of joint unlawful ventures.¹⁴⁵

¹⁴⁰ Para 42.

¹⁴¹ Para 43.

¹⁴² Para 40.

¹⁴³ Ibid 40.

¹⁴⁴ Para 34.

¹⁴⁵ Ibid 34.

The court held further that:

“The phenomenon of serious crimes committed by collect individuals, acting in concert, remains a significant societal scourge. It is often difficult in consequence crimes to prove that the act of each person or of a particular person in the group contributed causally to the criminal outcome. The requirement of such a causal connection for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and would make the prosecution of joint criminal enterprise intractable and ineffectual”.¹⁴⁶

The courts findings on the issue of *dignity and freedom* was based on sections 35 and 12(1) of the Bills of Rights which authorised and anticipated prosecution, conviction and punishment of persons provided it occurs with the framework of a procedurally and substantively fair trial and a permissible degree of criminal culpability. The court held further that the common minimum requirements of common law crimes are proof of unlawful conduct, criminal capacity and fault, all of which must be present at the time the crime is committed. The court further held that the requirement of a causal connection is not definitional element of every crime. Thus, in terms of the common law, mere exclusion of causation as a requirement of liability is not fatal to the criminal norm.¹⁴⁷ There are no pre-ordained characteristics of criminal actions, outcome or condition. “Conduct constitutes a crime because the law declares it so”. Constitutionally, any crime whether common law or legislative in origin must be constitutionally compliant. Thus, to be constitutionally compliant, the criminal norm may not unjustifiably limit any of the rights or offend constitutional principles, and may not deprive a person of his or her freedom arbitrarily or without “just cause”. This means that people are protected from being deprived of their freedom arbitrarily or without an adequate or acceptable reason and to the procedural right to a fair trial.¹⁴⁸

On the issue regarding *presumption of innocence*, the court held that the common purpose doctrine neither places an onus upon the accused nor does it presume his or her guilt.¹⁴⁹ The prosecution has the duty to prove beyond a reasonable doubt all the elements

¹⁴⁶ Ibid 34.

¹⁴⁷ Para 37 and 38.

¹⁴⁸ Para 38 and 39.

¹⁴⁹ Para 42.

of the crime charged under common purpose. The court stated further that when the common purpose is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt of their guilt. The doctrine, in the Courts views does not encroach the right to be presumed innocent.¹⁵⁰

Lastly on the issue regarding *active association* the court held that “collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls”.¹⁵¹ The court held further that the trial court had the duty to determine in respect of each accused person, “the location , timing, sequence ,duration ,frequency and nature of the conduct alleged” and the factual context of each case will determine whether or not active association has been properly established.¹⁵²

CHAPTER 4

Criticism of the common purpose doctrine

4.1. Summary of arguments and Remarks.

¹⁵⁰ Para 42 and 43.

¹⁵¹ Para 45.

¹⁵² Ibid 45.

The application of the doctrine of common purpose has not been without controversy over all the jurisdictions where it has been applied and has been causing so much discord in the South African legal system.¹⁵³ Despite the doctrine having passed constitutional muster, it has evoked severe criticisms from academics such as Burchell,¹⁵⁴ Grant,¹⁵⁵ Rabie¹⁵⁶ and Boister.¹⁵⁷ It is against these criticisms that my dissertation is particularly against.

It has been argued that the common purpose doctrine both in its prior agreement and its active association form, which exempts the State in consequence crimes from proving individual causation contradicts the fundamental rule that the prosecution has the duty to prove beyond any reasonable doubt the elements of liability of the crime in question, and therefore it is an encroachment of the presumption of innocence.¹⁵⁸

The question which arises from the foregoing, is whether in cases where the State cannot prove individual causation of each participant in the common purpose beyond reasonable doubt but *active association* and *intention* is proved. For instance, in mob justice murder, should the perpetrators of the crime escape liability because the prosecution could not prove whose actions contributed causally to the death of the deceased while clearly there is a murder case?

It is imperative to note that the primary objective of the common purpose doctrine is to facilitate convictions of crimes committed by multiple persons and to control crimes committed in the course of joint ventures.¹⁵⁹ In consequence crimes, such as mob justice murder cases, it would be difficult if not impossible to establish individual causation of

¹⁵³ See *Nzo* (note 21 above) and *Safatsa* (note 21 above). See also E. Cameron 'Inferential reasoning and extenuation in the case of Sharpeville Six' *Southern African Journal of Criminal Justice* 1988 (2) 243-260 and J R Lund 'Extenuating circumstances, mob violence and common purpose' *South African Journal of Criminal Justice* 1988 (2) 260-268. See also Unterhalter (note 57 above, 671-678). See also V V W Duba 'What went wrong with the Sharpeville Six decision?' *South African Journal of Criminal Justice* 1990 (2) 180-185.

¹⁵⁴ See Burchell (note 21 above, 486-489).

¹⁵⁵ J Grant 'Common Purpose: Thebus, Marikana & Unnecessary Evil' *South African Journal on Human Rights* (2014) 1(30) 10-23.

¹⁵⁶ Rabie (note 30 above, 236-237).

¹⁵⁷ N Boister 'Common purpose: association and mandate' (1992) 5 *South African Journal of Justice* 172.

¹⁵⁸ See Burchell (note 21 above, 486). See also Grant (note 155 above, 10).

¹⁵⁹ *S v Thebus* supra note 3 at para 34.

each person in the common purpose or joint unlawful enterprise.¹⁶⁰ Requiring a causal connection between the accused and the criminal outcome would render the objective of the common purpose doctrine ineffective and make prosecution of collective criminal enterprises ungovernable.¹⁶¹

One of the requirements for criminal liability in terms of the South African law is that there should be a causal link between the accused's conduct and the criminal outcome.¹⁶² Take for instance, if a group of about 100 people assemble and commit a riot, and it thus happens that during the riot a victim who is believed to have been breaking into people's homes and stealing is attacked by the mob. Some striking him with fists and others severally assaulting him until he is unconscious and while he is still unconscious one of the member's in the mob douses petrol over him, set him alight and left to die.

In such circumstances, nobody is probable to voluntarily concede guilt. Some may even plead that the mental impacts of being in a crowd influenced their observation.¹⁶³ Having to prove individual causation in such a case involving a group of 100 people would be troublesome if not impossible to prove. Thus, the justification of the use of the common purpose doctrine in this regard is justifiable, because in this instance it will be difficult for the State to prove individual causation of each accused in the mob violence as it is often unclear whose actions in the mob contributed causally to the death of the victim.¹⁶⁴

Furthermore, absent the doctrine of common purpose would mean that even if there were eyewitnesses at the scene of the crime who willingly assist the State to identify the perpetrators of the crime, it would not be sufficient for the court to convict the perpetrators. Reason being, the prosecution would not be able to prove beyond reasonable doubt that that specific accused person's actions contributed causally to the criminal outcome.¹⁶⁵ Thus, from the foregoing it is argued that it is justifiable that the prosecution in

¹⁶⁰ Ibid 34.

¹⁶¹ Ibid 34.

¹⁶² Snyman (note 41 above,29-33).

¹⁶³ S Hoctor 'Crowd violence and criminal behaviour dissecting deindividuation' (2000) 21 *Obiter* 161-166.

¹⁶⁴ Grant (note 155 above, 16). See also *S v Thebus* (note 3 above).

¹⁶⁵ Snyman (note 18 above,256).

consequence crimes committed by a collective is relieved from proving individual causation.¹⁶⁶

In mob violence attacks the criminal outcome is probable to be murder. Absent the doctrine of common purpose all the participants would escape liability.¹⁶⁷ Therefore, the rationale for the common purpose doctrine is to attempt to deal with troublesome situations involving the proving of causation in consequence crimes¹⁶⁸ and its aim is not to encroach any rights of an accused person but rather to ensure that justice is served and to limit crimes committed in the course of a joint enterprises.¹⁶⁹

According to Lord Steyn in *Regina v Powell*:

“[T]he law has a particular hostility of criminal groups. The rationale is partly one of dangerousness: experience has shown that joint criminal enterprises are only too readily escalate into the commission of greater offence. Criminal associations are dangerous. They present a threat to public safety than ordinary criminal prohibitions, addressed to individual actors, do not entirely address. Moreover, the danger is not just an immediate physical nature. A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has itself against the law and order of society at large”.¹⁷⁰

Murder is one of the serious crimes in South Africa, crimes perpetrated by collective individuals acting in concert have a greater impact on the society. This is not suggesting that, crimes perpetrated by individuals are less serious, but collective crimes are difficult to solve. Their difficulty usually lies in having to prove the element of causation of each individual in the joint enterprise.¹⁷¹

Further, on the issue of encroachment of the “presumption of innocence”,¹⁷² the Constitutional Court in *Thebus* held that the common purpose doctrine did not relate to a

¹⁶⁶ *S v Thebus* (note 3 above). See also A Paizes ‘Common Purpose by Active Association: Some Questions and Some Difficult Choices’ 1995 112(4) *South African Law Journal* 571.

¹⁶⁷ *S v Thebus* supra note 3 at 34.

¹⁶⁸ *Sisilana* (note 58 above, 308).

¹⁶⁹ *S v Thebus* (note 3 above).

¹⁷⁰ 1997 3 W.C.R. 959-14-G-H.

¹⁷¹ *S v Thebus* supra note 3 at 40.

¹⁷² *S v Thebus* supra note 3 at 42.

reverse onus or presumption which exempts the prosecution of any part of the burden. The State has the duty to prove beyond any reasonable doubt all the elements of the crime charged under common purpose.¹⁷³ In other words, although the prosecution is exempt from proving individual causation in consequence crimes when the common purpose doctrine is applied, the prosecution still has the duty to establish beyond reasonable doubt that the participants in the common purpose all agreed to commit a crime or actively associated themselves with the commission of the crime by one of their member in the common cause with the requisite fault element (*mens rea*).¹⁷⁴ Once that is proved, then the actions of that one participant in the group who brought about the criminal outcome will be imputed to the other participants in the common purpose.¹⁷⁵

In short, the prosecution is relieved from proving individual causation of each participant in consequence crimes but it is not relieved from proving that at least one of the members in the common cause brought about the criminal result. Therefore, the argument that the doctrine infringes the accused right to be presumed innocent should not stand because the doctrine does not shift the onus of proof to the accused person. The State, even though the doctrine is applied, is still required to prove the elements of the crime in question.¹⁷⁶ Furthermore, it is essential to note that where the common purpose doctrine is applied properly, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt of their guilt.¹⁷⁷

It is further argued that the “Law should stop pretending that people do what they did not do”.¹⁷⁸ In other words, in consequence crimes the law should not impute liability to the other remote members in the common purpose who did not contribute causally to the criminal outcome.¹⁷⁹ It is also argued that there are competent verdicts such as conspiracy, public violence, incitement, accomplice liability and attempt which the courts

¹⁷³ Ibid 43.

¹⁷⁴ Burchell (note 21 above,477).

¹⁷⁵ Ibid 477.

¹⁷⁶ *S v Thebus* supra note 3 at 43.

¹⁷⁷ Ibid 43.

¹⁷⁸ Grant (note 155 above, 10).

¹⁷⁹ Burchell (note 21 above, 477).

could apply which are reflections of what the participants in the common purpose did rather than imputing liability.¹⁸⁰

What is suggested above will not prevail in a case of mob justice murder. In such circumstances having to convict the participants of a competent verdict of public violence for instance will not be proportional to the crime in question. It is imperative to note that in mob attacks usually the participants would be in possession of the fault element (*mens rea*) and the active association requirement. Therefore, for this reason the participants in the mob violence should continue to be regarded as perpetrators or co-perpetrators of the crime in question.

It should be noted that where the criminal outcome is murder, competent verdicts such as the ones suggested above are not likely to have the desired detrimental effect as the conviction of murder. The application of the common purpose doctrine is not limited to murder cases but its application has been extended to the following crimes, robbery, treason, public violence, assault and house breaking cases.¹⁸¹ However, it should be noted that the doctrine is frequently applied in murder cases.¹⁸² “A crime like murder carries a stigma greater than a conviction on an alternative charge or competent verdict such as public violence, conspiracy, incitement, attempt and accomplice liability”.¹⁸³

In mob justice attacks, the criminal outcome is probable to be murder. A conviction of a competent verdict in such cases would not have the same desired impediment impact as the conviction of murder would have. This is because these competent verdicts are not proportional or on the same scale with the conviction of murder. Subsequently, it is

¹⁸⁰ Grant (note 155 above, 17). See also Burchell (note 21 above, 486-487). See also Rabie (note 30 above, 236-237). His objections against the doctrine were as follows: (i) that a person cannot be a perpetrator or co-perpetrator if he does not fulfil all the requirements of definition of the crime. (ii) further objected the doctrine of common purpose on the premise that the doctrine is primarily based on the principle of imputation and that the basis upon which this imputation takes place is also objectionable. (iii) his last objection to the doctrine was that, although the participants had a common purpose only in regard to the commission of crime x, they are held liable on the basis of this common purpose for crime y, the commission of which was only foreseen as a possibility.

¹⁸¹ Burchell (note 21 above, 484 and 485).

¹⁸² Snyman (note 18 above, 257 and 258).

¹⁸³ *S v Thebus* supra note 3 at 35.

submitted that the competent verdicts recommended ought not be received ,particularly in collaborative crimes where the criminal outcome is likely to be murder.

In *S v Makwanyane*¹⁸⁴ the court held that “proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading”. It is therefore argued that every punishment should fit the crime.¹⁸⁵ For example, in a mob attack the criminal result is probable to be murder, having to convict the participants of public violence in the absence of proof of individual causation in this event will not be based on the principle of proportionality and will not have the desired deterrent effect.

It is further argued that the common purpose rule treats a particular category of accused person unequally in contrast to accused persons who are charged with committing consequence crimes but who are not engaged in a common purpose.¹⁸⁶ For instance, in cases where the common purpose rule is applied (particularly in collective crimes) the prosecution is not required to prove the causation element while in ordinary crimes perpetrated by an individual all the requirements for liability must be met.¹⁸⁷ It is essential to note that the common purpose doctrine does not fit to every wrong doing and thus in certain cases the doctrine will not be pertinent.¹⁸⁸ The common purpose doctrine is tailor made and as a result the courts are segregating in its application.¹⁸⁹

Crimes committed by a group are likely to have a great impact on the society than crimes perpetrated by an individual.¹⁹⁰ Thus, it is a reasonable justification that the common purpose doctrine applies in special cases (such as mob justice murder cases) and should not apply to crimes perpetrated by an individual, because causation can be easily established in those cases.

It is respectfully submitted that it is a reasonable and justifiable infringement of the accused person’s rights. A submission is further made that the limitation that the common

¹⁸⁴ 1995 3 SA 391 (CC).

¹⁸⁵ SS Terblanche *A Guide to Sentencing in South Africa* 3rd ed (2016) 151.

¹⁸⁶ Burchell (note 21 above,486).

¹⁸⁷ Burchell (note 21 above ,477).

¹⁸⁸ Bositer (note 157 above, 172).

¹⁸⁹ Ibid 172.

¹⁹⁰ *S v Thebus* supra note 3 at 35.

purpose doctrine does not apply to every crime is reasonable and justifiable.¹⁹¹ Reason being, the component of causation can be easily established in crimes perpetrated by an individual, while determining causation in collaborative crimes normally poses challenges, thus it is reasonable that this special doctrine be applied in special cases in order to control crime.¹⁹²

It is argued further that it may be appropriate to consider a participant in common purpose, particularly one who plays a relatively minor part in the execution of the crime, to be regarded as an accomplice rather than a co-perpetrator.¹⁹³ From the foregoing, it appears that another form of liability was suggested, namely accomplice liability.¹⁹⁴ An accomplice is regarded as someone who does not comply with all the requirements of the definition of the relevant crime¹⁹⁵ but however he is also punishable even when these requirements are not met, if he lawfully and intentionally furthers a crime committed by somebody else. For instance, by giving advice to the latter, facilitating, aiding or encouraging the commission of the crime.¹⁹⁶

To what extent will a person's actions in a "mob justice" murder case be regarded as a relatively minor role? Take for instance, if in a mob attack one of the participants strikes the victim with his fists and the other participant in the common cause strikes the victim with stones, whose actions in these circumstances will be regarded as minor? While certainly both actions have an effect of contributing to the victim's death.

What might constitute a minor role in one case (or example murder) might not constitute a minor role in another case (such as robbery). What barometer will be used to determine which accused person's actions constitute a minor role? Accordingly, it is the concept of accomplice liability under mob justice murder cases that I am against on the basis that Burchell failed to set out the extent in which a person's actions will be regarded as a minor part. Thus, it is submitted that there should be prerequisites laid down to determine the

¹⁹¹ Section 36 of the Constitution of the Republic of South Africa, 1996. See also *S v Thebus* supra note 3 at para 40.

¹⁹² *S v Thebus* supra note 3 at 40.

¹⁹³ Burchell (note 21 above, 487).

¹⁹⁴ *Ibid* 487.

¹⁹⁵ See *S v Williams* (note 75 above).

¹⁹⁶ Snyman (note 18 above, 266 and 267).

extent in which a person's role in the commission of the crime will be regarded as a minor part. It is therefore respectfully submitted that the concept of accomplice liability in joint unlawful enterprises should not be adopted because in those circumstances nobody is probable to admit guilt. Therefore, we should rather continue regarding accused persons in joint criminal enterprises as perpetrators or co-perpetrators.

It was further argued that "it would have been better for the Constitutional Court in *Thebus* to have heeded the academic criticism of the application of the doctrine in both the *Safatsa* (Sharpeville Six) and *Nzo's* cases and declare invalid at least the 'active association' form of common –purpose criminal liability".¹⁹⁷ The common purpose doctrine is probable to be applied in its active association form.¹⁹⁸ In mob justice attacks liability would usually arise in its active association form , because it usually occurs at a spur of a moment, where people would join in the crowd during the mob violence without having consented either expressly or implied. Therefore, removing the active association form under the common purpose doctrine would affect the convictions of such participants in mob justice attacks or joint unlawful ventures.

Furthermore, the active association form of the doctrine assists the prosecution facilitate convictions of multiple persons involved in the execution of joint unlawful enterprise even in cases where prior agreement cannot be established.¹⁹⁹ Therefore, the concept of active association is the only source of hope the prosecution relies on frequently in collaborative crimes. Removing the active association form of the doctrine will endanger our criminal justice system and will result in participants in joint unlawful enterprises to escape liability.²⁰⁰

Lastly, it was argued that the concept of active association is inherently vague and might fail the standards of reasonable clarity envisaged by the fundamental principle of legality.²⁰¹ The restrictive meaning of active association is set out by the four requirements

¹⁹⁷ Burchell (note 21 above,488).

¹⁹⁸ See or example *Mgxwiti supra* , *Dladla supra* , *Malinga supra*, *Nkwenja supra*, *Khoza supra*, *Mzwempi supra* ,*Daniel supra* ,*Mgedezi supra*, *Safatsa supra*, *Thebus* and *Nzo supra*.

¹⁹⁹ *S v Mgedezi* (note 54 above).

²⁰⁰ *Snyman* (note 18 above, 256). See also *S v Thebus supra* note 3 at 40.

²⁰¹ Burchell (note 21 above,174).

for liability under common purpose as formulated in *S v Mgedezi*.²⁰² It is trite law that in the absence of proof of prior agreement under the common purpose doctrine an accused may still be found guilty on the basis of his active association.²⁰³ Furthermore the court in *Thebus* held that the criticism that “the requirement of active association has been cast too widely or misapplied did not render unconstitutional the liability requirement of active association”.²⁰⁴ It is submitted that if these requirements of active association are applied because collaborative approach to determining the actual actions or active association of an accused person has evidentiary pitfalls then the court was correct in declaring the requirements of active association under the doctrine constitutional.²⁰⁵

CHAPTER 5

Conclusion

The common purpose doctrine is and has always been a useful instrument in the South African criminal courts.²⁰⁶ The doctrine makes it possible for the court to convict a group

²⁰² See *S v Mgedezi* (note 54 above).

²⁰³ Ibid 705I-706C.

²⁰⁴ *S v Thebus* supra note 3 at 45.

²⁰⁵ Ibid 45.

²⁰⁶ The doctrine has been applied since apartheid era, see for example *S v Safatsa* supra till the dawn of the new democracy see for example *S v Thebus* supra.

of people acting in concert where individual causation is elusive to prove, rather than allowing the perpetrators of the crime to escape liability.²⁰⁷ Although the doctrine has evoked severe criticisms in the way it is applied, it is submitted that, should the doctrine be discarded it would impact the number of convictions of crimes committed by collectives individuals acting in concert.²⁰⁸

Crimes committed by a mob or a collective crimes are usually elusive to solve, the problem usually lies in the component of causation.²⁰⁹ For instance, if the State is faced with a case of murder involving a crowd of about 100 people, in this circumstances absent the common purpose doctrine the State will have to prove individual causation of each accused, which will be elusive if not impossible to solve and thus the application of the doctrine in this instances can be justifiable.²¹⁰

The common purpose doctrine is essential to the eradication of crimes committed in the course of a joint unlawful enterprise and to diminish the quest of violent crimes in our society.²¹¹ Furthermore, it is argued that waiving the causation component in special cases involving crimes committed by a group of persons is a reasonable infringement of the accused person's rights.²¹² The doctrine is the primary instrument frequently used by the prosecution when challenged with crimes committed in a course of a joint unlawful enterprise. Why should we then take away the only source of hope the prosecution frequently relies on when challenged with crimes perpetrated by collective individuals acting in concert? Although the common purpose doctrine was used and abused under apartheid and so was almost our entire criminal justice system.²¹³ "Which then does not make common purpose apartheid law or outdated particularly when it continues to be

²⁰⁷ Snyman (note 18 above,257).

²⁰⁸ *S v Thebus* (note 3 above).

²⁰⁹ *S v Thebus* supra note 3 at 40.

²¹⁰ *S v Thebus* (note 3 above).

²¹¹ *S v Thebus* supra note 3 at para 40.

²¹² Ibid 40.

²¹³ J Grant 'Common purpose not outdated or defunct' *Mail and Guardian online*, 31 August 2012 available at <http://mg.co.za/article/2012-08-31-marikana-common-purpose-not-outdated-or-defunct>, accessed on 24 October 2016.

applied in the dawn of our new democracy and is relied on by our criminal courts on a daily basis in almost every case where multiple of accused persons are on trial”.²¹⁴

Henceforth, it is respectfully submitted that the doctrine both in its *prior agreement* and *active association* form should not be discarded and the competent verdicts suggested above under the common purpose doctrine ought not be received, particularly in “mob justice” murder cases.

In conclusion, the common purpose doctrine in murder cases does not need to be further developed in terms of section 39(2) as it has been found to be constitutional, furthermore it does not encroach the accused rights to be presumed innocent until proven guilty and nor does it place the onus of proof on the accused, it is the State duty to prove beyond reasonable doubt the accused guilt.²¹⁵ Therefore, the doctrine should continue to be applied in all the cases where it is applicable.

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²¹⁵ *S v Thebus* supra note 3 at 50.

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